



A Competition Regime for Growth: A Consultation on Options for Reform

Response by the Competition Commission

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Summary

The Competition Commission (CC) wholeheartedly supports the Government's aim of enhancing the world class calibre of the UK's competition regime. A strong competition regime helps ensure that firms compete to deliver choice and good-value products and services for consumers while encouraging innovation and productivity improvement, thereby supporting economic growth.

A merged competition authority with a clear focus on competition issues can:

- bring increased clarity and authority to competition policy and advocacy;
- deploy skilled staff flexibly across the full range of competition tools; and
- streamline and speed up processes to reduce burdens on business.

But the merger must preserve the characteristics of the existing system that have given it its high reputation and credibility with business; in particular:

- clear separation between phase 1 screening of cases (including case selection) and thorough and objective phase 2 investigation and decision-taking;
- the use of panels of independent expert members to conduct the phase 2 investigation; and
- fair and transparent processes governed by statutory timescales.

Together, these institutional design features ensure that the most important issues get the appropriate level of scrutiny and that the decisions of the authority are based on the evidence in each case, on sound economic analysis and on processes that withstand challenge.

Two substantial advances that could come from reform are:

- extending the system of phase 2 decision-making by member panels to antitrust cases, for which it is well suited; and
- extending statutory timetables more widely, particularly to include phase 1 of merger and market investigations, and antitrust cases.

A merged authority needs a system of governance that preserves the separation between phase 1 and phase 2 decision-making and between strategic oversight and decisions on cases.

An authority built on these principles and focused on promoting competition will be able to evolve appropriate rules and processes, capture the benefits of merger without losing the strengths of the existing system and further enhance the effectiveness and world leading reputation of the UK competition regime.

Introduction

A world class competition regime requires institutions which make decisions that:

- rest on sound economic analysis; and
- are reached using fair, transparent processes.

Careful analysis and transparent processes allow competition agencies to reach sound decisions which businesses and consumers can be confident are just, credible and well founded. A body of sound decisions provides clarity and predictability for businesses about how the law will be interpreted and enforced.

The UK regime and its institutions are well regarded, but there is always room for improvement to ensure that the practical application of competition policy delivers its full potential for the UK economy.

To achieve benefits from reform, **the characteristics of the current system which have generated its high reputation need to be built upon in the new regime.** These characteristics are:

- **the separation between phase 1 and phase 2 decision-taking;**
- **the use of panels of independent expert members to conduct phase 2 scrutiny;** and
- **fair and transparent processes governed by statutory timescales.**

These characteristics and a governance structure for a merged competition authority need to be reflected in the legislation establishing the regime. An authority designed on these principles and focused on promoting competition can then develop appropriate rules and processes for its work.

Competition inquiries naturally have two phases, an initial phase 1 screen for a wide range of cases and a phase 2 investigation for the smaller number of cases which merit detailed scrutiny and may lead to significant economic intervention. A merged authority will have the incentive to ensure that only the cases that meet the thresholds for phase 2 investigation receive it. The thorough, objective, fact-based scrutiny involved in phase 2 investigations can consume significant time and resource, for the authority and for businesses. To avoid imposing unwarranted burdens on business, they need to be confined to the most economically or legally significant cases.

Separation of decision-making between phase 1 and phase 2 avoids both the risk that decisions at phase 2 simply confirm the initial decision to investigate and the charge that a single body is both prosecutor and judge. While a merged authority can minimize duplication of staff work in the two phases, it must not jeopardize the benefits of a two-phase system by compromising this separation.

Currently the CC carries out phase 2 investigations into mergers and markets, using **panels of independent expert members.** This is acknowledged as an effective model which provides expertise, balance and objectivity. The CC has recruited a wide pool of high-calibre members, with backgrounds in economics and accountancy, in law and in business. Panel members, most of whom are part time and make themselves available as needed, direct the course of phase 2 investigations before making decisions. They are paid modest fees (well below what most could earn elsewhere). And since most have significant other interests and sources of income, and are appointed for a fixed term, they are not susceptible to political or institutional pressure.

Decisions made by CC panels have seldom been successfully challenged; the few successful challenges have not materially altered the CC's conclusions or remedies.

The UK's **antitrust** regime has a less clear-cut distinction between phase 1 and phase 2 and has been subject to criticism in recent years. Many of the CC's members have extensive antitrust experience, both in the UK and elsewhere. We strongly believe that the same degree of separation between phase 1 and phase 2 as applies to mergers and markets should be applied to civil antitrust cases, and that scrutiny of civil antitrust phase 2 cases should be undertaken by member panels.

Phase 2 merger and market inquiries run to **statutory timescales**, which encourage efficiency and focus on important issues, provide predictability for businesses which limits burdens on them, and ensure timely delivery of outputs. Statutory timescales should be extended more widely, to antitrust cases and to phase 1 activity, backed up by information-gathering powers and stop-the-clock measures.

CC inquiries are also run on principles of **transparency**. Parties know who the decision-makers are, they have direct access to members (who are involved throughout) at specified points in the inquiry, and they can see and challenge the CC's evidence and reasoning, including the case against them. They know early on which issues the CC is pursuing, so they can focus on addressing them. The new authority could enhance transparency in antitrust enforcement.

These disciplines make it more likely that correct decisions will be made as quickly and efficiently as is consistent with rigour and fairness.

Panels have also proved their value in handling **regulatory appeals**. The expertise in economic analysis, and the suitably qualified pool of members that the CC has developed, make the new authority the natural home for these functions. There is no reason to change these arrangements and the new authority can continue to adapt its approach and processes, and tailor panel membership, to the demands of particular cases.

The **governance** of the new authority needs to ensure appropriate accountability, separation of powers and checks and balances in decision-making. Phase 2 decision-makers cannot have any say in the decision to refer individual cases. But they must have a voice in the governance of the authority through representation on the supervisory board. Conversely, the board must be accountable for the work of the authority but must not be involved in decisions about individual cases at either phase. The main roles of the board should be governance, policy and strategic direction, and establishing a framework which ensures that cases are conducted in line with its rules and guidance.

A new authority designed on these lines will be able to reach well-founded decisions based on good economic analysis and balanced assessment of the facts, through a demonstrably fair process. It would bring the timeliness, robustness and credibility of member panel decision-making to all kinds of competition work. It would be able to deploy staff flexibly across phase 1 and phase 2 activities and different competition tools in response to varying workloads, increasing the efficiency of the regime. And it would be able to use those tools judiciously to improve the competitiveness of markets and thus promote innovation, productivity improvement and economic growth.

Why reform the competition regime?

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

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

The CC supports the Government's aim of enhancing the world class calibre of the UK's competition regime. The principles underlying any reforms should be:

- to preserve and build on the elements of the current system that give it its world class reputation for rigour and fairness; and
- to capture the benefits of the merger of competition authorities, without losing the valuable components of the current regime.

The CC believes there is scope to improve in all three ways cited by the Government:

- *Robustness of decision-making.* The current two-phase inquiry process should be maintained for mergers, markets and regulatory appeals, and extended to scrutiny of antitrust cases. This process is characterized by decisions being made by panels of experienced, expert members, independent of Ministers and the phase 1 decision-maker. Members have an investigatory role and are involved throughout the inquiry. The inquiry is conducted according to fair and efficient processes including statutory timescales and a transparent approach. Those processes, and the expertise and independence of panel members, makes it possible for them to apply the far-reaching remedies available at phase 2. An authority equipped with such a proven decision-making tool should use it to address the criticism that has been levelled at antitrust enforcement.
- *Taking forward the right cases.* An authority with a clear focus on competition and a full range of competition tools at its disposal would be better equipped to apply the right competition tools to the right cases and pursue them energetically. That means applying rigorous and detailed phase 2 scrutiny to significant mergers and markets and to regulatory appeals, and extending similar approaches to the most significant antitrust cases to improve the effectiveness of the antitrust regime and business confidence in it. It also implies making full use of the market investigation regime to address the most complex and intractable competition issues in significant markets.
- *Improving speed and predictability for business.* Statutory timetables can be extended to phase 1, antitrust and remedy implementation activity where they do not currently apply. The application of principles of transparency can likewise be extended. And a larger pool of expert staff can be more efficiently deployed than is possible in two authorities. All these developments can help to ensure that decisions are made as quickly and efficiently as is consistent with rigour and fairness.

These reforms would enable a new authority to reach well-founded decisions through a demonstrably fair process. They would limit burdens on business by ensuring that the most thorough and rigorous processes are applied to the important cases that merit them, and are progressed efficiently, subject to statutory timetables. They would bring the robustness and credibility of member-led decision-making to all kinds of competition work. And they would enable the new authority to use the most powerful competition tools judiciously to improve the competitiveness of markets and thus promote innovation, productivity improvement and economic growth.

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

The CC believes that, implemented in the right way, the creation of a single Competition and Markets Authority (CMA) can enhance the UK competition system. While many of the objectives Ministers seek could be achieved without a merger of authorities, a single CMA will:

- bring increased clarity and authority to competition policy and advocacy;
- be able to deploy a larger pool of expert staff flexibly across the full range of competition tools;
- have better incentives to select the right competition tools for the right cases;
- be able to streamline and speed up processes to reduce burdens on business; and
- be able to apply good ideas and practices from both former organizations across the competition landscape, thus, for example, addressing the criticisms that have been levelled at antitrust enforcement.

All these developments should increase the efficiency with which the highest-impact cases can be pursued using the right competition tool and reduce burdens on business by increasing the overall speed of throughput of cases, without compromising the rigour of analysis and judgement that ensures the right decisions.

This can be best achieved by the new authority applying principles of triage rigorously to mergers and markets. A swift initial scrutiny can enable the authority to judge which is likely to be the best tool to use; for example, a market issue might be best tackled through Competition Act enforcement, a market study or a market investigation reference. Some further work might then be necessary to ensure that the relevant statutory test is met before launching the appropriate action, but the presumption should be that the initial screen uses little time and few resources, which should be devoted to the markets and the issues which most merit them. Similarly, initial scrutiny can enable the authority to identify the most potentially problematic mergers meriting further investigation and/or swift implementation of remedies.

The creation of a new authority inevitably involves risks. Single authorities operate in most other jurisdictions worldwide. The UK has escaped many of the criticisms that have been levelled at them of inadequate separation of powers and roles or of risks of confirmation bias. In order to maintain its reputation and its authority, the CMA needs to be structured to maintain:

- its independence from Ministers;
- the separation between corporate governance and strategy on the one hand and initiation of and decision-making on cases on the other; and
- the separation between phase 1 and phase 2 decision-making, and thus the independence of phase 2 decision-makers.

The transition to a new CMA entails both direct costs and the risks of distracting, or being unable to retain, the staff of the existing authorities through a period of uncertainty and transition. These will need to be managed carefully.

The CC has a good record of improving the efficiency of its operations and is seeking to improve further. Though there may be some synergies available from better deployment of expert staff in a merged authority, the CC does not believe that they are substantial. Decisions about the merger of the authorities should be based on enhancing its effectiveness. Seeking significant additional savings risks compromising the quality of the work and decision-making of the CMA.

A stronger markets regime

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

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

The CC welcomes the Government's recognition that the markets regime is one of the key strengths of the UK competition regime and shares the Government's enthusiasm for finding ways to strengthen the markets regime and ensure it is properly utilized as we move to a single CMA.

Market investigations need to be used where there are good grounds to believe that competition is not delivering benefits to consumers in significant markets; there are important issues in those markets that a thorough investigation can assess and if necessary resolve.

Enabling investigations into practices across markets

The CC broadly supports this proposal. It has the potential to provide the CMA with an additional tool to promote competition across markets and proactively investigate problematic behaviour across the economy. The sort of issues for which it might be most likely to be useful might be:

- Features that do not fit neatly within only one market, for example collective licensing of public performance and broadcasting rights in sound recordings.
- Recurring sources of consumer complaint or identified detriment, including situations where similar economic characteristics have the potential to affect competition adversely across multiple, distinct markets. Under the Fair Trading Act 1973 (the FTA) the Monopolies and Mergers Commission (MMC) investigated discounts to retailers, full-line forcing and tie-in sales (now offences under the Competition Act 1998 when practised by a dominant company). More recently, issues like early settlement terms (in Payment Protection Insurance (PPI) and Home Credit) and the sale of secondary products at particular points of sale (eg in PPI and Extended Warranties) have arisen in more than one CC market investigation. There may be some synergies in investigating the same practices across multiple markets. And the provision might also enable the CMA to target its investigation on to these specific practices rather than review the market as a whole.

The proposal would combine the OFT's current ability to conduct 'horizontal' market studies at phase 1 with the investigatory and remedial powers currently available at phase 2; thus it completes the set of competition tools available to a merged authority.

By adding a second phase to such studies, the CMA would be able to follow through its initial screen by looking in depth at those practices where intervention might have the greatest impact.

The CMA would need to consider what processes to use to carry out such investigations. They would need to work somewhat differently from existing market investigations and the CMA would need to beware of spreading itself too widely (which might impose unwarranted burdens on businesses peripherally involved) or too thinly (which might dissipate effort).

Powers to report on public interest issues

The CC broadly supports this proposal. It brings the markets regime in line with the merger regime, where the CC has investigated public interest issues, for example media plurality in the Sky/ITV merger case.

However, there are risks associated with the CMA being asked to consider more public interest cases:

- the CMA could be perceived to be politicized if its independence of Government could be questioned or if it came into direct conflict with Government; and

- its competition focus might be diluted if it needed to spend significant time in investigations on inevitably high-profile public interest issues.

Therefore, as with the merger regime, the public interest issues should be tightly defined in legislation (with formal mechanisms for the Government to amend the list).

Extending the supercomplaint system to SME bodies

The CC believes that this proposal could help the CMA identify markets for investigation and build broadly-based support for the regime.

However, there are some risks associated with it which would need to be managed:

- supercomplaints require the authority to resource an investigation to a short timescale, inevitably drawing resources from other activity and limiting the CMA's freedom to determine its own priorities;
- as with current supercomplainants (ie consumer groups), the relevant SME bodies may be especially interested in particular markets, which could lead to missed issues in other markets; and
- it will be important to guard against self-interested supercomplaints from bodies representing producer rather than consumer interests.

Whether or not this specific proposal is pursued, it will also be important for the CMA more broadly to enhance its sensitivity to the voice and particular concerns of small businesses, which are often entrants or maverick innovators capable of enhancing and broadening competition in markets, and often have particular insights to bring to competition activity from their perspective as customers of other businesses and from their understanding of their own customers.

Measures to reduce timescales and strengthen information-gathering powers

The CC supports the use of statutory timescales in competition law enforcement. They impose a useful discipline on case management, encourage focus and prioritization of work and ensure timely delivery.

The CC believes that one benefit from the proposed merger could be to reduce the overall time taken to complete all parts of a market investigation, from initial screen through phase 1 scrutiny and phase 2 investigation to remedies implementation where appropriate. This suggests that, alongside timetables for individual elements of the process, a timetable might be applied to the overall process, recognizing that time well spent in one stage of the process can reduce the time needed at the next.

The CC agrees with reducing the statutory deadline for the phase 2 investigation from 24 to 18 months, with the ability to extend the deadline by six months where there are special reasons to do so (eg in complex cases):

- Recent cases such as BAA airports, Groceries and PPI have taken almost the full 24 months to complete. However, they have been among the most complex undertaken by the CC. The CC considers that earlier market investigations which were less complex, such as Home Credit, Store Cards, Liquefied Petroleum Gas (LPG) and Northern Irish Personal Banking could have been completed in a shorter time period with the benefit of the learning the CC has now gathered from experience of the market investigation regime.
- It is hard to predict which market investigations are likely to take the most time. CC experience suggests that the complexity of the investigation—multiple issues, multiple (often local) markets and/or multiple parties—is a significant driver of time. Other drivers include the availability of data on the markets and the extent to which that data has been collated and analysed by the referring body prior to the reference.

- The exercise of the power to extend could sensibly be modelled on the merger regime, where the CC must disclose the special reason for the extension. This model has worked well, but the board of the CMA would want to ensure that the power to extend is not used excessively.
- CC experience suggests that in most cases it will be obvious by the time provisional findings are being drafted whether the issues are such that an extension is likely to be necessary to complete the analysis and, where relevant, develop effective and proportionate remedies.

The CC supports in principle the introduction of statutory timescales for all phase 1 studies. As with phase 2, there is probably a case for an ability to extend the deadline at phase 1, for example to allow for consideration of undertakings designed to avoid a reference or where there are other special reasons to do so.

The CC agrees with the introduction of timescales for the remedies process after publication of the final report, if combined with information-gathering powers and the ability to extend the timetable where there are special reasons to do so. The CC suggests six months, with the possibility of a four-month extension. Experience of market investigation remedies to date suggests that this timetable is challenging but achievable. Extensions are most likely to be necessary in cases where consumer testing of remedies is necessary (as in PPI), or where the CC encounters complex practical issues relating to remedy implementation (as in LPG).

It will be necessary to have powers to gather information and to stop the clock in this period to ensure that the quality of implementation is not compromised. It also reduces the incentive to game the system (which is otherwise increased by a fixed timescale). The remedies implementation clock should be reset, rather than stopped, in the event of an appeal.

The CC agrees with the introduction of information-gathering powers for phase 1. This will be necessary to achieve the ambition to speed up phase 1 investigations without the quality of phase 1 decisions being compromised. However, the powers available would need to be those appropriate to an initial screen, to avoid them becoming burdensome on parties and phase 1 scrutiny becoming too extensive. Information-gathering powers will need to be accompanied by a power for the CMA to stop the clock where information is not provided, to avoid gaming by parties.

The CC agrees to the introduction of a statutory threshold for phase 1 market study. This would add clarity to the process and is probably necessary if there is a statutory timescale. However, this should not be a high threshold, which could deter legitimate initial investigations.

The CC shares the Government's ambition of facilitating quick referrals to phase 2 where justified. It considers that the creation of a new authority and the imposition of thresholds, definitions and timescales for phase 1 screens, and any more detailed market studies which might follow from an initial screen, will facilitate this.

The CC also agrees that the creation of the CMA provides an opportunity to clarify the CMA's ability to investigate breaches of the Competition Act 1998 it identifies in the course of a market investigation. Having all competition responsibilities within the same organization will facilitate this link.

Measures to ensure remedies are proportionate and effective

The CC supports the introduction of powers to require the appointment of an independent party to monitor and/or implement remedies. The CC has used independent parties successfully in merger cases (notably Macquarie/National Grid) where parties have been willing to provide undertakings. Similar powers in the markets regime where orders are a more likely means of remedy implementation are necessary because of the number of parties involved and the weaker incentives they have to offer undertakings voluntarily.

Had such powers been in place, the CC might have used them in past cases in preference to the remedies it adopted. Where the CC has made recommendations to Government, it would doubtless have considered whether powers of this kind could have been used instead.

The CC supports the introduction of powers enabling remedies to include the publication of non-price information. The CC has published non-price information (eg switching messages) alongside price information as a remedy in market investigations including PPI and Northern Irish Personal Banking. The CC has been careful not to publish price information where there was reason to fear that it might encourage tacit coordination. This was the case in the LPG investigation where prices charged to individual customers were not widely known, but not, for example, in the Home Credit investigation where suppliers clearly already knew one another's prices but customers did not.

Measures to simplify the review of remedies process and update remedial powers

The creation of a single authority offers the prospect of simplification of remedies review process through removing any duplication or inefficiency from the current participation of two authorities in the process.

To ensure that these benefits are captured, the CC supports the introduction of timescales and information-gathering powers. We propose timescales of 26 weeks with the potential to extend by 16 weeks for remedies deriving from a market investigation and 26 weeks with the potential to extend by 8 weeks for remedies deriving from a merger inquiry. These timescales would cover the whole process of review currently undertaken by both the OFT and the CC.

The CC does not consider that the case has been made for the revision of remedy review thresholds. The requirement to identify a change of circumstances provides an important element of legal certainty, but should not unduly inhibit the CMA where there is a genuine need for review, as it can be interpreted widely.

The CC supports the proposal to clarify that phase 1 and 2 powers apply when cases are remitted following appeal.

The CC does not agree with any proposal to remove the requirement to consult if not making a Market Investigation Reference (MIR) as it is important for transparency. The CC will support revisions to clarify the precise circumstances when such a decision should be considered as one where consultation is required.

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

The CC believes that by applying the principles of triage more rigorously to markets, the CMA could ensure that problems are swiftly tackled using the most appropriate competition tool.

An initial phase 1 scrutiny governed by a tight timescale, requiring limited resources, can enable the authority to judge which tool is most likely to be appropriate—a market investigation, Competition Act or consumer protection law enforcement action by the competent authority, a market study, or no further action by the CMA. Whatever phase 2 action is preferred, resources can be devoted to it and an appropriate statutory timescale applied to ensure that the process overall is not more burdensome on parties than necessary.

A stronger mergers regime

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

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

The CC supports proposals to improve the merger regime in the UK, in particular those that will:

- ensure that all potentially anticompetitive mergers can be reviewed by the CMA;
- reduce the risks created by integration of mergers prior to such review; and
- reduce costs to parties and the CMA, and ensure that mergers that are anticompetitive bear the appropriate portion of costs.

Addressing the disadvantages of the current regime

The principal disadvantages of the current voluntary notification regime are the risks of missing anticompetitive mergers and the risks that arise through integration of merging parties prior to scrutiny of the merger by the competition authorities. The latter risks, in the CC's experience, are:

- Any consumer detriment from an anticompetitive completed merger is experienced in the period between integration and the implementation of remedies. This can be a period of well over a year, and based on the CC's estimates the detriment caused to customers can be substantial.
- It can be difficult to reverse integration or apply preferred remedies, even divestitures, to a completed merger. For example, assets may have been sold, key staff may have left or the business may have been integrated such that no viable stand-alone business remains. In other cases, assets are no longer saleable, or no suitable purchaser can be found.
- It takes longer, and is therefore more costly to the authorities, to deal with completed mergers where a substantial lessening of competition (SLC) is found. Under the Enterprise Act, the CC has needed an extension to its timescale in 10 of the 15 inquiries into completed mergers which have given rise to an SLC, compared with 3 of the 11 anticipated mergers which have given rise to an SLC. The additional time is needed to identify and maintain the degree of integration that has taken place, negotiate interim remedies and arrange for them to be implemented and monitored (for example, by appointing a monitoring trustee and/or a hold separate manager).

There are also costs to parties of monitoring trustees and hold separate managers where appointed as part of interim measures needed to preserve the ability to achieve an effective remedy, though these may be risks understood and taken willingly by parties.

A system of mandatory notification, akin to those widely operated in other jurisdictions, would ensure that all mergers with a UK nexus are notified to the CMA (with the exception of those that are wilfully or negligently not notified). If such a system had suspensory effect (preventing both integration and completion), it would prevent the risks that arise through integration prior to clearance.

View on the merits of mandatory notification vary among the CC's members. Some favour it and note the consistency with regimes in operation in many other jurisdictions. However, that a system of mandatory notification would impose costs on parties for mergers that are not currently notified but would need to be. Many such mergers would not raise competition issues. Yet the additional costs would be borne by parties engaged in neutral or even pro-competitive mergers as well as by those meriting scrutiny. Moreover, there would either be additional costs to the CMA in scrutinizing a higher volume of mergers, or the level of scrutiny given to each would have to be less.

These are significant disadvantages and the CC recognizes that the merits of mandatory notification may not outweigh them.

The hybrid system proposed attempts to reduce these costs by adjusting the notification thresholds, so targeting to a greater degree the obligation to notify, but retaining a Share of Supply provision which enables the authority to review cases where the obligation to notify is not satisfied but there is a prospect of a competition issue. This would enable more targeted scrutiny than is achievable through a turnover threshold. But while it would overcome some of the drawbacks, it would deliver neither the comprehensive coverage, nor the legal certainty of a mandatory notification system.

If a mandatory or hybrid regime were preferred, the CC would be concerned that the notification thresholds referred to in the consultation document are too low for an efficient notification trigger. The CC would therefore recommend that a higher notification threshold should be set, while the authority's jurisdiction will remain for all mergers above any small business exemption (discussed below).

In the event that the regime remains voluntary, the CC supports the strengthening of the regime. The incentives for parties to bring mergers to the attention of the CMA at an early stage need to be increased. But the CMA will also need to evaluate and account for its ability to detect mergers and identify those meriting review in a timely fashion.

In a voluntary regime it will also be important to strengthen the CMA's ability to impose initial measures quickly. The CC supports the proposal to introduce an automatic suspensory power on completed transactions the CMA identifies, triggered when the authority requests information from the merging parties. Relief from the automatic suspension should be provided following consideration of a request from the merging parties. The CMA should retain the ability to decide whether to impose initial measures (by order or undertakings) on transactions notified to it. This proposal strengthens the incentive to notify transactions while recognizing the strong commercial pressure to integrate acquired businesses. It would also preserve the CMA's power to impose remedies where completed mergers are found to be anticompetitive.

The CC supports the introduction of penalties proposed for breaches of hold-separate measures and also for failure to notify (in the event a mandatory system is introduced).

Jurisdictional thresholds

The CC recognizes the Government's desire to exempt transactions involving small businesses from merger control. However, the CC has experience of small mergers which can have substantial effects:

- large bus companies taking over smaller local ones can have substantial effects on (often localized) groups of customers; and
- mergers which affect new but growing markets can have a long-term impact.

The application of merger control in such cases can protect vulnerable customers and send important messages to participants in developing markets.

Ultimately, Ministers have a choice between exempting smaller businesses from the regime and catching all anticompetitive mergers. If they are minded to put in place a small business exemption in place of the existing statutory discretion available to the OFT not to make a phase 2 reference, it should apply when the turnover of both the acquirer and the acquiree are below the set level. Such a threshold may enable the share of supply jurisdictional threshold to be dispensed with, provided that the levels for the exemption are low. This will bring greater clarity to business about which mergers are subject to scrutiny, reducing any disincentive on small businesses to merge.

The CC supports the retention of the material influence limb to the definition of merger. It recognizes that even in a mandatory notification regime, this would require the authority to have the ability to call in mergers that the parties did not raise with the authority when the jurisdiction arises and that it should not be a merger subject to the notification requirement. In a voluntary regime this would represent no change from the current position. The CC notes that this limb has enabled scrutiny of significant mergers raising both competition and media plurality concerns (eg Sky/ITV), an opportunity currently denied to the European Commission as the recent Ryanair/Aer Lingus case illustrates.

Measures to streamline the regime by reducing timescales and strengthening information-gathering powers

The CC agrees with the introduction of statutory timescales for phase 1, Undertakings in Lieu (UIL) processes, and remedies stages, subject to the ability to extend the deadline in some circumstances (eg complex cases at phase 2). The CC suggests:

- Twelve weeks, with the possibility of a six-week extension for merger remedies implementation following phase 2; but
- a shorter period of eight weeks for UILs (with the possibility of a further four weeks for anticipated mergers), reflecting the nature of remedies that are most suitable at phase 1.

The CC supports the introduction of information-gathering powers at phase 1, to be used consistently with the intention of a first-phase screen, but with penalties for non-compliance. Similarly the authority should have available to it the same powers of sanction at both phases.

However, the CC considers that it is important that the regime overall does not suffer from gaming by the parties nor cause delay in processing mergers in the authority. While stop the clock provisions should be available in phase 1, there needs to be some means of ensuring that the clock does not remain stopped for too long.

The CC supports in principle the proposal to consider remedies in Phase 2 before having to decide whether the merger results in an SLC. This would be an evolution of the UIL of reference arrangements for a single authority. Parties should have one opportunity to offer undertakings to avoid an in-depth investigation at the point (or shortly after) the duty to refer arises. The system might work as follows:

- To allow for sufficient time (within the proposed eight-week time frame) to consider the offer, for undertakings to be drafted, for up-front buyers to be approved and for undertakings to be consulted on, we would anticipate that parties would have to provide sufficient information to enable consideration of the UILs proposed very quickly after the phase I decision, and before the timetable for phase 2 scrutiny begins.
- This could be prior to the panel being appointed (as now) or the application could be reviewed by the newly-appointed panel.
- There would be one opportunity and a strict window of eight weeks to agree undertakings with the CMA (during which time the overall clock would stop). In effect, the making of the reference would be suspended until such time as the UILs were accepted, or the Phase I body determined that suitable undertakings were not likely to be accepted during the eight-week period.
- As an added incentive, for anticipated mergers, the authority might have the flexibility to be able to extend this period by a further month in the case of complexity (eg when the number of divestments is large and the parties are showing willingness to implement the remedy).

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

See the response to Q5 above.

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

The CC believes that the creation of a new CMA offers opportunities to streamline the merger process further. A merged authority offers the opportunity to improve efficiency by transferring elements of a staff team (and the knowledge they have built up) directly from phase 1 to phase 2 at the point of reference (note that this efficiency is only possible without risk of confirmation bias if a new decision-maker is appointed). It also makes it easier to address the issue of greatest concern to business which is the overall time taken by the merger control system.

In addition to imposing time limits on individual stages of the process, we propose a 12-month overall time limit for merger scrutiny, from initial notification to implementation of remedies, to run alongside the phase-by-phase timescales. This would apply to the parts of the process largely within the control of the authority, so would exclude periods of negotiating UILs (subject to their own timetable as described above) and periods when the inquiry clock is stopped because of failure to provide information. It would address directly the concerns expressed by business about the overall time taken by merger review and motivate the CMA to capture the efficiency savings from the merger of authorities and transfer them to parties.

Effective action to avoid pre-notification integration would make this timetable easier to adhere to.

A stronger antitrust regime

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

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

The CC shares the Government’s objectives for the future antitrust regime—more decisions, taken faster, to a high standard of quality and transparency. The antitrust enforcement process both in the UK and EU is too slow and remote, reducing its impact, and the UK should seek to show a lead in the EU in introducing innovations to address this.

We recognize that the OFT has improved its processes with experience over time, and current trials may lead to further improvements. But Option 1 would miss the opportunity to capture a potential benefit from the creation of the CMA—the ability to deploy members on the cases that most merit their input.

The CC believes that more substantive change is desirable. The CMA’s range of proven decision-making tools will include the member panels currently used for phase 2 merger and market investigations. Their core expertise lies in making decisions based on their assessment of the interaction of evidence, economic analysis and law, the very capability that lies at the heart of decision-making in civil cartel, agreements or abuse of dominance cases.

While it would be wrong to apply a single rigidly defined model to all the CMA’s decision-making, it would be equally wrong to rule out the use of panels for antitrust cases. The independence, expertise and judgement of panel members give them credibility with the parties to merger and market investigations and regulatory reviews. Their track record in driving the management of complex and difficult cases to a timely conclusion and their relatively low cost all reinforce the view that they are well suited to antitrust cases.

We believe the best way forward would be to require a second phase for antitrust cases in which independent decision-makers are deployed. This might take the form of enabling panels of independent members with appropriate expertise to conduct the second stage of antitrust case decision-making within the CMA. The second stage might start at the point at which the CMA decides to open a formal investigation, or might be delayed to a later point, but should in practice be well before the issue of a statement of objections.

The membership of the panels and their procedures would need to be adapted for the potentially penal process involved in antitrust work, but we believe that the model of an independent group assessing different kinds of evidence and reaching decisions could be readily adapted to all kinds of antitrust case.

The advantages of a panel system for antitrust cases include:

- clarity as to the identity of the decision-maker, enabling effective communication with and access to them by persons interested in a case;
- formal independence of the decision-makers from the decision to investigate a case;
- specialist decision-making expertise, giving reassurance to the parties of the fairness of the process as well as quality and credibility to the decision; and
- the effective and focused project management and decision-making that the regular interaction between panels and staff provides.

Engaging panels in antitrust cases would not be novel. It would be a logical extension of a proven decision-making tool at the authority’s disposal to cases for which it is well suited. There would be scope for synergy with other panels deciding cases; many similar issues of evidential assessment, market definition, assessment of market power, efficiencies and competitive effects arise in merger

and market investigations as well as in antitrust. Panels, operating within a framework of legal precedent, guidance and rules, have shown themselves appropriate for decision-taking, selecting and applying remedies with significant economic impact on parties in merger and market investigations.

Panelists would be drawn from a pool of expert practitioners, including some with very specialist legal and economic expertise. And because they would only be paid when required, it would be possible to obtain access to such panel members at a fraction of the cost of comparably qualified professionals.

While we believe panels can enhance antitrust decision-making, however they are deployed, we believe that the full benefits of their involvement will be achieved if their role is investigatory, not simply adjudicatory. They should be involved from early enough in the process to steer the direction of inquiry work, should meet to discuss the case regularly through its duration, should see the bulk of the evidence and should hear evidence directly from the parties. They should not simply receive and rule on a set of papers prepared by a staff team at the end of a process.

While we recognize that it would be possible to combine the introduction of internal panels with a change in the grounds of appeal to the Competition Appeal Tribunal (CAT) to harmonize them with the rights available in cases decided by the European Commission, we do not consider that such a change to appeal rights is necessary. If decisions are based on the application of sound economic analysis, judgement and fair processes, they should be capable of withstanding scrutiny on the merits in the CAT. What matters most in our view is that the CMA itself carries out focused and time-limited inquiries, weighs and critically assesses evidence, and reaches infringement and sanctions decisions, which are sufficiently robust to withstand challenge and secure the confidence of the CAT.

We understand the reasoning behind Option 3—the prosecutorial model. We recognize that it would bring some improvements on the current system, and some CC members with antitrust experience favour it. Were it to be preferred, we are confident that the CMA could, over time, make it work.

However, we can see that there would be significant risks—and transitional costs—of such a radical departure from UK and European precedent for anti-trust cases. In particular:

- We are not clear that it would provide an adequate mechanism for the assessment of economic evidence in particular cases, particularly ‘rule of reason’ and abuse cases.
- It might result in a high proportion of cases being settled out of court by negotiation, losing the precedent value of published, legally tested decisions.
- It risks outcomes being unduly influenced by willingness and ability to resource a court defence rather than just the facts of the case, which might disadvantage small or less well-resourced businesses.
- We recognize that case management by the CAT could expedite matters, but doubt that it would be any quicker or cheaper than other options.

We are therefore not persuaded that it would be desirable to take such a significant and radical step when a less dramatic and proven improvement option—decisions taken by investigatory panels of members on the CC model—will be available to the CMA.

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

The CC believes that antitrust cases should be subject to time constraints in order to focus decision-taking. The CC believes that time limits, if extendable where there is lack of cooperation by parties as proposed for the markets regime, can powerfully drive efficient processes and fair outcomes. We recognize that some of the considerations are different and that the scale and complexity of Competition Act cases varies. However, we believe that, if appropriately resourced and with appropriate information-gathering powers, the CMA should be able to conclude a second phase of most Competition Act cases in no longer than the two years that the longest, most complex market investigations have taken the CC.

Member panels should apply a similarly transparent approach to antitrust work to that employed currently at the CC, where possible giving persons under investigation and third parties the opportunity to understand their developing thinking and make oral representations to the decision-makers.

These proposals would be evolutionary changes building on the best practice processes the OFT is already implementing as contemplated by Option 1.

The CC agrees with the introduction of financial penalties for non-compliance with information requests; the CMA needs a plausible power of sanction (ie neither so light as to be ineffective nor so heavy as to be disproportionate for the CMA to use).

The CC considers that the current jurisdiction of the CAT should be retained and supplemented by revision to the arrangements for private damages actions, so that the jurisdiction of the CAT and High Court is harmonized, and cases are transferable between them as necessary to secure their expeditious disposal, recognizing that the correct forum for competition cases will depend on a number of factors.

The CC considers that the current investigative powers and powers of entry of the OFT should be retained unchanged in any new regime.

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

Our proposals above for antitrust cases to be referred for investigation and decision by an independent panel and for time limits for case investigation and decision-taking would require some statutory provision to secure this. However, this could be a relatively light touch provision, leaving considerable discretion to the CMA to determine the timing of reference of cases, and the time limits to be imposed at different stages.

It would be desirable for there to be some harmonization of the powers of the CMA to obtain information and evidence under its different powers, and that the relevant powers under the Competition Act 1998 and Enterprise Act 2002 should be reviewed.

The criminal cartel offence

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

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

The CC has no comment to make on this question.

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

The CC has no comment to make on this question.

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

The CC has no comment to make on this question.

Concurrency and sector regulators

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

The CC does not believe that the concurrency arrangements have worked in the way envisaged when they were established, nor as well as they could to date. This view is supported by the conclusions of the National Audit Office's *Review of the UK's Competition Landscape* (2010). The specific proposals in response to Q15 are designed to address this.

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

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

The CC agrees with the suggestion that the sectoral regulators should be encouraged to use competition powers ahead of other tools where appropriate. The proposals below would support this objective.

The CC supports proposals to ensure that the substantial body of competition expertise assembled in the CMA should be used to benefit the regulated sectors. In particular:

- The CMA could provide a central core of expertise for the sectoral regulators to draw upon.
- However, were CMA staff and sectoral regulators to engage in any joint working, for example in phase 1 market studies or in antitrust investigations, the CMA would need to take steps to ensure that the CMA's roles as a phase 2 decision-making body, as the appeal body for some regulatory decisions and its broader role in reviewing the regulated sectors (see below), were not compromised.
- The CMA will have greater expertise and experience in conducting phase 2 cases under both the Competition Act and the Enterprise Act than any of the sector regulators. It would therefore be logical for it to conduct phase 2 investigations in the regulated sectors, on reference from the relevant sectoral regulator (the regulators would retain the same powers to conduct time-limited market studies in the relevant sector as the CMA would have in other sectors). This would bring greater quality and consistency to competition law enforcement across all sectors of the economy.

The CC does not agree with the suggestion that the CMA carry out a rolling programme of market reviews into the regulated sectors. This would unhelpfully fetter the ability of the CMA to set its own priorities and risk taking resources away from necessary work to review sectors that may in practice not be a priority.

The CC prefers the proposal (in paragraph 7.33 of the consultation document) that the CMA could periodically review the competition work of the sector regulators and publish its conclusions, giving the sectoral regulators a powerful incentive to be proactive in their use of their competition powers and highlighting where they might consider taking further action, including potentially making market investigation references.

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

The CC has no comment to make on this question.

Regulatory appeals and other functions of the OFT and CC

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

The CC agrees that the CMA will be the most appropriate body to consider regulatory references and appeals:

- It is important to retain a capable and well-resourced body to provide an effective appeal mechanism. CC members and staff have developed significant knowledge and expertise in these areas, and are familiar with the necessary procedures. They are experienced in and equipped to do work like that associated with price control appeals, where a rapid decision on a corrected price control is appropriate, rather than remittal. Such work is highly numeric in nature, which the CC is better placed to carry out than the CAT.
- The CMA would have an advantage over an independent appeals body in being able to exploit synergies with competition work, and would be able to handle better the variable case load. Price reviews take place at defined intervals and many appeals are associated with these. The level of staffing at an independent body would have to cope with peaks and potential peaks (the potential for appeals following a major regulatory decision may be high, while the number of actual appeals may be low) in workload.
- Regulatory appeals require expertise and knowledge relating to regulatory economics, regulatory accounting, financing and cost of capital assessment, the specific industry and regulatory regime, along with general legal, micro-economic, accounting and commercial appreciation. The CC has members and staff with specialist knowledge of financial markets and corporate finance (which is also deployed in merger and market investigations). CC decision-makers include some with general and specific regulatory and sectoral expertise and others with a broader perspective used to working with complex markets.
- The CC's ability to undertake market investigations and impose remedies in regulated sectors (eg BAA) is complementary to the appeals role—both require a high degree of knowledge of the economics of the regulatory regime and of the sector. This synergy benefits both regimes. Experience in regulatory affairs helped the CC in imposing a regulatory reporting requirement on Aberdeen Airport as a remedy in the BAA airports market investigation.

If the CMA takes on these roles, these advantages will be maintained. There may be some risk of perceived tensions with some of the CMA's other roles, such as working with or receiving references from the sectoral regulators. But the separation of decision-making required is no more challenging than the separation the CMA will have to manage between phase 1 and phase 2 scrutiny of mergers or markets.

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

Although the CC considers that there are potential merits to this proposal, it does not consider it practicable to mandate such an approach.

Scope, objectives and governance

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

The CMA does not consider it necessary to provide statutory objectives in addition to the statutory powers and duties which the CMA will have. Should the Government decide to enshrine objectives on the face of legislation, they should be:

- broad enough not to limit the CMA's discretion nor to risk becoming outdated; and
- couched so as to encompass all of the CMA's powers and duties.

The CC is not persuaded that it will be possible to draft statutory objectives that strike the right balance between undesirably fettering the discretion of the CMA, and being so general as to be meaningless.

For similar reasons, the CC does not agree with the proposals to place a duty or objective to keep certain markets under review. This would fetter the ability of the CMA to direct resources where they are most needed. A better alternative would be to require the CMA to set out (and publish for comment) a programme over a set number of years, with the markets for review to be decided as the CMA sees fit.

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

The CC believes that the CMA should have a clear focus on competition. Diluting it with consumer protection law enforcement powers would:

- risk distracting from its competition focus;
- provide temptation at case level to use consumer protection law enforcement rather than competition powers to fix a competition problem; the CC considers this less likely to be effective; and
- dilute consumer enforcement resource and expertise across many agencies; the CC understands this to be counter to the Government's intentions for the consumer enforcement regime.

The CMA should have the interests of consumers at heart in its application of competition law. But the CC has not found it necessary to have powers to enforce consumer protection law in order to address demand-side issues inhibiting effective competition in markets. It has acted itself to remedy problems on the demand side of markets (for example, improving information available to customers and encouraging switching in the Home Credit market investigation) and successfully recommended action by others.

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

The CMA will be very different from both the CC and the OFT, combining many of the functions of both. The current governance structures of the CC and OFT are fit for their purposes. But the CMA brings together tasks which are currently separated and the CMA needs a purpose-designed structure consistent with principles of good governance.

A new governance structure should adhere to the following principles:

- To give effect to the separation of phase 1 and 2 decision-making, there should be no role for any phase 2 decision-maker in making references, nor any role for anyone involved in deciding to initiate or refer cases in phase 2 decision-making.
- The structure should impose checks on the powers of any individual.

- The interests of decision-makers at both phases should be represented and balanced on the board.

It may be possible to give effect to these principles in a variety of ways. The CC believes one such model could be as follows:

- The CMA should have a supervisory board accountable to Parliament (and the sponsor department) for the strategy and management of the organization.
- The board should not be directly accountable to Parliament for individual case decisions, nor should it take any casework decisions itself. The CMA is accountable to the courts (the CAT in the first instance) for the quality of its decision-making.
- The board should hold the executive to account for the running of the organization—for use of resources, financial and risk management, the timeliness and quality of its casework—but not the decisions made.
- The board should be chaired by a non-executive, who could take a leading role in representing the CMA publicly. We believe that the board should be predominantly non-executive, with only a minority of executives.
- An Accounting Officer appointed by Ministers would take charge of the day-to-day running of the CMA, and would be an executive member of, and accountable to, the supervisory board.
- He or she would be responsible for resource deployment and all operations of the CMA including compliance with law, duties, guidance, rules of procedure, and might play some public advocacy role.
- He or she might want to convene an executive board of senior colleagues to manage the organization.
- A pool of full- and part-time panellists, appointed by Ministers for a fixed term, would (in groups) determine phase 2 merger, market and antitrust references and regulatory appeals in line with published rules/guidance.
- A head of the body of phase 2 panellists would appoint groups from among the panellists (and advise them), and would be an executive member of the board.
- None of the phase 2 panellists could have any role in case initiation or making references.
- A head of phase 1 would also be a ministerial appointment and an executive member of the board responsible for case initiation and references to phase 2. He or she might be obliged to involve or consult senior professional staff when making reference decisions.
- CMA staff would all report (ultimately) to the Accounting Officer and could be deployed flexibly across the various activities of the organization.

The main attributes of this model are:

- its underpinning of a model of executive decision-making for phase 1 activities and member panels determining phase 2 cases;
- the supervisory nature of the board, accountable for the CMA's activities but not for individual decisions;
- the majority non-executive nature of the board; and
- the balance in the executive between the interests of the different phases and the day-to-day management of the authority.

Decision-making

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

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

The CC believes that the system of decision-making in the CMA should be based on the current phase 1 and phase 2 separation in place for merger and market investigations. This system is one of the features of the UK system that gives it its reputation for fairness and robustness. It needs to remain in place for merger and market investigations and could usefully be extended to antitrust.

Phase 1 decisions should be taken by executives, though care should be taken in structuring the organization to ensure that these decision-makers do not have influence over phase 2 decisions. Although some continuity in case teams across phases provides some continuity of knowledge, it also carries the risk of perception of confirmation bias.

The phase 2 decision-makers should be wholly separate from phase 1 to avoid confirmation bias. The independence of phase 2 decision-makers and the fresh pair of eyes they bring to the more detailed scrutiny of the case are important safeguards which give credibility and legitimacy to the decisions they take, which can do significant economic damage to the interests of parties.

The CC does not support the introduction of executives or non-executive board members into phase 2 panels. This would reduce the independence of the phase 2 process, and does not in return add anything extra that members, including a full-time Chair, do not already provide.

CC members are clear that their experience, expertise and judgement is as valuable in merger inquiries (where decisions often hinge on business judgements about the health of a firm or the likelihood of a particular market development) as in market investigations.

The CC does not support the proposal to have phase 1 and 2 decisions taken by different executives. It is not clear what weakness in the current system this proposal seeks to remedy. Moreover:

- This form of separation provides a much weaker safeguard against confirmation bias.
- It loses the benefit of the panel's challenge function during investigations (this could only be compensated for at a higher cost).
- Decisions made by executives would almost inevitably have to be more adjudicatory in nature than decisions currently taken by panels, as executives would be overseeing more cases and could not get so involved in the detail. This weakens the decision-maker's engagement in the case and risks giving rise to decision bottlenecks and additional work.

The CC disagrees with the proposal to change the mergers panel to an adjudicatory one. Having panels involved from the outset of the case promotes effective case management, enables members to steer the direction of the inquiry, avoiding late changes of direction or requests for additional work, and gives parties confidence in decision-makers' close understanding of the issues. It can be achieved at modest costs if members are paid, as CC members are, only for when they work in the authority.

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

The CC considers the current use of part-time members with a few full-time panel chairs to be the best approach.

Full-time chairs develop expertise in managing cases, and can draw on the experience of multiple cases as well as their own professional background, experience and judgement in deciding on cases. They can work closely with the staff team and regularly exchange case experience and insights.

These interactions, and input from senior professional staff to group discussions, contribute to ensuring the requisite degree of consistency in decision-making: consistency with the law and with the CC's published rules and guidance.

The use of part-time members allows for a variety of people with particular expertise to take up the role. The CC currently has six professors of economics and one of accounting, continuing a long-established pattern of input from a variety of relevant academic disciplines. It also has eight former senior competition law practitioners and eleven senior business people, most now with largely non-executive responsibilities and/or portfolio careers. They bring expertise, experience and judgement to decision-making. Requiring more of a commitment of them would result in a different mix of people willing and able to commit to the role, and some of the benefits associated with the diverse backgrounds of our members would be lost. For example, we would be unable to include practising academic economists if they were unable to be members without giving up their current positions. Recent experience trying to fill deputy chair vacancies, both from among the current membership and from beyond, suggests that there is a relatively small pool of people of sufficient calibre willing to make this form of commitment (and contrasts with the greater numbers generally willing to seek part-time roles).

Moreover, full-time members could not be remunerated on an hourly rate as part-time members are. As salaried employees, their remuneration would be higher (roughly twice the hourly rate of a part-time member) and their cost to the authority would become fixed; unlike part-time members, we would continue to pay them even when the workload is low.

Were the pool of members to be smaller (even if the overall time available were unchanged), the risk of conflicts and competing inquiry pressures on their time would increase, making it more difficult to staff cases appropriately. The breadth of expertise and views brought to bear on any case would inevitably decrease, and the perceived independence from the organization of the decision-makers could be compromised.

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

The CC has nothing further to add in response to this question.

Merger fees and cost recovery

The CC has no comment to make on most of these proposals (but see response to question 32 below)

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

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

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

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

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

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

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

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

The CC agrees with the principle that unsuccessful appellants should meet the CMA's costs. This would limit the cost of appeals to the public purse and has the potential to discourage ill-founded grounds of appeal, without limiting parties' appeal rights. The principle could also be applied to other appeal regimes as well as to telecoms appeals.

The CC believes that it would be helpful for the CMA to have discretion on how best to apportion costs, as courts have. In deciding how best to do so, it would be likely to take into account the extent to which appellants had been successful and unsuccessful in their appeals.

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

Overseas information gateways

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

The CC has no comment to make on this question.

Questions on the impact assessment

The CC has provided extensive evidence to BIS both for the original impact assessment and for its subsequent revision of it, and will continue to do so as far as it is able.

It will be important to set out the costs and benefits of the proposals, and the opportunities and risks associated with them, clearly.

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

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

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

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

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