

## **City of London Law Society Response to the Government's Announcement of its Proposed Reforms to the UK Competition Regime**

Today, 15th March 2012, the Government published its proposals for the reform of the UK Competition Regime.

These proposals followed an extensive consultation exercise conducted by the Government which closed in June last year in which it outlined its options for change. (see "A Competition Regime for Growth : a Consultation on the Options for Reform")

The **City of London Law Society (CLLS) Competition Law Committee** submitted its detailed views in response to the Government's Consultation paper and has been working closely with Government to develop detailed proposals.

Commenting on the Government Proposed Competition reforms, **Robert Bell, Chairman** of the **CLLS Competition Law Committee** and Competition Partner at **Speechly Bircham LLP** said:

*"In broad terms we strongly support the Government's competition reforms. The proposed reforms show they have listened very carefully to our detailed views."*

*"We particularly endorse the proposals on injecting greater fairness into antitrust investigations which is vital to retain business confidence in the regulatory process. In addition the retention of voluntary merger control is a positive boost to promoting growth investment and confidence in the UK economy. The Government has rightly turned its back on imposing mandatory notification which would have imposed an unnecessary regulatory burden on business."*

Bell continued ...*"On the negative side however, we have serious concerns about the proposal to remove the dishonesty element from the Cartel Offence (S188 Enterprise Act 2002). In addition the offence will not be made out if the parties have published details before it is implemented.*

*We look forward to seeing the Bill to study the proposals in more detail. But our feeling is that such a change is premature given that so few cases have come before the Courts.*

*Enforcing the new offence is likely to be problematic. The Government does say it will need to be subject to a required intent to enter into a cartel agreement but it is not clear how this will be implemented. In addition the removal of the dishonesty element will utterly transform the offence lowering the bar to criminal prosecution and giving rise to potential injustices".*

**ENDS**

## **City of London Law Society Response to the Government's Announcement of its Proposed Reforms to the UK Competition Regime**

The CLLS generally supports the Government's Competition reforms but does have serious concerns about a number of elements. We have set out below the Government's proposals on each of the main areas and CLLS' views. It will be seen in the vast majority of cases the Government's proposals closely follow the CLLS preferred option.

### **(i) Unitary Competition Authority**

**Government Proposal:** The ("OFT") and the Competition Commission ("CC") will be merged into a single Competition and Markets Authority ("CMA").

**CLLS View:** The Committee is generally ambivalent over the creation of a single unitary competition authority in the CMA. Many of the reforms can be enacted regardless of whether the OFT and the CC remain separate entities or become a merged entity. We do not see likely cost savings flowing from the amalgamation. However the Committee does recognise efficiency benefits and the prospect of uniform guidance on key competition and structural market issues are likely to follow from their combination.

### **(ii) Antitrust**

**Government Proposal:** There will be reforms to provide greater procedural fairness in anti-trust investigations. There will be a separation of powers between the investigators and those taking the final decision and imposing the penalties. This will be based on the existing administrative model operated by the OFT but will be enhanced through the introduction of identified decision makers including the involvement of independent experts possibly from the CMA merger and market investigation panel. There will be specific statutory provisions to ensure those responsible for final decisions on a case will be different from those carrying out the investigation. The reforms stop short of the establishment of a separate tribunal. Full merits appeal to the Competition Appeal Tribunal will be retained. In addition the Government will legislate that financial penalties should reflect the seriousness of the infringement and the need for deterrence. The CAT must have regard to this statutory guidance.

The Government will also introduce timetables for anti-trust investigations to improve performance and standards. Criminal penalties will be replaced by civil penalties for non-compliance with investigations.

**CLLS view:** The CLLS strongly believes that in investigations under the Competition Act 1998 – so called antitrust – greater fairness could be achieved if there was a clear separation of powers between investigators and those taking the final decision and possibly imposing penalties. These proposals are necessary to redress the inherent unfairness of a single group of officials being investigator, prosecute, judge and jury – the problem of confirmation bias

### **(iii) Merger Control**

**Government's Proposals:** The voluntary system of merger control will be retained along with the current thresholds. There will be no small mergers exception. Mergers will be

investigated at both Phase I and II subject to new statutory time limits. There will be an enhanced system of interim measures giving the CMA discretion to use its greater powers to ensure there is no integration between businesses during the regulatory investigation period. These measures will be backed up by substantial financial sanctions of up to 5% of worldwide turnover. The CMA will be able to order steps to reverse any integration which has taken place.

Greater transparency will be injected into the end of Phase I merger investigation process. If the CMA is minded to refer a merger to a Phase II investigation it will announce a provisional decision to refer. There will then be a new statutory window in which the parties can offer and negotiate acceptable undertakings to combat the perceived anti-competitive effects. There will also be a new 12 week statutory time limit from publication of the final report in Phase 2 cases for implementation of remedies (subject to extensions)

**CLLS Views:** The Committee is glad to note that Government has decided against introducing mandatory merger notification. Mandatory merger notification would have represented an unnecessary regulatory burden on parties to mergers raising no competition issues and would have the perverse effect that innocuous merges would be caught by the regime while as a consequence many mergers with anti-competitive effects would escape scrutiny. The Committee strongly agrees with the Government on the retention of the current voluntary notification regime, and the retention of the existing thresholds under the Enterprise Act 2002. It does also recognise that powers to impose interim measures (prohibiting the parties putting a merger into effect until clearance or prohibitions) need to be strengthened and be backed by proportionate sanctions. We favour giving the CMA the discretion to apply these interim measures at an early stage. The Government's proposals are therefore to be welcomed.

#### **(iv) Two Stage Decision - making Process for Mergers and Market Investigations**

**Government's Proposal:** There will be independent separate decision makers in Phase II investigations within the CMA composed of senior business executives, lawyers and economists, roughly equivalent to the Competition Commission panel but small in number. The Government will also legislate to establish a separate CMA Board to be responsible for Phase I investigations, overall strategy performance, rules and guidance

**CLLS view:** The CLLS notes that the Government has accepted the CLLS' views on this issue. The Committee considers it essential that there should be a fresh pair of eyes in both the decision making process of merger and market investigations to avoid confirmation bias. Therefore within a single CMA decision in Phase II merger and markets investigation decisions should be made by different people from those undertaking the initial examination at Phase I so as to minimise the danger of confirmation bias that might otherwise arise from an amalgamation of the two existing competition authorities. The Phase II decision makers within the CMA should be senior and experienced to which the companies under investigation would have access.

#### **(v) Cartel Offence**

**Government Proposal:** The Government proposes to remove the element of dishonesty from the Cartel Offence. The offence will not be made out if the agreements are published.

**CLLS View:** The Committee has a number of serious concerns about the proposal to remove the dishonesty element from the offence. We think reform is premature as there have only been two cases come before the Courts since its introduction in S188 of Enterprise Act 2002. However we look forward to seeing a copy of the draft Bill to study the proposals in more detail.

#### **(vi) Fees for Merger Control and Antitrust Investigations.**

**Government Proposal:** There will be an increase in merger control fees but not by as much as proposed in the consultation document. No fees will be levied in relation to antitrust investigations.

**CLLS View:** The Committee welcomes the Government announcement that no fees will be levied on guilty parties in anti-trust investigations. In the CLLS' view charging such fees would be contrary to the proper principles of the administration of justice.

The Committee is against any increase in merger control fees. Although the increases are not as high as proposed under certain options in the Consultation the increased fees represent an additional unnecessary burden on business and tax on investment in the UK economy. They are also out of tune with international best practice.

#### **(vii) Market Investigations**

**Government's Proposals:** The CMA will have statutory powers to request information from parties in Phase I market studies. If a Market Investigation Reference ("MIR") is contemplated a market study must be completed within 6 months. If not market studies which propose possible consumer remedies or recommendations to Government can continue up to 12 months.

MIRs will have to be completed within 18 months, down from the present 24 months. There will be express statutory powers to allow the CMA to conduct cross market investigations and the Secretary of State will be able to make MIRs on public interest grounds. Independent experts will be added to the CMA competition panel to advise on public interest.

The Government has decided not to give SME's or other representative bodies privileged status to make super complaints in Market Investigations.

**CLLS Views:** The CLLS supports the introduction of statutory time limits on market studies and the introduction of information gathering powers for the CMA. The introduction of tighter time limits for Phase II Market Investigation is also supported.

However, the CLLS is very much against the further politicization of the market investigation process. The power for the Secretary of State to make a MIR on public interest grounds and for the CMA to report on the competition based issues present already exist but has not been used. However the new proposals will allow the Secretary of State when making such an MIR to co-opt independent experts to the CMA Phase II Competition panel to report on public interest issues along side the CMA competition panel. This muddies the duties of the CMA as a competition authority to scrutinize markets solely on competition grounds.

The CLLS is very much against conferring any privileged status on SME's as a class and allowing them on their representatives to have the power to file super complaints in MIRs.