



Department of Trade and Industry

# ***Productivity and Enterprise***

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A World Class Competition Regime



**A WORLD CLASS  
COMPETITION REGIME  
DEPARTMENT OF TRADE AND INDUSTRY**

*Presented to Parliament by the Secretary of State for Trade and Industry  
By Command of Her Majesty  
July 2001*

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# FOREWORD

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**The Rt Hon Patricia Hewitt MP**  
**Secretary of State for Trade and Industry**

In the last Parliament this Government built a platform of economic stability with strong and stable growth and employment at record levels. We began a major programme of structural economic reform, including a new Competition Act and insolvency reforms. Now is the time to build on these achievements. We want an enterprising economy to make the UK the best place in the world to do business.

On 18 June, the Chancellor and I announced our intention to make enterprise and productivity the cornerstone of the Government's economic reforms in this Parliament. Promoting enterprise will boost UK business and improve productivity. Our Enterprise Bill will strengthen competition and the power of consumers by radically reforming competition law, transforming our approach to bankruptcy and corporate rescue and promoting new

safeguards for consumers. We believe that promoting enterprise will release the entrepreneurial skills of the British people.

In this White Paper, I am setting out my proposals for the reform of competition law. Competition and enterprise will be strengthened. The Office of Fair Trading, enhanced by a strategic board, with increased powers and more resources, will have duties to promote competition in the economy. Ministers will be taken out of the vast majority of monopoly and merger cases, and decisions on day to day cases will be taken by the Competition Commission against a competition-based test. This will increase business certainty. We are giving the Office of Fair Trading a formal role to advise where regulations may have an impact on competition issues and we propose to introduce strong deterrents to anti-competitive behaviour by introducing a new criminal offence for those engaged in cartels. Through measures such as the introduction of the super-complaint, where named consumer bodies can raise important market issues with the Office of Fair Trading, we are putting consumers at the heart of competition policy.

Through these reforms, and other far reaching measures such as our review of company law and reform of employment law, we will put in place a modern business framework with enterprise and productivity at its heart. We will strengthen UK businesses helping them get to the future first through enhanced competition and stronger consumers.

A handwritten signature in black ink, which appears to read 'Patricia Hewitt'. The signature is stylized and fluid, with a large initial 'P' and a long, sweeping underline.



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# EXECUTIVE SUMMARY

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This White Paper sets out a blueprint to build a world-class competition regime for the UK. Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal, and drives innovation and productivity.

## THE GOVERNMENT'S PRINCIPLES FOR COMPETITION POLICY

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Since 1997, the Government has taken a series of steps to build a world-class competition regime in the UK. The Government's actions have been based on a clear set of principles, which also underpin the reforms in this White Paper:

- Competition decisions should be taken by strong, pro-active and independent competition authorities.
- The regime should root out all forms of anti-competitive behaviour.
- There should be a strong deterrent effect.
- Harmed parties should be able to get real redress.
- Government and the competition authorities should work for greater international consistency and co-operation.
- Competition policy deserves a high profile – because of its importance for economic performance.

The Government will publish a mission statement – setting out its objectives on competition policy, and what it promises to do to achieve them. This will help Parliament and others hold Government accountable for its actions.

## STRONG, PROACTIVE AND INDEPENDENT COMPETITION AUTHORITIES

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The Government, the Office of Fair Trading (OFT) and the Competition Commission, all share a common understanding of the aims of our competition regime – to increase the level of competition in the economy, to improve the UK's productivity performance and to make markets work well for consumers.

The Government wishes to see strong, independent competition authorities which work proactively to root out instances of anti-competitive behaviour:

- There will be clear legal duties for the OFT to promote competition.
- The Government invites our competition authorities to advise it on the impact of laws and regulations on competition. The Government commits itself to responding publicly within 90 days.
- The Government welcomes the OFT's move to introduce “super-complaints” from consumer groups. This new power for consumer groups will be enshrined in legislation.

- Only those with expertise relevant to competition will be appointed to the Competition Commission. Only those with expertise relevant to competition or consumer affairs will be appointed to the new Board of the OFT.
- Both the Competition Commission and the OFT will improve their staffing – with recruitment on the basis of expertise relevant to competition becoming the norm for those working on competition.
- The Government invites Parliament to actively scrutinise our competition regime. The mission statements of the Competition Commission, OFT and Government will help it to do so.

## MODERNISING THE MERGER REGIME

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The Government is committed to introducing a new merger regime:

- Final decisions will be taken by independent competition authorities, rather than Ministers.
- The test they will apply will be whether a merger results in a substantial lessening of competition rather than the current public interest test.
- Exceptionally, where competition considerations point the other way, it will be possible for the authorities to clear the merger or allow it to proceed with less stringent conditions where they believe it will bring overall consumer benefits.
- Ministers will continue to decide on the small minority of cases which raise defined exceptional public interest issues.
- There will also be procedural and other improvements, building greater transparency into the process.

## INVESTIGATING MARKETS

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The Government will reform the monopoly provisions – replacing them with a new power to investigate markets – where the overwhelming majority of decisions will be taken by independent competition authorities:

- The OFT will work proactively to keep markets under review – where it appears that markets may not be working well, it will be able to refer them to the Competition Commission for further investigation.
- The Competition Commission will carry out a full investigation – assessing the market against a new competition-based test.
- The Competition Commission will itself determine what remedies are necessary. If appropriate, it will ask the OFT to negotiate undertakings on its behalf.
- Occasionally, even though there are adverse competition effects, the way a market operates may bring countervailing benefits to consumers. If this is the case, then the Competition Commission may decide to take no action or modify its remedies.
- Ministers will retain the power to decide the very small minority of cases where clearly defined exceptional public interest issues arise.

- There may be a case for Ministers retaining a limited role in relation to divestment remedies recommended by the Competition Commission.

### A STRONG DETERRENT EFFECT

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Hard-core cartels are highly damaging to consumers and to the economy in general. The Government believes that the current level of fines against those who engage in cartels does not provide an adequate deterrent.

There is a strong case for introducing criminal sanctions against individuals who engage in hard-core cartels:

- The new criminal offence would need to catch price-fixing, market-sharing and bid-rigging cartels.
- It should target individuals who set up and maintain cartels, and also senior executives or directors who either condone or encourage the arrangement.
- There would be real advantages for the main prosecuting authority to be the OFT.
- The Government intends that the OFT should be able to bring a criminal case against an individual whenever a cartel is implemented or intended to be implemented in the UK – this would include cases where the case against the firm is pursued by the European Commission.

### REAL REDRESS FOR THIRD PARTIES

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Private actions are a very important limb of an effective competition regime. Where behaviour is illegal under competition laws, parties who are harmed should be able to bring action against the perpetrators – getting the compensation they deserve.

- The Government proposes to widen the remit of the Competition Commission Appeal Tribunals enabling them to hear claims for damages brought by harmed parties.
- There will be a new right of appeal when seeking interim measures under the Competition Act to stop anti-competitive behaviour while a case is under consideration.
- The Government intends to repeal the exclusion of vertical agreements under the Competition Act.
- The Government believes that consumer groups should be able to bring actions for damages on behalf of consumers who have suffered harm as a result of anti-competitive behaviour.
- The OFT will be able to seek a court order disqualifying company directors where serious breaches of competition law have been found.

## NEXT STEPS

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The Government is committed to moving swiftly to implement this White Paper. Many changes do not require legislation and will be implemented over the coming months.

The forthcoming Enterprise Bill will implement those reforms requiring legislation. The Government invites views on the proposals in this White Paper to inform the process of drafting the Enterprise Bill. Comments should be received by 5 October 2001.

### **Consultation process**

#### **Contacting Us:**

We would prefer to receive comments by e-mail. Such comments should be sent to:

[competition.reform@dti.gov.uk](mailto:competition.reform@dti.gov.uk)

However, if you wish, you may instead post comments to:

Rachel Crisp  
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#### **Confidentiality:**

Your response to this White Paper may be made publicly available in whole or part at the Department's discretion. If you do not wish all or part of your response (including your identity) to be made public, you must state in the response which parts you wish us to keep confidential. Where confidentiality is not requested, responses may be made available to any enquirer, including enquirers outside the UK, or published by any means, including on the internet.

# COMPETITION AND THE ECONOMY

- **Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal, and drives innovation and productivity.**
- **Establishing strong competition in the UK economy is central to the Government's aim of meeting the productivity challenge through the promotion of enterprise for all.**
- **This White Paper sets out a blueprint to build a world-class competition regime for the UK.**
- **The Government is also working to open up UK markets to competition and pushing for increased liberalisation in European markets.**

**1.1** The importance of competition in an increasingly innovative and globalised economy is clear. Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organisation of production. As such, competition is a central driver for productivity growth in the economy, and hence the UK's international competitiveness.

## COMPETITION AND CONSUMERS

**1.2** Competition between firms protects consumers. In markets which lack effective competition, firms know that customers have little or no choice but to buy from them – and so they can treat their consumers unfairly.

**1.3** With strong competition firms are forced to work hard to win and keep customers. As a result, competition drives down prices and drives up quality and choice. This is most marked in areas which have moved from (often state owned) monopolies to more open markets. For example, greater competition between utility firms has helped to reduce bills for UK householders.

**1.4** We can see equally positive results of competition in other markets. A recent court action outlawed fixed prices for branded over-the-counter medicines – including popular painkillers and vitamin pills. Within hours, major supermarket groups announced that they would cut prices of such medicines by up to 50%.

## COMPETITION AND AN EFFICIENT ECONOMY

**1.5** Strong competition is closely linked to dynamic and efficient markets (see Box 1.1).

### Box 1.1: Competition and Productivity: The Economic Evidence

**Blundell, Griffith and Van Reenen (1995)<sup>1</sup> and Nickell (1996)<sup>2</sup> find that various measures of competitive pressure in a sector have a positive impact on firm efficiency and productivity growth rates.**

**Geroski (1990)<sup>3</sup> finds evidence that market power tends to reduce the rate of innovation and productivity growth.**

**Caves and Barton (1990)<sup>4</sup> find that increased market concentration is associated with reduced technical efficiency.**

**Barnes and Haskel (2000)<sup>5</sup> attribute 30-50% of productivity growth in the UK and US to the entry and exit of firms in their markets.**

**Caves (1998)<sup>6</sup> finds that new entrants bring with them higher rates of productivity.**

**Porter (1990)<sup>7</sup> finds in his major survey of international industrial performance that it is firms which face strong domestic competition which perform best in international markets. More recent work (Porter 2000)<sup>8</sup> shows that in Japan only those sectors characterised by strong domestic competition remain internationally competitive following the country's recent economic downturn – examples include cameras, automobiles and audio equipment.**

<sup>1</sup> Blundell, Griffith and Van Reenen: *Dynamic Count Data Models of Technological Innovation*. *The Economic Journal*, 105, March 1995.

<sup>2</sup> Nickell S: *Competition and Corporate Performance*. *Journal of Political Economy*, 104 (4) 1996.

<sup>3</sup> Geroski, P: *Innovation, Technological Opportunity and Market Structure*. *Oxford Economics Papers* 42, July 1990.

<sup>4</sup> Caves and Barton: *Efficiency in US Manufacturing Industries*. MIT Press, 1990.

<sup>5</sup> Barnes and Haskel: *Productivity in the 1990s: Evidence from British Plants*. Draft Paper, Queen Mary College, University of London, 2000.

<sup>6</sup> Caves, R: *Industrial Organisation and New Findings on the Turnover and Mobility of Firms*.

<sup>7</sup> Porter, M: *The Competitive Advantage of Nations*. MacMillan Press, 1990.

<sup>8</sup> Porter, M, Takeuchi, H and Sakakibara, M: *Can Japan Compete?* Macmillan Press, 2000.

### Productivity and enterprise

**1.6** Establishing strong competition in the UK economy is central to the Government's aim of meeting the productivity challenge through the promotion of enterprise for all.

**1.7** Productivity is the main factor which determines living standards – so raising our productivity holds the key to our long-term prosperity. However, UK productivity lags behind that of our principal competitors. The labour productivity gap with the US was 45% in 1999, that with France was 19%, and Germany, 7%. If the UK were to match the productivity performance of the US, for example, output per head would be over £6,000 higher.

**1.8** As the Government's reforms have recognised, competition is by no means the only driver of productivity in an economy – enterprise and innovation, skills and investment are also important drivers of productivity. But the competition regime is vital. Strong competition regimes encourage open dynamic markets and through them, innovation and value for consumers.

**1.9** This White Paper sets out a blueprint to build a world-class competition regime for the UK.

## LIBERALISING MARKETS

**1.10** A strong domestic competition framework is essential. However, the full benefits of competition will only be felt in markets that are open to trade and investment by overseas firms as well as by domestic rivals.

**I.11** With markets open to international competition, the best, most efficient domestic firms can expand while continuing to face effective competition. Inefficient domestic firms either need to improve or leave the market. Such change leads to major improvements in national productivity and can boost economic growth.

**I.12** The opposite happens with protectionist trade policies. Closed markets can shelter inefficient domestic firms from the need to compete, encourage cartels, limit buyer power and deny consumers the benefits of lower prices that can emerge from competitive pressure.

**I.13** Recent Government policy has had a twin focus of opening up UK markets wherever possible and pushing for increased liberalisation in European markets.

### Liberalising UK markets

**I.14** The UK's approach to opening up utility markets to competition can deliver significantly lower prices and create more dynamic markets. Such benefits can be illustrated by looking at the gas, electricity and telecommunications markets, which have been extensively liberalised in recent years.

### Gas and electricity markets

**I.15** Liberalisation of energy markets has led to lower costs through increased efficiency and lower prices for consumers. The UK gas and electricity markets are already fully liberalised, with all types of customer able to choose their own supplier. For example:

- More than 30% of domestic gas customers and 25% of electricity customers have switched suppliers.
- Domestic electricity prices have fallen as markets have opened up. In real terms, quarterly credit electricity customers paid 23% less in 2000 than in 1995.

**I.16** The UK experience also shows that energy liberalisation need not get in the way of our objectives on fuel poverty and the environment. For example:

- Electricity and gas disconnections have fallen in the last 3 years – suppliers must offer customers a range of payment options.
- Total carbon dioxide emissions from power stations in 2000 were estimated to be 23% below 1990 levels, despite a 19% increase in electricity consumption.

### Computing and telecoms

**I.17** UK consumers have benefited from rapid price falls as a result of the opening up of the UK market in telecoms:

- For mobile phones, prices have fallen by 20% in 18 months from the beginning of 1999.
- A quarter of consumers in each of the mobile and fixed markets have switched suppliers.
- There are high levels of overall satisfaction with both mobile and fixed line services.
- The cost of international calls has fallen dramatically over the past decade.

**I.18** While much remains to be done to secure the benefits of further liberalisation of the UK telecommunications market the progress underlines the importance of securing effective competition and open markets in telecommunications.

### Liberalising European markets

**I.19** The Government has been at the forefront of the debate in Europe about opening up previously closed markets to competition. For example, at the Stockholm Summit, the EU endorsed the target to conclude as early as possible in 2001 work on the legislative proposals

announced by the Commission following its 1999 review of the telecommunications regulatory framework.

**1.20** The UK has pushed for the early adoption of the European Commission's proposals for full liberalisation of European energy markets, also for the telecommunications and financial services markets. The UK experience has shown that opening up markets to competition can deliver significantly lower prices to all consumers and create more dynamic markets. And in many markets there have been welcome developments in respect of increased competition and consumer choice.

**1.21** One example is air travel in Europe. The open market for flights within the EU, developed during the 1990's, has allowed new players to enter the market and offer better deals for consumers. The Government believes that further liberalisation is necessary so companies can compete effectively across borders in the interests of both business and consumers.

**1.22** The Government will actively promote policies to create stronger competition and liberalisation of markets to benefit both business and consumers.

- **The UK's competition regime is built on the Competition Act 1998 which prohibits anti-competitive agreements and abuses of dominant market position.**
- **EC law has direct effect in the UK – prohibiting the same kinds of behaviour where they have an effect on inter-state trade.**
- **The European Commission proposes far-reaching reforms to strengthen the effectiveness of the EU regime – the Government broadly welcomes these proposals.**
- **The Fair Trading Act 1973 contains important provisions which address mergers and allow for market-wide investigations. Currently, final decisions on cases are made by Ministers acting on the advice of competition authorities.**

## THE DOMESTIC REGIME

**2.1** Four years ago, the UK's competition regime was widely accepted as being much weaker than those of our industrial competitors. In particular, it was ineffective at dealing with cartels. The penalties for engaging in anti-competitive behaviour were also weak – the competition authorities could not fine firms, nor could third parties take action for the harm they suffered.

**2.2** Following the 1997 general election, the Government introduced legislation to adopt a prohibition against anti-competitive agreements and abuses of dominant market position – along the same lines as the European regime.

**Competition Act 1998** **2.3** This legislation – now the Competition Act 1998 – prohibits cartels and other anti-competitive agreements. It also prohibits abuses of dominant market position. The new regime ensures businesses do not face the burdens of two divergent sets of competition law addressing similar practices.

**2.4** Firms which breach the prohibitions in the Competition Act break the law. Their actions can be subject to penalties – of up to 10% of UK turnover in the relevant market, for up to three years of an infringement. They also face the prospect of actions for damages against them by third parties that have been harmed by their illegal acts.

**2.5** Under the Competition Act, it is the Office of Fair Trading (OFT)<sup>1</sup>, rather than Ministers, which is responsible for taking decisions on day-to-day competition cases. Appeals against decisions are made to a new tribunal – the Competition Commission Appeal Tribunals.

**Mergers** **2.6** The Fair Trading Act 1973 also provides an important limb of domestic competition law.

**2.7** Most merger cases are considered under this legislation. Initial investigations are normally carried out by the OFT, who advise Ministers on whether to make references to the reporting side of the Competition Commission<sup>2</sup> (although Ministers can also independently make references). The Competition Commission then conducts a formal investigation and sends its report to the Secretary of State for Trade and Industry – in particular considering

<sup>1</sup> Even though formal powers are vested in the Director General of Fair Trading, in reality it is the OFT led by the Director General which enforces the law. Therefore, this document refers to the OFT rather than the Director General.

<sup>2</sup> Throughout this document, the reporting side of the Competition Commission is referred to simply as the "Competition Commission". Similarly "competition authorities" includes only the reporting side of the Commission.

whether the merger operates, or may be suspected to operate against the public interest. The Government cannot take action unless the Commission advises that the merger contravenes the public interest – in such cases, it has discretion on what, if any, remedies to adopt.

**2.8** The Government announced in 1999 that it intended to modernise the merger regime – leaving decisions on cases to the competition authorities, making judgements against a competition-based test. Following consultation, the Government has decided how best to put these proposals into practice – more detail on the changes is set out in Chapter 5.

### Complex monopolies

**2.9** The Fair Trading Act also contains provisions to address “complex monopolies” – ie where a group of firms in a market adopt similar behaviours which have anti-competitive effects. Recent cases have included New Cars and Supermarkets. These provisions are the primary basis in UK law for looking at how markets work. They are particularly valuable because they allow action to be taken against non-collusive parallel behaviour – for example where a particular practice is prevalent in a market, and its effects mean consumers do not get a fair deal.

**2.10** The procedures are similar to the merger procedures. Initial investigations are carried out by the OFT. Rather than advising Ministers on whether to make a reference, the OFT makes references direct (Ministers also have the ability to refer markets). The Competition Commission conducts an inquiry – determining whether the market operates in a manner which is against the public interest and normally recommending remedies to address the situation. The Secretary of State for Trade and Industry considers the report, and determines what remedies to impose.

**2.11** The Government announced in June 2001 that it saw a strong case for reforming the complex monopoly regime along the same lines as the planned merger reforms. Chapter 6 sets out in some detail how the Government intends to proceed.

### Scale monopolies

**2.12** The Fair Trading Act also contains provisions on scale monopolies – ie where a single firm has a share of supply exceeding 25%.

**2.13** The Competition Act overtakes these provisions. In the majority of monopoly cases, the OFT will wish to take action under the prohibition of abuse of a dominant market position, which carries the possibility of fines. However, there was some doubt about the extent to which these powers could be used to require firms to sell some of their business. Therefore, the Government decided in 1997 that it would be premature to repeal the scale monopoly provisions. Instead, it would be better to curtail their use – so that they would only be used in the utility sectors, or if firms engaged in repeated abuses of their dominant market position.

## THE EU COMPETITION REGIME

**2.14** Articles 81 and 82 of the EC Treaty outlaw anti-competitive agreements and abuses of dominant market position when they may affect trade between Member States. They are enforced by the European Commission, which has powers to investigate infringements, and can impose fines of up to 10% of worldwide turnover on firms that break the law. Firms can appeal against Commission decisions in the European Courts. The Competition Act regime is modelled very closely on Articles 81 and 82.

**2.15** The European Commission also considers large merger cases. Under the European Community Merger Regulation, the Commission assesses whether mergers between companies with turnovers above certain defined thresholds would create or strengthen a dominant position which would significantly impede effective competition. Member States

have a formal role in the process, but the final decision is for the Commission alone. As with cases under Articles 81 and 82, the Commission's decisions may be appealed to the European Courts.

**EU Modernisation 2.16** The Commission has, however, embarked on a programme of reform of Community competition rules. It is considering a possible reform of the European merger control regulation but has already brought forward proposals for a significant modernisation of the rest of the Community framework.

**2.17** Most notably these proposals seek a much greater role for national authorities in enforcing Community competition law. Furthermore their emphasis on strengthening the effectiveness of the regime in combating serious infringements and on achieving greater consistency and co-operation in the application of competition rules in the Single Market demonstrates that the Commission shares the Government's approach set out in its principles for competition policy in Chapter 3 of this White Paper.

**2.18** Under these **modernisation proposals**, the Commission plans:

- To decentralise much of the enforcement to courts and competition authorities in the Member States. Currently, the European Commission has a monopoly on the right to approve agreements, which although restrictive of competition, have certain beneficial effects which merit an exemption.
- To end the burdensome procedures whereby companies have to notify agreements to the Commission in order to be sure they are compatible with EU competition law. In the future, companies will be responsible themselves for assessing whether their agreements comply with the law.
- To improve the legal certainty for businesses operating in the Single Market, by obliging Member States to apply Community law – to the exclusion of national law – for all cases which affect inter-state trade. Such harmonisation would only extend to substantive issues of law: national rules for investigations and penalties would remain.

**2.19** Overall, the Government welcomes the Commission's proposals:

- Decentralisation will allow the OFT to handle more cases which affect inter-state trade and impact on the UK. Cases with truly pan-European implications will continue to be handled by the European Commission.
- The end of the notification system should reduce the bureaucracy of (largely unnecessary) notification and in so doing free resources for the Commission to investigate the more serious European-wide cartels and other serious breaches of competition law.
- Greater consistency for businesses operating in the Single Market has long been a UK policy goal. Reducing the costs of operating in multiple jurisdictions should benefit them by increasing investment opportunities, allowing businesses to concentrate on their business strategies, rather than worrying about legal uncertainties.

**2.20** The Commission's proposals remain at a relatively early stage of consideration. Nevertheless, it is likely that the Commission will amend the proposals over the coming months in order to win the support of Member States. The Government will work closely with the Commission to ensure they meet the best interests of the UK.

**Future developments** **2.21** We will need to reflect the outcome of negotiations on the modernisation proposals (once they have been completed) in our domestic laws – for example, giving the OFT the power to apply Articles 81 and 82 directly.

**2.22** The Government does not believe it would be right to hold up desirable reform to our competition regime until the modernisation proposals are finalised. However, it is clear that both to implement the modernisation reforms and to maintain the consistency of our domestic regime with developments in the EU, some changes will be needed to the domestic regime, including significant modification of primary legislation. We currently anticipate that the changes required could be made by the exercise of delegated powers under the European Communities Act 1972 and the Regulatory Reform Act 2001. However, the modernisation proposals are not settled and are likely to require substantial changes to domestic legislation. Therefore, **the Government will keep under review whether these existing powers are likely to be sufficient and appropriate to deal with inconsistencies or difficulties of interaction between the EU and domestic competition regimes. If it concludes that they are not, it will come forward with proposals for further powers to ensure modernisation can be implemented by secondary legislation.**

## THE GOVERNMENT'S PRINCIPLES FOR COMPETITION POLICY

- Since 1997, the Government has taken a series of steps to build a world-class competition regime in the UK.
- The Government's actions have been based on a clear set of principles, which also underpin the reforms in this White Paper:
  - Competition decisions should be taken by strong, proactive and independent competition authorities.
  - The regime should root out all forms of anti-competitive behaviour.
  - There should be a strong deterrent effect.
  - Harmed parties should be able to get real redress.
  - Government and the competition authorities should work for greater international consistency and co-operation.
  - Competition policy deserves a high profile – because of its importance for economic performance.
- The Government is adopting a mission statement – setting out its objectives on competition policy, and what it promises to do to achieve them. This will help Parliament and others hold Government accountable for its actions.

**3.1** The period since 1997 has seen significant changes to the UK's competition regime. Before then, the regime had remained largely unchanged for almost 20 years, even though it was clear for most of the period that our competition laws were out of date.

**3.2** The Competition Act 1998 showed the Government's commitment to ensuring that the UK has a world-class competition regime. It provides a much stronger regime than previously. However, the Government has continued to look for ways in which the competition regime could be further improved. Box 3.1 lists the key steps the Government has taken to strengthen the regime since 1997.

### **Box 3.1: Steps to strengthen the UK's competition regime since 1997**

- a) The Government introduced the Competition Act 1998. This legislation introduced a modern regime to address anti-competitive agreements and abuses of dominant position.
- b) The Government has announced reforms which will take Ministers out of most merger decisions and replace the current public interest test with a competition test.
- c) The Financial Services and Markets Act 2000 gives the OFT and Competition Commission new powers to scrutinise the rules of the Financial Services Authority.
- d) We have appointed a new Director General of Fair Trading, John Vickers, who has adopted a new goal for the OFT: "making markets work well for consumers".
- e) The Treasury has increased the OFT's budget from £20 million in 1997 to a planned £32 million in this financial year, in order to improve radically the enforcement of competition law.
- f) The Government has encouraged the OFT and the Competition Commission to look at consumer markets. In particular, the *Banking* reference followed the Cruickshank report into the industry. It looks at banking services for small and medium sized businesses – the inquiry is still underway.
- g) The Government asked the OFT to conduct a review of competition and the professions. The OFT reported in March this year<sup>1</sup> – and found that many professional rules did

appear to have anti-competitive effects. They called on the Government to repeal the provision for exclusion of professional rules from the Competition Act 1998 – the Government has confirmed that it will do so. The Government will also be consulting on the OFT report to determine whether some of the professional rules identified are in the wider public interest.

- h) As part of the Criminal Justice and Police Bill, the Government aimed to allow our competition authorities increased opportunities to share information with overseas competition authorities – in order to assist them with their criminal inquiries. These provisions fell when Parliamentary time was curtailed. However, the Government remains committed to bringing legislation forward in this area.
- i) The Government has announced that it intends to legislate to transform the OFT into an Authority with a board. This would replace the current system where power is formally all vested in the Director General of Fair Trading, rather than the OFT as a whole. The Director General has already appointed an advisory panel to strengthen the external advice available to the OFT.
- j) The Government announced in the White Paper “Opportunity for all in a World of Change” (February 2001), that OFT and other regulators were being given an explicit role to assess when laws and regulations may inhibit competition. This would apply both to existing regulations and to the development of new legislation.

<sup>1</sup> “Competition in professions”, published March 2001, is available on the OFT’s website: [www.offt.gov.uk](http://www.offt.gov.uk)

**Principles 3.3** These steps have been based on a clear set of principles:

- **Competition decisions should be taken by strong, proactive and independent competition authorities:** Before 1997, competition decisions were taken largely by Ministers. Since 1997, the new framework means decisions are increasingly taken by competition authorities – bringing the UK into line with most industrial countries. Key changes in this area are the introduction of the Competition Act and proposed changes to the merger regime. The Government has also sought to improve the effectiveness of the OFT. We have appointed a new Director General of Fair Trading, John Vickers, who has given the OFT greater direction by adopting a new goal: “making markets work well for consumers”. The increased budget for the OFT has helped to improve the number and quality of its staff. The new advisory panel, and in future the OFT’s board, will strengthen the strategic management of the OFT.
- **The regime should root out all forms of anti-competitive behaviour:** The Competition Act introduces a far more effective regime against anti-competitive agreements and abuses of dominant market position. Since 1997, our competition authorities have also looked at a number of consumer markets where it appeared that a lack of competition was acting against the interests of consumers. The OFT’s recent review of the professions demonstrates the importance of ensuring that our competition authorities can highlight and take action against anti-competitive practices across the economy. The OFT’s new role to scrutinise new and existing regulations will extend our regime into looking at the framework of laws and rules under which markets work.
- **There should be a strong deterrent effect:** By imposing fines against companies who engage in unlawful anti-competitive behaviour, the Competition Act strengthens the deterrent effect of our regime. In the past, firms which were found to have engaged in anti-competitive behaviour faced no penalties for their actions.

- **Harmed parties should be able to get real redress:** The Competition Act opens the way for those harmed or affected by unlawful anti-competitive behaviour to seek redress. Previously, damages were only possible where firms failed to comply with certain legal obligations – but not for anti-competitive behaviour itself.
- **Government and the competition authorities should work for greater international consistency and co-operation:** The Competition Act mirrors the EU regime – and so helps to ensure greater international consistency. The Government has already taken steps to ensure increased possibilities for disclosure of information to foreign competition authorities and recognises the importance of co-operation at an international level. Last autumn, the OFT also hosted a major international conference bringing together cartel investigators from 27 countries.
- **Competition policy deserves a high profile – because of its importance for economic performance:** Government has worked to improve business' and the public's understanding of the importance of competition policy for future prosperity. The OFT and the Competition Commission have also taken steps to raise awareness – for example, the OFT recently launched a major campaign to promote awareness of the Competition Act.

**3.4** Despite the rapid pace of change in this area since 1997, the Government remains committed to improving the effectiveness of our competition regime. The recently completed peer review lends support to further change (see Box 3.2).

### **Box 3.2: Peer review of competition policy**

The Government commissioned a peer review<sup>1</sup> of the UK's competition regime to provide a benchmark against which to measure progress against the DTI's Public Service Agreement target of having 'the most effective competition regime in the OECD'.

The review asked over 100 competition experts from around the world to rank various aspects of the UK regime against that in their own country and against the EU regime. The key conclusions were:

- The UK regime ranks in the top half of its peer group, behind those of the US and Germany, but ahead of a number of other OECD regimes.
- Only 10% of British respondents thought that competition policy was important to the UK public. This compared with 83% in the USA.
- The complex monopoly provisions of the Fair Trading Act 1973 are particularly well regarded.
- The UK's current merger regime ranks less well, but respondents welcomed the merger reform proposals.
- 83% of respondents in the UK believed that criminal penalties would improve the effectiveness of the UK regime, by increasing its deterrent effect.

The review recommended:

- Measures to enhance the status and role of competition policy in the UK.
- Measures to improve the visibility and transparency of the UK regime, and to give the OFT a more proactive role.
- Retaining the complex monopoly provisions of the Fair Trading Act, which are widely seen as a very useful part of the UK system.
- Considering the introduction of criminal sanctions.

<sup>1</sup> "Peer Review of the UK Competition Policy regime", published April 2001, is available on the DTI's website: [www.dti.gov.uk](http://www.dti.gov.uk)

**3.5** The Competition Act 1998 allowed the UK to build the foundations of a modern competition regime after years of neglect. **The Government is determined, however, to keep up the pace of change to ensure our regime is the best in the world. The reforms set out in this White Paper move further towards that goal.**

**Mission statement 3.6** The Government's primary responsibility is to set a strong pro-competition framework on the basis of the principles mentioned earlier.

**3.7** Government itself should be held accountable for its actions in this area. To this end **the Government will adopt a mission statement (set out in Box 3.3) setting out its objectives and what it promises to do to achieve them. The Government will report periodically on progress against the objectives set out in the mission statement.**

**Box 3.3: The Government's mission statement**

**The Government is committed to promoting competition in the economy to improve the UK's productivity performance and to make markets work well for consumers.**

**The Government will:**

- **Respect the absolute independence of our competition authorities.**
- **Not interfere in cases which are under investigation.**
- **Adopt remedies recommended by the Competition Commission except where there are exceptional public interest grounds not to do so – in such cases, Government will explain its reasoning fully.**
- **Ensure that the legal framework allows our competition authorities to address all forms of anti-competitive behaviour.**
- **Explain the importance of competition policy to the public, businesses and the media.**
- **Respond positively where the OFT, the Competition Commission or a sector regulator believes that regulations significantly undermine competition – publishing within 90 days a reasoned analysis of how Government intends to proceed.**
- **Appoint only those with expertise relevant to competition to the Competition Commission and only those with expertise relevant to competition or consumer protection to the OFT Board.**
- **Ensure that our competition authorities are properly resourced to meet their objectives.**

**3.8** This mission statement complements those issued by the OFT and the Competition Commission (reporting panel). Between them they will help ensure that Parliament and others can judge the actions of Government and our competition institutions against their aims.

# 4

## STRONG, PROACTIVE AND INDEPENDENT COMPETITION AUTHORITIES

- **The Government wishes to see truly independent competition authorities which work proactively to root out instances of anti-competitive behaviour.**
- **There will be clear legal duties for the OFT to promote competition.**
- **Government invites our competition authorities to advise on the impact of laws and regulations on competition. The Government is committed to responding publicly within 90 days.**
- **Government welcomes the OFT's move to introduce "super-complaints" from consumer groups. This new power will be enshrined in legislation.**
- **Only those with expertise relevant to competition will be appointed to the Competition Commission. Only those with expertise relevant to competition or consumer affairs will be appointed to the Board of the OFT.**
- **Both the Competition Commission and the OFT will improve their staffing – with recruitment on the basis of expertise relevant to competition becoming the norm for those working in competition.**
- **The Government, the OFT and the Competition Commission, all share a common understanding of the aims of our competition regime – to increase the level of competition in the economy, to improve the UK's productivity performance and to make markets work well for consumers.**
- **The Government invites Parliament to actively scrutinise our competition regime. The mission statements of the Competition Commission, the OFT and Government will help it to do so.**

**4.1** While the Government can set a strong framework for competition, it is our competition authorities which carry responsibility for implementing it. For an effective competition regime, UK consumers and businesses rely on the OFT and the Competition Commission to detect instances where markets are not working well, and to take the necessary action to remedy the problems.

### THE PRESENT UK INSTITUTIONAL FRAMEWORK

**4.2** Our primary UK competition authority is the OFT, which also has responsibility for consumer protection. The OFT is headed up by the Director General of Fair Trading – John Vickers. The OFT enforces the Competition Act 1998, and also carries out initial investigations under the Fair Trading Act 1973. Under these Acts, all formal powers are vested in the Director General rather than the OFT. The OFT also has a leading responsibility for enforcing consumer protection laws.

**4.3** The Competition Commission is a smaller organisation split into two functions with a Council chaired by Derek Morris. The reporting side of the Competition Commission conducts investigations under the Fair Trading Act. It also has a number of functions under sector-specific legislation. It is led by the Chairman and comprises around 55 members – drawn from industry, trade unions, former civil servants, economists, lawyers and consumer activists.

**4.4** The Competition Commission Appeal Tribunals operate much like a court. They are headed by Sir Christopher Bellamy – who has the status of a High Court judge, and was formerly a judge of the European Court of First Instance.

**4.5** In addition, some sector regulators, specifically the Office of Gas and Energy Markets (OFGEM), the Office of Telecommunications (OFTEL), the Office of the Rail Regulator (ORR), Civil Aviation Authority (CAA), the Office for the Regulation of Electricity and Gas (OFREG(NI)) and the Office of Water Services (OFWAT) can apply competition law (other than for mergers) in their sectors, in the same way as the OFT does for the economy as a whole. Utility regulators can also enforce consumer protection legislation.

## RECENT DEVELOPMENTS

**4.6** Until the Competition Act 1998, our competition regime lagged behind that of other countries. Lacking the necessary legislative tools, it is hardly surprising that neither the OFT nor the Competition Commission were seen as leading world-class competition authorities.

**4.7** The last few years have seen significant changes. Decisions under the Competition Act are taken by the OFT. In 1998, the OFT embarked on a significant change management programme to ensure that the organisation was ready to take on its increased responsibilities under the Competition Act. Following a recent review, the OFT is putting in place changes designed to provide a stronger platform for meeting its goals (see Box 4.1).

**4.8** The Competition Commission's reporting side has not been directly affected by the Competition Act 1998. However it has increased the transparency of its procedures by conducting more public meetings and making more information publicly available during the course of inquiries. It has also taken steps to increase public awareness of its decisions – for example, through press releases and media interviews.

**4.9** Both the OFT and the Competition Commission, as well as the Competition Commission Appeal Tribunals, are currently led by renowned competition experts – a move which should help the organisations build their profile in coming years.

**4.10** These improvements are bringing international recognition. A recent survey<sup>2</sup> of competition authorities around the world found that both the OFT and the Competition Commission were held in higher regard than in earlier years, and that they ranked above many other competition authorities (equal fourth, with five others, out of twenty five).

**4.11** However, the Government believes that there is more to be done if our competition authorities are to stand at the top of the world league. In particular, we wish to see competition authorities which play an active role in increasing the level of competition in the economy – helping to boost productivity and enterprise.

### **Box 4.1: Key changes the OFT has made since 1998**

- **More recruitment of specialist staff to competition posts.**
- **Mandatory training for all staff enforcing the Competition Act 1998.**
- **Open recruitment to fill posts.**
- **Creation of Markets and Policy Initiatives Division (see paragraph 4.18).**
- **Enforcement divisions given more focused role.**
- **Introduction of more flexible pay arrangements to enable the OFT to respond to market pressures and recruit and retain staff with key skills.**

<sup>2</sup>Rating the Regulations 2001, Global Competition Review, June 2001

## CHAMPIONING COMPETITION

**4.12** The Government wants to see a step change with the authorities looking beyond enforcement to a role of advocacy and promotion. Historically, our authorities have tended to focus all their energies on implementing the law. They have found it hard to step outside this function – for example, by publicly explaining the importance of competition, the significance of decisions, or ways in which competition might be increased.

**4.13** In other countries, for example the US and Australia, competition authorities have a clear role as advocates of competition.

**4.14** In future, the Government would like our competition authorities to take on a high profile advocacy role, both by advising on the impact of the Government’s own laws and regulations on competition; and more widely acting to promote competition in the economy in a variety of ways.

### The impact of regulation on competition

**4.15** Our laws and regulations are vital in helping to achieve the Government’s social, environmental and other objectives. However, they can have unintended consequences. Legislation can affect market structures and dynamics, for example by erecting barriers to entry or to new products.

- In the White Paper, “Opportunity for All in a World of Change”<sup>3</sup>, the Government announced that it wished the **OFT and other competition regulators to advise where laws and regulations create barriers to entry and competition, or channel markets in a particular direction, thereby holding back innovation and progress**. This new role applies to assessing the effects of existing and proposed new legislation.
- The competition authorities have on occasion highlighted the impact on competition of existing laws. For example, the Competition Commission in its report on underwriting drew attention to the effect pre-emption rights under company law had on the market for underwriting services. But **our authorities need to be confident that issues they identify will actually be addressed**. For that to happen, Government must commit itself to respond.
- **The Government will therefore consider the advice it receives from the OFT, the Competition Commission or a sector regulator, balancing competition against other public policy considerations**. Decisions on how to proceed will be taken by Ministers collectively.
- **Government will publish a response within 90 days** of receiving a report, setting out where it does or does not propose to make changes in light of the report, or where it proposes to consult on options.
- The Government anticipates that **changes to legislation** that it decides to make following a report on competition effects could generally be made by the exercise of delegated powers under the Regulatory Reform Act 2001.
- **The Government will also legislate to give the OFT the power to publish reports on future developments in markets**, including future regulatory impacts. (Reports on the effects of existing regulations can already be published.) This is addressed in more detail in paragraph 4.21.

<sup>3</sup>A White Paper on enterprise, skills and innovation, “Opportunity for All in a World of Change” published February 2001, is available on the DTI’s website: [www.dti.gov.uk](http://www.dti.gov.uk)

**Promoting competition** 4.16 To ensure our competition authorities work actively to promote competition in the economy:

- The OFT should work to communicate the importance of competition to businesses and the public in a modern, dynamic economy.
- Both the OFT and the Competition Commission should ensure that businesses and the public understand their decisions, the reasoning behind them and the likely impact that they will have. This will provide greater transparency and certainty for all.
- The OFT should scrutinise markets to assess whether strong competition pressures are at work. If there are concerns, the OFT should consider whether it should take action under the Competition Act or the Fair Trading Act, or its consumer protection powers. In some cases a quick report, which shines a light into a dark corner, will prove sufficient. In others, it will need to refer the market to the Competition Commission for further investigation.
- The OFT should keep the effectiveness of our competition regime under review. The OFT should publish reports which analyse the effectiveness of previous competition interventions – considering, for example, whether the remedies have been successful at promoting competition and bringing consumer benefits. This will be good for business and consumers and increase confidence in the system.
- The OFT should also advise Government on ways in which the competition regime might be improved.

4.17 Both the OFT and the Competition Commission have begun to work towards this goal. For example, the Competition Commission has adopted a more visible media stance – which heightens awareness of the importance of competition policy.

4.18 The OFT is to set up a new unit – the Markets and Policy Initiatives Division. It will sit alongside the existing competition enforcement and consumer protection divisions and will provide a stronger platform for tackling markets which do not appear to be working well for consumers. **The Government warmly welcomes this move**, as the new unit will have primary responsibility for promoting competition, and will provide additional funding to ensure that the new unit is successful.

**Local markets** 4.19 Often, the market for goods and services are very local, and it can prove particularly difficult for the OFT to detect where these markets are not working well. **The Government is considering how to improve the detection of competition problems in local markets.** Local Authority trading standards officers have a good knowledge of how local markets work in practice, and may be well placed to take on a more active role in detecting local competition breaches, referring cases to the OFT for fuller investigation.

## POWERS AND DUTIES

4.20 Government needs to ensure that the OFT has the legal powers and duties necessary to carry out in full its role of championing competition. **It will legislate to give it clear duties to promote competition.**

4.21 The OFT has long-standing duties to keep markets under review (in the Fair Trading Act) and to publish reports on its findings. However these need to be updated.

**4.22** The Government will revise these provisions to give the OFT wide ranging duties to consider and report on matters (including legal restrictions) which they consider are preventing, or could prevent, commercial markets operating effectively, bearing in mind particularly the importance of strong competition in generating benefits to consumers and economic welfare, and on matters aimed at improving the effectiveness of the competition regime. This will give OFT clearer and proactive roles to:

- **Scrutinise markets to assess whether strong competitive pressures are at work** – and if not, find out why not.
- **Review and report on possible future developments that may affect markets.** The OFT will be able to publish reports that are forward looking, including if necessary on the likely effects of prospective new legislation on competition.
- **Publish reports which analyse the effectiveness of previous competition interventions** – considering, for example, whether they have been successful at promoting competition.
- Advise Government on **ways in which the competition regime might be improved.**

**4.23** The Government will also give the OFT a further duty to explain and promote the importance of competition to consumers and businesses.

**4.24** Greater powers and independence require more accountability. The annual reports of the OFT and the Competition Commission will assume greater importance as they report, and are held to account, against new mission statements (see paragraph 4.43). **The Government will legislate to require the Competition Commission to produce its own annual report** (currently it has to be covered by the OFT's document, though it also produces its own non-statutory report).

## CONSUMER GROUPS

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**4.25** Anti-competitive behaviour in consumer markets can be particularly difficult to detect. Where there are a large number of consumers, and most firms operate in a similar way, consumers will often not know whether they are getting a raw deal. Individual consumers rarely have access to the information necessary to put together a cogent complaint.

**4.26** In this situation, consumer groups have a crucial role to play. Through them the interests and power of large numbers of consumers can be articulated.

**4.27** The Government wishes to strengthen the voice of the consumer in competition. It therefore proposes to give consumer groups the right to bring super-complaints to the OFT where they suspect there are market structures or practices which are working against the interest of consumers. A draft procedure for this is set out in Box 4.2. The OFT intends to establish arrangements to introduce this new role for consumer groups as soon as possible. Super-complaints will be investigated quickly by the OFT who will issue a clear, public response within 90 days. While the OFT is taking this new procedure forward informally, **the Government intends to enshrine this power in legislation.**

**Box 4.2: How would the new “super-complaint” work?**

- A number of organisations will be granted the right to submit super-complaints. These could include the Consumers’ Association; National Consumer Council; councils for regulated sectors such as energy and postal services; and the Financial Services Consumer Panel.
- It is envisaged that super-complaints will concern situations where markets fail to work for consumers rather than the activities of particular companies. While the super-complainant may lack a clear understanding of the cause of the market failure, the super-complainant will, however, be expected to provide reasonable supporting evidence.
- The OFT will fast track super-complaints, undertaking preliminary work to establish whether there is sufficient evidence to support the complaint.
- Where sufficient evidence is found for the OFT to proceed directly to the use of competition or consumer powers it will do so. Where further investigation is called for, The OFT will ensure that the super-complainant is regularly up-dated on progress. Eventual outcomes could include a formal reference to the Competition Commission or the publication by the OFT of a report recommending changes to regulation or self-regulation.
- The OFT will within 90 days, announce what action they are taking in response to a super-complaint. Where the OFT does not intend to carry an investigation forward the announcement will explain the reasons for their decision.
- In most cases, super-complaints will be made public and the OFT will announce immediately that it is taking action. In some cases, however, it may be necessary to maintain confidentiality in order to enable the OFT to gather more evidence. In these circumstances, the super-complainant will be expected to respect this confidentiality.

**PUBLIC APPOINTMENTS**

**4.28** Strong competition authorities are generally led by people who are expert in competition issues. In Italy, for example, the Competition Authority is led by a Board – and each member is an expert lawyer or economist.

**4.29** Government has already announced it intends to legislate to create a **Board for the OFT** – similar to the Italian model. **We believe that it is essential that those who are appointed to this Board have expertise relevant to competition or consumer protection – and intend to appoint only such individuals to the Board.**

**4.30** The Government is responsible for appointing members of the Competition Commission. Some members, including the current Chairman, have been recruited for specific expertise relevant to competition – accountants, economists, lawyers and consumer activists. Others have been senior persons from various walks of life – without specific expertise relevant to competition but with wider strengths.

**4.31** We need to reflect the increasing complexity of competition issues in the people appointed to deal with them. So, for the future, **the Government intends to appoint as members of the Competition Commission only those with expertise relevant to competition.**

## HIGH QUALITY AND PROFESSIONAL STAFF

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**4.32** Historically, our competition authorities have been staffed largely from the pool of generalist civil servants. Staff became increasingly expert in competition over time but it was unusual to recruit people on the basis of specific competition expertise. Such expertise (particularly in staff who are qualified economists, lawyers and financial analysts) is vital in assessing mergers, when investigating whether agreements are anti-competitive and whether a dominant company has abused its position. Competition analysis also underpins the diagnosis of where competitive pressures may be muted. But **in many other countries – including Italy, the US, Germany and France – the norm is for staff enforcing competition law to be recruited on the basis of their expertise in the subject. The UK has to do likewise.**

**4.33** Some progress has already been made. The OFT recruited an additional 55 staff to implement the Competition Act 1998 – most of whom are expert competition lawyers or economists. It has required training for an externally validated diploma for new and existing staff. The Competition Commission has recruited some outside economists and accountants, and the Appeal Tribunals have also recruited two new lawyers. **The OFT and Competition Commission are actively recruiting to increase the number of staff they have with such qualifications and they intend that recruitment on the basis of expertise relevant to competition will be the norm in the UK too.**

**4.34** In the US, there is a true “revolving door”. Many of the US’ best competition lawyers and economists view a stint at the competition authority as part of a successful career path. They will often take significant pay cuts in the knowledge that it would enhance their long-term income expectations. That reflects the profile and respect the US competition regime enjoys; an ability readily to attract similar people will show how successful the UK authorities are in raising their profile.

**4.35** The **OFT and Competition Commission are reforming their human resources strategies so that they are fully equipped to deliver the new agenda, and to recruit the very best** – both competition experts and others with necessary skills, for example investigations or project management experts. They are developing the freedom to set staffing policies which fully underpin their ability to meet their objectives. This involves open competition for new staff (already normal practice) and a move away from the traditional civil service pay and grading arrangements. These moves are welcome improvements.

**4.36** Our authorities need to think radically in this area – for example, designing strategies to improve their ability to recruit and suitably reward their staff. Government needs to ensure that they have sufficient funds to make this transition, and that they are not constrained unnecessarily by public sector rules.

## ADDITIONAL RESOURCES

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**4.37** The Government recognises that our competition authorities will need additional resources in order to be able to successfully deliver the radical improvements to the competition regime that this White Paper sets out. Ministers will take decisions on the level of increases to the budgets of the OFT and the Competition Commission over the next few weeks. Box 4.3 sets out how this extra funding will be deployed.

**Box 4.3: What will the new resources be used for?****The new resources for the OFT will enable them to:**

- Enhance the skills and expertise within the OFT, including increasing the numbers of their staff who have specific competition expertise so that the OFT meets its goals and is a first class, professional organisation.
- Carry out more proactive and rigorous enforcement work, including undertaking preparatory work on how the new criminal offence for individuals who engage in hard-core cartels will be prosecuted.
- Undertake a new role in assessing when proposed regulations may inhibit competition, including providing guidance to government departments and running a new “help desk” function.
- Further raise the public awareness of the work of the OFT and the benefits arising from increased competition.
- Set up a new Markets and Policy Initiatives Division (MPID) – the centre for investigating markets, handling “super-complaints” from consumer organisations and taking forward examinations of government regulations. The new Division will develop a rigorous system for determining priority areas for studies, taking account of the size of consumer detriment involved. It is expected that MPID will:
  - Undertake 5 whole market studies in the first full year.
  - Ensure that super-complaints will be dealt with on a fast-track process, giving a reasoned response within 90 days whether or not the super-complaint leads to a longer investigation.
  - Publicly identify a number of existing government regulations which may have the effect of limiting or distorting competition, including carrying out two studies a year.
  - Increase the number of referrals made to the Competition Commission, as part of the new process of identifying markets where competitive pressures are ineffective.

**The new resources for the Competition will enable it to:**

- Enhance the skills and expertise within the Commission, including adopting a “revolving door” staffing policy to bring in professionals and others on short-term contracts.
- Play a full part in the new strengthened competition regime by making rigorous and effective use of its powers, including its new determinative role on competition issues, and increasing the impact of reports.
- Deal effectively with the increased number of market investigation inquiries that may be referred to it by the OFT as a result of the new reference test.
- Devoting more efforts to remedies which address the competition concerns identified, including adopting a new two-stage process for remedy setting.
- Advise where regulations hinder the effective working of markets.

**ACCOUNTABILITY**

**4.38** Consumers and businesses have a right to know what our competition regime aims to achieve, and the responsibilities of the various players (OFT, Competition Commission, sector regulators with competition powers, Government) in doing so.

**4.39** The Government, the OFT and the Competition Commission, all share a common understanding of the aims of our competition regime – to increase the level of competition in the economy, to improve the UK’s productivity performance and to make markets work well for consumers. They are committed to the competition authorities actively using their current and proposed powers to achieve these aims.

**4.40** The competition authorities and Government each have separate but complementary roles to play. **The Government’s mission statement is set out in Box 3.3.** The OFT<sup>4</sup> and the Competition Commission<sup>5</sup> have also published their own mission statements.

**4.41** These three statements together set out what the public and businesses can expect from the Government and our competition authorities. The statements will help to ensure that they are held accountable for their actions – both collectively and individually.

**4.42** Our competition authorities already produce annual reports – in future, these documents will be focused more on the work that they have done to meet their separate mission statements.

**4.43** Competition is a matter of crucial importance to the economy. Government wants to see Parliament play a more active role in scrutinising our competition regime – probing, in particular, the extent to which the various players are delivering against their promised missions. **The Government invites Parliament (the Trade and Industry Select Committee under existing arrangements) to actively scrutinise our competition regime.**

## OTHER REFORMS

**Information exchange** **4.44** Urgent action is needed to broaden powers to share confidential information in the fight against international anti-competitive practices. Cartels, in particular, are a worldwide problem – which potentially affects us all. There is a growing international consensus on the need for greatly enhanced co-operation on competition issues.

**4.45** The Government recently brought forward legislation to allow UK competition authorities to share confidential information with competition authorities pursuing criminal investigations. However, these provisions fell when Parliamentary time was curtailed. **The Government will bring forward new legislation to allow UK authorities to share information with foreign authorities to assist them with civil and criminal investigations.** In both cases, information gained from firms as part of a merger investigation will be excluded.

**4.46** The European Commission is also proposing, as part of its modernisation powers, greater scope for information exchange between Member States. This will make it easier for the OFT to obtain information from other European competition authorities. The Government will work with our European partners and the European Commission to ensure that these powers allow for maximum co-operation between competition authorities, whilst ensuring the necessary procedural protection.

**Investigations** **4.47** The Government intends to make an amendment to the investigation powers under the Competition Act 1998. At present it is only possible to send ‘officers of the Director’ on raids to companies. The amendment will **allow the OFT – and sector regulators with concurrent powers – to use the services of expert consultants** (eg on extracting information from computer systems) **during the course of their investigations**, in addition to their own staff.

<sup>4</sup> “The OFT: Statement of Purpose” is available on the OFT’s website: [www.of.gov.uk](http://www.of.gov.uk)

<sup>5</sup> “The Competition Commission; Statement of Aims and Objectives” is available on the Competition Commission’s website: [www.competition-commission.gov.uk](http://www.competition-commission.gov.uk)

**International aviation cases** 4.48 In line with the principle that competition decisions should be taken by independent competition authorities, the government intends to remove Ministers from decisions on international aviation cases. The regime for EU-third country aviation is different from that for most other sectors and is applied by Member States in conjunction with the Commission. Previously, UK Ministers had a role in decision-making, but all decisions will now be taken by the OFT.

- **The Government is committed to introducing a new merger regime – with final decisions taken by independent competition authorities on the basis of a competition test.**
- **There will also be procedural and other improvements, building greater transparency into the process.**
- **The Government has now finalised the few remaining areas of policy – the conclusions are set out in this chapter.**

**5.1** The Government announced in 1999 its intention to reform the merger regime by taking most decisions out of the political arena. In October 2000, following a wide ranging consultation exercise, the Government announced its main conclusions on the way ahead<sup>1</sup>. It also triggered further consultation on certain points of detail. This covered such matters as the treatment of consumer benefits in a competition-focused regime, and the development of the Competition Commission's procedures for identifying remedies. Following this consultation, the Government has taken a number of further decisions<sup>2</sup> – set out below.

**5.2** Government policy in recent years has been to take merger decisions primarily on competition grounds. Practice has also been for the Government to follow the advice of the competition authorities in most cases. The reform proposals build on these developments. They have two central elements. Firstly, decisions on the vast majority of mergers will be transferred from Ministers to the OFT and the Competition Commission. Secondly, the test against which mergers are assessed will be changed from a broad-based “public interest” test to a new competition-based test. The Government is also committed to procedural and other improvements, such as the introduction of maximum statutory timetables for investigations, and building more transparency into the process.

## REMOVING MINISTERS FROM THE DECISION-MAKING PROCESS

**5.3** Removing Ministers from most decisions will bring the UK's merger regime into line with best practice in other countries. Decisions will be taken by those best qualified to make them – namely the expert competition authorities – in line with one of the Government's principles for competition policy.

**5.4** This change will clarify arrangements and make decision-making more predictable. Business will no longer need to factor in the possibility that decisions will be influenced by political considerations.

### Exceptional public interest cases

**5.5** The new regime will, however, allow Ministers to continue to take final decisions on the small minority of mergers raising defined exceptional public interest issues. National security, covering essential defence interests and other public security concerns, will be defined as an exceptional public interest from the outset. Ministers will be able to define further criteria subsequently, but only by statutory instrument subject to the affirmative resolution procedure in both Houses of Parliament.

<sup>1</sup> “Mergers: The Response to the Consultation on Proposals for Reform” (URN 00/805), published October 2000 is available on the DTI's website: [www.dti.gov.uk](http://www.dti.gov.uk)

<sup>2</sup> A summary of responses to the October 2000 consultation on detailed aspects of the new merger regime, and the full list of the Government's conclusions is available on the DTI's website: [www.dti.gov.uk](http://www.dti.gov.uk)

**Box 5.1: How will the new merger regime work?**

- Final decisions on most mergers will be taken by independent competition authorities rather than Ministers.
- The test they will apply will be to determine whether the merger results in a substantial lessening of competition rather than the current public interest test.
- Exceptionally, where competition considerations point the other way, it will be possible for the authorities to clear a merger or allow it to proceed with less stringent competition remedies where they believe it will bring overall consumer benefits.
- The Secretary of State for Trade and Industry will continue to decide the small minority of mergers which raise defined exceptional public interest issues.
- National security will be defined at the outset as an exceptional public interest issue. It will be possible to define further exceptional public interest issues by statutory instrument using the affirmative resolution procedure.
- The new regime will retain a two-stage approach to merger investigations. The OFT will carry out first stage investigations which will be sufficient to decide most cases. The Competition Commission will continue to carry out second stage, in depth investigations where necessary.
- There will be statutory maximum timetables for both first and second stage investigations by the competition authorities. There will also continue to be the option of an administrative timetable at stage one.
- The criteria used to determine which mergers qualify for investigation will be modernised to focus more efficiently on cases that may raise concerns.
- The UK's system of voluntary rather than compulsory pre-notification of mergers will be retained.

**Interim measures in advance of legislation**

**5.6** The reforms announced last October require legislative change. At the time, the then Secretary of State for Trade and Industry announced that he would take steps in advance of legislation to reduce Ministerial involvement in current merger decisions. His policy would, save in exceptional circumstances, be to accept the advice received from the OFT on whether or not to refer merger cases to the Competition Commission. The interim policy has worked well. Since October, the Secretary of State has taken more than 150 decisions on whether or not to refer mergers to the Competition Commission. On each occasion, the Secretary of State has accepted the Director General of Fair Trading's advice on reference.

**5.7** The Government announced last autumn that it would consider whether it is appropriate to take an additional interim step so that Ministers follow the recommendations of the Competition Commission on remedies in all but exceptional circumstances. Since then, the Government has announced that it will introduce an Enterprise Bill in the current Parliamentary session. Given this, the Government believes there is no need to take this additional interim step.

## THE COMPETITION TEST AND THE TREATMENT OF CONSUMER BENEFITS

**5.8** In the new regime, mergers will be assessed against a test of whether they will result in a substantial lessening of competition. Making competition the focus of the assessment will ensure that the underlying economic arguments can be brought to bear on the analysis of a merger in a clear and straightforward manner.

**5.9** The Government recognises, however, that there will occasionally be circumstances where a merger which results in a substantial lessening of competition can, nonetheless, bring overall benefits to consumers. The challenge is to identify a framework which allows such benefits – which will arise only infrequently – to be taken into account without undermining the central importance of the competition analysis.

**5.10** In October, the Government sought views on how to take this issue forward. In the light of comments received, the Government has decided to proceed as follows:

- **The competition test will be at the heart of the assessment carried out by the competition authorities.** The authorities will be required to reach a clear view on the competition aspects of each case. A merger will be cleared unless the authorities expect it would result in a substantial lessening of competition in any UK market.
- **Where a merger fails the competition test, the authorities will have to take steps to remedy the competition problem.**
- However, **the authorities will – exceptionally – be able to clear a merger or allow it to proceed with less stringent competition remedies than would otherwise be the case where they believe that the merger will bring overall benefits to UK consumers affected by the merger.**
- The authorities will be able to **take account of consumer benefits which take the form of lower prices, or greater innovation, choice or quality of products or services.** They must expect such benefits to materialise within a reasonable period and be satisfied they would be unlikely to happen without the merger.
- **Consumer benefits will cover benefits to end-consumers, but will also extend to customer benefits in upstream markets** where the immediate beneficiaries of a merger are other businesses.

## THRESHOLDS FOR INVESTIGATION

**Turnover threshold** **5.11** Mergers currently qualify for investigation if they create or enhance a 25% share of supply of a particular good or service in the UK as a whole, or a substantial part of it; or involve the acquisition of gross worldwide assets in excess of £70 million. The Government has already announced that it will replace the assets test with one based on turnover. With service industries and intangibles of increasing importance, a turnover test represents a sounder measure of the economic significance of a merger.

**5.12** In October, the Government invited comments on its proposal that the turnover test should be based on the total UK turnover of the target company with the level set at £45 million. **We will proceed with the new turnover test.** Provision will be made in the legislation for the threshold to be reviewed and amended as necessary.

**Mergers in linked markets** **5.13** The two main jurisdictional tests should ensure that almost all economically significant mergers are capable of investigation. The October document, however, asked whether there might be a gap in coverage. This could happen where a company with a powerful position in one market acquired a smallish company in a different but linked market, and thereby levered market power into the related market. This could risk foreclosure – depriving existing or potential competitors of outlets. Such a merger might not qualify for investigation on either share of supply or turnover grounds.

**5.14** The Government therefore asked whether the share of supply test should be changed to ensure mergers between companies in separate but linked markets could be subject to

scrutiny. This could be done by adding an additional limb to the share of the supply test which would be satisfied if either party already had a 40% share of supply in a market affected by the merger.

**5.15** Consultation has revealed potential difficulties with such a test. The main concern is that it would be poorly targeted – bringing a large number of mergers which could have no adverse effect on competition within the merger control regime. Better targeting requires a robust definition of a “linked market”. Unfortunately, it is not a precise term and could create uncertainty about whether mergers would qualify for investigation.

**5.16** There is no firm evidence of a significant gap in the existing and proposed thresholds. **The Government therefore believes that action to tighten the jurisdictional net would be disproportionate and will not add an additional jurisdictional threshold.**

## REMEDIES

**5.17** The Fair Trading Act currently specifies the kinds of remedies which can be imposed following merger and monopoly investigations. Although some of the permitted remedies are very far-reaching, such as divestment of all or part of a business, some less radical remedies are not permitted.

**5.18** The Government will correct this situation. It will **update the existing list of possible remedies – including for example a remedy to require a company to grant licences and a remedy to require companies to publish information in a specified manner. The Government invites views on these and other possible modifications.**

**5.19** The Government also believes that adjustment to the list of available remedies should be possible without the need for new primary legislation. Economic thinking moves on – and with it, views about the correct set of remedies which should be available to address competition problems. **The Government will introduce a new power which allows the Secretary of State, acting on the advice of the Competition Commission and the OFT, to amend and add additional remedies by statutory instrument.**

## PROCEDURES

### Timetables and inquiry procedures

**5.20** The new regime retains a two-stage approach to merger investigations. The OFT will conduct the first stage investigation to decide whether a reference is necessary. The Competition Commission will continue to carry out such references via a second stage, in depth investigation.

**5.21** There will be statutory maximum timetables for both first and second stage investigations. These will help provide a more certain and predictable mergers framework for business, in line with best practice overseas.

**5.22** The statutory timetable for first stage investigations will be reduced from 35 to 30 working days for businesses who want to pre-notify their mergers on a Merger Notice. The option of an administrative timetable at stage one will also continue, for which the target will be reduced from 45 to 40 days.

**5.23** In October, the Government sought views on the duration of second stage Competition Commission investigations. It invited comments on the benefits of reducing the timetable to a definite maximum of 16 working weeks, against the case for developing procedures for identifying remedies which could require longer. It also asked whether and for how long the Commission should be able to extend its investigation where an unexpected event occurs late on in the process. In the light of comments received, the Government has decided:

- There will be a set statutory maximum timetable for Competition Commission inquiries of 24 weeks. This will allow procedures to be adopted which strike the right balance between speed, thoroughness and fairness. There will be powers to shorten the timetable, if experience shows that this is feasible.
- In exceptional circumstances, the Competition Commission will be able to extend the maximum timetable by up to 8 weeks. It will be required to publish the reasons for the extension.
- The Government believes that the Competition Commission should determine its own procedures, given its independent status and role as final decision-taker in the new regime. The procedures will need to be accommodated within the maximum timetable set out in the legislation, and ensure the best possible decisions within that timetable.
- To ensure the Competition Commission's procedures are clearer and more certain the Chairman will have a duty to set rules of procedure binding on inquiry panels.

**5.24** Separately, the Chairman of the Competition Commission has said that he will make a procedural rule at the outset of the new regime requiring inquiry panels to publish their provisional findings on the competition aspects of a merger along with the key parts of the analysis before turning to the consideration of remedies. He has not ruled out subsequent change in the light of experience. The Government strongly welcomes these plans.

#### Obtaining information

**5.25** The Government has looked carefully at the adequacy of the Competition Commission's formal powers to obtain information from merging parties and from third parties. It is vital that the Competition Commission can access information on a timely basis. We have already proposed that the competition authorities should be able to suspend the statutory timetables if companies fail to provide required information by a specified date. We will proceed with this arrangement.

**5.26** The Government has looked further at whether the Competition Commission needs additional powers to secure compliance with requests for information. Initiating contempt of court proceedings is an appropriate sanction in certain serious cases of non-compliance which we will retain. However, it is a lengthy and complex process which does not fit well with the fixed deadlines of a merger inquiry.

**5.27** We will therefore give the Competition Commission a new power to impose monetary penalties on parties and third parties for the late or non-provision of information. This will be modelled on the equivalent power under the EC Merger Regulation.

#### Powers relating to completed mergers

**5.28** The UK's merger regime allows mergers to be completed without the need for prior notification. We will retain this option. Businesses will continue to be able to confirm agreements speedily if commercial circumstances require it, and if they are prepared to accept the risks of subsequent investigation. The system can, however, sometimes lead to difficulties in identifying effective remedial action for a completed merger which subsequently fails the merger test where irreversible action has been taken by the companies concerned.

**5.29** The Government will address this problem by giving the OFT a new power to prevent parties to a completed merger from taking further steps to integrate their businesses before a decision has been taken on whether a reference is required.

**Voting rules 5.30** At present, Competition Commission inquiry panels need a two-thirds majority to take decisions on whether a merger operates against the public interest. In the case of panels of five, this means that a 3:2 decision would not suffice even though it would be closer to two-thirds in percentage terms than a 4:1 decision. A simple majority rule would solve this particular difficulty without making any difference to the majorities required for panels of three, four or six members. However, as the Competition Commission will have final responsibility for decisions in the future there are arguments for maintaining the two-thirds majority rule.

**5.31** **The Government invites views on whether to replace the current requirement for a two-thirds majority with a requirement for a simple majority.** The same arrangements will need to apply for the new merger regime and the new regime for investigating markets.

# 6

## INVESTIGATING MARKETS

- **The Government will reform the monopoly provisions – replacing them with a new power to investigate markets – where the overwhelming majority of decisions will be taken by independent competition authorities.**
- **Under the new regime, the OFT will work pro-actively to keep markets under review – where it appears that markets may not be working well, it will be able to refer them to the Competition Commission for further investigation.**
- **The Competition Commission will carry out a full investigation – assessing the market against a new competition-based test.**
- **The Competition Commission will itself determine what remedies are necessary. If appropriate, it will ask the OFT to negotiate undertakings on its behalf.**
- **Occasionally, even though there are adverse competition effects, the way a market operates may bring countervailing benefits to consumers. If this is the case, then the Competition Commission may decide to take no action or modify its remedies.**
- **Ministers will retain the power to decide the very small minority of cases where clearly defined exceptional public interest issues arise.**
- **There may be a case for Ministers retaining a limited role in relation to divestment remedies recommended by the Competition Commission.**

**6.1** The ability to investigate markets as a whole is an important feature of our competition regime. Where a market is not working well, the complex monopoly provisions of the Fair Trading Act 1973 provide a very effective means of taking action, complementing powers under the Competition Act 1998 and EC law.

**6.2** Economic evidence shows that in markets where competitors engage in parallel behaviour, competition is often reduced to the cost of consumers. In many cases, such practices may just emerge and become widespread in a market – but still have a detrimental effect.

**6.3** 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, without necessarily attaching any blame to the participants.

**6.4** These important provisions are 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. Under the monopoly provisions, decisions are still taken by Ministers.

**6.5** **The Government intends to reform the monopoly provisions – replacing them with a new power to investigate markets – where the overwhelming majority of decisions will be taken by independent competition authorities.**

### INTERACTION WITH EUROPE

#### **Collective dominance**

**6.6** European community law is developing in a way which, in due course, may make it possible to tackle some of the practices covered by our complex monopoly provisions. For example a concept of “collective dominance” is developing through case law, which may allow action against a group of firms who collectively abuse their dominant position without

actually colluding. The Competition Act will ensure that as European case law develops the extent of powers available to the European Commission under Article 82, these are automatically available to the OFT.

**6.7** Our domestic monopoly provisions currently allow us to tackle a much larger range of market failures than does Community law. The new power to investigate markets will also do so (regardless of the development of the concept of collective dominance). Although there will continue to be some overlap, our new domestic provisions are intended to be complementary to the emerging concept of collective dominance.

**6.8** A distinctive feature of the Fair Trading Act regime is that where a market is found not to be working well, the firms might be prohibited from particular practices for the future, but they face no retrospective penalties nor do they face the prospect of third party actions for past abuses.

**Modernisation 6.9** Under modernisation, the European Commission proposes that Article 81 should apply to agreements to the exclusion of domestic competition law. It also intends that where firms infringe the Article 82 prohibition, other domestic competition law should not apply.

**6.10** These proposals are contentious among some Member States as they would limit the use of their domestic competition law which may not mirror Articles 81 and 82 as UK law does. The UK Government believes the Commission's proposals could mark a welcome improvement – with greater consistency across Europe. However, the Government wishes to ensure they do not undermine the effective working of the complex monopoly regime and its successor.

**6.11** The European Commission will need to work closely with Member States over the coming months to revise its proposals. **The Government is committed to ensuring that the outcome maintains the effectiveness of our regime for investigating markets.**

## THE NEW REGIME FOR INVESTIGATING MARKETS

**6.12** The new regime for investigating markets will have a similar scope to the existing monopoly provisions, but will operate along the same lines as the new merger regime. It will be used for market wide inquiries. It is not Government's intention that it will be used to deal with scale monopoly problems except in exceptional circumstances (see paragraphs 6.58 to 6.59 below).

- The **OFT will work pro-actively to keep markets under review** – where it appears that markets may not be working well, it will be able to refer them to the Competition Commission for further investigation.
- The **Competition Commission will carry out a full investigation** – assessing the market against a new competition-based test.
- The **Competition Commission will itself determine what remedies are necessary**. If appropriate, it will ask the OFT to negotiate undertakings on its behalf.
- **Occasionally, even though there are adverse competition effects, the way a market operates may bring countervailing benefits to consumers**. If this is the case, then the Competition Commission may decide to take no action or modify its remedies.
- **Ministers will retain the power to decide the very small minority of cases where clearly defined exceptional public interest issues arise.**

- There may be a case for Ministers retaining a limited role in relation to divestment remedies recommended by the Competition Commission.

## MAKING REFERENCES

**6.13** The Fair Trading Act enables a reference to the Competition Commission to address complex monopoly questions when:

- it can name or define companies in a market who collectively have a share of supply of 25% or more; and
- it appears that the companies, whether voluntarily or not, and whether by agreement or not, so conduct their affairs as in any way to prevent, restrict or distort competition.

**6.14** The Government believes that this test should be changed. The first limb is of little value – as in almost every market, it is possible to name or define companies who collectively have a share of supply of 25% or more. The second limb is also problematic, as it asks the OFT to make an assessment that is not directly related to the substantive test applied by the Competition Commission in its subsequent inquiry.

**A new reference test** **6.15** For the new regime for investigating markets, the Government will develop a more flexible reference test – which allows the OFT to refer markets when it believes that conduct, or circumstances surrounding the operation of a market, suggest a Competition Commission investigation would be merited. The Government invites views on the following replacement test:

The OFT believes (or has a reasonable suspicion) that a market may operate in a manner which adversely affects competition.

Or, alternatively, and closer to the proposed merger test:

The OFT believes (or has a reasonable suspicion) that the market may operate in a manner which substantially lessens competition.

**Indirect indicators** **6.16** The Government believes that, in addition to direct observable conduct, other, indirect indicators of a lack of effective competition, thus damaging the consumer interest, should provide grounds for a reference. The new legislation will ensure that such factors can be taken into account. For example:

- the conduct or practices of the firms in the market;
- prevailing prices, profit levels or productivity levels;
- the structure of and barriers to entry into the market;
- comparisons with similar markets in other countries; and
- laws or regulations which affect the operation of the market.

**6.17** The Government invites views on these factors and others which might provide a basis for a reference.

**6.18** As at present, it will also be possible for references to be made by sectoral regulators with concurrent powers, and by Ministers. The Government believes that where a reference is made, the reasons should be explained publicly.

## DURING INQUIRIES

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**6.19** The current reference procedure can be inflexible. During an inquiry, the Competition Commission can sometimes find that the reference is too wide, too narrow, or not worth making at all. While the Fair Trading Act 1973 does give the Competition Commission the opportunity to seek an alteration to the reference, this is rarely taken. **The Government will retain this power for the future and believes that the Competition Commission should become more active in using it – to ensure that its inquiry is focused on the markets that most merit investigation.**

**6.20** The Competition Commission should also be able to cut short an inquiry if it becomes clear that there is no problem in the market. The current legislation does not allow the Competition Commission to seek a termination of the reference. For the new regime, **the Government invites views on whether to introduce a new power for the Competition Commission to drop inquiries subject to the agreement of the OFT<sup>1</sup>, and a requirement for it to explain publicly its reasons for doing so.**

## A NEW COMPETITION-BASED TEST

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**6.21** When a market is referred for investigation, a key question that the Competition Commission needs to answer is whether any facts found by the Commission during their investigations operate, or may be expected to operate, against the public interest. The test is concerned with the public interest rather than competition issues.

**6.22** With the advent of the Competition Act 1998, monopolies and restrictive agreements are considered against a competition test. The continued presence of the public interest test in the Fair Trading Act now looks anomalous and outdated.

**6.23** **The Government intends to replace the public interest test with a narrower, more focused competition test.**

**6.24** In a merger case, the Competition Commission will assess whether a merger will lead to a substantial lessening of competition. A similar analysis may be applicable in a market-wide investigation (ie whether the conduct or performance of any firm or any other aspect of the market has the effect of substantially lessening competition). Alternatively, the test may be based on adverse effects (ie whether the conduct or performance of any firm or any other aspect of the market means that the market operates in a manner which adversely affects competition). **The Government invites views on these two approaches.** One issue is whether the test should include some degree of appreciability such as ‘substantial’.

## COUNTERVAILING BENEFITS

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**6.25** Adopting a competition-based test would bring the new regime for investigating markets into line with other aspects of our competition law. The Government believes that inquiries which are required explicitly to focus on competition will best deal with the adverse impact that reduced competition can have on consumers and the economy.

**6.26** There may be cases, however, when it would be wrong to base decisions solely on competition grounds. Few areas of competition law operate by doing so. For example, Article 81(3) allows for the exemption of anti-competitive agreements if they bring wider countervailing benefits. The Competition Act provides a similar power for the OFT. The new merger regime will allow the competition authorities to clear a merger or allow it to proceed with conditions when, even though competition considerations point the other way, they believe that it will bring overall benefits to consumers.

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<sup>1</sup> or the person making the reference, which could be a sectoral regulator or a Minister.

**6.27** For the new regime for investigating markets, the Government is considering whether to follow the merger model or the Article 81(3)/Competition Act model. Under the merger model, benefits to consumers will be tightly defined as price, innovation, quality or choice for consumers who are affected by the merger. Under Article 81 and the Competition Act, the relevant test is broader, and includes whether the agreement contributes to improving production or distribution; or promoting technical or economic progress – whilst allowing consumers a fair share of the resulting benefit. European case law demonstrates, for example, that countervailing benefits can be taken to include consideration of the environmental, social and health benefits.

**6.28** Inquiries which look across entire markets may be more likely than merger cases to identify wider countervailing benefits – and, therefore, there is a case for following the Article 81(3) model. However, there are also advantages in consistency between the new regimes for mergers and for investigating markets. **The Government invites views on which model to follow.**

**6.29** Additionally, in a small minority of cases issues of exceptional public interest may arise, and in such cases, Ministers will retain the discretion to take final decisions (see paragraphs 6.41 to 6.48 below).

## REMEDY SETTING

### A new duty to develop remedies

**6.30** Effective remedies which promote competition, although often difficult to devise, are the key to ensuring that consumers benefit from an investigation.

**6.31** The current regime places too little emphasis on the process of remedy setting. The legislative framework does not require the Competition Commission to identify any remedies at all. The Fair Trading Act says that the Competition Commission panel may, if they think fit, include in their report recommendations to remedy the adverse effects found. In practice the Competition Commission does offer its view of remedies. The Commission is itself not responsible for decisions on the remedies to be applied. Government proposals address both these points.

**6.32** Under the new regime for investigating markets, the Government will introduce a new requirement for the Competition Commission to develop remedies which address the problems it has identified through the promotion of competition and the consumer interest.

### Designing remedies

**6.33** The process of determining remedies is complex and difficult – and would benefit from greater public debate. In the past the process has often been opaque. In some cases, the Commission may have concluded that there is no evidence of a competition problem, but still seek views on hypothetical remedies. In others, the Commission may have strong evidence of problems, but those asked to comment on hypothetical remedies may have no access to this evidence.

**6.34** In the future the Competition Commission intends to adopt a new procedure for setting remedies. The Commission will, at the end of its main analysis of the market, publish provisional findings on the substantive test and key parts of the analysis. It will then focus its energies on devising remedies to correct any competition problems, doing so in a transparent manner inviting views from the parties and others.

**6.35** The Competition Commission will still be able to alter its findings after the provisional findings are published – for example, where new evidence comes to light, or where further analysis suggests the provisional findings need refining. However, the Commission intends that the new procedure will allow it to move more clearly to the remedy stage of the inquiry.

Once the Commission has completed its inquiry, it will publish its final report, including remedies.

**6.36** The Government strongly welcomes the decision of the Competition Commission to adopt this new approach to remedy setting.

**Regulations** **6.37** The Government is keen that the Competition Commission should recommend changes to laws and regulations which it judges undermine the effective working of markets during the course of its inquiries. The final decision on how to proceed will be for Ministers who will need to balance competition considerations against other public policy considerations. **The Government is committed to making a public response to such recommendations within 90 days** (see also paragraph 4.15).

**Monitoring effectiveness** **6.38** Once remedies have been imposed, it is important to monitor how effectively they address the problems which the Competition Commission originally identified. Only by doing so can we be sure consumers are benefiting at least cost to business. The Fair Trading Act already requires the OFT to keep undertakings under review – but there is no formal requirement to produce a report, or to publish it.

**6.39** In recent years, the Government and the OFT have agreed that in some cases formal reports should be prepared and published – for example on the beer orders and classified directory advertising.

**6.40** From today, **the Government will ask the OFT to produce follow-up reports for markets which have been previously investigated by the Competition Commission** – setting explicit timetables for monitoring the effects of the remedies imposed. Regular re-examination of such markets should help to establish whether more might be done to strengthen competition. It will help to improve the remedy setting process, with a better understanding of what remedies work under particular circumstances.

## ROLE OF MINISTERS

**6.41** Reducing Ministerial involvement is an underlying theme of the changes made to our competition regime. For mergers, the Government has announced that it intends to take Ministers out of the loop except where there are issues of exceptional public interest. Under the Competition Act 1998, decisions are taken on individual cases by the authorities, rather than Ministers.

**6.42** Reducing Ministerial involvement is an underlying theme of the changes made to our competition regime. The Government believes that competition authorities acting on the basis of sound economic analysis are best placed to take decisions in order to correct competition weaknesses, and restore healthy competition for consumers. This view has strong support within our domestic competition community, and internationally.

**6.43** For the new regime for investigating markets, the Government proposes that:

- Decisions on individual cases will be taken by the Competition Commission – which will look primarily at competition factors, but may also consider wider countervailing benefits.
- The findings of the Competition Commission and the remedies it sets will be final – unless specified exceptional public interest issues arise, in which case Ministers will be able to override the Competition Commission's advice.
- The legislation will set out areas where exceptional public interest issues can arise.

- The Competition Commission will be able to ask the OFT to negotiate undertakings.

**6.44** In market wide inquiries the issues raised can be wide-ranging and it may not always be clear at the outset whether exceptional public interest issues arise. So, unlike the merger regime, where Ministers will not be able to raise exceptional public interest issues after a reference decision, for market investigations Ministers will be able to register their interest at any stage of the inquiry, and for a short period (eg 30 days) after the report is published. If, during its inquiries, the Commission identifies concerns about matters of exceptional public interest it will raise the issues publicly, so that the Minister may decide whether he or she wants to see them investigated.

**6.45** The new merger regime will specify national security as an exceptional public interest ground. There will also be a reserve power for the Government to list further grounds by secondary legislation subject to affirmative resolution – but the Government has no current plans to use this power. **To do so would go against the whole thrust of the policy reforms in this White Paper. Government considers the same approach should apply to the new regime for investigating markets, and invites views.**

**Divestment 6.46** The divestment remedy may sometimes be particularly radical in the case of a market inquiry. In merger cases, firms will know from the outset that their transaction may be blocked or reversed if it fails the competition test. Market cases are different since an inquiry can show that the way a particular market has operated for some time undermines competition – and therefore that divestment is necessary to restore competition. In such cases, firms may be required to dispose of parts of their business.

**6.47** **The Government believes in principle that the responsibility for deciding on, and implementing, such remedies should rest with the Competition Commission.** It will be necessary for the Commission to demonstrate that divestment remedies are necessary and proportionate. But the **Government recognises that a case can be made for Ministers to retain a role where a major divestment remedy is proposed – eg a break-up of a company. The Government invites views on the role of Ministers and in particular whether Ministers should retain a role in relation to major divestment remedies.**

**6.48** Because the prime responsibility for remedies should rest with the Competition Commission, the Government believes that if a role for Ministers were to be retained, it should be limited to a power to override the Commission's decision – put into effect by passing secondary legislation subject to affirmative resolution. In such cases, the Commission would then be responsible for determining alternative remedies.

## MINOR CHANGES

**6.49** There are a number of other changes to the regime which the Government is considering or intends to make.

**Statutory questions 6.50** At present, in framing its reports, the Competition Commission is required to answer a number of statutory questions before it makes its public interest findings:

- Whether there is a monopoly situation and, if so, in favour of whom?
- Whether any person is taking steps to exploit or maintain the monopoly position, and by what uncompetitive practices or other means?
- Whether any action or omission is attributable to the existence of the monopoly situation?

**6.51** This requirement imposes a rigid structural framework on the Competition

Commission that is difficult to work with. **The Government intends to replace the statutory questions with two overarching requirements:**

- **Assessing the market against the new competition test.**
- **Taking account of any countervailing benefits to consumers and developing remedies which correct the problems by promoting competition and the consumer interest.**

**Timetables** **6.52** Under the new merger regime, statutory maximum timetables will apply. The Government is considering whether a statutory timetable is required for the new market investigation regime. If there were to be one, the timeframe would need to be much longer than for mergers – as the issues raised can be much more complex.

**6.53** Even without a statutory timetable, there would be an administrative deadline for inquiries – set in most cases by the OFT. The Government intends that, in future, extensions should only be possible by agreement with the referring organisation, rather than Ministers. Given this, the introduction of statutory timetables may not add much further benefit. **The Government invites views on how to proceed in this area.**

**Information gathering** **6.54** For the new merger regime, Government will introduce a new power for the Competition Commission to impose monetary penalties on parties (including third parties) where they do not provide information on time. **The Government invites views on whether such a power should apply under the new regime for investigating markets.**

**General references** **6.55** The Fair Trading Act includes a power for the Secretary of State to make a general reference to the Competition Commission where she believes that practices have been adopted that are uncompetitive or that result from or are for the purpose of preserving a monopoly situation. This power has not been used for some time (the last case was Collective Licensing in 1988<sup>2</sup>) – possibly because it does not carry the possibility of remedies at the end of the inquiry.

**6.56** **The Government is considering whether, in the light of the new power to investigate markets, there is any need to retain the power to make a general reference. The Government invites views on this issue.**

**6.57** If the power is retained, it should be modernised, so that where the Competition Commission in the course of a general reference inquiry found evidence to justify converting the inquiry into a market investigation it could do so (subject to the agreement of the OFT, and a public statement of the reasons). This would mean that general references could actually lead to improvements in the market. The Government would also extend the power of general reference to the OFT as well as the Secretary of State.

## SCALE MONOPOLIES

**6.58** The Fair Trading Act contains provisions which allow action against scale monopolies. No references have been made since the introduction of the Competition Act's prohibition of abuse of dominant market position, which is the primary vehicle for addressing monopolies.

**6.59** Government policy is that where possible, the OFT should use the Competition Act 1998 or EC law, if empowered to do so, to deal with problems arising from the dominance of a company, save in exceptional circumstances. The Government decided in 1997 that the Fair Trading Act provisions could be used where undertakings engage in repeated breaches of the prohibition, or in regulated sectors with high market power where restructuring may be appropriate. This policy will also apply to the use of the new market investigation powers.

<sup>2</sup>“Collective Licensing - A report on Certain Practices in the Collective Licensing of Public Performance and Broadcasting Rights in Sound Recordings,” Cm 530, December 1988.

- **Hard-core cartels are highly damaging to consumers and to the economy in general. The Government believes that the current level of fines does not deter involvement in cartels.**
- **There is a strong case for introducing criminal sanctions against individuals who engage in hard-core cartels.**
- **The new criminal offence would need to catch price-fixing, market-sharing and bid-rigging cartels. It should target individuals who set up and maintain cartels, and also senior executives or directors who either condone or encourage the arrangement.**
- **There would be real advantages for the main prosecuting authority to be the OFT. It will be able to bring a criminal case against an individual even where the case against the firm is being pursued by the European Commission.**

**7.1** Competition law works best where it acts as a real deterrent against individuals and companies engaging in anti-competitive behaviour.

**7.2** In most cases, the Competition Act 1998 provides a sound basis for deterrence. But for the most damaging form of anti-competitive behaviour – engaging in a “hard-core” cartel – the Government believes that there is a strong case for strengthening the penalties, with the introduction of criminal sanctions against individuals. A new criminal regime would work alongside the existing civil regime.

## THE CASE AGAINST HARD-CORE CARTELS

**What is a hard-core cartel?**

**7.3** Hard-core cartels involve firms making a network of agreements, often in secret, which are deliberately designed to ensure that unsuspecting enterprises and individuals get a raw deal. They are highly damaging to their customers and to the economy in general.

**7.4** The OECD defines the essence of a “hard-core” cartel as being:

- “an anti-competitive agreement, anti-competitive concerted practice or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce”<sup>1</sup>

**7.5** Hard-core cartels either raise or maintain prices at higher levels than they would be if competition were not distorted. They can restrict the supply of goods and services to consumers and businesses or make them unnecessarily expensive. The money that leaves consumers’ pockets simply becomes extra profit for the firms involved.

**7.6** The US competition authorities estimate that cartels, on average, lead to a 10% increase in the price of the goods or services affected. By adversely affecting the efficient running of the economy, the potential harm to society could be much greater – a cartel can affect up to 20% of the volume of commerce.

<sup>1</sup> OECD: Hard Core Cartels: Meeting of the OECD Council at Ministerial Level, 2000.

**Box 7.1: The OECD's work on hard-core cartels**

The Competition Law and Policy Committee of the OECD has reported that in the US alone, ten recently condemned international hard-core cartels:

- Cost individuals and business many hundreds of millions of dollars annually.
- Affected over \$10 billion in US commerce, with overcharges of over \$1 billion.
- Caused even more harmful economic waste estimated at over \$1 billion.

The OECD recognised that, to calculate the global harm of all cartels, these striking numbers would have to be increased by:

- The harm these cartels had done outside the US.
- The harm done by other successfully challenged international and domestic cartels.
- The much larger number of undiscovered and unproven hard-core cartels.

They concluded that although no such calculation was possible, cartels are clearly a major and largely invisible drain on the world's economy.

**7.7** The OECD estimates that the drain to the US economy from recently exposed cartels runs into billions of dollars. But academics<sup>2</sup> estimate that the US authorities, even with their stronger investigation powers, only manage to detect around a sixth of cartel activity.

**7.8** In the past year, the OFT has launched investigations into eight possible cartels in such diverse markets as services to domestic consumers and services to local authorities, milk, construction materials and fabricated metal. These show that cartels may be operating in the UK at the local level in major cities as well as across the whole economy.

**Other countries 7.9** Some countries take a tougher line on hard-core cartels than the UK has done so far. In the US, for example, criminal penalties have been on the statute book for antitrust offences since 1890, and these penalties have been applied actively. During the 1990's, the US Department of Justice successfully prosecuted thirty five people a year on average. This has helped to raise the profile of competition law within the business community. The US authorities believe that, as a result, business executives understand the harm that cartels can cause, and the risks associated in engaging in them. The importance of strong competition between firms is therefore much more ingrained in the US than in the UK.

**7.10** The US authorities are also able to take action against cartels which have worldwide effects. In the recent Vitamins cartel case (see Box 7.2), the US authorities imposed fines of \$500 million and \$225 million respectively against a Swiss and a German firm. They also obtained criminal convictions against six European executives for engaging in price-fixing. These executives have subsequently agreed to serve their sentences in US jails.

**7.11** Other countries also have criminal sanctions against individuals involved in hard-core cartels. Canada has long criminalised serious competition breaches. Japan also has criminal sanctions and Australia is considering introducing them.

**7.12** Within Europe, Austria, France, Norway and Ireland all have a criminal offence covering cartels and in Germany bid-rigging is a criminal offence. Sweden is currently considering introducing a criminal offence for cartels.

<sup>2</sup> PG Bryant and EW Eckhard, "Price Fixing: The Probability of Getting Caught", 1991 Review of Economics and Statistics 531

**Box 7.2: Some recent cartel cases****The Global Lysine Cartel**

Between 1993 and 1996, the world's five leading producers of Lysine, an animal feed additive, colluded to fix both prices and sales quotas. As a result of this, the world price of Lysine doubled on sales of over \$1.4 billion. The cartel was discovered and cartel members prosecuted. Fines of more than \$100 million in the US and Canada and more than 105 million euros in the EU were levied.

**The Global Vitamins Cartel**

Cartel members operated a highly sophisticated and complex operation to fix prices and share markets for certain types of vitamins. This cartel was hidden for a decade and the OECD has estimated that it produced \$500 million of overcharges in the US alone. Cartel members were successfully prosecuted and fines of over \$1 billion were levied. Three Swiss executives from one firm and three German executives from another have agreed to serve time in US prisons.

**The French TGV Cartel**

French competition authorities successfully took action against a domestic cartel amongst building firms bidding for work on France's high speed train system. The cartel was destabilised by a foreign firm who planned to enter the bidding. The cartel offered the new entrant FF75 million to submit a higher bid on one part of the project and not to bid at all for other parts of the work. The competitor firm rejected the payment and after another attempt by cartel members to disrupt the bidding, the cartel was discovered. Cartel members were collectively fined FF378 million.

**The UK Volvo Cartel**

Volvo dealers agreed not to allow any discounts on new cars bought by retail customers and to limit discounts to commercial customers to 2.5%. This cartel, which operated for varying periods during the late 1990's, was uncovered by the OFT just before the Competition Act 1998 came into force. The OFT estimate that in the time the cartel was operating consumers may have paid £250 more than they should have for a vehicle.

**DETERRING INDIVIDUALS – CRIMINAL SANCTIONS**

**7.13** For most forms of anti-competitive behaviour, large fines against companies act as an effective deterrent. But for cartels there is good evidence that the current level of fines is not enough (see Box 7.3).

**7.14** One option would be to increase the maximum level of fines significantly – perhaps six to ten times the existing maximum fines. The Government does not believe that fines at this level would be proportionate.

**7.15** A US study<sup>3</sup> indicates that more than half of firms convicted of price-fixing would go into liquidation if required to pay the optimal fine. This would not be fair. In many cases, the cartel will only have covered one aspect of the firm's business – and the real participants will have been the few executives involved. Very large fines would damage innocent employees, shareholders and creditors who have done nothing to harm consumers or break the law.

<sup>3</sup> Craycraft, C, Craycraft, JL and Gallo JC, "Antitrust Sanctions and a Firm's Ability to Pay" (1997)

**Box 7.3: Why don't fines provide an effective deterrent against cartels?**

If fines are to deter firms and their executives effectively, they need to be set at a level which is greater than the expected gains from participating in a cartel.

US evidence shows that cartels often raise prices by around 10%. Increasing prices will have some dampening effect on demand – so a cartelist might increase its profits by a smaller proportion. Conservatively, they might do so by around 5%. If the cartel operates for six years (as the average US cartel is thought to do), then the total benefit might be 30% of annual turnover.

The Competition Act 1998 allows fines to be imposed at this level – up to 10% of annual turnover in the relevant market for a maximum of three years. But not all cartels will be caught: in the US, estimates suggest that only a sixth of cartels are detected.

The expected fine for the would-be cartelist is the probability of being caught multiplied by the likely fine (ie a sixth of 30%), around 5% of annual turnover.

Faced with very high likely benefits arising from engaging in a cartel, the expected fine is unlikely to act as a meaningful deterrent.

**7.16** Therefore, **the Government believes that for cartels, the level of fines against firms should remain at the same level as at present – but that there should be specific sanctions against individuals engaging in the cartel.** The threat of a criminal conviction and the possibility of a prison sentence means that individuals are more likely to think very carefully before engaging in cartels. Or, if they are directed to do so by their managers, they may be far more willing to inform the authorities.

**7.17** Some countries impose criminal fines against individuals involved in serious competition breaches. The Government believes that this would improve the deterrent effect of our regime, but is unlikely to provide adequate protection against cartels. In practice firms could find ways to cover the costs for individuals fined. The New Zealand Government is currently seeking to outlaw exactly this behaviour.

**7.18** The Government's recent peer review of competition policy asked competition experts for their views on the increased deterrence of criminal penalties. In the UK, 83% of those questioned believed that the introduction of criminal penalties against individuals who engage in cartels would improve our regime.

## THE CRIMINAL OFFENCE

### Catching the right agreements

**7.19** The new criminal offence will cover hard-core cartels only – widely recognised as the most serious form of competition breach. The most common form of hard-core cartel involves illegal price-fixing – where a number of firms agree what price should be charged for a particular product. In most cases, this will be above what the competitive market price would be.

**7.20** However, cartels can also involve conduct which achieves the same economic result by different means. This includes agreeing not to compete for each other's customers – which leaves each firm free to set higher prices (market sharing). Or firms could agree to reduce levels of output – which also increases the price that they can charge.

**7.21** In some cases, firms will agree to inflate the price charged in a tender-bidding process and enter bids which ensure that one company in the cartel will win, but on better terms than would otherwise be the case (collusive tendering). The OFT believes that public sector contracts are particularly vulnerable to these practices. As such, they could hit taxpayers hard – because Local Authorities or Government departments have to pay more for public services.

**7.22** In all these cases, the effect is the same – prices rise and consumers pay more than they should. The Government intends that the new criminal offence will cover each of these different types of cartel. Defining the offence in a way that distinguishes legitimate agreements from illegitimate ones is likely to be more difficult in some areas, in particular market sharing. The Government is keen to avoid encouraging disguised price-fixing through such arrangements.

**7.23** The Government is also considering whether the offence should only catch involvement in horizontal agreements between competitors or whether certain types of vertical agreement, especially those which are already outside the existing EC exemptions and involve abuse of market power, should also be caught. [The Government invites views on whether to adopt a broader offence which will catch involvement in illegal vertical agreements or to confine the offence to horizontal agreements between competitors.](#)

### The interplay with European law

**7.24** European competition law is directly applicable in the UK where cartels affect interstate trade. As many of the most serious cartels are international, the interplay of EC and UK regimes is important. The EC regime, like the UK's Competition Act, operates against undertakings not individuals. There is no provision in European law for individual criminal penalties. However, a new criminal offence in UK domestic law would apply to individuals involved in illegal agreements irrespective of whether action against the undertaking was taken under existing EC or UK law. [The Government is therefore concerned to ensure that introducing a new criminal offence does not cause significant divergence from European law.](#)

**7.25** Competition law distinguishes between agreements which are anti-competitive and those which have strong offsetting or countervailing benefits. Companies often make commercial agreements to work together to bring a product to market. This can mean that they share technology or resources and become more efficient through doing so. Such joint working arrangements can improve the supply of goods and services and benefit business customers and consumers. An example is the ticketing arrangements between London Underground and bus and rail operators in and around London. These agreements make it easy for customers to travel freely between one transport operator and another. They demonstrate that a network of agreements can have a positive effect.

**7.26** Under both EC and UK law it is possible to exempt a restrictive agreement with significant countervailing benefits. In some cases, this can be done retrospectively. Block exemptions can also be issued for certain categories of agreements. The type of secret agreements which bind hard-core cartels together are highly unlikely to be capable of exemption under EC law. However, the Government recognises the need to define carefully the criminal offence so as to make it clear that only individuals actively involved in agreements which could never be exempt would be caught. **The Government has no desire to criminalise involvement in benign agreements which would not be unlawful under existing competition law.**

#### Catching the right people

**7.27** Most importantly, the offence must catch the right people. **The Government wishes to ensure that the law targets those who set up and maintain the cartel, as well as any senior executives or directors who know about the arrangement and condone or encourage it.**

**7.28** We have identified two broad approaches to the offence itself, both of which involve setting out on the face of the statute the types of hard-core cartel activities identified above: price-fixing, market sharing and bid-rigging.

**7.29** The first would make it unlawful for a person to participate in an agreement whose purpose is one or more of the hard-core cartel activities identified above, where the agreement also involves a breach of either Article 81 of the EC Treaty or the equivalent prohibition of the Competition Act 1998 (Chapter I).

**7.30** This approach maintains a direct link with a breach of Article 81 or Chapter I. However, where there has not been a prior determination of an infringement of those provisions, a court would first have to find that the agreement breached one of them. This could require a lay jury with no competition expertise to consider potentially complex economic arguments.

**7.31** The second approach is to remove the direct link to a finding that an undertaking has breached Article 81 or Chapter I. Instead the offence would be defined as the dishonest participation in an agreement which has, as a purpose, one or more of the specified hard-core cartel activities. A jury would need to determine whether a defendant had acted dishonestly. A defendant could use as his defence the claim that he honestly believed he was acting in accordance with Article 81 or Chapter I.

**7.32** This approach avoids the real difficulties involved in requiring a prior determination regarding a breach of either Article 81 or Chapter I by a jury. It would also remove the possibility of a defendant's employer frustrating court proceedings by notifying an agreement to the European Commission, although this option would, in any case, only be available until EC modernisation. The disadvantage of the approach is that the direct link with a breach of these provisions is lost.

**7.33** To be effective, it is critical that the offence is defined in a way which is both clear and easy for business and the courts to understand. It must also be actively applied so that its deterrent effect is genuinely felt. **The Government recognises that defining the offence is a complex task and would welcome views on the proposals outlined above and other possible approaches.**

#### Penalties

**7.34** To gauge the level of penalty that should be applied, it is important to consider offences which have similar characteristics. Offences such as insider dealing and obtaining property by deception carry the possibility of a custodial sentence of between 7 and 10

years. In the international arena, Canada and Japan can have penalties of 5 years imprisonment for engaging in cartels and in the US, the maximum available sentence is 3 years.

**7.35** Hard-core cartels are serious conspiracies which defraud business customers and consumers and have wide economic impacts. If discovered they jeopardise the interests of shareholders, creditors and employees. Their costs to the global economy runs into billions of dollars. The offence merits a strong sentence. **The Government believes that the offence should be triable in both the higher and lower courts ('triable either way') and seeks views on what level of sentence should be applied.**

**7.36** The Government is concerned to avoid the possibility of individual fines being paid by employers (who are the main beneficiaries of the cartel) and for this reason does not propose fines an alternative sanction to a custodial sentence. Insider dealing and obtaining property by deception do carry the possibility of a fine as an alternative sanction, but the risk of an employer paying a fine is minimal as they are rarely the beneficiaries of the behaviour.

## THE PROCEDURES

### Investigation and prosecution

**7.37** The introduction of criminal sanctions has significant implications in the way cases are investigated and prosecuted. Procedural safeguards are required to ensure a fair trial. To secure a successful criminal conviction, guilt must be proved “beyond reasonable doubt” rather than “on the balance of probabilities”, the required civil standard of proof. Only in the most serious cases are criminal charges likely to be brought against individuals. The majority of cases will continue to be taken forward under the existing civil regime. It will be important both that OFT meets the new higher safeguards for criminal cases and that it retains its effectiveness in dealing with the full range of competition breaches.

**7.38** The Government believes there are good reasons for the OFT to be the main prosecuting authority for the offence<sup>4</sup>. The OFT has primary responsibility in the UK for uncovering cartels and has developed the necessary expertise. However, the OFT has no responsibility at present for bringing prosecutions, so would need to develop the capability to do so.

**7.39** The Government proposes to ensure that the OFT has sufficiently strong powers of investigation – including powers to carry out surveillance and use covert human intelligence sources. In cases where surveillance is used, the OFT could seek the assistance of the police during investigations. The Government considers that strong powers of investigation are an essential component in successfully detecting and prosecuting the offence. Without such powers it would be difficult to detect the most damaging cartels. For example, in the Lysine case, the US authorities planted hidden cameras with the co-operation of one of the cartel members. The cartel members were caught on camera in hotel rooms concluding their deals which provided valuable evidence in securing convictions.

**7.40** In all cases, it will be essential that procedural safeguards are followed to ensure that defendants receive a fair trial. The OFT will need to caution those who are under suspicion to ensure that they are fully aware of their right to silence, and manage documents carefully to protect the evidence trail. If the OFT are the main prosecuting authority, different

<sup>4</sup> OFT's prosecution authority would extend to England and Wales only. In Scotland, the Lord Advocate is responsible for the prosecution of crime. This function is exercised at local level by Procurators Fiscal as his representatives. In Northern Ireland, prosecution would fall to the Director of Public Prosecutions.

divisions in the OFT would handle the investigation and prosecution phases of a case. The formal decision to prosecute would be made by a functionally separate part of the OFT with advice from the OFT's legal branch. The legal branch may also need to operate as a separate entity. This model is used by other bodies who exercise powers of investigation and prosecution such as the Inland Revenue and the Serious Fraud Office.

**7.41** In deciding whether to issue proceedings, the OFT would also need to follow the code for crown prosecutors – satisfying itself that there was a realistic prospect of conviction – and that prosecution was in the public interest.

**7.42** The Government does not see a strong case for the sectoral regulators to have powers to prosecute. Rather it would be more efficient for them to refer cases to the OFT, who will have the necessary investigatory powers and evidence handling procedures in place.

**The interplay  
with European  
law**

**7.43** The European Commission's modernisation proposals would decentralise powers to enforce Article 81. In most cases where cartels are suspected in the UK, the OFT will investigate. Under modernisation, the imposition of penalties would be a matter for Member States' law rather than Community law. The OFT would therefore be able to act against those agreements it believes breach Article 81. This should help to simplify court proceedings.

**7.44** Some – mainly global cartels – will be investigated by the European Commission. In such cases, the Government intends that the new criminal offence will allow the UK authorities to take action separately against individuals involved in the cartel. **The agreement will be caught by the new offence where it was implemented or intended to be implemented in the UK.**

**7.45** EC procedures are conducted under civil standards of evidence. So where the OFT wished to bring a case against individuals involved in the cartel, it would need to ensure that evidence was gathered to criminal standards. Where evidence had been used in a prior case by the Commission, the OFT investigators might have to secure fresh evidence for a criminal trial to proceed. The Government proposes, however, that **a prior finding in EC proceedings should be admissible as evidence in a subsequent criminal trial.**

**Link between  
civil and  
criminal cases**

**7.46** Where the OFT took action against an undertaking under either EC or domestic civil law and separately against an individual under criminal law, it would need to ensure that the interaction of investigations and proceedings in each case does not prejudice the other.

**7.47** **The Government invites views on whether the new criminal offence should extend to corporate bodies.** There are procedural efficiencies to be gained by enabling the OFT to bring a case against a company and its officers rather than to have to institute two separate sets of proceedings under different law. Corporate bodies are also the primary beneficiaries of the revenues raised by a cartel. Under general principles of criminal law, culpability on the part of those in key corporate positions would also incur corporate liability. Set against this is the divergence with EC law which would occur in the small number of cases in which the OFT took criminal proceedings as well as the difficulty of requiring a lay jury to hear a potentially complex economic case against a company.

**Encouraging  
whistle-blowers**

**7.48** **The Government believes that encouraging whistle-blowing is a critical success factor in securing convictions under the new criminal offence.**

**7.49** There is a risk that introducing a criminal offence could act as a disincentive to those considering whistle-blowing – because employees might fear incriminating themselves in a

criminal investigation. In the US, many of the largest cartel cases have come to light and been successfully prosecuted on the basis of information gained from whistle-blowers. However, the key to this is the competition authorities' ability to selectively plea bargain on behalf of executives who co-operate with their investigations. Those who come forward can do so in the legitimate expectation that they could be offered some degree of leniency.

**7.50** The UK does not have a formal mechanism akin to plea bargaining. However, under the code for crown prosecutors, cases against individuals must be brought in the public interest and the OFT could exercise its prosecutorial discretion and decide not to bring a case against an individual who had provided valuable evidence central to the successful prosecution of key members of a cartel. The OFT would need to decide each case on its own merits, but whistle-blowers could come forward in the knowledge that they may not face a criminal trial<sup>5</sup>.

**7.51** **The Government proposes that prosecutions under the new offence can only be made by the OFT, or with the OFT's consent.** This would prevent OFT's prosecutorial discretion from being undermined by subsequent private actions against whistle-blowers.

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<sup>5</sup> In Scotland and Northern Ireland this would be a matter for respectively the Lord Advocate/Procurators Fiscal and the Director of Public Prosecutions. The OFT could provide its view on the appropriate course of action.



- Private actions are a very important limb of an effective competition regime. Where behaviour is illegal under competition laws, parties who are harmed should be able to bring action against the perpetrators – getting the compensation they deserve.
- The Government proposes to widen the remit of the Competition Commission Appeal Tribunals enabling them to hear claims for damages brought by harmed parties.
- There will be a new right of appeal for third parties seeking interim measures under the Competition Act 1998 to stop anti-competitive behaviour.
- The Government intends to repeal the exclusion of vertical agreements under the Competition Act.
- The Government believes that consumer groups should be able to bring actions for damages on behalf of consumers who have suffered harm as a result of anti-competitive behaviour.
- The OFT will be able to seek a court order disqualifying company directors where serious breaches of competition law have been found.

## PRIVATE ACTIONS

### The importance of private actions

**8.1** Competition between firms protects consumers. Efficient markets mean that consumers get better products and services at lower prices. In markets where competition is distorted, consumers' interests are harmed. It is essential that where this happens, consumers can obtain redress. Private actions are therefore a very important limb of an effective competition regime. Where behaviour is illegal under competition laws, parties who are harmed should be able to bring action against the perpetrators. There are two main advantages:

- Those who are harmed get the compensation they deserve for the harm they suffer.
- It draws private resources into the enforcement process. In the US, for example, 90% of competition cases are private actions. This allows the US authorities to focus their energies on more important cases – leaving less significant cases to be pursued privately.

### The European dimension

**8.2** Although the possibility of private actions is a basic tenet of Community law in Europe, and Articles 81 and 82 have had direct effect in the UK since we joined the European Community in 1973, in fact no reported cases have resulted in a damages award in the UK courts. Similarly, no cases have yet been successful under the Competition Act, though the Act has only been in force for a relatively short time. There is, however, some anecdotal evidence that cases are occasionally settled out of court.

**8.3** The contrast with the US is striking – but needs to be viewed with some caution. Many US commentators view the number of private antitrust cases in the US as too high. In particular, unscrupulous lawyers can be quick to file vexatious actions – attracted by the prospect of treble damages.

**8.4** The Government is keen to achieve a system in the UK where private actions are less inhibited than at present – but in doing so, wishes to guard against the risks of the US system.

**8.5** The European Commission's modernisation proposals will make a significant contribution in this area. At present, if a firm wishes to delay an action against an anti-competitive agreement, it can seek an exemption from the European Commission (the only body which can grant such an exemption). This precludes the court from considering the case until the Commission has acted. After modernisation, UK courts will be able to make the judgment about whether the agreement infringes Article 81(1) including whether it is eligible for exemption on the grounds of countervailing benefits under Article 81(3). This should pave the way for an increased level of private actions.

**New procedures  
to encourage  
private actions**

**8.6** At present, private actions are likely to be brought before the High Court or, in Scotland, the Court of Session. The costs can be high, and the judge considering the case is likely to have limited knowledge of competition law. **The Government intends to streamline the judicial process so as to make it easier to bring these cases.**

**8.7** **The Government proposes to expand the role of the Competition Commission Appeal Tribunals enabling them to hear claims for damages in competition cases brought by harmed parties.** This would make better use of existing judicial resources. It is also likely to reduce the costs for the parties. The Tribunals currently do not award costs and operate less expensive procedures. Although their rules on costs would need to be revised in light of their new powers, it might be possible to retain some flexibility in awarding costs where a private action is also in the public interest.

**8.8** The Tribunals could **hear damages claims both immediately after considering the substantive appeal** against a decision of the OFT and in cases where the OFT's decision is accepted and no appeal is subsequently made. This would bring procedural efficiencies as the Tribunals would be able to act more swiftly where they are already familiar with the facts of a case against an undertaking. Clear tests of whether a claimant had just cause and the formula by which the Tribunals would calculate damages would be laid out.

**8.9** In addition, where private actions are brought before the courts, they could be dealt with more swiftly if **determinations of infringements under the Competition Act 1998 were binding on the courts.** This would be relevant both to the findings of the Appeal Tribunals and, where no appeal is made, decisions of the OFT. The Government intends to amend the law to give the decisions of the competition authorities this status.

**8.10** The Government also wishes to strengthen the powers of the **Competition Commission Appeal Tribunals to enforce their own orders. This is procedurally more efficient and could be addressed by giving the Tribunals some or all of the powers of a superior court of record.**

**8.11** The Leggatt Review of Tribunals, which is due to be published shortly, has examined the diverse models in operation in current tribunal practice. The Government intends to consult widely on the outcomes of the review before deciding how, and in what way, they might be implemented. The Government will consider further what implications, if any, this review might have for our plans to streamline the process of bringing private actions.

**Interim  
measures**

**8.12** Interim measures are available under the Competition Act 1998 for parties who are claiming serious, irreparable harm as the result of anti-competitive behaviour. They can apply to the OFT asking it to require the offending company to stop its damaging behaviour.

At present, if the OFT makes such a direction, the person to whom it is addressed has a right of appeal, but if the OFT decides not to make an order, the injured third party cannot appeal the decision although they can subsequently seek judicial review. **The Government wishes to offer third parties with sufficient interest a quicker route for reviewing the OFT's decision not to apply interim measures. The Government intends to introduce a new right of appeal to the Competition Commission where the OFT decides not to give an interim measures direction.**

**8.13** In addition, **the Government will require the OFT to set out a formal timetable for deciding interim measures.**

#### Vertical agreements

**8.14** In 1997, the Government decided that vertical agreements should be excluded from the Competition Act in order to guard against the risk of large numbers of notifications of benign agreements. Along with the decision to allow the OFT to charge for notifications, and the OFT's campaign to discourage notifications, this policy has been successful – with only 12 notifications in the first year of operation of the new legislation.

**8.15** In June 2000, the European Commission brought into force a block exemption which covers vertical agreements. The Commission's block exemption is more narrowly drawn than our domestic exclusion – in particular, it does not cover agreements where one of the parties has a market share exceeding 30%.

**8.16** The Government believes that there is a risk that the more permissive domestic exclusion may have the effect of discouraging some private actions. Now that a European-level block exemption is in place (with parallel effect in the UK), there is no strong case for retaining the domestic exclusion. Therefore, **the Government intends to repeal the domestic exclusion of vertical agreements.**

## ACTIONS ON BEHALF OF CONSUMERS

**8.17** The Government wishes to take specific steps to facilitate damages actions on behalf of consumers. Often such cases will involve a large number of harmed parties – each of whom may only have suffered relatively small loss. In such cases, it is much more sensible that claims are brought on behalf of those that suffer by representative consumer bodies.

**8.18** To date, our legal system has not allowed such claims. The Government has recently conducted a review of representative claims<sup>1</sup>, and concluded that representative organisations (such as consumer or environmental groups) should be able to bring claims on behalf of a wider group of consumers.

**8.19** Enabling a representative body to take a claim on behalf of a group of consumers is not without its difficulties. In the majority of competition cases, especially those involving long-standing breaches of competition law which affect consumer markets, identifying exactly who has been harmed and in what way is a significant hurdle. The would-be plaintiffs are either not known or a huge additional effort would be required to identify them.

**8.20** The Government is concerned that consumer groups will have little incentive to bring cases if they are required to identify large numbers of harmed parties. This will be

<sup>1</sup> "Representative Claims: Proposed New Procedures", published February 2001 is available on the Lord Chancellor's Department website: [www.lcd.gov.uk](http://www.lcd.gov.uk)

further compounded if the court is then unable to award damages. **However, the principle of allowing action in the wider public interest where harm to consumers can be shown is an important one. The Government therefore wishes to consider further how to enable cases to be brought in seemingly intractable areas such as competition.**

**8.21** One option would be to enable selected bodies, such as the Consumers' Association, the National Consumer Council or sectoral consumer bodies, to make a claim for damages on behalf of a wider group or class of consumers in specific circumstances. Following the general legal principle that a plaintiff should have just cause to seek damages and be able to demonstrate the nature and extent of the harm suffered, a representative body would need to be able to identify the numbers of consumers falling into the class and the overall economic harm suffered. This might be possible where the OFT has found that an undertaking is in breach of competition law. In making its decision, the OFT will already have defined a market and determined the economic effect of the company's behaviour. The case would then be brought in the wider public interest.

**8.22** A key issue arising out of this approach is how damages which are awarded either by the courts or by the Competition Commission Appeal Tribunals should be handled. **The Government seeks views on the uses to which such recovered damages could be put.** It recognises that this is a difficult area where procedural difficulties are likely to arise. One option might be to keep any damages awarded in trust for a limited period so that claimants could come forward. In this scenario, once the period had expired, the Competition Commission Appeal Tribunals could be given the role of determining individual claims against the fund. A further option would be that once the costs of the action had been covered, residual monies could be used for other purposes which benefit consumers of the product in question or those in related markets. This could include better provision of consumer information or, where there was a limited geographical market, specific community facilities. **The Government seeks views on these and other alternatives.**

## PROTECTING THE PUBLIC

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**8.23** In certain circumstances, UK law enables directors, whose conduct makes them unfit to be involved in the management of a company, to be disqualified from doing so unless they have permission from the court. The law operates in the public interest to prevent abuses of limited liability status. Breach of a disqualification order is a criminal offence and also imposes personal liability for the debts of the company incurred during the period of the breach.

**8.24** The Government believes that it is also in the public interest that directors who have engaged in serious breaches of competition law should be exposed to the possibility of disqualification on that ground alone. **It therefore proposes to legislate to enable the OFT to seek a court order disqualifying a director from acting in the management of a limited liability company where serious breaches of competition law have been found.** The OFT would be able to do this irrespective of whether a criminal prosecution has taken place and irrespective of whether the director was aware that agreements were in breach of EC and UK competition law. The type of conduct which could lead OFT to seek a disqualification would be clearly laid out.

**8.25** Following the model recently introduced by the Insolvency Act 2000, the OFT could be empowered to accept an undertaking from the director not to act in the management of a company. The undertaking would have the same legal effect as a disqualification order

and breach of the undertaking would be an offence. Adopting such a model would have the benefit of streamlining the disqualification process and reducing the burden placed on the courts.

**8.26** The maximum period of disqualification for a director, who is found to be unfit to act in the management of a company, is currently 15 years. The Government considers that this is an appropriate maximum period for disqualification arising from serious breaches of competition law.

**8.27** The Government proposes that the OFT should extend its leniency policy so as not to disqualify those directors who have come forward to assist the OFT in detecting serious breaches of competition law. The Government believes that the wider public interest is best served by not creating a potential additional deterrent for individuals who want to blow the whistle on their co-conspirators. In offering leniency however, the OFT will not be able to influence the outcome of any other proceedings against the director under the Company Directors Disqualification Act 1986. **The Government invites views on whether this approach is in the wider public interest.**



- **Building a world-class competition regime is central to the Government's economic agenda. The reforms set out in this White Paper will further the Government's principles for competition policy.**
- **Competition decisions will be taken by strong, pro-active and independent competition authorities.**
- **Our regime will root out all forms of anti-competitive behaviour.**
- **We will have a strong deterrent effect.**
- **Harmed parties will be able to get real redress.**
- **The Government and our competition authorities will work for greater international consistency and co-operation.**
- **Competition policy will have a high profile – because of its importance for economic performance.**

**9.1** Strong and effective competition policy is central to the Government's economic agenda. It is one of the primary means through which we will close the productivity gap with our major competitors.

**9.2** Chapter 3 set out the principles which guide the Government in this area. Each of the reforms set out in this White Paper will further these principles.

**9.3 Competition decisions will be taken by strong, pro-active and independent competition authorities:** Our competition authorities will have greater independence – with decisions on mergers and complex monopoly cases taken by the OFT and the Competition Commission on the basis of sound economic analysis of the effects on competition. There will be new duties for the OFT to promote competition. All public appointments in this area will be reserved for those with expertise relevant to competition.

**9.4 Our regime will root out all forms of anti-competitive behaviour:** There will be a new role for the OFT, the Competition Commission and sector regulators to alert Government to anti-competitive regulations, and a commitment for Government to consider advice at the highest level, responding publicly within 90 days. The complex monopoly powers will be modernised – with a more flexible reference test, and better remedy-setting for complex monopolies. There will be more resources for the OFT and the Competition Commission allowing them to work more pro-actively to root out anti-competitive behaviour. Consumer groups will have a new power to bring super-complaints, helping the OFT to detect problems in consumer markets. The exclusions of vertical agreements and professional rules under the Competition Act will be repealed.

**9.5 We will have a strong deterrent effect:** There will be a new criminal offence for individuals who engage in hard-core cartels – carrying the possibility of a custodial sentence.

**9.6 Harmed parties will be able to get real redress:** The Competition Commission Appeal Tribunals will have a strengthened role – allowing them to hear claims for damages from third parties. There will be a new right of appeal against decisions of the OFT not to grant interim measures. The Government is developing proposals allowing consumer groups the power to bring actions for damages on behalf of consumers.

**9.7 The Government and our competition authorities will work for greater international consistency and co-operation:** The Government will ensure that the Competition Act remains in step with developments in Europe, such as changes resulting from the Commission's modernisation proposals. There will be new powers for our competition authorities to share information with foreign competition authorities – to ensure that international investigations can proceed smoothly.

**9.8 Competition policy will have a high profile – because of its importance for economic performance:** The OFT will have a new role to act as a champion of competition – ensuring that consumers and businesses understand the importance of competition policy. There will be separate mission statements setting out the respective roles of the OFT, the Competition Commission and Government – so that the public, businesses and Parliament can hold each organisation accountable. In addition, the increased possibility of third party actions will demonstrate the harm that those who engage in competition breaches can do, whilst the new criminal offence will demonstrate the penalties that they deserve.

**AI.1** This is a partial Regulatory Impact Assessment (RIA) of the proposals set out in the Competition Reform White Paper. A full RIA will be produced at a later stage when we develop legislation to implement the proposals in the White Paper. **In this document we scope the range of likely costs and benefits and invite views from consumers and industry on quantifying those costs and benefits.**

## INTRODUCTION

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**AI.2** The **UK competition regime** is now founded on two main pieces of legislation – the Competition Act 1998 and the Fair Trading Act 1973. (EC competition law also applies where there is an effect on trade between Member States.)

- The **Competition Act 1998 mirrors the two European prohibitions**. It prohibits cartels and other anti-competitive agreements and also abuses of dominant market position. It is enforced by the Office of Fair Trading (OFT), which can impose fines of up to 10% of UK turnover – covering up to three years of the infringement. Recently the OFT fined NAPP pharmaceuticals £3.21 million for anti-competitive behaviour. Firms can appeal against OFT decisions to the Competition Commission Appeal Tribunals.
- The **Fair Trading Act 1973** addresses mergers and non-collusive oligopolies<sup>1</sup> (where a number of firms are suspected of engaging in parallel behaviour which could undermine competition – inquiries include *New Cars, Supermarkets and Banking*). Initial investigations are normally carried out by the OFT – leading to references to the Competition Commission (although Ministers can also make references independently). The Commission then conducts a formal investigation and sends its report to the Secretary of State for Trade and Industry. The Secretary of State is required to follow the Commission’s advice on whether the merger or oligopoly operates against the public interest – but it has wide discretion on what, if any, remedies to adopt.

## PURPOSE OF THE WHITE PAPER PROPOSALS

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**Issues AI.1** Strong competitive pressures across our economy are a key driver for productivity and growth. Competition acts as a stimulus for innovation, efficiency, wider choice and lower prices for consumers. The Government has already made significant improvements to the competition regime. The Competition Act 1998 introduced a much stronger regime than before, but we still need to go further. The White Paper proposes, and in some cases, seeks to consult on, changes which will strengthen our competition regime.

**Objectives AI.2** The main objective of the reforms is to modernise and strengthen the competition regime. The reforms are based on the following principles:

- Competition decisions should be taken by strong, pro-active and independent competition authorities.

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<sup>1</sup> It also contains provisions on scale monopolies but the Government announced in 1997 that following the Competition Act coming into force, these provisions would only be used in limited circumstances.

- Our regime should root out all forms of anti-competitive behaviour.
- We need a strong deterrent effect.
- Harmed parties should be able to get real redress.
- The Government and our competition authorities should work for greater international consistency and co-operation.
- Competition policy deserves a high profile – because of its importance for economic performance.

**The option of no change** **A2.3** The introduction of the Competition Act 1998 brought the UK into line with Europe, however the recent peer review<sup>2</sup> showed that further reform is still needed in order to achieve a world-class competition regime. Although the UK competition regime was placed in the top half of its peer group, the well-established competition regimes of Germany and the USA rank ahead of the UK. The Government feels that these proposals would strengthen our competition regime and increase productivity and innovation in our economy.

**Risk assessment** **A2.4** We welcome views from industry and consumers on the risks inherent in the policy proposals we set out in the White Paper and, where possible an economic valuation of them.

## PROPOSALS

**A3.1** The Government has already consulted widely on proposals to reform the mergers regime. A draft RIA has been drawn up for merger reform proposals and is available in the document “Mergers: the Response to the Consultation on Proposals for Reform”<sup>3</sup>. This Regulatory Impact Assessment will address other proposals in general terms.

**A3.2** The Governments main proposals are that:

- Criminal sanctions will be introduced for those who engage in cartels. Cartels are a sophisticated form of theft from consumers, and although a criminal sanction is severe, the Government feels that it is proportionate to the offence.
- The OFT will be given a power to seek court orders for disqualification against directors who engage in serious competition breaches.
- In line with the OFT’s advice on professions<sup>4</sup>, the exclusion of professional rules in the Competition Act 1998 will be repealed.
- The monopoly regime will be replaced with a new regime for investigating markets which will follow the same procedural principles as the new merger regime – decisions will be taken as often as possible by independent competition authorities against a competition based test rather than the current public interest test.

<sup>2</sup> “Peer Review of the UK Competition Policy regime”, published April 2001, is available on the DTI’s website: [www.dti.gov.uk](http://www.dti.gov.uk).

<sup>3</sup> This document is available on the DTI’s website: [www.dti.gov.uk](http://www.dti.gov.uk).

<sup>4</sup> “Competition in professions”, published March 2001, is available on the OFT’s website: [www.of.gov.uk](http://www.of.gov.uk).

- Harmed parties should be able to bring private actions before a specialist competition body. Other courts should also see Competition Act decisions as evidence of infringements, as well as being able to refer competition aspects of other cases to a specialist competition body.
- There will be a new right of appeal when seeking interim measures under the Competition Act to stop anti-competitive behaviour while a case is under consideration.
- OFT powers to review and report on markets will be extended to include future developments that affect markets.
- Consumer groups will have the ability to bring a new category of ‘super-complaint’ to the OFT.

## EXPECTED BENEFITS

**Benefits to consumers** **A4.1** *Stronger markets:* Competitive markets benefit consumers by **driving down prices** and **increasing innovation**<sup>5</sup>.

**A4.2** *Harmed parties will be able to get real redress:* The Competition Commission Appeal Tribunals will have a strengthened role – allowing them to hear claims for damages from third parties. Consumer groups will have the ability to bring “super-complaints” to the OFT. The new procedures for representative actions will gain **compensation for consumers**.

**A4.3** *We will have a stronger deterrent effect:* There will be a new criminal offence for individuals who engage in cartels – carrying the possibility of a custodial sentence. Stronger action against cartels will reduce prices and benefit consumers.

**Benefits for business** **A4.4** *Competition decisions will be taken by strong, pro-active competition authorities rather than Ministers:* Our competition authorities will have greater independence – with decisions on mergers and complex monopoly cases taken by the OFT and the Competition Commission on the basis of sound economic analysis of the effects on competition. Therefore decisions will not involve politics so there will be **greater certainty** for business and improve the **clarity** of the regime. Our competition authorities will have more resources and expertise, resulting in **better decisions** being taken.

**A4.5** *Harmed parties will be able to get real redress:* Not only will the strengthened role of the Competition Commission Appeal Tribunals benefit consumers, it will also benefit businesses allowing compensation to be sought more easily.

**Benefits to taxpayers and the overall economy** **A4.6** *Reduction in resource costs for DTI:* There should be an overall reduction in the level of resource needed at the DTI as it is proposed to take Ministers out of most monopoly and merger decisions.

**A4.7** *Government regulations:* The ability of the OFT to review and report on future developments that affect markets will allow the OFT to publish advice on the effect on competition of proposed legislation. This will benefit the economy by ensuring that proposed legislation is not significantly anti-competitive and there is a level playing field for business.

<sup>5</sup> Geroski (1990) Innovation, Technological Opportunity and Market Structure. Oxford Economic Papers 42

**A4.8** *Our regime will root out all forms of anti-competitive behaviour:* Together the proposals will help to achieve stronger competition in the economy, leading to increases in productivity<sup>6</sup> and innovation.

**A4.9** *There will be greater international consistency and co-operation:* This will ensure that international investigations can proceed smoothly and quickly.

#### Quantifying benefits

**A4.10** Economists have estimated the welfare loss from monopolistic behaviour in the UK economy and arrived at figures of between 0.5%<sup>7</sup> and 1%<sup>8</sup> of GDP. This amounts to a cost of between £4.5 and £9 billion (given that UK GDP is currently in the region of £900 billion). Therefore rooting out monopolistic behaviour will have significant cost benefits to the economy.

**A4.11** The OFT will be given resources to scrutinise markets to root out anti-competitive behaviour. A recent OFT report, "Competition in professions," suggested changes, including repealing the exclusion of professional rules in the Competition Act which is proposed in the Enterprise Bill. The value of services provided by the professions is £11.37 billion per annum so if the changes OFT recommended improve productivity by only 0.1% that represents a gain of £11.37 million per annum compared to additional resources of £750,000 for this study.

**A4.12** There have been several estimates of the amount that cartels raise prices by. In general the evidence suggests that there is a rise in prices in excess of 10% of competitive levels<sup>9</sup>. Increasing prices will have some dampening effect on demand – so a cartel might increase its profits by a small proportion, conservatively 5%<sup>10</sup>. The typical cartel lasts 5-6 years so the disbenefit to consumers over time is large. The turnover will vary, but for example the Lysine cartel, which ran from 1992 to 1995, had an estimated turnover of approximately \$600 million. Therefore the increase in profits due to price-fixing would be very significant.

**A4.13** Respondents are invited to submit any further information they have on the prospective size and value of benefits.

## COSTS

#### Costs to consumers

**A5.1** It is not anticipated that there will be a direct cost to consumers as a result of these proposals.

#### Policy Costs

#### Compliance costs for business

**A5.2** Businesses will face increased costs through more frequent and more thorough investigations by the OFT. If there are five more investigations per annum and we assume an average cost of £1 million to business from each investigation, there would be increased costs of £5 million per annum.

<sup>6</sup> Blundell, Griffith and Van Reenan (1995) Dynamic Count Data models of technological innovation. The Economic Journal 105.

<sup>7</sup> Davies and Majumdar (2001) The Development of Targets for Consumer Savings arising from Competition Policy.

<sup>8</sup> See, for example, P. Fergusson and G. Fergusson (1988), Industrial Economics; Issues and Perspectives, Table 5.3 p.94 for a survey of empirical estimates.

<sup>9</sup> See, for example, Davies and Majumdar (2001) The Development of Targets for Consumer Savings arising from Competition Policy.

<sup>10</sup> Wils (2001) Does the effective enforcement of Articles 81 and 82 EC require not only fines on undertakings but also individual penalties, in particular imprisonment?

## Implementation Costs

**A5.3** It is unlikely that there will be large changes in compliance costs for businesses. The proposals in this White Paper do not change the prohibitions of the competition regime only investigation and enforcement powers and procedures.

**A5.4** There maybe small costs associated with staff training to ensure that staff are aware of developments in the interpretation of law. Where this burden falls on law firms this may be passed on to clients through fees. We would welcome views from business and law firms as to the scale of this cost.

**Small Business Litmus Test** **A5.5** The proposals do not target legitimate business activity and small businesses should benefit from them in the ways out lined above. The DTI will work with the Small Business Service to promote awareness of the legislation.

## Costs for the OFT and the Competition Commission

**Costs to taxpayers and the overall economy** **A5.6** The Government recognises that our competition authorities will need significant additional resources in order to be able to successfully deliver the radical improvements to the competition regime that are proposed. Ministers will take decisions on the level of increases to the budgets of the OFT and the Competition Commission over the next few weeks.

**Quantifying costs** **A5.7** Respondents are invited to submit any information they have on the costs associated with these proposals.

## DEVOLUTION

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**A6.1** Competition legislation is not a devolved matter. Responsibility rests with the Government of the United Kingdom. Consequently the proposals apply to England, Scotland, Wales and Northern Ireland. They have no special or different effect in Scotland, Wales and Northern Ireland.

## CONSULTATION

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**A7.1** We value consultation on the proposals in the White Paper and in this Regulatory Impact Assessment. These documents will be published on the DTI website<sup>11</sup> and we will be drawing them to the attention of practitioners, business and consumer associations. The consultation period will close on October 5th 2001. Further work will be undertaken on the Regulatory Impact Assessment during the consultation period.

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<sup>11</sup> [www.dti.gov.uk](http://www.dti.gov.uk)

## CONTACT POINT

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**A8.1** Rachel Crisp  
Competition Policy  
Department of Trade and Industry  
1 Victoria Street  
London  
SW1H 0ET  
[competition.reform@dti.gov.uk](mailto:competition.reform@dti.gov.uk)

# B

## THE CONSULTATION CRITERIA

- B1** Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.
- B2** It should be clear who is being consulted, about what questions, in what timescale and for what purpose.
- B3** A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.
- B4** Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others), and effectively drawn to the attention of all interested groups and individuals.
- B5** Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.
- B6** Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and reasons for decisions finally taken.
- B7** Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated.

**Consultation Period** The consultation period of this White Paper is less than the standard minimum in order for comments to be received in time to inform drafting of the Enterprise Bill.

**Comments** Any comments on the conduct of the consultation should be directed to:

Andrew Dobbie  
Consultation Co-ordinator  
Department of Trade and Industry  
1 Victoria Street  
London  
SW1H 0ET  
Tel: 020 7215 6509



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