CLA MEETING 4 MAY 2011

ROUND TABLE ON BIS CONSULTATION PAPER ON REFORM OF UK COMPETITION LAW

Chaired by John Swift QC (Monckton Chambers)

Jane Swift (Deputy Director, BIS) made the following points: -

- Ministers have an open mind on all the issues
- They are aware of the risk of unnecessary uncertainty created by any transition to a CMA
- This is part of the public bodies reform process but that is not the key driver for the single CMA proposal
- The drivers for the CMA proposal are:
    - that the CMA will have a "complete tool kit" of all expertise (including e.g. the CC's economists and business experts who could be used in effects-based anti-trust cases)
    - one single advocate for competition in the UK and internationally
    - greater predictability/no overlap
- Dr Cable is particularly concerned by lack of speed and insufficient number of cases to deter
- the following points have recently been at the front of BIS's thoughts: -
    - Market Investigations -
        - how to define the small business super complaint so it does not become merely a vehicle for individual complaints
        - thresholds for market studies
    - Mergers
        - thresholds/triggers
    - Antitrust
        - the possibility of an option (in addition to the leave it as it is/internal tribunal/prosecutorial options) of different models for different cases i.e. where some cases (e.g. cartels) are

prosecuted while others (e.g. effects-based Art 102) are left on the current basis

        - How to deal with fining policy and consistency in a prosecutorial model where the court sets the fine
    - Concurrency
        - BIS have had a range of views as to whether to abandon concurrency and including views that concurrency should be abandoned. They are considering taking a power to bring it to an end by secondary legislation.

Michael Grenfell (Partner, Norton Rose) made the following points: -

- Although it was always possible to pick holes in proposals of this kind, the consultation paper was unusually well thought out and showed that BIS had been listening to comments made since the CMA proposal was floated.
- As far as procedural fairness was concerned, the paper: -
    - solved the investigator/prosecutor/judge/jury problem for anti-trust but
    - created a similar problem for mergers/market investigations (MIRs), which it then had to try to solve
- In anti-trust, the investigator/prosecutor/judge/jury problem stemmed from the DG Comp model that had been followed in the CA98. In a nutshell, the OFT's anti-trust procedures lacked a fresh pair of eyes and was subject to "confirmation bias"
- DG Comp had tried to solve this problem by the hearing officer mechanism but that was flimsy: the OFT had recently moved to try a similar approach
- Options 2 and 3 (the internal tribunal/prosecutorial models) created a welcome separation of powers. The prosecutorial model could be burdensome. But moth models were better than the present.
- As for mergers/MIRs, the system had always involved a fresh pair of eyes at the CC stage. The creation of the single CMA was a retrograde step.

Simon Pritchard (Partner, Allen & Overy) made the following points: -

- The creation of a "single voice" for competition was a great benefit of a CMA
- It should lead to greater predictability: the single OFT/CC mergers guidance had however helped
- At the moment, the existence of two institutions created issues that took up a lot of senior management time.
- For anti-trust, the CC's resources would assist the management of effects based cases: it had a lot of "effects experts" and had great experience of running cases to deadlines and running fair processes.
- On the question of mandatory/voluntary notification of mergers, the suggested thresholds were insane and would involve catching far too many harmless transactions. As to the "scrambled egg" problem (cases where the merger was completed before consideration by the OFT/CC) he was not sure in how many of those cases a divestment remedy had been impossible as a result.

Alexander Cameron QC (3 Raymond Buildings) made the following points: -

- He saw no case for changing the criminal offence to remove the "dishonesty" element
- The offence had been created only in 2002
- Neither of the two prosecutions conducted since then had gone wrong on the question of dishonesty
- In principle, to be convicted of a serious offence you should have done something blameworthy
- "dishonesty" was a routine and familiar test in the criminal law
- Option 1 (wide scope of offence, prosecution only in certain cases) would lead to immense uncertainty and it was not a good idea to criminalise conduct and not to prosecute it
- Option 2 (list of acceptable agreements) would be complex and fiddly
- Option 3 (replacing "dishonesty" with a "secrecy" test) was unnecessary since secrecy was a badge of dishonesty

- Option 4 (excluding agreements "made openly") would lead to uncertainty? The paper said disclosure to one customer would not count as being open, but what about disclosure to two or three?
- Since agreements outside the scope of the offence would in any event be caught by the civil prohibition, the criminal offence should be kept as a sword for the most serious cases.

Nicholas Green QC (Brick Court) made the following points: -

- The CAT's supervisory jurisdiction had led to great improvements in OFT procedures after *IBA Health*: fear of the CAT was a good driver for good decision-making: that was well worth the low cost of the CAT
- However, fear of the CAT had led to a reluctance by OFT to bring antitrust cases, and it was disappointing that few serious complex economic cases had been brought
- On the proposed procedural models for anti-trust cases: -
    - The internal tribunal model was unattractive. It would not be independent. It would be part of the CMA and subject to budget pressures. members would not be judges. It would duplicate the CAT and lead to added expense. If it was an effective tribunal, it would need pleadings, case management, hearings, and a need for time to write judgments. If it operated an abbreviated procedure, why bother? It would be seriously mistaken to use a watered-down tribunal as an excuse for weakening the powers of the CAT: and that would not be ECHR compliant.
    - Under the prosecution model, there would be an independent and impartial tribunal, but how would it be ensured that the OFT brought cases? How would settlements be achieved? Would the model increase throughput? The model could place a greater burden on small businesses, but the current system also placed a large burden on them (see the construction cases).

- The DG Comp system led to confirmation bias. oral hearings were not adequate. In the EU, there were serious questions about the General Court's ability to deal with competition cases: judges were not generally chosen for their anti-trust skills.

Questions and Answers – the following questions were discussed: -

- Jennifer Skilbeck (Monckton Chambers) referred to the lack of consideration in the consultation paper about SMEs and whether the CMA would take into account the barriers to entry that faced small firms. Jane Swift highlighted a number of proposals that were aimed at small businesses e.g. increasing the number of cartel cases and the small business super complaint proposal. Jennifer Skilbeck suggested the OFT analyse the number of complaints that it has received and chosen not to pursue to assess the extent to which issues affecting SMEs had not been addressed.
- Tony Metcalfe (BIS) commented on the dishonesty test in criminal cartel cases. The need to prove dishonesty was seen as a hurdle in cartel cases, in part because the individual being prosecuted did not have a personal gain. In some states, cartel infringements were strict liability offences. Alexander Cameron QC considered that removing the dishonesty requirement would make it easier to prosecute cartel infringements, but there was a question as to whether that was desirable. It might be more appropriate to reserve the criminal powers for the really serious cases.
- Christopher Vajda QC commented that the prosecutorial model would represent a step forward. Under the prosecutorial system, the time and resources involved in the OFT producing statements of objections and holding hearings would be avoided. The CAT could hear standalone competition cases.
- Jane Swift (BIS) commented that the ministers were considering options for facilitating private enforcement and that would be the subject of a separate consultation.
- Peter Freeman (Competition Commission) warned of the dangers of over-simplification. The prosecutorial model would not be suitable for all cases. For

example, it would be less suitable for cases involving economic evidence, e.g. Article 102 cases nor for market investigations.

- Euan Burrows (Ashursts) queried how remedies in market investigations would be dealt with in a prosecutorial model. Jane Swift comments that BIS had received suggestions that remedies should come back to Parliament. John Swift QC commented that market investigations would be subject to judicial review. However, the degree of scrutiny engaged by the CAT in cases such as BAA suggested that the difference between judicial review and an appeal on the merits was not great.
- John Swift QC queried whether it was possible to have an effective single body with different groups of people examining the same facts. A single body would face issues of accountability and culture. Jane Swift commented that, in relation to mergers and markets, strong views had been expressed in favour of the Competition Commission panel system. She thought that the panel system could be used within the CMA.