CLEARY GOTTLIEB

Alert Memo

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U.K. Government Reforms the Competition Regime

In March 2011, the U.K. Government Department for Business, Innovation and Skills ("BIS") issued a consultation entitled "*A competition regime for growth*," which identified possible reforms of the U.K. competition regime to improve the robustness of decisions, ensure better focus on "high impact" cases, and improve the speed and predictability of investigations.[1] The issuance of this consultation generated a great deal of interest from the business, legal, and academic communities and BIS received 115 submissions from a wide range of contributors. On March 15, 2012, BIS issued a response outlining the decisions that the Government intends to progress (the "Response").

This Alert Memorandum describes the principal decisions contained in the Response and sets out some thoughts on their potential implications.[2] Section I below addresses the decision to merge the competition functions of the Office of Fair Trading ("OFT") and Competition Commission ("CC") into a single competition authority, the Competition and Markets Authority ("CMA") and Sections II, III, IV, and V detail respectively the reforms proposed to the Criminal Cartel Regime, Mergers Regime, Antitrust Regime, and Markets Regime. Likely next steps are discussed in Section VI.

I. THE CMA

The Response explains BIS's decision to create a new CMA (which, like the OFT, will be a Non-Ministerial Department, so that its decision making can be free of political influence) to which the functions of the CC and the competition functions of the OFT will be transferred.[3] According to the Response, the benefits of this merger are "*(1) greater coherence in competition practice and a more streamlined approach in decision making, through strong oversight of the end-to-end case management process, (2) more flexibility in resource utilisation to address the most important competition problems of the day and better incentives for sector regulators to use antitrust and markets tools to deal with competition problems, (3) faster, less burdensome processes for business, (4) a single strong*

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1 BIS Consultation "*A Competition Regime for Growth: A Consultation on Options for Reform*", March 2011. http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657-competition-regime-for-growth-consultation.pdf

2 Annex 1 to this Memorandum contains a list of all decisions proposed in the Response.

3 The CMA may also have consumer enforcement powers. However, the scope of these powers will be subject to the outcome of a separate consultation (the "consumer landscape consultation"), which will be announced shortly.

centre of competition expertise, which can provide leadership for the sector regulators on competition enforcement and a single authoritative voice for the UK internationally; and (5) increased accountability and transparency in public bodies and lead to savings in corporate governance and back office costs."[4]

Importantly, BIS has decided not to change the way in which the CC and OFT have traditionally made decisions (*e.g.*, Phase I decisions will continue to be made under a "Board structure" whereas Phase II decisions will be made by a panel),[5] and so cases will continue to benefit from a "fresh pair of eyes" at Phase II.[6] In addition, the timetables proposed in the Response are, in some cases, markedly longer than the current regime (see below in relation, in particular, to the Mergers Regime) and new measures designed to provide transparency (*i.e.*, over and above the OFT's recent initiative to improve the transparency of its Competition Act investigations) are not proposed.[7] Accordingly, it is not immediately apparent how and why the proposal to replace the OFT and the CC with the CMA will provide "*greater coherence*," a more "*streamlined approach in decision making*," "*faster, less burdensome processes for business*," or "*increased accountability and transparency.*"

As a result, it seems that any benefits arising from the replacement of the OFT and the CC with the CMA will likely be confined to achieving a more flexible allocation of resources, securing cost savings, and establishing a single British advocate on competition matters. The focus on cost-saving is interesting given that, all else equal, a well functioning competition regime is capable of generating significant revenue for the Government. In addition, and perhaps in any event, it is by no means clear that the case for cost savings has been shown given the (potentially significant) costs associated with merging the two bodies, each of which has a different structure and different personality.[8] Indeed the Response itself admits that the "*creation of the CMA is not expected to result in savings over and above those which need to be achieved as a result of the Spending Review, but will facilitate these*."[9] In these circumstances, the case for establishing the CMA is perhaps less than compelling and it is curious that BIS did not progress, or give significant attention to, the proposal to merge the sectoral regulators (Ofcom, Ofgem, Ofwat *etc.*) into the CMA.

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4 Response, pages 5 and 6.

5 Response, page 94.

6 Response, page 99.

7 Response, page 57.

8 Note that BIS's Impact Assessment (http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-758-competition-regime-for-growth-impact-assessment.pdf) suggests that the net cost savings will be in "*staff, accommodation, and supply contracts*" (paragraph 44) and that those savings are expected to be *de minimis*: around £1.4m - £2m in staff savings, £0.6m - £2.8m in accommodation savings, and £0.6m in contracts savings.

9 Response, page 26.

Given the current differences between the OFT and CC (both in governance structure and in personality), a successful merger will depend on a number of factors, including, notably, the choice of Chairman and Chief Executive Officer. Strong leadership and a clear, workable, and effective governance structure should improve the prospects of creating a strong CMA in the near future.

II. CRIMINAL CARTEL REGIME

The most significant, and arguably the most controversial, decision in the Response is BIS's decision to remove the "dishonesty" element from the cartel offence and define the offence so that it does not include cartel arrangements that the parties have agreed to publish in a suitable format before implementation (so that customers and others are aware of them).[10] Although certain exceptions apply (*e.g.*, the cartel offence will not be made out where the agreement in question offers countervailing benefits[11] – which would hardly ever be the case in respect of hardcore cartel agreements), the reform significantly diminishes the standard for the cartel offence. The drivers for this change seems to be the fact that the *Ghosh* dishonesty standard is difficult to prosecute (there have been only two cases prosecuted since 2003), and, as a result, the cartel offence is argued not to have sufficient deterrent effect.[12] BIS considers the move to a lesser standard to be consistent with the definition of other economic crimes, such as insider trading, and that it will not open the floodgates because the offence still requires a *mens rea* or mental element of intention.[13]

BIS's decision is surprising and worrying for a number of reasons:

- First, the decision as to the standard to apply to the criminal cartel offence was not determined by reference to the mischief that the Government is trying to prevent (*i.e.*, hardcore cartel behavior) but by reference to the difficulties associated with prosecution and the number of successful convictions. Indeed, disturbingly, the analysis seems to have been conducted by reference to how many people the Government had expected to imprison and not by reference to the specific conduct to be deterred:

  > "*The Government considers that removing the 'dishonesty' element from the criminal cartel offence will improve enforceability, and increase deterrence, bringing levels closer to what was intended when the offence was introduced. While*

[10] Response, page 72.

[11] Response, page 73.

[12] Response, page 69.

[13] Response, page 69.

> *levels of prosecution were never expected to be high, they were certainly expected to be higher than they have been to date*." [Emphasis added][14]

Difficulty of prosecution is arguably, however, not a basis for expanding the scope of activities that are considered criminal behavior. This is particularly so where, as here, the offence is intended to apply to mid-level executives who may not be privy to the full commercial impact of their actions.[15]

- Second, the notion that conduct should not be forbidden where the existence of an agreement is published in advance is fraught with legal and practical difficulty. For example, there is no clarity on what type of agreements should be published (in particular because the law on "agreements" for the purposes of Chapter I Competition Act 1998 is not mature), what level of detail would be sufficient or who should publish them (given that the cartel offence is a personal offence and the agreement is entered into by the company). Indeed, the significance of the consequences and legal/practical uncertainties may lead companies to publish many agreements out of an abundance of caution. Such notifications have serious implications on the ability of businesses to negotiate confidentially perfectly legal agreements, such as mergers and joint R&D agreements, and might also put British businesses at a disadvantage when compared to other jurisdictions.

- Third, even if "difficulty in prosecution" is a relevant consideration for the reform of the standard for the cartel offence, the fact that the newly proposed standard is "consistent with" the standard for insider trading does not mean that the regime will be any more effective. Insider trading prosecutions in the U.K. are rare and the manner of prosecution is also the subject of criticism. In addition, a standard less than dishonesty may not be appropriate for cases where the customer assists in the *actus reus*.

- Fourth, the approach of requiring companies to publish their agreements in the London Gazette (or similar publication) might have negative consequences for damages claims based on cartel behavior, as one might argue that the relevant limitation period runs from the date the agreement was published. If that is the case, a number of possible claims will potentially be time-barred, in particular if the claimant wishes to wait to gain the benefit of a competition authority's decision as regards liability.

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[14] Response, page 69.

[15] Response, page 73.

- Fifth, given that publishing an agreement in the London Gazette (or similar publication) would not provide any protection from civil actions, it remains unclear whether (and if so, how) this obligation would have any impact on the OFT/CMA's leniency policy.

Analysis of the proposed reform of the cartel offence therefore raises a number of important concerns. In particular, the proposal suggests an unfortunate desire to imprison individuals so as to have a deterrent effect without sufficient focus on the conduct that those individuals engaged in. At best, and at the very least, the proposal gives rise to more fundamental questions than the Response addresses, still less provides answers to.

III. THE MERGERS REGIME

In the Consultation, BIS stated its view that the principal perceived failures of the Mergers Regime were that (1) the voluntary nature of notifications could mean that it was more difficult to apply remedies in completed transactions (the so-called "unscrambling the eggs" problem), (2) certain potentially anticompetitive mergers were escaping review, and (3) the merger process was not streamlined.[16] BIS therefore proposed to consider whether another type of regime (*e.g.*, a mandatory or hybrid mandatory/voluntary notification system) or amendments to the jurisdictional thresholds and process were necessary or appropriate. Each of these aspects is dealt with in turn:

- **Voluntary Regime**. In its Response, BIS has decided to maintain the voluntary regime, albeit with some amendments (*e.g.*, statutory time limits for all aspects of the merger review process, statutory information gathering powers, statutory power to suspend and reverse integration steps, and to introduce fines, alongside judicial remedies, for the failure to comply with hold separate requirements).[17] The proposals neatly compromise the need to have a strong mergers regime capable of enforcing effective remedies with the ostensibly strong desire from the business and legal community to maintain a voluntary regime. Provided that the principles are properly implemented, it seems possible to achieve the objective of a *de facto* suspensory period while a review is being conducted. That said, some important questions nevertheless remain. For example, it remains to be seen when and how the CMA will apply these powers. Blanket application in all cases risks unnecessarily decelerating the pace of pro-competitive mergers. Accordingly, targeted use on a case by case basis (*e.g.*, where the CMA has reasonable grounds to believe that the transaction may have an anti-

[16] Response, pages 40 and 41.

[17] Response, page 40.

competitive impact) would seem more proportionate and achieve the legitimate aims.

- **Jurisdictional Thresholds**. Given the decision to maintain a voluntary regime, the Response proposes to maintain the current jurisdictional thresholds and not empower the CMA to have jurisdiction over *all* mergers save those that are exempted by a small mergers exemption.[18] Whilst the decision not to grant the CMA jurisdiction over all mergers is to be welcomed, the fact that BIS chose not to analyze in any detail the issue of whether the current jurisdictional thresholds remain appropriate (*i.e.*, whether they allow the CMA to have jurisdiction over the right types of cases) is a missed opportunity. When considering the reforms, BIS's objective seems to have been to examine whether a mandatory regime would have the "*same scope*"[19] as the current voluntary regime but this ignores entirely the question of whether the current scope is appropriate. Accordingly, as is the case today, the scope of review will be left, in large part, to the CMA and the risk that potentially anticompetitive mergers progress without review remains real.

- **Timetable**. BIS proposes to introduce statutory time limits to the review process: 40 working days for Phase I capable of extension where information is outstanding; 24 weeks for Phase II, extendable by 8 additional weeks; and a total of 50 working days from Decision to finalize remedies. The statutory Phase I review period will now be one of the longest in the world. By way of example, the European Commission has 35 working days to consider a merger (including proposed remedies) and adopt a decision. The equivalent period for the OFT is up to 90 working days (though a Decision would be rendered on working day 50). In addition, given that notification by way of a Statutory Merger Notice (which had a shorter review period) will no longer be available, parties will not have the option to expedite a review. Accordingly, perhaps despite the good intentions (*e.g.*, BIS was concerned to ensure that the availability of remedies did not impinge upon the CMA's decision of whether or not a merger is anticompetitive), it is difficult to see how BIS's decision streamlines the process.

In addition, BIS proposes to increase merger fees to achieve approximately 60% cost recovery.[20] The rationale for such an increase (despite vociferous opposition from business

[18] Response, page 43.

[19] Response, page 42.

[20] Cost recovery will not be introduced in antitrust investigations, there will be one-way cost recovery for telecoms appeals, and the CAT will apply a system of optimal cost recovery. Response, pages 121 and 122.

and the legal community) is that the costs of merger control should not be borne by the taxpayer. The new merger control fees, effective October 2012, are as follows:

Value of the U.K. turnover of the enterprise being acquired	Fee
£20 million or less	£40,000
>£20 million, but not >£70 million	£80,000
>£70 million, but not >£120 million	£120,000
>£120 million	£160,000

IV. ANTITRUST REGIME

The Response considers carefully perceived failings of the Antitrust Regime (notably the low number of cases and unsuccessful prosecutions, the duration of the investigations, and the fact that the OFT is currently the investigator, prosecutor, and decision maker). The focus is likely to be, in large part, as a result of the submissions of a number of respondents who addressed this issue and because of the active debate on this topic that exists at the EU level. BIS has decided, however, not to amend the current structure of the regime (*e.g.*, not to move to a prosecutorial model or to amend the internal structure of decision making) principally because the OFT's recent *Competition Act Procedures Guidance* (published in March 2011) adopts measures designed to quell concerns (*e.g.*, the Guidance itself proposes changes to the decision making to avoid confirmation bias and make decisions more robust).

Although the OFT's Guidance is unquestionably a step forward, concerns remain because the procedures themselves remain largely untested. BIS seems to have recognized this by requiring the OFT to consider further how it might ensure procedural fairness, expand the role of the Procedural Adjudicator, enhance "independence of mind," and improve its project management capabilities. In addition, BIS intends to adopt legislative measures to enhance the Antitrust Regime (*e.g.*, introduce a statutory time limit for investigations, require a separate decision maker from the person responsible for the investigation, require the use of adjudication panelists in antitrust cases, require the Secretary of State to review the operation of the Antitrust Regime within 5 years of the commencement of the relevant provisions, and ensure that financial penalties imposed should reflect the seriousness of the infringement and the need to reduce the incidence of infringement through specific and general deterrence).

BIS also proposes to make some refinements to the OFT's procedures (*e.g.*, introduce a civil sanction for failing to comply with an investigation; allow the OFT to obtain a warrant from the Competition Appeal Tribunal, as well as the U.K. High Court; allow the OFT to make announcements before the adoption of a Statement of Objections or

infringement decision, but noting that the scope of the announcement must be appropriately framed; and lowering the standard for the use of interim measures from "*serious, irreparable harm*" to "*significant damage to a particular person or category of persons*").

The proposed amendments to the Antitrust Regime demonstrate that, at the very least, the U.K. Government and its antitrust agencies are alive to the drawbacks of the current model whereby the OFT is investigator, prosecutor, and decision maker (*e.g.*, the potential for confirmation bias to impact the robustness of decisions). Although BIS stopped short of a structural change such as moving to a prosecutorial model, the ongoing review requirements suggest that this issue will still be considered closely in the future.

V. THE MARKETS REGIME

The Response seeks to address complaints that the Markets Regime is too complicated, duplicative, lengthy, and disjointed.[21] In order to address these concerns, BIS intends to introduce statutory time limits and confer information gathering powers upon the CMA (with civil penalties for failure to comply) at the market study phase before a reference is made, creating a formal Phase I. It will also afford the CMA some flexibility in the manner in which investigations are conducted (*e.g.*, an ability to investigate across markets and to consider public interest issues alongside competition issues). In addition, the CMA will be empowered to require companies to appoint a trustee to monitor and arbitrate the implementation of any remedies imposed and to publish certain "non-price" information.

The bolstering of the CMA's powers in the Markets Regime may reveal an intention to use market investigations more often than is currently the case (though the extent to which these powers are used will depend *inter alia* on many factors, including the personalities of the leadership at the CMA). The more formalized structures should function to make the procedures more transparent. That said, given that the proposed statutory timetable could mean that investigations last nearly four years (with extensions), the prospects of a faster and cheaper process are less than secure and it will now be key to ensure that the focus of any investigations is well directed (*i.e.*, that the market(s) selected for investigation are truly not working well). It will also be important to ensure that the new trustee process is properly implemented (*e.g.*, businesses are not being required to publish information that is objectively confidential or sensitive).

VI. CONCLUSION AND NEXT STEPS

Certain of the proposed reforms will be subject to changes in primary legislation (*i.e.*, principally to the Enterprise Act 2002 and the Competition Act 1998). These amendments will proceed through Parliament in the ordinary course (and subject to Parliamentary timing and approval). In parallel, the U.K. Government will implement those

[21] Response, page 28.

other reforms that are not subject to Parliamentary approval and will consult on changes to the consumer enforcement regime and the recovery of CAT costs. The Government's consultation will be in addition to the OFT's consultation on its antitrust enforcement processes. BIS expects the CMA to be fully operational by April 2014. In the meantime, the business, legal, and academic communities will watch with interest how a number of important questions are answered (*e.g.*, the appointment of the Chairman and CEO) and how the issues raised above will be addressed.

Please feel free to contact any of your regular contacts at the firm or any of our partners or counsel listed under "Antitrust and Competition" in the "Practices" section of our website (http://www.clearygottlieb.com) if you have any questions.

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Annex 1 - Summary of the Government's Decisions

The Government has decided:

Why reform the competition regime?

- **To create a new Competition and Markets Authority and transfer the functions of the CC and the competition functions of the OFT to it.**

A Stronger Markets Regime

- The CMA will have the power to **investigate practices across markets**.
- **Not to extend the super-complainant mechanism to SME bodies.**
- The Secretary of State will have the power to request the CMA to investigate **public interest issues** alongside competition issues.
- To introduce **statutory time limits and information gathering powers** for all stages of the markets process, including:
    - Statutory time limits and information gathering powers for market studies (phase 1) that will require the CMA to **consult on making an MIR within 6 months of launching a market study, where such an outcome is being considered, and concluding all studies within 12 months**. The OFT's current criminal penalties will also be replaced with civil penalties for failure to comply with information gathering requirements.
    - **Reducing statutory time limits for phase 2 market investigations (phase 2) from 24 to 18 months**, with powers to extend these by 6 months in special circumstances.
    - **6 Month statutory time limits for the CMA to implement phase 2 remedies** with powers to extend these by 4 months.
- To amend Schedule 8 to the Enterprise Act 2002 (EA02) to enable the CMA to require parties **to appoint and remunerate an independent third party to monitor and/or arbitrate on the implementation of remedies;** and to require parties to **publish certain non-price information**.
- To **clarify in legislation the type of interim measures that the CMA could take at phase 2.**

- Proposals to move to a **single stage process for the review of remedies, with new statutory time limits** are not a high priority at this time.

- **Not to change the current *'change of circumstances'* threshold for the review of remedies.**

- Proposals to **clarify that the powers of investigation and requirements relating to timelines apply if a decision of the CMA is quashed** and the matter is remitted back to it for a new decision are not a high priority at this time.

- **Micro businesses and start-ups will not be subject before 1 April 2014 to the CMA's new information gathering powers for market studies and market investigations remedies implementation.**

- To **remove the duty of the CMA to consult on decisions not to make an MIR unless any person has expressly asked for a reference to be made during a Market Study.** The CMA will have a duty to consult on decisions to make an MIR.

- There is **no need for further legislation to improve the interaction between MIRs and antitrust enforcement.**

A Stronger Mergers Regime

- To **strengthen the voluntary notification regime**.

- To **introduce statutory time limits for all parts of the merger review process**.

- The CMA should have the **discretion to trigger a power to suspend all integration steps** pending negotiation with the CMA.

- To **clarify in legislation the interim measures that the CMA could take at phase 1 and phase 2**.

- To introduce financial **penalties which will apply to integration measures** taken in breach of CMA orders, with a maximum penalty of 5% of aggregate group worldwide turnover of the enterprises concerned.

- To introduce a **time limited period after the phase 1 decision where merging parties could offer and negotiate UILs.**

- To have **specific time periods for different aspects of the UIL process** so as to mitigate against any adverse impact on the markets.

- That there should be a **possibility of extension to the UIL time limits.**

- To have the possibility of a **longer extension to time limits in cases where the CMA decides that an upfront buyer is needed.**

- **Micro businesses and start-ups will not be subject before 1 April 2014 to the CMA's new information gathering powers at phase 1and the UIL process of merger inquiries and phase 2 remedies implementation of merger cases.**

- To amend Schedule 8 to the Enterprise Act 2002 (EA02) to enable the CMA to require parties **to appoint and remunerate an independent third party to monitor and/or arbitrate on the implement of remedies;** and to require parties to **publish certain non-price information**.

- **Not to change the current *'change of circumstances'* threshold for the review of remedies.**

A Stronger Antitrust Regime

- To **embed an enhanced administrative approach to antitrust enforcement**, involving improvements to the speed of the process, and the robustness of decision-making, addressing perceptions of confirmation bias. This will include means of bolstering the separation between investigation and decision-making.

- To put in place **a performance framework to ensure the improvements will be fully delivered** and will prove effective in practice; and a process for review of progress and report to Parliament.

- To take **a power for the Secretary of State to introduce statutory time limits for cases**, to be exercised should reductions in the time cases take not be forthcoming.

- To legislate that **financial penalties should reflect the seriousness of the infringement and the need to deter and that the Competition Appeal Tribunal (CAT) must have regard to the statutory guidance on the appropriate amount of a penalty**.

- To provide for the competition authorities to impose **civil financial penalties on parties who do not comply with certain formal requirements during antitrust investigations** and to remove the current criminal sanctions (they would remain for falsifying, destroying documents etc).

- To provide for applications **for a warrant authorising entry to premises by force to be made to the CAT** (as well as the High Court and Court of Session).

- To provide in the case of antitrust investigations, and subject to certain safeguards, **a similar power to require a person to answer questions as exists in relation to the criminal cartel offence**.

- To provide explicitly that **absolute privilege from defamation attaches to a notice by a competition authority regarding the existence of an antitrust investigation**.

- To **lower the threshold before interim measures can be imposed**, so that they would require there to be a perceived need to act for the purposes of preventing significant damage to a particular person or category of person.

The Criminal Cartel Offence

- To adopt a version of Option 4 - remove the 'dishonesty' element from the offence and define the offence so that it does not include cartel arrangements that the parties have agreed to publish in a suitable form (which could be the London Gazette) before they are implemented, so that customers and others are aware of them.

- In the very rare cases where businesses operate arrangements that fall within the scope of the offence but that nevertheless offer **countervailing benefits, a limited disclosure to customers** of the aspects of the arrangements within the scope of the offence can be made by businesses in order to trigger the availability of the exclusion.

- There will be a **short transitional period** prior to introduction of any revision to the cartel offence.

- **Not to adopt any of the respondents' alternative proposals** for improvements to the cartel offence.

Concurrency and Sector Regulators

- To **retain the concurrent competition powers of the sector regulators**.

- **Strengthen the primacy of CA98**, by requiring sector regulators with concurrent powers to consider CA98 first when they have a choice between enforcing CA98 and using their sectoral powers.

- To **encourage the CMA to be a more proactive central resource** for the sector regulators.

- To give the **CMA a bigger role in the regulated sectors**, by requiring the competition authorities to **share more information** about CA98 cases involving the concurrent sectors, and give the **CMA the power to take CA98 cases** from the sector regulators where it is better placed to proceed with the case.

- The CMA will be required to **report on the use of concurrent competition powers across the competition authorities.**

- The CMA will **not be required to undertake a rolling programme of market reviews** in the regulated sectors.

Regulatory References and Appeals and Other Functions of OFT and CC

The Government has decided:

- To transfer the **CC's roles in determining regulatory appeals and references and in Energy Code Modification appeals to the CMA**.

- **Not to legislate, as part of the competition reform process, to harmonise the regulatory appeals and reference processes**.

- To **develop model processes** for regulatory appeals and references.

- To **transfer the ancillary competition roles of the CC and OFT** to the CMA with respect to: local bus schemes or agreements, access arrangements under the Payment Services Regulation and legal services regulation.

- The **CC and OFT's role in keeping under review the regulating provisions and practices of the FSA, recognised clearing houses and recognised investment exchanges will be modernised under the *Financial Services Bill*.**

- To **repeal the provisions of the Competition Act 1980** that provide the Secretary of State with powers to refer to the CC any question relating to the efficiency and costs of, the service provided by, or possible abuse of a monopoly situation by, various public bodies and providers of bus services in Northern Ireland or rail passenger services in London.

Scope, Objectives and Governance

- To give the CMA a **primary duty to reflect the role the Government sees for the CMA in promoting effective competition in markets, across the UK economy, for the benefit of consumers'.**

- The CMA will be constituted as a **Non Ministerial Department.**

- **The scope of the CMA's role in purely consumer protection issues will be decided following the conclusion of the Government's consultation on the consumer landscape.**

- The CMA will be accountable to Parliament.

- To legislate for the establishment of a **CMA Board.**

Decision-Making

- The **separation of phase 1 and phase 2 decision making** in mergers and markets cases, and ring fencing of regulatory appeals will be provided for in legislation.

- Legislation will provide for **phase 1 decisions in mergers and markets cases decisions to be the responsibility of the CMA Board**.

- Legislation will provide that **those decisions currently taken by the CC will be the responsibility of groups of independent panellists**, drawn from a pool of panellists and appointed to investigate and report on the inquiry to which they are appointed.

- The detail of decision-making on antitrust cases will need to reflect the Government decisions on implementing the separation of investigation and decision-making under the procedural rules but the legislation will not prevent the use of CMA panellists.

- To **retain the processes for appointing individuals to panels which currently apply to the CC under** schedule 7 to CA98.

- **There may be benefits to panellists having a greater time commitment** to the CMA, but will not legislate for this as it is possible under the current legislative framework.

- **Staff resourcing of cases, in particular the ability of staff to follow a case from phase 1 to phase 2, is an issue that is best left to the CMA** to determine for itself.

- The **maximum duration of terms of appointment of panellists will remain 8 years**, as is currently the case for CC members.

- The **CMA will be required to publish procedural rules and guidance, including decision making structures and details of delegated** authorities.

Merger Fees and Cost Recovery

- **To increase merger fees to achieve approximately 60% cost recovery from October 2012.** This will involve the introduction of a new fee band and increases in each fee band as shown in the table below.

Value of the UK turnover of the enterprise being acquired	Current level	New level
£20m or less	£30k	£40k
Over £20m but not over £70m	£60k	£80k
Over £70m but not over £120m	£90k	£120k
Over £120m	£90k	£160k

- **To not introduce cost recovery in antitrust investigations.**

- **To introduce a system of one-way cost recovery for telecoms appeals**, in which appellants are liable for the CMA's cost to the extent that their appeal is unsuccessful. The Government has decided that interveners should also be liable for the costs to the CC caused by their intervention, again to the extent to which the side on which they intervened lost. The exact costs figure for each appeal should be determined at the discretion of the CMA.

- **On a policy of optimal cost recovery for operating the CAT**, in which costs are recovered from the majority of parties, but where the CAT has discretion to waive these in the interests of access to justice.

Overseas Information Gateways

- **Not to make any changes to overseas information gateways.**