



King's Research Portal

Document Version

Early version, also known as pre-print

[Link to publication record in King's Research Portal](#)

Citation for published version (APA):

Aitken, J., & Jones, A. (2011). Reforming a World Class Competition Regime: The Government's Proposal for a Single Competition and Markets Authority. *Competition Law Journal*, 97(2).
http://www.jordanpublishing.co.uk/practice-areas/competition/news_and_comment/reforming-a-world-class-competition-regime-the-governments-proposal-for-the-creation-of-a-single-competition-and-markets-authority#.Vd26iflVhBd

Citing this paper

Please note that where the full-text provided on King's Research Portal is the Author Accepted Manuscript or Post-Print version this may differ from the final Published version. If citing, it is advised that you check and use the publisher's definitive version for pagination, volume/issue, and date of publication details. And where the final published version is provided on the Research Portal, if citing you are again advised to check the publisher's website for any subsequent corrections.

General rights

Copyright and moral rights for the publications made accessible in the Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognize and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the Research Portal

Take down policy

If you believe that this document breaches copyright please contact librarypure@kcl.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.

Reforming a World Class Competition Regime: The Government's Proposal for the Creation of a Single Competition and Markets Authority

James Aitken and Alison Jones*

This is a draft version of an article published in its final form in the *Competition Law Journal*: [2011] *Comp Law* 97

Introduction

The last eleven years have seen dramatic substantive and institutional change to the UK competition law regime. In March 2000, the Competition Act of 1998 (CA98) brought into force prohibitions against restrictive agreements (the Chapter I prohibition) and abuse of dominance (the Chapter II prohibition) modelled on Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).¹ The Act swept away much of the old law,² but left intact the monopoly and merger provisions set out in the Fair Trading Act of 1973 (FTA). On June 20 2003, however, the Enterprise Act 2002 (EA) made additional significant alterations to create a 'world class' competition regime:³ modernising, reforming and replacing the FTA monopoly and merger regimes; establishing the Office of Fair Trading (OFT);⁴ creating the Competition Appeal Tribunal (CAT);⁵ and introducing measures to supplement, the CA98 – in particular, a new criminal offence for individuals who dishonestly engage in cartel agreements, a new power to disqualify directors of companies that have breached the competition rules, and rules designed to enable individuals to obtain redress when injured by anticompetitive behaviour. Subsequently, in 2004, further reform to the system was introduced following the 'modernisation' of EU competition law.⁶ Although the prohibitions set out in Articles 101(1) and 102 TFEU had always

* James Aitken is a partner at Freshfields Bruckhaus Deringer LLP. Alison Jones is a Professor of Law at King's College London and a solicitor at Freshfields Bruckhaus Deringer LLP. The authors would like to thank Margaret Bloom for her helpful comments on an earlier draft of this paper. The views set out in this document are personal and do not reflect the view of Freshfields Bruckhaus Deringer LLP.

¹ To be interpreted, in so far as is possible, consistently with Articles 101 and 102 TFEU, CA98, s 60.

² The CA98 repealed the Restrictive Trade Practices Act of 1976, the Resale Prices Act of 1976 and most of the Competition Act of 1980. It also established the Competition Commission (CC), CA98, s 45.

³ The Act received Royal Assent on November 7, 2002. Although some provisions were brought into effect by statutory instrument on April 1, 2003 nearly all the substantive provisions came into effect on June 20, 2003. It was adopted following consultation on the DTI's White Paper, *Productivity and Enterprise - A World Class Competition Regime*, July 2001.

⁴ EA, Part I established the new statutory body, the OFT (consisting of a chairman and at least four other members), abolished the Office of Director General of Fair Trading (DGFT) and transferred all of the DGFT's functions, property, rights, and powers to the OFT.

⁵ The CAT took over the functions formerly performed by the appeal tribunals of the Competition Commission (CCAT) and assumed some new functions.

⁶ On May 1, 2004, a new Regulation implementing Articles 101 and 102, Regulation 1/2003, became effective. The regulation abolished the notification and authorization system set up by Regulation 17 and provided for Article 101(3) to become directly effective.

had direct effect in the UK,⁷ modernisation had two major consequences. First, the UK competition authorities (the OFT and sector regulators) were given the power to apply and enforce Articles 101 and 102. Second, the changes to the EU system led to changes to the CA98 in order to realign it with the system upon which it is based.⁸

Following these upheavals, the regime has had a relatively short period of time to settle and for practice to develop. In 2010, the Competition Law Journal published a special edition commemorating 10 years of the CA98 prohibitions being in force and examining the progress that had been made during that period.⁹ Further, following the entry into force of the EA, a significant number of market studies, market investigations and merger inquiries have been completed¹⁰ and three successful convictions (all relating to the *Marine Hoses* case) have been brought under the cartel offence.¹¹

It is undoubtedly true that the system of competition enforcement created by these provisions is not a simple one. Not only does it involve a large number of players (including the OFT, a number of sector regulators, the Competition Commission (CC), the Secretary of State, the CAT, super-complainants, private litigants and the ordinary civil and criminal courts), but, reflecting their different natures, it entails different enforcement systems for the separate regimes – whether the CA98 and TFEU competition prohibitions (antitrust cases); market studies and investigations (market cases); merger cases; or cartel offence cases. It is also true that a number of concerns about the working of the existing system have been expressed. Indeed, the Government¹² has become particularly concerned about institutional performance and the level and length of decision-taking. Its concerns include the fact that: there have been insufficient decisions under the CA98 to ensure clarity in the interpretation of the law and to act as a deterrent to its violation;¹³ many of the

⁷ These provisions can be relied upon by or against private individuals in disputes arising before the UK courts, *BRT v SABAM* (Case 127/73) [1974] ECR 51.

⁸ The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, SI 2004/1261.

⁹ [2010] *Comp Law* Volume 9, Issue 2. See also B Rodger (ed), *Ten Years of UK Competition Law Reform* (Dundee University Press, 2010).

¹⁰ See Department for Business Innovation & Skills, *A Competition Regime for Growth: A Consultation on Options for Reform*, March 2011 (the ‘Consultation Document’), chs 3 and 4 and Appendix 2 (Tables 4, 5 and 6).

¹¹ See e.g., *R v Whittle* [2008] EWCA Crim 2560 and n 15 below.

¹² Its views are set out in the Consultation Document. See also more generally the National Audit Office Review of the UK’s Competition Landscape, 22 March 2010.

¹³ The Government is concerned that, compared with other EU Member States, the UK’s antitrust enforcement record is thin and that cases take too long. Indeed, the OFT and sector regulators have taken only 27 infringement decisions since the Act came into force in 1990. Further, the UK has, between 2004-March 2011, notified only 12 intended Article 101/102 decisions to the European Commission (compared to the 71 reported by France, 66 by Germany, 62 by Italy and 42 by Spain), see e.g., <http://ec.europa.eu/competition/ecn/statistics.html> and Consultation Document, Table 5.1 and Appendix 2 (statistics on competition cases). See also generally on enforcement in the first 10 years of the CA98, M Bloom ‘The Competition Act at 10 Years Old: Enforcement by the OFT and the Sector Regulators’ [2010] *Comp Law* 141 and e.g., A Jones and D Trapp, ‘Penalties under the Competition Act 1998: March 2000 to March 2010’ [2010] *Comp Law* 228.

investigations culminating in infringement decisions under the CA98 have lasted for long periods;¹⁴ the record under the cartel offence suggests concerns about the viability of the criminal offence and whether the OFT has sufficient expertise to run a criminal investigation successfully;¹⁵ there have been insufficient numbers of market investigations;¹⁶ and there has been insufficient application of the competition rules by the sector regulators.¹⁷ In addition, the Government has expressed concern that the two-stage procedure under the markets and mergers systems (involving both the OFT/sector regulators and the CC) results in investigations being unnecessarily protracted,¹⁸ duplication of process, inefficient use of resources and that the voluntary merger regime might be proving inadequate to deal with completed mergers.¹⁹ Not all might concur with such a pessimistic view of the current position, however. Rather, the view could be taken that, although the OFT may not have adopted as many antitrust and cartel cases as it might have done, it has taken time to develop settled

¹⁴ ‘The UK also seems to take significantly longer over both anti-competitive agreement and abuse of dominance cases than other member states. Certain cases can be extremely protracted; for example, the tobacco price-fixing case is still at the appeal stage for some parties eight years after the OFT opened an investigation’ Consultation Document, 5.7 and Appendix 2 (average antitrust chapter I cases take 30.7 months (excluding appeals) or 38.2 months (including appeals) and average chapter II cases take 31.8 months (excluding appeals) or 45 months (including appeals)).

¹⁵ The only successful criminal prosecutions to date involved the *Marine Hoses* cartel, see n 11 above. In this case however the defendants had already pled guilty in the US and were returned to the UK on condition that they plead guilty in the English courts. The only other (and contested) criminal case brought so far (the *BA* case) collapsed early on in the trial, see e.g., OFT press release 47/10, OFT withdraws criminal proceedings against current and former BA executives, 10 May 2010. The Government’s view is that the high standard of evidence required to establish ‘dishonesty’ is likely to be one reason for the lack of cases in this area and the consequent weakening of the deterrent effect of the offence, see Consultation Document, ch 6 and 6.5. Other reasons may be judicial incomprehension ‘over the damage that price-fixing does’ (see A Riley, ‘Outgrowing the Administrative Model? Ten years of British Anti-Cartel Enforcement’ in Rodger (ed), *Ten Years of UK Competition Law Reform* (Dundee University Press, 2010)) and the enforcement structure (see e.g., N Purnell QC, Sir C Bellamy QC, N Kar, D Piccinin and P Sahathevan, ‘Criminal Cartel Enforcement - More Turbulence Ahead? The Implications of the BA/Virgin case [2010] *Comp Law* 313).

¹⁶ Since 2003, there have been 11 market investigation references (nine by the OFT and two by the sector regulators). This is much fewer than the four per year anticipated when the EA regime was brought in, Consultation Document, 3.5.

¹⁷ In addition to applying specialised sectoral regulatory rules, sector regulators exercise concurrent competition law powers in the regulated sectors. The sector regulators have adopted only two antitrust infringement decisions and made two market investigation references, despite a presumption that they should take responsibility for competition cases in their sectors and that the sectors contain many dominant companies, uncompetitive market structures and involve services of considerable consumer interest, see Consultation Document, ch 7.

¹⁸ Although the CC must complete market investigations within 24 months, the OFT does not have to complete its initial market study within a set timetable and there are no time limits on remedies. ‘For cases that were referred to the CC, the end-to-end process [for market cases] has taken between 33-67 months (including the OFT stage and remedies and, in some cases, legal challenge)’, Consultation Document, 3.5.

¹⁹ Unlike many merger regimes, the UK merger notification system is voluntary. This can make it difficult for the CC when investigating completed deals (approximately half of the deals it investigates). Further, it has been estimated that approximately half of potentially anti-competitive mergers escape review altogether, see Deloitte Report prepared for the OFT, Deterrence effect of competition enforcement by the OFT (2007) and see generally Consultation Document, 4.3-4.5.

practice and procedures under the new provisions and to publish substantive and procedural guidance;²⁰ engaged in debate on complex antitrust issues;²¹ selected some cases that have developed the law, particularly under Chapter 1/Article 101;²² engaged in competition advocacy;²³ and concluded a significant (and some might even say excessive) number of market studies.²⁴ Further, that the two-stage EA procedure for markets and merger cases, although requiring some duplication of process, provides a valuable and important mechanism, allowing for an independent institution to take a thorough second look at preliminary investigations completed by the OFT.²⁵

Although some difficulties with the current regime might, therefore, be identifiable, few might perhaps have predicted that the Coalition Government would consult on yet further fundamental systemic competition law reform. Nonetheless, in October 2010 the Government announced its intention to merge the OFT and CC²⁶ as part of its ‘bonfire of the quangos’²⁷ and, on 16 March 2011, the Department for Business Innovation and Skills published a 173 page Consultation Document on reform, ‘A Competition Regime for Growth: A Consultation on Options for Reform’.²⁸

Following the announcement of the possible merger between the OFT and CC, it was immediately evident that the institutional change sought could not occur without some change and rethinking of the current system, particularly to the mergers and markets regimes which provides separate and independent roles in the process for the OFT and CC respectively. It quickly became apparent, however, that the

²⁰ The OFT is required by law to publish certain guidance. See generally e.g. J Fingleton, The importance of a competition agency providing guidance: the UK experience, 4 April 2011.

²¹ See e.g., M Bennett and P Collins, ‘The law and economics of information sharing: The good, the bad and the ugly’ [2010] *European Competition Journal* 311 and M Bennett, A Fletcher, E Giovannetti and D Stallibrass, ‘Resale price maintenance: Explaining the controversy, and small steps towards a more nuanced policy’ 30 January 2010, MPRA Paper No 21121, available at <http://mpa.ub.uni-muenchen.de/21121/>.

²² E.g. involving hub and spoke agreements (see e.g., Case 1022/1/1/03, *JJB Sports plc v. Office of Fair Trading* [2004] CAT 17, *aff’d* [2006] EWCA Civ 1318).

²³ See e.g. J Fingleton, Challenges and Opportunities for the Competition Regime’ [2010] *Comp Law* 301, 304 (‘the competition regime plays a key role in advising and intervening in the various aspects of government’s involvement in markets ... The Competition regime’s work includes, but goes beyond, traditional “competition advocacy”. It advises on the design of new markets and opening of existing ones to greater competition, and has a role to play with regard to helping ensure competitive neutrality where public services are opened to competition.’)

²⁴ See Consultation Document, Appendix 2, especially Tables 4 and 5.

²⁵ As the Consultation Document itself notes this is regarded internationally as a key strength of the current system, see n 130 and accompanying text below..

²⁶ See Statement by Vince Cable, 14 October 2010.

²⁷ See B Allan, ‘Redesign of the UK’s Competition System: The Case for an Efficient Separation of Powers’ [2010] *Comp Law* 389.

²⁸ See n 10 above.

Government's intention in merging the institutions was not simply (or even?²⁹) to achieve cost and efficiency savings, but to support the recovery of the economy, economic growth and competition by putting in place a more effective and less complex competition regime with stream-lined processes and faster and more proactive decision-making by the new single competition and markets authority (the 'CMA'). In order to achieve this broader objective, the Consultation Document puts up for deliberation a plethora of intertwined proposals designed to deliver benefits to competition and consumers and for economic growth. The Government wishes to select measures which can be implemented as soon as possible, without significant uncertainty and risk for the momentum and the effectiveness of the competition regime.

This paper commences by outlining the principal reform proposals set out in the Consultation Paper. Given their huge breadth, however, the paper does not discuss each proposal in detail but, following their introduction, focuses on the core proposal to create a new CMA and a new procedural framework for decision-taking in each of the antitrust, markets and merger regimes. In particular, a key issue considered is how the Government proposes to achieve faster and more frequent decision-taking, whilst at the same time ensuring accountability, predictability, due process and that the system is compliant with the requirements of the Human Rights Act 1998³⁰ and the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR). In the last section some conclusions are drawn.

The Main Proposals in Outline

The changes proposed in the Consultation Document are designed broadly (1) to improve robustness of decisions and a strengthening of the regime, (2) to support the competition authorities in taking forward high impact cases and (3) to improve speed and predictability for business. At the core therefore is the objective of introducing reform which will allow a greater number of 'high impact' competition cases to be investigated faster, cheaper and more efficiently. In particular, the Government is consulting on:

- how to strengthen and modernise the markets regime (for example, by allowing the CMA to investigate multiple markets and to advise on public interest issues and by expanding the right to make super-complaints to small

²⁹ See e.g., keynote speech by L Carstensen, Deputy Chairman of the Competition Commission, to the Association of Corporate Counsel Europe Seminar, 9 March 2011 ('It should be said at the outset that the driver for such a merger, if it happens, will not be cost savings') and B Lyons, 'Under what conditions is one competition authority better than two?', available at <http://competitionpolicy.wordpress.com/2011/04/01/under-what-conditions-is-a-single-competition-authority-better-than-two/> ('Cost savings for the taxpayer include a single premises and more effective use of staff. The consultation's estimate suggests these amount to a tiny 0.18% of the benefits of active competition policy. It would be only a fifth of that if we include the value of deterrence! It is much harder to estimate business savings, but even a marginal impact of the merger on coordination or decision making would almost certainly dominate the contribution of cost savings').

³⁰ Under the Human Rights Act 1998, s 6(1), it is unlawful for a public authority to act in a way which is incompatible with a Convention (European Convention on Human Rights, ECHR) right.

businesses)³¹ and to streamline it (e.g., by introducing new timeframes and information gathering powers);³²

- whether to reconsider the UK's voluntary notification system for mergers and how to speed up merger review (for example, whether to introduce mandatory notification and whether to streamline the regime by reducing timescales and introducing information gathering powers);³³
- how the remedies process in mergers and market cases can be made simpler and more effective;³⁴
- how to speed up and increase antitrust enforcement by the CMA, including whether to introduce a prosecutorial system;³⁵
- whether statutory or administrative timetables should be introduced for antitrust cases³⁶ and how to encourage private enforcement of the rules;³⁷
- increasing the deterrent effect of the cartel offence by removing its dishonesty requirement;³⁸

³¹ The Government proposes enabling the CMA to carry out in-depth investigations into practices across markets and enabling it to provide independent reports to Government on public interest issues, Consultation Document, 3.8-3.13. It is also seeking view on whether the super-complaint system should be extended to SME bodies, *ibid*, 3.14-3.16.

³² It is seeking views on: a proposal to reduce the Phase 2 market investigation statutory timescales (from 24 to 18 months); whether statutory timeframes should be introduced for all market studies or only those that have the potential to be referred to a phase 2 investigation; the introduction of information gathering powers at the phase 1 stage; and whether any other changes could be made to facilitate prompt phase 2 referrals, *ibid*, 3.18-3.23.

³³ *Ibid*, ch 4. It is also consulting on the introduction of an exemption from merger control for transactions involving small businesses. See also e.g. speech of P Freeman 'Merger control: a view from the departure lounge', March 17 2011.

³⁴ *Ibid*, 3.29-3.38.

³⁵ *Ibid*, ch 5 and see discussion of the decision-making structures for the new CMA below.

³⁶ *Ibid*, 5.48.

³⁷ *Ibid*, 5.49-52. The Government is considering how to develop a way forward for collective redress (see also, Private actions in competition law: effective redress for consumers and business, OFT, 2007 and the European Commission's public consultation on collective redress, available at http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html). It is also considering implementation of EA, s16 so as to allow 'stand alone' (in addition to follow-on) actions to be commenced in the CAT and conferring jurisdiction on the CAT to deal on a judicial review basis with a procedural challenge against the handling of an antitrust investigation. The Government is also considering introducing offences of non-compliance with an investigation and is consulting on whether to roll back any unnecessary or unnecessarily intrusive powers of investigation.

³⁸ The Government is consulting on the question of what, if any, alternative steps should be taken to ensure that the offence is sufficiently differentiated from civil antitrust prohibitions and can be prosecuted in parallel with civil antitrust enforcement, *ibid*, ch 6. The Government proposes removing the dishonesty requirement from the offence but is consulting on whether: (1) to introduce prosecutorial guidance as to the types of agreements that are most likely to warrant

- how to strengthen enforcement in the regulated sectors;³⁹
- the transfer of regulatory reference and appeals functions of the OFT and CC;⁴⁰
- options for future funding of the merger regime and cost recovery in antitrust and telecom price control cases;⁴¹ and
- how well the current overseas information disclosure gateway is working and whether there is a case for reviewing this provision.⁴²

Central to the reform is the proposal that robust competition decision-making should be delivered, through more efficient use of scarce public resources, by a single CMA which combines functions previously carried out by separate entities.⁴³

The New CMA

The overall constitutional form and institutional design for the CMA and the scope of its activities

The Government envisages that the CMA will be independent of Ministers, but accountable to Parliament.⁴⁴ Further, that it will have a supervisory board, and an executive board, with separation of Phase I and Phase II investigations for at least market and mergers cases (see further discussion below). The current proposals envisage that the Supervisory Board, likely to be made up of a combination of Non-Executive Directors (the majority) and Executive Directors (including the Chief Executive), will have overall responsibility for governance, resourcing, strategy and policy, including the development of rules and guidance. The Executive Board, chaired by the Chief Executive, will take responsibility for the day to day running of the CMA and casework decisions (depending upon the decision-making model adopted).⁴⁵

investigation and prosecution; (2) to carve out a set of white listed agreements from the offence (such as joint venture agreements); (3) to replace it with a ‘secrecy’ element; or (4) to redefine the offence so it does not include agreements made openly.

³⁹ Ibid, ch 7. The Government is consulting on a number of options, including: (i) removing concurrent antitrust and market investigation powers from the sector regulators and giving the CMA sole *ex post* competition law powers in the regulated sectors; (ii) taking steps to improve the use and coordination of concurrent competition powers and to encourage more proactive use of competition powers in the regulated sectors.

⁴⁰ Ibid ch 8.

⁴¹ Ibid, ch 11.

⁴² Ibid, ch 12.

⁴³ Ibid, chs 5, 9 and 10.

⁴⁴ It could be a non ministerial department (like e.g., the OFT), a non departmental public body (like e.g., the CC) or a public corporation (like e.g., Ofcom).

⁴⁵ It is proposed that the Supervisory Board will be chaired by a non-executive director and will be accountable to parliament for performance but not for individual decisions. This ‘dual’ structure is unusual among economic regulators in the UK. In particular, it seems odd to have a ‘supervisory

The Government is also consulting on the appropriate objectives for the CMA and whether these should be embedded in statute. It proposes, in paragraph 9.2 of the Consultation Document, that the main scope of its activity should be antitrust, merger, and market cases, review of undertakings and orders, assessing challenges to sector regulator's decisions, resolving disputes relating to licences and price modification proposals and competition advocacy. It is proposed that many of the OFT's current consumer enforcement powers will be transferred, although the Government considers that the CMA should continue to consider consumer issues when conducting market studies.⁴⁶ Paragraph 9.2 does not state that one of the CMA's activities should be criminal cartel cases. Although the document consults on reform of the wording of the criminal cartel offence, it does not specifically address enforcement and whether it should be the CMA or another agency (for example, a new single Economic Crime Agency or the Serious Fraud Office) which should have the key responsibility for prosecution of the offence.⁴⁷

A single or differing decision-making processes across the competition 'tools'?

The creation of a new CMA requires that decision-making structures be set up for each of the competition 'tools'⁴⁸ available to it. Under the current regime, decision-making structures are quite different for mergers and market cases and antitrust cases respectively.⁴⁹ In consulting on reform, one of the issues addressed is whether the CMA should adopt the same processes across all competition tools (mergers, markets and antitrust), whether specific decision-making structures should be used for each tool or whether some half way house should be adopted with commonality of processes but some adaption of process by tool. In identifying any appropriate decision-making process, other crucial issues arising are, in particular: whether there should be separation of phase 1 and 2 decision-makers, whether any phase 2 panels should have investigatory as well as an adjudicatory functions, the role that 'panels' should play in the decision-making process (and their nature) and how the appeals system should be structured to ensure due process and that the system is ECHR compliant.⁵⁰

The Government seems to accept that different approaches to the tools may be required which, without leading to organisational complexity, might ensure tailored,

board' which would not be accountable for, or in control of, decisions taken by the executive board.

⁴⁶ See Consultation Document, 9.21-9.31. The proposal to take away the CMA's consumer powers is controversial, however, see e.g., OFT Press Release 37/11, OFT Welcomes consultation on the Competition and Markets Authority, 16 March 2011 and P Collins, OFT fears narrowing range of powers, Financial Times, 17 April 2011

⁴⁷ The Government is considering the creation of an economic crime agency to prosecute a number of white collar crimes currently prosecuted by different agencies, see e.g., <http://www.homeoffice.gov.uk/media-centre/news/economic-crime>.

⁴⁸ This is the term used in the Consultation Document to describe the different types of competition proceedings that can be brought by the new CMA.,

⁴⁹ Enforcement of the cartel offence, of course, requires criminal prosecution before an independent court (as is the case for any other crime). The Consultation Document does not discuss enforcement of the cartel offence, however, see n 47 and accompanying text.

⁵⁰ See especially Consultation Document, Figure 10.1.

improved and more efficient decision-making in each case. For each tool, the Consultation Document considers a base case decision-making model for the single CMA (involving limited changes to the existing procedural framework) and other more radical options for change.

The ECHR: due process, the right to a fair trial and the EU debate

The Government acknowledges that the new regime must ensure that the UK institutional architecture, and any more streamlined procedures introduced, sufficiently protect an investigated undertaking's rights of defence and are ECHR compliant. Currently, UK procedures provide higher standards of protection for undertakings' rights than those that exist under the EU system.⁵¹ This is of importance as the Consultation Document has been published at a time when concern about the compatibility of the EU antitrust enforcement structure with ECHR provisions is mounting. The EU debate on this subject has escalated recently⁵² in light both of (i) the "more prosecutorial" nature of competition proceedings;⁵³ (ii) the increasing levels of fines imposed by the Commission in its Article 101 and 102 infringement decisions⁵⁴ and, crucially, (iii) the development of ECHR case law and, following the Lisbon Treaty, the EU's commitment to accede to the ECHR.⁵⁵ Broadly, the core issue which has been raised is whether the EU enforcement system is satisfactory and complies with the investigated undertaking's right '[i]n the determination of his civil rights and obligations or of any criminal charge against him' to a 'fair and public hearing within a reasonable time by an independent and impartial tribunal' (see Article 6(1) ECHR) (the 'right to a fair trial').⁵⁶

⁵¹ See e.g., H Schweitzer, 'The European Competition Law Enforcement System and the Evolution of Judicial Review' in C-D Ehlermann and M Marquis eds *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing, 2010) and available at <http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Schweitzer.pdf> ('[t]he institutional structure appears geared to a high degree of internal and external controls. The interaction between the OFT and the CC - two independent competition agencies - is unique, and provides for internal control. External control mechanisms in the form of judicial review are also exceptionally strong ...') and n 87 below.

⁵² But the concern is not a new one, see e.g., F Graupner, 'Competition Decision-Making on Competition Questions' [1973] *CMLRev* 291 and F Montag, 'The Case for Radical Reform of the Infringement Procedure under Regulation 17' (1996) *ECLR* 428.

⁵³ See e.g., H Schweitzer, op cit n 51 ('The European system of competition law enforcement has changed over time. The replacement of Reg. 17/62 with Reg. 1/2003, in particular the abolition of the notification regime, as well as the Commission's increased leeway to set its own enforcement priorities including an intensified "fight against cartels" have had some unexpected effects: public competition law enforcement has become less "administrative" in nature, and more prosecutorial.')

⁵⁴ Especially since the introduction of the new fining Guidelines in 2006, 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003' [2006] OJ C 210/2.

⁵⁵ (And the entry into force of the Charter of fundamental rights of the EU), see Consolidated version of the TEU, TFEU and the Charter and TEU, art 6(2), available at <http://www.consilium.europa.eu/showPage.aspx?id=1296&lang=en>.

⁵⁶ The right to a fair trial includes the right to give evidence in one's own defence, to hear the evidence against one, to be able to examine and cross-examine witnesses as well as other matters of due process, such as the right against self-incrimination. See also the EU Charter of fundamental rights, art 47.

There now seems to be fairly widespread acceptance that antitrust proceedings which may culminate in the imposition of punitive fines (designed to have deterrent effect) are, in spite of the characterisation of the fines in Regulation 1/2003 as administrative charges,⁵⁷ to be treated as *de facto* ‘criminal’ charges within the meaning of Article 6(1) ECHR.⁵⁸ Consequently, in addition, to their entitlement, within a reasonable time, to a fair trial before an independent and impartial tribunal, undertakings investigated for a possible violation of Articles 101 and 102 TFEU are presumed innocent until proven guilty (Article 6(2) ECHR⁵⁹) and are entitled to benefit from certain minimum rights set out in Article 6(3) ECHR. Divergent views exist, however, as to the consequences of the characterisation of competition proceedings as ‘criminal’ ones. In particular, a contested issue is whether the right to a trial before an independent and impartial tribunal can be satisfied where an administrative body (such as the European Commission), which does not itself qualify as an independent and impartial tribunal, adopts initial infringement decisions following its own investigation of the case,⁶⁰ but where an independent and impartial tribunal is able to review and, if necessary, annul that decision (in the EU - on the grounds set out in Article 263 TFEU).⁶¹ It seems clear that if the proceedings are characterised as ‘core’ or ‘hardcore’ criminal offences, it will not. Rather, in this scenario, a fair and public hearing must be conducted before an independent tribunal in first instance proceedings – a first decision by an administrative body is insufficient.⁶²

⁵⁷ Regulation 1/2003, art 23(5). It seems that merger and market cases concern an undertaking’s civil rights and obligations, so that investigated undertakings also have a right to a fair trial, see n 125 below and accompanying text.

⁵⁸ See especially, *Engel v Netherlands* (1979-80) 1 EHRR 647, *Stenuit v France* [1992] ECC 401, *Hercules Chemicals NV v Commission* (Case T-7/89) [1991] ECR II-1711 (opinion of AG Vesterdorf), *Baustahlgewebe v Commission* (Case 185/95) [1998] ECR I-8417, (Opinion of AG Leger), *Nederlandse Federatieve Vereniging voor de Goothandel op Elektrotechnisch Gebied v Commission* (Case C105/05) [2006] ECR I-8725 (opinion of AG Kokott), *KME Germany AG v Commission* (Case C-272/09P), 10 February 2011 (Opinion of AG Sharpston), Case 1001/1/1/01, *Napp v OFT* [2002] CAT 1, paras 91-103, D Slater, S Thomas, D Waelbroeck, ‘Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?’ (2009) *European Competition Journal* 97 and Consultation Document, Annex 1, 84.

⁵⁹ See e.g., *Hüls v Commission* (Case C-199/92P) [1999] ECR 4287, para 150.

⁶⁰ In the EU system of competition enforcement, there is no division between those who investigate, prepare the statement of objections setting out the ‘charges’ the undertakings under investigation must answer, draft the decision and propose the fine. The process does not provide for any hearing before an independent decision-maker on matters of substance. Further, the final decisions are actually taken by the College of Commissioners, a body of political appointees which have not been involved in the hearing or heard any of the evidence adduced.

⁶¹ A review of the ‘legality’ of the decision (rather than a full appeal to the court). The Court, however, has unlimited jurisdiction with regard to penalties, see TFEU art 261 and discussion n 71 below.

⁶² *Jusilla v Finland* (2007) 45 EHHR 39. See, in particular, e.g., I Forrester, ‘Due Process in EC competition cases: A distinguished institution with flawed procedures’ (2009) *EL Rev* 817, D Slater, S Thomas, D Waelbroeck n 58 above and WPJ Wils, ‘The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights’ (2010) 33(1) *World Competition* 5.

It has been argued, however, that different considerations may apply where proceedings are against legal, rather than natural, persons and/or where the proceedings involve civil or ‘minor’ (non-core) criminal offences (not strictly belonging to traditional criminal law categories, such as traffic offences, tax surcharges and, possibly, competition law infringements).⁶³ In particular, case-law of the European Court of Human Rights (ECtHR) suggests that some minor criminal offences do not require such stringent safeguards and protection as ‘core’ criminal offences. Rather, in such cases an administrative body may determine the issue as a preliminary matter, so long as its proceedings are governed by sufficiently strong procedural guarantees and its decision is subject to sufficient judicial control⁶⁴ by a body with ‘full jurisdiction’⁶⁵ on questions of fact and of law and with power to quash challenged decision in all respects.⁶⁶

The European Commission’s view is that the current EU system, which has provided the Commission with an important and central role in the development of EU competition policy,⁶⁷ is compatible at EU level with the ECHR and that major change to the enforcement and institutional structure is not necessary. Rather, the Commission’s position is that the administrative system is based, like others which rely on a judicial system (such as the US), on solid legal traditions, with the ultimate aim of attaining the truth while respecting the rights of the parties. ‘This is why I do not think we can say that one system [administrative or judicial] is better than the other.’⁶⁸

The Commission’s perspective is not, however, universally held and serious questions undoubtedly hang over the issues of (1) whether EU antitrust proceedings are ‘core’ criminal proceedings for Art 6 ECHR purposes which require determination by an independent tribunal at first instance;⁶⁹ and (2) whether, even if it is correct that

⁶³ See especially e.g., WPJ Wils, n 62 above.

⁶⁴ *Jusilla v Finland* (2007) 45 EHHR 39, para 43.

⁶⁵ *Ibid* and see *Janosevic v Sweden* 21 May 2003 and *Le Compte, Van Leuven and de Meyere v Belgium* [1982] 4 EHRR 1, and e.g., *KME Germany AG v Commission* (Case C-272/09P), 10 February 2011 (Opinion of AG Sharpston, paras 67-69).

⁶⁶ See e.g., *Cimenteries CBR SA v Commission* (Case T-25/95) [2000] ECR II-491, paras 718-9, I. Forrester, ‘A Bush in Need of Pruning: the Luxuriant Growth of “Light Judicial Review” in C-D Ehlermann and M Marquis (eds) *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing, 2010) and articles cited n 62 above.

⁶⁷ See n 103 below.

⁶⁸ A Italianer, Safeguarding due process in antitrust proceedings; Fordham Competition Law Institute, 23 September 2010. See also J Almunia, SPEECH/10/449, Due process and competition enforcement, Florence, 17 September 2010.

⁶⁹ See e.g., I Forrester, op cit n 62 above, 821 (‘I submit that the procedures of the European Commission in determining guilt or innocence under the competition rules, and in imposing sanctions, manifestly do not correspond to the standards established by the ECHR’), A Andreangeli et al ‘Enforcement by the Commission: The decisional and enforcement structure in antitrust cases and the Commission’s fining system’ in M Morela and D Waelbroek *Towards an Optimal Enforcement of Competition Rules in Europe*, GCLC Annual Conference 11-12 June 2009 (‘competition law infringements leading to the imposition of sanctions cannot anymore be regarded legally as “mere administrative sanctions”, or “minor offences” and that necessary

competition proceedings should be treated as minor criminal (or even civil - in the case of merger) proceedings, the judicial review conducted by the General Court (controlling legality, and not providing for a full merits review of a Commission's decision⁷⁰) is broad and intense enough to remedy deficiencies in the first instance decision and to constitute effective review and scrutiny sufficient to ensure a full, fair, impartial and timely protection of the individual rights at stake so that ECHR obligations are discharged.⁷¹ Some of these issues are currently pending before the General Court⁷² and it seems likely that they may, ultimately, have to be resolved by the ECtHR itself.⁷³

Antitrust Enforcement

The Options

The CA98 and EU antitrust prohibitions are currently chiefly enforced by the OFT, which has power to investigate violations of the Act, to issue infringement decisions and to impose penalties on undertakings found to be in breach.⁷⁴ Sector regulators have concurrent power to enforce the prohibitions within their regulated sectors.⁷⁵ If no appeal follows an OFT or sector regulator decision, the proceedings end there. In a majority of cases to date, however, proceedings have been brought before the CAT, which hears full merit appeals from such decisions.⁷⁶ The CAT has power to confirm,

safeguards provided by Article 6 ECHR have therefore to be accorded to the fullest extent) and D Slater, S Thomas, D Waelbroeck, op cit n 58 above.

⁷⁰ TFEU, art 263 gives the Court of Justice jurisdiction to review the legality of actions of the Commission 'on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or any rule of law relating to its application, or misuse of powers'). TFEU, art 261 gives the Court of Justice unlimited jurisdiction with regard to the penalties provided for in regulations adopted pursuant to the provisions of the TFEU. See also n 71 below.

⁷¹ See *KME Germany AG v Commission* (Case C-272/09P), 10 February 2011 (Opinion of AG Sharpston, paras 67-69) and n 69. One issue that has arisen is whether the Court's unlimited jurisdiction with regard to the penalties provided for in TFEU, art 261 may give it unlimited jurisdiction (and broader jurisdiction than that set out in TFEU, art 263) to review the decision imposing the fines as well as the fines themselves, see I Forrester n 66 above.

⁷² See, especially, *Saint-Gobain Glass France v Commission* (Case T-56/09) (judgment pending) (one of the pleas in support of their action is, 'infringement of the right to an independent and impartial tribunal and of the right to respect for the presumption of innocence in so far as the fine was imposed by an administrative authority which holds simultaneously powers of investigation and sanction, and that Regulation No 1/2003 is unlawful in far as it does not provide for that right to an independent and impartial tribunal') and *Schindler Holding v Commission* (Case T-138/07) (judgment pending) (pleas in support of the action include 'infringement of the principle of division of powers and due process').

⁷³ The debate in the EU is further complicated by the fact that the final decision is adopted by the College of Commissioners, political appointees, who despite not being involved in the proceedings take the final decision collectively by majority vote, see n 60 above.

⁷⁴ CA98, see especially ss 25-28, 32 and 36.

⁷⁵ The Government notes in the Consultation document that the paucity of CA98 and market investigation cases in concurrent sectors is regarded by many as a weakness of the regime, see n 39 above. This paper does not discuss the proposals to strengthen enforcement in regulated sectors.

⁷⁶ CA98 ss 46&47.

set aside, or vary the decision, remit the matter to the OFT (or sector regulator), or to make any other decision that the OFT could have made.⁷⁷

This system does not involve the CC which is not designated to investigate and enforce the antitrust provisions. No change to the antitrust enforcement structure is thus technically required by the merger of the OFT and the CC: OFT powers could simply be transferred to the CMA, in the same way as DGFT powers were transferred to the OFT when the OFT was created by the EA.⁷⁸ Although building on the existing system is one option considered by the Government, the Government is, however, as already noted, keen to enhance the effectiveness of the CA98 regime and its deterrent effect. The Government considers that this will be achieved if the reform delivers a greater number of competition cases across the board (antitrust, market and merger) under shorter procedural timescales than apply currently.⁷⁹ The Government believes that the relatively few decisions taken and length of UK antitrust investigations is explicable partly because the antitrust process is onerous compared with the use of other powers⁸⁰ and partly as a result of the fact that cases are effectively ‘run twice’: not only do the OFT and sector regulators conduct lengthy investigation, prosecution and adjudication processes, but the CAT conducts full appeals on the merit. The Government’s proposals for reform thus also consider whether the system can be streamlined, either at the investigative, decision-making or at the appeal stage, whilst ensuring that due process and procedural fairness is respected. The Government is consulting on three options outlined in Table 1 below. Option 1 builds on streamlining measures already in hand to streamline the administrative decision-making process but leaves in place the CAT’s full merits review. Option 2 provides for reforms to decision-making, with additional checks and balances inserted at the investigatory and decision-taking stages within the CMA but with a shortened process at the appeal stage. Option 3 requires the CMA to prosecute cases before the CAT and, therefore, for decisions to be taken judicially.⁸¹ All options envisage that the CAT will remain part of the system of judicial oversight in competition cases.

⁷⁷ Ibid, Sched 8, para 3(2).

⁷⁸ See n 4 above.

⁷⁹ See n 37 above.

⁸⁰ Consultation Document, 5.10

⁸¹ ‘Although the desirability of a “second pair of eyes” has acquired the status of an unquestionable truth, its meaning and implementation require closer examination. As a matter of language, the concept is ambiguous. A weak version is satisfied where the “second pair of eyes” is simply second in time to the “first pair of eyes”: that version is observed where the “first pair of eyes” acts purely as an initial screen to identify those cases that require detailed investigation by the “second pair of eyes”. The strong version requires that the “first pair of eyes” advance the case for enforcement action upon which the “second pair of eyes” decides.’ B Allan, *op cit* n 27 above, 396.

Table 1: Summary of options for antitrust enforcement reform

<i>Proposed Approaches</i>	<i>Role of CMA</i>	<i>Role of CAT</i>
Option 1 (retaining and enhancing existing procedures)	OFT's existing procedures for making decisions would be retained and enhanced for CMA. This option would build on and augment improvements to current decision-making process by OFT in last 11 years. ⁸² CMA would decide on infringement and penalty (integrated decision-making body) possibly within transparent, administrative timetables.	CAT to retain full merits appeal jurisdiction.
Option 2 (developing a new administrative approach)	Strengthen the procedural safeguards and independence and impartiality of the decision-making stage in the current system by e.g.: creating an independent and impartial Internal Tribunal within the CMA to adjudicate and decide on cases brought by Phase I teams within the CMA or sector regulators; providing for final decisions on infringements and penalties to be taken by CC style investigatory and adjudicatory panels following a phase 2 investigation; or reinforcing due process arrangements.	Appeal before CAT to be on judicial review basis or 'enhanced judicial review' (on the same grounds as available under Art 263 TFEU).
Option 3 (more prosecutorial) - institutional separation of the prosecutorial and decision-making functions	The CMA (or sector regulators) would be required to prosecute the case before the CAT – removing a significant layer in the system. Unlike the current position, the CMA would not take any decisions or impose any remedies itself.	The CAT would decide on infringement and penalty. In this option therefore the CAT is the final decision-maker before which the CMA (or sector regulators ⁸³) must make its case. ⁸⁴

⁸² The OFT is already testing new methods for speeding up and improving procedure and case-team efficiency, eg through considering narrowing the scope of its investigations, more sophisticated information gathering, the trial of a Procedural Adjudicator and a greater willingness to consider commitments and early resolution of cases, see e.g., OFT1263, A guide to the OFT's investigations procedures in competition cases (March 2011) and Consultation Document, 5.24-5.27.

⁸³ But see n 39 above.

⁸⁴ The Consultation Document does not discuss further appeals but, presumably, any subsequent appeal would be on the same basis as currently, i.e., on a point of law to the Court of Appeal.

Selecting an approach

It seems clear that UK antitrust proceedings (which may culminate in significant fines being imposed) are, like EU ones, ‘criminal’ within the meaning of Article 6(1) ECHR.⁸⁵ Some of the suggestions proffered in Options 1 and 2 of the Consultation Document are only consistent with Article 6 ECHR, therefore, if it is correct that antitrust proceedings can be characterised as ‘minor’ criminal offences. In such cases, an initial decision by an administrative body may be compliant with Article 6 if it is subject to full judicial review by an independent and impartial tribunal.⁸⁶ At the time the CA98 was originally adopted, the UK legislator took the view that a far-reaching full merits view was an essential factor to ensure compatibility with the Human Rights Act and in ensuring the fairness and transparency of the new competition regime since decision-making was to be entrusted to the OFT, an integrated decision-maker.⁸⁷ The options for reform proposed by the current Government, however, indicate that the Government’s view now is that if greater procedural protection is provided at the decision-taking stage, then a full merits review may not be required. Option 2 thus provides for an inverse relationship between the procedural safeguards provided within the CMA and the level of review to be conducted by the CAT (see Table 2).

Table 2: Options 1 and 2 - relationship between decision-making structure and level of review

Procedural safeguards/independence and impartiality at decision-making stage			
Weaker		Stronger	
Option 1	Variants on Option 2		Option 2
CMA investigates and decides	CMA investigates and decides but due process arrangements reinforced	CMA investigates but Phase I team hands over to Phase 2 team for further investigation and decision	Phase I CMA case team to make case before independent and impartial tribunal within CMA itself
Full merits appeal	EU-style ‘judicial review’		Judicial Review
Stronger		Weaker	
Intensity of judicial review			

⁸⁵ See n 58 above.

⁸⁶ See discussion above of the ECHR: due process, the right to a fair trial and the EU debate.

⁸⁷ ‘It is our intention that the tribunal should be primarily concerned with the correctness or otherwise of the conclusions contained in the appealed decision and not with how the decision was reached or the reasoning expressed in it ... Wherever possible, we want the tribunal to decide a case on the facts before it, even where there has been a procedural error, and to avoid remitting the case to the director general. We intend to reflect that policy in the tribunal rules...’ Nigel Griffiths MP, Parliamentary Under Secretary of State for Competition and Consumer Affairs, June 18, 1998. See also B Allan, *op cit* n 27, 400 (‘At the time of enacting the Competition Act 1998, [the EU review model] was deemed insufficient to guarantee due process, not least to comply with Art 6 of the Convention’).

Option 1 provides essentially for the preservation of the status quo in terms of system design (integrated decision-making within the CMA and a full merits appeal) with operational enhancements aimed at speeding up the decision-making process. Clearly this choice involves the least change from the position today and hence least risk in terms of a loss of momentum and a hiatus in enforcement.⁸⁸ It does not seem to address the Government's essential concern that antitrust cases are effectively heard twice, however. Further, the Government states that 'the option may not be sufficiently radical to bring about significant improvements in the speed and throughput of antitrust decisions'.⁸⁹ It is not clear what, if any, work has been done either by the Government or the OFT to evaluate whether, and to what extent, the factors driving the length of investigations and/or the number of investigations conducted are related to the structure of the enforcement system rather than operational matters. However, the Consultation Document lists a number of areas in which the OFT, based on its experience to date, has already recently made various improvements, for example, regarding the sophistication of information gathering and discussion of draft information requests to better focus its evidence gathering.⁹⁰ As several of these operational improvements have been introduced relatively recently, and their effect on decision-making will not yet have been fully reflected in terms of final decisions, there may well be greater scope to contract the decision-making stage and improve operational and case management processes within the CMA than the Consultation Document perhaps envisages.⁹¹

The core proposal in Option 2 and the Option 3 proposal provide, more radically, for the CMA (and sector regulators) to bring antitrust cases before an independent and impartial tribunal. Option 2 envisages that the tribunal should be constructed within the CMA and Option 3 envisages that the cases should be brought before the institutionally separate CAT. If it is correct that antitrust proceedings do fall within the hardcore of criminal offences, then ECHR law requires that an initial infringement decision be taken by an independent and impartial tribunal.⁹² Whilst some uncertainty exists over the question of whether competition law proceedings constitute core or minor criminal matters under the ECHR, best practice would seem to point towards increased independence at the decision-making stage. Option 3 provides for institutional separation between the prosecutor and decision-maker and, consequently, the clear impartiality of the latter.⁹³ In addition, to having the advantage of ensuring ECHR compliance and best-practice, Option 3 would seem:

⁸⁸ It does involve potential risk in terms of ECHR compliance, however, see n 86 and accompanying text. although this is no greater than is the case for the current system of enforcement by the OFT.

⁸⁹ Consultation Document, 5.29.

⁹⁰ See n 82 above.

⁹¹ See also the steps recently taken by the OFT to improve process and increase transparency (n 82 above).

⁹² See discussion above of ECHR: due process, right to a fair trial and the EU debate.

⁹³ For the view that institutional separation would provide the best model for enforcement of the antitrust prohibition, see B Allan, *op cit* n 27.

(i) to respect the ‘spirit’ of ECtHR judgments which require serious criminal charges to be heard at first instance before an independent and impartial tribunal;⁹⁴

(ii) to allow antitrust defendants to benefit from additional safeguards which are closer to those available to firms facing charges under comparable criminal offences with comparable levels of penalty.⁹⁵ Further, other severe consequences may follow a finding of infringement, including the payment of damages in follow-on litigation;⁹⁶

(iii) to provide greatest respect for the ‘presumption of innocence’ that antitrust defendants benefit from; and

(iv) to go some way to reducing the need for the OFT to conduct two resource-intensive processes, both when establishing and working up an antitrust case before adopting a final decision (and the statement of objections that precedes it) and, subsequently, defending the merits of such decisions before the CAT.

The Consultation notes that if this option were adopted, some thought would have to be given to if, and how, the CAT could be guided on fining levels and to what, if anything, could be done to replace the guidance businesses can receive by way of a case closure or non-infringement decision by a competition authority.⁹⁷ A number of other procedures, including a process for potential settlement, would have to be reconsidered too. One solution for settlements might be to adopt a process similar to the ‘consent decree’ procedure pursued by the DOJ in the US in civil enforcement actions.⁹⁸ Under this procedure, consent decrees must be filed before a federal district court with a competitive impact statement both for public consultation and approval by the court.⁹⁹ The court only enters the decree if it determines, taking account of

⁹⁴ See discussion above of ECHR: due process, right to a fair trial and the EU debate.

⁹⁵ Indeed, CA98 fines now generally outstrip those imposed for violation of criminal offences such as bribery and corruption, see A Jones and D Trapp op cit n 13, n 92. See also I Forrester op cit n 62 above.

⁹⁶ See n 37 above.

⁹⁷ National competition authorities are not, however, competent to take ‘negative’ decisions on the merits under Articles 101 and 102. Only the Commission is competent to make a finding that there has been no infringement, see, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. zoo, now Netia SA w Warszawie* (Case C-375/09), 3 May 2011, see also the Opinion of AG Mazák, (‘the EU legislature conferred on the Commission exclusive competence to adopt negative decisions on the merits (inapplicability decisions)’, para 35).

⁹⁸ As this procedure is used in civil, not criminal, cases in the US it is not used in fining cases. Any UK procedure would need to reflect this difference. In Australia agreed resolutions of cartel cases are also frequently put before the court for endorsement, see e.g. A Guirguis, ‘Cartels: Early Court resolution in Australia – the Experience – The Challenge’, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc739.pdf>.

⁹⁹ The Tunney Act (the Antitrust Procedures and Penalties Act of 1974), amended the Clayton Act and the changes are now incorporated in Clayton Act s 5(b)-(h), 15 USC, s 16(b)-(h).

specified factors including the impact of the judgment upon competition in the relevant market(s), ‘that the entry of such judgment is in the public interest’.¹⁰⁰

Although intuitively attractive on paper, Option 3 is, in spite of the Government’s view that the ‘big’ changes required would be ‘in principle relatively straightforward’,¹⁰¹ likely to be the most challenging for the CMA, at least in the short term, (i.e., during the first few years of implementation). Even though it might secure the efficiency benefits sought in the long run (allowing for the application of more flexible court rules and evidence to be heard just once in open court), such a dramatic change would require concomitant radical alterations in working practices and culture within the CMA from those of either the OFT or the CC and a fundamental overhaul and reworking of procedures developed by the OFT in antitrust cases to date. The CMA would require a very different mix of staff with more litigators/ prosecutors and fewer generalist case handlers. It would also involve considerable change for the CAT which does not currently act as a first-instance trial court.¹⁰² This might mean that enforcement wanes for an initial period whilst the CMA retrains and rethinks future workings practices. Indeed, although it is difficult to judge likely effects on speed of investigations for a new institution seeking to apply a wholly new procedure, there would clearly be a ‘learning curve’ and an incentive for the CMA to be seen to ‘get it right’ initially. This may mean that speed will be compromised in favour of thoroughness and caution. Another important objection from the current competition agencies perspective may be the loss of control over competition policy that the change could entail. It could well mean that the CMA would not be able to play such a pivotal role as the centrepiece of the competition system and as the driver of the competition policy agenda as its predecessors were able to do.¹⁰³ It is also not possible to assess what impact this change would have on the incentives for the CMA as to whether to use its antitrust powers or other competition and/or consumer powers available to it.

¹⁰⁰ 15 USC s 16(e) deals with how the public interest determination must be made by the court.

¹⁰¹ Consultation Document, 5.45.

¹⁰² The President and many of the Chairmen of the CAT are, however, chancery division judges who of course have extensive experience of hearing facts and cases at first instance. The Government is also consulting on giving the CAT jurisdiction to hear standalone private actions (see n 37 and accompanying text above) and some CAT cases have involved lengthy witness testimony (see e.g., Case 1022/1/1/03, *JJB Sports plc v. Office of Fair Trading* [2004] CAT 17, *aff’d* [2006] EWCA Civ 1318, Case 1099/1/2/08, *National Grid plc v The Gas and Electricity Markets Authority* [2009] CAT 14, *aff’d* but fine reduced [2010] EWCA Civ 114 and the ‘Tobacco’ appeals, e.g. Case 1160/1/1/10, *Imperial Tobacco Group plc v OFT*).

¹⁰³ See also J Almunia, SPEECH/10/449, ‘Due process and competition enforcement’ Florence, 17 September 2010 (‘One advantage of our model over the judicial system is that it has helped us take forward the analytical part of our work. When you think how a pure judicial system could work in a Union composed by 27 member states, with different cultures, different systems, this advantage appears quite clearly. Over the years, we have established a system that incorporates the very best economic analysis into competition enforcement’). See also OFT’s concern about the creation of a new EU Competition Court (decision and policy making functions would shift away from the Commission to the new EU Court), House of Lords Select Committee (EU-Fifteenth Report), para 76.

By contrast, in Option 2, the Government considers whether, alternatively, it could develop the administrative approach so that the first instance decision within the CMA is taken by an ‘independent’ and ‘impartial’ tribunal housed within the CMA itself. The Government considers this option to be compatible with Article 6 ECHR if stringent conditions are satisfied (for example, by ensuring that members of the tribunal are not involved in, and are distanced from, the investigation and prosecution of cases, that one or more members is suitably legally qualified and appointed by the head of the judiciary, that members are appointed by an external person or body and/or that there is a clear and comprehensive policy on conflicts and bias). The Government believes this proposal would allow for cases to be argued at an earlier stage than is currently the case, would ensure greater consistency in decision-making, reduce the burden on CMA staff and sector regulators in progressing their cases and allow the appeal before the CAT to be conducted by way of judicial review.¹⁰⁴ If the Government wishes to provide for cases to be tried before an independent adjudicator, however, it is hard to understand in what way this suggestion is preferable to Option 3. The CAT is already an expert and institutionally ‘independent and impartial’ competition tribunal and satisfies the appointment and other criteria the Government refers to. In that light it is not clear why significant cost, effort and measures should be incurred to recreate a new internal (but impartial) tribunal within the CMA itself. Further, whatever safeguards are put in place, it would seem inherently less likely that an internal body would be willing to exercise as rigorous and independent a review as the CAT has proved itself willing to conduct. If it were to do so, there would be significant risk of institutional disharmony.¹⁰⁵ In addition, it seems likely that, the curtailing of appeal rights to a structurally independent court would be likely to involve the new UK competition regime in early challenges to its compatibility with the ECHR.¹⁰⁶

In addition to its proposal to create an internal adjudicatory panel within the CMA, the government consults in Option 2 on some other variants for a new administrative approach which it proposes will strengthen due process and the protection of rights of defence at the ‘administrative’ stage, so permitting a lighter (and hence shorter) review to be conducted at the judicial stage. The Consultation thus asks if, for example, ‘further protections’ could be built in to the current OFT arrangements for antitrust enforcement (for example, by adopting the European Commission’s procedure of using a Hearing Officer, by specifying decision-makers or by mandating oral hearings at which the parties can directly address decision-makers).¹⁰⁷ Alternatively, whether decision-making within the CMA could ‘follow the same process as phase 2 of mergers and market cases and be led and determined by panels of independent office holders. The panel would have an investigatory as well as an adjudicatory role (unlike an Internal Tribunal which would be adjudicatory

¹⁰⁴ On the basis that an independent and impartial tribunal with full jurisdiction has been created internally, see Consultation Documents, especially 5.32-5.35 and Annex 1, 82-87.

¹⁰⁵ See also n 45 above.

¹⁰⁶ See n 112-114 and accompanying text below.

¹⁰⁷ Ibid, 5.40. The Consultation Document notes that these proposals are already being proposed or trialled by the OFT as part of its streamlining exercise (see n 82 above) but asks whether other steps could be taken in this direction

only).¹⁰⁸ The Government considers that this latter proposal might have the advantage of aligning procedure across the ‘tools’,¹⁰⁹ so improving overall coherence of the regime, and might provide a ‘higher degree of transparency, rigour, protection against confirmation bias and access to decision-makers. It would introduce a well established mechanism for effective, independent project management and robust evidential and economic analysis that has been shown to work for mergers and market investigations.’¹¹⁰

Although the Government considers that these two variants might not provide sufficient separation between the investigation, prosecution and decision-making functions to allow appeal before the CAT to be by way of judicial review,¹¹¹ it is considering whether they would be sufficient to allow the appeals to be on the same basis and grounds as those made to the European General Court under Articles 261 and 263 TFEU. As currently specified it is not clear how, if at all, the ‘further protection’ variant differs from Option 1 (and so why the different level of review would be justifiable). Further, as both proposals still involve decision-making within a single administrative body, it would appear to remain essential to retain a full merits appeal before the CAT. Not only does it seem inappropriate to seek to parachute an (alien) EU model of judicial review into the UK system, which has over a number of years developed its own understood and carefully crafted distinction between full merits appeals and judicial review, but it has already been seen that, increasingly, doubt is being raised as to whether the EU level of judicial review is itself ECHR compliant.¹¹² Whilst this uncertainty remains it would seem difficult and potentially inappropriate to introduce this approach into the UK system.¹¹³ If it is correct that these variants would continue to require review by means of a full appeal on the

¹⁰⁸ Ibid, 5.38.

¹⁰⁹ See the discussion of market and mergers cases below.

¹¹⁰ Consultation Document, 5.39. ‘However, the creation of the single authority offers the opportunity to build further on these improvements and to introduce the sort of second phase decision-making for antitrust that we currently have for mergers and markets-ie using a panel drawn from a pool of publicly appointed people with the appropriate authority, expertise and independence’, L Carstensen, op cit n 29. It is not, however, clear why it would be necessary to alter the institutional design of the CMA’s antitrust processes (e.g., by the insertion of investigatory and/or adjudicatory panels) simply to introduce further project management techniques and/or additional oversight of case management by senior personnel.

¹¹¹ See e.g., Consultation Document, 5.39.

¹¹² See nn 69 and 71 above and accompanying text. Indeed, there is a view that the ECtHR case-law in this area requires that the court ‘has the power to rehear the evidence or to substitute its own views to that of the administrative authority. Otherwise, there might never be a “possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute”.’ A Andreangeli et al, op cit n 69 above, para 49 relying on *Tsfayo v UK* (2006), para 48. But contrast the view of the Government, Consultation Document, 5.41-5.43.

¹¹³ Even if the Government considers that EU case law might develop in response to concerns about Human Rights, Consultation Document, 5.43. See also e.g., L Carstensen, op cit n 29 (‘One view is that provided a sufficiently robust institutional design can be established, all appeals can be limited to JR. My own view is that this is unlikely and not necessarily even desirable. In the first place, there is an existing “merits” appeal system in relation to antitrust decisions which it would be hard to curtail. In any event, even an institutional design with “fairness” fully embedded may not satisfy ECHR requirements for a fair trial’).

merits by a structurally independent judicial body, ‘it is hard to see how that would achieve any of the advantages in terms of efficiency and speed that would be sought’.¹¹⁴ Indeed, all of the Option 2 proposals appear to add further procedural hurdles at the CMA stage without a clear case for reducing the rights of those affected by its decision to judicial review only.

An Option 4?

During the debate that the Consultation Document has provoked, there has been some discussion as to whether a further option should also be considered, of introducing a ‘split’ procedure for antitrust cases. One suggestion is that cartel (and other ‘object’) cases under Article 101 TFEU/Chapter I could be treated differently from other cases (such as ‘effects’¹¹⁵ and dominance cases) – the former perhaps requiring a prosecutorial system, with the latter requiring a more inquisitorial, administrative system.

Although this type of proposal may feature in some of the responses, it is not set out in the Consultation Document and does not yet seem to have been fully articulated on paper. Nonetheless, such an approach would appear, at first sight, to raise a number of considerable practical issues. First of all, it is well known that the dividing line between ‘object’ and ‘effect’ cases under Article 101/Chapter I is not a clearly defined one and the issue still provokes considerable litigation and discussion in the literature.¹¹⁶ Plainly, a regime requiring differing procedures for the different cases would require a bright line to be drawn between those cases. This may be challenging in the light of the evolving case law in this area. Secondly, although object and effects/dominance cases, respectively, require different types of analysis

¹¹⁴ B Allan, *op cit* n 27, 407 (but see n 110 above). In any event, it is not clear that judicial review will always be shorter. ‘[I]t is incorrect that JR ... is necessarily a light touch or speedy – and indeed where it results in a remittal the consequences for the end-to-end timeline of cases can be far more adverse than a merits appeal’, see L Carstensen, *op cit* n 29.

¹¹⁵ ‘Conduct in the first sub-category [conduct prohibited by object] is subject to severe punitive sanctions; conduct in the second sub-category [arrangements which require a careful balancing of their benefits and detriments before their legality can be determined] will normally only attract non-punitive civil consequences (unenforceability, injunction and/or damages). Conduct in the first sub-category does not normally require sophisticated analysis of its economic implications; the essential issues concern a factual inquiry into the parties’ conduct. By contrast, the facts as to the parties’ conduct in the second sub-category are normally clear and the issues turn upon the economic implications of those facts’, B Allan, *op cit* n 27, 393. Both dominance and ‘effects’ cases, although requiring detailed analysis of economic benefits and detriments, can, however, result in severe sanctions being imposed on a company found to be in breach, see e.g., OFT decision in *Reckitt Benckiser*, 13 April 2011 (fine of £10.2 million) and decisions of the European Commission in *Intel* 13 May 2009 (fine of €1.06 billion) and *Visa* 3 October 2007 (fine of €102 million for refusing to admit Morgan Stanley to the Visa network).

¹¹⁶ See e.g., *GlaxoSmithKline Services Unlimited v Commission* (Cases C-501, 513, 515 & 519/06 P) [2009] ECR I-9291, *Competition Authority v Beef Industry Development Society Ltd (BIDS)* (Case C-209/07) [2008] ECR I-8637, *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (Case C-8/08) [2009] ECR I-4529, *Pierre Fabre*, (Case C-439/09) (judgment pending) and e.g., O Odudu, ‘Interpreting Article 81(1): object as subjective intention’ (2001) 26 *ELRev* 60, Jones, A., ‘Left behind by Modernisation? Restrictions by Object under Article 101(1)’ (2010) *European Competition Journal* 649 and A Andreangeli, ‘From mobile phones to cattle: how the Court of Justice is reframing the approach to Article 101 (formerly 81 EC Treaty) of the EU Treaty’ (2011) *Word Competition* 000.

(with the latter being more likely to require greater analysis of the economic implications of the conduct), both types of investigation may result in severe consequences for the investigated undertaking(s) and, in particular, the imposition of significant fines for violations. In the light of this, the exact rationale for wishing to operate such separate regimes for the different types of cases is not entirely clear.¹¹⁷ Thirdly, there is already a recognition in the UK that hardcore ‘cartel’ cases may be in a different category – this is the reason that a criminal cartel offence was introduced in 2003. It might not seem justifiable, therefore, to draw a further distinction or subcategory of anticompetitive arrangements within antitrust cases.¹¹⁸

The Markets and Merger Regimes

The Options

In contrast to the antitrust enforcement system, the EA markets and merger provisions currently confer separate and independent roles on the OFT and CC respectively. Broadly, in markets cases the OFT conducts market study investigations (in some ways akin to a ‘phase 1’ investigation process) and may make a market investigation reference (MIR) to the CC where it has grounds for suspecting that any ‘feature, or combination of features’¹¹⁹ of a market prevents, restricts or distorts competition. On a reference to it, the CC determines whether referred market features lead to an adverse effect on competition and, if so, what should be done to remedy or mitigate it.¹²⁰ In merger cases, the OFT conducts Phase I reviews and has to determine whether to refer a relevant merger situation to the CC. Essentially it has to consider whether the merger may result in a substantial lessening of competition in the UK.¹²¹ It is the CC, however, which determines after a more in-depth Phase II review, whether or not the relevant merger situation will have an anticompetitive outcome and, if so, how to remedy, mitigate or prevent the adverse effect.¹²² In both scenarios, therefore, the OFT screens markets and mergers and, in cases requiring more detailed scrutiny, the CC investigates the issues further and takes final decisions (it thus combines investigatory and adjudicatory functions). The two phase procedure is designed to ensure that only more complex or potentially problematic cases are subjected to full phase 2 scrutiny and to guard against the risk of confirmation bias by providing for phase 2 decisions to be taken by an independent entity. Markets and merger decisions

¹¹⁷ See n 115 above.

¹¹⁸ In the US the important distinction between cartel and ‘other’ antitrust cases is recognised by virtue of the fact that the former are prosecuted by the Department of Justice criminally, whilst other violations are only dealt with through civil proceedings. Fines can only be imposed in the context of criminal proceedings.

¹¹⁹ EA s 131(1). It can also accept undertakings in lieu of making a reference EA, s 154. A feature can be any aspect of market structure, any conduct of supplier(s) or acquirer(s) of goods or services or customers (s 131(2)). The Secretary of State can also make MIRs under EA, s 132.

¹²⁰ EA, ss 159, 161 and Sched 8. MIR remedies are monitored by the OFT once in place.

¹²¹ The OFT can accept undertakings from the merging parties in lieu of a reference to the CC, EA s 73. The Secretary of State plays a role in specified public interest cases, EA, s 58.

¹²² EA, ss 35, 36 and 41. Merger remedies are monitored by the OFT once in place.

are subject to review by the CAT, but unlike the full merits appeal for antitrust cases, the CAT applies judicial review principles.¹²³

The decision to merge the OFT and CC presents the question of whether this two stage procedure should be retained within the CMA, and if so how, and whether providing that the two stages should be conducted within the same institution has implications for the appeals process which should be conducted. For both markets and merger cases the Government presents a ‘base case’ model (which remain largely unchanged in relation to decision-making although other process improvements might be introduced eg tighter statutory deadlines) and then makes other proposals based on some modification to that model. The Consultation Document considers that there is a broad spectrum of alternative potential decision-making structures and invites comments on them (these are described in tables 3 and 4 below as Option 2). It does not discuss change to the appeal structure or a potential ‘Option 3’ for markets and merger cases, i.e., there is no proposal that these cases should be taken before the CAT or some other institutionally independent body for adjudication and final decision.¹²⁴

Table 3: Markets Options for Reform

	<i>Phase I Review</i>	<i>Phase II Review</i>	<i>Appeal</i>
Option 1 (Base Model)	Decision to initiate study and make MIR by executive board	Investigatory panel made up of independent members from a list of panel members (full or part time), working closely with case team. Conducts investigation within guidance set by Supervisory Board and comes to own independent decision and determines remedies.	Judicial Review before the CAT.
Option 2 (Possible Changes)	Decision to initiate study and make MIR by executive board	Possible changes: (i) some of phase I market study team continue to work on the Phase 2 investigation (as part of larger team to avoid confirmatory bias); (ii) role of panel - should it move to being more adjudicatory in function; and (ii) should there be a role for the executive on the panel or some other way for executive to input into the case, whilst preserving independence of the decision-taker.	Judicial Review before the CAT.

¹²³ EA, ss 179 and 120. This is ‘normal’ judicial review as applied by the ordinary courts. Indeed, in *BSkyB* [2010] EWCA Civ 2, para 29 the Court of Appeal noted that the EA appeared to provide the only example of a situation in which a specialist tribunal has the duty of applying judicial review principles.

¹²⁴ But see the view set out by B Allan, *op cit* n 27.

Table 4: Merger Options for Reform

	<i>Phase I Review</i>	<i>Phase II Review</i>	<i>Appeal</i>
Option 1 (Base Model)	Decision as to reference, clearance, undertakings in lieu to be undertaken by one or more senior members of the executive	In depth investigation and final decision and remedies determination taken by panel made up of part time panel members working within the guidance set by the Supervisory Board.	Judicial Review before the CAT.
Option 2 (Possible Changes)	Decision as to reference, clearance, undertakings in lieu to be undertaken by one or more senior members of the executive	Possible changes: (i) Phase 2 decision to be made by an independent senior member of the executive (not previously involved in the case) - alone or in conjunction with a Non-Executive Director or an independent panellist; (ii) retain panel as final decision-maker but not as an investigatory panel - phase 2 case team puts evidence before panel who makes final decision and on remedies; and (ii) investigation and adjudication by a panel made up of independent panellists with enhanced role for executive (case team from phase I flows into phase 2 as part of a larger team).	Judicial Review before the CAT.

Selecting an Option

The options for change to the decision-making structures for markets and merger cases are not so clearly spelt out or developed in the Consultation Document as they are for antitrust cases. Essentially, however, the proposals amount to:

- retaining very similar structures to the existing ones (recreating a Phase II investigation and decision-making panel within the CMA which conducts the Phase I review);
- altering the Phase 2 panel structure (for example, who the members of the panel should be, whether there should be an executive on the panel and whether the panel or an individual (or individuals) should take the final decision);
- having members of the Phase 1 team flow into, and participate as members of, a larger Phase 2 team;

- having the Phase 2 panel operate as decision-taker acting simply as an adjudicatory panel with no investigative powers.

Both markets and merger cases appear to be ‘civil’ cases within the meaning of Article 6 ECHR.¹²⁵ Although therefore it may be correct that an initial decision may be adopted by an administrative body, the decision-making structure of the CMA still must ensure due process and an ECHR compatible right of appeal to an independent and impartial tribunal (full jurisdictional control within a reasonable period of time).¹²⁶ Further, sight must not be lost of the serious consequences which result from an adverse finding in a markets or merger case. In merger cases, parties may be prohibited from completing a merger, ordered to reverse a merger or may only be permitted to complete it subject to onerous conditions. In addition, in market cases although market participants are not technically ‘punished’ for violations in the same way as they may be punished for violating the antitrust provisions, extremely severe consequences can follow from an MIR.¹²⁷ Indeed, the EA provides for, amongst other things, structural remedies so that an investigated firm can be ordered to divest a part, and potentially a significant part, of its business.¹²⁸ For those investigated under the markets provisions therefore, the stakes may seem to be just as high as they are in antitrust investigations. Because of the high stakes and the potentially serious issues for those involved, the current UK model has provided for the institutional separation of initial investigations and ‘fresh’ in-depth investigations.¹²⁹ Indeed, this aspect of the UK regime has been regarded as one of its key strengths and is one of the factors which has contributed to its strong reputation internationally.¹³⁰

These issues appear to indicate that robust and impartial decision-making will be best served in any new markets and mergers regime, if the Phase 1 and Phase 2 investigations within the CMA are kept separate, i.e., decision-making at each stage, and the staff supporting them, are kept independent so that there is no risk of confirmatory bias and so that phase 2 panels can complete impartial and in-depth

¹²⁵ See e.g., *Le Compte, Van Leuven and de Meyere v Belgium* [1982] 4 EHRR 1 and D Waelbroeck and D Fosselard, ‘Should the decision-making power in EC Antitrust procedures be left to an independent judge? - The impact of the European Convention on Human Rights on EC Antitrust procedures’ (1994) *YEL* 111, 124-125. ‘By contrast, decisions at phase 2 of the merger and markets regimes are unlikely to engage “criminal” rights under Article 6 as their aim is to restore a market to a competitive state (or prevent a planned merger that would create an uncompetitive state), rather than to deter and punish transgressions. Phase 2 mergers and markets decisions may engage the Article 6 ECHR “civil” protections insofar as they “determine civil rights and obligations”.’ Consultation Document, Annex 1, 84. See also e.g., Case T-351/03, *Schneider v Commission* [2007] ECR II-2337, para 183.

¹²⁶ Consultation Document, para 3.41.

¹²⁷ Final orders are limited to matters set out in EA Sched 8, but there is no such constraint upon undertakings.

¹²⁸ See e.g., CC, *BAA Airports Market Investigation*, 19 March 2009, as a result of which BAA was required to sell off Gatwick, Stansted and a Scottish airport. The avenues of challenge were exhausted when the Supreme Court refused leave to appeal from a judgment of the Court of Appeal upholding the CC’s decision, see [2010] EWCA Civ 1097.

¹²⁹ Although arguably it hard to sustain the idea that the CC is a fresh pair of eyes at the end of a two year investigation, see B Allan, op cit n 27.

¹³⁰ Consultation Document, 4.1.

investigations. Consequently, it does not seem appropriate that any Phase 1 team members should ‘transfer over’ and form part of a larger Phase 2 team or that a member of the executive board (involved in the Phase I decision) should play a role in Phase 2 decision-making.¹³¹ In addition, the UK system of merger control has long provided for inquisitorial review by a second-phase investigative body. The Reports of the CC, and its predecessor the MMC, set out the Commission’s reasoning in some detail, whether or not the decision (or recommendation) is to clear or block a transaction. A decision to require the UK authorities to persuade an adjudicator (or a court) to grant an ‘injunction’ to prevent a merger from completing (or to impose remedies in a market investigation) would represent a dramatic cultural change. Although such a requirement may well encourage high standards of evidence gathering and case management by the new CMA it would, again, require a profound change in skills and culture which may be difficult to achieve in the short term.¹³²

The discussion above might indicate, therefore that the base case models may be most suitable for markets and merger cases. There are a few difficulties with this conclusion, however. First, this solution may not make a significant difference to speed or efficiency in decision-taking that the Government desires (although this objective may be achieved through the separate proposals for shortening some statutory timetables¹³³). In that context, in any phase II process there is a potential trade off between speed on the one hand and thoroughness and due process on the other. While most companies subject to a phase II merger or market investigation wish, at the time, for the competition agency to conduct its processes more quickly, few companies or practitioners are likely to welcome any reform that elevates speed for its own sake over opportunities to make their case fully, orally and in writing, or to provide evidence.¹³⁴ Secondly, it seems, essentially, to recognise that the second review should be conducted by an entity with sufficient independence to genuinely look afresh at the case. These internal panels will not have the same degree of independence as those which already exist in the institutionally separate CC. Thirdly, the Consultation Document does not address the level of appeal or review which would be required by the new proposals in great detail.¹³⁵ It simply states that it is

¹³¹ This would mean that the decision would essentially be adopted by an integrated decision-maker requiring greater scrutiny by a court with full merits jurisdiction. See also the view of B Allan, *op cit* n 27, 412.

¹³² Although several jurisdictions (e.g., the US and New Zealand) do adopt a judicial model for merger cases. See also the view of B Allan, *op cit* n 27 (effective decision-maker does not necessarily require the support of its own investigatory and analytical resources).

¹³³ See nn 32 and 33 above. These changes are not of course dependent on the merger of the OFT and CC. The creation of a single authority might, however, enable some streamlining measures ‘such as, eg, [in merger cases] a faster fast track to phase 2 and early phase 2 determination with remedies in appropriate cases’, L Carstensen, *op cit* n 29.

¹³⁴ See e.g. Consultation Document, 4.46.

¹³⁵ It also does not discuss length of appeals. In merger cases it is of course of enormous importance that to be effective appeals should be heard within a reasonable time period. To date, however, the CAT has a good track record of providing quick and robust review of merger decisions, see e.g., Appendix 2 (merger reference are generally concluded end to end within 9.4 months (excluding appeals) and within 10.6 months (including appeals)) and National Audit Office Review of the

possible to structure the decision-making processes for mergers and market cases within the single CMA in such a way that the existing right of appeal on judicial review processes remain the appropriate means of ensuring that the decision-making process is ECHR compliant.¹³⁶ There is no discussion, however, as to why judicial review is appropriate for these cases but not for antitrust cases where an integrated decision-maker engages in both investigation on the one hand and decision-making on the other.¹³⁷

Conclusions

The Government has raised the issue of reform of the UK institutional architecture for competition law enforcement at a time when concern about the due process and fairness within the EU system is escalating. Now the debate has been opened in the UK, the Government should ensure that any changes it makes to the system respect undertakings' right to a fair trial and that the chosen decision-making structure is clearly (and not simply possibly) ECHR compliant. The current system provides checks and balances over and above those available at the EU level and the understandable desire for faster and more efficient decision-making structures should not be elevated to the extent that they water down the essential protections now provided. Designing a new system provides an opportunity to showcase best practice and to provide for decision-making structures that permit robust and thorough decision-making while respecting fundamental due process rights.

The Government, consequently, has some difficult choices to make. The discussion above illustrates that there is a trade-off to be made between some of the Government's objectives: i.e., balancing the desire to increase speed in decision-taking in competition cases through changes which can be implemented as soon as possible, with potential uncertainty and risk for momentum and the effectiveness of the regime that some of the options entail. With regard to antitrust enforcement, Option 2 does not seem a strong contender to bring about the changes the Government desires. All of the variants set out in Option 2 would impose a new structure within the CMA and may not be ECHR compliant without retaining full merits appeal before the CAT. They would therefore have limited impact to the speed and number of antitrust cases which could be brought and the structural changes envisaged would not be necessary for the introduction of case management measures designed to accelerate process. Whilst Option 1 is least likely to compromise momentum and the short-term effectiveness of the regime, the extent to which the CMA will be able to build upon operational reforms to substantially speed up and increase decision-taking is unclear. Option 3, in contrast, does appear to have the potential to speed up and increase decision-making in the long run. It is also clearly fully compliant with Article 6 ECHR. The radical changes that its implementation would require, however, may

UK's Competition Landscape, 22 March 2010, 5.7 (the relatively few merger appeals brought since the EA came into force have all been determined by the CAT in under 12 months, with four of the 12 cases being determined in less than one month).

¹³⁶ Consultation Document, 10.43.

¹³⁷ Especially as the Consultation Documents accepts that in 'civil and in some non-criminal cases, where the requirements for an "independent and impartial" tribunal are not fully met by the first-instance decision-taker, Article 6 can be satisfied if there is a right of appeal of the first instance decision before an independent and impartial tribunal that has "full jurisdiction".' Ibid.

mean that there would be a reduction in enforcement for a period whilst the CMA and CAT adapt to their new roles and to the new procedures and processes involved.

In the context of the market and mergers cases, the optimum solution may be to put in place a system for the CMA which retains as many features of the current system as possible. This would preserve the rigour and impartiality of the current system of 'phase 2' merger and market investigations as far as possible within the new unitary body. Although there may be some (limited) additional scope to reduce time periods for market investigations through the introduction of tighter procedural deadlines, it is unclear whether any new structure would fundamentally alter the CMA's incentives to conduct more market investigations (even if that were considered to be desirable). In conclusion, the proposals in the Consultation Document present a complex and inter-related set of issues for debate. The consultation process presents an important opportunity for additional reflection on the issues before any final decision is taken on further fundamental reform of the UK's competition regime.