

THE ENTERPRISE ACT

COMPETITION REFORM – REGULATORY IMPACT ASSESSMENT

1. INTRODUCTION

1.1 In July 2001 the Government published the White Paper “*Productivity and Enterprise: A World Class Competition Regime*” which set out a number of proposals for the reform of UK competition law¹. The aim of the reforms is to help put in place a modern business framework with enterprise and productivity at its heart.

1.2 Strong competitive pressures across the UK economy are a key driver for productivity and growth. Competition acts as a stimulus for innovation, efficiency, wider choice and lower prices for consumers.

1.3 The Government has already made significant improvements to the competition regime - the Competition Act 1998 introduced a much stronger regime than before. But the Government considered that further changes to modernise and strengthen the UK’s competition regime were needed.

1.4 The main competition reforms in the Enterprise Act are:

- A new merger regime where decisions will be taken as often as possible by independent competition authorities against a competition-based test rather than the current public interest test.
- Replacement of the monopoly regime established by the Fair Trading Act 1973 with a new regime for investigating markets where decisions will be taken as often as possible by independent competition authorities against a competition-based test rather than the current public interest test.
- The introduction of criminal sanctions for those who engage in hard-core cartels (alongside the existing Competition Act 1998 fines on companies).
- The Office of Fair Trading will be given a power to seek court orders for disqualification against directors who engage in competition breaches.
- Harmed parties will be able to bring claims for damages before a specialist competition body (Competition Appeal Tribunal (CAT), formerly the Competition Commission Appeals Tribunals). Designated organisations will also be able to bring claims for damages to the CAT on behalf of groups of named and identifiable consumers. Other courts will have to regard Competition Act decisions as evidence of infringements, as well as being able to refer competition aspects of other cases to the CAT.
- Amendment to Section 47 of the Competition Act 1998 to provide third parties with a direct right of appeal to the CAT against decisions of the Director General of Fair Trading (DGFT) or Director Generals of the sector regulators with concurrent powers.
- Repeal of the exclusion of professional rules in Schedule 4 of the Competition Act 1998.

¹ Available on the DTI’s website at: www.dti.gov.uk/cp/ukcompref.htm

1.5 Of these measures, we are confident that third party rights of appeal to the CAT and repeal of exclusion of professional rules will impose no significant costs on business (or charities and voluntary organisations) and therefore have not required full regulatory impact assessments.

2. ISSUES AND OBJECTIVES

Merger reform

2.1 The general purpose of exercising control over mergers is to prevent significant reductions in competition. The Government believes that this is essential for the maintenance of open and competitive markets, and ensures the competitiveness of UK business overall and the best deal for consumers in terms of a wider choice of goods and value for money. Beyond these overall objectives, it is important to provide a clear, stable and predictable framework for business.

2.2 The Government considered that the current (pre-Enterprise Act) merger regime (governed by the Fair Trading Act 1973) was in need of modernisation. It is one of the Government's principles that competition decisions should be taken by strong pro-active and independent competition authorities. To demonstrate commitment to this principle Stephen Byers, the then Secretary of State, announced in October 2000 that he would henceforth follow the advice of the DGFT on whether mergers should be referred to the Competition Commission (CC) (except in exceptional circumstances). This policy has also been followed by the current Secretary of State.

2.3 The Government's objective is to ensure that the merger regime operates as effectively and efficiently as possible.

Investigating markets

2.4 The Fair Trading Act 1973 contained provisions to address *complex monopolies*. These occur where a group of firms (which together supply 25% or more of specified goods and services) in a market adopt similar behaviours which have anti-competitive effects. The purpose of the Fair Trading Act provisions has been to allow the UK competition authorities to take action against such non-collusive parallel behaviour.

2.5 The ability to investigate competition across the whole of a market is an important feature of the UK's competition regime. Strong competitive pressures are a key driver for productivity and growth, acting as a stimulus for innovation, efficiency, wider choice and lower prices for consumers. The distinctive feature of the Fair Trading Act monopoly provisions is that they allow the CC to investigate markets in which competition is failing, and consumers are losing out, not because companies are engaging in behaviour which is prohibited by the Competition Act 1998, but e.g. for structural reasons. Remedies can then be introduced to increase competition in such uncompetitive markets, to the benefit of both individual consumers and business customers of the companies concerned.

2.6 The Government considered that the Fair Trading Act monopoly provisions (which have changed very little since their original enactment in 1948) were in need of modernisation. It is one of the Government's principles that competition decisions should, wherever possible, be taken by strong, pro-active and independent competition

authorities, whereas under the existing (pre-Enterprise Act) monopoly provisions decisions have still been taken by Ministers.

Criminal sanctions

2.7 The Act introduces a new criminal offence against individuals engaging in hard-core cartels. People found guilty of dishonestly entering into cartel agreements could be imprisoned for up to 5 years and/or face an unlimited fine.

2.8 The most common form of hard-core cartel is *price fixing*, where a number of firms which are competitors agree what price should be charged for a particular product. The same economic result can be obtained by agreeing not to compete for each other's customers (*market sharing*) or agreeing to reduce levels of output. In some cases, firms agree to inflate the price charged in a tender-bidding process or agree not to compete with each other (*bid rigging*).

2.9 The effect of these agreements is the same – prices rise and customers pay more than they should. Hard-core cartels are highly damaging to consumers and to the economy in general. The Government's objective in introducing the criminal sanction is to create a real deterrent against individuals engaging in serious anti-competitive behaviour.

Disqualification of directors

2.10 In certain circumstances, UK law provides for the disqualification of unfit persons from being directors or otherwise being involved in the management of limited companies for a certain period, without leave of the court. The aim of disqualification is to protect the public by denying limited liability status to those who have been shown to abuse it.

2.11 The Government believes that it is in the public interest that directors of undertakings who have been involved in breaches of competition law should be exposed to the possibility of disqualification. The Enterprise Act therefore gives the Office of Fair Trading (OFT) and sector regulators the power to seek a court order disqualifying a person from being involved in the management of a company where there have been breaches of competition law.

Claims for damages

2.12 Claims for damages suffered as a result of a breach of competition law can currently be brought in the High Court or County Court (or the equivalent courts in Scotland and Northern Ireland) in much the same way as any other claim for damages.

2.13 Under the pre-Enterprise Act regime, the Competition Commission Appeal Tribunals do not have a role in claims for damages for breaches of competition law. The role of such a tribunal is limited to hearing appeals under the Competition Act 1998 against certain decisions taken by the DGFT (or one of the sector regulators).

2.14 Claims for damages should be an integral part of an effective competition regime. The main advantage of allowing harmed parties to bring actions to recover damages is that those who are harmed receive compensation for the harm suffered and as a result

there is increased deterrence against those who engage in anti-competitive behaviour. The Government's objective is to ensure that harmed parties can gain appropriate compensation for harm suffered.

3. RISK ASSESSMENT

Merger reform

3.1 The involvement of Ministers alongside the competition authorities has brought an element of uncertainty as far as business have been concerned. Since May 1997, the Secretary of State has disagreed with the competition authorities in 12 non-newspaper merger cases: 7 in respect of the decision whether or not to refer; and 5 in respect of remedies following a CC report. The use of a public interest test in the merger regime has also created uncertainty for business as there are a wide variety of issues that can be taken into account in addition to the competition issues.

3.2 This uncertainty can lead to share price volatility, loss of investor confidence, and possibly the loss of the merger deal. It also creates extra uncertainty for employees and stakeholders.

Investigating markets

3.3 Economic evidence shows that in markets where competitors engage in parallel behaviour, or which become uncompetitive for structural reasons (such as barriers to entry), competition is often reduced to the cost of consumers. Economists have estimated that the welfare loss from monopolistic behaviour in the UK economy is between 0.5% and 1% of GDP (around £4.5 billion - £9 billion per annum given that UK GDP is currently in the region of £900 billion)². The complex monopoly provisions allow broad investigations into markets to see how they are working, what the problems might be, and how to solve them.

3.4 The monopoly provisions are a useful auxiliary tool for the competition authorities, particularly in tackling those types of competition problem which other provisions (for example, merger regulation and the prohibitions against anti-competitive agreements/abuse of dominance in the Competition Act 1998 and Article 81/82) do not cover. An example is "non-collusive oligopolies", where a few large players (who account for the majority of sales) fall into similar patterns of behaviour - such as parallel pricing - without there being any need for any explicit agreement to restrict competition, and without any of them (or all of them together) occupying what could be characterised as a dominant position.

3.5 Since 1 January 1997, reports on 10 CC monopoly investigations have been published. The majority of these have related to complex monopoly situations.

3.6 The CC's report into new cars, published in April 2000, found that British motorists were paying up to 12% more for new cars than their European counterparts. They recommended outlawing special discounts for fleet buyers, and taking steps to

² "The social costs of monopoly power" K Cowling and D Mueller (*The Economic Journal* 1978, 727 – 748).

ensure that dealers are free to set their own prices. Since these recommendations have been implemented, new car prices have dropped by around 10%, equal to around £1,100 for an average priced car. The CC's investigation into supermarkets, published in October 2000, found that the large supermarkets' buying power meant that some of their purchasing practices adversely affected the competitiveness of their suppliers, and distorted competition in the supplier market. This meant that suppliers were likely to invest less and spend less on product development and innovation, leading to lower quality and less consumer choice. The CC found that there were also likely to be fewer entrants into the supplier market. The CC recommended that the largest supermarkets sign a Code of Practice which addressed those particular purchasing practices as well as providing independent dispute resolution.

3.7 The CC currently (under the pre-Enterprise Act regime) assesses whether a monopoly would operate against the public interest. However, the use of such a public interest test can create uncertainty for business, as a wide variety of issues can be taken into account in addition to competition. Furthermore, the involvement of Ministers alongside the competition authorities brings an additional element of uncertainty as far as business is concerned. The uncertainty as to the outcome of a monopoly investigation can leave companies in a particular market unable to make the most of strategic opportunities during the period of investigation. Uncertainty can also lead to share price volatility as the markets speculate on the outcome of the regulatory process.

3.8 The structure of the Fair Trading Act monopoly provisions is unnecessarily legalistic. The CC are required to answer a complex series of "statutory questions", which increases the burdens on both the CC and parties to their inquiries, without improving the quality of the CC's economic analysis or the fairness of the outcomes for business or consumers.

3.9 Any discussions of remedies between the CC and the main parties to an inquiry are conducted on a purely hypothetical basis, i.e. without the CC making clear precisely what adverse public interest effects they have found in the market which requires to be addressed by particular remedies; indeed on the explicit understanding that no conclusions on the public interest have yet been reached. The existing procedural and institutional framework thus militates against an effective discussion of remedies by incentivising companies to focus much of their energy in the remedies phase on denying that there is any problem which needs remedying rather than constructively considering a workable package of remedies with the CC.

3.10 In addition, the use of a public interest test when assessing monopoly situations means that the current monopoly regime is not as focused on competition issues as it should be. Therefore the potential for monopoly regulation to promote the maintenance of open and competitive markets for the benefit of consumers and the economy as a whole is not being fully exploited.

Criminal sanctions

3.11 Cartels are, by their nature, secret arrangements, which makes them difficult to detect. It is therefore very difficult to estimate the extent to which cartels operate in the UK. We can derive the size of cartels in the UK from the turnover of cartels cases which OFT are discovering. OFT estimate that at present the relevant turnover in cartels cases where they are likely to make a decision will be about £200 million per annum. Evidence

suggests that cartels can raise prices in excess of 10% of competitive levels³. On this basis, the detriment to consumers and other businesses from the cartels the OFT is uncovering amounts to approximately £20 million per annum. A typical cartel lasts for a period of 7 years and it is estimated that the competition authorities discover one cartel for every eight that are operating. The turnover of cartels in the UK over 7 years is £11,120 million. Cartels raise prices by 10% on average so the detriment to consumers is £1,120 million over 7 years or £160 million per annum⁴.

Disqualification of directors

3.12 Between 1 March 2000 (when the Competition Act 1998 came into force) and the end of the year, OFT had considered nearly 40 cases where there were reasonable grounds for suspecting an infringement of one or both of the two prohibitions in the Act. At the end of the year over 20 of these cases were still under investigation (the others had either been dismissed or resolved informally)⁵.

3.13 Since the Competition Act 1998 came into force, the DGFT has made four decisions that companies have breached the Competition Act prohibitions. Two relate to the Chapter II prohibition (abuse of a dominant position): one decision has been upheld on appeal; the other is currently under appeal to the CCAT. Two decisions relate to the Chapter I prohibition (anti-competitive agreements).

Claims for damages

3.14 Between 1994 and 1999 there were 45 breaches of competition law. Whilst not a massive number, this figure nevertheless indicates a certain level of anti-competitive activity and, as a consequence of such activity, a significant number of parties (consumers, businesses, public authorities) will have suffered some level of harm. Anecdotal evidence in relation to the out of court settlements in competition related cases that have occurred suggests settlements running into millions of pounds.

3.15 However there have been no successful claims for damages (as opposed to settlements) brought as a result of companies being found to have breached either UK competition law or Articles 81 & 82 of the EC Treaty (which have had effect in the UK since 1973).

3.16 The process involved in bringing a claim for damages can take years rather than months and involves costs mounting up to hundreds of thousands of pounds. The issues involved are invariably complex and will inevitably require significant court time and use of lawyers. These factors are likely to make large companies think twice about pursuing such actions, and may well be seen as insurmountable obstacles by smaller companies and individual consumers.

³ See "Does the effective enforcement of Articles 81 and 82 EC require not only fines on undertakings but also individual penalties, in particular imprisonment?", Wouter P J Wils (2001)

⁴ £200 million turnover of cartels uncovered yearly by OFT multiplied by 7 (the average life of a cartel) and then by 8 (the proportion of cartels estimated as remaining uncovered) gives £11,200 million turnover over 7 years. Multiplied by 10 per cent (the level at which prices are raised) gives a consumer detriment of £1,120 million.

⁵ Annual Report of the DGFT January – December 2000.

ISSUES OF EQUITY AND FAIRNESS

3.17 The new regimes for investigating mergers and markets will apply to all companies and markets in the UK. The introduction of a criminal offence for individuals engaging in cartel activity and the power to disqualify directors for serious breaches of competition law do not change the existing prohibitions of the competition regime which already prohibit cartels and other anti-competitive behaviour. The change in the procedures for bringing actions for damages by parties who have been harmed by anti-competitive behaviour will only apply where there has been a breach of the existing competition law provisions.

4. OPTIONS CONSIDERED

Merger reform

4.1 Five possible options were considered:

Option 1 - retain the current merger regime unchanged.

Option 2 - remove all forms of merger control from the UK competition regime and rely on the European Merger Regulation (ECMR) to deal with the biggest mergers/the general competition regime to address any adverse consequences resulting from mergers not caught under the ECMR.

Option 3(a) - replace the current system with a new merger regime which removes Ministers from most decisions in favour of independent competition authorities, but leaves the public interest test against which mergers are assessed unchanged.

Option 3(b) - replace the current system with a new merger regime which changes the current public interest test to a competition test but retains Ministerial involvement.

Option 3(c) - replace the current system with a new merger regime which removes Ministers from decisions in most cases and changes the test to a competition test.

Investigating markets

4.2 Five possible options were considered:

Option 1 - retain the current system for investigating complex and scale monopolies.

Option 2 - remove the monopoly provisions entirely and rely on other competition provisions (e.g. the Competition Act 1998 and Articles 81/82 of the EC Treaty).

Option 3(a) - replace the current system with a new market investigations regime which removes Ministers from most decisions in favour of independent competition authorities, but leaves the public interest test against which mergers are assessed unchanged

Option 3(b) - replace the current system with a new market investigations regime which changes the current public interest test to a competition test but retains Ministerial involvement.

Option 3(c) - replace the current system with a new market investigations regime which removes Ministers from decisions in most cases and changes the test to a competition test.

Criminal sanctions

4.3 Three main options were considered:

Option 1 – retain the current level of Competition Act 1998 fines of up to 10% of annual company turnover.

Option 2 - increase levels of Competition Act 1998 fines on companies by six to ten times. This order of increase would be needed to set fines at a level which is greater than the expected gains from participating in the cartel and thus to provide adequate deterrence⁶.

Option 3 - introduce criminal sanctions against individuals engaging in cartels alongside the existing Competition Act fines on companies. Individuals found guilty of dishonestly entering into cartel agreements could be imprisoned for up to 5 years and/or face an unlimited fine

Disqualification of directors

4.4 Three main options were considered:

Option 1 – rely on current disqualification provisions. Under the Company Directors Disqualification Act 1986, directors who have been convicted of an indictable offence connected with the management of a company can also be subject to a disqualification order. This would apply where individuals have been convicted of involvement in hard core cartels.

Option 2 - provide OFT with the power to seek civil disqualification orders against directors of undertakings who have been involved in breaches of competition law.

Option 3 - provide OFT with the power to seek civil disqualification orders - or accept equivalent undertakings - where directors of undertakings have been involved in breaches of competition law. This would be an additional procedure whereby an individual could consent to being disqualified without the necessity for a court hearing.

⁶ Assuming that a price increase of 10% leads to an increase in profits of 5% of turnover, the gain from a price cartel lasting 5 years would be in the order of 25% of the annual turnover of the products covered by the violation. US research has estimated the probability of a successful government prosecution of a price-fixing cartel in the US to be between 13 and 17 per cent [“Price Fixing: The Probability of Getting Caught” P G Bryant and E W Eckhard (1991) *Review of Economics and Statistics* 531]. On these assumptions, fines would need to be in the region of 150% of the annual turnover in the products covered by the violation [Wils (2001)].

Claims for damages

4.5 Five main options were considered:

Option 1 - retain the current (court-based) system for damages claims.

Option 2 - make DGFT determinations of infringements of competition law binding on the courts (once the full appeals process has been exhausted). This would remove the need for the claimants to develop complex competition arguments to prove a breach had taken place. The court process would be able to focus on determining whether the claimant had been harmed by the actions of the defending company and, if so, what level of damages would be appropriate to compensate for that harm.

Option 3 - enable the CAT to hear claims for damages subsequent to a finding by the DGFT that there has been a breach of competition (providing the full appeals process has been exhausted).

Option 4 - make determinations of infringements binding and enable the CAT to hear claims for damages.

Option 5 - make determinations of infringements binding and enable the CAT to hear claims for damages, and allow group claims for damages to be heard by the CAT. Group claims would be made on behalf of named and identifiable groups of consumers. Rather than bringing several individual cases, those parties wishing to combine forces could ask a designated body to represent them in a representative action.

5. BENEFITS OF EACH OPTION CONSIDERED

Merger reform

Option 1 (retain current regime unchanged)

5.1 There would be no additional benefits arising from this option.

Option 2 (remove all forms of domestic merger control)

5.2 Business would save the costs associated with a merger investigation and Government would save the costs of merger control (see paragraph 6.2). However, there are potential disbenefits arising from this option. The competition authorities would not be able to address the creation of market power in the first instance, nor would it be able to require remedies for a loss of competition resulting from the bringing together of two enterprises where this does not amount to abuse.

Option 3(a) (make procedural changes only to the current regime)

5.3 The approach that decisions on merger cases should be taken by independent competition authorities rather than by Ministers should improve the overall clarity and predictability of the regime.

5.4 Additional procedural reforms such as the publication of provisional conclusions by the CC part way through an investigation, will also improve the transparency and thoroughness of the investigatory process with informed decisions on remedies.

Option 3 (b) (change the test against which mergers are assessed only)

5.5 The introduction of a competition-based test in place of the existing public interest test will make the regime more competition focused. Although in recent years it has been rare for merger cases to be decided on anything other than competition grounds, such a change may help to reduce strategic uncertainty in that companies should have a clearer idea as to the issues that will be taken into account in an investigation. This should result in a reduction of the time spent by staff and lawyers in addressing wider public interest issues in evidence to the competition authorities. A greater competition focus should also reduce uncertainty for competitors and investors in assessing the regulatory issues in the development of a market.

5.6 A merger control regime that is more focused on competition will benefit consumers by promoting the maintenance of open, competitive markets. This will ensure a wide choice of goods and value for money. This will reinforce the position of consumer interests at the heart of the merger regime.

5.7 In addition, changing the basis on which a merger will qualify for scrutiny under this new test from the level of assets to a turnover-based test (a more accurate measure of activity in a market) would enable the competition authorities to focus more efficiently on cases that may cause concerns.

Option 3(c) (change both the procedural aspects of the current regime and the test against which mergers are assessed)

5.8 Overall this proposal will combine the benefits of options 3(a) and 3(b). These changes would update and improve the framework in ways that would increase strategic certainty for companies while improving its effectiveness in focusing assessment on competition issues.

Market investigations

Option 1 (retain the current system for investigating complex and scale monopolies)

5.9 There are no additional benefits arising from this option.

Option 2 (remove the monopoly provisions entirely and rely on other competition provisions)

5.10 Business would save the costs of a monopoly investigation and Government would save the costs of monopoly control (see paragraphs 6.16 and 6.17). There are potential disbenefits arising from this option. The competition authorities would not be able to tackle those types of competition problem which other provisions do not cover, in particular, “non-collusive oligopolies”. Whilst it may be the case that the concept of dominance under Article 82 and the Competition Act will develop to enable remedies to be applied in some oligopoly cases, this is uncertain, and is likely to take some time, and it does not seem likely to develop sufficiently to enable all structural market problems to be addressed in such cases.

Option 3 (a) (make procedural changes to the current monopoly regime only)

5.11 Making procedural changes to the Fair Trading Act regime would improve the overall clarity and predictability of the regime.

Option 3 (b) (change the test against which markets are assessed only)

5.12 The introduction of a competition-based test in place of the existing public interest test would make the regime more competition focused. This may help to reduce strategic uncertainty in that companies should have a clearer idea as to the issues that will be taken into account in an investigation. A greater competition focus should also reduce uncertainty for competitors and investors in assessing the regulatory issues in a market.

Option 3 (c) (change both the procedural aspects of the current regime and the test against which markets are assessed)

5.13 Overall this approach would combine the benefits of options 3(a) and 3(b). These changes would update and improve the framework in ways that would increase strategic certainty for companies while improving its effectiveness in targeting cases that may damage consumer interests.

Criminal sanctions

Option 1 (retain the current civil regime unchanged)

5.14 There are no additional benefits arising from this option.

Option 2 (increase the level of Competition Act fines on companies)

5.15 Fines which were set at a level which is greater than the expected gains from participating in the cartel may help to deter firms from engaging in cartels. However, such corporate sanctions would not necessarily deter individuals within the firm from engaging in cartel activities.

Option 3 (introduce criminal sanctions for individuals engaging in cartels)

5.16 US evidence suggests that the threat of a criminal conviction and the possibility of imprisonment means that the individuals are more likely to be deterred from engaging in cartels. We estimate that the consumer detriment caused by cartels operating in the UK is £1,120 million over a seven year period.

5.17 Assuming that a new criminal offence would deter between a quarter and a third of cartels from forming, we estimate a reduction in consumer detriment over a seven year period of between £280 million and £370 million (£40 million - £53 million per annum).

Disqualification of directors

Option 1 (rely on current disqualification provisions)

5.18 There will be no additional benefits from this option.

Option 2 (give the courts the power to disqualify for breaches of competition law)

5.19 This option has the benefit of protecting the public whose conduct in respect of a breach of competition law has shown them to be unfit to be involved in the management of a company. Breaches of UK or EC competition law have adverse effects on both consumers and the business community. For example, the DGFT found that one company had abused its dominant position by charging prices for one of its products which were between 33 per cent and 67 per cent higher than those of its competitors (and typically around 40 per cent higher). The substance of the DGFT's decision was upheld on appeal

by the CCAT⁷. The DGFT has estimated that the decision would save the NHS around £2 million a year.⁸

Option 3 (give the courts the power to disqualify and the OFT the power to accept equivalent undertakings)

5.20 This would have the same benefits as option 2. The addition of a procedure allowing a person to consent to disqualification without the necessity for a court hearing would have the benefits of earlier protection of the public from the actions of unfit directors, savings in court time, and reductions in costs for the Government and respondents to disqualification proceedings. It is difficult to quantify the likely percentage of respondents to disqualification proceedings who would opt to give undertakings. Between March 2001 and September 2001, 57% of the disqualifications obtained by the Insolvency Service were given by way of undertakings. Even if only 10% of respondents gave undertakings this would represent a significant saving.

Claims for damages

Option 1 (retain the current system)

5.21 There would be no additional benefits from this option.

Option 2 (make determinations of infringements binding on the courts)

5.22 This would streamline the process with the benefit that less time would be needed in court. This would go some way towards alleviating the twin problems of the length of time taken to pursue these cases and the costs involved. Although the courts will usually follow determinations made by the DGFT (and findings of fact by the DGFT are already binding on the parties in subsequent court proceedings), this does not provide the same level of certainty as making the determinations binding.

5.23 As there have been no successful claims for damages in respect of competition breaches it is not possible to estimate the time and costs savings to claimants of making determinations of infringements binding on the courts. However, we consider that making such determinations binding could result in more claims being made as there should certainly be some time and cost savings.

Option 3 (enable the CAT to hear claims for damages)

5.24 Enabling the CAT to hear claims for damages opens up a more streamlined route for pursuing such actions. Cases will be heard by experts in competition law thus valuable court time will not be taken up by lengthy explanations of competition technicalities. These experts may also be able to make more accurate assessment of the harm caused by anti-competitive behaviour when weighing up claims for compensation and evaluating expert evidence. In addition, hearings will take place in the slightly more informal nature of a tribunal setting which may prove less intimidating for the ordinary person and for small companies. It is probable that cases will move more quickly through the CAT, mainly as a result of the competition expertise available and a more active case management system than currently used in most courts, as well as greater use of written procedure.

⁷ *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading*. Judgment January 2002 (www.competition-commission.org.uk).

⁸ OFT press notice PN 03/02.

Option 4 (make determinations of infringements binding and enable the CAT to hear claims for damages)

5.25 This would combine the benefits of Options 2 and 3.

Option 5 (make determinations of infringements binding and enable the CAT to hear claims for damages (including group claims for damages))

5.26 This would combine the benefits of Options 2 and 3. Allowing the CAT to hear group claims for damages, brought by consumer bodies on behalf of named and identifiable consumers, would benefit consumers in situations where several have been harmed by anti-competitive behaviour. The group would be able to share the burden of costs and would also benefit from having their action managed by a body which may have previous experience in bringing similar cases. It would also be a more efficient manner for the CAT to hear cases. Rather than hearing several individual cases with the bulk of the same evidence being presented several times, if those parties wishing to combine forces asked a designated body to represent them in a representative action this would reduce the CAT's time taken by the action and the costs involved.

5.27 We conservatively estimate that there will be at least 7 findings of a breach of competition law per annum (this is based on the average number of competition breaches per year between 1994 and 1999, see paragraph 3.14). In addition to these UK cases, there will also be a number of breaches of European competition law. However, under the changes to private action procedures we consider that it would not be unreasonable to assume that perhaps 50% of cases could give rise to damages claims. This would mean in the region of 3 – 4 private actions per year.

6. COSTS OF EACH OPTION CONSIDERED

Merger reform

Option 1 (retain the current system)

Policy costs

6.1 There would be no additional policy costs to business of this option.

Implementation costs

6.2 There would be no additional implementation costs to business of this option. Businesses would continue to incur the costs of merger investigations (which we estimate as between £1 million and £1.5 million for a full CC investigation). The costs to Government of the current system of merger control averaged around £3.137 million per annum between 1991-9.

Option 2 (remove all forms of domestic merger control)

Policy costs

6.3 There would be no additional policy costs to business of this option.

Implementation costs

6.4 There would be no implementation costs to business of this option. However, there may be situations which could not be addressed by wider competition law and which would result in prices to businesses and consumers increasing. Further, if action did have to be taken for a breach of one of the Competition Act prohibitions, the monetary penalties for those involved in a breach could be significant (up to 10% of turnover).

Option 3(a) (make procedural changes only to the current regime)

Policy costs

6.5 There would be no additional policy costs to business of this option. It amends the existing merger provisions in terms of the procedures to be followed.

Implementation costs

6.6 There may be some implementation costs associated with the introduction of a new regime such as the need for staff training. We expect that this burden would fall mainly on law firms although law firms that were regularly involved in mergers/acquisitions would be attuned to the changes.

6.7 The proposals for introducing greater transparency during a CC investigation, particularly with respect to the discussion of remedies, may increase business costs. We have been unable to obtain specific figures relating to a potential increase in costs due to a more thorough/transparent CC investigation, however virtually all firms implied that any such costs would be negligible (especially in view of the overall costs of merging).

6.8 Procedural changes to the current merger regime would have an impact on the level of costs for Government. Broadly procedures for merger investigations at OFT would remain the same. OFT's initial estimate is that there may be an additional staff cost of approximately £50,000 per annum. The CC will face additional costs arising primarily from their new determinative role in deciding remedies, and the more transparent and open procedures – in particular through publishing provisional conclusions part way through an investigation. The CC estimate that the additional costs per merger inquiry in relation to these will be in the region of £370,000. There should be an overall reduction in the level of resources required at DTI (we estimate that DTI staff costs will reduce by approximately £250,000 per year).

Option 3(b) (change the test against which mergers are assessed only)

Policy costs

6.9 There should be no additional policy costs to business of this option. It amends the existing merger provisions in terms of the way in which mergers are analysed.

Implementation costs

6.10 There may be some implementation costs associated with the introduction of a new regime such as the need for staff training. We expect that this burden would fall mainly on law firms although law firms that were regularly involved in mergers/acquisitions would be attuned to the changes.

Option 3(c) (change both the procedural aspects of the current regime and the test against which mergers are assessed)

Policy costs – compliance costs for business

6.11 There should be no additional policy costs to business of this option. It amends the existing merger provisions in terms of the procedures to be followed and the way in which mergers are analysed.

Implementation costs

6.12 There may be some implementation costs associated with the introduction of a new regime such as the need for staff training. We expect that this burden would fall mainly on law firms although law firms that were regularly involved in mergers/acquisitions would be attuned to the changes.

6.13 The proposals for introducing greater transparency during a CC investigation, particularly with respect to the discussion of remedies, may increase business costs. We have been unable to obtain specific figures relating to a potential increase in costs due to a more thorough/transparent CC investigation, however virtually all firms implied that any such costs would be negligible (especially in view of the overall costs of merging).

6.14 The estimated impacts on the level of Government spending are as set out in paragraph 6.8 above.

Market investigations

Option 1 (retain the current system)

Policy costs

6.15 There would be no additional policy costs to business of this option.

Implementation costs

6.16 Significant levels of costs (both internal and external) are incurred by businesses in relation to monopoly investigations. The main source of internal costs is the amount of staff time taken up in data collection and compilation and in liaison with external legal and economic advisers. Legal fees make up the bulk of the external costs to a firm. We estimate that the average costs for a company of a full CC investigation would be in the region of £1 million.

6.17 The main costs to Government for a monopoly inquiry are the costs of the CC. We estimate that the average cost of a monopoly inquiry for the CC is £1,181,000.

Option 2 (remove monopoly provisions and rely on other competition provisions)

Policy costs

6.18 There should be no additional policy costs to business of this option.

Implementation costs

6.19 There would be no direct costs to business if the monopoly regime was abolished. However, where a complex monopoly existed and could not be addressed by competition law, it could result in increased prices to customers (including other businesses as well as consumers), less choice, lack of innovation, lower quality of goods or services, and loss of productivity.

Option 3 (a) (amend the procedural aspects of the current regime only)

Policy costs

6.20 There would be no additional policy costs to business of this option. It would amend the existing complex monopoly provisions of the Fair Trading Act in terms of the procedures to be followed.

Implementation costs

6.21 We do not anticipate that this option would create significant additional costs for business. There are likely to be some small implementation costs (mainly for law firms and other professional advisers rather than for industry as a whole) associated with the introduction of a new regime such as the need for staff training. We do not consider that these costs will be high for law firms who are regularly involved in competition issues.

6.22 The majority of the additional costs for Government arising from the procedural changes would fall to the CC. We estimate that the additional costs could average about £700,000 per inquiry. There will be some additional costs for OFT. OFT's initial estimate is that these costs will be in the region of £100,000 per annum.

Option 3(b) (amend the test against which complex monopolies are assessed only)

Policy costs

6.23 There would be no additional policy costs to business of this option. The proposals amend the existing complex monopoly provisions of the Fair Trading Act in terms of the way in which complex monopolies are analysed.

Implementation costs

6.24 We do not anticipate that this option will create significant additional costs for business or Government. There are likely to be some small implementation costs (mainly for law firms and other professional advisers rather than for industry as a whole) associated with the introduction of a new competition test, such as the need for staff training. We do not consider that these costs will be high for law firms who are regularly involved in competition issues.

Option 3(c) (replace the current system with a new regime which changes both the procedural aspects and the test against which markets are assessed)

Policy costs

6.25 There would be no additional policy costs to business of this option. The proposals amend the existing complex monopoly provisions of the Fair Trading Act in terms of the procedures to be followed and the way in which complex monopolies are analysed.

Implementation costs

6.26 We do not anticipate that this option will create significant additional costs for business. The implementation costs are those set out for options 3(a) and 3(b). One law firm informed us that they considered the effects of the proposals to be neutral in terms of costs.

Criminal sanctions

Option 1 (retain the current civil regime)

Policy costs

6.27 There would be no additional policy costs for business of this option.

Implementation costs

6.28 There would be no additional implementation costs for business of this option.

Option 2 (increase the level of civil corporate fines by 6 – 10 times)

Policy costs

6.29 This option would lead to additional policy costs. In the event that fines were increased, this could result in increased costs of up to 150% of turnover for companies that breached the Competition Act 1998.

Implementation costs

6.30 If the level of fines on companies for competition breaches were increased by some six to ten times, it is likely that there would be an increase in the current level of costs as firms would want to ensure that their compliance programmes were sufficiently rigorous. In the event that a company committed a breach of the Competition Act 1998, the resulting fine on the company might exceed the company's ability to pay, this could lead to corporate insolvency. This would entail undesirable social costs as it would impact on shareholders, employees, suppliers, customers, creditors and tax authorities.

Option 3 (introduce criminal sanctions against individuals engaging in hard-core cartels)

Policy costs

6.31 There should be no additional policy costs to business for this option. The criminal penalty will apply to individuals rather than to businesses.

Implementation costs

6.32 We do not anticipate that this option will create significant additional costs for business. Those whose businesses were perceived to be less at risk from infringing the legislation thought that communication of the new provisions would form part of their existing compliance programme and would not be a huge burden. One company said that this option would not increase their costs as they already had an extensive compliance programme in place. On the other hand, some companies suggested that they might redesign and re-run their compliance programmes if there was a new criminal offence.

6.33 Introduction of a new criminal offence would result in increased costs of investigation activity for the OFT. OFT estimate that this may involve an additional staff cost in the region of £330,000 per year. There would also be additional costs for the Serious Fraud Office (SFO) in prosecuting the offence.

Disqualification of directors

Option 1 (retain current disqualification provisions unchanged)

Policy costs

6.34 There would be no additional policy costs to business of this option.

Implementation costs

6.35 There would be no additional implementation costs for business of this option. Following conviction of an indictable offence, the courts would be merely invited to consider whether a person should also be subject to a disqualification order.

Option 2 (give the courts the power to disqualify for breaches of competition law)

Policy costs

6.36 There will be no additional policy costs to business of this option as it will apply to individuals who have committed competition breaches, not companies.

Implementation costs

6.37 It is unlikely that the possibility of civil disqualification proceedings against individuals involved in competition breaches would result in large increases in implementation costs for business. Civil sanctions against companies are already in place and will be unchanged, so there should be no need for companies to amend the compliance programmes which they already have in place to ensure that they do not fall foul of the prohibitions contained in the Competition Act 1998. Companies have said that the provisions would not result in large compliance costs to them.

6.38 The measure will result in increased costs for the OFT in investigating individuals' conduct and taking proceedings in appropriate cases. The average cost of disqualifying a director under section 6 of the Company Director Disqualification Act 1986 is approximately £21,000 (although a proportion of these costs may be recovered from defendants where costs are awarded against them). The OFT estimate that the introduction of a power to take disqualification proceedings may involve an additional staff cost of c. £85,000 per annum. This would represent an additional proportion of the work of 4 staff.

Option 3 (give the courts the power to disqualify and the OFT the power to accept equivalent undertakings)

Policy costs

6.39 There would be no additional costs to business of the measure as it will apply to individuals who have committed competition breaches, not companies.

Implementation costs

6.40 It is unlikely that this option would result in large changes in compliance costs for businesses, for the same reasons as in option 2 above.

6.41 The level of costs to the OFT of bringing disqualification proceedings set out in paragraph 6.41 above would be reduced to the extent that respondents choose to give undertakings that they will not be involved in the management of a company. However, it is difficult to quantify the possible savings as the likely take up of the undertakings procedure is not known.

Claims for damages

Option 1 (retain the current system)

Policy costs

6.42 There will be no additional policy costs for this option.

Implementation costs

6.43 There will be no additional implementation costs for this option.

Option 2 (make determination of infringements binding on the courts)

Policy costs

6.44 The intention of this option is to reduce the costs incurred by business and consumers in bringing a claim for damages for breach of competition law. If more businesses and consumers are encouraged by these measures to take private actions then more firms will incur the costs of defending actions than at present. However, it will only be companies who have been found to have breached competition law that will be subject to these additional costs.

Implementation costs

6.45 There will be no additional implementation costs for this option.

Option 3 (enable the CAT to hear claims for damages)

Policy costs

6.46 The intention is to reduce the costs incurred by business and consumers in bringing a claim for damages for breach of competition law. This reduction in costs will be achieved by introducing the CAT as an alternative route with the additional possibility of bringing a group claim for damages. If more businesses and consumers are encouraged by these measures to take private actions then more firms will incur the costs of defending actions than at present. We estimate that there will be perhaps 3 – 4 actions per year. However, it will only be companies who have been found to have breached competition law that will be subject to these additional costs, and the costs themselves in each individual case should be lower in the CAT than in the courts. The CAT will have the power to throw out any proceedings that have no valid grounds.

Implementation costs

6.47 The costs for the CAT will vary depending on the number of members involved and the amount of time taken by the case. Each member costs £250 per day and there maybe administration costs of approximately £1-2000 per case. As there have been no successful private actions it is not possible to estimate the time that a case would take.

Option 4 (make determinations of infringements binding and enable the CAT to hear claims for damages)

Policy costs

6.48 The policy costs are the same as for those for options 2 and 3 above.

Implementation costs

6.49 The implementation costs are the same as those for options 2 and 3 above.

Option 5 (make determinations of infringements binding and enable the CAT to hear claims for damages (including group claims for damages))

Policy costs

6.50 The same policy costs will be incurred as under options 2 and 3 above.

Implementation costs

6.51 The implementation costs are the same as for options 2 and 3 above.

7. SUMMARY OF COSTS AND BENEFITS OF OPTIONS CONSIDERED

Merger reform

Option	Costs	Benefits
1 (no change)	Costs for business and Government remain the same. Lack of competition focus leading to potentially less open and less competitive markets.	Tried and tested merger regime which is generally effective

	Uncertainty for business due to public interest test and Ministerial role.	
2 (remove merger regime)	Inability to address the creation of market power. Inability to enforce remedies to address a loss of competition resulting from a merger. Less open and less competitive markets leading to significant damage to the economy.	Business saves the costs associated with a merger investigation (£1 million - £1.5 million). Certainty for business. Government saves the costs of merger control (average of £3.137 million p.a. between 1991-9).
3(a) (new merger regime: decisions by independent competition authorities)	Some increased costs for business as a result of a more thorough CC investigation, though these are thought to be negligible. Would be broadly neutral in terms of costs for business. Increased costs for OFT (approximately £50,000 per annum). Increased costs for the CC arising from their enhanced role in determining remedies and more open and transparent procedures (approximately £370,000 per inquiry).	Reduction in uncertainty for business through removal of Ministerial involvement and increase in transparency of competition authorities' procedures. Reduction in DTI costs through removal of Ministerial involvement (approximately £250,000 per annum)
3(b) (new merger regime – competition test rather than public interest test)	Costs for business remain the same.	More competition focused regime will ensure the maintenance of open and competitive markets which acts as a stimulus for innovation, efficiency, wider choice and lower prices for consumers.
3(c) (new merger regime – decisions by independent competition authorities and a competition test rather than a public interest test)	Some increased costs for business as a result of a more thorough CC investigation, though these are thought to be negligible. The new regime would be broadly neutral in terms of costs for business. Increased costs for OFT (approximately £50,000 per annum). Increased costs for the CC arising from their enhanced role in determining remedies and more open and transparent procedures (approximately £370,000 per inquiry).	Reduction in uncertainty for business through removal of Ministerial involvement, more focus on competition, and increase in transparency of competition authorities' procedures. More competition focused regime will ensure the maintenance of open and competitive markets which acts as a stimulus for innovation, efficiency, wider choice and lower prices for consumers. Reduction in DTI costs through removal of Ministerial involvement (approximately £250,000 per annum)

Market investigations

Option	Costs	Benefits
1 (no change)	Costs for business and Government remain the same. Lack of competition focus leading to potentially less open and less competitive markets. Uncertainty for business due to public interest test and Ministerial role.	Tried and tested monopoly regime which is generally effective. No additional monetary benefits to the public or business.
2 (remove monopoly regime)	Inability to address the non-collusive parallel behaviour or structural problems leading to uncompetitive markets. Less open and less competitive markets leading to significant damage to the economy.	Businesses save the costs associated with a monopoly investigation (average cost for a company of £1 million) Government saves the costs of monopoly control (average of £1,500,000).
3(a) (new markets regime – decisions by independent competition authorities)	Broadly cost neutral for companies. Increased costs for OFT (approximately £100,000 per annum). Increased costs for CC arising from their enhanced role in determining remedies and more open and transparent procedures (approximately £700,000 per inquiry).	Reduction in uncertainty for business through removal of Ministerial involvement and increase in transparency of competition authorities' procedures. Reduction in DTI costs through removal of Ministerial involvement (approximately £400,000 per annum).
3(b) (new markets regime – competition test rather than public interest test)	Some increased costs for law firms, although these are expected to be small.	More competition focused regime will ensure the maintenance of open and competitive markets which act as a stimulus for innovation, efficiency, wider choice and lower prices for consumers.
3(c) (new markets regime – decisions by independent competition authorities and competition test rather than public interest test)	Broadly cost neutral for companies. Increased costs for OFT (approximately £100,000 per annum). Increased costs for CC arising from their enhanced role in determining remedies and more open and transparent procedures (approximately £700,000 per inquiry).	Reduction in uncertainty for business through removal of Ministerial involvement, more focus on competition and increase in transparency of competition authorities' procedures. More competition focused regime will ensure the maintenance of open and competitive markets which act as a stimulus for innovation, efficiency, wider choice and lower prices for

		consumers. Reduction in DTI costs through removal of Ministerial involvement (approximately £400,000 per annum).
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Criminal sanctions

Option	Costs	Benefits
1 (retain current civil regime unchanged)	No additional costs	No additional benefits.
2 (increase level of Competition Act fines on companies by 6 – 10 times)	Possible increase in the current level of compliance costs through re-design of compliance programme. If firm was unable to pay a fine and went into insolvency, there would be additional costs on others such as the firm's suppliers.	Higher fines would help to deter firms from engaging in cartels.
3 (introduce criminal sanctions for individuals engaging in cartels)	Firms would be advised to update their existing compliance programmes but the additional costs would be minimal. Increased investigation costs for the OFT of approximately £330,000. Increased prosecution costs for the SFO.	Benefits come from increased deterrence and are estimated at £40 million - £53 million per annum.

Disqualification of directors

Option	Costs	Benefits
1 (current regime unchanged)	No additional costs.	No additional benefits.
2 (give courts the power to disqualify for breaches of competition law)	The option does not change the prohibitions of the competition regime, only investigation and enforcement powers and procedures against individuals. There should be no additional costs imposed directly on business as disqualification would apply to individuals rather than companies.	Protection of the public from directors whose conduct has shown them to be unfit to be involved in the management of a company.
3 (give courts the power to disqualify and OFT the power to accept equivalent undertakings)	The option does not change the prohibitions of the competition regime, only investigation and enforcement powers and procedures against individuals. There should be no additional costs imposed directly on business as disqualification	Protection of the public from directors whose conduct has shown them to be unfit to be involved in the management of a company. Giving of undertakings would provide earlier protection of the public, savings in court time and reduction in costs for Government and respondents.

	would apply to individuals rather than companies.	
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Claims for damages

Option	Costs	Benefits
1 (retain current system)	No additional costs incurred.	Cases heard by judges experienced in adversarial inter-parte actions
2 (make determinations of infringements binding)	More streamlined process should encourage more claims – this will increase the likelihood of companies incurring costs defending such actions.	More streamlined process. Courts can focus on whether damage was caused and the appropriate level of compensation
3 (enable CCAT to hear claims for damages)	More attractive process should encourage more claims – this will increase the likelihood of companies incurring costs defending such actions. Increased costs to CAT (£250 per member day plus admin costs of approx £1-2000)	Creates an alternative streamlined route Cases heard by experts in competition law
4 (make determinations of infringements binding and enable CCAT to hear claims for damages)	More streamlined process combined with the additional CAT route should encourage more claims – this will increase the likelihood of companies incurring costs defending such actions. Increased costs to CCAT (£250 per member day plus admin costs of approx £1-2000)	More streamlined process. Courts can focus on whether damage was caused and the appropriate level of compensation Creates an alternative streamlined route Cases heard by experts in competition law
5 (make determinations of infringements binding and enable CCAT to hear claims for damages (including group claims))	More streamlined process combined with the additional CAT route should encourage more claims – this will increase the likelihood of companies incurring costs defending such actions. Increased costs to CAT (£250 per member day plus admin costs of approx £1-2000)	More streamlined process. Courts can focus on whether damage was caused and the appropriate level of compensation Creates an alternative streamlined route Cases heard by experts in competition law Potential for small cases to be combined into one bigger action.

8. IMPACT ON SMALL BUSINESS

Merger reform

8.1 The measures will not impact significantly on small business as such firms, by definition, will not be caught by the turnover thresholds and the majority will not meet the share of supply test. However small business should reap the benefits of more open and competitive markets that will result from the improved regime.

Market investigations

8.2 The measures will not impact significantly on small business, except that small businesses should reap the benefits of more open and competitive markets that will result from the improved regime. The measures should enhance small firms' ability to compete in markets e.g. by removing barriers to entry or expansion.

Criminal sanctions

8.3 The measure does not target legitimate business activity and small businesses should benefit from it. An effective deterrent to cartels would make it less likely that customers, who may be small businesses, are subject to excessive prices

Disqualification of directors

8.4 The measure will not target legitimate business activity. Small businesses should benefit from it to the extent that those directors who have been shown to have fallen below the standards to be expected will not be able to be involved in the management of a company for a specified period of time.

Claims for damages

8.5 The measures will benefit small businesses as the CAT should provide them with an improved route to gain redress for any harm suffered through the anti-competitive actions of other firms.

9. RESULTS OF CONSULTATION

9.1 The proposal to introduce a new regime for investigating markets; a new criminal offence for individuals involved in hard-core cartels; disqualification of directors for breaches of competition law; and new procedures for making claims for damages in respect of anti-competitive behaviour were contained in the White Paper "*Productivity and Enterprise: A World Class Competition Regime*", published in July 2001. The White Paper also contained a short chapter on merger reform, which had been the subject of two earlier consultative documents (detailed in paragraph 9.2 below).

Merger reform

9.2 Proposals to amend the merger regime were first set out in "*Mergers: A Consultation Document on Proposals for Reform*", which was published in August 1999 and invited comments from all interested parties. Responses were received from a range of companies, law firms, trade unions and representative organisations. A further document "*Mergers: The Response to the Consultation on Proposals for Reform*" was issued in October 2000 and contained further proposals and a draft RIA. In addition to

the responses received to this second consultation, a number of other stakeholders were contacted directly for their specific comments on the draft RIA.

9.3 Respondents strongly supported the removal of Ministers from the mergers regime (except in exceptional circumstances) and the move to a competition-based test. However a small minority of respondents objected to the narrow competition focus of the new test. They considered that other issues such as employment, the environment and the impact on local communities should be capable of being taken into account.

9.4 It had been proposed to introduce an 'enhanced share of supply' test so that more non-horizontal mergers might be subject to further scrutiny where they involve a company that already has a significant share of the affected market. However this was not well received by business in consultation, one firm referred to such a test being 'an absolutely unbearable burden on companies'. In light of such adverse feedback, this proposal has now been dropped.

Investigating markets

9.5 About half of the 72 respondents to the July 2001 White Paper commented on the market proposals. A large majority of those respondents endorsed the principle of the reforms. No respondents defended the existing monopolies regime, which is widely felt to be outmoded.

9.6 There was strong support for the emphasis given in the new regime to the independence of the competition authorities, particularly as regards the CC's ability to set remedies. Comments were also supportive of the recommendations that the CC should conduct investigations in accordance with firm and detailed procedural rules.

Criminal sanctions

9.7 About half of the respondents who commented on the proposal favoured the introduction of criminal sanctions against individuals and agreed that this would provide a greater deterrent effect.

Disqualification of directors

9.8 The majority of respondents who commented favoured introduction of disqualification. A smaller number of respondents thought that disqualification should be limited to participation in hard core cartels, rather than apply to wider competition breaches. A number also thought that disqualification should be limited to active involvement in a competition breach.

Claims for damages

9.9 The majority of respondents who commented on the proposal to enable the CAT to hear claims for damages suffered as a result of anti-competitive practices supported the policy.

9.10 Views regarding the proposals in the White Paper on allowing group claims for harm suffered as a result of anti-competitive activity were fairly mixed. The main reasons for opposing group claims for damages (and an issue that was also recognised by some of

those who favoured the proposal in principle) rested on the difficulty of proving the level of harm suffered by individual consumers and the problems involved in distributing damages to an unidentified group of consumers. Some respondents were concerned that the proposal could lead to an increase in vexatious claims. The suggestion was also made that group claims should only be allowed on behalf of named and identifiable consumers (which has been accepted by the Government).

10. DEVOLUTION

Merger reform

10.1 The new merger regime will apply to the whole of the UK.

Market investigations

10.2 The new markets regime will apply to the whole of the UK.

Criminal sanctions

10.3 The criminal offence will apply to England, Scotland, Wales and Northern Ireland. The SFO will be the lead prosecutor in England, Wales and Northern Ireland, and the Lord Advocate will be the prosecutor for Scotland.

Disqualification of directors

10.4 The disqualification provisions will apply to England, Wales and Scotland.

Claims for damages

10.5 The new regime will apply to the whole of the UK.

11. GUIDANCE, ENFORCEMENT AND EVALUATION

Merger reform

11.1 The merger regime under the Enterprise Act will maintain the current system of voluntary notification of prospective deals falling under the regime. However, OFT will perform the same monitoring as they do under the current regime whereby they scan various information sources for announcements of relevant mergers. There is also the possibility for third parties to make a complaint regarding a particular merger which may trigger an OFT investigation. As the merger regime is one of voluntary notification, there can be no sanctions for non-notification of a merger which meets the thresholds laid out in the regime.

11.2 The OFT will retain responsibility within the mergers regime for monitoring compliance with orders and undertakings that are made or accepted by the authorities following an investigation.

11.3 The OFT and the CC will produce guidance on how the competition tests will be applied in January 2003. The new regime is due to commence in the Summer of 2003.

Market investigations

11.4 The CC will have the power to fine companies for the late or non-provision of information. The OFT and the CC will publish guidance on the operation of the new regime in January 2003. The new regime is due to commence in the Summer of 2003.

Criminal sanctions

11.5 Guidance on the investigation process and guidelines on prosecution (to include leniency arrangements) will be made publicly available by January 2003. The provisions are due to commence in the Summer of 2003.

Disqualification of directors

11.6 Disqualification would only take effect where the court was satisfied that a director was unfit to be involved in the management of a company, or where a director chose to give an undertaking that he would not be involved in the management of a limited company for a particular period of time. Contravention of a disqualification order or an undertaking will be a criminal offence and would lead to the imposition of personal liability in respect of debts of the new company incurred during the period of the breach.

11.7 The OFT will produce guidance on the circumstances in which it will seek disqualification.

Claims for damages

11.8 An order made by the CAT will be enforceable in the courts in the same way as an order made by the High Court.

12. SUMMARY OF OPTIONS TAKEN FORWARD IN THE ENTERPRISE ACT

Merger reform

12.1 Under the Enterprise Act the current merger control system will be replaced with a new regime which removes Ministers from decisions in most cases and changes the test against which mergers are assessed to one focused on competition. We consider that this is the most effective package to update and improve the merger regime in ways that will increase strategic certainty for companies while improving its effectiveness in focusing assessment on competition issues.

Market investigations

12.2 Under the Enterprise Act the current monopoly regime will be replaced with a new power to investigate markets which removes Ministers from decisions in most cases and

changes the test against which markets are assessed to one focused on competition. The introduction of these reforms will update and improve the competition framework in ways that increase strategic certainty for companies while improving its effectiveness in targeting cases that may damage consumer interests. These reforms will help bring the system of monopoly regulation into line with modern economic thinking and best practice in international competition policy.

Criminal sanctions

12.3 The Government’s objective is to ensure that the UK’s competition law acts as a real deterrent against individuals and companies engaging in anti-competitive behaviour. The Enterprise Act introduces a new criminal offence for individuals engaging in hard-core cartel activity as the most effective means of deterring individuals from engaging in cartels and encouraging informants to come forward.

Disqualification of directors

12.4 Under the Enterprise Act the disqualification provisions are extended to breaches of competition law. This will protect the business community and the general public from directors whose actions have shown them to be unfit in the management of a limited company. The addition of a procedure whereby an individual could consent to being disqualified without the necessity for a court hearing will have the benefits of earlier protection of the public from the actions of unfit directors, savings in court time, and reductions in costs for the Government and respondents to disqualification proceedings.

Claims for damages

12.5 Under the Enterprise Act determinations of competition law infringements will be binding on the courts, enabling the CAT to hear claims for damages (including group claims for damages). We consider that this is the most effective package of measures to ensure that harmed parties can gain appropriate compensation for harm suffered.

13. DECLARATION

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

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Parliamentary Under-Secretary of State for Competition, Consumers and Markets

Date November 2002

14. CONTACT POINT

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