BIS | Department for Business Innovation & Skills

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

IMPACT ASSESSMENT

MARCH 2012

Title: A Competition Regime for Growth **IA No:** BIS0238 **Lead department or agency:** Department for Business Innovation and Skills **Other departments or agencies:**	**Impact Assessment (IA)** **Date:** 18/11/2011 **Stage:** Final **Source of intervention:** Domestic **Type of measure:** Primary legislation **Contact for enquiries:** James Jamieson (020) 7215 0113

Summary: Intervention and Options

RPC Opinion: AMBER

Cost of Preferred (or more likely) Option				
Total Net Present Value	**Business Net Present Value**	**Net cost to business per year** (EANCB on 2009 prices)	**In scope of One-In, One-Out?**	**Measure qualifies as**
£11.4m	£-12.8m	£0.14m	Yes	IN

What is the problem under consideration? Why is government intervention necessary?

The UK competition regime is highly regarded internationally and independently assessed as world class. There are however, some aspects of the competition regime, identified by research, that might be improved to enhance the system. They include the length of time it takes to conduct investigations, the cost for authorities and businesses in having two competition bodies, the throughput of antitrust cases and the problems associated with investigating completed merger cases. Ensuring the regulatory framework within which business operates is effective, is a key action the Government can take to enhance the UK's international competitiveness and support economic growth.

What are the policy objectives and the intended effects?

Three main policy objectives have been identified. These are:-

1) Improve the robustness of decisions and strengthen the regime;

2) Support the competition authorities in taking forward the right cases;

3) Improve speed and predictability for business.

The intended effects are to strengthen the existing competition regime to support growth in the economy.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

A number of options have been considered to reform the UK competition institutional landscape and to improve the competition tools. The Evidence Base (and relevant annexes) sets out all these options in detail.

Each summary sheet option that follows sets out the governments preferred options (except for anti-trust)

Of the major reform options, creating the CMA from the merger of CC and the competition functions of OFT is the preferred option as this will best meet the policy objectives. In particular, by merging the two bodies we would anticipate more efficient resource allocation and a strengthened competition regime should deliver wider economic benefits through restricting and deterring anti-competitive behaviour. The reform to other areas is explained further in the main analysis

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** 04/2018

Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	**Micro** No	**< 20** Yes	**Small** Yes	**Medium** Yes	**Large** Yes
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** n/a	**Non-traded:** n/a	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the minister responsible: Date: 15 March 2012

Summary: Analysis & Evidence

Policy Option 1

Description: Create the CMA by merging the competition functions of the OFT and CC

FULL ECONOMIC ASSESSMENT

Price Base Year 2011	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 13.0	**High:** 39.0	**Best Estimate:** 13.0

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	2.4		0	**3.7***
High	5.8	1	0.2	**5.8**
Best Estimate	5.8		0	**5.8**

Description and scale of key monetised costs by 'main affected groups'

Creating the CMA will involve transition costs incurred by Government including redundancy costs, contract exit costs, IT, moving staff and equipment, branding and project management costs. Transition costs of past government reorganisations have been underestimated so a 20% optimism bias is applied to calculate the high and best estimate. *Total costs (low) is a combination of the low transition costs and the high average costs due to the scenario in which they both occur.

Other key non-monetised costs by 'main affected groups'

Other transition costs may arise from the uncertainty the merger may create, including key staff leaving the organisation and a lowering of staff morale, which may weaken the effectiveness of the body during the transition period. There may be additional costs of harmonising staff pay.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			2.2	**18.8**
High			5.0	**42.7**
Best Estimate	0		2.2	**18.8**

Description and scale of key monetised benefits by 'main affected groups'

Creating the CMA would result in annual benefits to Government arising mainly from accommodation, staffing and back office savings. However, the OFT and CC are required to make significant savings to meet their 2010 Spending Review settlements and the merger savings are not expected to exceed those required by the SR. Rather, the merger is a way to achieve these savings more efficiently. Past reorganisations have overestimated benefits so the best estimate is equal to the low estimate.

Other key non-monetised benefits by 'main affected groups'

Merging the two bodies, should lead to more efficient resource allocation, as the CMA would be able to better balance the portfolio of work across the regime as a whole and reduce some duplication of activities.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

The low estimate of benefits assumes the CMA is located at Fleetbank House and the newly vacant space in Victoria House can not be sublet. The high estimate assumes the CMA is located at Victoria House and the newly vacant space at Fleetbank House is sublet, but costs occur in year 7 when the lease at VH expires and the CMA relocates. The benefits are sensitive to the future state of the property market. The UK competition regime is recognised as world class and reform risks weakening it.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 0	**Benefits:** 0	**Net:** 0	No	NA

Summary: Analysis & Evidence

Policy Option 2

Description: Mergers - Strengthen Interim measures, introduce a small business exeption for small mergers, introduce statutory timeframes

FULL ECONOMIC ASSESSMENT

Price Base Year 2011	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best Estimate:** -1.2

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low				
High				
Best Estimate	0		0.1	**1.2**

Description and scale of key monetised costs by 'main affected groups'

There would be a cost to business of £140k from the introduction of information gathering powers at phase 1. This is due to not all third parties replying to information requests at present.

Other key non-monetised costs by 'main affected groups'

Strengthened interim measures mean that certain notifying business that have already completed take on additional risk from completing the deal where competition issues are likely to be raised and risk fines for not complying with authorities.

There may be a small loss of deterrence of anticompetitive mergers below small business threshold although given the number and size of mergers affected, this is likely to be low.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low				
High				
Best Estimate	0		0	**0**

Description and scale of key monetised benefits by 'main affected groups'

Through strengthened interim measures, there should be significant benefits to UK economy from reducing harm from notified completed mergers which are found to be anticompetitive.

Other key non-monetised benefits by 'main affected groups'

The main benefits from the various reforms are that more problematic mergers will be notified before completion meaning less harm from these mergers and remedies will be easier to implement. There will be greater certainty for mergers involving small businesses as they will no longer be required to consider notifying and there will be greater certainty of timing for overall merger regime, including introducing remedies quicker which benefits both the relevant business and the economy as a whole

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

It is assumed that 1/3 or third parties already respond to information requests. It is also assumed that information gathering powers will not be used on every investigation. Existing information gathering powers in phase 2 are not always used, even though they are currently available.

The key risk is that there would be the potential for more type I and type II errors when mergers are referred to phase 2

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 0.14	**Benefits:** 0	**Net:** -0.14	Yes	IN

Summary: Analysis & Evidence

Policy Option 3

Description: Anti-trust - Move to a prosecutorial model where OFT/CMA present a case to court and CAT adjudicate on the evidence

FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best Estimate:**

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low				
High				
Best Estimate	0		0	**0**

Description and scale of key monetised costs by 'main affected groups'

The modelling exercise showed that there are likely to be significant transition costs on the competition authority and businesses whilst the system settles and increased costs for running the CAT as it has a more central role in adjudicating all cases. However the modelling is illustrative rather than definitive and thus we cannot accurately monitise the costs . See annex H for further information on modelling.

Other key non-monetised costs by 'main affected groups'

Other potential costs are that parties may settle too quickly or reduced settlements will lead to more costs for the authority.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low				
High				
Best Estimate	0		0	**0**

Description and scale of key monetised benefits by 'main affected groups'

Modelling exercise showed the potential for overall savings, including savings to business and competition authority. However, as above the modelling is considered illustrative rather than definitive. Full analysis is in the evidence base and Annex H..

Other key non-monetised benefits by 'main affected groups'

Seperation of prosecutor and adjudicator would lead to more robust decisions. Making the CAT the arbitor will remove a stage of the process, reducing the end-to-end timescales and reducing the average length of time for all cases.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

We assume the rate of settlements will increase,appeals to a higher court will tend to zero and a transition period of 5 years as the system settles. Main sensitivity is the costs for business defending cases and the number of settlements and further appeals. Main risk is prosecutions will take much longer than anticipated, and parties will challenge the CMA process and CAT decisions, although the presence of CAT and design of it's rules should mitigate this to an extent.

BUSINESS ASSESSMENT (Option 3)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/A	**Benefits:** N/A	**Net:** N/A	No	NA

Summary: Analysis & Evidence

Policy Option 4

Description: Markets - Shortening overall process for Market studies and Market investigations and allowing investigations into practices across markets and the ability to make independent reports to Government

FULL ECONOMIC ASSESSMENT

Price Base Year 2011	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best Estimate: 0**

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low				
High				
Best Estimate	0		0	**0**

Description and scale of key monetised costs by 'main affected groups'

Information gathering powers in phase I could increase costs to business, but much of this information is gathered presently and the power is to ensure that the authority can comply with statutory timetables to increase the speed of cases rather than to be requiring new information that isn't gathered in phase I now. Therefore the additional cost to business is expected to be 0.

Other key non-monetised costs by 'main affected groups'

Competition authority may have to prioritise markets work over other areas without statutory timescales, or reduce the amount of effective markets work, leading to worse outcomes for consumers and the economy.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low				
High				
Best Estimate	0		0	**0**

Description and scale of key monetised benefits by 'main affected groups'

Other key non-monetised benefits by 'main affected groups'

Cases can be conducted quicker and there will be increased certainty about the timescales involved, potentially having remedies implemented up to 12 months earlier. There would be less duplication of information requests between phase I and phase II. Ability to investigate practices across markets and for CMA to provide independent reports will reduce duplication workload in appropriate circumstances, and enable the markets tools to be more targetted and used more flexibly.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

We have assumed that there would not be a significant additional burdens on business from complying with statutory information request. Businesses provide information to OFT already and phase II currently has statutory information gathering powers, although these are not used frequently. Risks include possibility that decisions are less robust because of increased speed of cases, leaving the possibility of legal challenge.

BUSINESS ASSESSMENT (Option 4)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 0	**Benefits: 0**	**Net:** 0	Yes	Zero net cost

Summary: Analysis & Evidence

Policy Option 5

Description: Markets - Criminal Cartels - Removing the 'dishonesty' element from the offence and defining the offence so it does not include agreements made openly

FULL ECONOMIC ASSESSMENT

Price Base Year 2011	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best Estimate: -0.5**

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low				
High				
Best Estimate	0		0.1	**0.5**

Description and scale of key monetised costs by 'main affected groups'

An additional case per year, with increased conviction rates will lead to increased costs of imprisoning offenders of approximately £55k a year.

Other key non-monetised costs by 'main affected groups'

Due to a lack of information, we have not been able to quantify the private costs of defendants legal costs. The court costs are not expected to increase, even with extra cases, as cases are anticipated to be processed more quickly. Authority costs are not anticipated to increase as authority should find it easier to bring cases and the costs per case should decrease.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low				
High				
Best Estimate	0		0	**0**

Description and scale of key monetised benefits by 'main affected groups'

Other key non-monetised benefits by 'main affected groups'

Main benefits will be from an increase the deterrence of anti-competitive behaviour. Past reports on the deterent effect of competition enforcement work of OFT estimated that current enforcement produces benefits that are at least 5 times those that are calculated directly in evaluation of direct action.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

We assume that there may be an additional case per year, but court costs and authority costs will not increase as the change in the definition of the offence will mean it will be easier to bring case, lowering the per case costs. The main risk is that the change in definition may still not lead to improved enforcement and thus deterrence. In this case, there will be no additional costs or benefits from increased deterance, although this risk is considered low.

BUSINESS ASSESSMENT (Option 5)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	**Benefits:**	**Net:**	No	N/A

Summary: Analysis & Evidence

Policy Option 6

Description: Markets - Concurrency - Introducing a package of measures to give CMA a more central role in the regulated sectors

FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best Estimate:**

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low				
High				
Best Estimate	0		0	**0**

Description and scale of key monetised costs by 'main affected groups'

Other key non-monetised costs by 'main affected groups'

May be some additional costs to regulators where they carry out more extensive competition analysis. There may be some costs if CMA takes a comptition case from a sector regulator, including the uncertainty that this may produce for the regulated sector, although this would be mitigated by the CMA and sector regulators working more closely with one another. There may be costs for CMA if it is supporting sector regulators at the expense of its other case work.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low				
High				
Best Estimate	0		0	**0**

Description and scale of key monetised benefits by 'main affected groups'

Other key non-monetised benefits by 'main affected groups'

Benefits for both competition authority and sector regulators working together as they will be able access resources to help each other run more effective competition cases. Potential for greater deterance of anti-competitive behaviour if comeptition tools are used more frequently in the regulated sectors. Better allocation of resources should follow from more secondments between the different bodies to deal with peaks and troughs of work.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

Main risks are that competition tools are not as effective as sectoral powers in the long run or competition tools are used inappropriately. However, sectoral regulators will still have a choice of powers and can decide that competition tools may not be appropriate in all circumstances so will use the most appropriate tool.

BUSINESS ASSESSMENT (Option 6)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: n/a	**Benefits: n/a**	**Net: n/a**	No	N/A

Summary: Analysis & Evidence

Policy Option 7

Description: Markets – Telecoms cost Recovery - One way cost recovery where CC can reclaim costs from appealants and interveners but not from Ofcom

FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 0	**High:** 0	**Best Estimate: 0**

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			1.2	**10.3**
High			1.5	**12.8**
Best Estimate	0		1.4	**11.6**

Description and scale of key monetised costs by 'main affected groups'

There will be costs to businesses if, when appealing Ofcom decisions, they lose and the CC considers it appropriate for costs to be recovered - although this would be a transfer from businesses to government. The size of cost will depend on the circumstances of the appeal, the cost of the case and the success of the case. In the evidence base, we estimate this to be between £1.2m - £1.5m a year.

Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			1.2	**10.3**
High			1.5	**12.8**
Best Estimate	0		1.4	**11.6**

Description and scale of key monetised benefits by 'main affected groups'

There will be an increase in costs recovered for CC's Telcom price control appeals work although CC will not receive the monies recovered to prevent peverse incentives on CC. This is equal to the costs that parties and interveners will pay. This is a transfer from business to government

Other key non-monetised benefits by 'main affected groups'

There may also be more considered approach to appeals by parties and interveneers so only points of contention are appealed, leading to a more efficient appeal mechanism.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

There may be a risk that the introduction of cost recovery disincentivises legitimate appeals, although giving CC panel discresion on the amount of cost recovery will enable the CC to consider whether a losing appeal was substative or frivolous.

BUSINESS ASSESSMENT (Option 7)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 1.3	**Benefits: 0**	**Net: -1.3**	No	N/A

Evidence Base (for summary sheets)

Background

1. Competition is a key driver of productivity growth both within and across firms. Competition forces firms to improve management techniques and innovate, and it also encourages improvements in the resource allocation between firms. It ultimately benefits consumers through greater choice, better quality and lower prices. This is particularly important in the context of the current economic climate and the Governments' aim to stimulate growth.

2. In the short term competition generates efficiency gains within firms by forcing firms to allocate resources more efficiently and putting downward pressure on costs. In the long term, competition generates dynamic benefits as the best performing firms expand, the worst performers exit and new firms enter the market, leading to increased aggregate productivity. The static benefits from increased allocative efficiency have been shown empirically to be substantial, but it is widely believed that the dynamic benefits exceed the static benefits. Harris and Li (2007)[1] used data from 1996 to 2004 to examine the factors affecting productivity growth. They found that 42% of UK total factor productivity growth comes from reallocation between firms, 37% from exit and entry of firms and 22% from intra-firm productivity growth.

3. Competition also encourages innovation of new products and production processes and R&D investment as firms need to remain competitive in order to retain customers and survive. Griffiths et al. (2006)[2] analysed the impact of the EU single market programme. They found that competition increased innovation by incumbents, but if anything decreased the incentive for new firms to innovate. In addition, competition creates pressure for management efficiency. Bloom and Van Reenen (2006)[3] found that competition increases management quality but does not reduce work-life balance, a trade off that has been argued.

4. Market forces can sometimes fail to deliver effective competition, if for example, mergers lead to a high degree of concentration or if high barriers to entry prevent new and innovative companies from accessing markets. By setting the market frameworks, Government can therefore help to ensure markets are conducive to productivity growth. Competition law facilitates open and competitive markets and restricts and deters anti-competitive behaviour. Empirical work suggests that there is a negative relationship between market power and productivity, with a 10% increase in price mark-ups resulting on average in a 1.3 to 1.6% loss in total factor productivity growth (Disney et. al, 2003[4] and Nickell, 1996[5]). A recent discussion paper[6] looked

1. [1] Harris, R. and Li, Q. (2007), 'Evaluating the Contribution of Exporting to UK Productivity Growth: Some Microeconomic Evidence', *The World Economy*, Vol. 31, Issue 2.
[2] Griffith, R., Harrison, R. and Simpson, H. (2006), 'The Link Between Product market Reform, Innovation and EU Macroeconomic Performance', *European Economy Economic Papers* No. 243.
[3] Bloom, Nick and van Reenen, John (2006), 'Management practices, work-life balance and productivity: A review of some recent evidence', *Oxford review of economic policy*, Vol. 22.
[4] Disney, R., Haskel, J. and Heden, Y. (2003), 'Restructuring and Productivity Growth in UK Manufacturing', *Economic Journal*, Vol. 113.
[5] Nickell, S.J. (1996), 'Competition and Corporate Performance', *Journal of Political Economy*, Vol. 104.
2. [6] http://econstor.eu/bitstream/10419/48605/1/663605695.pdf

at the direct impact of competition policy on efficiency in 12 OECD countries between 1995 and 2005. The results imply that good competition policy has a strong impact on total factor productivity (TFP) growth, with the institutional and antitrust elements of competition policy appearing to have the strongest impact on TFP growth.

5. In common with all modern economies, and consistently with the European Union's competition rules, which are themselves directly effective here, the UK maintains a system of competition law which governs the economic behaviour of businesses. Competition laws have become increasingly prevalent internationally as their value has been recognised: today some 112 jurisdictions have competition laws, with more proposing to adopt them in the next few years[7].

6. The aim of the competition regime is to benefit consumers and the rest of the economy by supporting and enhancing the process of competition. Its main elements are:

   - *Anti-trust:* enforcing legal prohibitions against anti-competitive business agreements (including cartels) and the abuse of a dominant market position. There is also a specific cartel offence against individuals who engage in certain forms of price-fixing and other 'hard core' cartel activity.

   - *Merger control:* protecting competition in markets by regulating mergers between businesses.

   - *Market studies and market investigations:* examining markets which may not be working well, with powers to impose remedies where an adverse effect on competition is found.

   - *Competition Advocacy:* promoting the virtues of competition and challenging barriers to competition, for example Government regulations.

   These elements can be found in competition regimes around the world, although with some variation; the UK system of market investigations is particularly developed and is regarded as an exemplar. A detailed note on the various legal powers and how they are exercised is at Annex A. This includes the European Union's arrangements on competition and the details of the various statutory bodies which are responsible for enforcing the competition regime: principally the Office of Fair Trading (OFT) and the Competition Commission (CC), but also the sector regulators which exercise certain competition powers in their sectors.

7. The promotion and enforcement of these competition laws facilitates open and competitive markets and restricts and deters anti-competitive abuses. The presence and abuse of market power means that consumers consume less of the affected products or services and pay more than the competitive price. This results in a transfer from consumers to producers and also in a deadweight loss from the inefficient allocation of resources. However, it is likely that the benefits from remedying these losses are greatly exceeded by the dynamic benefits flowing from competition law enforcement.

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3. [7] Kovacic W., 'Dominance, duopoly and oligopoly: the United States and the development of global competition policy', *Global Competition Review*, December 2010 (Vol. 13 ISS 11).

8. The competition regime is therefore clearly of vital importance, particularly in view of the stress now being placed on the role of competitive markets in driving growth, and the Government is concerned to ensure that the regime operates as optimally as possible.

Assessment of the UK Competition Regime

9. The UK competition regime is highly regarded internationally. In Rating Enforcement 2011 the Global Competition Review (GCR) [8] awarded the Competition Commission (CC) its highest rating of 5 stars and the Office of Fair Trading (OFT) 4.5 stars. In addition, an independent review of competition regimes, by KPMG (2007)[9], ranked the UK's competition regime third, behind the US and Germany. Although the UK was also ranked third in the 2001 and 2004 reviews, the UK had narrowed the gap by 2007 and was by then almost level with Germany. The National Audit Office (NAO) has also concluded that the competition regime (including as enforced by the sector regulators) is generally effective in meeting its aims and is well regarded internationally[10].

10. The Government acknowledges that it has inherited a competition regime which has been independently assessed as world class. The UK has been ranked relatively highly in the following areas in particular: clarity of analysis and decision making; transparency and the open and fair way in which the CC consults; business awareness of policy; effectiveness of legislation; technical competence; and political independence. The merger regime is particularly highly regarded: the KPMG report ranked this as second world-wide behind the US.

11. The Government has no intention of undermining these solid foundations. In particular, the Government supports the basic principles that underpinned the previous administration's reforms to the regime: that competition issues should be decided by independent, expert competition authorities, equipped with effective powers to investigate and remedy problems, and taking decisions on the basis of rigorous economic analysis. Rather, the Government intends to build upon these foundations, and to address the weaknesses in the regime that have become apparent.

Rationale for intervention

12. The recent McKinsey report[11] on growth and productivity once again identified competitive intensity within sectors as one of the key conditions needed for a productive, broad-based and resilient economy. At a time of deficit reduction, when the UK faces growing challenges from emerging economies, getting right the regulatory framework within which business operates is a key action the Government can take to enhance the UK's international competitiveness and grow the economy. Ensuring the UK has the most effective regime possible for identifying and remedying

4. [8] http://www.globalcompetitionreview.com/surveys/survey/516/Rating-Enforcement/
5. [9] http://www.berr.gov.uk/files/file39863.pdf
[10] http://www.nao.org.uk/publications/0910/competition_landscape.aspx
6. [11] http://www.mckinsey.com/mgi/publications/uk_report/index.asp

failures, weaknesses and distortions in competition is the primary objective of this reform exercise.

13. Reviews of the regime have highlighted the following among others as areas for improvement: the time taken over market studies and investigations, antitrust enforcement and merger cases; the complexity of the regime; the effectiveness and efficiency with which resources are used; the relevance and importance of subject matter; the management of caseloads generally; and the number of decisions on significant cases aside from mergers.

14. The Government has specific concerns about various elements of the regime. There are difficulties in successfully prosecuting antitrust cases at reasonable cost and in reasonable time, including by the sector regulators with concurrent powers, which means that the decisional case law is too thin and precedents too few, and the deterrent effect of the prohibitions is reduced. The voluntary nature of notification requirements in the merger regime gives rise to problems in dealing with the anti-competitive effects of a completed merger. In relation to the market regime there are questions over the split between market studies and market investigations, and this is an area which poses in an acute form whether the best use is made of the resources and powers available to the competition authorities. There are also questions around whether all of the sector regulators have access to a critical mass of competition expertise, and whether the operation of powers concurrently by the OFT and the sector regulators can be improved. More generally, there may be scope for delivering more streamlined and consistent processes, and better and more flexible allocation of resources, across the competition regime. These are discussed in more detail below.

15. Over the years the CC has been particularly affected by this. The staff numbers and number of cases are outlined in table 1 below. The table shows that staff numbers have stayed broadly constant, but case work has fluctuated widely. Although the CC has tried to ensure that staff are seconded out in quieter periods, this is clearly not the most efficient allocation of resources.

Table 1: Number of staff and number of cases at the CC

	Number of competition enforcement staff	**Number of merger cases**	**Number of market investigations open[12]**
2006	**82**	**14**	**6**
2007	**118**	**3**	**5**
2008	**114**	**12**	**4**
2009	**115**	**7**	**3**
2010	**113**	**8**	**2**

Source: Global Competition Review: Rating Enforcement and OFT website

16. In addition, the Government is committed to reduce the number and cost of public bodies, and to reduce the burden that such bodies impose on the businesses with

7. [12] Market Investigations can take up to two years, so the numbers in this table will exceed the total number of market investigations in the relevant years.

which they deal. The OFT and the CC have worked hard both individually and collectively to maximise the efficiency of their processes. However, the need for two wholly separate competition bodies – with two boards, offices, support systems, sets of powers and internal processes etc – should come under scrutiny. Currently, the OFT and the CC cannot fully take into account the impact of their prioritisation on each other, especially with regards to Markets work, because they operate as two separate bodies and are seeking to maximise the effectiveness of their own work, while taking some, but not the whole, account of their decisions on the other body.

17. Government intervention is being considered to deal with the issues outlined in the above section, given the separation of the two bodies. It is the government which sets the legal framework under which the bodies operate so if any changes are required, it would be necessary for the Government to intervene. In addition, options which change legislation that make it easier for the bodies to conduct their work and reduce burdens to business and increase growth should increase both the efficiency and impact of the competition regime.

Policy objectives

18. In more detail, the policy objectives for proposed reform are:-

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

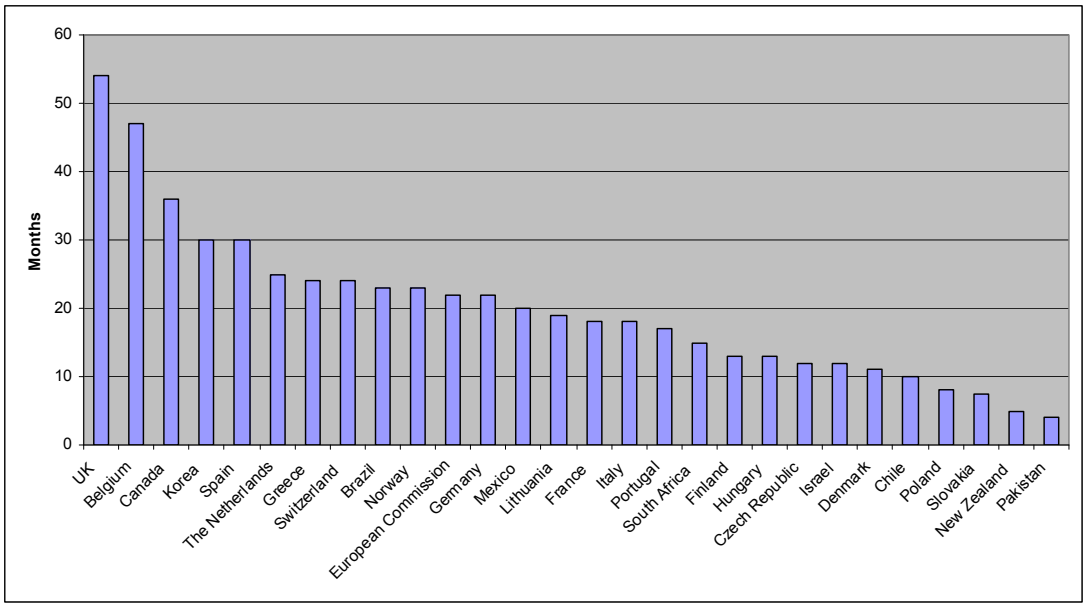
19. There are some supplementary objectives which support the overall objectives. These are:-

- The decision-making of a CMA is demonstrably independent of the Government and accountable to Parliament;
- Competition decisions are high quality, transparent and robust;
- There is coherence and predictability in competition practice and decision-making;
- Competition processes are efficient and streamlined on the one hand and fair and rigorous on the other;
- Reform should wherever possible reduce the cost to business and the public purse and improve the efficiency of the regime;
- The new regime should have the right legal powers and tools to address competition problems in the interests of consumers and the economy.

Issues identified with the current regime

20. *Length of process.* The time taken to deliver cases has been criticised by some commentators – for example, it was flagged by some respondents in the 2007 KPMG report[13], and the length adds cost to the public purse and to those parties subject to the investigations. Some aspects of the process, particularly antitrust cases, are lengthy by international standards as indicated in figures 2 and 3. The factors affecting the length of time differ for the different tools, and these are explained more fully in those relevant sections.

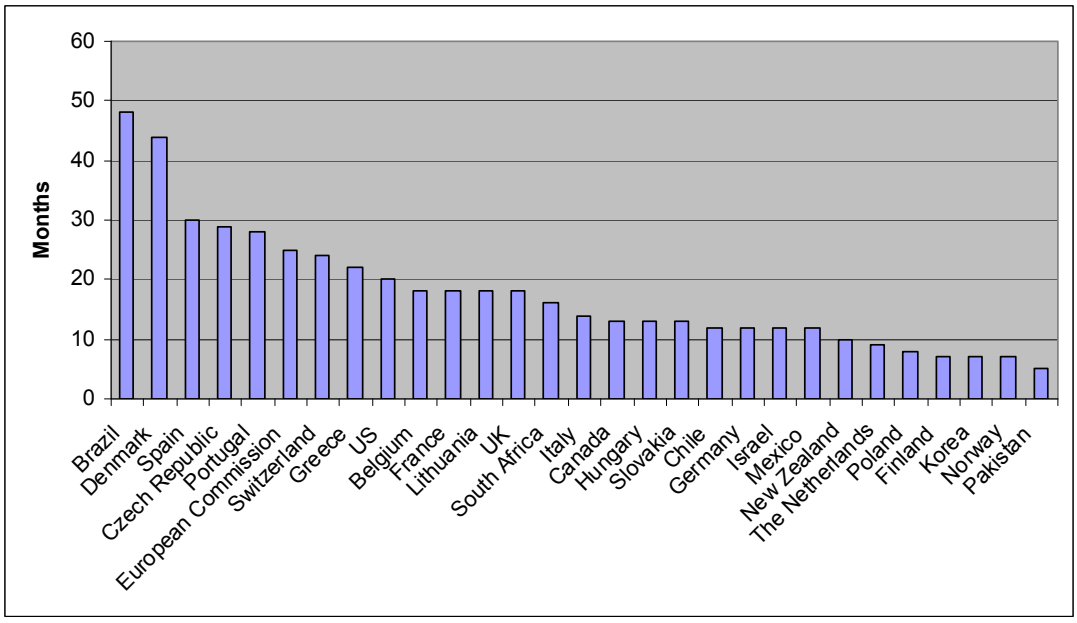
Figure 2: Average duration of cartel investigations



Source: Global Competition Review 2011

8. [13] Although, as noted later, the OFT and the CC have done some work to address this since the KPMG report.

Figure 3: Average duration of abuse of dominance investigations



Source: Global Competition Review 2011

21. *Throughput of cases.* Although the outcome of interventions should be a key focus of the regime, absolute numbers of cases also play a vital role. The throughput of cases contributes to the deterrence effect[14],[15] along with the clarity of decision making for business, which is globally recognised as a crucial plank of an effective competition regime. Some commentators[16] have suggested that antitrust policy would be more effective if there were a greater number of Competition Act 1998 (CA98) cases, and Deloitte's report noted that throughput is one of a few factors that affect deterrence. Since OFT introduced its settlement policy in 2006, there have only been 8 cases with infringement decisions.

22. *Cost of the regime to business.* A number of businesses have also commented on the costs of the regime. There is a perception of a duplication of information requests when cases are looked at by both bodies, and concerns have been raised about unnecessary complexity of the system and occasional lack of cooperation between the two authorities.

23. *Costs to the authorities.* The costs of competition enforcement action by the OFT and the CC amounted to around £55m in 2009/10. To put this in perspective, the GCR gives estimates of spend on competition enforcement for the agencies that it rates. These estimates are provided by and limited to the agencies themselves i.e. they are not all-inclusive costs of the individual country regimes. The UK estimate appears to exclude the OFT's markets function (although the CC's is included), the costs of the

9. [14] Deterrence is a relevant factor in Mergers CA98, Article 101/ 102 and criminal cartels.
10. [15] 'Deterrence effect of Competition Enforcement by the OFT', Deloitte on behalf of OFT, 2007, available at: http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf
11. [16] 'There have been significantly fewer Competition Act decisions by the OFT and the sector regulators than expected… Infringement decisions have also taken longer than expected'. '*The Competition Act at 10 years old: Enforcement by the OFT and the sector regulators', Margaret Bloom, 2010 Competition Law.*

CAT and the costs of the regulators in enforcing competition law. Table 4 shows spend in Euros and ranks the countries by spend per million of population.

24. The figures suggest the UK is mid-ranking on spend per head of population, and given the world class rating of the regime, would suggest reasonable value for money by international standards. There are countries such as Italy and Japan that spend more than the UK on competition enforcement but whose regimes are rated less highly; whilst the German regime is less costly but considered to be on a par with or better than the UK[17]. Typically, given the significant fixed costs in running a competition regime, we would expect larger countries to achieve better spend per head.

Table 4: Spend by country and spend per million population

Country	Population (Millions)	Budget (€m)	Budget per person (€)
Ireland	4.2	6.7	1.6
Australia	21.3	32.5	1.5
Denmark	5.5	7.9	1.4
Netherlands	16.7	15.8	0.9
Italy	58.1	52.8	0.9
New Zealand	4.2	3.8	0.9
United Kingdom	61.6	45.6	0.7
United States	307.2	193.8	0.6
Japan	127.0	55.3	0.4
France	64.0	19.4	0.3
Spain	40.5	12.0	0.3
Germany	82.0	18.3	0.2

Source: Global Competition Review

Document Structure and Key Areas

25. The key decisions are in the following areas:-

- Institutional design - whether to create a CMA or continue to have the OFT and CC;
- Mergers - whether to introduce a system of mandatory notification or to strengthen the current voluntary notification regime, and
- Antitrust - whether to change the current administrative regime.

These areas are discussed in more detail below. In addition, a number of other options for reform were identified for Markets, Criminal Cartels, Concurrency and the Sector Regulators and Telecom Price Control Appeals. The options considered in each of these areas together with more specific objectives referring to the particular problems of these aspects of the current regime are discussed in the annexes C to F.

12. [17] See, for example, KPMG's 2006/07 peer review of the competition regime.

Institutional Design

Description of options considered

26. To meet the policy objectives above and to address the issues identified, two primary policy options have been identified. Other options were considered but discounted for reasons of feasibility.

27. Option 1: Do nothing. Under this option the responsibilities and decision making powers of the OFT and the CC would not change. The principal bodies responsible for enforcing competition law would continue to be the OFT and the CC, although sector regulators such as Ofcom and Ofgem would continue to have concurrent powers in relations to civil antitrust enforcements, making market investigation references to the CC and consumer powers.

28. Option 2: Create a single Competition and Markets Authority[18] (CMA). Under this option the competition functions of the OFT and the CC would be merged to create the CMA. Concurrent powers would remain under this option

Benefits and costs of each option

Option 1: Do nothing.

29. Table 5 and 6 below shows the budgets of the OFT and the CC for 2011/12 and how they are allocated.

Table 5: OFT Budget for 2011/12

2011/12	Office of Fair Trading
Staff budget	**£35.4m**
Accommodation	**£6.24m**
Litigation budget	**£2.2m**
Other costs	**£12.5m**
Net Allocated Budget	**£56.3m**

Source: OFT

13. [18] This is a working title. The name of the possible new body is yet to be decided.

Table 6: CC Budget for 2011/12

2011/12	Competition Commission
Inquiry staff	**£7.75m**
Inquiry support	**£1.14m**
Corporate Services Support	**£2.82m**
Accommodation costs	**£8.16m**
Other costs	**£1.56m**
Income	**- £3.70m**
Net Expenditure	**£17.74m**

Source: CC

30. The OFT and CC are already pursuing efficiency programmes driven by the 2010 Spending Review settlements. Specifically, the OFT received a 25% budget cut in real terms phased over the four years, with the administration spend needing to reduce by 33.3% over the same period. Over the Spending Review period BIS needs to reduce the resource budget by 25% and capital spend spending by 44%. In addition, the administration budget for the Department and its partner organisations will fall by 40%. As BIS is the CC's sponsor department, BIS will outline the CC's budget over the spending review period.

31. The OFT's Positive Impact Report[19] notes that the enforcement of competition law saved consumers £83 million per year on average between 2008 and 2011, the merger regime saved consumers £127 million per year, market studies and market investigations saved consumers £479 million per year and consumer protection enforcement work saved consumers £36 million per year.

32. The benefit of the current institutional design of the competition landscape is the separation between phase 1 and phase 2 decision making in mergers and markets. In addition, commentators have noted business awareness of policy; effectiveness of legislation; technical competence; and political independence as other key benefits of the current regime. However, having two separate bodies responsible for enforcing competition has led to inefficiencies in the resource allocation and additional burdens on business from having to respond to duplicated information requests. It is necessary to consider how efficiency can be enhanced, which creating the CMA provides the opportunity to do.

Option 2: Create a single Competition and Markets Authority.

33. As mentioned earlier, the principle benefit of a merger between the CC and the competition functions of the OFT would be to create a single competition authority whose primary focus would be on promoting competition and enforcing competition law. As a single body, there would be significant benefits to the regime as it would be able to prioritise scarce public sector resources more effectively, taking into account the balance of work across the whole spectrum.

14. [19] http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/OFT1354.pdf

34. Uniting the competition responsibilities of the OFT and CC in a single organisation would provide the impetus to use competition powers and processes in the most flexible and dynamic way, applying whichever tools were most appropriate to promote competition across the economy. As the clearly identifiable principal competition body in the UK, the CMA would be a strong focus for attracting and bringing together competition expertise and capability. This would be further enhanced by deliberate cross-fertilisation of staff from the two current bodies, sharing and deepening expertise across the new organisation.

35. The CMA would be able to focus its resources wherever they were needed most, regardless of whether this fell within the current remit of the CC or OFT. For example, the CMA would have the incentive to reach earlier decisions on whether a market study or investigation was the most appropriate way to address a competition problem. By taking a view across the entire landscape and maintaining an end-to-end view of investigations, the CMA could eliminate overlaps between current processes and would also have a greater understanding of where pressures were likely to arise, allocating resources accordingly.

36. In addition to the wider benefits to the economy from maximising the efficiency of the CMA's resources, there would also be direct benefit to business from creating a single organisation. The need for business to engage separately with two entirely distinct teams with entirely different processes, has been criticised by some commentators as imposing too high a burden on the public purse and on the parties involved in cases. A single body could streamline this process, whilst still maintaining the requisite degree of separation between first and second phase decision making.

37. Though it is not the principal driver for the creation of a new body, in terms of administrative savings, the creation of the CMA would result in modest savings across a number of areas, though these must be offset against transition costs:

    - Staffing: Approximately £1.4m - £2m annually would be saved through efficiency savings in merging the board and consolidating senior and back-office staff. Against this, transition costs, around redundancy, are estimated to cost £0.6m - £0.9m. Other transition costs related to staffing may include short term recruitment costs if key staff leave the bodies during the transition period and harmonising pay in the new organisation.

    - Accommodation: Sharing accommodation could save £0.6m - £2.8m annually depending on whether the CMA was located at Fleetbank House or Victoria House and the ability to sublet newly vacated space with transition costs of £1.6m - £3.6m associated with IT, staff and equipment move costs and project management costs.[20]

    - Contracts: Approximately £0.6m a year would be saved through rationalisation of contracts, against transition costs of £0.3m associated with exiting contracts.

    These savings and costs are discussed in more detail at Annex B.

15. [20] It should be noted that co-location could take place without creating the CMA, however, the co-location would be an essential part of creating the CMA and therefore both the transition costs and savings are included.

38. Creating the CMA is not expected to deliver savings above that which need to be achieved as a result of the spending review settlements of the OFT and CC. Rather the savings identified as a result of the merger represent a way to achieve the SR settlements and are considered a subset of the savings that need to be realised over the SR period.

39. Finally, creating a single competition authority would create a single voice for competition, able to speak with authority at home and abroad. To an outsider, currently it may not be immediately apparent where responsibility for an aspect of competition policy lies: the creation of the CMA would correct this, increasing the UK's influence in competition policy in Europe and elsewhere. Domestically, a unified authority would allow the CMA to be a stronger advocate for pro-competition policy across Government, including in the delivery of public services.

40. However, there are also downsides to creating a new, single competition body. At the moment, in relation to mergers and markets, there is a separation of decision making in phase 1 and phase 2 by virtue of having separate bodies undertake each phase. If the bodies were to merge, then there is a clear risk that the 'second pair of eyes' may be lost.

41. In addition, there is also a risk that there would be disruption to the work of the competition authorities as they moved towards a merger and integrated. As noted, both agencies are highly regarded internationally, and it is clear that nothing must be done to jeopardise these ratings. These are clear risks that would need to be mitigated, and are addressed in the relevant Mergers, Markets and Risks sections below.

42. Alongside the proposed reform of the competition landscape to create the CMA, a number of other reforms to the consumer landscape and the location of the OFT's consumer credit function are being considered, albeit in separate consultations and impact assessments. Whether or not a new CMA retained responsibility for OFT's consumer functions there would be consequent risks: if they were retained, it would be necessary to ensure that consumer concerns received due weight in a body with a primary focus on competition; if they were removed, the risks would result from transition issues and a potential loss of integration between competition and consumer issues. We have sought to describe the impact of the competition reform only, while acknowledging there are issues which are difficult to separate at points.

Summary

43. Merging the competition functions of the OFT and the CC to create the CMA is a significant change to the current competition landscape. It should result in a more coherent competition regime, able to target resources better, to promote competition and deter anti-competitive behaviour, whilst acting as a greater advocate for competition both domestically and abroad. This should lead to a better framework for growth in the economy as a whole.

44. The merger should also result in net cost savings in staff, accommodation and supply contracts. The potential savings are not the primary motivation for the merger but are nevertheless a factor to consider at a time in which public resource is increasingly scarce.

45. However, there are potential risks, in particular relating to the continued high-quality functioning of the competition regime during the period of transition and to the maintaining of separation in decision-making between Phase 1 and Phase 2 of merger and markets investigations. There are also potential risks from the interaction with the reforms to the consumer and consumer credit regimes, which will be addressed in separate consultations.

46. Overall, given the clear benefits to the competition regime from the creation of a single competition body able to allocate resources and expertise more effectively, this is the Government's preferred option.

Mergers

Issues under consideration

47. A merger regime is necessary to prevent companies achieving a dominant position, thus potentially leading to anti-competitive outcomes. The direct benefits to consumers of the UK merger regime were estimated to be £127 million per year during 2008 to 2011[21].

48. The UK merger regime is highly regarded internationally and was ranked second behind the US out of nine merger regimes by KPMG in 2007[22]. The strengths noted include technical competence, independence from the political process, transparency and access to decision makers, accountability and robustness of decisions. There are, however, areas where the current regime could be improved. The government had identified three problems with the current merger regime in the consultation:

- *Risk that some anti-competitive mergers escape review.* The UK is one of the very few OECD countries operating on the basis of voluntary notification as opposed to mandatory notification, which carries a risk that some anti-competitive mergers escape review by the competition authority.

- A report prepared by Deloitte for the OFT in 2007 suggested 'the ratio of mergers which advisers considered would have been unlikely to obtain unconditional clearance by the OFT (but of which the OFT was unaware) to those which were found to have a SLC (substantial lessening of competition) or had undertakings in lieu was approximately one to one'. The OFT, however, noted the lack of third party complaints indicating this does not represent a serious failing in the current regime. In addition, in recent years the OFT has improved its merger intelligence function through increasing its resource and taking a more targeted approach. Therefore, the problem of missed mergers is not considered to be significant. Stakeholders also note the lack of complaints in this area indicates a lack of a problem.

16. [21] This is based on conservative assumptions and does not take into account the very significant deterrent effect of the mergers regime. http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/OFT1354.pdf

17. [22] Peer Review of Competition Policy, KPMG, June 2007.

- *Investigating completed mergers.* The current voluntary notification regime results in the competition authorities looking at some cases which have already completed. Businesses have a commercial incentive to integrate following completion and it is the degree of integration which makes investigations burdensome in terms of case handling – both for the competition authorities and for the companies concerned – and can give rise to problems in designing appropriate remedies where a merger is found to result in a substantial lessening of competition (SLC), since it can be difficult to undo the effects of a completed merger. The OFT has found a 'realistic prospect' of an SLC (so that the reference test is met) in 125 cases since 2004/05 of which 60 were completed. Of these 60 cases, 34 ended in a reference to the CC. Although 19 (56%) of these completed acquisitions, resulted in a clearance at phase 2.

- At the OFT stage the main additional task for completed cases has been the need to put in place hold-separate undertakings and to manage any derogations to them which takes, on average around 1.5 days per case. A good indication of whether or not a merger inquiry is particularly complex at phase 2 is whether an extension to the statutory deadline is used. There have been 13 cases where an extension was used, 10 of which involved completed mergers.

- Investigations into completed cases are also more costly for the parties. For completed mergers the CC will generally require the appointment of a monitoring trustee (costing from £60k to £300k depending on the complexity of the task and the length of time of assignment), possibly a hold separate manager (costing approximately £1000 a day) and if a divestiture trustee is also required to effect a divestiture, this can cost the parties up to £300k. However, the cost to business is an avoidable cost as such costs would not have been incurred had the parties sought merger control clearance before completing the merger.

- Most importantly, completed cases generate a cost to society. The extent of competitive damage that occurs prior to investigation, and if necessary, remedy, is related to the extent to which the acquired business no longer operates as an independent entity placing a competitive constraint on the acquirer. The CC has measured the damage caused by the mergers where it has found an SLC in terms of cost to consumers[23]. The analysis done since 2005 shows that the cost to consumers from an SLC found in mergers investigated by the CC can range from £200k to £30 million per year depending on the size and complexity of the market involved. The interval between completion of a merger and when remedies are imposed can be significant. For completed mergers where the CC finds an SLC, the average time taken until final undertakings are implemented[24] is 26 months from when the merger completed,[25] with a range of 12 to 74 months. When faced with a completed merger the CC will generally impose interim measures to prevent further integration and mitigate the effects of any integration that has occurred. As such, it is possible that once the CC inquiry is in progress, the level of consumer detriment will be lower. In addition, although this may be unavoidable, harm may also be

[23] http://www.competition-commission.org.uk/our_role/analysis/evaluation_reports.htm. The practical difficulty is that such price rises represent predictions, in effect, of a future that now will not happen. The estimates represent a 'best guess' derived from all the information available to the CC for each case.

18. [24] In the case of behavioural remedies, this is when the final undertakings are signed. For structural remedies, this is when the divestment is complete.

19. [25] This compares to an average of 11 months for anticipated mergers from notification with the OFT to acceptance of final undertakings or completed divestment.

done to the acquired company through a lack of R&D during the inquiry and uncertainty leading to some staff leaving.

- *Businesses argue that the merger process could be speedier and more streamlined.* The Peer Review of Competition Policy by KPMG in 2007 found that the UK regime was considered slow compared to other countries and ranked 7th out of nine merger regimes on speed of decision making.

- Speed of decision making was one of the characteristics identified in the Peer Review of Competition Policy by KPMG in 2007 that influence the effectiveness of a competition regime. While the UK merger regime is highly regarded internationally, it is considered slow compared to other regimes, even taking into account that there may be a trade off between speed and robustness of decisions. This is a concern to business that experience uncertainty while they are waiting for a decision by the competition authorities. Table 7 below shows the review periods of various international merger regimes[26].

20. [26] The actual average duration of cases can be quite different to the legislative or administrative timetables due to the amount of time in pre-notification discussions and 'stop the clock' mechanisms.

Table 7: Review period of international merger regimes

Jurisdiction[27]	Phase 1 review period	Phase 2 review period
UK	**40 day administrative time limit**	**24 week statutory time limit (extendable by 8 weeks)**
EU[28]	**25 – 35 working days**	**90 – 125 working days**
France[29]	**25 working days**	**65 days**
Germany[30]	**One month**	**Four months (including phase 1)**
New Zealand[31]	**Target timetable of 40 to 60 working days**	
Spain[32]	**One month – one month and 10 working days**	**Two months – two months and 15 working days**
US[33]	**15 – 30 days**	**No fixed period**

Policy objectives

49. Along with the overall objectives, there are some specific objectives for the mergers regime which are linked to the overarching objectives including:-

- **Create a strengthened merger regime which supports growth and productivity** by ensuring that mergers that weaken competition are correctly identified and remedied, bringing benefits to consumers and the economy as a whole.

- **Create a more efficient, speedier and streamlined merger regime** through amending the investigatory process and reducing the duplication of work between phase 1 and phase 2 to benefit businesses.

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21. [27] The notification requirements differ between the jurisdictions.
22. [28] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:EN:NOT.
23. [29] http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=319.
24. [30] http://www.bundeskartellamt.de/wEnglisch/Fusionskontrolle_e/Information_leaflets_FusW3DnavidW2638.php.
25. [31] http://www.comcom.govt.nz/assets/Business-Competition/Mergers-and-Acqusitions/Mergers-and-Acquisitions-Clearance-Process-Guidelines-14-July-2010.pdf.
26. [32] http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=18425&Command=Core_Download&Method=attachment
27. [33] http://www.ftc.gov/bc/hsr/introguides/guide1.pdf and http://www.ftc.gov/bc/hsr/introguides/guide2.pdf

Description of options considered

50. To meet the policy objectives and to address the issues identified, a number of options for reform to the merger regime were set out in the consultation document. These options fall into two categories; notification / thresholds and streamlining / timeframes.

Notification and thresholds

51. Option 1: Do nothing. The current voluntary notification system and the thresholds which dictate over which mergers the competition authority have jurisdiction would not change.

52. Option 2: Improve the voluntary regime through strengthening interim measures.

- Currently the OFT has two powers which enable it to prevent companies achieving a high level of integration whilst it is conducting an investigation. The first is that the OFT may seek initial undertakings to prevent pre-emptive action including halting integration. The second power enables the OFT to make an order that it can use to prohibit pre-emptive action.

- This option strengthens the interim measures through giving the CMA a power to invoke a statutory restriction on merging parties which would immediately stop further integration of the businesses. In addition, this option would clarify the legislation to make it clearer the type and range of measures that the CMA could take, in order to prevent pre-emptive action. Penalties would also apply to integration measures taken in breach of any restrictions.

53. Option 3: Mandatory notification.

a) Option 3.a: Full mandatory notification. Mergers where the turnover of the target in the UK exceeds £5 million and the world wide turnover of the acquirer exceeds £10 million would be required to notify.

b) Option 3.b: Hybrid mandatory notification. Mergers where the value of the UK target turnover exceeds £70 million would be required to notify. In addition, the CMA would retain the ability to initiate investigations and take action where appropriate for mergers that fall below the turnover threshold but are caught by the share of supply threshold.

54. Option 4: Introduce a small merger exemption under both the hybrid mandatory and voluntary regime options where the UK target turnover does not exceed £5m and the acquirer worldwide turnover does not exceed £10m.

Streamlining and timeframes

55. Option 1: Do nothing.

- The OFT carries out phase 1 of merger investigations and decides whether the merger leads to a 'realistic prospect' of a SLC. The OFT has a 40 day administrative time limit and has stop the clock powers which can be used when parties fail to respond to information requests. The OFT has a 20-30 day statutory deadline if the merger notice route is used, although in practice it rarely is. The CC carries out phase 2 of merger investigations and decides if an SLC exists 'on the balance of probabilities'. It has a 24 week statutory time limit, information powers for main and third parties, stop the clock powers which can be used when main parties fail to comply with a notice requiring the production of information and the ability to extend the time limit by 8 weeks under specific circumstances.

56. Option 2: Statutory timeframes on all phases of the merger regime.

a) Introduce an 8 week statutory timetable for phase 1.

b) Introduce shorter statutory time scales for phase 2 and introduce statutory timescales for the remedies implementation stage of phase 2.

c) Introduce stop the clock powers for anticipated mergers entering phase 2. This would enable the CMA to suspend or extend its statutory review timetable for a period of three weeks should it believe cancellation or significant alteration to the merger is likely.

57. Option 3: Amend the process for undertakings in lieu (UILs) so they are offered, negotiated and agreed post publication of phase 1 decision.

- Currently parties can offer undertakings in lieu at phase 1 after the issues meeting but before the Case Review and Decision Meetings. The OFT however, does not consider UILs until the decision on whether the case meets the test for reference to the CC has been made (and whether to apply any available exceptions to the duty to refer, including 'de minimis'[34]). This is to ensure that there is no question that the offer of remedies influences the decision on whether the duty to refer arises (i.e. to avoid any possibility or suggestion of 'reverse engineering').

Benefits and costs of each option

Notification and thresholds

28. [34] Cases where the OFT considers that UILs could reasonably be offered by the parties are not considered as candidates for application of the markets of insufficient importance ('de minimis') exception to the duty to refer.

Option 1: Do nothing. The current voluntary notification system and the threshold which dictates over which mergers the competition authority have jurisdiction would not change.

58. The cost of the merger regime to government varies each year depending on the number of investigations, which in turn depends on the level of merger activity in the economy as a whole and the maturity of the regime. In 2008/09 merger control cost approximately £9 million (£2m to OFT and £7m to CC).

59. The OFT estimated the direct benefits to consumers of the UK merger regime to be £127 million per year during 2008 to 2011. In addition, deterrence research by Deloitte in 2007 indicated that at least five proposed mergers were abandoned or modified on competition grounds before the OFT became aware of them for each merger blocked or modified following intervention by the competition authorities[35].

60. The current voluntary notification regime minimises the burden on business as only businesses which choose to notify to benefit from certainty that the merger won't be investigated later, and businesses called in by the OFT as the merger may on the basis of public information be considered to raise potential concerns face the cost burden of investigations. However, this option would not address the problems identified in the current regime.

Option 2: Improve the voluntary regime through strengthening interim measures.

61. The problem with the current system is that initial undertakings are often not put in place until a significant period after completion due to negotiations between the OFT and parties concerning the scope of the derogations and when they are put in place can be imperfect.

62. The key benefit of this option is that it will enable the CMA to stop integration during investigations and therefore make it easier for the CMA to investigate cases and apply appropriate remedies. A secondary benefit is the effect strengthened interim measures may have on the timing of merger notifications. Strengthened interim measures should transfer the risk of completing a merger from the economy to the merging parties, making businesses less likely to complete mergers before receiving clearance. In addition, given the increased risk to the merging parties that the authority will use its strengthened powers to keep the businesses separate, they are more likely to notify prior to completion. Enabling the CMA to halt integration and incentivising the notification of anticipated as opposed to completed cases, directly addresses the problem identified in the current regime that the authorities investigate many completed cases which are more complex and difficult to remedy.

63. Consumer detriment from anti-competitive mergers arises when the acquired business no longer operates as an independent entity placing a competitive constraint on the acquirer. Therefore awarding the CMA the ability to trigger a statutory power to suspend the integration of businesses during the investigation should reduce the consumer detriment that would occur in cases found to be anti-

29. [35] http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft962.pdf

competitive. However, the use of these powers delays the merger benefits to the merging parties.

64. Under this option the CMA will be able to choose whether to seek a court order and / or impose a penalty in the event of a breach of restrictions. The benefit of seeking an order is to ensure merging parties stop integrating[36], while the benefit of a penalty is its deterrent effect. These two tools should ensure businesses comply with the interim measures so the benefits of keeping the businesses separate are realised.

65. The government proposed in the consultation that the maximum penalty for breach of restrictions should be 10% of aggregate turnover of the enterprise concerned, which is in line with the penalties under the EU Merger Regulation for failure to comply with the suspensory requirement, but are much higher than the penalties that the CC can currently apply in relation to failures to comply with a notice requiring production of documents/information[37]. However, consultation responses argued the penalty proposed was too high. It is the same as the maximum penalty that can be applied in antitrust cases (which applies to prohibited agreements and conduct); although in practice the penalty rarely exceeds 4% of worldwide turnover. Therefore, the preferred option is for the maximum penalty for breach of interim measures to be 5% of aggregate turnover. This is high enough to serve as an effective deterrent and is more than the current CC penalties for failure to supply information, but less then the maximum penalty possible in antitrust cases.

66. Although penalties, if levied, are an additional cost to business for the purpose of the Impact Assessment we assume full compliance and therefore that there will be no cost considerations for penalties levied, in line with Impact Assessment guidance[38].

67. Maintaining a voluntary notification regime but strengthening the interim measures is a targeted and proportionate approach to address the problem of completed cases. Unlike mandatory notification it does not create a significant burden on business as a whole but rather targets particular mergers[39] and also does not significantly increase the cost of merger control to the CMA. This is therefore the preferred option.

<u>Option 3: Mandatory notification.</u>

a) Option 3.a: Full mandatory notification. Mergers where the turnover of the target in the UK exceeds £5 million and the world wide turnover of the acquirer exceeds £10 million would be required to be notified.

b) Option 3.b: Hybrid mandatory notification. Mergers where the value of the UK target turnover exceeds £70 million would be required to be notified. In addition, the CMA would retain the ability to initiate investigations and take action where

30. [36] The OFT currently can obtain a court order to ensure compliance when there is a breach of undertakings or orders, but it has not yet used this power.
31. [37] The penalties the CC can apply for failure to comply with a notice requiring production of documents/information where the amount of a fixed penalty of £30,000 and/or daily penalties of £15,000 are set out in the EA2002. However the maximum is set by an order by the Secretary of State which is £20,000 for fixed penalties and £5000 for daily penalties.
32. [38] http://bis.gov.uk/assets/biscore/better-regulation/docs/i/11-1112-impact-assessment-toolkit.pdf
33. [39] Where marginal additional cost may be incurred.

appropriate for mergers that fall below the turnover threshold but are caught by the share of supply threshold.[40]

68. Full mandatory notification reduces the risk of anti competitive mergers being missed and the problem of completed mergers as all mergers captured by the jurisdictional threshold are required to notify and could not complete until after they received clearance. A hybrid mandatory notification system would only solve the problem of completed cases to a limited extent as over 75% of completed mergers qualify on share of supply and therefore they would continue to be voluntarily notified or called in by the authority[41].

69. Mandatory notification would impose a significant additional cost both on business, in terms of legal fees, management time and delayed benefits of merging, and the competition authority from having to investigate more cases, many of which would be benign[42]. A short form notification was seen as a way to reduce the cost to business under mandatory notification. However, businesses argue the CMA would need more than just basic information to clear a merger, so parties would still feel obliged to prepare lengthy and costly notifications. In addition it is difficult to design an effective threshold for mandatory notification. Option 3a is very low, would increase notifications tenfold and would be out of step internationally. However, raising the threshold would reduce the benefits. As mergers are not required to notify under a voluntary notification regime it allows the use of more flexible thresholds thus giving wide coverage.

70. Further, consultation responses noted that mandatory notification would go against the better regulation agenda and the Government's objective of increasing growth in the economy, as it may slow down merger activity. Merger value may be seen as a proxy for growth and empirical evidence shows that some mergers create value whereas others do not and many factors affect their success. Mergers facilitate exit from an industry and reflect economically beneficial reallocations of productive assets and the threat of takeovers can have a disciplining effect on management therefore increasing internal growth.

71. Mandatory notification is not recommended as it is not targeted and it is not the most proportionate way to address the problem of completed cases.

Option 4: Introduce a small merger exemption where the UK target turnover does not exceed £5m and the acquirer worldwide turnover does not exceed £10m.

72. The benefit of this option is the certainty it provides to small businesses that they cannot be investigated by the competition authority and that they do not face the costs of merger investigations. However, there is a potential cost to society resulting

34. [40] Options 3.a. and 3.b. are considered in parallel.
35. [41] At phase 1, 34 (79%) out of 43 completed cases investigated over the past 3 years, qualified on share of supply. Therefore, these cases would still have been able to complete and only later would have been called in to the OFT. At phase 2 since the introduction of the Enterprise Act 2002, 25 (76%) out of the 33 completed cases investigated qualified on share of supply.
36. [42] This was quantified in the consultation stage Impact Assessment. http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-758-competition-regime-for-growth-impact-assessment.pdf

from the adverse effects of small anticompetitive mergers and the loss of the deterrence effect.

73. According to the zephyr database 1,965 mergers occurred in 2009[43]. The UK target turnover is recorded for 604 of these mergers and shows that 239 of these had a UK target turnover less than £5 million. Assuming that the distribution among target turnover bands of all 1,965 mergers follows the same distribution as the 604 mergers for which the target turnover is recorded, means approximately 780 mergers in 2009 had a UK target turnover less than £5 million.

74. The zephyr database does not record the worldwide acquirer turnover, so it is not possible to say how many mergers would have been exempt under the proposed exemption. However, 3% (2 out of 64) of the mergers investigated at phase 1 from 06/2010 to 06/2011 had a worldwide acquirer turnover of less than £10 million. It is likely that the distribution by worldwide acquirer turnover of the mergers investigated by the UK authorities is skewed towards higher turnover firms. Therefore it seems sensible to suppose 5% to 10% of the mergers that satisfied the target turnover exemption threshold in the economy as a whole, also satisfied the worldwide acquirer turnover exemption threshold and would therefore be exempt. So approximately 40 to 80 mergers would have been exempt under the exemption had it applied in 2009. These businesses would benefit from certainty in not being investigated. This is an important benefit to business but it is not possible to quanitfy certainty.

75. Data from 06/2010 to 06/2011, for qualifying phase 1 cases shows there were 14 mergers investigated where the UK target turnover was less than £5 million. However, in all these cases the worldwide acquirer turnover was greater than £10 million and would therefore not have been exempt from investigation had the proposed exemption been in place. There may have been mergers which were found not to qualify which would have satisfied the exemption, although due to data limitations it is not possible to say how many. However, it is likely that some mergers would no longer be investigated by the competition authorities and therefore would benefit from not having to bear the cost of investigations, which is likely to be around £60k for small, reasonably straightforward mergers in both legal fees (£50k) and management time (£10k). This is an important benefit to business but given the uncertainty regarding how many mergers would no longer face the cost of investigations, it is not possible to quantify this benefit.

76. The intention was for the small business exemption to replace the current de minimis threshold. However, 5 cases over the past year were cleared on de minimis grounds, but these cases would not have qualified under the small business exemption. Therefore, the preferred option is for the small business exemption to operate in addition to the de minimis threshold.

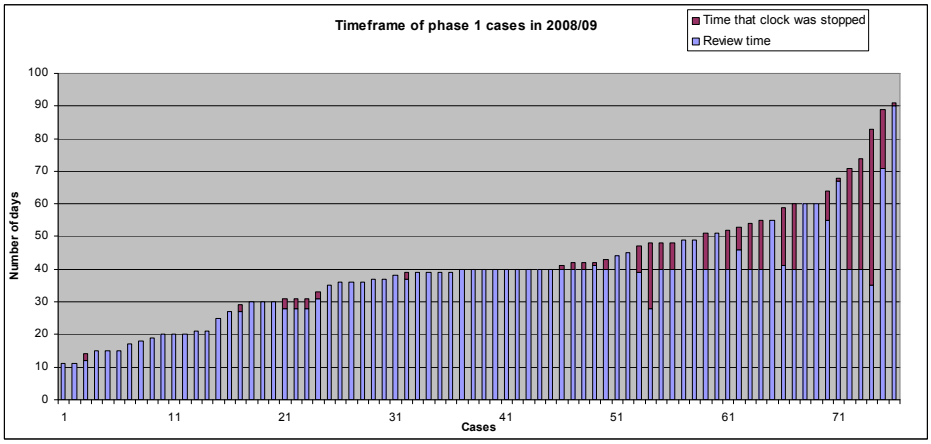
Streamlining and timeframes

Option 1: Do nothing.

37. [43] The zephyr data cover only UK targets.

77. This would not address businesses concern regarding the speed of decisions, as it would not make the merger review process faster. Speedy decisions are key to an effective competition regime and the problem of the current system is the uncertainty for business while they are waiting for a decision. Figure 8 shows the timescales of the 76 cases investigated by the OFT in 2008/09, including the review time and the time the clock was stopped. The graph shows that the clock was stopped in 30 out of the 76 investigations in 2008/09, with the time the clock was stopped ranging from 1 to 48 working days, with an average of 10 days. The 40 working day administrative timetable was exceeded in 15 out of the 76 cases, excluding the time the clock was stopped. Under the current system cases are allowed to take longer than the 40 working day administrative timetable as the consequences for doing so are limited.

Figure 8: Timeframes of phase 1 cases in 2008/09



78. The time taken at the remedies implementation stage of phase 2 (i.e. the time between final report and agreement of undertakings) for the 8 cases where remedies were implemented from 2007/08 to 2009/10, has ranged from 8 weeks[44] to over 2 years and 2 months[45]. Excluding BSkyB – ITV, the average time was 24 weeks.

Option 2: Statutory timeframes on all phases of the merger regime.

a) Introduce an 40 day statutory timetable for phase 1.

79. Consultation responses from businesses and law firms recognised the benefit of increased predictability and speed that would result from statutory phase 1 timescales, but are not strongly arguing in favour of statutory timescales as they argue the net effect is uncertain.

80. The benefit of statutory phase 1 timescales is the focus it creates for the authority to complete investigations in an efficient and timely manner. Statutory timescales, along with information gathering powers (see paragraph 83), should also change the behaviour of businesses, creating an incentive for the merging parties to provide

38. [44] In the case of Capita Group plc – IBS OPENSystems plc.
39. [45] In the cases of BSkyB – ITV.

information promptly when it is requested and even to voluntarily provide information to aid the investigation and avoid the risk of a phase 2 investigation.

81. Arguably statutory timescales may result in more benign phase 2 cases due to less time to obtain sufficient information to clear cases in phase 1 (type I errors) which is costly to businesses and government, and some cases may be cleared which warrant a phase 2 investigation (type II errors) which is potentially costly to consumers, but such errors should be small given the incentive on parties to provide information and aid the investigation. It is likely that there will be more type I than type II errors with a few more phase II cases, but many of these are likely to be subsequently cleared. Statutory timescales may also result in longer pre-notification discussions, therefore not making a material difference to the overall timescales. However, the CMA should be able to manage this. The timing of notification is at the parties' discretion; the sooner they notify the sooner the clock starts.

82. On balance a statutory timetable should lead to businesses benefitting from decisions sooner, while unintended consequences should be minimal. A 40 working days statutory timetable for phase 1 is therefore the preferred option, addressing a key problem recognised in the current regime that the merger process is slow[46].

83. To help enable the authority to complete phase 1 investigations in the 40 working days statutory timetable the authority will have information gathering powers similar to the powers the CC currently has. The CC can impose penalties on main and third parties for failure to comply with a notice requiring the production of information, but the CC has not yet imposed such penalties. Awarding the authority similar powers at phase 1 should enable relevant information to be gathered quickly.

84. Awarding the CMA information gathering powers at phase 1 may result in an additional cost to business, particularly on third parties. Most merging parties provide information voluntarily and therefore there is not expected to be an additional cost to the main parties; rather it is likely the CMA will be able to compel them to provide information more quickly by the threat of using their formal powers[47]. However, there is likely to be an additional cost to third parties.

85. The number of information requests varies considerably by type and profile of case, but on average information requests are sent to 5 third parties per case consisting on average of 10 questions. On average a third do respond and therefore bear the cost of providing information.

86. It is expected that the CMA will use its information gathering powers when parties are reluctant to provide information or when they believe important information is being held back, as the CC does now. The CC has rarely needed to use their formal information gathering powers as usually the threat of use is enough. In addition, sometimes firms have requested the CC to use the statutory notice as it is more expedient. The CC has issued only 12 notices during 6 merger inquiries out of the total 76 phase 2 cases.

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40. [46] The CMA may need additional resource to be able to process all cases within the statutory timetable.

41. [47] Although there are cases where main parties may not provide information, these cases are rare and therefore there is no additional cost.

87. It is estimated that an additional one third of third parties sent information requests will face the cost of providing information, given that a third already respond on average and the CMA will only use its powers in some cases. Given a corporate managers median gross hourly pay of £19.36[48] and 1 to 10 hours of their time needed to respond to a information request, a cost per business of £20 to £200 per information request is estimated. Therefore assuming 1.7 businesses (i.e. a third of 5) per case face an additional cost of providing information, the cost to business is estimated at around £20 to £200 per case, and given 88 cases per year on average (the average of the past 3 years), the total additional cost to business is estimated at approximately £3k (i.e. 1.7 * 88 * 20) to £30k (i.e. 1.7 * 88 * 200) per year. However, in a recent case the OFT sent a questionnaire to 1,000 third parties and received 300 responses. This could be an additional cost to business of £10k to £110k per year, but there is unlikely to be more than one of these cases per year. The total additional cost to business is therefore estimated at £13k to £140k per year.

88. The penalty that the CMA will be able to impose if parties fail to provide information acts as an incentive on parties to provide information. In line with Impact Assessment guidance, assuming full compliance means that no additional cost to business arises from these penalties.

b) Introduce shorter statutory time scales for phase 2 and introduce statutory timescales for the remedies implementation stage of phase 2.

89. A minority of consultation responses have argued that phase 2 should be shorter and note that it is long by international standards[49]. However, shortening the statutory timescales on phase 2 may significantly compromise the quality and robustness of decisions. Also, the additional proposed timescales on the remedies implementation stage of phase 2 may creep into the time of phase 2 investigations. Therefore shortening the phase 2 statutory timescales is rejected.

90. Consultation responses were supportive of introducing timescales for the remedies implementation stage of phase 2 i.e. the time between publication of the final report and accepting undertakings. The proposal is to introduce a 12 week statutory time limit which is extendable by up to 6 weeks. This should result in the beneficial effect of remedies being realised sooner to the advantage of consumers. Remedies were implemented in 8 cases from 2007/08 to 2009/10, but were only implemented in less than 12 weeks in 2 of these cases and would therefore have met the proposed statutory time limit had it been in place. In a further 2 cases remedies were implemented in less than 18 weeks and would therefore have required the extension. In the remaining 4 cases the time taken for remedies implementation exceeded 18 weeks. The proposed statutory timescale should lead to greater co-operation between the CMA and business, enabling remedies implementation in the proposed time. This means the benefits of remedies for consumers should be realised sooner and the time detriment occurs from anti-competitive deals to be reduced. This is therefore a preferred option.

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42. [48] http://www.statistics.gov.uk/downloads/theme_labour/ashe-2010/2010-industry.pdf

43. [49] For example, under the EU system, phase 2 cases (including the remedies phase) take 90 working days (roughly 18 weeks) provided that any remedies are offered early in the process. If remedies are offered after day 55, the phase 2 duration is extended to 105 working days (roughly 21 weeks) and it can also be extended by up to 20 working days at the request of the parties (125 working days or roughly 25 weeks). The European Commission also has the ability to "stop the clock" if parties fail to comply with decisions requiring them to provide information by a specified date.

91. Table 9 below shows the impact of the proposed timeframes.

Table 9: Impact of proposed timeframes

	Phase 1[50] (excluding time clock was stopped)	**Remedies Implementation Stage[51]**
Length of cases in current regime	11 – 90 days	8 – 112 weeks
Average in current regime	36 days 15 cases = > 40 days: average 54 days	35 weeks 6 cases = > 12 weeks: average 43 weeks
Length of cases under proposed changes	40 working days	12 weeks
Average time saving for current outlier cases under proposed changes	14 days for 40 + day cases	31 weeks for 12 + week cases

c) Introduce stop the clock powers for anticipated mergers entering phase 2. This would enable the CMA to suspend or extend its statutory review timetable for a period of three weeks should it believe cancellation or significant alteration to the merger is likely.

92. This will enable the CMA to save resource and give breathing space to merging parties should they need it, as the CMA would pause on issuing requests to merging parties and third parties and thus reduce the investigatory burdens for all.

Option 3: Amend the process for UILs so they are offered, negotiated and agreed post publication of phase 1 decision.

93. The drawback of the current regime is that merging parties offer UILs without understanding the full competition issues identified by the OFT as at the time the UILs are offered, they have not yet seen the OFT's decision. This means that the parties have to offer UILs based on the issues set out in the issues letter, but must necessarily do so to some extent 'in the dark' as they do not know what the OFT's conclusions will be on the various concerns in the issues letter.

94. Under this option there would be a time limited period after the publication of the phase 1 decision and the detailed decision disclosed to the parties where merging parties could offer and negotiate UILs. Phase 2 would only begin if the parties confirmed they were not willing to offer UILs, if the CMA believed no UILs were possible, or the time period to offer and negotiate UILs expired or if the CMA believed that parties were abusing the system and not serious about negotiating appropriate UILs.

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44. [50] 2008 – 09 data.
45. [51] 2007/08 – 2009/10 data.

95. Under this option we would not expect any changes in total costs. Stakeholders agree that the benefit of this option is to increase transparency as merging parties would have the benefit of the phase 1 decision and would therefore be able to decide whether to offer UILs based on the concerns actually identified. It would avoid the need for parties to make 'hypothetical' or 'speculative' offers to meet concerns that did not actually materialise.

96. Under this option there would be 1 week for merging parties to offer UILs, 1 week for the CMA to consider and decide whether to pursue UILs and if so, 8 weeks to negotiate the text of UILs, consult and for the agreed UILs to be published. The aim of the timescales is to strike a balance in changing behaviour and encouraging faster agreement of UILs while not making the timescale too tight so that more cases are pushed into phase 2, which could have been resolved at phase 1 with a little bit more time. Increased phase 2 cases would be costly both to the authority and business. Upfront buyer[52] remedies are helpful as they reduce the risk of the agency not finding a suitable purchaser. However, they do take longer to arrange than UILs without upfront buyers. The time period between the SLC decision and the formal UIL acceptance was 4 months on average for all cases (3.5 months excluding outliers[53]) from 05/06 to 10/11. The average time for non-upfront buyer cases was 3.5 months (3 months excluding outliers[54]) and 5.5 months (4 months excluding outliers[55]) for upfront buyer cases. Therefore for added flexibility the time period for negotiation of UILs can be extended by 4 weeks in non-upfront buyer cases and 8 weeks in upfront buyer cases.

97. In non-upfront buyers cases, without the extension 10 out of 19 cases (about 50%) from 05/06 to 10/11 would not have achieved this timetable. Using the extension, 8 out of 19 of these cases (about 40%) would not have achieved this timescale. In upfront buyer cases, without the extension, 9 out of 10 cases (90%) from 05/06 to 10/11 would not have achieved this timescale. Using the extension, 4 out of 10 cases (about 40%) would not have achieved this timescale. The time periods should result in a behavioural change in both merging parties who will have an incentive to co-operate to avoid a reference, and the CMA and therefore the proposed timetable should be achievable. The benefit of UILs being achieved quicker is that the competition problem identified is resolved sooner, therefore reducing the time in which consumer detriment is occurring.

98. Another option considered in the consultation document was to enable early discussion of remedies in phase 2. This would be difficult to implement in practice as the authority would not have any new information until the investigation is finished. Further, having to discuss remedies earlier in phase 2 is likely to divert resource from the investigation as merging parties will be keen to negotiate remedies rather than co-operate with the investigation. Moreover, the decision makers would not yet know what it is they are seeking to remedy.

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46. [52] In upfront buyer cases, the OFT suspends its duty to refer whilst the merger parties seek a purchaser for the business that is to be divested in order to remedy the identified competition issues. UILs are not accepted until such time as the purchaser has been identified and approved.
47. [53] Aggregate / Atlantic Aggregates and Global / Gcap.
48. [54] CGL / Plymouth & South West Co-ops and William Hill / Stanley Leisure.
49. [55] Aggregate / Atlantic Aggregates and Global / Gcap.

Summary

	Strengthened regime	More efficient, speedier and streamlined regime
Strengthen interim measures	**Directly and proportionately targets the problem of completed cases enabling better case outcomes**	
Mandatory notification	**Does not target the problem of completed cases and is a disproportionate way to address the problem increasing the burden on business**	
Small business exemption		**Provides certainty to some businesses**
Statutory timeframes		**Businesses benefit from earlier certainty and anti-competitive harm is corrected sooner**
Amend the process for UILs	**Avoids merging parties having to offer UILs without understanding the full competition issues identified by the OFT**	**Improves transparency**

Anti- Trust

Problem under consideration

99. An effective competition regime needs to root out anti-competitive activity and provide a significant deterrent effect. For the latter to occur, the regime needs to deliver a stream of cases concluded within a reasonable time. The identification and sanctioning of breaches of the antitrust prohibitions, needs to take place sufficiently swiftly that businesses and their executives can expect that sanctions for such behaviour will have an effect on them, and their business, in the foreseeable future.

100. The primary law imposing the antitrust prohibitions in the UK derives from the Treaty on the Functioning of the European Union [TFEU] and European case law, applies

across the Union and is enforced by national competition authorities in the member states and by the European Commission, but the procedural arrangements for enforcing it varies. For example, and looking from a high level perspective, the European Commission acts, as in our system, as investigator, prosecutor and adjudicator but in contrast to our provision permitting appeal on the merits, the courts of the European Union have full jurisdiction to hear appeals only over the amount of a penalty; they have a more limited, JR-like jurisdiction over the actual infringement decision[56]. In practice, the ECJ gives a significant *margin of appreciation* to the European Commission in making economic assessments[57].

101. There is evidence that the UK typically brings a lower number of antitrust cases than many other regimes as shown in table 10.

Table 10: Aggregate figures on antitrust cases for selected member states 1 May 2004 - 30 September 2010

Member state	New case investigations	Decisions notified to the European Commission
France	**189**	**70**
Germany	**128**	**58**
Italy	**81**	**58**
Netherlands	**76**	**32**
Denmark	**62**	**32**
Spain	**75**	**30**
Greece	**31**	**22**
Hungary	**79**	**20**
Sweden	**36**	**16**
Slovenia	**24**	**12**
UK	**52**	**11**
(European Commission)	**195**	**N/A**

Source: European Commission

102. There can be arguments over the comparability of these figures as between member states, and the relevance of differences in market structure, but the general picture of fewer UK cases has been raised by others, including in the 2007 KPMG report[58].

103. There are some reasons why there is a difference in the number of cases. It may be that the UK has more competitive markets than other European countries and therefore we would expect fewer cases. Also the UK's competition authorities may

50. [56] Article 263 TFEU.

51. [57] The Commission's procedures have been criticised by lawyers and businesses including on the grounds that they are not ECHR-compliant although those arguments are strongly rebutted by the Commission. There is a current ECJ case (Bolloré v Commission (Case T-372/10) (2010/C 301/60)) which may clarify some of these issues. But it should be noted that the proposal for the Internal Tribunal option would aim to provide much greater protections and rights than the current Commission model, including access to the decision-makers.

52. [58] Peer Review of Competition Policy, KPMG, June 2007.

be targeting particularly serious and/or complex cases more than those in other member states[59]. It is, anyway, impossible to say what proportion of anticompetitive behaviour is being tackled in any particular jurisdiction since the number of potential cases is unknown and unknowable.

104. There is some evidence, however, that the lower number of cases is down to the burden on the competition authorities in establishing and upholding a case[60]. As the National Audit Office has noted, "[a] perception persists amongst Regulators and the Office of Fair Trading that the UK enforcement system, including the likelihood of appeal, is an onerous process compared with the use of other powers."[61] Ofcom has made trenchant criticisms of the lengths it has to go first to make a decision finding an infringement and second to defend the decision before the CAT[62]. These difficulties seem to be an important factor in explaining not just the number of cases but also why they can be so protracted; whilst accepting there are exceptional cases in every country, the tobacco price-fixing case which is (for some parties) still at the appeal stage eight years after the OFT opened its investigation, highlights some of the problems in the current system.

105. There is also some evidence from the Global Competition Review (see fig. 2 and 3) that civil infringement cases in the UK take more time to investigate and conclude than other countries that are considered on a par or better than the UK regime.

106. Expediting antitrust cases is therefore a vital aim of the review of the competition regime. It is, however, also important to ensure that the decision making process is fair and the quality of decisions high, so that decisions are robust against legal challenge. Moreover, businesses rightly expect to receive due process over allegations that they have broken the law, especially when the potential penalties - fines of up to 10% of turnover[63], voiding of agreements, liability in damages and disqualification of directors - are high. They are also protected by the ECHR and in particular the Article 6 (the right to a fair trial), so procedural fairness must be built in to any system we devise. Moreover, antitrust cases often involve complex issues of law and analysis, and require the careful identification of relevant facts and the weighing of evidence. They will only rarely be straightforward or easy cases to resolve.

107. Concerns have been expressed by business[64] and practitioners[65] regarding the existing OFT/sector regulator system for investigating infringements with particular concerns arising from the length of the process and the lack of separation of powers between investigators and decision makers.

108. From the consultation responses, there is a widespread view in the responses that antitrust is not working well and needs fundamental change. Getting the antitrust

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53. [59] For example, the recent *Construction* case involved over 100 parties.
54. [60] The CAT's take on this, so far as we understand, is however that the authorities should simply bring cases before it at an earlier stage, and legislative changes that encourage this are to be welcomed; the underlying belief that there are too few cases is the same
55. [61] *National Audit Office Review of the UK's Competition Landscape*, March 2010, paragraph 3.8.
56. [62] See for example Ed Richards' speech at http://media.ofcom.org.uk/2010/07/13/competition-law-and-the-communications-sector/
57. [63] Although fines at this level have, so far, not been levied
58. [64] CBI: see *UK Competition Regime: CBI "Clean Sheet" Approach*.
59. [65] The City of London Law Society: see *Discussion Paper on UK Competition Reforms.*

regime right is widely seen as a key objective of the whole reform exercise – it has been suggested that the reform will not be worthwhile unless this is fixed.

109. A strong theme in the responses – stronger than was articulated in the consultation document – is concern over the quality of decision-making and over due process, although many see these as inextricably linked to the number of cases and the time they take, on which the consultation document focussed. A number of consultees, have emphasised that some difficulties in antitrust enforcement stem from the quality of OFT's management of cases, particularly in their early stages, and especially the lack of intense lawyer engagement in evidence gathering with the role and power of the OFT's lawyers contrasting with that of the Commission's Legal Services.

110. In considering the antitrust procedures it is helpful to bear in mind two common but contrasting approaches to enforcing the law which can be found in many legal regimes including ones for the enforcement of competition law.

111. In a *prosecutorial model* the competition authority investigates suspected misconduct, builds a case and then in effect presses charges. This is the model used in the United Kingdom for criminal offences and indeed is how the OFT (or the Serious Fraud Office) enforces the cartel offence (against individuals) in section 188 of the Enterprise Act 2002. This model can be used in a criminal or a civil enforcement context, but here it is intended only to describe a means of enforcing civil prohibitions[66]. The prosecutorial model is the approach adopted for civil as well as criminal antitrust prohibitions in other common law jurisdictions such as the United States, Australia, Canada, and Ireland. In this model the court is the real decision-maker.

112. In an *administrative model*, the competition authority has a more balanced role. It seeks to establish the truth itself. It gives a full and fair hearing to the alleged infringer, states its case formally, gives access to the file and gives careful consideration to the alleged infringer's rebuttal before taking a decision. In effect, it operates as adjudicator as well as investigator and prosecutor. The European Commission follows this model as do many member states. In this model the authority is the primary decision-maker and the court plays a role only on appeal.

113. Looked at in this light, the UK model appears to be double-banked in providing the protections of both a prosecutorial model, through full merits appeals to the CAT and an administrative model. The OFT and the sector regulators with concurrent powers:
    - carry out investigations, which can include dawn raids and statutory demands for information;
    - prosecute alleged infringements by way of a formal Statement of Objections (SO) – in effect a draft detailed and reasoned decision;
    - then adjudicate as to whether an infringement has in fact occurred by reviewing the parties' submissions in response to the SO and conducting an oral hearing, and then taking a decision on whether there has been an infringement; and
    - finally they decide on the level of fine if any that should be imposed.

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60. [66] For example it is used in the UK for enforcement in the criminal courts of offences, including the criminal cartel offence, and it is also used for enforcement in the civil courts of some breaches of consumer protection law.

114. Clearly there are tensions in this approach given the multiple roles that are adopted and therefore built into the detailed processes on case handling are protections to guard against, for example, so-called institutional "confirmation bias". Then the parties have the right to appeal the decision and to argue the merits of it before the CAT which has full jurisdiction to substitute its analysis, to decide the issue and to impose that decision; in the many cases which go to appeal, the CAT may be said to be the real decision-maker at least over the matters appealed (which may be very wide). Arguably the combination of these successive processes can mean that the case is in effect run twice (although the CAT has generally sought to try to focus appeals on the relevant and substantive disputes).

115. Concerns have been expressed by business[67] and practitioners[68] about the OFT/sector regulator system for investigating infringements with particular emphasis given to there being no separation of powers and that the procedures are too protracted. It has been suggested[69] before the consultation that the CC model of bringing a case before members of an inquiry group who did not initiate the investigation and can hear representation from the parties would provide appropriate safeguards and enable cases to be speeded up.

116. The analysis above suggests that there may be scope and thus benefits from lightening the overall process, which may reduce the burden on the competition authorities (and the opportunities for businesses to challenge or otherwise delay or obstruct the process) and allow a swifter throughput of more cases. Conceptually, this could be done at either the front or back end of the process; or to put it another way, we could move either to a more administrative or a more prosecutorial approach. Provided that is, that we continue to provide due process and in particular comply with the 'right to a fair trial' requirements of Article 6 of the ECHR, an issue which is addressed at length in the consultation document.

61. [67] CBI: see *UK Competition Regime: CBI "Clean Sheet" Approach*.
62. [68] The City of London Law Society: see *Discussion Paper on UK Competition Reforms.*
63. [69] *Ibid*., pages 18-19.

Policy Objectives

117. Alongside the overall objectives for the competition regime, there are specific policy objectives for a new antitrust regime which are:
    - Deliver a stream of cases concluded within a reasonable time
    - Making it easier and quicker to bring antitrust cases
    - Ensure that cartels and anti-competitive behaviour is appropriately deterred
    - Maintain a regime that is ECHR compliant, but does not give excessive rights of appeal which could lead to unnecessary delays and costs and even allow the system to be abused.

Description of options

118. A number of options have been considered. In the consultation document three options were presented. However option 2, as expressed in the consultation document, was not considered suitable as it didn't provide adequate protections to parties, and emerging in the consultation responses was a variant of this model which we present below.

119. Therefore the options are:-
    - **Option 1**: Do nothing – Under this option, we would retain the current administrative model but rely on internal pressure and pressure from CAT decisions for the OFT/CMA to continue to improve its processes. The OFT have proposed to make improvements to the current regime by focussing on:
        - The **speed of investigations** (covering reforms to internal case management procedures, greater transparency and public target setting to improve working relations with the parties, a review of settlement policy, and further consideration of setting a maximum case time in law and proposals for legislative reform);
        - **Quality and robustness of decisions** (covering an undertaking to review policy on penalty-setting and improvements to case management and greater senior level involvement in cases from an earlier stage); and
        - **Perceptions of legitimacy** (covering reforms to internal decision-making including collective decision-making for milestone decisions; greater transparency about, and access to, decision makers; and making the Procedural Adjudicator role permanent).

    - **Option 2:** Administrative cases brought before a CC style panel. This option would seek as much as possible to use the CC decision making system to bring more independent decision making into the administrative system. However, appeal on the merits would remain.

    - **Option 3:** Prosecutorial model, where OFT/CMA would bring cases before the CAT after publishing a Statement of Case (SoC). Further details on this model are outlined in Annex G.

Costs and Benefits

120. This section sets out the main benefits, costs and risks of the different options. In addition, although we have sought to quantify the different options (see annex H), the models are vulnerable to the assumptions that have had to be made and thus it is difficult to be conclusive about the options on the basis of the quantified costs and benefits. Therefore these should be treated as illustrative rather than definitive.

121. In addition, it is important to note that the do nothing option is not a 'no change' option as this will undoubtedly include improvements the OFT have made, which are yet to show effect, and future changes to improve the current administrative model. Thus the past is not an infallible predictor of the future.

Option1: Retain administrative model

122. A number of problems have been identified in the current system, which have been outlined above. However, there is still a fair degree of debate over both the extent to which problems in the past still exist, and the extent to which new ways of working will deal with the problems identified.

123. The OFT (supported by the sector regulators) says that it has 'learnt by doing' and that its latest reforms to its procedures will enable better and swifter decisions such that the historical record is not a good guide to the future. However, some stakeholders have a degree of scepticism about the nature of improvements, pointing to cases such as *Dairy* where a decision was only recently published after an 8 year investigation, and *Tobacco* which is currently under appeal before CAT having been under investigation for a similar amount of time.

124. The OFT believe that they will be able to speed up the time taken to bring CA98 cases and has already made improvements to its speed of delivery in existing cases. For example, the recent decisions in the RBS / Barclays and Reckitt Benckiser cases (where the OFT reached its infringement decisions within 32 and 29 months respectively) and also the recent issue of a statement of objections in the ongoing bunker fuel investigation (within 10 months of opening) show some of the potential of improvements to the current regime. Project timelines for recently opened multi-party cases brought under Chapter I of the Competition Act propose that the OFT, on average, will issue statements of objections within 14 months and infringement decisions within a total of 25 months (if the evidence supports such outcomes). However, as yet only a few of these cases have come through the system.

125. In terms of improvements targeted at the pace of CA98 cases, the OFT has introduced the ability for parties to settle CA98 cases, resulting in considerable resource savings for the OFT. The OFT has also adopted a number of changes, some of which were targeted at improving the speed of delivery of cases (for example, sending focused information requests to collect less irrelevant material, tighter deadlines for parties to respond to information requests and an emphasis on narrowing the scope of investigations, where appropriate). The OFT has also developed project management tools to manage all its investigations more tightly, including its CA98 investigations, which add to the efficiency of the decision making process.

126. In addition, other proposals could include a focus on enforcement through the objectives of the CMA, increasing the amount of senior legal input into CA98 cases, introducing administrative timescales that OFT/CMA commit to. The OFT have also said they will consider their penalty setting guidelines in response to recent CAT decisions to ensure that these are being set under similar principles. These proposals would deal with some of the weaknesses, such as the speed of cases, and potentially the number, depending on case selection. Indeed, some of OFTs proposals would mitigate the risk of confirmation bias[70].

127. The main advantages of this option is that it is evolutionary and therefore would be quicker to implement and wouldn't face the same transition costs as a change under option 2 or 3. OFT, as above, point to the fact that the system is already delivering cases quicker than in the past, and if there were fewer appeals, the speed of the regime would potentially be quicker.

128. Nevertheless, there is a risk that proposals to improve the current administrative system, such as increasing the amount of senior legal input and senior oversight into CA98 cases, and potential extensions of initiatives such as the procedural adjudicator trial, may not fully address the problems identified. There would not be the full pressure of a court process to improve robustness and timescales and leave some problems unsolved, such as the present concerns that the OFT are both the investigator/prosecutor and adjudicator of decisions. In addition, there may not be much reduction in the incentives, and thus the propensity, to appeal - arguably leading to the same issues as now where cases are decided by OFT and then by the CAT. It would require more fundamental reform to deal with these issues.

Option 2: Administrative cases brought before a CC style panel

129. Under this option, cases would be investigated by a CC style panel of suitably qualified impartial experts that would be independent of the executive arm of the authority that initially decided to investigate the case and appointed with sufficient tenure to secure their independence. In all cases, there would remain provision for appeal on the merits. However, an anticipated substantial advantage of this system would be that it would enable a more transparent and robust decision making process at an early stage, thereby reducing grounds for and the likelihood of successful appeals, and hence the incentive to appeal on the merits.

130. The benefits of this option would be that it would enable the bringing of the case before a panel that can impose a discipline on the investigatory and decision taking processes much sooner so that there is a shorter and more efficient investigation resulting in higher throughput of cases. The panel could also ensure procedural fairness as well as allowing parties' access to the decision makers. However, this option would not allow for the removal of appeal on the merits in antitrust cases[71] so savings would only result if the number of appeals reduced. In addition, CC believes

64. [70] The majority of appeals on substance have been dismissed, although in the recent Construction case (for some parties) have appeals were upheld. However, appeals on penalties have been more successful. This would suggest the issue of confirmation bias is a problem in perception rather than actuality.

[71] Provided that the internal tribunal is sufficiently independent.

that panels would be less likely to engage in early resolution/settlement and this would therefore be likely to increase costs.

131. A number of law firms and the City Of London Law Society favour imposing separation of functions within the CMA either along the lines of the CC panel structure or something similar, to guard against confirmation bias and other risks to good decision-making, combined with retaining full appeal on the merits. They see considerable attractions in Option 3 as an alternative, but express some concerns on the grounds of access to justice for smaller firms.

132. The CC recommends transposing its own panel system for mergers and markets to antitrust enforcement, in view of the acknowledged quality of its decision-making and management of investigations, and the consistency it would bring to the CMA's procedures across the range of competition tools.

133. Balanced against this, however, costs may just be transferred with limited savings at the end of the investigation process, and a more labour intensive process at the beginning when collecting evidence. In addition there is no firm evidence that the gain in speed at the first phase of bringing cases would not be lost at the second judicial phase. Finally, there is a risk that the degree of legal challenge might intensify meaning that the process is no quicker than under do nothing, and may even be longer.

134. The Internal Tribunal option(and variants of it) is not the government's favoured, on the grounds that it would be difficult to ensure the CMA incorporated the necessary safeguards, there would remain the appearance of bias and there would likely be sustained attempts to appeal decisions. There is little or no appetite for reducing appeal rights from full-merits appeal, for example to the rights which pertain in Europe, under the administrative variants for antitrust enforcement. This is notwithstanding that those who support the administrative approach recommend reinforcing the safeguards and protections governing antitrust decision-making within the OFT (this reinforcing is true even of the procedural changes which the OFT has recently introduced as part of Option 1).

135. Businesses and their advisers feel strongly that, in the light of the quasi-criminal nature of the antitrust prohibitions, and the severe consequences that may follow from being found to have infringed them, a full right of appeal to the CAT is vital. This means that there would only be a prospect of time saving if the number of appeals reduced, and given that settlements may reduce under CC panels, there would be an increase in decisions that could be challenged. As the time saving prospects are limited and the costs would likely increase under this model, it is not the preferred option.

Option 3: Prosecutorial Model

136. The prosecutorial model is outlined more fully in Annex G. In a world where appeals are a regular feature of the current system[72], the prosecutorial model is potentially the most procedurally efficient system, eliminating one rung of the process, without losing

65. [72] This has certainly been true in the past, and with the potential to continue in the future.

robustness. Arguably, the CMA and the CAT would be handling the tasks to which they are best suited. Moving to a prosecutorial system should provide the new Authority with a greater degree of focus in its task of enforcing competition law. Instead of having to investigate, prosecute and decide a case, the CMA would be able to concentrate its energy on the entirely partial activities of investigation and prosecution without needing to be drawn into acting in a quasi-judicial capacity.

137. This, and our expectation that the CMA would have to arrange for experienced litigators to have input into case handling from an early stage, would also to some degree address the concerns that have been expressed about management and legal control of cases, although internal improvements could address this in the current model.

138. Granted full appeal on the merits by a specialist competition tribunal or court as a part of the administrative model alternative, a prosecutorial model seems a more efficient process (because a heavy-duty judicial process is conducted anyway when cases are appealed.) There is a risk that the authority would no longer be the final decision maker, and thus would not control competition policy to the same degree as it does now. However, full merits appeal makes the CAT ultimately the real decision-maker in the administrative system anyway, and the CAT is clearly very well equipped to take these decisions.

139. In part, the judgement here depends on an assessment of how many decisions are appealed under an administrative system, versus how many under a prosecutorial system would get to court (in other prosecutorial systems most cases are settled beforehand). The OFT have shown that even in the current system, a significant number of parties either enter into leniency agreements or settlements. However, as noted in footnote **Error! Bookmark not defined.**, even though 87% parties have been subject to leniency or early resolution, cases which are not subject to Early Resolution in their entirety have still been appealed.

140. A number of stakeholders have pointed to the increased pressure on parties to settle under a prosecutorial model. Factors contributing to this include the speed at which cases would reach court, the prospect of cross-examination for senior executives and the outcome being uncertain.[73] In addition, the Authority would be on the front foot in proceedings, able to present the case as a whole and forcing the defendants to defend themselves in court. All these reasons would suggest that rates of appropriate settlements in a prosecutorial model would be increased. It is difficult to know whether this would lead to extra cases settling in their entirety or whether this would lead to an additional proportion of parties settling.

141. There is however, another factor that would potentially increase settlements in this regime. In general, the costs of court for a party are higher than the costs of dealing with the authority in an administrative system. This could lead to parties, especially SMEs, settling earlier than they would otherwise. However, this issue of access to justice also exists to a lesser extent in the current regime, where an SME is much less likely to appeal to CAT than a larger party. This is clearly a risk that needs to be mitigated though it is also inherent in the current regime.

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66. [73] The court could either find the parties to have infringed or not to have infringed. Under the current system, parties who appeal are unlikely to end up worse off when in court (other than legal costs) than if they hadn't appealed.

142. Moving to a prosecutorial system would be a significant change in the way that the antitrust prohibitions are enforced in the UK and therefore would entail some risk and a degree of transitional disruption as the new system bedded down, which shouldn't be underestimated. The CMA would need to acquire more litigation expertise and, the CAT may have to be involved in more cases increasing the costs to this part of the regime compared to now.

143. But the disruption could be limited by the fact that it could lighten the burden on the CMA in bringing cases as it would not be responsible for adjudicating, whilst many of the lessons that the OFT has learned in making decisions over the last decade would be just as relevant. It should also be borne in mind that, from a wider perspective, the prosecutorial model is not a radical departure but is in fact the antitrust model operated in most jurisdictions with a common law system such as the USA, Canada, Australia and Ireland, and is the model in the UK in other areas of the law (including for the criminal cartel offence).

144. To some extent though, the applicability of outcomes from other regimes is hard to compare given the different legal contexts. For example although we find high settlement rates in USA and Canada, the existence of plea bargaining and the long established nature of those regimes makes it difficult to assume a similar settlement rate would occur in UK. In the same way, in Ireland, there are lower rates of settlements, but this would be a poor comparator due to the criminal nature of the offence in Ireland. International comparisons also show that prosecutorial regimes can also be subject to exceptional long running cases.

145. As discussed, the prosecutorial model could well increase the rates of settlements, increase the amount of legal scrutiny and provide an external court process to improve the speed and robustness of process. However, above all these things, a prosecutorial model would split the roles of the investigator and prosecutor from that of the arbiter of cases. This would simultaneously increase the appearance of independence and robustness of the final decisions, making appeals less likely. Indeed, in a system where a court is the arbiter, appeals from the CAT, like now, would be on points of law and amount of penalty only.

146. Although there is intrinsic appeal to the prosecutorial model, it is not without its risks. Firstly, the current model is well understood, having been in place for 10 years. There would be a danger of losing the learning that has been incorporated in the current regime. As such we should anticipate a period of transition that may lead to a reduced level of enforcement (although still some) affecting deterrence, and possibly a larger propensity to appeal and a smaller propensity to settle cases. The extent to which this occurs is difficult to predict.

147. In annex H, we model the changes proposed against the baseline. The models illustrate that:-
    - There is the potential for significant time savings by removing one step of the process
    - There may be some savings overall to business and the authority once the system bedded down.
    - There are likely to be significant transition costs such that the net present value would be negative over a 10 year period, although positive over a 20 year period.

- There is a range of scenarios, illustrating the fact that the system may not bed down as anticipated.

148. Although we note that the transition period and the length of that period, will clearly affect the assessment, the other major risk will be that the prosecutorial model does not deliver its potential. This could be due to reduced settlement levels, leading to higher resource costs for the authority, cases being caught up in the court and being bogged down slowing down the system, or a number of cases being lost leading to increased challenge.

149. There are clearly a number of elements contributing to the level of settlements such as the perceived strength of the case, previous success rates (i.e. reputation of the prosecutor) and the potential costs of not settling[74]. The first two elements are areas which the CMA would, to some extent have control over. They would clearly have to assess the validity of all cases, which would affect their overall success rate. In addition, the perceived strength of the case would be as a result of the CMA preparation and evidence that could be gathered. By nature the prosecutorial model applies these pressures to the Authority.

150. Nevertheless, the risk remains that the cases brought by CMA are unsuccessful leading to a culture of defeat. It would then be important for the CMA to learn quickly from its mistakes and improve its procedures as it brought more cases. The CMA may have to devote more resource to make this happen, diverting it from other activities. This could lead to increased costs to the authority. However, these risks are to some extent present in the current system, and arguably there have been a series of cases that highlighted the problem, causing the amount of enforcement work overall to reduce while resource were focused on difficult resource intensive cases. These problems, could however, be exacerbated in a prosecutorial model if the costs per case are much greater.

151. A potential mitigation to this is the presence of the court process that would force cases to be dropped if the evidence was not strong enough and ensure that cases would not get significantly delayed. However, as above, there may be some resource considerations for the court to ensure that this happens.

152. The other risk is that cases would necessarily become more legal in nature, and the ability of OFT to weave economic and legal arguments together would be restricted. Under the current system, the CAT has the OFT decision as its base which includes the economic and legal analysis. However, the CAT has economists on its panel and this would not change. In addition, they could choose a panel with the most appropriate expertise.

Summary

153. The main arguments for moving away from an administration model are that it would increase the speed of the regime overall by removing a stage from the current process, increasing the settlement rates and would procedurally be considered more

67. [74] In addition, there would also be factors affecting the authority, including the precedent value or novelty of an individual case. However these would affect individual cases whereas other factors would affect all cases.

fair as the body investigating and prosecuting cases would be a different from the body from the body adjudicating and setting penalties.

154. To some extent, cases may be able to be sped up within the current regime, and stronger legal management of case would address concerns about the handling of cases. However, there is the risk that changes proposed would not fully address some of the problems and if cases continue to be appealed, the process could continue to be elongated.

155. However, set against the prosecutorial model are the likely transitional costs and the difficulty in knowing whether the assumptions about settlements and appeals will be realised, meaning that the system may not operate as intended.

156. The Government has not yet made a final decision, and the Impact Assessment accompanying the Bill will outline the Government's final decision.

Risks

Description of the risks associated with moving to a single CMA and mitigating action

157. The UK competition regime is highly regarded internationally and delivers significant benefits to consumers. Any change to the current system risks deterioration in the performance of the UK's competition bodies. Maintaining the current standing of the UK's competition bodies is a key objective of the reforms.

158. The main risks identified are:-

- The various tools may not operate as intended. For example changes to the antitrust regime may still be characterised by long running cases. Also, the CAT may base its decisions more on legal rules than economic analysis and therefore reach sub-optimal decisions. Although we can be mitigate against this to an extent, by the design of the system and ensuring appropriate experts are appointed to CAT. Businesses being investigated could successfully delay cases or make the use of the competition regime powers more difficult leading to reduced enforcement and therefore deterrence.

- Competition authorities underperform in the short term if detailed transition strategies and plans, and adequate transition funding, are not in place to address impact on senior management time of implementing institutional change while continuing to deliver competition functions to a high standard.

- Failure to effectively integrate cultures and competition tools of OFT and CC leads to low morale and difficulties in retaining expert staff and the loss of the world class reputation of the current bodies. Mitigating action would include communicating opportunities for a wider range of competition roles and experience as functions are brought together in a single, more powerful body.

- Chilling effect on growth if there is business uncertainty about the impact of and requirements of changes to competition powers and functions. Mitigating action

would include careful preparation of guidance and information, in consultation with business and their advisers.

- Increase in appeals in the short term, as business test independence and objectivity of decision making in a single organisation, potentially leading to higher costs in short term and a greater than anticipated role for courts. In the event of challenge, there is a risk that the Courts consider that the decision-making structure is not fit for purpose and would require further change. Mitigating action would be to ensure design of decision making structure can demonstrate independence, objectivity, transparency, fairness and appropriate access to decision makers. In addition, ensuring a measure of flexibility in the regime to enable the CMA to respond to any adverse judicial ruling without the need for further primary legislation.

- Consumer and consumer credit functions of the OFT remain in the CMA and therefore the cost savings, resulting from the ability to sublet the vacated space in the existing accommodation are not achieved. The CMA will also therefore not be a focused competition body.

159. Conversely, deciding not to integrate the competition functions of the OFT with the CC would mean foregoing the opportunity to:

- Maximise the flexible use of competition tools and, in particular, efficient allocation of resource and expertise to particular competition issues. For example, there is much commonality in the skills, analysis and evidence base required for OFT and CC to conduct, respectively, Competition Act Chapter 2 (abuse of dominance) cases and phase 2 market investigations.

- Improve evaluation of competition outcomes.

- Improve stakeholder and information management. For example, enabling more efficient information requests from business and in the handling of information passing from phase 1 to phase 2 of a merger or market case.

Equalities Impact test

160. Our analysis shows that protected groups would not be disproportionately affected by the proposed institutional reform.

161. In terms of accommodation, the group most likely to be affect by this change would be those with disabilities where the access to various buildings may be different. The location of the CMA is yet to be decided but in assessing suitable accommodation consideration will be given the accessibility of the building alongside the affordability.

162. The other area where equalities considerations need to be taken into account is in the staff of the new body and how roles are allocated. The exact number and composition of staff in the CMA will be the decision of the Board. However, it is not anticipated that any group would be disproportionately affected by the changes, although this will be reviewed through the implementation phase.

One-in One-out

163. The implications of one-in one-out have been carefully considered when analysing the preferred policy options. In particular, the information gathering powers to be awarded to be awarded to the CMA under the mergers regime constitute an IN. The equivalent annual net cost to business is estimated at £0.14 million (as detailed in paragraph 87). We also recognise the reduction in the cost to business from the new small merger exemption but have not been able to quantify this (as detailed in paragraph 75).

164. An OUT has been identified. This is from Petition Reform proposals from Insolvency Service. The OUT in the Impact Assessment for those proposals amounts to £32.3m. Therefore, this would only be partially using the OUT identified.

165. There are other areas that could result in costs for business but these are currently out of scope according to the OIOO methodology. This includes the following:
    - Mergers - Financial penalties for failure to comply with statutory restriction on further integration are out of scope. According to the OIOO methodology fines and penalties - even if levied on a regulated entity for non-compliance with a regulation are out of scope.

    - Anti-trust - Changes to the regime which may result in a greater throughput of cases and therefore additional cost to those businesses subject to investigation is out of scope. According to the OIOO methodology specific enforcement action - individual enforcement or inspection activities, or actions to ensure compliance with regulations are out of scope.

    - Telecom Price Control Appeals - Recovering the cost the CC bears in hearing telecom price control appeals from telecom businesses is out of scope. According to the OIOO methodology fees and charges are out of scope except where they result from an expansion or reduction in the level of regulatory activity.

Micro business exemption

166. The micro business exemption aims to exempt micro businesses from new regulation for a period of three years from 1 April 2011. The proposals outlined in this Impact Assessment will come into effect at the time of commencement of the CMA, which is anticipated to be at the beginning of the 2013 financial year. Therefore there is a year in which the new policies coincide with the micro business exemption.

167. The only measure which is in scope of the micro business exemption, as with OIOO, is the information gathering powers being awarded in phase 1. Therefore the information gathering powers will not apply in reference to micro business until April 2014. This essentially means a delayed commencement of the Act but without causing any long-term inconsistencies to the regime.

Summary and Preferred option

168. Merging the competition functions of the OFT and the CC to create the CMA is a significant change to the current competition landscape. It should result in a more coherent competition regime, able to target resources better, to promote competition and deter anti-competitive behaviour, whilst acting as a greater advocate for competition both domestically and abroad. This should lead to a better framework for growth in the economy as a whole.

169. The merger should also result in net cost savings in staff, accommodation and supply contracts. The potential savings are not the primary motivation for the merger but are nevertheless a factor to consider at a time in which public resource is increasingly scarce.

170. However, there are potential risks, in particular relating to the continued high-quality functioning of the competition regime during the period of transition and to the maintaining of separation in decision-making between Phase 1 and Phase 2 of merger and markets investigations. There are also potential risks from the interaction with the reforms to the consumer and consumer credit regimes, which will be addressed in separate Impact Assessments.

171. Overall, given the clear benefits to the competition regime from the creation of a single competition body able to allocate resources and expertise more effectively; this is the Government's preferred option.

172. The preferred options set out in the Mergers, Markets, Concurrency, Telecoms Appeals, and Criminal Cartels sections are also going to be taken forward. However, the preferred option on Ant-Trust reform will be confirmed in the Impact Assessment accompanying the proposed Bill.

Annex A: Background to current competition framework in the United Kingdom

1. The principal bodies charged with enforcing competition law are the OFT and the CC, although sectoral regulators such as the Office of Communications and the Gas and Electricity Markets Authority have particular responsibilities in relation to their sectors and have powers that are concurrent with those of the OFT in respect of civil antitrust enforcement and making market investigation references to the CC.

2. The OFT was established as a body corporate under section 1 of the Enterprise Act 2002 ("EA02"). It succeeded the Director-General of Fair Trading (DGFT) established under the Fair Trading Act 1973. The functions of the DGFT were transferred to the OFT under section 2 EA02.

3. The CC is established under section 45 of the Competition Act 1998 ("CA98") and succeeded the Monopolies and Mergers Commission.

4. The Enterprise Act 2002 brought about a significant change in the way that decisions on merger and market cases were made. Under the previous Fair Trading Act merger and monopoly regimes, the DGFT would advise the Secretary of State whether the conditions for a reference for in-depth investigation appeared to be satisfied. It was for the Secretary of State to decide, having regard to that advice, whether such a reference should be made. The function of the Monopolies and Mergers Commission/CC was to investigate the merger or market that had been referred to it and to report its findings to the Secretary of State, along with its recommendations for remedial measures. The final decision on what action should be taken was for the Secretary of State. The Enterprise Act 2002, largely removed Ministers from the decision making process. The decision to refer mergers or market is taken by the OFT. The decision as to the appropriate remedial measures for any competition issues identified is taken by the CC.

5. The substantive test applied by the DGFT and then by the Monopolies and Mergers Commission/CC, under the Fair Trading Act regime was whether the merger operated against the "public interest". A public interest test also applied in monopoly cases[75]. In practice, successive Secretaries of State had applied the public interest test as a competition based test. The Enterprise Act 2002 formalised this by making the substantive test a competition test. As a result the substantive test in merger cases became whether the merger gave rise to a substantial lessening of competition within any market or markets in the UK for goods or services. The substantive test in market investigations became whether there were features of the relevant market that prevent, restrict or distort competition in any market for goods or services in the UK or a part of the UK.

68. [75] The Fair Trading Act 1973 identified two types of monopoly that could be referred to the CC for in-depth investigation: scale monopolies where one party accounted for 25% or more of a relevant market; and complex monopolies, where a number of companies collectively accounted for 25% of more of a relevant market. The scale monopoly provisions were considered to be redundant once the Chapter 2 prohibition, prohibiting abuse of dominance was introduced into UK legislation. The complex monopoly provisions were retained in a modified form through the current market investigation regime.

Background on antitrust prohibitions

Antitrust Prohibitions

6. The OFT is responsible for investigating and enforcing the Chapter 1 and Chapter 2 prohibitions in the CA98. These prohibitions are modelled on similar prohibitions in the Treaty on the Functioning of the European Union (TFEU). Chapter 1 prohibits agreements, decisions and concerted practices between two or more undertakings (i.e. entities conducting economic activities) whose object or effect is to prevent, restrict or distort competition.

7. Chapter 2 prohibits the abuse of a dominant position by one or more undertakings. Undertakings generally means businesses but it is also capable of including e.g. public sector bodies when they operate in economic markets.

8. The OFT also investigates and enforces the EU prohibitions imposed by Articles 101 (anticompetitive agreements etc between undertakings) and 102 (abuse of a dominant position) of the TFEU. The EU prohibitions are engaged whenever agreements or abusive conduct may substantially affect trade between Member States. The European Commission also enforces Articles 101 and 102, and there are working rules to establish whether the OFT or the European Commission will act in each case.

9. The OFT is tasked with investigating and enforcing the EU prohibitions because it is designated to do so under the EU regulation that introduced the concept of enforcement action being taken by the member states. This is Regulation 1/2003 ("the Modernisation Regulation"). The Competition Commission is not designated to investigate and enforce the EU prohibitions. This means it currently cannot do so[76].

10. In relation to the prohibitions in Article 101 TFEU and Chapter 1, horizontal cartel agreements between competitors (commonly agreements to fix prices, share markets, rig bids for contracts, or restrict output) are typically categorised as 'object' infringements. In 'object' based cases there is no need also to prove that an agreement has an anticompetitive effect – so these cases typically involve less economic analysis.

11. Agreements that are caught by the Article 101 TFEU and/or Chapter 1 prohibition may nevertheless be exempt if they:

    a. contribute to improving production or distribution, or to promoting technical or economic progress; and

    b. allow consumers a fair share of the resulting benefit; and

    c. do not impose restrictions that are not indispensible to achieving these objectives; and

69. [76] The Market Investigation Regime requires the OFT and CC to consider whether there are features of relevant markets that prevent, restrict or distort competition. Features include the structure of the market, conduct of suppliers in the relevant market or in related markets, and the conduct of customers in the relevant market. This broad definition is capable of emcompassing conduct that would be caught by Article 101 and/or Article 102, which can in some cases limit the ability of the CC to take action to address identified competition concerns.

d. do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question

12. In effects based cases, and in cases in which parties argue their agreement is exempt, applying the criteria above, deciding on whether or not the Article 101 and/or Chapter 1 prohibition has been infringed can involve significant economic analysis.

13. In relation to the prohibitions in Article 102 TFEU and Chapter 2, in making any assessment of dominance, it is necessary to carry out a detailed analysis of market power. In addition, some of the types of conduct that may, in principle, amount to abusive conduct on the part of parties involve significant economic or financial analysis. Accordingly Article 102 TFEU and Chapter 2 cases also typically involve significant economic and perhaps also financial analysis.

14. When it is enforcing the UK and the EU prohibitions, the OFT uses the investigation powers in CA98. These include the powers to request documents and information in writing, to enter premises having given the parties notice and to enter premises under a warrant. The OFT has to prove infringement cases on the civil standard of evidence – i.e. on the balance of probabilities, but case law provides that the evidence must be 'carefully considered'[77] bearing in mind the nature of the issues involved and the high penalties that can be imposed. Accordingly, significant effort goes into working up the necessary evidence to prove an infringement.

15. Before making an infringement decision, the OFT must give the investigated person(s) notice of the proposed decision and an opportunity to make representations[78]. If the OFT decides that an antitrust prohibition has been infringed, it may give directions requiring the person concerned to bring the infringement to an end.

16. The main penalty for infringement is the imposition of a fine. Fines can be substantial: up to 10% of an undertaking's turnover (there is OFT guidance on how it sets fines).

17. The OFT's infringement decisions, non-infringement decisions, interim measures and other directions and decisions as to the imposition of penalties can be appealed to the Competition Appeal Tribunal ("the CAT") by parties under investigation and (with some exceptions) by third parties with sufficient interest. On all appeals of infringement decisions and decisions imposing fines, the CAT has to determine the appeal 'on the merits'. This means that it can reopen all of the OFT's assessments of the facts and evidence, and can reach a different view and substitute its own view for that of the OFT.

<u>Background on criminal cartel offence</u>

18. The cartel offence is a criminal offence under section 188 EA02. It is separate from the Chapter 1 prohibition and the Article 101 TFEU prohibition, but the same set of facts may give rise to parallel civil proceedings brought under Chapter 1/Article 101 and criminal proceedings brought against an individual under section 188 EA02. The OFT can investigate alleged cartels where it has reasonable grounds for suspecting that the

70. [77] *Re Doherty* [2008] UKHL 33 (*11 June 2008*)
71. [78] See section 31 of the 1998 Act. More detail on the procedural requirements is set out in enclosure (e) the OFT's Rules.

offence has been committed. Proceedings are brought in criminal courts by the OFT, or in cases of serious or complex fraud, by the Serious Fraud Office.

Background on EA02

Mergers:

19. The operation of the UK mergers regime is primarily the responsibility of the OFT and CC. There is a residual role for the Secretary of State in certain specified public interest cases[79]. The sectoral regulators have no concurrent powers.

20. Where a merger is a concentration with a Community dimension as defined in the EU Merger Regulation,[80] assessing the effect on competition of the merger ordinarily falls to the European Commission.

21. The OFT has a duty (subject to certain exceptions) to refer a merger or contemplated merger to the CC if it believes it is or may be the case that a relevant merger situation has been created (or in the case of an anticipated merger will be created)[81] and the merger results or may be expected to result in a substantial lessening of competition within any United Kingdom market(s). In essence the OFT conducts a "first phase" investigation to determine whether there is a qualifying merger that might lead to a substantial lessening of competition[82]. Where it finds that both limbs are satisfied it has a duty to refer the merger to the CC. Where that duty arises, the OFT may seek undertakings from the merging parties in lieu of a reference to the CC[83]. Undertakings in lieu of a reference may be appropriate where there is a clearly identifiable competition problem with a clearly identifiable solution.

22. The CC, when cases are referred to it, conducts the "second phase" of the investigation. The CC conducts its investigations through Inquiry Groups which are created for the purposes of the particular investigation[84]. CC members are appointed by the Secretary of State. They work part time when required for an inquiry. Following a reference, the Chairman of the CC will select a group of 3 to 5 of these members to form the Inquiry Group. A chairman is appointed for each group (usually the Chairman of the CC or one of the Deputy Chairs). Subject to following published CC Rules and guidance, Inquiry Groups are free to establish their own procedures for inquiries. They

72. [79] This covers: national security (this includes, but is broader than, defence issues – it could for example include security of supply issues, or public safety issues on a national scale e.g. availability of vaccines); issues relating to free expression of opinion, accuracy of news presentation and sufficient plurality of ownership of newspapers; broadcast media public interest considerations relating to plurality of ownership of broadcast media, broad range of programming and commitment to broadcasting standards objectives; and financial stability (section 58 of the 2002 Act).
73. [80] Council Regulation 139/2004/EC on the control of concentrations between undertakings.
74. [81] Under section 23 of the 2002 Act, there are two jurisdictional thresholds. The satisfaction of either of the thresholds will mean that there is a 'relevant merger situation' that can qualify for reference (depending on the prospects of a substantial lessening of competition): first, the turnover in the UK of the target business exceeds £70 million; or second, as a result of the merger, at least 25% of goods or services of any description will be supplied in the UK (or a substantial part of the UK) by or to the merged entity.
75. [82] The precise ambit of the duty was considered in more detail by the Court of Appeal in *IBA Health v Office of Fair Trading* [2004] EWCA Civ 142.
76. [83] Section 73 of the 2002 Act.
77. [84] Competition Act 1998, schedule 7 sets out the requirements for the appointment of members to Inquiry Groups.

direct the investigation and analysis to be carried out by CC staff and are the ultimate decision makers on the competition issues arising from the merger and remedies required to address any such issues. The CC determines whether a relevant merger situation has been created and whether there is an anti-competitive outcome (i.e. that the merger does, or is expected to, give rise to a substantial lessening of competition). The CC is required to meet the civil standard of proof and establish its case on the basis of the balance of probabilities. In such cases, the CC has a duty to take remedial action to seek to achieve as comprehensive a solution to the identified competition issues as is reasonable and practicable. In this way it can block a merger or it can put in place remedies designed to address the anti-competitive outcome. These can be by way of undertakings to take specified action or making enforcement orders[85] (which can among other things require the divestment of business or assets, regulate prices, and impose behavioural measures aimed at improving the way in which goods or services are supplied).

23. Merger remedies, once put in place by way of undertakings or orders, are monitored by the OFT[86], and can be enforced in civil proceedings by both the OFT and the CC or by third parties in private law action for breach of statutory duty[87]. The OFT has an ongoing duty to keep merger remedies under review and from time to time to consider whether they need to be revoked, varied, released or superseded by reason of a 'change of circumstances' and to advise the CC accordingly. The CC considers the OFT's advice and is empowered to revoke, vary, release or supersede any remedy if it concludes that this is necessary in the light of any change of circumstances.[88]In addition, persons who have given undertakings to the CC may seek variation of, or release from the undertakings at any time. These provisions prevent undertakings remaining in place when there is no longer a need for them.

24. Decisions in relation to mergers (whether by the OFT, CC or Secretary of State) are subject to review by the CAT. Unlike appeals against OFT antitrust decisions, the CAT applies judicial review principles in considering applications under section 120. [89] The CAT may wholly or partially quash the decision in question and direct the decision-taker to reconsider in accordance with the CAT's ruling.

Market investigations:

25. Market investigations are also a two stage process involving the OFT and CC. In the first stage, the OFT considers under section 131 EA02 whether it has reasonable grounds to suspect that one or more feature(s) of a market in the United Kingdom

78. [85] The content of undertakings is not restricted – although it must be aimed at addressing the competition problems that the CC has identified. By contrast, the content of orders is restricted and must comply with the requirements of Schedule 8 of the 2002 Act. This means that remedies imposed by way of order are less flexible than undertakings. CC are remedies are usually implemented by means of undertakings.
79. [86] Section 92 of the 2002 Act.
80. [87] Section 94 of the 2002 Act.
81. [88] There is a Memorandum of Understanding between the OFT and the CC concerning remedy reviews.
82. [89] Decisions on penalties imposed as a result of a failure to comply with the requirements of a notice issued under section 109 of the 2002 Act, are subject to a full appeal on the merits (see sections 109 to 114 of that Act).

prevents, restricts or distorts competition, and whether to exercise its discretion to refer.[90]

26. This consideration often occurs during the course of a market study by the OFT conducted under the OFT's general information-gathering function under section 5 EA02. But it can also happen during the OFT's consideration of a super-complaint made by a designated consumer body, or in the course of a review by the OFT of remedies put in place by the Competition Commission following a merger inquiry or market investigation reference or of monopoly or merger remedies put in place by the Monopolies and Mergers Commission under the Fair Trading Act 1973.

27. The Secretary of State can also make a market investigation reference (under section 132 EA02) when the OFT decides not to refer but the Secretary of State disagrees, or when the Secretary of State has brought a matter to the attention of the OFT, and is not satisfied that the OFT will decide within a reasonable period whether or not to refer it under section 131. The Secretary of State also has a discrete role in relation to market investigations involving specified public interest considerations. [91]

28. Where the statutory test for reference is met, the OFT can accept undertakings in lieu of making a reference (UIL) from the parties that would be the subject of the reference.[92] In doing so, the OFT must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned, and any detrimental effects on consumers resulting from that adverse effect.

29. In practice the OFT has only accepted UIL once, in relation to postal franking machines. The OFT's experience of the statutory provisions around accepting UIL is that it is likely to be difficult to get satisfactory UIL from all the relevant parties. This is different from the merger regime where usually there are only two parties involved. In addition, the considerations the OFT has to have regard to in accepting UIL set quite a high threshold when compared to the statutory test for reference which only requires the OFT to have 'reasonable grounds to suspect' that there is a competition problem caused by features of the market. In many cases at the time it is considering referring, the OFT will not have a sufficiently strong belief as to the adverse effects on competition caused by the features it has found to reach a judgement on whether a proposed solution is sufficiently comprehensive to address any problems.

30. The CC conducts its investigations through Inquiry Groups which are created for the purposes of the particular investigation[93]. CC members are appointed by the Secretary of State. They work part time when required for an inquiry. Following a reference, the Chairman of the CC will select a group of 3 to 5 of these members to form the Inquiry Group. A chairman is appointed for each group (usually the Chairman of the CC or one

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83. [90] The OFT has a discretion rather than a duty to refer, unlike the position in relation to merger references. The OFT has published guidance that describes, non-exhaustively, the factors it will take into account in considering the discretionary element of the test for making a reference (OFT 511 "Market investigation references").

84. [91] These are specified in section 153 of the 2002 Act, which currently specifies only "national security" (this includes "public security", which includes, but is broader than, defence issues – it could for example include security of supply issues, or public safety issues on a national scale e.g. availability of vaccines).

85. [92] Under section 154 EA02.

86. [93] Competition Act 1998, schedule 7 sets out the requirements for the appointment of members to Inquiry Groups.

of the Deputy Chairs). Subject to following published CC Rules and guidance, Inquiry Groups are free to establish their own procedures for inquiries. They direct the investigation and analysis to be carried out by CC staff and are the ultimate decision makers on the competition issues in the relevant market and remedies required to address any such issues. Upon referral under section 131 or 132 EA02, the CC determines whether there is an adverse effect on competition in the market concerned. In such cases, the CC must take remedial action, which includes accepting undertakings to take specified action or making enforcement orders (which can among other things require the divestment of business or assets, regulate prices, and impose behavioural measures aimed at improving the way in which goods or services are supplied)[94]. In practice, given the difficulties in obtaining undertakings in acceptable form from every participant in the market, and in ensuring that future market entrants comply with the same obligations, it is more usual to impose remedies through an order in market investigation cases than to seek undertakings[95].

31. Market investigation remedies, once put in place by way of undertakings or orders, are monitored by the OFT[96], and can be enforced in civil proceedings by both the OFT and the CC or in private law action for breach of statutory duty[97]. The OFT has an ongoing duty to keep market investigation remedies under review and from time to time to consider whether they need to be revoked, varied, released or superseded by reason of a 'change of circumstances' and to advise the CC accordingly. The CC considers the OFT's advice and is empowered to revoke, vary, release or supersede any remedy if it concludes that this is necessary in the light of any change of circumstances.[98] In addition, persons who have given undertakings to the CC, or who are subject to orders made by the CC, may seek variation of, or release from the undertakings or order at any time. These provisions prevent undertakings or orders remaining in place when there is no longer a need for them.

32. Decisions in connection with a market investigation reference or possible reference (whether by the OFT, CC or Secretary of State) are subject to review by the CAT.[99] As with merger decisions the CAT is required to apply judicial review principles when reviewing these decisions and the CAT may wholly or partially quash the decision and direct the decision-taker to reconsider.

Judicial Review versus Full Merits

33. Judicial review is an administrative law process that enables public law decisions to be examined – generally by the Administrative Court (but other courts and tribunals also exercise judicial review jurisdiction in some cases) Challenges by way of judicial review can only be brought on the basis of a limited range of public law failures in the

87. [94] See sections 159 and 161 and Schedule 8.
88. [95] The content of undertakings is not restricted – although it must be aimed at addressing the competition problems that the CC has identified. By contrast, the content of orders is restricted and must comply with the requirements of Schedule 8 of the 2002 Act. This can limit the scope of remedies that the CC is able to impose.
89. [96] The OFT has a duty to monitor under section 162.
90. [97] See section 167.
91. [98] There is a Memorandum of Understanding between the OFT and the CC concerning remedy reviews.
92. [99] Decisions on penalties imposed as a result of a failure to comply with the requirements of a notice issued under section 109 of the 2002 Act (which applies to market investigations by virtue of section 176 of that Act), are subject to a full appeal on the merits (see sections 109 to 114 of that Act).

original decision-maker's decision. These include that the decision was made illegally, that the decision was irrational and/or that the process for taking the decision involved some procedural impropriety. In addition decisions can be challenged by way of judicial review on the basis that they breach EU law and/or rights established under the European Convention on Human Rights.

34. Importantly, a court or tribunal applying judicial review principles can only look at the facts underlying the original decision-maker's decision in limited circumstances. And the range of remedies is limited. The court can quash the decision and refer it back to be retaken by the original decision-maker. It cannot itself retake the decision.

35. By contrast, in a full merits review of an antitrust decision, the CAT can review all the facts and evidence underlying the decision that is challenged afresh, reach its own view on those facts and if it wishes substitute its view for that of the decision-taker.

36. Because full merits review is more intensive than judicial review, it may be that appeals by way of a full merits review take longer than appeals by way of judicial review. We consider that they may also involve greater resource.

37. If appeals of antitrust decisions can be changed to being by way of judicial review, this may both a) reduce the frequency of appeals and b) reduce the length and resource intensiveness of any appeals that are brought.

38. Whether or not it will be possible to move to appeal by way of judicial review depends in part on considerations in relation to the right to a fair trial under Article 6 of the European Convention on Human Rights.

Considerations on Article 6 of the European Convention on Human Rights

39. Article 6 of the European Convention on Human Rights (ECHR) essentially provides that in any decision that determines civil rights and obligations or criminal charges, a person (including a business entity) is entitled to a fair hearing within a reasonable time before an independent and impartial tribunal established by law. This right is commonly referred to as the 'right to a fair trial'.

40. Where the decision involves determination of a criminal charge, there are a number of additional rights.[100]

[100] These include the right to be presumed innocent until proven guilty under Article 6(2) ECHR. They also include (under Article 6(3) ECHR) the following minimum rights:

> *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
> *(b) to have adequate time and facilities for the preparation of his defence;*
> *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
> *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
> *(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'*

41. It is fairly well accepted that decisions establishing that there has been an infringement of the two competition prohibitions (either the Chapter 1 and/or 2 UK competition prohibitions or the EU prohibitions under Article 101 and/or 102 TFEU on which they are modelled) are 'criminal' in nature for the purposes of Article 6 ECHR. This is primarily due to the nature and severity of the penalties that can be imposed on a party to an infringement.

42. By contrast, we consider that determinations at stage 2 of the merger and markets regimes are 'civil' in nature for the purposes of Article 6 ECHR. This view is based on the nature of the regimes, and in particular the fact that their aim is to restore a market to a competitive state (or prevent a planned merger that would create an uncompetitive state), rather than to deter and punish transgressions.

43. The ECHR case law confirms that the right of access to a determination by an independent and impartial tribunal doesn't have to be provided in all cases at first instance (i.e. by the person taking the final decision). In civil cases and in some criminal cases, the requirements of Article 6 ECHR will be met if there is an appeal from the decision to an independent and impartial tribunal that has 'full jurisdiction'.

44. What is meant by 'full jurisdiction' depends on the subject matter of the decision appealed against, the way in which the decision was reached, and the content of the dispute. There are some inconsistencies in the case law that explains the concept of 'full jurisdiction' and there may be different approaches taken in relation to decisions that engage civil rights and obligations and those that engage criminal charges.

45. However, taking into account EU case law as well as cases under Article 6 ECHR, it appears that:

- appeal by way of judicial review will be sufficient to cure any Article 6(1) shortcomings at first instance for decisions on the competition prohibitions that depend on the application of specialised knowledge and/or complex economic or technical appraisals (such as in 'rule of reason'[101] CA98 and Article 101 and 102 TFEU infringement decisions) as long as the facts have been established by a first instance process that is quasi-judicial and that incorporates some safeguards in terms of independence of decision-making

- appeal to a tribunal that can conduct a full review on the merits would be needed in order to cure Article 6(1) failings in a first instance decision taker in relation to decisions on the competition prohibitions that depend on an assessment of primary facts (such as CA98 and Article 101 and 102 decisions in relation to fines, and CA98 and Article 101 decisions as to whether or not undertakings have been engaged in 'hard core' cartel activity)

- in relation to stage 2 merger and market investigation decisions and remedies, we consider these types of decision involve the application of complex economic or technical appraisals, and appeal by way of judicial review should be sufficient to meet the Article 6(1) requirement for a tribunal that has 'full jurisdiction' as

93. [101] 'Rule of reason' is a US antitrust expression that does not strictly apply in EU law, and in regimes modelled on the EU prohibitions. However, broadly speaking it denotes those cases that involve assessment of the economic effects of agreements or conduct, including cases that require an assessment of whether the exemption criteria under Chapter 1 and Article 101 TFEU are met, instead of being able to rely for infringement on agreements having a clear anticompetitive object.

long as the facts are established by a first instance process that is quasi-judicial and that incorporates some safeguards in terms of independence of decision-making.

46. But if the full requirements of Article 6(1) ECHR can be met by ensuring that there are sufficient protections for the independence and impartiality of the first instance decision-taker (i.e. it is sufficiently independent of the executive and establishes and analyses facts by a sufficiently impartial process), there will be no need for those decisions to go on appeal to a tribunal that also has 'full jurisdiction'. The case law suggests that a tribunal does not have to be totally independent to meet the requirements of Article 6(1) but there do need to be significant protections in terms of separation between the investigation and prosecution function, on the one hand, and the decision-making function on the other.

47. So, if it is possible to establish a fully Article 6 ECHR compliant tribunal *within the single CMA* to take first instance decisions, we think it may be possible to reduce the intensity of the court's scrutiny on appeal of antitrust decisions to judicial review only. We also think that if some or all of the same protections are built into decision-making by the merged single CMA in stage 2 mergers and market investigations, it ought to be possible to retain appeal by way of judicial review for these regimes.

48. Conversely, if we roll together the OFT and CC stage 1 and 2 processes on markets and mergers without incorporating sufficient protections, there is a risk that the decision-making at stage 2 will not provide sufficient procedural protections to enable appeal to be by way of judicial review only. There is a risk that appeals would need to provide a full merits review of the decision.

Separation of decision-making

49. In the current regime, there is separation of decision-making as between stage one and stage two on mergers and on market investigation references. The OFT takes the decision that there is something that merits further in depth investigation in mergers and or markets cases, by applying the relevant statutory test. The CC conducts an in depth investigation – starting afresh as fact finder decision maker. It decides whether there is an adverse effect on competition (or in merger cases a substantial lessening of competition). If it reaches an adverse competition finding it must decide on appropriate remedies to the problems it has found. Appeals from second stage decisions go to the CAT for review, applying judicial review principles only.

50. The two-stage decision-making process helps to guard against the risk of 'confirmatory bias' – i.e. the initial set of decision-makers having an interest in having their original concerns about mergers and markets confirmed in the eventual decision. Non-executive Phase 2 decision makers (as are currently used in market and merger investigations) also ensure that decision makers are independent of bias or perceived bias stemming from any apparent desire to drive forward a broader organisational policy agenda in coming to decisions on specific cases.

51. In legal terms, the two-stage decision-making process helps to ensure that, in combination with an appeal mechanism where judicial review principles are applied, the overall process for deciding whether there are problems and if so what should be

done about it, satisfies the requirements in Article 6 of the European Convention on Human Rights as regard the right to a fair trial.

52. In a merged body, where one and the same organisation conducts both stage 1 and stage 2 inquiries[102], there may be a need to build in extra procedural protections in the decision making during stage 2 of the mergers and markets regime in order to preserve appeals being by way of judicial review.

94. [102] This is the format that applies in cases brought by the European Commission and which has been subject to significant criticism on the basis that the same case teams handle the phase 1 and phase 2 inquiry (and are seen as been subject to confirmatory bias). In addition, the EU regime has been criticised as not providing the parties to an investigation with access to the ultimate decision maker during the investigatory process.

Annex B: Potential costs and savings from proposed institutional reform

1. The OFT has both competition and consumer functions and therefore in order to estimate the transition costs and potential cost savings arising from merging the competition functions of the OFT and the CC, it is necessary to consider the OFT holistically and then to allocate the costs and benefits between the various functions of the OFT, broadly including competition, consumer and consumer credit. The costs and benefits will be allocated based on the proportion of staff working in each of these areas. Although there can be arguments over the incidence of the savings and the method to allocate the savings between the different functions, this allocation seems the most, appropriate given the mix of staff at the OFT and the desire to ensure that we do not double count potential costs and savings. The costs and benefits specific to the options being considered to reform the consumer and consumer credit landscapes will be considered in separate Impact Assessments.

Staff

2. As of August 2011 the OFT employed 582 FTE staff and the CC employed 129 FTE staff. At the OFT there are approximately 218 FTE competition staff, 132 FTE consumer staff and 101 FTE consumer credit staff. The remaining OFT staff include back office and middle office staff that provide support to the organisation as a whole[103]. The CC is a focused competition body[104] and there is approximately 79 FTE competition staff, with the remaining staff including senior staff and back office which also provides shared services to other organisations subletting from the CC in Victoria House. It is estimated that the CMA will have approximately 300 FTE front office competition staff, given the OFT and CC have 218 and 79 FTE competition staff respectively. The total cost of staff at the OFT is approximately £34.4 million[105], with competition staff costing approximately £13.4 million, consumer staff £6.8 million and consumer credit staff £4.3 million. The total cost of staff at the CC is approximately £8.6 million[106]. This includes a salary uplift of 30% to account for non-wage costs such as National Insurance.

3. The main cost saving in the area of staff from merging the organisations to create a single competition body will be from having just one Board and the reduction in the number of senior and back office staff. These are considered in turn below.

Board

4. The OFT Board includes the Chief Executive, the Chairman and 5 Non-executive Directors, costing around £710k per year[107] and 3 Executive Directors. The CC Board includes the Chief Executive, Chairman, 2 Deputy Chairman and 3 Non-executive Directors, costing around £720k per year.

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95. [103] The split of staff outlined reflects the current state of the OFT and it may be different by the time of the merger. The OFT are currently recruiting and its business plans have around 650 FTEs in post by March 2012.
96. [104] Although the CC also has a regulatory appeals function.
97. [105] Excluding Non-executive Directors.
98. [106] Excluding Non-executive Directors.
99. [107] The cost of the 3 Executive Directors who sit on the OFT Board are excluded from the cost of the Board as they are counted as senior staff for the purpose of estimating potential savings and are not considered here to avoid double counting.

5. Cost savings are likely to result from having one Board for the CMA instead of the two that currently exist between the OFT and the CC. For the purpose of estimating the lower estimate of the potential Board savings it is assumed that the CMA Board will comprise the Chairman, the Chief Executive, 7 Non-executive Directors (working 2 days per month) and the 3 full time panel chairs, totalling 12 members. This assumption is illustrative and the exact make up and size of the Board is still to be decided, but the assumption made here is likely to be an upper estimate of the size of the Board and therefore the potential saving a lower estimate.

6. Assuming that the CMA Chairman and Chief Executive are paid an average of the current salary of the CC and OFT Chairman and Chief Executive respectively, and the panel chairs are paid an average of the current salary of the CC panel chairs, the cost of CMA Board will be approximately £1.1 million per year. Therefore we estimate that there may be a saving of approximately £320k per year[108] from having only one board.[109]

7. For the purpose of estimating the upper estimate of the potential Board savings it is assumed that the CMA Board will comprise the Chairman, the Chief Executive, 5 Non-executive Directors (working 2 days per month) and the 3 full time panel chairs, totalling 10 members. Assuming that the CMA Chairman and Chief Executive are paid an average of the current salary of the CC and OFT Chairman and Chief Executive respectively, and the panel chairs are paid an average of the current salary of the CC panel chairs, the cost of CMA Board will be approximately £1.07 million per year. Therefore we estimate that there may be a saving of approximately £370k per year[110] from having only one board.

Senior Staff[111]

8. The detailed institutional design of the CMA will be the decision of the CMA Board. However, it is likely that there will be potential savings in the area of senior staff resulting from the CMA having a smaller senior staff requirement compared to the sum of the OFT and CC currently as the CMA will be a smaller organisation and / or from the reduction in the duplication of roles[112] that currently exists across the OFT and CC. The lower estimate of the cost savings results from the reduction in duplicated roles, including the role of the Chief Economist, Chief of Legal, Director of Corporate Services and Director of Policy. The elimination of these duplicated roles generates a potential cost saving of approximately £500k per year, based on the average salary of these staff across the OFT and CC. The upper estimate of the cost savings results from having a smaller senior staff requirement including Executives / Senior Directors and a reduction in duplicated roles. The upper estimate of the potential cost saving in the area of senior staff is approximately £800k per year. However, as noted, depending on the policy changes to antitrust, there may be a need for more senior input into cases.

Back Office Staff

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100. [108] i.e. £0.3m = (£0.7m + £0.7m) - £1.1m
101. [109] There may be governance costs associated with moving the OFT's consumer functions out of the OFT. However, these will be considered in the consumer landscape and consumer credit Impact Assessments.
102. [110] i.e. £0.4m = (£0.7m + £0.7m) - £1.07m
103. [111] For the purpose of the Impact Assessment, the salaries of staff have been used as an indicator of senior staff.
104. [112] These roles may not be identical but they are sufficiently similar to expect the CMA not to comprise both.

9. Currently there are 19 FTE HR staff and 15 FTE finance staff[113] at the OFT, costing approximately £2 million per year. At the CC there are 3 FTE HR staff and 3.5 FTE finance staff, costing approximately £300k per year. In total therefore there are 22 FTE HR staff and 19 FTE finance staff, costing around £2.2 million per year.

10. The lower estimate of the savings from the reduction in back office staff is estimated assuming that the CMA will require finance and HR staff equivalent to the average percentage of finance and HR staff out of the total number of front office staff in the OFT and CC currently. Given the CMA is expected to comprise around 340 front office staff and members, the CMA would have 13 finance FTEs and 14 HR FTEs. The lower estimated saving is therefore £0.8 million per year, based on current average salaries of HR and finance staff, resulting from a reduction of 14 FTEs (i.e. 14 = (22 + 19) – (13 + 14)).

11. The upper estimate of the saving is estimated assuming that the CMA will require 1 HR FTE for every 49 FTEs (the 2009/10 public sector median[114]) and finance staff FTEs equivalent to 4% of the number of front office FTEs (the average of the OFT and CC currently). Therefore, given the CMA is expected to comprise around 340 front office staff and members, 7 HR FTEs and 13 finance FTEs would be sufficient to support the CMA. Based on the current average salaries of finance and HR staff across the OFT and CC, the cost of finance and HR staff in the CMA is estimated at £1.1 million per year. The estimated saving from the reduction in 20 back office staff therefore is £1.1 million per year[115] (i.e. £1.1m = £2.2m - £1.1m).

12. However, there may be diseconomies of scale associated with having a smaller organisation compared to the OFT currently. A small HR support may necessitate some services needing to be outsourced, so increasing non-staff costs. In addition, some of these savings may result from next generation HR and not the merger. However it is difficult to fully disentangle all the various effects. The estimated saving, therefore, may be an overestimate.

13. The potential back office savings have been estimated in relation to finance and HR staff. However, there may be other areas of back office and middle office where there is scope for savings.

14. The potential cost savings from changes to staffing levels are summarised in table B.1 below.

Table B.1: Cost savings from staffing

Total	£1.6m Lower Estimated Saving Per Year	£2.3m Upper Estimated Saving Per Year
Board	**£0.3m**	**£0.4m**
Senior staffing	**£0.5m**	**£0.8m**
Back office staffing	**£0.8m**	**£1.1m**

105. [113] This includes Internal Audit and Procurement staff.
106. [114] http://www.cabinetoffice.gov.uk/sites/default/files/resources/2010-Back-Office-Benchmarking-Analysis.pdf (page 9)
107. [115] There may be back office costs associated with moving the OFT's consumer function elsewhere, however this will be considered in the consumer landscape and consumer credit Impact Assessments.

15. Given that the OFT has competition, consumer and consumer credit functions, the savings identified are apportioned between these functions. The OFT's Board, senior and back office staff are divided between the competition, consumer and consumer credit functions of the OFT based on the amount of time staff spend working in each area and staff not working in a particular function are allocated based on the percentage of FTE staff working in each area (48% competition (i.e. 48% = 218 / (218 + 132 +101)), 29% consumer (i.e. 29% = 132 / (218 + 132 +101)) and 22% consumer credit (i.e. 22% = 101 / (218 + 132 +101))). All CC governance, senior and back office staff are allocated to competition. The percentage of the competition, consumer and consumer credit Board, senior and back office staff costs out of the total cost of both the OFT and CC Board, senior and back office staff is then used to allocate the potential annual savings and one off costs. This means that approximately £1.1 million to £1.5 million of the Board, senior staff and back office staff cost savings can be attributed to competition.

16. There will however be some transition costs, in particular, redundancy costs. It is estimated that redundancy costs may be in the region of approximately £1 million to £1.4 million[116], resulting from 14 to 20 HR and finance staff redundancies and 6 to 8 Board and senior staff redundancies, although as discussed this will depend on the structure of the CMA, which will ultimately be the decision of the CMA and its Board. This estimate is based on the average cost of release of staff provided by the OFT[117] and assuming that the main areas of redundancy, as with the potential staff savings, occur in senior staff and back office staff. However, redundancy costs may be higher if there are skills mismatch between the current OFT and CC staff, and the requirements of the CMA, which may be possible at the margin. Allocating the cost between the functions of the OFT, means approximately £0.6 million to £0.9 million of the cost is attributed to competition.

17. Should key staff members leave the organisation in the period prior to changes, it may not be prudent to recruit permanent staff. It would be necessary to recruit temporary staff to provide the necessary flexibility, but this could increase short-term staffing costs. Frequent staff changes during cases could also impact on the quality of decisions. Lower quality decisions are not only damaging to the economy, but they also increase the risk of successful legal challenge.

18. The CC pay bands are generally slightly higher than the OFT, although there are more senior staff at the OFT, but all other main terms and conditions of service are broadly similar. There may also be costs associated with harmonising pay which applies whether salaries are harmonised up or down. Either some salaries need to be increased which raises the annual staff costs or there is a need to buy people out of benefits or protect employees salaries for typically 4 years.

19. The other transition costs may be significant but given the number of currently unknown factors that would be necessary to calculate these costs, which would only

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108. [116] This excludes redundancy and transfer costs associated with the OFT's consumer and consumer credit functions which will be considered in the consumer landscape and consumer credit Impact Assessments.

109. [117] The average cost of release is based on the current average number of years of service of staff across the different grades. However, this may change by the date the redundancies occur.

become apparent in detail during the transition planning, these costs have not been quantified.

20. It has been assumed that the CMA will be part of the Principal Civil Service Pension Scheme (PCSPS) and therefore there will be not be pension transfer costs associated with staff transferring to the CMA[118].

Accommodation

Scenario 1: Do nothing

21. The OFT currently occupies Fleetbank House, where the rent is subject to an annual uplift of 2.25% and the lease ends on the 28 September 2023. The OFT's total accommodation cost for 2011/12 is about £5 million[119] and the total sublet income is around £1.4 million. There may also be some additional space to sublet by January 2012. It is assumed this will be sublet by 2013/14. In 2013/14 therefore, uplifting rent by 2.25% per year and all other costs by 2% to account for inflation, the OFT's total accommodation cost is estimated at £5.3 million and the total sublet income at £2.8 million.

22. The CC has 3 leases for Victoria House with rent increases built into them, taking place every fifth year. All the leases run until the 29th September 2023, with a lease break on the 29th September 2019, which requires 9 months notice. The CC's total accommodation cost for 2011/12 is approximately £6.9 million[120] and its sublet income is approximately £3.3 million. In 2013/14 the CC's accommodation cost is estimated at £7.3 million, given the rent increase built into the lease and uplifting all other accommodation costs by 2% to account for inflation. The sublet income in 2013/14 is estimated at £2.8 million given two of the CC's current tenant's leases end in 2013.

23. Given that the CC has a lease break in 2019 it is assumed, for the purpose of this assessment, that this will be exercised and the CC would find alternative accommodation in the 2019/20 financial year since, compared to the current market, Victoria House is an expensive building to run[121]. Moving accommodation in 2019/20 will involve a one-off cost. It is assumed this will be around £2.4 million, including IT (£1.9m), staff, equipment and furniture move costs (£70k based on a cost of £500 per person), project management costs (£30k) and the cost of fitting hearing rooms (£350k based on a cost of £95 per square foot and a need for around 3,500 square foot of hearing room space). There may be other general refurbishment costs but it is difficult to estimate these as it will depend on the new accommodation. It is assumed that the CC will move to another central London location with total accommodation costs of approximately £1.2 million per year. This is based on the CC needing 20,000 square foot of space at a rent of £25 per square foot, facilities management at £10 per square foot and the other accommodation costs as they are now for the CC. These costs clearly depend on developments in the property market. However for the purposes of this assessment, it is assumed that there will be no ongoing lease liability beyond 2019 and no sublet income for Victoria House.

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110. [118] There may be pension transfer costs associated with the transfer of the OFT's consumer and consumer credit function which will be considered in the consumer landscape and consumer credit Impact Assessments.
111. [119] Excluding rates.
112. [120] Excluding rates.
113. [121] Although this will clearly depend on the property market at the time.

24. Potential cost savings may result from locating the CMA within one building. However, this will depend on the scale of the transition costs and the success in subletting the newly vacant space. The cost savings are considered over a 10 year period from 2013/14, the date of commencement of the CMA in line with Impact Assessment guidance.

25. There are a number of possibilities for the location of the CMA; namely locating the CMA in Fleetbank House, in Victoria House or in an alternative building.

Scenario 2: Locate the CMA in Fleetbank House

26. It is expected that there will be a transition cost under this scenario in 2013/14 totalling approximately £3.6 million. This includes IT (£3.5m to set up a new IT system to support the CMA), staff, equipment and furniture move costs signage and branding additional security and project management costs, totalling £100k. There may be other costs associated with making the building fit for purpose. The Courts and Tribunal Service have confirmed their willingness to make their hearing rooms available, but there may be additional transition costs associated with making these hearing rooms fit for purpose for phase 2 work. There may be costs to the Competition Appeal Tribunal and other tenants in Victoria House who would need to find a new shared service provider.

27. If the CMA located in Fleetbank House and the newly vacated space at Victoria House cannot be sublet, then it is estimated that compared to the do nothing option, there would be a cost to government in year 1 due to the transition costs, then cost neutral until year 6 and then there would be a cost saving each year after the lease break on Victoria House is exercised. It is assumed that the space the OFT currently occupies in Fleetbank House is adequate to house the CMA, given that the OFT's consumer and consumer credit staff are assumed to be moving to other organisations at the time of commencement of the CMA[122].

28. However, there is the potential for the space that the CC currently occupies in Victoria House to be sublet. The prospect for subletting is sound given the location of Victoria House and the security and IT benefits, however, the CC are currently having some difficulty letting its vacant space, in part due to the uncertainty regarding the future of the CC. Given the space the CC currently occupies it is estimated that potentially £4.6 million per year could be raised in additional sublet income, assuming that rental income of £35 per square foot is achievable. However, there will be a cost of approximately £260k of converting the space currently used as hearing rooms and a café into office space. If the CC are able to sublet the additional vacant space then compared to the do nothing scenario, it is estimated that there would be a cost to government in year 1 due to the transition costs, then from year 2 there would be cost savings of £3.3 million per year on average due to the additional sublet income achieved.

29. There is a risk that if the CC moved out of Victoria House, tenants that the CC support will no longer be able to locate there. This is a risk that will be accounted for when the final accommodation options are considered.

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114. [122] The transition costs associated with moving consumer staff will be estimated in the consumer landscape Impact Assessment.

Scenario 3: Locate the CMA in Victoria House

30. The transition cost under this scenario is estimated to total £1.6 million, including IT (£1.4m to scale up the CC's current IT system to support the CMA), staff, equipment and furniture move, signage and branding and project management (approximately £200k in total). There may also be some refurbishment costs to accommodate the CMA in Victoria House. It is also assumed that in 2019, when there is a lease break on Victoria House, the CMA would relocate to another central London office. The one-off costs associated with this have been outlined in the do nothing scenario as the CC, if it remained in Victoria House as it is, is expected to exercise its lease break, relocate and incur the associated one-off costs. The one-off costs under this scenario is estimated to be £1.6 million more than the transition cost under the do nothing scenario, due to the fact that the CMA will be a larger organisation than the CC currently.

31. If the CMA located at Victoria House and the vacant space at Fleetbank house was not sublet, then it is assumed that the CMA would relocate to Fleetbank House in 2019 when there is a lease break for Victoria House. It is estimated that compared to the do nothing scenario this would be costly for the government in year 1 due to the transition costs, then cost neutral until year 6 and then there would be a cost saving after the lease break on Victoria House was exercised of around £1.4million per year on average.

32. However, there is a possibility of letting the vacated space in Fleetbank House. The prospect for subletting is moderate given the property condition is good and midtown office take-up has improved, although better quality refurbished space tends to be preferred. Given the space the OFT currently occupies, it is estimated that approximately £3.8 million could be earned in sublet income in 2013/14, based on a rent today of £32 per square foot. If the additional vacant space at Fleetbank House can be sublet then compared to the do nothing it is estimated that the average annual potential saving to government would be approximately £3.2 million.

33. It may be possible to realise the accommodation savings outlined from subletting additional space either at Fleetbank House or Victoria House, by co-locating the OFT and CC. However, the creation of the CMA will incentivise a change in the accommodation strategy making the savings achievable.

34. TableB.2 below summarises the transition costs and potential cost savings of the cost savings compared to the do nothing scenario.

	Transition Cost	Average annual cost	Average annual saving compared to Scenario 1	NPV of total saving over 10 years
Scenario 1: Do nothing	0	£7m		
Scenario 2: Locate the CMA in Fleetbank House	£3.6m	£6.3m	£0.7m	£2m
Scenario 2.b: Locate the CMA in Fleetbank	£3.6m	£4m	£3m	£22.6m

House with additional sublet income				
Scenario 3: Locate the CMA in Victoria House	£1.6m	£6.3m	£0.7m	£2.4m
Scenario 3.b: Locate the CMA in Victoria House with additional sublet income	£1.6m	£3.5m	£3.6m	£27.7m

Table B.2: Summary of accommodation scenarios

Scenario 4: Locate the CMA in an alternative building

35. Although this option is not eliminated by our analysis, further analysis would be needed to justify this decision at a later stage. The above options outline the potential savings that could be achieved. Locating the CMA in an alternative building has the advantage of creating a new identity and culture for the CMA and is unlikely to replicate 'silos' of the OFT and CC[123].

36. As noted the costs and cost savings must be apportioned between the various functions of the OFT. The net accommodation cost of the OFT is allocated between its functions based on the percentage of FTE staff working in each function (48% to competition, 29% to consumer and 22% to consumer credit), while the whole of the CC's net accommodation cost is allocated to competition. The percentage of the competition, consumer and consumer credit net accommodation cost out of the total cost of both the OFT's and CC's net accommodation costs is then used to allocate the costs and cost savings (75% to competition, 14% to consumer and 11% to consumer credit). Therefore the competition allocation of the cost saving under scenario 2, assuming the vacant space in Victoria House cannot be sublet, is £2.7 million (in constant prices) over 10 years from 2013/14. If the newly vacant space can be sublet then the competition cost saving allocation is £20.8 million over 10 years from 2013/14. Under scenario 3, if the vacant space at Fleetbank House cannot be sublet, then the competition allocation of the cost saving is £3.1 million, and the competition allocation of the cost saving if the space can be sublet is £25.6 million over 10 years from 2013/14.

Contracts

37. The OFT have 44 supply contracts, but few of these are high-value contracts. In 2010/11 the OFT's cost of contracts was approximately £4 million[124]. Four of the OFT's contracts have end dates beyond 2013/14 and therefore are a liability. This includes 2 facilities management contracts; one is a low value contract (under £50k per year) but there is limited room for exit and one is a high value (over £1m per year) but has been designed to minimise exit costs and also offers flexibility and scalability. The other 2 contracts with end dates beyond 2013 are IT contracts. Both have end dates in 2014 and are committed to annual costs of approximately £160k in total. The liability of the IT contracts is estimated at approximately £70k and the cost of exit from the facilities management contract is estimated at approximately £400k. Therefore it is estimated that there will be a £470k cost for government in 2013/14 associated with contract liabilities and exit costs. This assumes the OFT exiting residual contracts that end past

115. [123] The Creation of Ofcom: Wider lessons for public sector merger of regulatory agencies, NAO, July 2006.
116. [124] Excludes Fleetbank House lease contract and contracts specifically for Consumer Direct and the OFT's consumer credit function.

the date of commencement of the CMA. It is possible that an alternative strategy may be adopted by the CMA, with these contracts being scaled to provide for the CMA.

38. The CC has 59 supply contracts in total but only 2 of which have a cost per year that exceeds £100k. In addition, only 1 of the contracts has an end date past the proposed commencement of the CMA and this is a low value contract. Therefore the ongoing liability of the CC's contracts for government is negligible.

39. There is some duplication of contracts across the OFT and CC and therefore it is possible to estimate some potential cost savings that may result from operating a single set of contracts under the CMA. This duplication arises in the areas of facilities management and IT. It is estimated that the cost saving will be approximately £1 million per year. Allocating 48% (the percentage of FTE competition staff) of the OFT's contract costs to competition and 100% of the CC's contract costs to competition, means the CMA is allocated 61% of the contract savings (the total contract cost allocated to competition divided by the total OFT and CC cost of contracts). Therefore there is a potential saving to the CMA of £630k (61% of £1m) per year and a one off transition cost of 280k (61% of £470k).

40. Given that there are few high value contracts which extend beyond the date of commencement of the CMA, the associated transition costs are low. However, there are possible additional transition costs arising from having to put in place interim contracts. It might prove difficult during the transition period to ensure value for money in contracts that are ending 1 to 2 years prior to the commencement of the CMA, as it is likely to be difficult to find a supplier to be competitively prices for the letting of a short contract. It is difficult to quantify the size of this cost. However, contracts will be negotiated to minimise exit costs and which allow flexibility to adapting to the new organisation.

Decision Making

41. The CMA will have a Supervisory Board with oversight over the functions of the whole of the CMA, and responsibility for setting priorities and for establishing the Rules and Guidance that will apply to the CMA's various functions, but will not have a role in decisions in individual cases. It is anticipated that the Supervisory Board will comprise a Non Executive Chair, CEO, a number of executives, representatives of the phase 2 Group members and a number of non-executive directors. An Executive Committee would sit beneath the Supervisory Board.

42. The decision making structure for antitrust cases will depend upon the model chosen.

43. The decision making structure of the CMA will ensure separation of phase 1 and phase 2 decision making in mergers and markets cases. Phase 1 cases will be the responsibility of the Executive Committee which will have an ability to delegate decisions in individual types of cases to specified executives or committees. Decisions in phase 2 cases will follow the current CC Group model. With a Group of members drawn from a wider pool of members with a variety of skills and expertise being appointed for a particular case. The Group would be chaired by a full time member.

44. Decision making on Regulatory appeals would also follow the current CC Group structure and the Group members would be ring fenced from CMA personnel

responsible for liaising with the sector regulators in the context of antitrust and markets work to avoid any perception of bias

45. The Supervisory Board will have ultimate responsibility for policy development and dissemination of lessons learned from cases across the CMA - this could be achieved by means of policy and standing groups that would develop proposals to be submitted to and approved by the Supervisory Board but it will be for the Supervisory Board to decide how best to achieve this.

Other transition costs

46. The creation of the CMA will generate uncertainty amongst staff which may lead to better-qualified staff leaving the organisations and negatively impact staff morale. This may have a detrimental impact on the effectiveness of the body during the transition period but it is difficult to anticipate the extent of this.

47. Best efforts will be made to mitigate against this, including the provision of information to staff and giving staff the opportunity to discuss their concerns. Although there is likely to be a cost, it is difficult to quantify this, due to the uncertainty of impact.

Summary

48. The tables below summarise the potential savings and costs associated with the creation of the CMA as detailed in the paragraphs above. In addition, it shows the cost to business from the proposed information gathering powers detailed in the mergers section[125]. These are the inputs for the summary sheets. In the low scenario the CMA is located at Fleetbank House and is unable to sublet the vacant space at Victoria House. In the high scenario, the CMA is located at Victoria House and the newly vacant space at Fleetbank House is sublet.

117. [125] Calculations from paragraph 87 in the mergers section.

Table B.3: Low scenario summary of savings and costs

Low Scenario		Y1	Y2	Y3	Y4	Y5	Y6	Y7	Y8	Y9	Y10	NPV over 10 years
Savings	Accommodation	0	0	0	0	0	0	2.8	0.9	0.9	0.9	
	Staffing	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	
	Contracts	0.6	0.6	0.6	0.6	0.6	0.6	0.6	0.6	0.6	0.6	
	Total	**1.7**	**1.7**	**1.7**	**1.7**	**1.7**	**1.7**	**4.5**	**2.6**	**2.6**	**2.6**	**18.8**
Transition Costs	Redundancies	0.8	-	-	-	-	-	-	-	-	-	
	Contract exits	0.3	-	-	-	-	-	-	-	-	-	
	IT	3.5	-	-	-	-	-	-	-	-	-	
	Other	0.2	-	-	-	-	-	-	-	-	-	
	Total	**5.8**[126]	-	-	-	-	-	-	-	-	-	**5.8**

118. [126] Plus 20% optimism bias given the cost of past government re-organisations have been underestimated.

Table B.4: High scenario summary of savings and costs

High Scenario		Y 1	Y 2	Y 3	Y 4	Y 5	Y 6	Y 7	Y 8	Y 9	Y 10	NPV over 10 years
Savings	Accommodation	2.9	2.9	2.9	2.9	2.9	2.9	4	2.1	2.1	2.1	
	Staffing	1.5	1.5	1.5	1.5	1.5	1.5	1.5	1.5	1.5	1.5	
	Contracts	0.6	0.6	0.6	0.6	0.6	0.6	0.6	0.6	0.6	0.6	
	Total	**5.1**	**5.1**	**5.1**	**5.1**	**5.1**	**5.1**	**6.2**	**4.3**	**4.3**	**4.3**	**42.7**
Transition Costs	Redundancies	0.6	-	-	-	-	-	-	-	-	-	
	Contract exits	0.3	-	-	-	-	-	-	-	-	-	
	IT	1.4	-	-	-	-	-	-	-	-	-	
	Other	0.1	-	-	-	-	-	-	-	-	-	
	Total	**2.4**	-	-	-	-	-	-	-	-	-	
Annual Costs	IT	0	0	0	0	0	0	1.4	0	0	0	
	Other	0	0	0	0	0	0	0.1	0	0	0	
	Total	**0**	**0**	**0**	**0**	**0**	**0**	**1.5**	**0**	**0**	**0**	
Total Costs (transition + annual)		**2.4**	**0**	**0**	**0**	**0**	**0**	**1.5**	**0**	**0**	**0**	**3.7**

Annex C: Markets

Issues under consideration

1. The Markets Regime is an important tool in the UK competition regime. The current markets regime has delivered an estimated £479m[127] of consumer savings a year between 2007-10, as a result of the OFT's work on market studies and the CC's work on in-depth market investigations; and is considered to be at the forefront of global best practice, excelling in quality analysis, expertise, flexibility and transparency.[128] Despite these successes, there are some inherent weaknesses in the regime that have led to lengthy delays in taking final decisions. Common criticism from the competition consultation:

    - **Duplication and complexity for businesses subject to the regime.** Businesses have told us that where market studies result in references they can be subject to duplicative requests for information and that the need to engage with two extensive investigatory processes can be unnecessarily complex.

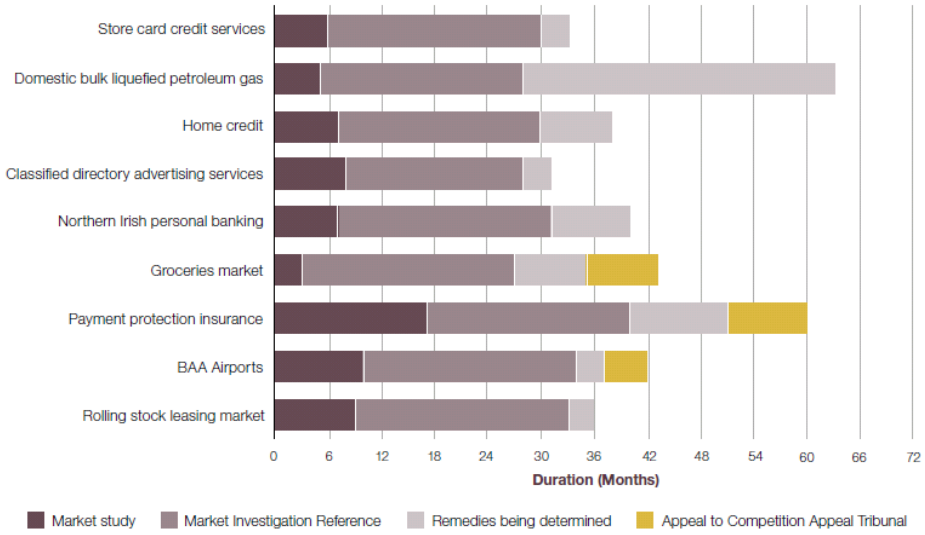
    - **The end-to-end markets process takes too long.** Businesses and consumer groups consider the process to take too long, causing uncertainty for business and delaying consumer benefit. To date, the time taken for OFT market studies not leading to a phase 2 investigation have taken between 3-21 months; and market investigations have taken up to 67 months from end-to-end[129] (see table C.1 from NAO report).

    - The length of time can cause uncertainty in the markets being investigated and costs to the businesses in engaging extensively with the competition authorities. OFT and CC have sought to address these issues and are already piloting processes to reduce these timescales. For example, the CC announced in 2009 that it would aim to complete a standard market investigation in 18 months and may complete less complex investigations in 12 months.

119. [127] http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/OFT1354.pdf
120. [128] Peer Review of Competition Policy, KPMG, June 2007.
121. [129] Including market studies, MIRs, remedies and appeals.

Table C.1: Timescales of market studies and market investigations

Figure 8
Timescales of market studies/market investigations



Source: National Audit Office analysis of Competition Commission website data

NOTE
The cases are ordered chronologically based on the date of referral, with store card credit services being the earliest which was referred to the Competition Commission in March 2004.

- **Disjointed working between the phase 1 and phase 2 process.** A number of businesses considered that market studies that are to be referred to a phase 2 investigation should be done so promptly, though many concede that they would like enough flexibility in the system to resolve issues through voluntary measures at phase 1 to avoid an MIR. A great majority of businesses that responded to the consultation do not consider that more MIRs should have been made.

Policy objectives

2. Along with the overall objectives, there are some specific objectives for the markets regime which are linked to our overarching objectives including:-

   - **Strengthen the UK competition regime in support of growth and productivity** by proactively look at markets where competition is not functioning well; and

   - **Streamline the end to end competition process to deliver more efficient, speedier but no less robust competition decisions** by having an emphasis on looking at competition 'in the round' rather than focusing on individual events of behaviours.

3. In the consultation, a number of options were identified to deal with the weaknesses identified. These included reducing the timeframes for the different phases of the investigation, and others to do with modernising the markets regime.

I. Streamlining the Markets Regime

Description of options considered

4. The great majority of respondents to the consultation document have welcomed the retention of a two phase markets regime as balance between achieving appropriate regulatory inquiry and minimising the burden and cost to business in taking part in the investigation. They have also welcomed proposals to streamline the markets regime.

5. Against the Do nothing option (option 1), the government is proposing to have statutory timeframes for all stages of the markets process, including:

   - **Option 2a: Introducing statutory timeframes and information gathering powers for market studies** (phase 1) that would require the CMA to consult on making an MIR within 6 months of launching market study, and concluding all studies within 12 months. This option will also replace the OFT's current criminal penalties with civil penalties for failure to comply with investigative requirements.

   - **Option 2b: Reducing statutory timeframes for MIRs** (phase 2) to 18 months, with powers to extend by 6 months in complex cases.

   - **Option 2c: Introduce 6 month statutory timeframes for phase 2 remedies** with powers to extend by 4 months, with appropriate powers and safeguards.

6. The desire to streamline the current system and introduce statutory time scales into the system should reduce delays and the associated uncertainty, reduce duplication of information requests and potentially reduce the cost to the competition bodies. Reducing uncertainty in a market is extremely difficult to quantify. The costs stemming from uncertainty may be things such as a lack of investment in physical capital and R&D or difficulty in obtaining capital for investment.

Benefits and costs of each option

Option 1: Do Nothing (Baseline)

7. There is unlikely to be new costs to business of Option 1, as this option will not give the CMA additional powers to conduct market studies. The CMA would have flexibility on timing and could continue to set guidelines on timescales.

8. In the current regime the OFT has made a commitment that it will aim to consult on making an MIR within 6 months of launching a market study, where an MIR is one of the outcomes being considered at launch and where it is the most appropriate and

proportionate outcome. One MIR[130] has been made by the OFT since this guidance was announced in October 2008.[131],[132]

9. It could be argued that in a single Authority there will be a smoother throughput of cases between phase 1 and phase 2 with greater synergies of information requirements. This proposal, however, may not deliver the certainty of timeframes requested by business and consumer stakeholders.

10. In addition, if the CMA were to be created, then this may also enable reduced duplication of requests for information and better resource management than the current system. It would be hoped that a single CMA would be able to then identify better which cases it takes on, considering the balance of resources in the two phases of investigation, leading to both a better selection of cases and quicker processing of each case.

Option 2: Introduce statutory timeframes for all stages of the markets process

11. We consider some of the individual impacts of the proposed changes but at the end, we consider the cumulative impact of options 2a, 2b and 2c.

Option 2a: Introducing statutory timeframes and information gathering powers for Market Studies

12. Currently, there are no statutory time limits to complete a market study, regardless of whether it is referred to the CC for an in-depth investigation. In practice, market studies that have not been referred to the CC have taken between 3 – 21 months (average 10.4 months). Most market studies that have been referred to the CC have taken between 4 – 10 months, though the referral to the CC for a phase 2 investigation on PPI, took the OFT considerably longer. A number of stakeholders have called for faster referrals to phase 2 where this is the expected outcome of a market study, but equally some stakeholders do not want timeframes to be used to initiate more MIRs and have called for a flexible regime that allows issues to be resolved at phase 1.

13. In Option 2a, a 6 month statutory time limit to consult on making an MIR would be implemented, where such an outcome is being considered as a result of a market study; and no longer than 12 months to make a MIR or publish the market study report. This builds in flexibility to allow the CMA to resolve issues through voluntary means and agree undertakings in lieu. In practice, where an MIR is expected to be made, we would expect the CMA to refer the case to phase 2 quickly, which currently takes approximately 6 weeks.

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122. [130] The Local Bus Services market study was completed within 5 months, but the consultation process took another 5 months. The MIR began in March 2009, and was referred to the CC for a phase 2 investigation in January 2010.

[131] The OFT's market studies, The Beesley Lectures, Lectures on Regulation Series XVIII 2008, 16 October 2008.

123. [132] There are two consultations currently on making MIRs for the aggregates and audit makrets.

14. In addition, we consider that statutory time limits will need to be supported by information gathering powers to enable the CMA to meet the necessary timeframes and prevent businesses employing delaying tactics to avoid an MIR.

15. The OFT currently has limited information gathering powers under section 174 (EA2002), which can be used for the purpose of assisting it in deciding whether to make an MIR. These powers are, however, limited to those situations where the OFT already believes that it has the power to make a reference. As such, it is unlikely that these powers can used at beginning stages of a market study.

16. The government is proposing that penalties for information requirements would need to be aligned between phase 1 and phase 2 to avoid unnecessary burdens on business. Under EA 2002 failure to comply with s.174 EA 2002 from the OFT is a criminal offence. This differs to civil penalties that apply in failing to comply with phase 2 investigative requirements, where fixed and or daily penalties can be imposed, (s.110 to 115 EA02)[133]. The Government propose reducing the sanction to civil penalties in phase 1 and extending the information powers across the whole of phase 1.

17. In this scenario the clock will start ticking when the CMA launches the market study. At this point information gathering powers (based on the current phase 2 powers available to the CC) will be triggered and last until the final market study report is published (no later than 12 months from launch) or, if an MIR is made, the information gathering powers would continue into the phase 2 process. The CMA will be duty bound to apply information gathering powers proportionately. A decision to use the information gathering powers is a potentially reviewable decision and as such, the CMA would consider whether use of its powers would be appropriate in the circumstances.

18. The additional information gathering powers in Option 2a may have some additional costs to business. To date, however, the OFT has predominantly relied on voluntary information provision and have only used formal s.174 EA 2002 powers once, in the case of the market study on Groceries. In addition, despite having formal information gathering powers, the CC also employs voluntary requests information in the majority of cases, using formal powers only when necessary[134]. A large number of competition authorities in other jurisdictions have similar information gathering powers for conducting market studies, but these are seldom used in practice. The threat of formal powers do, however act as an incentive to parties to provide information. Although formal information powers could be considered an additional burden to business, in practice, much of the information is already provided to the competition authorities at the relevant stages and thus the additional burden is in relation to the speed that information would be provided, rather than the amount of information provided. This power would, however, enable the authority to ensure that it is able to achieve the statutory timeframes.

19. Given that referrals to phase 2 are generally being made more quickly by the OFT and the additional 6 month flexibility built into this option, we do not envisage huge time savings with this option over and above a non-statutory route. However, it is also

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124. [133] The penalties imposed may not exceed the amounts specified by the Secretary of State by order. The maximum penalties that may be set out in such an order are: fixed penalty not exceeding £30,000, a daily penalty not exceeding £15,000 per day or a combination of the two. The current maximum penalties are set below this statutory maximum and are an amount not exceeding £20,000 for fixed penalties and an amount not exceeding £5,000 per day for daily penalties.

125. [134] Add ref. to ICB paper on market studies.

proposed that this proposal could be supported with a power to make an order to reduce the time frame in the future if it appears that processes are becoming more efficient. This power already exists in phase 2.[135] A statutory approach would create greater certainty for business. It may also result in more reliable, relevant and up-to-date information at phase 1 and more consistent information between phase 1 and phase 2, which would help to reduce duplication of information requirements increase speed for parties and ultimately faster results for consumers.

20. A minority of stakeholders have raised concerns about additional burdens this would place on business, but the majority consider costs would not be significant, as many already provide information voluntarily to the OFT. Many of these stakeholders also consider this to be a fair quid pro quo for tighter timeframes, increased certainty for businesses, and reduced duplication of information requirements between phase 1 and phase 2.

Option 2b: Reducing statutory timeframes for Market Investigation References

21. Phase 2 market investigations have a 24 month statutory timeframe. Almost all cases have taken the full period. The Government has proposed to reduce these timeframe to 18 months, with a possibility to extend by 6 months in exceptional, complex cases.

22. A number of stakeholders are concerned that reducing these timeframes will place a greater burden on business to provide information. However, based on past experience, the CC has implemented several measures designed to speed the stages of an MIR and considers the majority of MIRs can be completed within 18 months, even without a statutory clause - and the CC indeed aim to do this already. The option to extend by a further 6 months will give the CMA flexibility in complex cases to ensure that the CMA is able to assess all evidence and engage with parties. Therefore the benefit of this proposal would be to increase certainty over the timescales, but without additional burdens on business as the timescales could be achieved without legislative change though without certainty also.

Option 2c: Introducing statutory timeframes for Remedies

23. As with market studies, there are currently no statutory time limits on the CC to make remedies following an MIR. The remedies process following an MIR can take several months and in some cases years for the CC to implement. Whilst much of the delay is caused by appeals, the internal process can also be a prolonged process. In practice this has taken between 4-10 months (with the exception of domestic bulk liquefied petroleum gas, which took 35 months). In some cases these are caused by the CC reprioritising internal resources once the 24 month timeframe for an MIR has been met. We therefore propose introducing statutory timescales for remedy implementation of a standard period for remedies implementation of 6 months, with a maximum possible extension of another 4 months.

[135] S.137 EA 2002 sets out the current 2 year limit. Section 137(3) enables the SoS to amend that period by order and section 137(4) makes clear that any amended period cannot be longer than 2 years – i.e. it is a one way ratchet.

24. In this context 'remedy implementation' is the time between the CMA publishing its final report and either accepting undertakings from parties or making an Order to give legal force to the decisions set out in the CMA's final report. We do not propose statutory timescales for any actions necessary to implement remedies after the final determination (e.g. completing a divestiture process) as this is likely to vary too much case-by-case for any statutory timescale to be desirable.

Impact of proposed changes to statutory timeframes to phases 1 and 2

25. Only 3 CC decisions to date have been appealed (Payment Protection Insurance; BAA, and Groceries). It is difficult to be precise about the time spent on remedies on these cases as the remedy making may continue during the appeals process, particularly where only part of the CC's decision has been appealed.

26. Table C.2 shows the impact of these proposals to the average timing of current cases.

Table C.2: Impact of proposed timeframes

Impact of proposed timeframes					
	Market Studies (not referred)	Market Studies (referred to Phase2) inc. pre MS work	Market Investigations	Remedies	Total[136] Phases 1&2 (not inc. JR)
Length of cases in current regime	**3-21 months** **12 MS = 12+ months**	**3-17 months**	**19-24 months**	**3 – 34 months**	**30 – 67 months**
Average in current regime	**10.9 months** **12 MS = 12+ months: aver. 15.25 months**	**8.22 months**	**23 months**	**14.3 months**	**42 months**
Statutory length of cases under proposed changes	**Within 12 months**	**Consult on making an MIR within 6 months**	**18 + 6 months**	**6 + 3 months**	**30 + 9 months**
Expected timing of case against proposed changes	**Expected to be under 12 months**	**8 months**	**18 months**	**6 months**	**30 months**
Expected time savings under proposed changes	3.25 months for 12+ month cases	0.22 months	5 months	8.33 months	12 months

Note: These figures do not include time spend on remedies during the appeal process.

126. [136] Sum of columns 2 – 4, except in first row.

27. The largest time savings will come from reducing statutory timeframes of phase 2 market investigations and introducing statutory timeframes to phase 2 remedies.

28. Introducing statutory timeframes to market studies will have a significant impact on those cases that are not referred to CC for a phase 2 investigation. To date, of the 35 market studies conducted by the OFT that have not been referred to the CC, 12 have taken more than 12 months (taking an average of 15.25 months). The proposal will have less impact on the average timing of market studies that are referred to a phase 2 investigation as the current average is reasonably low. However, it will prevent anomalies such as the Payment Protection Insurance (PPI) case which was with the OFT for 17 months before being referred to the CC. It is also aimed at creating greater certainty of timing for business; and greater consistency of information provision between the 2 phases.

II. Modernising the Markets Regime

Description of options considered

29. In addition to the proposals to streamline the markets regime, there are a few proposals to modernise the regime to deal with other weaknesses. These options are:-
    - Practices across markets – allowing practices across multiple markets to be referred to phase 2 where practices are affecting competition across many markets
    - Extend Super Complaints to SME bodies
    - Independent reports to government – allowing ministers to refer public interest issues combined with competition issues to phase 2 for further investigation

Costs and Benefits of options considered

30. The options outlined below are considered for their qualitative impact on the economy and the competition regime. Many of these options are not anticipated to be regular features of the system but are to allow for a more flexible markets regime.

Practices across markets

31. The ability to investigate practices is essential to ensuring that markets work well. The CC in the course of conducting multiple MIRs has found some practices to be common across markets. These have included early settlement terms in MIRs on Payment Protection Insurance (PPI) and Home Credit; and the sale of secondary products at particular points of sale (in the MIRs on PPI and Extended Warranties). However, under the current regime, whilst the OFT is able to conduct market studies into such practices across markets, where there are reasonable grounds to suspect such practices have an adverse effect on competition across markets, the CC can only investigate them if the whole market is referred to them by the OFT, rather than the practices.

32. Giving the CMA additional powers to carry out 'horizontal' investigations of practices that affect more than one market could lead to a more targeted approach to tackling recurring sources of consumer complaint where similar economic characteristics have the potential to affect competition adversely across multiple, distinct markets. It would also allow the CMA to investigate features that do not neatly fit within one market, such as collective licensing of public performance and broadcasting rights in sound recording. Some stakeholders have identified additional 'horizontal' practices, including automatically renewable contracts, early termination charges, and additional charges for switching as cross-market practices that can have an adverse affect on competition.

33. On balance, we consider such an extension could be beneficial in some cases giving the CMA flexibility to manage the scope of these investigations. The potential risks are that cases would become unwieldy but they would have to comply with the timescale outlined above, which mitigates this risk to some extent.

SME Super complaints

34. Super-complaints were introduced with the Enterprise Act 2002 to enable consumer bodies to give consumers a stronger voice in the competition regime and to help identify problematic areas for consumers. However, SMEs do not have a strong voice and can suffer from a lack of representation and ability to highlight problematic areas.

35. Proposals to extend the super-complaint mechanism to SME bodies have met with strong opposition from a number of stakeholders who argue that SMEs should not be given special status over their competitors. Some also consider there is potential for such a system to chill competition in markets by allowing small business groups to challenge business practices which might be pro-competitive and efficiency-enhancing.

36. Since 2001, 12 super-complaints have been made by designated consumer bodies, averaging just over 1 per year. A number of these have lead to significant cases being bought by the OFT and the CC, including Payment Protection Insurance, Cash ISAs and Home Credit. In only three cases has a clean bill of health been given to a market following a super-complaint to the OFT.

37. We do, however, share the concern that enabling SMEs representative bodies could open the floodgates to single interest SME groups to seek super-complainant status to raise commercial concerns. Such complaints could have significant resource implications for the CMA.

38. On balance, although there does seem to be a gap, extending the Super Complaint system to SME bodies does not seem to target the problem effectively and is therefore not a preferred option of the Government.

Independent reports to Government

39. This proposal would align public interest powers more closely to the mergers regime, where if the SoS issues an intervention notice, the CC investigates the public interest[137] issue alongside competition issues.

40. These powers will give Ministers an alternative to setting up a bespoke inquiry group to examine a market and make recommendations to Government, where competition issues are at the heart of the matter. The Independent Banking Commission is one such example, where public interest issues and competition, in this case financial stability, are being considered.

41. Enabling the CMA to carry out this function gives scope to put the competition regime at the heart of market inquires currently undertaken by ad hoc ‘commissions’; and utilise the expert competition knowledge of the CMA and co-opt specialist expertise to

127. [137] The list of public interest issues is longer under the mergers regime than the markets regime. It includes media plurality and financial stability (recently added). We do not propose extending the list of public interest issues in the offset if this proposal is adopted.

consider, holistically, competition and public interest issues and make informed and collective recommendations.

42. In practice, the front end may prove too slow where Ministers saw urgency in setting up an inquiry. At the end of the process, however, existing competition remedy powers could be used to address competition issues, without the need for further legislation (though this would not be so for any public interest remedies Ministers may decide). In terms of the role of the CMA, any co-opted experts on public interest would have an advisory role only on their public interest sphere: they could not be involved in determining advice on competition which would be for the CMA. Costs of investigating public interest issues will need to be considered. The CMA may require additional funding when asked to investigate such cases.

43. We don't envisage that this mechanism will be used often by Ministers. In most cases an ad hoc inquiry group may be a more politically attractive option. A statutory provision would also be a vehicle for attracting wider amendments to the public interest regime.

44. Consultation responses on proposals to enable the CMA to provide independent reports to Government alongside public interest issues were divided. Some are attracted to independent advice to Ministers on public interest issues, whilst others felt that it would dilute the CMA's primary competition function. The authorities themselves were broadly supportive but point to risks to the independence of the CMA and impact on resources of potentially high profile investigations.

45. On balance, we believe that this will be a policy that enables the competition considerations to be considered significantly alongside public interest issues and may enable the implementation of competition remedies. Therefore the government proposes to pursue this option.

III. Increasing certainty and reducing burdens

Remedies on markets and mergers

46. The Government had considered options to amend Schedule 8 to the EA2002 to enable the CMA to:

- **Require parties to publish certain non-price information.** Under current legislation, if a CMA were to effect such a remedy by means of an Order it would currently also have to require price information to be published.[138] This can cause unnecessary costs to business, for example, in markets where prices can change more frequently than the non-price information that is the main focus of the remedy.

- **Require parties to appoint and remunerate an independent third party to monitor and/or implement remedies.** The CC currently has limited powers under Schedule 8 to require the appointment and remuneration of an independent third

128. [138] This is because paragraph 15 of Schedule 8 of the Enterprise Act stipulates that (1) an order may require a person supplying goods or services to publish a list of prices or otherwise notify prices; (2) an order made by virtue of this paragraph may also require or prohibit the publication or other notification of further information.

party to monitor and/or implement remedies to ensure their effectiveness. However, it may not always be practicable to secure undertakings from all parties to a market investigation, so a change to the Order-making powers of the CMA would be needed to facilitate this type of monitoring arrangement.

47. A number of stakeholders have supported these extensions to Schedule 8 powers. A small minority has raised concerns regarding addition burden to business of the cost involved to pay for a monitoring trustee.

48. However, in the recent *Groceries* case, the CC made a recommendation to government that a Groceries Ombudsman be set up. The government has since published a bill to set up the Groceries Code Adjudicator (GCA). In this case, if the CC had been able to set up the GCA itself then this would have reduced the delay and not necessarily been any more costly than if government had set it up. This proposal is clearly very case specific and only relevant to certain cases. In the case of the GCA, the additional cost to business is between £1.6m - £3.2m. The cost of the adjudication would change depending on the size of the market and the complexity of what it is trying to enforce.

Annex D: Criminal Cartels

Issues under consideration

1. The criminal cartel offence helps to deter the most serious and damaging forms of anti-competitive conduct: hard core cartels.[139] The offence applies to individuals who 'dishonestly' agree to put in place arrangements that fix prices, restrict production or supply, share markets or customers or rig bids.

2. The offence is prosecuted in the criminal courts, and the OFT and the Serious Fraud Office (SFO) are empowered to prosecute it in England and Wales. The SFO will prosecute cases that involve serious or complex fraud, and the OFT will prosecute all other cases. In Scotland the offence is prosecuted by the Lord Advocate. No cases have yet been prosecuted by the SFO or the Lord Advocate.

3. Experience shows that the offence is capable, where appropriate of being applied to the biggest international cartels in parallel with criminal investigations in the US and with enforcement action under Article 101 of the Treaty on the Functioning of the European Union (TFEU) taken by the European Commission. Nonetheless only two cases have been prosecuted since the offence came into force in 2003. Only one of these cases was contested, and it failed on procedural grounds before the jury began to hear the evidence. In the contested case, the Crown Court and later the Court of Appeal effectively recognised that defendants could adduce economic evidence in defence to the allegation that they had acted 'dishonestly'.

4. Economic evidence can be difficult for juries to understand, and its use in future cases will make the offence more difficult to prosecute. In addition, as recognised by the Law Commission and academic stakeholders, the 'dishonesty' test itself raises difficulties both as to the jury's state of belief in relation to whether cartel conduct is inherently dishonest and as to the defendant's state of mind and belief about cartel conduct. This is because the legal test for dishonesty, established in the case of *Ghosh*,[140] involves both a subjective and an objective element. The prosecution must prove not only conduct the jury believes was dishonest according to the ordinary standards of reasonable and honest people but also that the defendant realised that reasonable and honest people would regard what he did as dishonest.

5. A 2007 report by Deloitte for the OFT suggested that the cartel offence had begun to have the desired effect of increasing deterrence: competition lawyers and companies surveyed by Deloitte said that criminal penalties have a higher deterrent effect than other sanctions applicable to anticompetitive conduct.[141] But the fact that there have been only two cases to date, only one of which resulted in convictions, means that the deterrent effect of the cartel offence is weaker than it could be. The Deloitte report sets

129. [139] A 1998 OECD Recommendation proclaimed hard core cartels 'the most egregious violations of competition law' OECD Council (1998) *Recommendation o f the Council Concerning Effective Action Against Hard Core Cartels*.
130. [140] [1982] 2 All ER 689.
131. [141] *Deterrence effect of competition enforcement by the OFT: a report prepared by Deloitte on behalf of OFT*, Deloitte (2007), paragraph 5.58 and 5.59 and Table 5.11.

out that bringing more criminal cases will be a key way significantly to increase deterrence.[142]

6. The Government believes that the 'dishonesty' element in the cartel offence makes it more difficult to establish a case that looks promising for prosecution, and also makes it more difficult to prosecute. This view is supported by the experience of the Crown Prosecution Service in prosecuting cases based on fraud and conspiracy to defraud. Dishonesty cases have to be clear cut to succeed, and work better where there is a clear victim. In cases where the harm is to consumers or the economy at large it makes sense not to define an offence by reference to dishonesty.

Policy Objectives

7. Along with the overall objectives there are some specific objectives for the criminal cartel offence. The policy objective is to introduce more fact-based and objective elements into the offence and to lighten the evidential burden on the prosecution to make the offence easier to prosecute, so as to maximise the deterrent effect of the offence.

8. In particular, the offence should be designed to:-

- Ensure that it does not apply to agreements that would be lawful under the civil antitrust prohibitions;

- Minimise the likelihood that juries would need to consider and reach views on detailed economic evidence – yet provide them with a test that they can work with and that will signal the seriousness of the offence; and

- Sufficiently differentiate the cartel offence from the EU civil antitrust prohibition for anticompetitive agreements, decisions and concerted practices that it can be prosecuted in parallel with enforcement action taken by the European Commission under Article 101 TFEU.

Description of options considered

9. The options considered in the consultation were:

- Option 1: Doing nothing.

- Option 2: Removing the ‘dishonesty’ element from the offence and introducing prosecutorial guidance.

- Option 3: Removing the ‘dishonesty’ element from the offence and defining the offence so that it does not include a set of ‘white listed’ agreements.

- Option 4: Replacing the ‘dishonesty’ element of the offence with a ‘secrecy’ element.

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132. [142] See paragraphs 5.101, 5.109 to 5.110 and Table 5.13.

- Option 5: Removing the 'dishonesty' element from the offence and defining the offence so that it does not include agreements made openly.

Benefits and costs of each option

Option 1: Doing nothing.

10. In its most recent evaluation report, the OFT estimated that between the financial years 2008 and 2011 its competition enforcement work, including its criminal cartel work, resulted in an annual average consumer saving of £83m.[143] This is considered to be a lower bound estimate as it is based on case-specific conservative assumptions about price overcharge and expected future duration and does not include the significant deterrent effect of OFT's competition enforcement actions.

11. Only two cases have been prosecuted since the offence came into force in 2003, equivalent to approximately 0.25 prosecutions per year. Of these cases, only one was contested, and it failed on procedural grounds before the jury began to hear the evidence. The OFT's resources for bringing prosecution are limited, but it is feasible that the OFT could at best expect to prosecute 2 cases per year under the existing offence given its resource.

12. The OFT have estimated that the costs associated with investigating and prosecuting an 'average' cartel case range between £0.8 million[144] where there is an early guilty plea to £1.5 million[145] after a contested trial. The costs of an investigation is difficult to estimate and vary greatly between cases due to a number of reasons including the location of witness, the number of undertakings and employees involved and the volume of evidence.

13. Based on the limited past case data available from OFT, if contested, a trial is currently likely to take up to 3 months. Each case has is likely to have between 2 and 4 defendants with an average of 3, and 50% of defendants have not been convicted. Each offender is sentenced to between 6 months and 2 years imprisonment (an average sentence of 15 months) but serves only half of this time in prison[146]. The cost of a prison place is £40k per year[147]. Therefore the cost to Government currently from imprisoning offenders is approximately £20k (1 x 0.25 x £40k i.e. 1 defendant sentenced to 6 months imprisonment and serving 3 months in prison) to £80k (2 x 1 x £40k i.e. 2 defendants sentenced to 2 years imprisonment and serving 1 year in prison) per case. Given 0.25 cases per year, the cost to government is approximately £5k to £20k per year.

14. There are also private costs to those being investigated but due to data limitations we are unable to estimate these costs. The incidence of cost will vary as in some cases defendants may recieve legal aided.

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[143] http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/OFT1354.pdf

133. [144] The cost of the Marine Hose case.

134. [145] The cost of the Marine Hose case plus the cost of a trial lasting 10 to 12 weeks (the average length of a complex fraud case).

135. [146] This includes both anti-trust cases and criminal cartel cases.

136. [147] Ministry of Justice estimate

15. Options 2 to 5 are all intended to improve prosecution rates under the cartel offence. However, options 2 – 4 did not cover the correct scope of the offence as outlined in the objective and have thus been rejected. We consider further option 5 which covered the right scope of offences.

Option 5: Removing the 'dishonesty' element from the offence and defining the offence so that it does not include agreements made openly.

16. The main benefit of the proposed change would be to make it easier to bring such cases and therefore increase the deterrence against engaging in hard core cartels which are the most damaging forms of anti-competitive behaviour. The benefits from reduced anti-competitive behaviour contribute towards economic growth.

17. The proposed revision might increase the number of cases that will be prosecuted in the criminal courts. However, the OFT's resources for bringing prosecution are limited. It is estimated that under the proposed offence given current resources, the OFT could prosecute a maximum of 3 cases per year.

18. The proposed change to the definition of the offence could also change the incentives to plead guilty and increase the likelihood that juries will convict. However, again, the impact of these changes would be limited by reference to the OFT's resources[148]. It is possible that changes to the offence would increase the efficiency of bringing cases in the courts and this would speed up the court process so that the increase in the court's time will be less than might be expected on current experience. So, although the maximum number of cases prosecuted might increase to 3 per year, the expected additional cost to the courts would be less than the current cost per case.

19. The offence carries the possibility of fines and imprisonment. Revisions to the offence may lead to a very small increase in the number of fines.

20. In terms of prison places, the changes are intended to make it easier to secure convictions. The best estimate is that there will be 1 additional case per year and an increase in the number of convictions to 75% because of the increase in guilty pleas. Therefore the additional cost to government from imprisoning offenders is estimated at £55k (2.25 x 0.625 x £40k), given the best estimate of 1 additional case per year with 2.25 (75% of 3) defendents convicted per year serving 7.5 months in prison. There is no reason to believe that the changes to the offence will alter the courts' approach to sentencing with sentences remaining on average 15 months, of which half (7.5 months) is served in prison.

21. There may also be additional private costs for individuals defending themselves from the increased number of cases brought to the courts. However the incidence of this cost burden would depend on the ability of defendants to utilise legal aid.

22. Respondents to the consultation largely did not dispute the likely increase in deterrence from adopting any of the options. The policy arguments for and against change

[148] The fact that the SFO can also prosecute cases in England and Wales, and that in Scotland the Lord Advocate can prosecute cases, is not anticipated to materially affect the number of case estimates.

focused largely on whether the 'dishonesty' element was needed to signify moral culpability and in order to justify the 5 year maximum custodial sentence, whether 'dishonesty' in fact makes the offence more difficult to prosecute, whether there was a need for change based on experience to date, and whether any of the options under consideration were an adequate replacement for the 'dishonesty' element.

Summary

23. The Government has concluded that notwithstanding the lack of live evidence of difficulties arising during the course of a jury trial in a contested case, on the basis of analysis of the consultation responses, including informal examples provided by the OFT, it is more likely than not that the inclusion of the 'dishonesty' element is in fact inhibiting the OFT in investigating cases and that it would make contested cases more difficult to prosecute. On that basis, it is worth taking this legislative opportunity to remove the 'dishonesty' element.

24. The Government considers that the fact that the offence will be defined so far as practicable so that it captures only hard core cartels is basis enough to support the existing maximum sentence. It has long been recognised globally that hard core cartels are the most damaging and pernicious forms of competition infringement and that they are capable of causing great economic damage.[149]

137. [149] The consultation on introduction of the criminal cartel offence refers to OECD conclusions that the drain on the US economy from recently exposed hard core cartels runs into billions of dollars. See paragraphs 7.6 and 7.7 *A World Class Competition Regime.* http://www.archive.official-documents.co.uk/document/cm52/5233/523310.htm

Annex E: Concurrency and the Sector Regulators

Issues under consideration

1. General competition law provides a framework that can be used by companies to guide their compliance even in the absence of detailed rules. Competition regimes require a rich body of case law to maximise their effectiveness - cases establish the bounds of competition law and help explain the rules of the market.

2. In addition to general competition law, regulated sectors (energy, telecommunications, water etc.) are subject to sectoral regulation which prescribes in subtly different ways the framework within which the market participants may operate. Most sector regulators have a primary duty to further the interests of consumers through the promotion of competition, and most (but not all of them) have concurrent powers to use the Competition Act 1998 and make Market Investigation References (MIRs) in pursuit of this duty.

3. While the competition framework provides for concurrent jurisdiction over general competition law issues in the regulated sectors, in practice the sector regulators take responsibility for cases in their sectors but have brought relatively few competition infringement decisions. They have made only two antitrust infringement decisions and two MIRs, although there are also cases of commitments being accepted in lieu of MIRs.[150] This compares with 25 infringement decisions and 9 MIRs made by the OFT across the economy as a whole. The relative paucity of antitrust cases and MIRs in regulated sectors is regarded by a number of commentators as a particular weakness in the regime, as the opportunity to make generally applicable rules may have been missed and the deterrent effect of infringement decisions undermined either through the lack of, or poor, enforcement.[151]

4. There may be particular disincentives for regulators to make MIRs to the CC. The regulator may be concerned about: the length of time taken by the CC in conducting market investigations, especially if regulatory action can produce a swifter result; the risk of a lengthy investigation deterring private investment[152]; and, the difficulties of conducting a MIR in a sector in which government policy plays a strong role. Finally, there may also be a concern that in some circumstances, in looking at a market the CC might be perceived as commenting on the performance of the regulator.

5. Others point out that the regulated sectors are different to the rest of the economy in the degree of transparency and scrutiny they face and the structure of the industry following liberalisation where some of the big monopoly elements have been broken up.

6. On the other hand, the small number of cases may also be partly caused by and further lead to, a subsidiary problem of a lack of critical mass of competition expertise within

138. [150] The two antitrust cases have both been abuse of dominance cases (Chapter II / Article 102) with fines of £15m for National Grid and £4.1m for EWS.
139. [151] See for example, *Review of the UK's Competition Landscape*, NAO, 2010, p.14, *UK Economic Regulators*, House of Lords, 2007, Vol.1, p.67, and OFT response to consultation.
140. [152] Indeed shareholders of BAA have pointed this out (in public) in response to the CC's findings.

some sector regulators. Competition Act 1998 cases often require large teams of lawyers, economists, accountants and investigators, not in the least given the adversarial nature of the enforcement process, which often involves large and well-resourced investigatees.

7. The net result may be that detailed behavioural regulation is imposed and/or maintained for longer than it needs to be as regulated markets become more competitive. Such regulation could dampen innovation and deter the development of rivalry or scope for new entry in markets.

Policy objectives

8. The policy objectives for concurrency are to strengthen the UK competition regime in support of growth and productivity, by ensuring that the sector regulators and CMA apply general competition law more proactively in the regulated sectors, and that when they do bring cases they are managed better.

9. In particular the concurrency reform should encourage cooperation between the CMA and sector regulators; promote a culture in the CMA that is focused on promoting competition in markets and works proactively in cooperation with other bodies to achieve this; and help or encourage the sector regulators and CMA to bring more, faster or better competition cases.

Description of options considered

10. A number of options for strengthening the regime by improving the effectiveness of concurrency arrangements were considered in the consultation. With the exception of Option 1 (Do Nothing) these options are not mutually exclusive. They are outlined below:-

11. Option 1: Do nothing - continuing the current concurrency powers and arrangements between the sector regulators and competition bodies.

12. Option 2: Strengthening the primacy of competition law over sectoral regulation.

- Currently the duties of the sector regulators to use sectoral regulation to promote their objectives, may be dis-applied if they consider the use of the antitrust powers are more appropriate.

- One way to encourage the sector regulators to be more proactive in using general competition law would be to impose a consistently strong obligation on all the sector regulators, as a statutory duty, that they should consider their competition powers prior to using their sectoral powers.

- The sector regulators could also be required to work together towards a common set of factors (subject to EU requirements) for deciding which of their powers to use. This could help increase consistency of approach across sectors, increase understanding of the suitability of competition powers for resolving particular issues

and require all the regulators to consider the benefit of establishing a precedent in competition law.

13. Option 3: Making the CMA a proactive central resource for the sector regulators by:-

- The CMA acting as an advisor or source of expertise; and

- Improving the resource sharing between the CMA and the sector regulators.

14. Option 4: Giving the CMA a bigger role in the regulated sectors.

- The CMA would have a case allocation and oversight role. The regulators would notify the CMA before they open and close a competition case, but unlike under the current Concurrency Regulations, there would not need to be any formal decision on case allocation before the regulator could use its formal powers. The CMA and concurrent regulator under this system could agree at an early stage to transfer cases between themselves. Crucially, however, the CMA could, following consultation with sector regulators, take over an ongoing case in a concurrent sector when it considered that it was better placed to take the case or where there were concerns about the approach the regulator was taking.

- The sector regulators could be required to inform the CMA of cases where competition powers might be applicable alongside sectoral powers, even if the sector regulator considers that regulatory powers are more appropriate. The sector regulators and CMA would be required to keep each other informed of progress on the case, consult each other before making a decision on whether an infringement may have occurred or making a MIR. Sector regulators in particular could be required to consult or inform the CMA before taking a decision on whether to proceed on a case by making use of their sectoral or competition powers.

15. Option 5: The CMA could report on the use of competition powers across the landscape.

- While there is already some coordination of activity across the concurrent competition authorities, the CMA could be given more authority to drive the strategic direction of competition work and ensure greater consistency of approach. For example, by publishing an annual review of the use of competition powers across the concurrent competition authorities.

16. Option 6: Regular CMA market reviews in the regulated sectors.

- One of the objectives of the CMA could be to keep economically important markets or sectors under review or the CMA could have a duty to review economically important markets or sectors. This approach could also be applied to economic sectors subject to concurrent competition powers. The aim would be to mandate that reviews in the regulated sectors would have to be carried out, thereby overcoming any potential institutional reluctance in the CMA to look at areas that are already covered by the regulators, or opposition from the sector regulators to interference by the CMA.

Benefits and costs of each option

Option 1: Do nothing - continuing the current concurrency powers and arrangements between the sector regulators and competition bodies.

17. Concurrency is desirable for several reasons - first, the regulator has detailed knowledge of the sector, and may be best placed to understand complaints being made under competition legislation and to come up with appropriate remedies. Second, sectoral regulators are better placed to spot competition problems in the markets they regulate, even in the absence of specific complaints. Third, and perhaps most importantly, having concurrent powers means that the regulator is able to judge whether conduct will be more appropriately regulated by sector-specific regulation or the use of general competition powers. Regulators can co-ordinate their use of sector-specific regulation and expertise with the exercise of general competition law.

18. There is also considerable benefit in continuing to perform the current functions of the CC in regulatory cases in the CMA - it has the expertise, resources and procedures in place to handle a highly variable appeal caseload.

19. Table E.1 below shows the number of competition staff across the sector regulators. There are small numbers of competition staff in some of the regulators, although they may have a larger number of staff with wider knowledge and responsibilities for the sector whose expertise is drawn on for antitrust/MIR issues as well as for the promotion of competition under their sectoral powers.

Table E.1: Number of competition staff in sector regulators

Ofcom	Ofgem	ORR	Ofwat
21	Unknown[153]	4	4

Source: Review of the UK's Competition Landscape, NAO, 2010.

20. With regard to regulatory appeals, the costs of these vary hugely, dependant on both the size of the case and the type of appeal. For example, in the last 3 years, the costs of water appeals to the CC have ranged from £0.3m - £0.5m but the Stanstead price control review cost over £1m.

21. A few businesses and commentators have called for concurrency to be ended, on the grounds that this would then give the CMA scope to be more proactive in the regulated sectors. This would match the position in a number of overseas jurisdictions where the overlapping applicability of general competition law and sectoral regulation has been resolved by a clear division of these powers between different institutions.

22. However, ending concurrency would leave sector regulators with a duty to promote competition, but with a more limited toolkit to achieve this. Concurrency avoids the need to transfer an issue to another institution and therefore facilitates both faster decision making and an integrated approach to competition enforcement which can draw on the sector regulators' sectoral expertise and their ability to use a mix of tools. It

141. [153] Ofgem handles enforcement cases on a project basis drawing in staff from across the organisation. A typical investigation would involve two members of the relevant division, a lawyer, and two members of the Enforcement and Competition Policy Team.

should therefore facilitate higher quality competition enforcement. Retention of concurrency also enables multiple routes for bringing antitrust cases and MIRs, which should lead to more cases than would than would occur without concurrency.

Option 2: Strengthening the primacy of competition law over sectoral regulation.

23. It is expected that this would lead to a change in emphasis away from using sectoral powers and towards using competition powers. In the short term, this might mean that there is a slower movement towards a competitive outcome than under current regulatory requirements (as competition cases typically take longer than sectoral regulatory enforcement actions). However in the long term, it would be hoped that solving competition problems using competition tools will lead to more dynamic markets, greater deterrence of anti-competitive behaviour and ultimately reduced burdens on the sector regulators and businesses with less regulatory intervention.

24. Cooperation between the CMA and sector regulators would be enhanced and this would also enhance understanding across the network of regulators. There might also be some indirect benefit, if the stronger obligation gave the competition regime greater status among staff (thereby making the regulators a more attractive place for competition experts to work and enhancing their influence) as well as encouraging the development of better processes.

25. There may be small additional costs to Government in the short run as some of the sector regulators may be prompted to carry out a more extensive competition analysis than they may do otherwise. However, this option should lead to more antitrust cases over time. To the extent these cases enhance deterrence and thereby facilitate the roll back of regulatory regimes there will be savings to business through the refocusing of government intervention from relatively expensive ex ante regulation (which applies to all the firms in the regulated sector) to ex post competition enforcements (which is focussed on apparent infringements), though this is difficult to quanitfy.

26. It is hard to estimate the net additional benefit to consumers of a primacy obligation, as the regulators will retain a choice of tools to deliver their competition objectives. However, to the extent that regulators choose more often to use their concurrent powers, having considered them early on, it is reasonable to assume that there would be at least some net benefit.

Option 3: Making the CMA a proactive central resource for the sector regulators by:-

- The CMA acting as an advisor or source of expertise;

27. This option is supported by both the OFT and sector regulators. The CMA will have the benefit of its view across the economy, helping it spot anti-competitive behaviour and propose remedies. It is also likely to have a larger competition caseload than the sector regulators, so it will be able to develop greater expertise in case management. It would also help avoid the need for a more heavily bureaucratic regime for transferring CMA expertise to the regulators, or disputes with the regulators about which body should lead on a case.

- Improving the resource sharing between the CMA and the sector regulators.

28. This would have the advantage of enabling a greater transfer of knowledge for particular cases and ensuring that the CMA was incentivised to provide this level of resource. Sharing expertise and secondments between the competition authorities would improve case management and bring a wider competition perspective. It is also likely to incentivise the regulators to bring more cases, particularly those where the decision to use general competition law was finely balanced.

29. Secondments can provide flexibility in resourcing the system. From 2005 to 2009 there were 18 secondments from the CC to the OFT. However, there have been only four other loans or secondments in total around the competition regime. Although there would be a cost associated with seconding staff and the competition bodies hiring out their expertise to the sector regulators, it should lead to greater administrative efficiency as the peaks and troughs of the workloads of the competition bodies and sector regulators could be somewhat smoothed out – but this impact would be mitigated by a greater overall caseload. Greater expertise developed and shared between the competition bodies should increase the quality of decision making and increase the use of competition tools by sector regulators.

30. Making the CMA obliged to act if a sector regulator demands it was also considered as a way to make the CMA a proactive central resource for sector regulators. However, this is not workable in practice as the CMA may agree that there is a competition issue, but not assess it as matching its priorities or agree there is enough evidence to make a successful case. Other options considered to make the CMA a proactive central resource for sector regulators included the CMA running the case and the sector regulator making the decision and changing the legislation to permit joint sector regulator/CMA antitrust investigations. However, it is not be possible to disentangle case management from decision making, as the sorts of investigatory avenues that are pursued, or not pursued, are likely to shape the final decision. Further, stakeholders have also argued that sound decision making requires clear accountability and the parties having access to the decision maker, and that the decision maker should be familiar with the evidence base. These options may undermine clarity of accountability and access to the decision maker.

<u>Option 4: Giving the CMA a bigger role in the regulated sectors.</u>

31. The requirement on the CMA and regulators to share information about possible and actual cases will make cooperation more effective. It should help raise the quality of case management and encourage the sector regulators to proactively consider dealing with issues through general competition law, by making clear that the competition bodies have a duty to consider the advice of other bodies with relevant expertise.

32. The ability of the CMA to take cases from the sector regulators should ensure cases are brought where appropriate and managed properly (and by acting as a latent threat, to make its 'encouragement' more effective). The CMA would have greater control and oversight of the competition regime, building on its existing expertise. It could improve the quality of the case investigation and management process, ensure greater consistency of decision making and help create a greater body of case law to both

increase deterrence, increase certainty and support future case work. In cases where the sector regulators do not have the capacity or expertise to undertake competition cases speedily, it could also improve administrative efficiency by providing an alternative approach to bringing the case – i.e. having the CMA take it forward.

Option 5: The CMA could report on the use of competition powers across the landscape.

33. An annual review of the use of competition powers across the concurrent competition authorities would be particularly useful in bringing more transparency to the sector regulator's and CMA's use of competition powers and the degree to which they have been cooperating. This proposal forms part of a coherent set of proposals, including a duty on the CMA to work across regulated sectors and to support the regulators; and, powers to quality assure and take cases from the regulators. There would be some resource cost to producing the report, but we consider this would be worthwhile because of the impact of producing the report would have on the sector regulars.

Option 6: Regular CMA market reviews in the regulated sectors.

34. Given how tightly structured and extensive the market review activities of the regulators are (particularly Ofcom) we do not consider this to be a workable option. It would be difficult to draft in a meaningful way (and the regulated sectors cover many different markets) and would lead to duplication of activity and undermine cooperation. By undermining the CMA's ability to prioritise its own work, it would also constrain its ability to maximise consumer benefits. The advantages of this option, that it forces to the CMA to look harder at the regulated sectors, could therefore be achieved better through the options set out above.

Principles for Economic Regulation

35. We also have to ensure that the proposals are consistent with our recently agreed Principles for Economic Regulation – we should ensure the proposals do not undermine sound economic regulation. The Principles suggest that regulatory regimes should be focussed on outcomes rather than tools, and that regulators should have 'adequate discretion' to choose the tools that best achieve well functioning and contestable markets. But that principle is not the only relevant one, and the set of principles as a whole require some balancing. At the highest level, the Principles set out that that 'competitive markets are the best way in the long run to deliver [high quality and efficient economic infrastructure], and go on to note that 'regulatory frameworks should form a logical part of the Government's policy context' and 'regulatory frameworks should enable cross sector delivery of policy goals where appropriate'.

36. Over the long run, our concurrency proposals should also be consistent with the principle that 'policy interventions must be proportionate and cost effective', e.g. that we regulate ex ante only where necessary.

37. The Principles also note that 'specifying in a high degree of detail the manner in which the regulator is to achieve its objectives would be inappropriate'. We do not believe our proposed primacy rule does amount to over-specification. Under the competition regime, the competition authorities can apply a range of tools, and can decide amongst them which body is best placed to apply them. We are not trying to specify outputs to any level of detail, merely that regulators should look to their competition powers first where appropriate, and that the CMA should have scope to enforce CA98 in the regulated sectors.

38. While we judge that our proposals are consistent with the principles taken as a whole, there are reasons for caution. Not only do the Principles call for a stable and predictable regulatory regime, we have found little firm case study evidence that regulators have incorrectly declined to enforce CA98. There is also a difficulty in establishing that consumer benefits will outweigh disruption to the regimes and investor uncertainty.

39. However, the primacy proposals provide for relatively small changes to the current arrangements, and are unlikely to be regarded by businesses or investors as being a significant adverse change – other reform proposals are likely to have a much bigger impact on enforcement.

Summary

40. The preferred option is for a package of reforms for concurrency to be put in place to give the CMA a more central role in the regulated sectors and to create an effective framework to facilitate closer collaboration between the CMA and sector regulators.

Annex F: Telecom Price Control Appeals Heard by the Competition Commission

Issue under consideration

1. Currently the Competition Commission (CC) hears telecom price control appeals but there is no statutory basis for the CC to reclaim its own costs. However, in other regulatory appeals that the CC hears, it does have the ability to reclaim its own costs at the end of the hearing. The reason for this inconsistency is unclear. The appeal process can be complex and lengthy and therefore have serious repercussions for the CC's budget. There have been 5 cases so far (of which 1 is on-going), but there are potentially 4 more cases before the end of March 2012. This would consume a significant proportion of the CC's time and consequently its budget.

Policy objectives

2. The specific objectives for telecom price control appeals are:-

   - To enable the recovery, to some extent, of the costs borne by the CC (or CMA) as a result of hearing telecom price control appeals.
   - To incentivise the 'right' appeals as businesses currently have a dominant strategy to appeal.
   - To not put additional burdens on Ofcom where there is no possibility of cost recovery.

Description of options considered

3. The following options have been considered to address this problem:

   - Option 1: Do nothing. The CC will remain unable to reclaim the cost it bears as a result of hearing telecom price control appeals.
   - Option 2: A fixed charge payable by the appellant.to the Consolidated Fund.
   - Option 3: Standard two-way costs. The CC's costs in successful appeals would fall on all parties as appropriate, including Ofcom, and would be paid to the Consolidated Fund.
   - Option 4: One-way costs. The CC would be able to reclaim its own costs from the appellant when the appeal is unsuccessful. The money would be paid to the Consolidated Fund.

     a. Calculated based on the proportion of unsuccessful points of appeal

b. Calculated based on the proportion of unsuccessful points of appeal weighted by the importance of each point

c. Calculated at the discretion of the CC Panel

Background

4. Ofcom operate under 3 funding caps.

   - A Spectrum Management cap. This covers expenditure for the management of the spectrum and is funded through grant-in-aid from DCMS, offset through spectrum receipts. The excess over the cap is surrendered to the exchequer via the consolidated fund.

   - A total spending cap. This covers spectrum management and also any expenditure from the levy income that Ofcom receive from the businesses they regulate. The levy, payable by the businesses Ofcom regulate, is to ensure the businesses get value for money.

   - A separate spending cap for spectrum awards and clearance. This is also funded from grant-in-aid from DCMS. Reflecting the increased activity over the Spending Review (SR) period and the large amount of income this should generate, this cap is far higher over the SR 2010 compared to the previous SR.

5. The cap was renewed at the 2010 Spending Review but Ofcom are required to reduce spending by 28.2% in real-terms on the 2010/11 annual funding cap of £143 million by 2014/15. The settlement will drive organisational efficiencies but the impact on the delivery of Ofcom's core responsibilities will be minimised. In addition, the cap allows substantial income to be retained by the consolidated fund.

6. Ofcom has a statutory duty to make decisions in telecom price cases. Therefore, it is impossible for Ofcom to simultaneously exercise its statutory duty and control the risk of appeals, such as by not taking forward cases under a prioritisation programme. Telecom price control appeals are not an adjudication on the application of applicable law, but effectively an examination by the CC of Ofcom's economic analysis and logic in making their decision. Given that it is a matter of judgement rather than law, it is inevitable that there will be differences of judgement between Ofcom and the CC.

7. The appeal is limited to specific points of Ofcom's decision, which means the CC cannot view the decision holistically. While there is no suggestion any of these appeals have been without merit, there is a developing trend that Ofcom win many more appeal points than they lose – presumably having built on the experience of previous appeals. When an appeal on a point of economic analysis is won, the benefit to the telecom businesses in many cases represent a small percentage change to the regulated prices, but taking into account the precedent value, the change makes it worthwhile for the telecom companies to appeal. Further, in some cases even if an appeal is unsuccessful the (credible) threat of appeal itself delays the Decision (and the related implementation of the new prices) because of the need for Ofcom to armour-plate its Decision which is profitable for the business. Hence appealing is very often a dominant

strategy for businesses which means many telecom price control decisions are appealed, or appeal is threatened.

8. Table F.1 below lists Ofcom's statements imposing telecom price controls and indicates whether they were subsequently appealed (post 2003).

Table F.1: Previous cases[154]

Project	Statement year	Appealed?
Leased Lines (Business Connectivity) Market Review	2004	No
Fixed Narrowband (NCC)	2005	No
LLU / WLR / Openreach Financial Framework	2005	No
NTS Retail Uplift (part of Market 1)	2005	No
Mobile Call Termination (MTR)	2007	Yes
Leased Lines (Business Connectivity) Market Review	2009	Yes
Fixed Narrowband (NCC)	2009	No
LLU Openreach Financial Framework	2009	Yes
WLR Openreach Financial Framework	2009	Yes
Mobile Call Termination (MTR)	2011	Yes
NTS Retail Uplift	July 2011	?*
WBA Charge Control	July 2011	?*
LLU/WLR Openreach Financial Framework	Decision due in Autumn 2011	
ISDN 30 Charge Control	Decision due in Autumn 2011	

(*)The telecom companies have 60 days to file an appeal from the date when the Statement was published (20 July 2011).

9. Ofcom do not actively defend these appeals but need to file an initial detailed Defence, and are then are subject to many detailed information requests from the CC which is expensive, time consuming and has the affect of diverting resources from Ofcom's other functions. In addition to the staff time spent on the preparation of evidence for the appeal, Ofcom also have to retain and brief counsel for the hearing itself. In a recent case preparation of the Defence, the response to information requests from CC and the preparation for 3 hearings amounted to 5000 man-hours, so there are already considerable incentives on Ofcom to get the initial decision right to avoid appeals.

10. Interveners may present evidence supporting either the appellant or Ofcom. Interveners bear their own costs, whoever they are supporting, but are not liable for other parties' costs if they are on the losing side. It is proposed that interveners would also be liable for the costs to the CC caused by their intervention, again to the extent to which the side on which they intervened lost. It is important to treat interveners on both sides equally, otherwise this would distort the incentives to intervene on one side compared to the other. Furthermore, it would be unfair as a matter of principle to make an appellant liable for the costs caused by interveners on each side, which it may not have requested and over which it has no control. Recovering costs from interveners is in line with the overarching objectives of recovering costs and of incentivising the 'right' appeals, a principle which equally applies to interventions.

142. [154] Information provided by CC

Benefits and costs of options

Option 1: Do nothing. The CC will remain unable to reclaim the cost it bears as a result of hearing telecom price control appeals.

11. There have been 3 price control appeals between 2008 and 2010, costing the CC £2.8 million in total. Under the new EU Framework Agreement, Ofcom statutorily have to review each regulated market every 3 years making appeals more likely. Ofcom have noted that in addition to the ongoing case, there are potentially 4 more cases before the end of March 2012. Given an average cost to the CC of about £950k per case and potentially 5 cases during the 2011/12 financial year, this could generate a total cost to the CC of approximately £4.75 million this financial year. This would be a substantial proportion of the CC's budget which is £17.8 million for 2011/12.

12. There is also a cost to Ofcom both in preparing evidence for the appeal and briefing counsel. Given an average cost to Ofcom of £700k per case and potentially 5 more cases in this financial year, this could generate a total cost to Ofcom of approximately £3.5 million.

13. The number of appeals varies each year but given 3 appeals in 2009, 0 in 2010 and an expectation of up to 5 appeals in the 2011/12 financial year, gives an average per year of 3. Ofcom at present makes seven repeated price control decisions that last for three years, so on average makes 2.3 price control decisions a year.

14. The appellant also face a cost in appealing, however this is an avoidable cost in that they choose whether to appeal or not. As noted, appealing can be a dominant strategy for business even when the benefits accruing to them from appealing are marginal and businesses will rationally choose to appeal because the benefit of appealing outweighs the cost.

15. Table F.2 below shows the cost to Ofcom and the CC of the 3 previous appeals[155].

Table F.2: Cost of appeals to Ofcom and CC[156]

	Mobile Call Termination (18/03/08 – 16/01/09)	Cable and Wireless v Ofcom (17/12/09 – 30/06/10)	Carphone Warehouse v Ofcom (LLU & WLR) (27/11/09 – 31/08/10)
Total cost to Ofcom	**£1.2m**	**£0.4m**	**£0.5m**
Total cost to CC	**£1.5m**	**£0.5m**	**£0.8m**

143. [155] There have been 4 concluded appeals but the separate LLU and WLR appeals were consolidated into a single appeal so that the CC published a single determination. There were also four separate appeals to Ofcom's March 2011 mobile call termination decision but these have been consolidated into a single appeal by the CAT.

144. [156] Information provided by CC and Ofcom respectively

Option 2: A fixed charge payable by the appellant to the CC.

16. Under this option a fixed charge for telecom price control appeals would be payable by the appellant. It is difficult to determine an appropriate charge from the cost of past cases, given the range of costs and also because the cost of past cases are not necessarily a good predictor of the cost of future cases. If the charge payable by the appellant were to be based on the average cost of past cases it would be £950k per case. Since most price control decisions by Ofcom have been appealed during the last cycle and the trend is growing we assume that the CC (and in the future the CMA) will review on average 2 price control decisions per year. Assuming there were 2 appeals per year, a flat charge of £950k would result in an **additional cost to the appellants of £1.9 million per year**. It is important to note that this is not a cost to business generally, but to specific appellants.

17. This would be a transfer from business to the Treasury of **£1.9m per year.** As in all proposals, the financial position of the CC does not change as the moneys would be paid to the Consolidated Fund. Ofcom's financial position would also not change from the baseline.

18. This option, although achieving approximately full cost recovery, would de-link for the appellants the cost of the appeal to the relative merit of their appeal, as determined ex-post by the outcome and therefore disincentivise wholly justifiable appeals. It would also be difficult to fairly recover the costs from interveners. This approach is therefore considered too crude.

Option 3: Standard two-way costs. The CC's costs in successful appeals would fall on all parties as appropriate, including Ofcom.

19. In other regulatory appeals costs standard two-way costs is achievable because the authority has the ability to raise the revenue required. For example, under the Energy Act 2004, if an appeal is successful and the CC's costs fall on Ofgem they can use a standard licence condition to recover the money from the licensee who may in turn pass on the cost to the consumer. However, there is no mechanism within the Communications Act 2003 to allow for the same arrangement, in which Ofcom could recover the money from the appellants. The reason for this inconsistency is unclear.

20. Given the funding cap in place and that Ofcom have no avenue for additional income, there is a great risk that by allowing the CC to recover costs from Ofcom and the appellant, Ofcom may have insufficient funding to allow it to fulfil its other statutory duties.

21. Since Telecom price appeals are not an adjudication on the application of applicable law, but an examination by the CC of Ofcom's economic analysis and logic in making their decision, there will inevitably be differences of judgement between Ofcom and the CC. This means that Ofcom inevitably face significant CC costs during appeals under two-way costs.

22. The Government does not believe that standard two-way costs is appropriate, unless the funding cap was removed. Removing the funding cap is currently not possible

because it was recently settled in the Spending Review and performs a vital function in driving efficiency.

Option 4: One-way costs. The CC would be able to reclaim its costs from the appellant when the appeal is unsuccessful. The money would be paid to the Consolidated Fund.

23. Under this option the CC would be able to reclaim its costs from the appellant to the extent that they lose their appeal. Ofcom would pay nothing towards the CC's costs due to their funding cap and because it would be a transfer of money within government, which itself would incur an administrative cost.

24. There is a risk that this option does not provide an incentive for Ofcom to make a sound initial decision as it would not be responsible for its share of the CC's costs. However, there are already considerable incentives on Ofcom to produce robust decisions given the likelihood of appeals and Ofcom still have to fund their defence and respond to information requests, both of which would not change. Therefore this option only allows for partial cost recovery.

    a. Calculated based on the proportion of unsuccessful points of appeal

25. The estimate of the cost to the appellants of this option is based on the cost of previous cases. The CC's final determination report in each of the 3 past telecom price control appeal cases lists the points of appeal and their outcome i.e. successful or unsuccessful. From this it is possible to calculate the percentage of points on which the appellant was unsuccessful. Given the total cost to the CC of the case, the cost that the CC could have recovered from the appellant is calculated based on the percentage of points on which the appellant was unsuccessful.

26. For the Mobile Call Termination case there were 14 points of appeal of which the appellant was unsuccessful on 12 (86%) of the points. The cost of considering points made by interveners accounted for 50% of the costs due to the defence and 5% of the costs due to the appellant Given the total cost of the case to the CC was £1.5m, the CC would have been able to recover £1.2m (86% of £1.5m x 95%) from the appellant, £0.06m from interveners on the appellant's side (86% of £1.5m x 5%) and £0.1m from interveners on Ofcom's side (14% of £1.5m x 50%), for a total of £1.4m[157], had one-way costs calculated on this basis been in place.

27. For the Cable and Wireless v Ofcom case there were 16 points of appeal of which the appellant was unsuccessful on 11 (69%) of the points. The cost of considering points made by interveners accounted for 25% of the costs due to the defence and 5% of the costs due to the appellant. The total cost of the case to the CC was £0.5m, so the CC would have been able to recover £0.3m (69% of £0.5m x 95%) from the appellant, £0.02m from interveners on the appellant's side (69% of £1.5m x 5%) and £0.04m from interveners on Ofcom's side (31% of £1.5m x 25%), for a total of £0.4m, had one-way costs calculated on this basis been in place.

28. For the Carphone Warehouse v Ofcom (LLU & WLR) case there were 14 points of appeal, of which the appellant was unsuccessful on 11 (79%) of the points. The cost of

145. [157] Here and below, rounding may cause totals to differ from the sums of individual amounts.

considering points made by interveners accounted for 25% of the costs due to the defence and 5% of the costs due to the appellant. Given the total cost of the case to the CC was £0.8m, the CC would have been able to recover £0.6m (79% of £0.8m x 95%) from the appellant, £0.03m from interveners on the appellant's side (79% of £1.5m x 5%) and £0.04m from interveners on Ofcom's side (21% of £1.5m x 25%), for a total of £0.7m, had one-way costs calculated on this basis been in place.

29. In the cases above, the CC is able to recover 77% - 93% of its costs from appellants and interveners. Assuming the percentage of unsuccessful appeals and costs caused by interveners remains in this range, the CC would be able to recover this percentage of its costs under this option. Assuming the CC's costs of hearing appeals is £1.9 million per year; **the CC would be able to recover** (77% of £1.9m) **£1.5 million to** (93% of £1.9m) **£1.8 million per year** from the appellants and interveners, which would be paid to the Consolidated Fund. The estimated **additional cost to the appellant and interveners (i.e. business) is therefore £1.5 million to £1.8 million per year,** but this is a transfer from business to government. Ofcom's financial position would not change from the baseline.

30. This approach is broadly an 'issues based' approach as it is based upon success on particular points. However, the Civil Procedure Rules (CPR's)[158] advocates a more flexible approach. It recognises that account should be taken of points on which there has been success and failure as well as factors such as reasonableness in bringing a claim, conduct and proportionality. Under the CPR's, an issues based order should only be taken if a proportionate order or a time based order are impracticable. This is because issues based orders give rise to complicated and expensive assessments in relation to costs. In addition, they necessitate difficult and necessarily inexact analyses of undifferentiated costs; they necessitate similarly difficult and inexact analyses of costs which are common to more than one issue and impose no discipline on costs incurred.

31. There is also concern that this option would create strong incentives for 'gaming' the system. Appellants could list the grounds of appeal in such a way as to detail all the grounds where the chances of success are relatively high and aggregate the grounds where the chances of success are lower. This would mean the proportion of costs allocated to the appellant would be too low in many cases. In addition, it would create material inefficiencies in the way the appeal process works because there is a high degree of discretion as to how the appeal is framed and the different substantive and procedural issues presented.

32. The CC report[159] into the review of the telecoms appeal process noted that in many cases the appellant included a large number of issues in its appeal. "This may, in part, relate to the incentive to appeal (since the CC does not undertake a full redetermination, there is no risk for the appellant of parts of the decision with which it is content being revisited and determined less favourably and to that extent it is a 'one-way bet') and to the fact that having decided to bring an appeal the additional cost of

146. [158] Civil Procedure Rules, Part 44.3, General rules about costs; Court's discretion and circumstances to be taken into account when exercising its discretion as to costs. http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part44.htm#IDAD21EC

147. [159] Competition Commission Review of the Telecoms Appeal Process

148. http://www.competition-commission.org.uk/rep_pub/consultations/current/pdf/report_of_the_review.pdf

including extra points is relatively small." As a result the CC has issued guidance[160] which aims to further discipline appellants in taking points for appeal. Therefore the previous ratio of wins and losses in relation to grounds of appeal are not necessarily a good indicator of future cases.

b. Calculated based on the proportion of unsuccessful points of appeal weighted by the importance of each point of appeal

33. The equal weighting of points is potentially misleading because appellants base their decision to appeal on potentially good big points but then tend to include more doubtful small points. Therefore this option weights the points of appeal by the number of pages in the CC final report which is used as a proxy for the costs associated with each point. It also reduces the significance of the division of reference questions into smaller points.

34. For the Mobile Call Termination case the CC's final determination report was 324 pages of which 189 (58%) pages were regarding unsuccessful points of appeal. The cost of considering points made by interveners accounted for 50% of the costs due to the defence and 5% of the costs due to the appellant. Given the total cost of the case to the CC was £1.5m, the CC would have been able to recover £0.8m (58% of £1.5m x 95%) from the appellant, £0.04m from interveners on the appellant's side (86% of £1.5m x 5%) and £0.3m from interveners on Ofcom's side (14% of £1.5m x 50%), for a total of £1.2m, had one-way costs calculated on this basis been in place.

35. For the Cable and Wireless v Ofcom case the CC's final determination report was 217 pages of which 109 (50%) pages were regarding unsuccessful points of appeal. The cost of considering points made by interveners accounted for 25% of the costs due to the defence and 5% of the costs due to the appellant. Given the total cost of the case to the CC was £0.5m, the CC would have been able to recover £0.2m (50% of £0.5m x 95%) from the appellant, £0.01m from interveners on the appellant's side (69% of £1.5m x 5%) and £0.06m from interveners on Ofcom's side (31% of £1.5m x 25%), for a total of £0.3m, had one-way costs calculated on this basis been in place.

36. For the Carphone Warehouse v Ofcom (LLU & WLR) case the CC's final determination report was 359 pages of which 234 (65%) pages were regarding unsuccessful points of appeal. The cost of considering points made by interveners accounted for 25% of the costs due to the defence and 5% of the costs due to the appellant. Given the total cost of the case to the CC was £0.8m, the CC would have been able to recover £0.5m (65% of £0.8m x 95%) from the appellant, £0.03m from interveners on the appellant's side (69% of £1.5m x 5%) and £0.07m from interveners on Ofcom's side (31% of £1.5m x 25%), for a total of £0.6m, had one-way costs calculated on this basis been in place.

37. In the cases above, the CC is able to recover 63% - 79% of its costs from appellants and interveners. Assuming the percentage of unsuccessful appeals and costs caused by interveners remains in this range, the CC would be able to recover this percentage of its costs under this option. Assuming the CC's costs of hearing appeals is £1.9 million per year; **the CC would be able to recover** (63% of £1.9m) **£1.2 million to** (79% of £1.9m) **£1.5 million per year** from the appellants and interveners which would be paid to the Consolidated Fund. The estimated **additional cost to the appellant**

149. [160] Price control appeals under section 193 of the Communications Act 2003: Competition Commission Guidelines http://www.competition-commission.org.uk/rep_pub/consultations/past/pdf/110427_guidance_on_telecoms_appeal_process.pdf

and interveners is therefore £1.2 million to £1.5 million per year, but this is a transfer from business to government. Ofcom's financial position would not change from the baseline.

38. The CC takes various matters into account in its assessment; these include transparency of the original decision and issues of materiality. These matters affect the costs incurred and, even where the CC does not find in favour of the appellant, they concern matters that are not entirely in the control of the party taking the point. For example, where a point is taken on the basis of a lack of transparency in Ofcom's model, it may take a certain amount of scrutiny to establish the correctness or otherwise of the approach taken; that the CC finds in favour of Ofcom does not necessarily invalidate the point taken in absence of a full appreciation of the Ofcom model.

39. Equally the CC's costs are strongly affected by the conduct of the parties, both in the way grounds of appeal are presented and in regard to whether they are pursued or 'developed' when it becomes apparent that the ground does not have merit. It is also clear that the resources available to appellants affect their ability to take more specific points in relation to financial modelling, including the evidence offered in support. Where an appellant has fewer resources the CC may have to do more by way of assessment, whether this cost should be borne by the appellant depends upon the circumstances of the appeal. Table F.3 below summarises the one-way costs options.

Table F.3: One-way costs options

	% of cost CC could recover	
	Calculated based on the proportion of unsuccessful points of appeal	**Calculated based on the proportion of unsuccessful points of appeal weighted by the importance of each point of appeal**
Mobile Call Termination	**93%**	**79%**
Cable and Wireless v Ofcom	**77%**	**63%**
Carphone Warehouse v Ofcom	**85%**	**74%**

c. Calculated at the discretion of the CC Panel

40. The CC and Ofcom would strongly prefer an approach that enables it to take account of the particular circumstances of the appeal including the general merit of a point, conduct of parties and clarity of the Ofcom decision and common assessment costs. Such an approach would enable the CC to ensure parties exercise discipline in relation to appeal points while not undermining access to legitimate appeal on the basis of costs.

41. Such an approach would also allow costs to be recovered from interveners, again taking account the particular circumstances of the appeal including the general merit of

a point, conduct of parties and clarity of the Ofcom decision and common assessment costs.

42. The best estimate of cost recovery in this estimate is the same as that in Option b – calculated based on the proportion of unsuccessful points of appeal weighted by the importance of each point of appeal. The estimated **additional cost to the appellant and interveners is therefore £1.2 million to £1.5 million per year**. However, by allowing the decision to be made at the discretion of the CC rather than by a determined formula, the CC will be able to better take into account the particular circumstances of the appeal.

43. Although only partial cost recovery is possible, the Government believe that this option best addresses the CC's funding gap while preserving the current Ofcom funding arrangements and ensuring that they are not at risk of being unable to fulfil their statutory obligations due to a lack of funds. At the same time, it does not alter the scope of the current appeal arrangements which are subject to a separate DCMS consultation.

Summary

44. One-way costs calculated at the discretion of the CC (or CMA in the future) is the preferred option as this best meets the policy objectives. It enables the CC to recover to some extent the cost it bears in hearing telecom price control appeals so that resource is not diverted from its other functions, while providing flexibility to allow the CC to take account of the particular circumstance of the appeal.

45. Recovering the cost the CC bears in hearing telecom price control appeals from telecom businesses is out of scope. According to the OIOO methodology fees and charges are out of scope except where they result from an expansion or reduction in the level of regulatory activity.

Annex G: Possible Process for Antitrust Cases under a Prosecutorial System

1. Bodies involved

1. The role of the Office of Fair Trading ('OFT') would fall to the new Competition and Markets Authority ('CMA'). The Competition Appeals Tribunal (CAT) would become a first instance decision-making (rather than an appellate) body on antitrust cases though it would retain appellate functions under sectoral regulation.[161] Appeals on points of law, and on penalties, would go to the Court of Appeal.

2. The investigative phase

2. Although there are policy arguments that a prosecutorial system would place the CMA in a stronger position vis—a -vis the parties and make it harder for the parties to 'game' the system, and that it militate against any tendency to over-analyse cases, it is worth noting that, formally speaking, moving to a prosecutorial system would not cause any fundamental change in the way cases are investigated prior to the issue of proceedings.

3. The CMA would investigate cases as it does now, and take these to the point of preparing a Statement of Case ('SoC').

4. Much of the work in preparing the SoC would be very similar to the work that would need to be done to prepare a statement of objections under the current procedure. Most of the differences are ones of formality and format.

5. The process for considering and accepting Commitments in appropriate cases could remain largely unchanged.

6. There may be some savings under a prosecutorial process in relation to the taking of witness evidence. There should be less need for an iterative process where new points made in witness interviews are put to witnesses to augment their earlier statements, because it would be easier for the CMA to select the best witness evidence to present at the trial rather than having to present and reach a definitive view on all points made by witnesses, and because points made by witnesses could be fully tested at the hearing stage of the CAT process. This would move the emphasis away from having to square all aspects of witness evidence towards selecting the best evidence for the case the CMA wishes to present.

7. The prosecutorial process would be initiated by the CMA filing the SoC at the CAT.

8. We envisage that the SoC would not need to be as fully worked up as a Statement of Objections or indeed as a Decision under the current administrative process. As to the likely content of the SoC, see further paragraphs 16 and 17 below.

9. However, prior to filing the SoC, the CMA would in all likelihood wish to test the SoC to some extent with the parties, at the very least in the form of a 'letter before action'.

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150. [161] It may make sense to rename the CAT the 'Competition Tribunal' or even the 'Competition Court'.

10. In appropriate cases the CMA could engage in settlement discussions at any stage. See further below.

2. 'Prosecution' before the CAT

11. In referring to a "prosecutorial" approach what is envisaged is not a direct analogue of criminal prosecution procedure – where it is often the case that allegations are made in outline form in a brief document setting out the charges to which the defendant pleads guilty or not guilty and where much of the detailed substance of the case for both sides emerges during the actual trial.

12. The procedure before the CAT could have many of the features of the present procedure before the CAT that promote tight case management. This in turn would reduce the risks and costs of moving to a new system.

13. In order to avoid ambushes at the final hearing, the first part of the proceedings would (as now) be a strictly controlled written phase where the case for each side would be set out in writing in detail.

14. Instead of the proceedings being commenced by a notice of appeal by an undertaking contesting an OFT decision, the trigger would the lodging by the CMA of a SoC.

15. The content of the SoC could be very similar to the Notice of Appeal that currently commences the appeal process before the CAT.[162]

16. The SoC would need to:

- Set out the facts
- Indicate what infringements of competition law are alleged
- Set out the CMA's arguments as to how those infringements arise from the facts, drawing on expert evidence where necessary;
- Indicate what kind of decision the CMA will invite the CAT to make upon the conclusion of the proceedings in respect of the alleged infringement;
- Indicate (by reference to published statutory CMA guidelines) the level of any penalty which the CMA would like the CAT to award, including any leniency arrangements provisionally agreed between the CMA and any parties;
- List the documents on which the CMA will rely.

[162] The CAT's rules of procedure state that, amongst other things, the Notice of Appeal should contain:

- A concise summary of the facts
- A summary of the grounds for contesting the OFT's decision
- A succinct presentation of the arguments supporting each of the grounds of appeal;
- The relief sought by the appellant
- A schedule listing all the documents annexed to the notice of appeal.

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The Rules also indicate that the Notice of Appeal should have annexed to it:
151. "as far as practicable a copy of every document on which the appellant relies, including the written statements of all witnesses of fact, or expert witnesses, if any"

17. It would make for a speedier CAT process if the CMA were also required at this point to annex copies of written statements from witnesses of fact and expert evidence. If not annexed to the SoC, they should be supplied as soon as possible thereafter.

18. Upon the lodging of the SoC, the CAT would serve a copy on the defendant. This would start the time running for access to file and filing of the Defence.

19. The CT's rules of procedure could provide default settings with regard to access to file and submission of the Defence.

20. In practice, the rules would allow the CAT to vary the default settings by way of an early case management conference at which the CAT would give directions for disclosure and access to the file and set a deadline for submission of the Defence.

21. There would be provision for a further exchange of written pleadings (including in appropriate cases a Reply to the Defence which would be prepared and filed by the CMA).

22. If, during the proceedings, the defendant produced evidence which had not been considered by the CMA in drafting its SoC then the CMA could apply to the CAT for permission to amend the SoC or deal with the matter in a Reply to the Defence, or it might trigger a settlement or discontinuance in order to save the expenditure of further effort and resource. This illustrates that, whereas in an administrative decision-making process, the OFT is tied to the full corners of its decision, in a prosecutorial system the CAT could take account of refinements (even substantive ones) in the case until quite a late stage in the procedure.

23. The subsequent process could be the subject of further directions by the CAT (dealing with matters such as summoning witnesses, expert evidence etc) to prepare the matter for the hearing.

3. Case management

24. The CAT already has very broad powers of case management. Little more would be needed and there would be little difference in the way the CAT exercised those powers.

4. The hearing

25. The format of the hearing would remain the same save that the CMA would open the hearing, rather than the defendant (appellant) as now.

26. The hearing itself may sometimes be more extensive than hearings under the current system because of the more frequent need to cross-examine witnesses.

27. But the process of pleadings ought to identify the points in dispute such that cross-examination of witnesses should not in most cases be much more extensive than under the current system. Parties will only need to address themselves to the points in dispute between them. There will be many matters on which there is no dispute and they do not need to be dealt with at the hearing or may be dealt with in submissions and without the need for oral evidence.

28. As noted at paragraph 6 above, the process of taking witness evidence in court, including hearing and cross examining witnesses ought to allow for some resource saving during the investigative phase as the CAT, rather than the CMA, will take the final decision on the balance of the evidence presented and the CMA will have been able to be more focused and selective during its investigation of the facts.

5. Level of fines

29. Under the current administrative system, the OFT arrives at the level of penalty, subject to the overall maximum set out in section 36(8) of the Competition Act 1998, in application of its statutory guidance on the appropriate amount of penalty.[163] The OFT is bound to have regard to its guidance under section 38(8) of the Competition Act 1998.[164]

30. If the OFT has agreed to offer full or partial immunity from fines it applies any reduction by way of an appropriate adjustment in line with its leniency and no action policy after the penalty calculation in application of steps 1 to 5 described in its statutory guidance on the appropriate amount of penalty. If the OFT has agreed to an Early Resolution or Fast Track settlement in return for admissions of liability by any party, it applies the agreed level of reduction *after* calculation of the penalty in accordance with steps 1 to 5 and *after* any reduction for leniency.[165]

31. When hearing appeals of the OFT's administrative decisions, the CAT is not bound by the OFT's guidance on the appropriate amount of penalty[166], or by its leniency or settlements policy, but it does rule on whether the OFT has properly applied its guidance on the appropriate amount of penalty and on the proportionality of fines more generally in appeals that raise challenges on these issues.[167]

32. In a prosecutorial model, to ensure workability of the CMA's leniency and no actions policy, and any settlements policy, the CMA would need to be able to offer sufficient comfort to parties that in the event that a case were filed before the CAT, the CMA would make recommendations as to the appropriate fining discounts to be awarded in application of these policies, and the CAT would follow its recommendations.

33. There would need to be a mechanism developed by the CAT to take account of the CMA's recommendations as to the appropriate level of discount in application of these policies. As a minimum, it would be appropriate to provide in law for the CAT to be bound to have regard to the statutory CMA's guidance on the appropriate amount of penalty.

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[163] OFT 423, December 2004 http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft423.pdf, published under section 38(1) of the Competition Act 1998. The Court of Appeal in *Argos* has confirmed that the OFT may depart from this guidance when necessary, if it has reasonable justification to do so.

[164] In *Argos Ltd and Littlewoods Ltd and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, the Court of Appeal stated at paragraph 161 that the language of section 38(8) does not bind the OFT to follow the Guidance in all respects in every case. However, in accordance with general public law principles, the OFT must give reasons for any significant departure from the Guidance.

152. [165] This approach was followed in the OFT's *Tobacco* decision and in its *Construction* decision (case numbers CE/2596-03 and CA98/02/2009

153. [166] As noted in the CAT's judgement in *Napp Pharmaceutical Holdings Limited v DGFT* [2002] CAT 1, at paragraphs 497 to 502.

154. [167] See, for example, the recent construction appeal judgments, including *GF Tomlinson Group Limited and others v OFT* [2011] CAT 7, *Durkan Holdings Limited and others v OFT* [2011] CAT 6, and *Kier Group plc and others v OFT* [2011] CAT 3.

34. An alternative option, which we do not advocate, would be for fining guidance to be set by an independent sentencing body, akin to the Sentencing Council, but with a membership that included professional representatives from the competition field. Though this would provide more safeguards in terms of judicial independence, it would add expense and there is some risk that such a body (notwithstanding that it could contain some competition practitioner expertise) would have less regard to the policy objectives behind the current guidance than would the OFT/CMA and Secretary of State. The current presumption against setting up new public bodies should also be borne in mind.

6. Discontinuance

35. If the CMA case turned out to be less well founded than at first thought it would be possible for the CMA to apply for permission to discontinue the case at any stage. A decision by the CAT to allow the CMA to discontinue would not be appealable to the Court of Appeal.

7. Costs

36. We expect there would be an explicit starting point that each side would bear its own costs, unless the interests of justice dictated otherwise. The CAT's rules could be revised so as to tighten its discretion on costs to make it clear that a costs order in either party's favour would only be available in very exceptional circumstances.

8. Appeals

37. Decisions of the CAT would be appealable on a point of law, and also on the level of penalty, to the Court of Appeal. This is the same as the current position in relation to CAT judgments on appeals from OFT decisions. Allowing appeals on penalties in a prosecutorial regime would also provide consistency with criminal proceedings in the Crown Court.

38. We think it may be worth introducing some parallels to the criminal regime in relation to the extent of the Court of Appeal's power of review in relation to fines. In criminal cases, where an appeal from the Crown Court is against sentence only, the Court of Appeal does not have the power to increase the sentence, and can only reduce it where it is shown to be 'wrong in principle' or 'manifestly excessive'. The prosecution can also refer serious cases to the Court of Appeal where they consider the Crown Court sentence passed was 'unduly lenient', in which case the sentence may be increased.

39. We would like to think about introducing a similar restriction on reduction of fines as that would disincentivise appeals seeking lower fines. The model on increasing sentences at the instance of the prosecutor could also provide a useful check to ensure that the CAT's fines are set at a level that provides sufficient deterrence.

9. Settlement and Leniency

40. At any stage prior to proceedings being issued by the CMA lodging the SoC at the CAT, the CMA could seek to settle the case, offering a settlement discount for doing so. The OFT is currently revising its settlement policy, and further revisions would be needed to reflect a move to a prosecutorial process.

41. Specific issues to address under a prosecutorial regime include:

- whether or not the parties would be required to admit liability in return for any settlement discount and
- what would be published to indicate the terms of any settlement to facilitate follow on actions for damages, and to provide transparency and establish precedent

42. A requirement to admit liability could disincentivise settlement, because it would increase parties' exposure to third party damages actions. In the US – where follow-on liability is much more of a threat because of the availability of treble damages for competition claims – settlements of civil actions do not involve an admission of liability by the parties, but this is consistent with the fact that the authorities cannot fine undertakings for civil infringements: they can only require behavioural changes.[168]

43. In the UK, where fines are available for administrative infringements, and third party actions are rarer and subject to lower damages awards, we may want third parties to be able to rely on settlement agreements as admissions of guilt in order to incentivise follow on actions to bolster deterrence.

44. Consistency with the CMA's (and the European Commission's) leniency policies would also be important. As currently framed the OFT's leniency and no action policy requires parties to have a 'genuine intention to confess' to infringement when they apply for leniency.[169] At EU level, the European Commission's Notice on immunity from fines and reduction of fines in cartel cases[170] provides that '[t]he fact that immunity or reduction in respect of fines is granted cannot protect an undertaking form the civil law consequences of its participation in an infringement of Article [101] EC.'

45. Accordingly, for consistency with applicable leniency policies, and as a stimulus to increased follow-on actions, we consider it would be appropriate for any settlement policy under a prosecutorial regime to require that undertakings must admit guilt in order to benefit from settlement discounts.[171]

46. In terms of what should be published by the CMA, the options we have considered are whether the CMA should publish the terms of the settlement or whether any settlement should be agreed by the CAT.

47. If the CMA published the settlement we consider it should publish a summary description of the infringement, the undertaking's involvement in it, and the terms of the settlement, together with brief reasons for the level of the settlement agreed.

48. If settlement agreements were subject to the permission of the CAT, we consider that the CMA should file the terms of any settlement with the CAT, including the same

155. [168] For example the Microsoft settlement document provided that it 'does not constitute any admission regarding any issue of law or fact.' A further difference in the US is that civil antitrust enforcement actions do not lead to fines, only to behavioural orders.
156. [169] See 'Leniency and no action' OFT's guidance note on the handling of applications, December 2008 paragraph 3.1 http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft803.pdf
157. [170] 2006/C298/11
158. [171] Measures to increase the scope for third party actions will be the subject of future policy work and this issue will need to be revisited then.

details described above, and the CAT's agreement would be signalled by its publishing the substantive terms of the settlement in a CAT Order.

49. On balance we prefer the CAT based settlement process on the basis that it would give settlements more legal force (breach of settlement terms would be actionable before the CAT). It would also give the CAT the opportunity to scrutinise the fairness of the settlement agreement, and provide a definite mechanism to ensure transparency of settlement agreements. A possible comparator is the mechanism for settling cases by way of court order under the previous Restrictive Trade Practices Act 1973 regime – though no penalties were payable under this regime.

50. To date, the existence of settlement on some aspects of the fine has not deterred some settling parties from appealing OFT's decisions.[172] It seems likely that a right to appeal would be needed in order to satisfy Article 6 ECHR requirements, whichever process is followed, though requiring the CAT to approve any settlement agreements could reduce the level of appeals, particularly if the Court of Appeal's jurisdiction to reduce the level of fine were limited as discussed at paragraph 39 above.

51. At the latest, prior to lodging the SoC, the CMA could send a warning letter to the undertaking(s) involved stating that if they did not settle on terms acceptable to the CMA then the CMA would proceed to lodge the SoC.

52. In appropriate cases – perhaps those that involve detailed assessment of complex economic data – as an inducement to settle the CMA might consider sending the draft SoC to the defendant.

53. After the issue of proceedings, it would still be possible for the parties to settle. It would make sense for such a settlement to be subject to the permission of the CAT, with the substantive terms of the settlement being published in a CAT Order.

10. Interim measures

54. The provisions for interim measures in section 35 of the Competition Act 1998 would be revised to allow the CMA to apply to the CAT for an interim measures order. It would be up to the defendant undertaking whether it wished to oppose the CMA's request for interim relief.

11. Warrants etc

55. Whether or not the prosecutorial process is adopted, it is proposed that the CAT be granted the power to issue any warrants that are necessary for enforcement of the civil antitrust prohibitions under the Competition Act 1998 in addition to the High Court.

56. Given that it has jurisdiction in Scotland, this power would, subject to the agreement of the Scottish executive, extend to Scotland, where the CAT could issue warrants in place of the Court of Session, where this process seemed more efficient.

57. Under a prosecutorial process, the CAT could also be given powers to resolve any procedural issues which arose in the course of the investigation and prior to the main

159. [172] See e.g. *Crest Nicholson plc v OFT* [2011] CAT 10, where, inter alia, Crest Nicholson appealed the OFT's award of a 15% reduction in respect of an admission of liability, and secured a revised award of 20% reduction from the CAT.

hearing, on application by the CMA or the parties, without the need to go to another court.

12. Resource and cost savings

58. Resource savings are likely to arise as compared with the current administrative process as follows:

- in relation to interviewing witnesses because it will not be necessary for the CMA fully to test with each significant witness points made by later witnesses
- in relation to the production of the SoC because the SoC will not need to be as fully fleshed out as a Statement of Objections under the administrative process
- in relation to the whole period between the issue of the first Statement of Objections and the publication of the final Decision under the current administrative process, including the issue of any supplementary Statement[s] of Objection because this will be replaced by the trial before the CT
- in relation to delays caused by procedural gaming by the parties, in particular as to access to file and other procedural points that arise after the issue of a Statement of Objections, because greater procedural discipline and the threat of contempt of court will be introduced by the court process
- in relation to added incentives on parties to settle cases. We have been told that incentives to settle under the current administrative regime are low, due to the high likelihood that aspects of the OFT's administrative decision will be overturned on appeal. Under a prosecutorial model, there will be significant savings in terms of time, expenditure, and reputation that we think would more frequently tip the balance in favour of settling before a case gets to trial. Some experienced commentators have pointed to the previous regime under the Restrictive Trade Practices Act 1973, where many cases settled without the need for court proceedings.

59. In addition a prosecutorial system would have a major benefit as a means of applying continuous pressure to a defendant to make admissions and come to an agreement on liability. That pressure can begin during the investigative phase and continue through the presentation of the SoC to the CT. Conducted skilfully this process can impose a considerable psychological burden on the defendant to settle rather than risk the expenditure of further resources and public exposure for an uncertain outcome.

60. There would be administrative cost efficiencies associated with these resource savings. In terms of cost to business, anecdotal evidence suggests that the legal costs and costs in management time of dealing with successive Statements of Objection under the current administrative regime can run to millions of pounds for a single large defendant. In the light of the high likelihood of appeal under the current regime, and multiplying this figure by the number of defendants in each case, and the number of decisions in each year, this would represent a substantial annual business saving. One experienced and authoritative practitioner has estimated that resource and cost savings could, in principle, be as much as 50%.

13. Transition

61. Elements to consider in relation to transition include:

- how long it might take to effect the transition from the current regime to a prosecutorial regime;
- how long it might take a prosecutorial process to bed down in terms of establishing a settled legal process following early challenges that are bound to occur; and
- how far managing the change in process would create extra work for the CMA and CAT that would lead to a temporary downturn in delivery of enforcement cases.

62. As to the first issue, we consider that existing cases that have already passed the Statement of Objections stage, and any other cases that are awaiting only a final decisional document as to case closure, settlement or accepting commitments would need to continue under the administrative regime. For cases pre Statement of Objections at the time any change come into force, and for all new cases, it ought to be possible to move these across to the prosecutorial process immediately. The number of cases to which any transitional provisions would need to apply is likely to be low: at the time of writing, according to its website, the OFT had only 4 cases to which a transitional regime might apply.[173] In the run-up to any change, the OFT and/or CMA could presumably manage its case processes to ensure that the number of transitional cases was as low as it could be without unduly holding up case throughput.

63. Accordingly, moving through transition to a point where all cases are operating under the prosecutorial process ought to be achievable in a relatively short period – say, 2 to 3 years.

64. In terms of the new process bedding in, in the beginning there may be a certain amount of trial and error as to how cases are managed and the shape and form of the various directions made by the CAT. However, a standard pattern ought to emerge fairly soon – particularly with regard to the arrangements for disclosure of the CMA's file.

65. There is plenty of experience to draw on under the current system where the CAT has evolved standard ways of dealing with the disclosure of confidential information. Some aspects of the current standard approach would almost certainly translate across to the new system.

66. The changes to the regime would principally be procedural. Whilst, in the early days, there may be some interlocutory decisions made by the CAT that were appealed to the Court of Appeal we would expect these to quickly fizzle out bearing in mind that the Court of Appeal is generally unreceptive to these types of appeal. Allowing for cases to begin to move through the new process, we would expect key issues to have been settled within the first 3 to 5 years of its operation.

67. As to the level of downturn in output, we would not expect that a move to a prosecutorial process would in itself be a significant resource drag on the OFT/CMA – as compared with the alternative of improving the current administrative process.

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160. [173] It was consulting on commitments in relation to an investigation in the private motor insurance sector, it had reached a decision, but not yet published the decision in relation to loans to professional service firms, it had issued an SO and was considering written representations in relation to passenger services on the London to Hong Kong route, and it was consulting on a provisional case closure decision in relation to the sports goods retail sector.

Although we might expect a short delay while the CMA geared up to prosecute its early cases, we also expect increased incentives to settle from the outset, such that there may not be any discernable downturn in output of concluded cases in the first year to two years, and numbers of cases could be expected to increase thereafter.

Annex H: Modelling Antitrust options 1 and 3

1. In this annex, we set out the results and analysis of models developed when considering the decision on the most appropriate system for processing antitrust cases.

Option 1: Administrative model

2. As mentioned in the evidence base, the baseline model for this assessment is complicated given that the past may not be an infallible indicator of the future. Therefore, we have modelled the scenarios which are:-
   - Upper Scenario: This is based on the average time to process cases from past data.
   - Lower scenario: based on improvements anticipated by OFT.
   - Best estimate scenario: based on a more conservative view on the ability to improve the regime.

3. It should also be noted that the models developed are sensitive to the assumptions, and thus we consider that they are helpful in pointing out the range of scenarios that might occur.

4. The models have been developed with the help of the OFT and a workshop where a number of QCs and other experts provided their views on the pros and cons of the model. They reflect the views of stakeholders, but in some areas there were conflicting views and the government has had to take a view on the arguments put forward.

5. There are roughly three stages[174] to an anti trust cases at the moment. These stages are:-
   - Stage 1: Investigation up to publication of a Statement of Objections (SO)
   - Stage 2: Investigation and representation on SO up to the publication of a Decision
   - Stage 3: Appeal to the CAT, either on substance and penalty or penalty only

6. This last stage does not necessarily happen every time, but appeals have certainly been a feature of the current system, and this is likely to continue to some degree as the OFT changes will not significantly alter the incentive for parties to challenge the OFT/CMAs decision[175]. In the long run this may change if parties have confidence in the case management of OFT or if the benefits from appealing are outweighed by the risk of losing and the costs associated with that.

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161. [174] There is also a fourth stage of an appeal to the Court of Appeal. However this has only occurred in two cases, and is not a regular feature of the system. Therefore, we do not consider this in the modelling.
162. [175] Since OFT commenced its settlement policy in late 2006, there have been 8 cases where parties have been found to have infringed competition law. Of these cases, 2 have been the subject of full appeals, one has been subject to a penalty appeal, 3 have been the subject of a full settlement and one has no penalty charged. The other case was subject to a hybrid settlement where the only party OFT did not reach a settlement with has threatened to appeal the decision, although at writing, this has not yet happened.

Case Flow

7. The first key component in the model is the flow of cases through the system. The assumptions made in this part are critical to the overall model and the model is very sensitive to changes in the case flow, such that an increase in settlements or an increase in appeals changes the costs quite significantly. This also needs to be borne in mind when looking at the prosecutorial model.

8. We have modelled the flow of 10 cases opened in a year, through the system, shown in table H1 below. The number of cases opened per year, on average has been significantly below 10. However, now that a number of long running legacy cases are no longer within the OFT, together with a renewed prioritisation of antitrust cases, we would expect that there will be some additional resources to start more cases than in the past.

Table H1: Flow of 10 cases through current system scenarios

	SO		Decision		CAT Appeals	
	Cases Closed	**Published SO**	**Cases Settled**	**Decisions (without settlement)**	**Substance / Penalty**	**Penalty only**
Lower Scenario	**5**	**5**	**3**	**2**	**1**	**1**
Best estimate	**5**	**5**	**3**	**2**	**1**	**1**
Upper Scenario	**5**	**5**	**2**	**3**	**2**	**1**

9. In terms of cases closed before the SO is published, about 45% of OFT cases have been closed without further action being taken. In the model with 10 cases at the start, we assume that this wouldn't change much between the different scenarios, so 5 cases would be closed pre SO and 5 cases would be pursued to a published SO.

10. In terms of settled cases (through early resolution), there have been a number of cases that have settled since OFT introduced its early resolution policy in 2006. Early resolution agreements have been entered into pre-SO in relation to RBS-Barclays, Virgin-Cathay and BA-Virgin and post-SO in cases such as Tobacco, Dairy, Schools and Reckitt Benckiser. However, in some of these cases, it has not been across the entirety of the cases, and the OFT cannot realise the full benefit of settlement in terms of bringing the case to an end uncontested. However, there will be resource savings as a consequence of some parties entering into ER[176].

163. [176] In the models, we have assumed that settled cases are ones that settle in full. However, in reality, there have been incidences where there have been settlements with only some of the parties. The models are to give a picture of changes rather than being definitive of the precise costs.

11. The lower scenario acknowledges that 87% of parties either entered early resolution and/or have been leniency parties since OFT introduced its settlement policy. However the upper scenario and best estimate also accounts for the fact that in some of these cases, not all parties settled and one even appealed to the CAT on substance, and some of the leniency parties have appealed the penalties.

12. In terms of appeals, since 2006, every case where there has been a penalty attached and not all parties have been subject to early resolution, has been appealed to the CAT either on substance/penalty or the penalty only. Of the cases that the CAT have received, historically, most have been on substance and penalty with only CRF, Makers, Achilles and DQS dealing exclusively with penalty issues, all of theses cases being since 2006. This is why the models assume that under the different scenarios most, if not all cases where there is an infringement decision, will also have an appeal.

Timescales

13. In these models, we have set out the expected timescales for the three different scenarios, presented in table H2 below

Table H2: Length of time taken on anti trust cases in current model (Months)

	SO	**Decision**	**CAT Appeal** [177]	Total	Average time per case
Lower Scenario	**14**	**13**	**16**	43	18.8
Best Estimate	**18**	**14**	**16**	48	22.6
Upper Scenario	**25**	**18**	**18**	61	30.7

14. The Upper Scenario is based on the historical average performance of the system. The average length of time from investigation initiation to publishing an SO has been 25 months, the average time to a decision has been 18 months, and the time for an appeal before the CAT has been 18 months. However, there are reasons to believe historic cases are not a good indicator of future performance, as OFT has learnt by doing. Thus this scenario as a baseline should be treated with some caution.

15. In the lower scenario, current case performance is taken into account, even though not all of this has come through the system, so cannot be reflected in available data. None the less, this shows significant improvement over the historical picture. There is clearly some level of uncertainty over this as a baseline, but is provided to show the potential range of scenarios

164. [177] This is referring to substance appeals. There is also the possibility of appeals on the level of penalty only. This is built into the model, and these appeals are quicker, but for presentational simplicity, we have just considered the substance appeals here.

16. Finally, the best estimate reflects a step change improvement where the 18 months to SO represent a significant improvement from the past, but is at the lower end of the anticipated scenarios OFT considered for improving the current model. As such, it can be seen as allowing for optimism bias when considering the best estimate.

17. The average time per case represents the average time to process a case, whether it closes, settles, a decision is not appealed or is subject to an appeal. This average gives an indication of the speed of each element of the process, rather than giving an indication on the time taken for any individual case. This will clearly be sensitive to the number of appeals and the number of settlements.

Costs per case

18. For the OFT/CMA, we have assumed that the resources allocated per case per month will be similar to now, although there may be more senior legal resource requirements and more external costs such as counsel and expert advisors. The costs of the authority, however, are not a major sensitivity. Changes to the costs of the authority depend, to a limited extent on the length of cases, and to a more significant extent on the number of cases, including number of settlements and appeals.

19. There are different costs for different parts of the cases depending on length, and resource intensity required. Thus the model relies on multiplying the number of cases at each stage by the cost per case of each stage. Table H3 below presents the costs of each stage under each scenario.

Table H3: Authority costs for each stage[178]

	SO		Decision		CAT Appeals	
	Cases Closed	**Published SO**	**Cases Settled**	**Decisions (without settlement)**	**Substance / Penalty**	**Penalty only**
Lower Scenario	**£0.3m**	**£0.6m**	**£0.4m**	**£0.5m**	**£0.7m**	**£0.5m**
Best estimate	**£0.3m**	**£0.6m**	**£0.4m**	**£0.5m**	**£0.7m**	**£0.5m**
Upper Scenario	**£0.3m**	**£0.7m**	**£0.4m**	**£0.6m**	**£0.8m**	**£0.6m**

20. As well as authority costs, there are also estimates of business costs per case. These clearly depend on the cost per party and the number of parties involved in the case.

165. [178] Differences in per case costs are primarily from case length. Therefore, there are differences between the lower and best estimate scenarios but this is not indicated in the tables due to rounding.

[179], and when there are appeals, only half of those parties appeal[180]. The costs per party have been developed in conjunction with feedback from stakeholders. Very little data has been provided to us so we have had to base assumptions as best as possible on the information and opinions given. They are outlined in table H4 below

Table H4: Costs per party in each stage

	SO		Decision		CAT Appeals	
	Cases Closed	Published SO	Cases Settled	Decisions (without settlement)	Substance/ Penalty	Penalty only
Lower Scenario	£0.2m	£0.4m	£0.4m	£0.4m	£0.5m	£0.2m
Best estimate	£0.3m	£0.6m	£0.6m	£0.8m	£1m	£0.5m
Upper Scenario	£0.4m	£0.8m	£0.8m	£1.25m	£2.5m	£1m

21. Stakeholders have said that the costs pre and post SO can be similar and can be resource intensive even when settling. What was clear in discussions with stakeholders is that costs could vary greatly between parties, depending on their specific situation. Indeed, even the upper scenario of the costs may be exceeded in real life by some parties. However, this will not be true for all parties in a case, and as best as possible, we have tried to model the costs per party in a consistent way, noting that there are management as well as legal costs in engaging with a anti trust case.

22. Finally, we set out the Court's per case costs. For the court costs, we do not vary between the various scenarios, and have estimated them to be £300k for a substance appeal and £150k for a penalty appeal. The cost of the CAT at the moment is approximately £4m in total, although around half the cost is for accommodation, which is underutilised[181]. Based on past cases, we have estimated that £750k non accommodation cost is used on antitrust cases[182]. The costs of the court in comparison to the whole system is quite small, so even if theses costs varied, they would not lead to a great deal more cost to the system as a whole.

Summary of costs

166. [179] This assumption of 6 parties per case is used consistently through the models. The number of parties per case can vary widely but this takes a consistent approach as there would not be any expected differences between the models.
167. [180] Looking at past cases, very rarely will all parties appeal a decision. In the recent CRF and Tobacco cases, half the parties appealed to the CAT. In the Construction case, a significant number of parties appealed, but this was less than half the parties as there were over 100 parties in the case.
168. [181] Thus increasing the number of cases would not increase the accommodation costs of CAT.
169. [182] The remainder is spent on other appeals made to CAT.

23. Based on the components outlined above, the model estimates the costs of the current system under the three different scenarios, which are shown in table H5 below

Table H5: Summary of costs under the different baseline scenarios

	OFT/CMA	Business	Court	**Total Cost**
Low scenario	£6.5m	£32.1m	£ 0.5m	**£39.1m**
Best estimate	£7.6m	£51.9m	£0.5m	**£60.0m**
High scenario	£9.5m	£86.1m	£0.75m	**£96.3m**

24. The costs can vary to quite a large extent between the different scenarios and the biggest cost in each is clearly the business costs. This is influenced to some extent by the costs per party, but to a larger extent on the number of settlements and the number of appeals.

Option 3 : Prosecutorial model

25. As outlined in the baseline above, we need understand that the models outlined below give an indication of how savings may be made, but are clearly sensitive to the assumptions.

26. In a prosecutorial model, there are roughly two stages, although like the administrative model, there is the possibility of further appeals to the Court of Appeal. These stages are

    a. Stage 1: Investigation of case up to producing a Statement of Case (SoC) to the court
    b. Stage 2: The case is heard before court through written and oral statements leading to a decision by the court

27. The case may also be appealed to the Court of Appeal, although only on points of law and on the level of penalty. However, given that the court process gives the opportunity for parties to make these representations on the level of penalty, there should be less inclination to appeal (although we may expect some appeals while the system is bedding down, and in the upper scenario).

Case Flow

28. Like for option 1, we have modelled the flow of 10 cases opened in a year, through the system, shown in table H6 below. Whether more or less cases could be opened in a prosecutorial model will depend on the speed and the cost of the process. Our starting assumption for this model is that it should be similar to the administrative model. We

also model what may happen in a transition phase, as this plays a key role in the analysis.

Table H6: Flow of 10 cases through Prosecutorial model scenarios

	SOC		Decision		COA Appeals	
	Cases Closed	Published SOC	Cases Settled	CAT Decision	Point of Law/ Penalty	Penalty only
Transition	**5**	**5**	**2**	**3**	**1**	**0**
Lower Scenario	**5**	**5**	**4**	**1**	**0**	**0**
Best estimate	**5**	**5**	**3**	**2**	**0**	**0**
Upper Scenario	**5**	**5**	**3**	**2**	**0**	**1**

29. In terms of cases closed before the SOC is published, we would expect this to be similar to the current model, where about 45% of OFT cases have been closed without further action being taken. Again we assume that this wouldn't change significantly between the different scenarios, so we assume 5 cases would be closed pre SOC and 5 cases would be pursued to a published SOC.

30. In terms of settlements, as stakeholders have clearly expressed the view that there will be increased pressure to settle under a prosecutorial model, we have estimated that there will be increased settlements compared to the administrative model in the best estimate scenario. It is worth noting, however, that increased settlements may not lead to less cases going through the whole system as there may be increased hybrid settlements where some of the parties settle and some do not. In transition, we would expect there to still be an increased pressure to settle, but this will be tempered by parties wanting to test the new system, so we may expect similar numbers of overall settlements in transition as in the current administrative model[183].

31. Finally, in terms of appeals to the Court of Appeal, although for reasons already stated in paragraph **Error! Reference source not found.**, we do not expect this would be a feature of the new system, there may be times in the transition phase that parties would want to test out the new system, although they would need to seek permission of the court to appeal. Conservatively, we have allowed there to be appeals in the model transition phase and also in the upper scenario for penalties.

Timescales

32. In these models, we have set out the expected timescales for the three different scenarios, presented in table H7 below

170. [183] Hybrid settlements will be shown in the business costs below.

Table H7: Length of time taken on anti trust cases in prosecutorial model (Months)

	SOC	Decision	CoA appeal	Total	Average time per case
Transition	**22**	**18**	**12**	52	24.6
Lower Scenario	**16**	**16**	**n/a**	32	15
Best Estimate	**19**	**18**	**n/a**	37	17.9
Upper Scenario	**22**	**20**	**12**	54	24.2

33. The transition scenario and upper scenario reflect some of the difficulties that could be encountered, such as taking longer to get to a SOC because of familiarisation with new procedures, or early losses mean that more time is required to bring a case to court.

34. In the lower scenario, anticipated improvements in the administrative model pre SO are carried through and anticipated in the prosecutorial model. This assumption builds on the fact that the amount of work to reach an SO and SoC are similar although differ in presentation and there may need to be a higher level of certainty for the authority before it brings a case to court. Again the caveats are that there is clearly some level of uncertainty over this scenario, but it's provided to show the potential range of scenarios. Finally, the best estimate reflects a step change improvement, similar to some of the improvements anticipated in the administrative system.

35. The average time per case represents the average time to process a case, whether it closes, settles, a decision is unchallenged or is subject to an appeal. This average gives an indication of the speed of each element of the process, rather than giving an indication on the time taken for any individual case. This will clearly be sensitive to the number of appeals and the number of settlements. In table H8 below we show the improvement in timescales from moving to a prosecutorial model[184].

Table H8: Difference in length of time taken in prosecutorial model vs. administrative model (Months)

	SOC	Decision	Appeal	Total	Average time per case
Transition	**-4**	**-4**	**4**	-4	-2.0
Lower Scenario	**2**	**-2**	**16**	16	7.6
Best Estimate	**-1**	**-4**	**16**	11	4.7
Upper Scenario	**-4**	**-6**	**4**	-6	-1.6

171. [184] Calculated from Tables H2 and H7 above. In this context, negative numbers show a slower process.

36. In this case we have compared the best estimate scenario in the do nothing option as a baseline. In these models, the lower and best estimate scenarios show there are expected to be time savings. This is due to the reduction in one significant part of the process, namely appeals. The average time per case also indicates savings in the prosecutorial system.

37. The average time per case is particularly susceptible to the mix of cases going through the system, especially the number of settlements and appeals. Therefore, we should not attach too much importance to the precise numbers, but use it as a signal that we would expect there to be some time savings in a prosecutorial model.

Costs per case

38. For the OFT/CMA, we have assumed that the resources allocated per case per month will be similar to the administrative model, although there will be more external costs such as counsel and expert advisors. Again, the costs of the authority, however, are not a major sensitivity. Changes to the costs of the authority depend, to a limited extent on the length of cases, and to a more significant extent on the number of cases, including number of settlements and appeals.

39. There are different costs for different parts of the cases depending on length, and resource intensity required. Thus the model relies on multiplying the number of cases at each stage by the cost per case of each stage. Table H9 below presents the costs of each stage under each scenario.

Table H9: Authority costs for each stage

	SOC		Decision		CoA Appeals	
	Cases Closed	**Published SOC**	**Cases Settled**	**CAT Decision**	**PoL/ Penalty**	**Penalty only**
Transition	**£0.3m**	**£0.8m**	**£0.3m**	**£0.8m**	**£0.6m**	**n/a**
Lower Scenario	**£0.2m**	**£0.6m**	**£0.2m**	**£0.5m**	**n/a**	**n/a**
Best estimate	**£0.2m**	**£0.7m**	**£0.2m**	**£0.6m**	**n/a**	**n/a**
Upper Scenario	**£0.3m**	**£0.9m**	**£0.4m**	**£1.1m**	**n/a**	**£0.6m**

40. As well as authority costs, there are also estimates of business costs per case. Again these depend on the cost per party and the number of parties involved in the case. For the purposes of this assessment, we have assumed 6 parties per case[185], but when the case goes to court, half of these parties will have settled[186]. With appeals, we assume that there will be two parties appeal[187]. The costs per party have been developed in conjunction with stakeholders, although it is difficult to predict exactly what the new system will look like. The assumptions on cost have tried to make sure that the relative

172. [185] See footnote 179
173. [186] This is to show the increased settlements that are anticipated in the prosecutorial model.
174. [187] As there would only be 3 parties in court, to be consistent with assumptions in option 1, half of the parties would be 1.5. Conservatively we have used 2 parties.

costs between the stages are of the right magnitude. They are outlined in table H10 below

Table H10: Costs per party in each stage

	SOC		Decision		CoA Appeals	
	Cases Closed	Published SOC	Cases Settled	Decision	PoL	Penalty only
Transition	**£0.3m**	**£0.6m**	**£0.6m**	**£2m**	**£0.5m**	**£0.5m**
Lower Scenario	**£0.2m**	**£0.4m**	**£0.4m**	**£1m**	**n/a**	**n/a**
Best estimate	**£0.3m**	**£0.6m**	**£0.6m**	**£1.25m**	**n/a**	**n/a**
Upper Scenario	**£0.4m**	**£0.8m**	**£0.8m**	**£3m**	**n/a**	**£1m**

41. Again costs could vary greatly between parties, depending on their specific situation. Indeed, even the upper scenario of the costs may be exceeded in reality by some parties. However, this will not be true for all parties in a case, and as best as possible, we have tried to model the costs per party in a consistent way, noting that there are management as well as legal costs in engaging with a anti trust case.

42. We also need to set out the costs of the CAT, who will hear the cases and, the Court of Appeal (CoA) costs. The CAT costs are assumed to rise from the costs under the administrative system, acknowledging that the breadth of cases will be wider. We therefore assume for the purposes of the model that costs per case that is fully heard before the court will be £400k and £100k for cases that are settled and need court approval. For the CoA appeal we have assumed the costs will be similar whether it is on a Point of Law or penalty, at £150k for each appeal. We have not varied these costs across the different scenarios, but rather let the case mix provide the sensitivity to the models.

Summary of costs

43. Based on the assumptions set out above, the model estimates the costs of the prosecutorial model under transition and the three different scenarios, which are shown in table H11 below

Table H11: Summary of costs under the different baseline scenarios

	OFT/CMA	Business	Courts	**Total Cost**
Transition	£10.3m	£62.8m	£ 1.6m	**£74.7m**
Low scenario	£5m	£31.8m	£0.8m	**£37.6m**
Best estimate	£6.2m	£ 48.9m	£1.1m	**£56.2m**
High scenario	£10.4m	£ 75.2m	£1.1m	**£86.7m**

44. As under the baseline, the costs can vary to quite a large extent between the different scenarios and the biggest cost in each are clearly the costs to business. This is influenced to some extent by the costs per party, but to a larger extent on the number of settlements and the number of appeals.

Comparison with baseline

45. When we compare the costs in option 3 with the baseline, as before, we should be careful given the sensitivity of the models to the assumptions. Nevertheless, they can provide an insight into the magnitude of costs between the regimes.

46. Table H12 below sets out the difference between the administrative model (best estimate) and the various scenarios in the prosecutorial model, where positive numbers show where the prosecutorial model is cheaper than the administrative model.

Table H12: Comparison of costs between the prosecutorial and administrative models

	OFT/CMA	Business	Courts	**Total Cost**
Transition	-£2.6m	-£10.9m	-£1.1m	-£14.6m
Low scenario	£2.6m	£20.1m	-£0.4m	£22.4m
Best estimate	£1.5m	£3m	-£0.7m	£3.8m
High scenario	-£2.7m	-£23.3m	-£0.7m	-£26.7m

47. From observing the results, there appears to be some scope for savings, although that will depend to a large extent on our confidence of there being an increase in settlements and very few appeals. There is also some indication that there will be significant transition costs.

48. The length of the transition period will also be important. Even if the transition period was only for two years as the authority and businesses adjusted to the new system, given the length of time for cases to go through the system, it may be 5 years before the system would be in steady state. We cannot be certain about the size of the transition cost, but theses figures would indicate the net present value would be negative over a 10 year assessment period. Again, whilst not letting the figures from

the model be definitive, they do indicate that the net benefits would not accrue for a significant period of time.

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