

PRESS RELEASE

City of London Law Society's response to BIS consultation on Reforming the UK Competition Regime

Earlier this year, the Government published a consultation document entitled "A Competition Regime for Growth: a Consultation on Options for Reform". The consultation period recently closed (13th June 2011). The proposed reforms discussed in the consultation document represent the most comprehensive revision of the UK competition system since 1973, and involve much more than the Government's declared intention to merge the Competition Commission and the OFT into a unitary competition authority .

The Competition Law Committee of the City of London Law Society (CLLS) has now submitted a response to the consultation in which it has set out its views on the proposed reforms. The Committee's response to the consultation is presented in the spirit of highlighting the legal and practical implications of the reform proposals, drawing on the Committee's collective experience of many eminent competition law practitioners, to inform Ministers' deliberations and the wider debate.

A copy of the full Competition Law Committee response to the consultation is available on the CLLS website at <http://www.citysolicitors.org.uk/FileServer.aspx?oID=1030&iID=0> . It covers a range of issues including:

- a call for greater fairness in cartel investigations
- for mergers, opposing the proposal to replace the current voluntary system for notifying mergers with a compulsory system, which the Committee sees as imposing an unnecessary regulatory burden on business
- a demand that, within the unitary authority, merger and market investigations continue to involve two phases, with a fresh pair of eyes in the second phase to avoid unfairness
- opposing the proposal to change the criminal offence for cartels at this stage before the new rules (which were introduced in 2003) have a time to prove themselves
- pointing out the dangers of higher fees being imposed on businesses by the competition authorities

The Committee looks forward to contributing further to the debate both in the formal consultation and, to the extent that Ministers and officials in the Department for Business, Innovation and Skills (BIS, which is the sponsoring Department) might find it helpful, more informally.

The CLLS represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

Commenting on the CLLS response to the BIS consultation, **Robert Bell, Chairman of the Competition Law Committee at the CLLS and Competition Partner at Speechly Bircham LLP** said, "*Whilst we welcome certain of the Government's proposals we have serious concerns about the proposed changes to the Cartel Offence and in particular about the introduction of a mandatory merger control regime in the UK. Mandatory merger control*

would result in the imposition of unnecessary regulatory burdens on business and be another impediment to economic recovery"

Bell continued *"The Government's proposals represent the most significant change to the UK competition enforcement institutions for nearly 40 years and it is important the Government makes the right choices. We hope to have highlighted in our report to Government the direction of travel that would most benefit business, help further stimulate economic recovery and balance the rights of companies under investigation.*

Michael Grenfell, Chairman of the CLLS Working Party on Competition Reform and Competition Partner at Norton Rose LLP, added, *"This is a huge potential reform of the UK competition system - with a huge potential impact on British business, and international companies doing business here. We welcome many of the proposals, but are determined to ensure the removal of elements that impose unnecessary regulatory burdens on business. The consultation has been a valuable opportunity for business lawyers with expertise in competition law to explain their concerns to Government. We have been impressed by the willingness of the Government to listen so far, and we look forward to that productive process continuing."*

The CLLS Response

Whilst being generally supportive of certain aspects of the proposals, the CLLS has considerable concerns about other areas earmarked for reform in the Consultation.

Specifically, on the substance, the Committee strongly supports and advocates:

Greater procedural fairness in antitrust: We endorse the proposals that, in investigations under the prohibitions - so-called "antitrust" - greater fairness could be achieved if there were a proper separation of powers between the investigators and those taking the final decision and possibly imposing penalties. We see such proposals as necessary to redress the inherent unfairness of a single group of officials being investigator, prosecutor, judge and jury - the problem of "confirmation bias".

On balance, we favor a modified form of Option 2 - the key features being (i) a second phase of antitrust investigation to be conducted within the CMA by a group of independent decision-makers separate from the original investigating team (essentially the independent decision-makers who make the Phase 2 market and merger decisions) (ii) but with no need for a full internal tribunal (iii) crucially, retention of a full merits appeal to the CAT.

Retention of voluntary merger notification: We welcome the consultation paper's recognition that mandatory merger notification is not necessarily the right way forward; indeed, we believe that it would be very damaging (see below). We believe mandatory merger notification represents an unnecessary regulatory burden on parties to mergers raising no competition issues, and would have the perverse effect that innocuous mergers would be caught by the regime while, as a consequence, many mergers with anti-competitive effects would escape scrutiny; - moreover, our analysis of completed mergers considered by the Competition Commission in recent years does not suggest a major crisis of completed anticompetitive mergers that would warrant the draconian legislative change to mandatory merger notification. We welcome the consultation paper's identification of more proportionate, and practical ways to address concerns about completed mergers by strengthening interim measures (prohibiting the parties to put a merger into effect until clearance or prohibition), including the possibility of an order to reverse integration. We favor giving the CMA the discretion to apply these interim measures at an early stage.

Two Stage Decision Making Process for Merger and Market Investigations: -If there is to be a single CMA, the Committee welcomes, and considers essential that there should be a "fresh pair of eyes" in both the decision making processes of merger and market investigations to avoid confirmation bias. The Committee welcomes the proposals that, within a single CMA, the decisions in "Phase 2" of both merger control and markets processes should be made by different people from those conducting the initial examination at "Phase 1" - so as to minimise the dangers of "confirmation bias" that might otherwise arise from an amalgamation of the two existing competition authorities; The committee also strongly supports the proposal that those "Phase 2" decision-makers within the CMA should be senior and experienced individuals to which the companies under investigation have access, and who are of roughly equivalent status and experience to those senior management executives of the investigated companies who appear before them.

The Committee has serious concerns about the following issues:

Cartel Offence:- The Committee has a number of serious concerns about those proposals relating to the cartel offence. We do not believe that there are grounds, at this stage, to remove the "dishonesty" element in the offence.

Mandatory Merger Control:-As mentioned above we believe mandatory merger notification represents an unnecessary regulatory burden on parties to mergers raising no competition issues, and would have the perverse effect that innocuous mergers would be caught by the regime while, as a consequence, many mergers with anti-competitive effects would escape scrutiny.

Fees for Merger Control and Antitrust Investigations:- The Committee considers the proposals relating to merger control fees, and to ability to charge guilty parties in anti-trust investigations, disproportionate and excessive in the case of mergers, contrary to proper principles of the administration of justice in the case of antitrust investigations, and out of line with international best practice in the case of both.

SME "super-complaints" in market investigations:- The committee does not consider it is appropriate to confer privileged status on SME's as a class. If the Government is anxious to ensure SME's as a business grouping are adequately heard and represented with in the CMA we would advocate the establishment of an SME desk within the CMA to specifically focus on SME issues and concerns.

ENDS

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