NOTE ON PREVIOUS PROPOSALS TO MERGE THE OFT AND CC FUNCTIONS

This note gives a very brief account of the relevant institutional history. It is not a full account of the various processes of reform.

The idea of having a single competition authority in the UK is not new. Indeed, the 1948 progenitor of the CC, the Monopolies and Restrictive Practices Commission, was a single body. Its own recommendation led to the creation in 1956 of the office of Registrar of Restrictive Trading Agreements which in 1973 became OFT.

From about the late 1970s onwards, institutional ideas were in play, influenced in part by the existence in Brussels of a single "Commission" subject to judicial control by the ECJ and later the CFI. However, neither the 1978 or 1979 Liesner Committee reviews[1] recommended major changes in the institutional structure, but its 1988 review of Restrictive Trade Practices Policy[2] recommended a new decision-making authority to apply the proposed Article 81-type reformed system of competition law in the UK. The Liesner Committee expressly rejected a two-authority approach for Article 81-type cases, describing possible MMC involvement as "a remarkable extension of the MMC's function" (paragraph 6.16). The subsequent 1989 White Paper[3] proposed decisions to be taken by the DGFT on Article 81-type cases, appealable to an "independent tribunal" drawn from reporting side members of the MMC – the first signs of what was to become the CAT. Nothing came of any of this.

In 1991 the Trade and Industry Committee published a Report[4] on Takeovers and Mergers, specifically recommending a new authority, the Competition and Mergers Authority, to combine all existing OFT and MMC work on competition, including monopolies, restrictive practices and mergers, leaving the OFT confined to a consumer protection rôle. The *Evening Standard* headline on 19 December 1991 was "MPs call for single body to police bids".

DTI's 1992 green paper on "Abuse of Market Power"[5] considered whether to retain existing monopoly controls, to replace them with an Article 82-type prohibition, or to do both (more or less what eventually happened). On the basis that a prohibition -type system would be introduced, it proposed that the DGFT (as was) would decide on breaches of the prohibition

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[1] Cmnd 7198 (1978), Cmnd 7512 (1979).
[2] Cm 331 (1988).
[3] "Opening Markets", Cm 727 (July 1989).
[4] First Report 1991–92 No 90, 27/11/1991.
[5] Cm 2100 (November 1992).

but his decision would be appealable to an "independent tribunal", as had been envisaged in 1989 for the Article 81-type prohibition. The DTI further proposed that the OFT and MMC would retain their separate functions in relation to monopoly control.

So by 1991, there had already emerged the bones of the present structure namely two separate authorities handling monopolies and mergers, but a single authority applying Article 81/82 prohibitions. The difference from what applies now is that the reviewing tribunal was seen as part of the MMC, so the exclusion from applying the prohibition system did not disempower the MMC – far from it.

In 1995 the issue re-emerged somewhat explosively in the form of the Trade and Industry Committee's Report on UK Policy on Monopolies.[6] This recommended the replacement of the OFT and MMC by a "single Competition Authority headed by a small number of full-time Commissioners who would decide together on cases prepared independently by the Secretary General and officials of the Authority" with a right of appeal "to the courts" on judicial review grounds (paragraph 143).

This report also recommended abolishing the FTA monopoly controls and replacing them with a sector inquiry power as part of the Article 82-type prohibition system (modesty prevents a reference to paragraph 132 of the Report). The DGFT (Sir Bryan Carsberg) had given evidence in support of "a unitary competition authority for the UK" – the model adopted by the Committee – to the considerable consternation of the MMC witnesses (Graeme Odgers, Peter Dean, Dan Goyder and Hans Liesner). The Report's proposed structure is pictured as Annex I.

Subsequent events were affected by the change of Government. The consultation paper, draft bill and subsequent consultation that led to the Competition Act 1998[7] broadly endorsed the institutional structure previously proposed, namely OFT applying what became Chapters I and II, but with appeal on the merits to the CCAT (Competition Commission Appeal Tribunals), formed as a part of the newly constituted Competition Commission, whose "Reporting Side" would continue to investigate monopolies and mergers under the Fair Trading Act provisions. It was thought these aspects would continue unaffected.

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[6] Session 1994–95 Fifth Report HC 249–I, 17 May 1995.
[7] (i) "Tackling Cartels and the Abuse of Market Power", DTI, March 1996 (URN 96/70).
(ii) "Tackling Cartels and the Abuse of Market Power" – a Draft Bill, DTI, August 1996 (URN 96/905).
(iii) "A prohibition approach to anti-competitive agreements and abuse of dominant position", DTI, August 1997 (URN 97/803).

However in 1999, the DTI consulted on proposals for reform of Merger Control, as a consequence of a wish to take Ministers out of the process of assessing restrictions of competition. The Consultation Document[8] proposed two institutional options, the second being a single authority structure with the OFT investigating and deciding on mergers, with appeal on the merits to the CCAT (see Annex II). The response to this proposal was decisively to retain the two-tier structure. In the Response[9], 26 out of 60 responses were in favour of keeping things as they were, only 11 "showed a clear preference for" the single authority option. Reasons given were, apparently, the chance for an independent, fresh look at stage 2, the risk that a single authority's investigation would itself be lengthy and the utility of appeal on merits to the CCAT being doubtful in the light of EC experience with the CFI (Response pages 45 to 47).

There the institutional issue rests, subject only to the further consultation on and enactment of the Enterprise Act in the course of which the CCAT was finally separated from the CC and became the CAT.

As a result of this sometimes painful process, the CC itself plays no part in the application of Chapters I and II, which is a self contained system operated by OFT[10] and CAT. And when EC Modernisation appeared, the CC was not "designated" as an NCA to apply Articles 81 and 82.

PJF
25 January 2006

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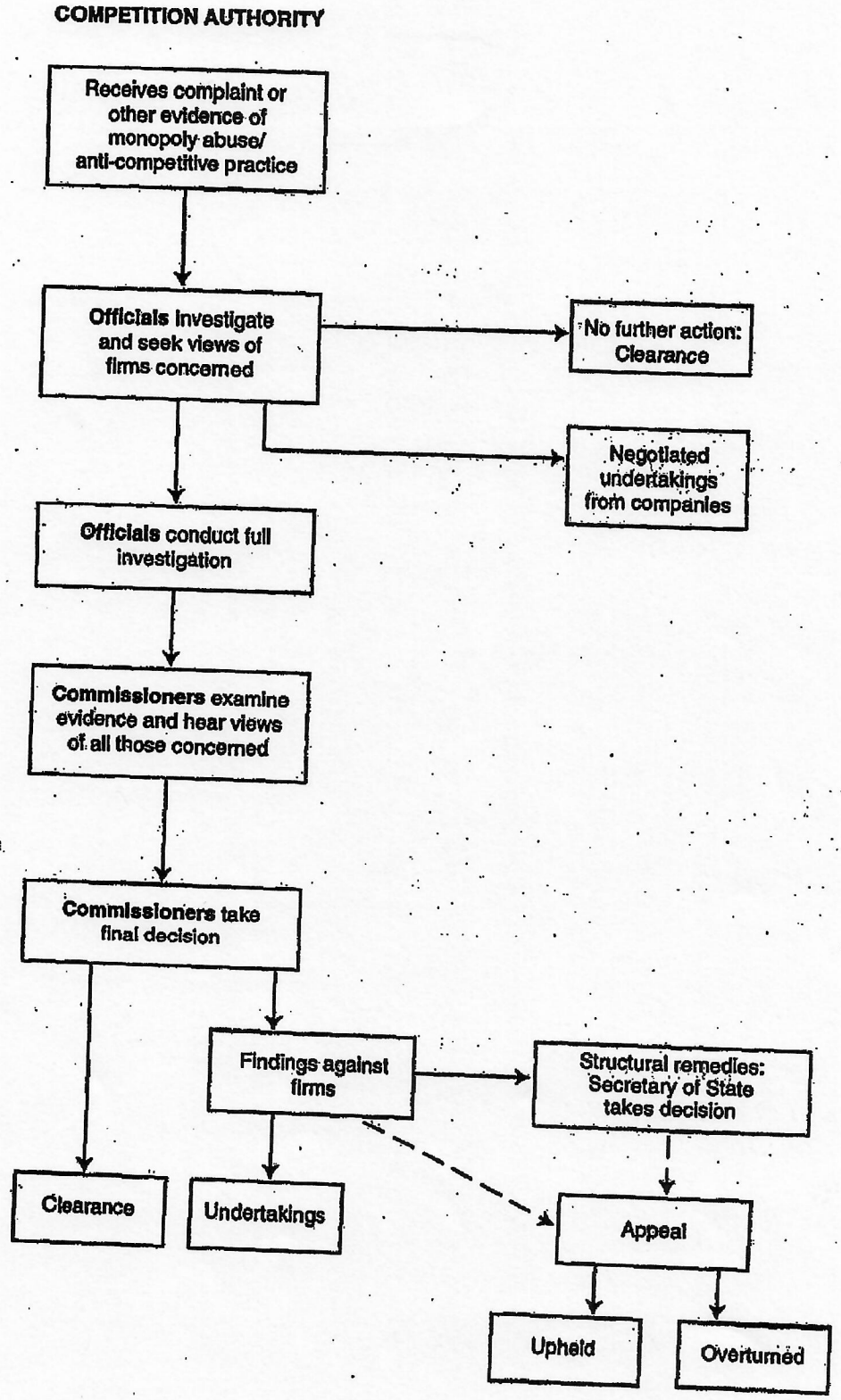
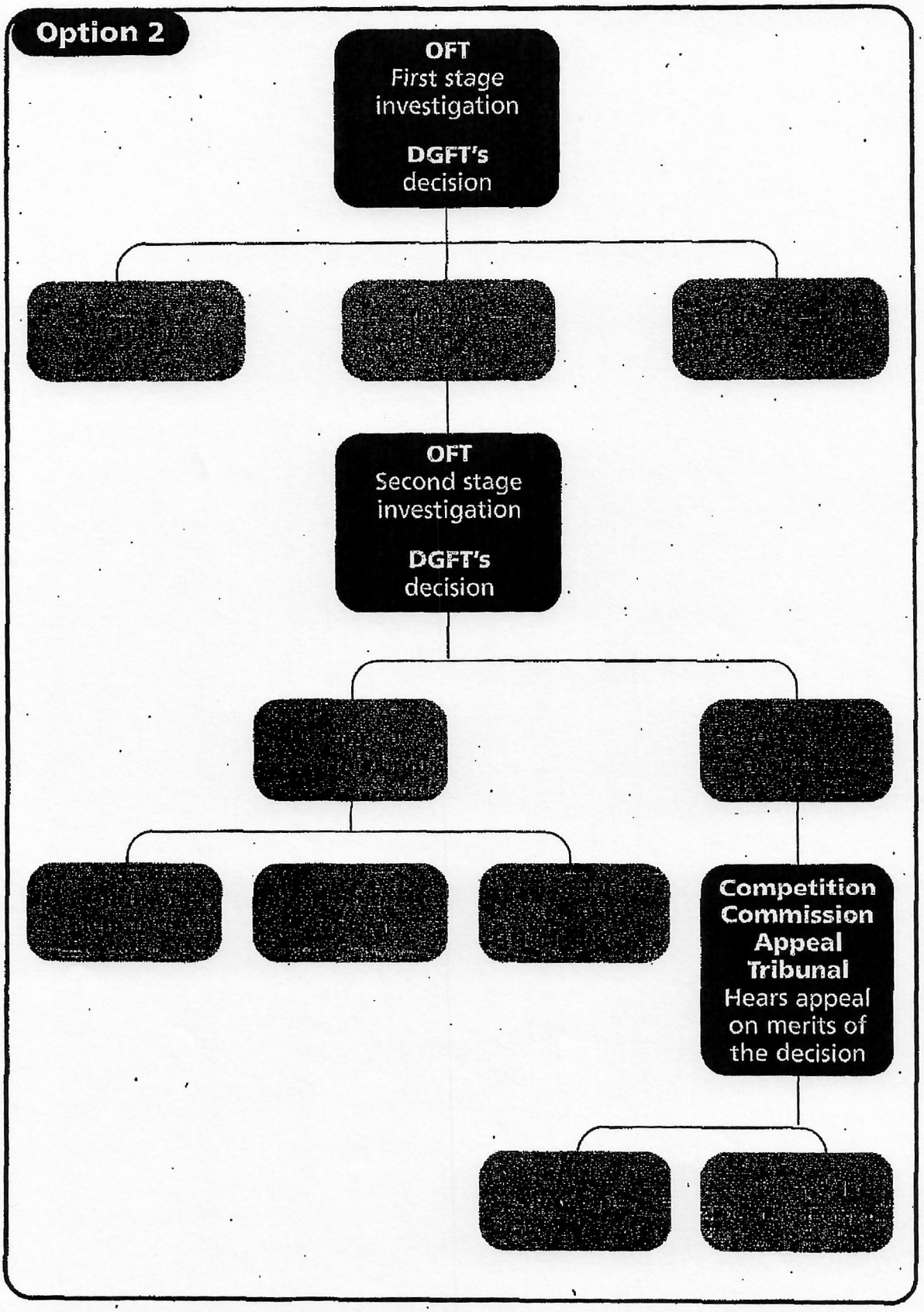
[8] URN 99/1028 (August 1999).
[9] URN 00/805 (October 2000).
[10] The sectoral regulators also have these powers.

ANNEX I

FIGURE 3

Suggested model for the procedures of the Competition Authority




Option 2
OFT
First stage investigation
DGFT's decision
OFT
Second stage investigation
DGFT's decision
Competition Commission Appeal Tribunal
Hears appeal on merits of the decision

OFT/CC MERGER – PROS AND CONS

This paper sets out the issues relevant to the consideration of the institutional structure for the UK Competition regime. As requested, it doesn't offer any conclusions.

History

2. The option of combining the roles of the Competition Commission and the Office of Fair Trading was most recently consulted upon in 1999[1]. That consultation exercise explored whether the second stage of merger investigations should be undertaken by an expanded OFT instead of the Competition Commission. Although it noted that there were some attractions in aligning the institutional structure for merger control with that of enforcement of the Competition Act, the Government concluded that it would not be appropriate to make changes to the existing structure where consultees generally supported the status quo.

3. However, this conclusion should be considered in the context of the development of the Government's plans for competition law reform. The 1999 consultation was on the reform of the merger regime, following a commitment[2] to review whether merger decisions should be made by bodies independent of Government (along the same lines as the move to grant the Bank of England power over interest rate changes). Merger reform was a discrete policy which

[1] The option of a unitary competition authority appears to have waxed and waned over the years – it's difficult to trace the history precisely – it seems that Labour and a number of high profile groups favoured the option in the mid-90s, but a consensus that the OFT and the MMC should be retained emerged again in 1997 before the change of Government. For the purpose of this paper, it should be noted that the option of combining the bodies has previously arisen in the context of wider reforms of competition policy – the debate now would be likely to centre on efficiency since there appears to be little appetite for further significant reform of the prohibitions or rules for mergers and markets.

[2] The Consumer White Paper 'Modern Markets: Confident Consumers', July 1999 promised consultation on merger reform, and said that the 'Government is considering whether the system could be improved if merger decisions were normally taken by the independent competition authorities, rather than Ministers, against a more clearly competition-based test.'

had been in development for a full two years. Then, the Government announced in June 2001 that enterprise and productivity were to be the cornerstone of the economic reforms for the current Parliament. Little more than a year later, the Enterprise Act (far more ambitious and wide-ranging than the merger reform proposals) was on the Statute Book. Arguably, there wasn't time for a rethink of any decisions that had been made within the narrower context of merger reform.

4. Now that the UK has perhaps the most comprehensive set of competition rules in the world, the focus may shift to the efficiency of the system for enforcing those rules.

Options for institutional reform

5. Clearly, Competition Authorities could be rearranged in a number of different ways. I suspect that the most credible options[3] are as follows:

- The existing structure: the OFT (with or without its consumer protection function), CC and the CAT.
- A unified competition authority alongside a specialist competition appeals tribunal.
- Two separate competition authorities to deal with: (1) the CA98 and Article 81/82 prohibitions (along the lines of the competition arm of the OFT, without mergers branch); and (2) merger and market rules (an expanded CC, initiating its own inquiries). These would exist alongside a specialist competition appeals tribunal.

Issues to consider:

Prominent Competition Authorities

[3] The first two options probably have the greatest currency in the competition policy field at present – the arguments for option three would need to be made by the CC in order to gain any ground. (Option three might suffer from size being a concern – if OFT has no consumer part and only part of its competition remit it might simply be too small to be viable.)

6. One of the aims of the Enterprise Act reforms was to ensure that there was a body working 'proactively to root out instances of anti-competitive behaviour'. There was a lot of rhetoric about strong, independent competition authorities, but the separate roles of the OFT, CC and CAT were pretty well defined.

7. It is the OFT that has, as part of its general functions under the Enterprise Act, the function of making the public aware of the ways in which competition may benefit consumers in, and the economy of, the UK. The Government wanted the OFT to go out and find competition problems, through: enforcing the Competition Act prohibitions; actively reviewing markets; engaging with others (e.g. through super-complaints).

8. The CC was not given any of these roles. The CC's unique selling points were its expertise, the robustness of its procedures, and its clearly defined focus. Although the Government talked about all competition authorities being 'advocates for competition', this was defined for the CC as offering advice on matters that arose in its inquiries rather than any role separate from these inquiries.

9. However, since the Enterprise Act came into force, it does appear that the CC's pursuit of 'world class' has led towards a more proactive and prominent position – some may see this as it overlapping the role of the OFT more than ever before[4].

Administrative Efficiency

[4] Modernisation has given the OFT (and to a lesser extent concurrent regulators) a prominent role in relation to the ECN and information sharing with other NCAs. If the CC is designated, it would also have some role in this. On the one hand this could be seen as further overlap with OFT but on the other it could be regarded as making the CC generally better informed, given the need for consistent application of competition law across member states, and better able to carry out its functions.

10. There are a number of activities where the OFT and the CC overlap at present. These range from core support services, such as IT, HR and information support/library services, through to possible duplication in merger cases (arising from the two-stage assessment which is a characteristic of the system) and market investigations (arising from a combination of the system and the growth of the OFT – the reference test for markets is very low, so the management of resources in the OFT determines the division of roles between them and the CC). There are indications that duplication of roles could increase in the future through designation of the CC under CA98, any moves by the CC to produce work on competition matters beyond the inquiries that it receives, and the increased involvement of the CC in international networks etc.

11. However, a simple merger of the two bodies would not necessarily address concerns about duplication:

- Duplication could be reduced without combining the two bodies. For example, cost savings could come from outsourcing central support services – an outsourcing exercise would probably be cheaper than seeking to combine statutory bodies.
- Duplication of roles does not necessarily mean duplication of work. For example, the argument on designation could be run both ways. On the one hand, it could be argued that delegation would avoid dual investigations. On the other, that it would result in the CC having to develop and apply procedures which are already up-and-running in another organisation. Similarly, it could be argued that OFT should not conduct its own detailed market studies before making a market reference. But the counter argument is that less work by the OFT could result in problems with the terms of reference and more CC market investigations in areas that may not warrant such attention.
- A two-stage process still has two stages even if they are carried out by a single organisation. The question of whether having two bodies involved in the merger and market systems contributes to inefficiencies is open to

debate. It may be that one authority[5] would result in cost savings to business, through fewer duplicative information requests, faster progress at the beginning of stage two etc. But this saving would need to be made through either (1) having the same people handle both phases which would sacrifice fairness, or (2) improving the procedure of handover to stage two (which should also be possible through better co-ordination between authorities).

12. In addition, a merger would present its own costs and complications. At present, the OFT is a body corporate established by statute which performs its functions on behalf of the Crown, whereas the CC is a non-departmental public body (NDPB)[6]. This affects the status of the staff (i.e. OFT staff are civil servants, CC staff are not), the manner of funding and implied powers. NDPBs are regarded as operating to a greater or lesser extent at arm's length from Ministers so, if the two bodies were merged, there could be implications for the nature of its powers and the degree of independence from Ministers.

'A Fair Hearing'

13. Previous debates have wrestled with the argument that a unitary competition authority would be undesirable because it would concentrate too much power in the hands of one body. This does not sound like a credible argument in 2005 – the Government has repeatedly called for strong independent competition authorities, the OFT (and certain sectoral regulators, who have concurrent powers) is the competition authority on CA98 and Article 81/82) cases, and we now have what some see as a form of Competition Court.

14. Currently, there are different rights of appeal under the CA98 and the Enterprise Act. While the CA98 provides for appeal on the merits to the CAT, the

[5] Of course, market references can be made by other regulators, so some cases would involve two bodies regardless of the position of the OFT and the CC.

[6] Schedule 7 to the CA98 expressly provides that the CC is not to be regarded as the servant or agent of the Crown or as enjoying any status, privilege or immunity of the Crown and the CC's property is not to be regarded as property of, or held on behalf of, the Crown.

EA has review by the CAT which requires the CAT to apply the same principles that would be applied on an application for judicial review. It was a conscious decision to choose these different appeal mechanisms. There was much debate during the passage of the Enterprise Act about whether a JR-type review was sufficient but the Government's view was that, for human rights purposes, the system overall (comprising the two stage system with review by the independent CAT (whose decision can be appealed to the Court of Appeal or Court of Session on a point of law)) was sufficient to meet human rights obligations and was the most appropriate mechanism in the circumstances. For the OFT's decisions, where there is only one body involved, it was considered that appeal on the merits was more appropriate.

15. If the OFT and CC were one body, the arguments relying on a two-stage decision would fall away and the human rights implications would need to be considered. However, it should be noted that this is something which is being considered in the context of the debate about designation in any event - if the CC was designated for the purposes of Article 81/82 there would have to be an appeal on the merits in relation to decisions about Article 81/82 (to be consistent with rights of appeal in such cases by other authorities).

Expertise

16. The merger and market regimes are rather different beasts from the Competition Act (and Article 81/82) prohibitions. It could be argued that this necessitates rather different investigatory procedures for the different laws, and that there is little to be gained from housing these within a single body. However, the drive to designate the Competition Commission under the Competition Act makes this assertion look a little strained.

17. Furthermore, the assertion could be attacked on the grounds that the CC's procedures have developed incrementally over time and the current procedures are not the only way to deliver merger and market assessments. It may also be

the case that a single body would benefit from a broader range of work in terms of understanding markets and being seen as credible interlocutors on competition law as a whole.