The CMA: Friend or Foe?
An Insider’s Perspective to UK Merger Control Reform

Emma Verghese, Principal Case Officer,
Office of Fair Trading

Junior Competition Conference, 27 January 2012

Views are personal and not binding on the OFT
Agenda

- Timetabling implications
- The use of Initial Undertakings
- Small Mergers Exemption v *de minimis* Exception
- Remedies

NB: assumes voluntary notification system is maintained
Timetabling implications (1)

● **Current timetables**

**Phase I**
- Stat Merger Notice: \( \leq 30 \text{ w/d} \)
- Informal Submission: 40 w/d
- Completed Merger: 40 w/d – within 4 months
- EUMR Art 9/4(4): 45 w/d

**Phase II**
- All mergers: 24 wks + 8 wks

» NB: excluding consideration of remedies
Timetabling implications (2)

- Likely implications of reform
  - Similar timeframe at Phase I and Phase II, but statutory
  - Additional period for consideration of remedies (PI and PII)

<table>
<thead>
<tr>
<th>Pros for business</th>
<th>Cons for business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Increased certainty</td>
<td>More extensive pre-notification</td>
</tr>
<tr>
<td>Standardised approach (prescribed Form?)</td>
<td>Tighter turnaround on RFIs</td>
</tr>
<tr>
<td>Less cumbersome Phase II (first day letter)</td>
<td>Diarising key dates earlier at Phase I?</td>
</tr>
<tr>
<td>More Phase II decisions before 24 wk deadline?</td>
<td>Longer overall timetable (clock stopping, UILs etc.)?</td>
</tr>
<tr>
<td></td>
<td>Implications for UFB requirement</td>
</tr>
</tbody>
</table>
The use of Initial Undertakings

- **Current system**
  - OFT can accept IUs where it has “reasonable grounds for suspecting that it is or may be the case that a relevant merger situation has been created.” (s71(3) EA ’02)
  - No use of initial enforcement orders to date (OFT will consider “where it has already given merging parties a reasonable opportunity to provide initial undertakings, but they have not been forthcoming” – J&P Guidance, para 6.44)
  - Numerous problems for the Regulator:
    - Difficult to unwind integration already undertaken
    - Agreeing derogations can be time-consuming and complex
    - Difficult to monitor further integration (‘leap of faith’)
    - OFT consents to derogations make life more difficult for the CC on referral
Initial Undertakings (2)

- CMA powers (BIS consultation doc)

- CMA ability to “require reversal of action that had already taken place and to prevent further pre-emptive action notwithstanding the existence of any contractual obligations on the part of the merged entity.” (BIS con doc, para 4.15)

- Likely to be a discretionary power of the CMA

- Penalties for non-compliance and / or court order to ensure compliance

=> Burden on the Acquirer
Small mergers exemption

- Introduction by BIS of small mergers exemption
- WW turnover of Acquirer ≤£10m, Target UK turnover ≤£5m
- Jurisdictional threshold – turnover; share of supply; “substantial part of the UK”
- But ensure that small, anticompetitive mergers don’t fall below the radar
Contrast with *de minimis* exception

- Exception to the duty to refer (s22(2)(a) & s33(2)(a) EA’02)
- OFT discretion
- Relates to market size, *not* turnover
- Cost / benefits analysis
  - Cost of reference (approx £400k) v Magnitude of harm
- Likely to benefit from exception where market size <£3m (e.g. *Towers Watson* / EMB); but fuller analysis where <£3m market size <£10m
Use of the exceptions and UILs to date

OFT qualifying merger decisions

New de minimis
guidance Nov 07

Source: OFT website
Remedies

● Phase I – Undertakings in Lieu of Reference
  - Offer currently provided to OFT with / following Response to Issues Paper
  - Decision Maker is “blind” to an offer having been made (the envelopes…)
  - Parties do not have the benefit of the decision prior to offering remedies
  - Only near-miss provision available ex post

● Phase II – Remedies
  - CC publishes notice of remedies with provisional findings, inviting comments from third parties
  - Conclusions on remedies published in Final Report
  - 8 week period to obtain undertakings from parties voluntarily, or CC imposes an order
Remedies (2)

• **BIS proposals**
  - Statutory period to consider remedies
  - Suggests 12 week period from publication of Final Report to accept remedies (or make an Order), extendable by up to 6 weeks (para 4.46 BIS con doc)
  - Suggests consideration of remedies at Phase II before the CMA decides whether the merger has or will result in an SLC (para 4.51-4.52 BIS con doc)

**Drawbacks:**
  - Makes Phase I remedies process redundant (no UILs, but immediate reference)
  - Phase II remedy based on ‘realistic prospect’ test rather than ‘balance of probabilities’
  - CMA at Phase II likely to be side-tracked from conducting main investigation

**Better approach:**
  - Statutory period following announcement of Phase I decision to consider UILs and equivalent period at Phase II after publication of Final Report
## The CMA: Friend or Foe?

<table>
<thead>
<tr>
<th>+</th>
<th>-</th>
</tr>
</thead>
<tbody>
<tr>
<td>More efficient use of resources creating greater economies of scale</td>
<td>Inevitable teething problems on transition</td>
</tr>
<tr>
<td>Greater consistency and predictability by bringing decision-making and policy approaches within a single organisation</td>
<td>Legislative change (amends to EA ’02) new procedures, guidance etc.</td>
</tr>
<tr>
<td>Less daunting move from Phase I to Phase II</td>
<td>Enhanced powers of CMA making for stricter approach</td>
</tr>
<tr>
<td>Business continues to bear burden of notification</td>
<td>Significant increase in merger fees</td>
</tr>
</tbody>
</table>
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Junior Competition Conference, 27 January 2012

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Institutional Frameworks for Competition Law Enforcement: What Can The UK Learn From France?

Marie Leppard
Clifford Chance LLP Europe
Paris

27 January 2011
Members of the ECN regularly report to the European Commission with respect to procedures involving the application of Articles 101 and 102 TFEU.

Investigations reported to the European Commission by the UK and French competition authorities between 1st May 2004 - 30th November 2011*:

<table>
<thead>
<tr>
<th>Member State</th>
<th>New case investigations</th>
<th>Envisaged case decisions (Art. 11(4) of Reg. 1/2003 1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>207</td>
<td>79</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>56</td>
<td>14</td>
</tr>
<tr>
<td>European Commission</td>
<td>214</td>
<td><em>Not applicable</em></td>
</tr>
</tbody>
</table>

1) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU.

Merger control decisions reported:

- The French Competition Authority ("FCA") issued 198 decisions of which two required in-depth examination.
- The OFT examined 77 merger cases, referring 8 to the Competition Commission.

* Source: European Commission’s statistics 2011
Structure & Powers
OFT Structure

Institutional Frameworks for Competition Law Enforcement: What Can The UK Learn From France?

27 January 2011
FCA Structure
Same Goals
But
Different Approaches
### Prevention vs. Sanction

<table>
<thead>
<tr>
<th>UK</th>
<th>France</th>
</tr>
</thead>
<tbody>
<tr>
<td>Educating</td>
<td>Mandatory Merger Notification</td>
</tr>
<tr>
<td>Detecting</td>
<td>“Advocate of Competition”</td>
</tr>
<tr>
<td>Voluntary Merger</td>
<td>Interim Measures</td>
</tr>
<tr>
<td>Notification</td>
<td></td>
</tr>
</tbody>
</table>

27 January 2011
Prioritisation vs. Generalisation

**UK**
- Enforcement Work Priority
- Sector Focus
- Cautious & Weighted

**France**
- Lower thresholds
- Lower standard of Proof
- Retail Trade
**OFT – Sector Focus During 2010-11**

**Distribution of key OFT work in 2010-11 across the economy**

Cases not in the public domain, mergers cases and consumer education campaigns are not included.

<table>
<thead>
<tr>
<th>Category</th>
<th>Cases</th>
</tr>
</thead>
</table>
| Transport, storage and communication          | - Airline passenger fares  
- Handpicked Media  
- Long-haul passenger flights                  |
| Arts, entertainment, hotels & restaurants    | - Recreation, other service activities  
- Modelling & entertainment agencies  
- Football tickets  
- Misleading prize promotions  
- Holiday clubs  
- Gym membership  
- Hotel online booking |
| Agriculture, forestry, fishing, mining &      | - Quarrying  
- Agriculture sector  
- Heating Oil  
- Off-grid energy |
| quarrying                                      |                                                                      |
| Manufacturing                                 | - Reckitt Benckiser (Gaviscon)  
- Tobacco retail pricing  
- Automotive sector  
- Commercial vehicles |
| Construction                                  | - Aggregates  
- Home repairs & improvements |
| Financial intermediaries                      | - Personal current accounts  
- Anti-money laundering supervision  
- Credit licensing and enforcement  
- Loans/ professional services  
- Equity underwriting  
- Corporate insolvency  
- Cash ISAs  
- Motor insurers  
- Credit & debit card surcharges  
- Cold calling & charging practices |
| Wholesale and retail trade                    | - We Buy Any Car Ltd  
- Second-hand cars  
- Bunker fuel  
- Postal Gold  
- Advertising of prices and online targeting of advertising and prices |
| Public administration and defence             | - Public services procurement  
- Choice in public services |
| Letting of dwellings                          |                                                                      |
| Other real estate activities, renting of     | - Street furniture contracts  
- Outdoor advertising  
- Estate agency regulation  
- Retirement home exit fees  
- Audit market  
- Pyramid schemes |
| machinery and goods, business activities      |                                                                      |

* Electricity and gas markets are regulated by Ofgem. The supply of water is regulated by Ofwat.

*Source: OFT Annual Report 2010*
FCA – Sectors Examined During 2010-11

Distribution of the FCA’s work in 2010-11

- **Retail Trade** (45%)
- **Miscellaneous** (19%)
- **Industry** (11%)
- **Agri-food** (10%)
- **Banking/Insurance** (6%)
- **Wholesale Trade** (5%)
- **Business Services** (4%)

*Source: FCA Annual Report 2010*
Criminal Sanctions: Widespread vs Limited Use

**UK**
- Director Disqualification Orders
- Up to 5 years imprisonment

**France**
- No power to prosecute
- Up to 4 years imprisonment
## Conclusion

<table>
<thead>
<tr>
<th>UK</th>
<th>France</th>
</tr>
</thead>
<tbody>
<tr>
<td>Two-tier competition law process</td>
<td>One single agency</td>
</tr>
<tr>
<td>Voluntary regime</td>
<td>Compulsory regime</td>
</tr>
<tr>
<td>No deadline</td>
<td>Strict timetable</td>
</tr>
<tr>
<td>Market investigation remedies</td>
<td>Interim measures</td>
</tr>
<tr>
<td>Education</td>
<td>Enforcement</td>
</tr>
<tr>
<td>Cautious and calculated</td>
<td>Risk taking</td>
</tr>
<tr>
<td>Widespread use of criminal sanctions</td>
<td>Limited criminal enforcement</td>
</tr>
</tbody>
</table>

Institutional Frameworks for Competition Law Enforcement: What Can The UK Learn From France?

27 January 2011
Institutional Frameworks for Competition Law Enforcement: What Can The UK Learn From France?
UK Competition Enforcement Reform – Frying Pan or Fire?

Dan Burton, January 2012
Overview

• Drivers of UK competition reform
• Institutional reform under review
• Key enforcement proposals
• Tobacco revisited
• Is enforcement reform needed?
Drivers of UK competition enforcement reform – calls for more decisions

Aggregate figures on antitrust cases for selected member states (1 May 2004 to 28 February 2011)

<table>
<thead>
<tr>
<th>Member state</th>
<th>New case investigations</th>
<th>Decisions notified to the European Commission</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>198</td>
<td>71</td>
</tr>
<tr>
<td>Germany</td>
<td>140</td>
<td>66</td>
</tr>
<tr>
<td>Italy</td>
<td>87</td>
<td>62</td>
</tr>
<tr>
<td>Spain</td>
<td>82</td>
<td>42</td>
</tr>
<tr>
<td>Netherlands</td>
<td>78</td>
<td>34</td>
</tr>
<tr>
<td>Denmark</td>
<td>64</td>
<td>34</td>
</tr>
<tr>
<td>Greece</td>
<td>33</td>
<td>25</td>
</tr>
<tr>
<td>Hungary</td>
<td>82</td>
<td>20</td>
</tr>
<tr>
<td>Sweden</td>
<td>36</td>
<td>17</td>
</tr>
<tr>
<td>Slovenia</td>
<td>26</td>
<td>15</td>
</tr>
<tr>
<td><strong>UK</strong></td>
<td><strong>56</strong></td>
<td><strong>12</strong></td>
</tr>
<tr>
<td>European Commission</td>
<td>198</td>
<td>N/A</td>
</tr>
</tbody>
</table>

Source: Table 5.1 from BIS Consultation Paper
Drivers of UK competition enforcement reform – calls for quicker decisions

Source: The City of London Law Society response, 8 June 2011
(http://www.citysolicitors.org.uk/FileServer.aspx?oID=1030&IID=0)
Key enforcement proposals

• OFT + CC = CMA
  - All but certain? (see s.2 and Schedule 2, Public Bodies Act 2011)
  - Timing? (after 14 February 2012)
  - CAT’s role? (c.f. s.1 and Schedule 1, Public Bodies Act 2011)
• Model for Competition Act enforcement?
• Cartel offence
  - Watering-down of dishonesty element?
  - Public / private distinction?
• Decision-making
  - Governance structure – Supervisory Board and Executive Board?
  - Day-to-day running – SRO, Project Director and Team Leader?
  - Transitional arrangements?
• Stronger enforcement powers (e.g. fines for non-compliance)
• Market investigations also seen as an enforcement tool
Tobacco – revisited under a prosecutorial system

- Conduct of OFT investigation
  - Timetable and scope of investigation
  - Settlement
  - SO, SSO
  - Oral hearing
- Stress-testing of evidence
  - Contemporaneous evidence
  - Witness evidence
  - Assumptions and inferences
- Output
  - Decision?
  - Case closure or non-infringement decision?
  - OFT recommendations on fine? To CAT?
  - Appeal to CAT on judicial review grounds only?
Is enforcement reform needed?

• OFT reforms already underway
  - Better and quicker complaints handling – decision within 4 months of “substantiated complaint”
  - Greater transparency promised – on timetable and decision-making
  - Procedural adjudicator
  - More settlements and commitments?
• Thoughts on an “enhanced” adversarial system
  - Prompt witness engagement is key
  - More expected from leniency and early resolution parties?
  - Confidentiality rings
  - 5 year limitation rule and/or time-limit for investigations?
  - Continued full or JR review by the CAT (not internal CMA body)
Any questions ...
Merging the merger authorities: An economist’s view on the BIS proposals

Sixth Junior Competition Conference
Dr Michael Scheidgen, Oxera Consulting

January 27th 2012
Overview

- introduction: An economic framework for assessing the merger of the competition entities
- potential economic benefits
- potential economic costs
- some costs and benefits of a move towards a more prosecutorial system
- conclusion
Introduction (I)

The BIS proposals

- the BIS consultation proposes streamlining the process of dealing with mergers and market investigations by merging the OFT and the CC

- it also suggests a range of options for how the merged entity might operate, including:
  - extending the use of the CC’s current approach, whereby decisions are taken by a panel of members; or
  - moving to a prosecutorial system in which the CMA would present cases before a court rather than being the decision-maker

Would an OFT/CC merger create value for shareholders (ie, taxpayers) and would it lead to clear customer benefits?
Introduction (II)

A framework for assessing economic costs and benefits

- there is a ‘tried and tested’ framework for regulatory impact assessments
- main categories of costs and benefits in regulatory assessments

<table>
<thead>
<tr>
<th>Costs</th>
<th>Benefits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct costs of market authority</td>
<td>Savings of direct costs of market authority</td>
</tr>
<tr>
<td>Direct costs of firms</td>
<td>Savings of direct costs of firms</td>
</tr>
<tr>
<td>– compliance costs</td>
<td></td>
</tr>
<tr>
<td>– costs of specific proceedings</td>
<td></td>
</tr>
<tr>
<td>Economic costs to the market in question</td>
<td>Economic benefits to the market in question</td>
</tr>
<tr>
<td>(negative market impacts)</td>
<td>(positive market impacts)</td>
</tr>
<tr>
<td>– distortion of incentives (reduced dynamic</td>
<td>– enhanced dynamic competition and/or innovation</td>
</tr>
<tr>
<td>competition and/or innovation)</td>
<td>– increased product and/or service quality</td>
</tr>
<tr>
<td>– reduced product and/or service quality</td>
<td>– enhanced market functioning</td>
</tr>
<tr>
<td>– restriction on market functioning</td>
<td></td>
</tr>
</tbody>
</table>

How do the costs and benefits play out in this case; in particular, with regard to the hard-to-measure economic ‘market impacts’?
Overview

- introduction: An economic framework for assessing the merger of the competition entities
- potential economic benefits
- potential economic costs
- some costs and benefits of a move towards a more prosecutorial system
- conclusion
Potential economic benefits (I)
The BIS assessment

- BIS sets out likely quantifications of benefits in the impact assessment\(^1\)

- these are summarised in three ‘illustrative policy options’ and the estimated benefits show large variations and uncertainties

<table>
<thead>
<tr>
<th>Policy option</th>
<th>Estimated benefit over ten years</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. ‘limited change’</td>
<td>£30.4m–£58.3m</td>
</tr>
<tr>
<td>2. ‘full mandatory merger notification’</td>
<td>£30.0m–£1,393.0m</td>
</tr>
<tr>
<td>3. ‘hybrid merger notification’</td>
<td>£30.0m–£325.0m</td>
</tr>
</tbody>
</table>

Potential economic benefits (II)
Potential benefits based on merger control considerations

- as a result of the ‘vertical merger’, there may be scope to:
  - reduce demands for information from parties by avoiding the duplication of data requests, as can sometimes occur under the current system
  - enhance staff understanding of cases by retaining the same project team for phase 1 and phase 2, which would make meetings at phase 1 more valuable in cases that are highly likely to be referred to phase 2
  - reduce the overall duration of market studies and investigations

- as with vertical mergers in general, whether such inefficiencies will be eliminated in practice depends on the detailed design and implementation of the new structure
Potential economic benefits (III)
Potential benefits of the ‘conglomerate’ merger

- further efficiencies might arise from the ‘conglomerate’ nature of the merger, for example:
  - the expertise of the competition economists and financial experts at the CC can be readily applied to abuse and agreement cases;
  - there also seems to be scope for greater alignment of the decision-making structures across Competition Act cases and market investigations (eg, extending the CC’s panel structure to Competition Act cases)
Overview

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- potential economic costs
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Potential economic costs (I)
The BIS assessment

- for the three illustrative policy options, BIS estimates the potential costs of the reform as follows:¹

<table>
<thead>
<tr>
<th>Policy option</th>
<th>Estimated cost over ten years</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. ‘limited change’</td>
<td>£4.5m–£6.8m</td>
</tr>
<tr>
<td>2. ‘full mandatory merger notification’</td>
<td>£934.0m–£2,442.0m</td>
</tr>
<tr>
<td>3. ‘hybrid merger notification’</td>
<td>£166.0m–£558.0m</td>
</tr>
</tbody>
</table>

- as for the benefits, the magnitude and uncertainty of potential costs increases when market impacts are taken into account (ie, option 2 and option 3)

Potential economic costs (II)
Potential costs of the quasi-horizontal merger

- some direct rivalry between the institutions would be lost as a result of the merger

  loss of the current form of informal ‘benchmark competition’

- as with mergers of any nature, there are issues surrounding brand and culture
  - a merger between two big brands inevitably destroys some brand value if one of the brands disappears
  - in any merger it is important that the best cultural aspects are taken from the merging parties (eg, the culture of openness at the CC)
Potential economic costs (III)

Shortening of timescales and assessing evidence

- weighing up economic evidence in the legal context of the competition regime is crucial to reaching appropriate decisions

- ‘getting it wrong’ may lead to significant consumer detriment that can easily wipe out any cost savings

- eg, if ‘bad’ remedies in a market with revenues of £1 billion per year (such as the UK market for travel money) lead to prices being 1% higher than ‘better’ remedies could achieve, consumers suffer detriment of about £10m per year; more than BIS’s estimated direct cost savings from the merger (as indicated in ‘option 1’)

when considering timelines for cases of all types, it is important that parties are given sufficient time to fully review and respond to the competition authority’s economic analysis

Overview

- introduction: An economic framework for assessing the merger of the competition entities
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- conclusion
Some costs and benefits of a move towards a more prosecutorial system

- one important benefit of such a system is the way in which economic and other evidence is taken into account
- removing decision-making power from the OFT/CMA would ensure independence of outcome and remove any potential conflicts of interest that the decision-maker might have
- it would increase incentives for the authority, and the parties, to conduct high-quality work throughout, and to be clear and transparent about their arguments and conclusions
- a solution might be to convert the CAT from an appellate body to a court of first instance, to which the OFT (or the CMA) would bring its prosecutorial case
- however, such a ‘divestment’ might reduce the efficiency gains resulting from the merger
Overview

- introduction: An economic framework for assessing the merger of the competition entities
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- potential economic costs
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- conclusion
**Conclusion**

- There is no one optimal model of institutional design for competition regimes, and a myriad of structures will continue to exist across the world. This in itself is useful, since it allows for comparative studies and learning from best practice between countries.

- Several of the changes recommended by BIS, and some of the ideas discussed in this presentation, could enhance the UK competition regime and allow it to maintain its position among the leading regimes in the world for years to come.

- It seems that there are indeed potential benefits to shareholders and customers from the proposed merger between the OFT and the CC. Whether they are realised depends on the government’s appetite for making real changes to the way the merged entity operates.
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The Mandatory v. Voluntary Debate

Ruchit Patel and Gabriella Olson-Welsh
January 27, 2012
Outline

- Background
  - Views of the OFT and CC
  - Worldwide and EU-wide perspective

- Comparative Analyses
  - Voluntary regime + strengthened hold separates
  - Pure mandatory regime
  - Hybrid regime

- Proposals
  - Voluntary regime
  - Mandatory regime
Background

- BIS’s consultation entitled a “A competition regime for growth” envisages three possibilities
  - (1) a “pure” mandatory regime,
  - (2) a “hybrid” regime incorporating mandatory and voluntary elements, and
  - (3) a voluntary system potentially with strengthened hold separate powers.

- **Pure mandatory regime:** all mergers which involve a target with at least £5 million turnover in the U.K. and an acquirer with £10 million turnover worldwide would have to be notified in advance and could not be completed without clearance. Transactions would qualify based purely on turnover, with no separate “share of supply” test (to determine if the proposed merger would lead to the creation or strengthening of a share of supply of 25% or more of goods or services of any description).

- **Hybrid regime:** Mandatory notification for all mergers where the target had turnover of at least £70 million in the U.K., while giving the OFT* the power to intervene in transactions below this level, based on a share of supply test.

- **Voluntary regime:** *Status quo* potentially with stronger hold separates

*References to the OFT may be read to refer to the CMA if the OFT and CC are combined.*
Views of the OFT and CC

The OFT considers that the current voluntary merger notification system provides a balance between the need to address anti-competitive mergers and the burdens on businesses and taxpayers arising from merger control. Since the OFT views the current system to be working well, it is not supportive of a radical shake-up but does believe that incremental changes would be beneficial. Mandatory notification: The OFT raises concerns about the introduction of a mandatory notification regime. It considers that this could present an increased burden on public and business resources and that the case for such a mandatory system is not established. Generally, the OFT believes that a “hybrid” model would be preferable to a mandatory system. This would involve mandatory notification of mergers above a certain threshold (coupled with an obligation to suspend the merger prior to clearance) and a voluntary system for mergers below the threshold. Exemption for small mergers in mandatory and voluntary regime: The OFT is of the view that a discretionary exception to the duty to refer a merger for a second stage investigation is less predictable than fixed thresholds. It therefore has no objection to replacing the current de minimis exception to the duty to refer with an exemption for transactions involving small businesses based on defined thresholds.

The CC supports the proposal to introduce an automatic suspensory power on completed transactions the OFT identifies, triggered when the authority requests information from the merging parties. Relief from the automatic suspension should be provided following consideration of a request from the merging parties. The OFT should retain the ability to decide whether to impose initial measures (by order or undertakings) on transactions notified to it. This proposal strengthens the incentive to notify transactions while recognizing the strong commercial pressure to integrate acquired businesses. It would also preserve the OFT’s power to impose remedies where completed mergers are found to be anticompetitive. The CC supports the introduction of penalties proposed for breaches of hold-separate measures and also for failure to notify (in the event a mandatory system is introduced).
Merger Control – WW/EEA

Mandatory Regime
Voluntary Regime
No Merger Regime
## Voluntary Regime (+ strengthened hold separates)

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less costly on the Government and on businesses</td>
<td>Potentially anticompetitive mergers escape scrutiny/review (potential over-reliance on market intelligence function)</td>
</tr>
<tr>
<td>Significant flexibility afforded to OFT to investigate “relevant merger situations” may improve the chances that only mergers posing a competitive risk are investigated.</td>
<td>Difficult to apply appropriate remedies (“unscrambling the eggs”)</td>
</tr>
<tr>
<td>Unscrambling issue may not be significant because few transactions have needed to be unwound in the past</td>
<td>Periods of uncertainty for businesses (including for 4 months after the merger has completed)</td>
</tr>
<tr>
<td>4 months post-closing is usually enough to identify competition concerns, in particular because customers and competitors complain</td>
<td>Hold separates may come too late (i.e., some integration may already have occurred by the time the OFT sends its Enquiry Letter).</td>
</tr>
<tr>
<td></td>
<td>Limited possibility in practice to “negotiate” hold separates / time wasted in attempting to do so</td>
</tr>
</tbody>
</table>
## Pure Mandatory Regime

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>No integration until merger is cleared (limits the possibility of exchange of competitively sensitive information even for an interim period)</td>
<td>If the proposed approach is adopted, the U.K. will have one of the lowest merger notification thresholds in the world without justification</td>
</tr>
<tr>
<td>Avoids difficulties associated with unwinding (e.g., competitiveness of the entity unwound)</td>
<td>Additional cost to the OFT and businesses -- A form of tax?</td>
</tr>
<tr>
<td>Parties are under no doubt as to their obligations and are accustomed to the practice</td>
<td>Captures transactions that are not problematic (e.g., between parties whose businesses have no product or geographic overlap).</td>
</tr>
<tr>
<td>In line with the majority of other jurisdictions</td>
<td>Decelerates/delays pro-competitive mergers unnecessarily</td>
</tr>
<tr>
<td>No uncertainty as to how the OFT will proceed</td>
<td>Additional administrative burdens on businesses.</td>
</tr>
<tr>
<td>No undue discretion afforded to the OFT</td>
<td></td>
</tr>
<tr>
<td>Enables more effective and certain transaction planning</td>
<td></td>
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<tr>
<td>No need to “negotiate” hold separates and no delay resulting from doing so</td>
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</table>
Hybrid Regime (as proposed)

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Certainty for larger mergers</td>
<td>Too much discretion afforded to the OFT in respect of mergers below the turnover threshold (no certainty as to how these mergers will be investigated)</td>
</tr>
<tr>
<td>Allows a degree of flexibility to intervene in mergers that may give rise to an SLC but are below the thresholds (more limited intervention in smaller mergers)</td>
<td>Does not solve the period of uncertainty issue</td>
</tr>
<tr>
<td></td>
<td>Does not solve the unscrambling the eggs issue</td>
</tr>
<tr>
<td></td>
<td>OFT may still miss potentially anticompetitive mergers (potential over-reliance on market intelligence function)</td>
</tr>
<tr>
<td></td>
<td>Two-stage regime may cause scope for confusion and not clear why £70 million is the appropriate benchmark</td>
</tr>
</tbody>
</table>
Voluntary Proposal

Majority view amongst practitioners is that if it ain’t broke don’t fix it

On balance the benefits don’t justify the increased costs or increased burden in terms of regulation

Only a few cases where merger cannot be “unscrambled” or instances where anti-competitive mergers escape review
Mandatory Proposal - Objectives

The OFT should have jurisdiction to review mergers that may give rise to an SLC but only those above a specified threshold (i.e., those that are likely to have a significant effect on U.K. commerce).

The OFT’s ability to impose remedies should not be impaired (it matters not that the powers to unwind have been used infrequently in the past – effective competition law regulation requires that remedies need to be effective when imposed even if they are imposed in few cases).

The costs of notification to businesses and to the Government should be minimized.

The review of unproblematic transactions should be expedited.

There should be no uncertainty for businesses.
Proposal - Suggestion

- Mandatory regime with suspensory effect

- Notification required where the target’s annual turnover exceeds £50 million

- No discretion afforded to OFT to investigate mergers where the turnover of the target is <£50 million

- Have a “simplified procedure” for mergers with no horizontally or vertically affected markets (under the EU test) with a fixed timeline for review of 20 working days
Proposal - Analysis

- No unscrambling the eggs problem – improves effectiveness of remedies where required
- Certainty for businesses – no 4 months period of uncertainty and in line with the majority of other merger control regimes worldwide
- £50 million is appropriate for the U.K. because:
  - SMEs (as defined in Recommendation 96/280/EC to be essentially companies ≤ £50 million in turnover) are seen as a separate category of companies under EU law that are in need of economic support. There is therefore some implicit recognition that SMEs have in general a more limited impact on competition than larger companies. The OFT should focus on mergers that are more likely to have a substantial impact on competition (under the “SLC” test). Are pricing effects in mergers involving SMEs sustainable? Only where other barriers to entry/expansion exist (e.g., IP)?
  - The EUMR implicitly excludes adverse effects where the turnover is under €25 million (Article 1(2)), so excluding smaller mergers is not necessarily inconsistent with applicable competition principles
  - The threshold would be similar to France, which is of broadly similar size, in terms of population and GDP.
  - From a policy perspective, U.K. merger control regime should not lead to a flood of notifications.
  - There was no discernable logic or force of reasoning behind £70 million turnover threshold except that (1) an assets test was no longer appropriate given the increase in biotech companies who were turnover heavy but not assets heavy, (2) £70 million would catch roughly the same number of companies as the $45 million assets test (c. 110,000) and a threshold of £100 million would mean that a high proportion of mergers (c. 50%) would not be scrutinized, and (3) CBI wanted £100 million so as not to clog up the system with “comparatively unimportant” transactions and £70 million was seen as a compromise. Similarly, there was no discernable logic behind the £45 million assets test. Accordingly, there is no reason to stick to it rigidly except that one should focus on the transaction’s potential impact on competition.
  - The CC supports a higher threshold than that proposed in the consultation (“If a mandatory or hybrid regime were preferred, the CC would be concerned that the notification thresholds referred to in the consultation document are too low for an efficient notification trigger.”).
There is a potential that some anticompetitive mergers are not subject to OFT jurisdiction. However, in general, these mergers will involve companies that do not significantly affect U.K. commerce. It must be accepted that there may be exceptions to this rule but the overall advantages (e.g., as regards effectiveness of remedies) seem to outweigh the small number of exceptions. In addition, it may be possible to deal with impediments to competition subsequent to such a merger under Chapter 1 and/or Chapter 2.

Fixed timeline for review of 20 working days should mean that unproblematic cases are expedited.

Would better dovetail with the Takeover Code which \textit{de facto} requires a Rule 12 Condition.

No need for a small business exemption under this proposal – existing \textit{de minimis} exception could function to that effect.

Would require legislative reform.