A competition regime for growth

Response to BIS consultation

SUMMARY

The British Brands Group endorses the goal of a world class competition regime that ensures vibrant, competitive markets that deliver for consumers and promote innovation, productivity and growth. We urge caution where changes are driven by a desire to economise (particularly if potential economies are small) and suggest focus is placed on ensuring authorities have the tools and quality of staff they need to deliver the intended regime.

1 The British Brands Group welcomes the opportunity to respond to the Department of Business Innovation and Skills' (BIS) consultation on the UK's competition regime.

2 The British Brands Group is a trade organisation that provides the voice for brand manufacturers in the UK. Its role is to help create in the UK the optimum climate for brands to deliver their benefits to consumers. Such benefits include broader choice, ever-better products through innovation, strong value and consumer confidence.

3 The competition regime plays a central role in shaping the environment in which brands may best serve consumers. The important enabling features include:

- an environment of vigorous but fair competition which stimulates investment in innovation, quality, diversity and reputation from which a fair return may be earned;
- the ability to launch new and better products on the market without facing undue barriers;
- the ability for companies of all sizes to distribute and present their products and services to consumers through diverse and competitive channels that serve well the hugely diverse needs of shoppers;
- an environment which inhibits free riding on hard-earned brand reputations.

The consultation is therefore directly relevant to branding in the UK and to our members. We confine our input to those areas directly affecting brands.

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4 WHY REFORM THE COMPETITION REGIME?

Improving the robustness of decisions and strengthening the regime
We support this objective overall but have no specific comments on the four proposals.

5 **Supporting the competition authority in taking forward the right cases**
There is value in the competition authority being able to carry out investigations into similar practices across different markets, something we explore further below.

6 **Considering whether the CMA should have a duty to keep key sectors under review**
There would be value in keeping economically important sectors under review, something we again explore below.

7 **Improving the speed and predictability for business**
Speed and predictability need of course to be balanced with rigorous analysis and robust decisions. It is important to strike a balance.

8 **Potential creation of a single Competition and Markets Authority**
While there may be scope to achieve some economies in a combined authority, we suspect these may be limited, being struck by work by Professors Davies and Lyons of the University of East Anglia which estimates savings at some £1.3 million pa or 0.18% of the measured policy benefits[1]. We feel the prime focus should be on an approach that delivers a stronger competition regime and more robust decisions. The delivery of a stronger regime is more a function of quality and depth of analysis, quality of staff, and adequate resource as opposed to the structure of the organisation(s) involved.

9 We would be concerned were a single competition authority to be created primarily as an economy measure, with the consequent competition regime being weaker rather than stronger. This would be bad for consumers and bad for the majority of businesses that seek to play by the rules.

10 As a good example of the value of the current approach, the OFT's review of the groceries market in 2005 dismissed concerns presented to it. It was only after a challenge via the Competition Appeal Tribunal (CAT) that the market was referred to the Competition Commission, resulting in a finding of two AECs accompanied by remedies. While we are encouraged that a two-tier approach would be preserved within a combined authority, it is not clear how a decision at the first stage might be challenged as effectively as it was in this instance.

11 We also have concerns about the effectiveness of remedies. An illustration is the way the OFT allowed the Supermarket Code of Practice that was recommended by the Competition Commission in 2000 to be watered down. This contributed to the remedy's lack of effectiveness. While we do not believe that this particular problem would arise under the new Enterprise Act regime, it demonstrates that currently the competition authorities may not always operate in full harmony and consistency. It would be important for a new single authority to be able to adopt and enforce fully effective remedies.

[1] Centre for Competition Policy, Research Bulletin Issue 21, Summer 2011

12 We strongly endorse an approach to the competition regime that delivers decision-making that is independent of Government, decisions that are high quality, transparent and robust, competition practice that is coherent and predictable, and practices that are efficient, streamlined and rigorous. We support reform that improves efficiencies and reduces costs to business and the public purse where these do not reduce the effectiveness of the regime and agree that authorities should have the right legal powers and tools to address competition problems.

13 A clear example of the problems caused by the current regime where, despite the Enterprise Act reforms, some remedies are still retained by government, is the recommendation by the CC that a Grocery Market Adjudicator (GCA) be appointed to enforce the Groceries Supply Code of Practice (GSCOP). Because the CC had inadequate powers, it had to leave the implementation of this essential part of its two-part remedy to the government which is having problems introducing the necessary measures three years after the CC's report. It now seems unlikely that the proposed GCA will come into being until more than five years after the CC's report!

14 A STRONGER MARKETS REGIME

Enabling investigations into practices across markets

There is merit in the competition authority being able to carry out investigations into similar practices across different markets. There are two areas that illustrate the benefits of such an approach:

- practices by large retailers that transfer excessive risks and unexpected costs to suppliers, found to have an adverse effect on competition in the grocery market, are likely to occur in other markets, for example where large retailers act as gatekeepers to significant numbers of consumers;
- where large retailers sell products under their own brand name (ie own label products) as well as branded products, they perform a dual and conflicting role. They are important retail customers for branded suppliers while at the same time being direct horizontal, product competitors. This throws up a significant anomaly. Commercially sensitive information is required from the supplier by the retailer in order to secure shelf space for a product while at the same time that same information may be freely used to influence that retailer's own label strategy. The sharing of such information between horizontal product companies would normally represent a serious breach of competition law. This arrangement – of retailers being at one and the same time customer and competitor – occurs in a number of different markets, such as clothing, pharmacy, DIY, electrical and electronic products.

15 **Enabling independent reports to Government on the public interest**

There would be value, in an ideal world, in the CMA being empowered to deliver reports on the public interest to Government as there are occasions where a strictly competition-focused analysis may be too narrow. In the grocery market for example concerns have been raised over the diversity of outlets available to shoppers (and planning rules generally), the decline of the high street and some labour practices (prior to the licensing of gangmasters) that fall outside a strict competition analysis but which nevertheless are relevant to the health of the market and the public interest. However, as pointed out in the consultation document, expanding the CMA's remit in this way

should not jeopardise the extent or quality of competition work and therefore will inevitably have resource and cost implications. These may not be affordable in the current economic climate.

16 **Reducing timescales and information gathering powers**
It is hard to be prescriptive over the timescales of investigations when individual cases may be so different. Certainly for businesses, 18 – 24 months of uncertainty can seem a long time, particularly where there may be a prospect of significant ramifications at an investigation's conclusion.

17 In contrast, the groceries market investigation took two years and yet we felt there were some important aspects of the market which were not scrutinised in sufficient depth. The way in which the timescale of the investigation was conducted however, with clear published target dates and regular updates, could not be faulted.

18 We would therefore be nervous were timeframes to reduce where markets are complex and investigations large. Some flexibility should be afforded the CMA, allowing it to determine from the outset of an investigation whether a 24 or 18 month timeframe would be followed, with the flexibility to extend an 18 month investigation if necessary up to a maximum of 24 months.

19 While timescales are an important factor in investigations, appropriate staffing is also a crucial factor. Any analysis should be founded on the true mechanics, customs, practices and experiences of the marketplace under investigation, rather than be a classroom theoretical study.

20 There would be advantages in there being information-gathering powers for Phase 1 studies were this to reduce timescales and lead to more robust findings at this stage.

21 The timescales for the implementation of remedies are most in need of reduction, a point that affects both the competition regime and Government practice. We have already registered our dismay that a remedy to an AEC found in 2008 in the groceries market investigation is still not fully implemented three years later and looks as if it may not be fully implemented for a further two years (we refer to the GSCOP monitored and enforced by a GCA). While there has been an intervening General Election, the Government has demonstrated no urgency in implementing the CC's clear recommendations, has published a Draft Bill that dilutes the remedy recommended by the CC and is inviting further input on a measure that was fully thought through by the CC and has already been subject to numerous consultations. Certainly authorities need to implement remedies quickly but where Government action is required, a greater level of priority needs to be afforded the delivery of recommended remedies.

22 **Statutory definitions and thresholds**
The current regime works well in this respect. The introduction of statutory definitions and thresholds for the initiation of a market study is likely to introduce an obstacle that would run counter to the objective of establishing a more robust competition regime.

23 **Powers to require parties to appoint and remunerate an independent third party to monitor and/or implement remedies**
This would be a significant improvement to the tools available to authorities to remedy AECs and one we would fully support. Such third party monitoring and enforcement of remedies is particularly important in markets where an independent body is required to ensure remedies work and to provide guidance to the market. Were the CC to have had those powers, the GSCOP and GCA remedy would be in place by now, to the benefit of consumers and to the market at large.

24 Where third parties are appointed to monitor and implement remedies, it is important that they have the necessary powers to be effective. Such powers are likely to include (depending on context and market):

- information gathering powers;
- the ability to receive credible information from whatever source;
- the ability to preserve the anonymity of those providing information on the performance of the remedy;
- the ability to provide guidance to the market;
- the ability to publish reports;
- the ability to recommend to parties actions that would lead to compliance;
- the ability to impose reasonable penalties (where appropriate);
- the full support of a public authority, to reinforce and back up the work and decisions of the third party.

25 **The review of remedies to be structured to ensure that they operate as intended**
A broader approach to the current threshold of a "change in circumstances" in reviewing remedies would help in ensuring remedies were effective. An example involves the SCOP which was a watered-down remedy from that recommended by the CC in its 2000 report and which we strongly believed – and which the CC later confirmed – did not operate as intended. The OFT however was unable to instigate a fundamental review of the remedy as there were no sufficient "changes in circumstances" in the market. The ineffectiveness of the SCOP became a contributory factor to the second market investigation, a factor that might have been removed were a full review possible.

26 A STRONGER MERGER REGIME

We have no specific views on the options presented, none of which address the concerns we have over the current merger regime. These relate to the depth and scope of merger analysis, each of which we explore further below.

27 In terms of the depth of analysis, we remain concerned that some mergers have been cleared without a full assessment of the implications. The strongest example relates to Tesco's acquisition of T&S Stores in 2002 which marked the entry of large supermarkets into the convenience sector. This merger was cleared without detailed scrutiny by the Competition Commission, allowing large supermarkets to apply their significant buyer power acquired in the one-stop shopping sector to the convenience sector. Since then other acquisitions have followed, with Tesco now having some 1,600 stores in the convenience sector (source: IGD and William Reed) and other supermarkets following suit. The impact of such acquisitions with the accompanying transfer of buyer power from

one sector to another continues to be felt, with non-affiliated convenience stores declining by 5% in the twelve months prior to April 2010 (source: IGD). Such mergers which represent such a significant shift in the structure of a market warrant detailed investigation and any proposed changes to the merger regime need to reflect this requirement.

28 Since the Competition Commission first found the UK grocery market to be concentrated in 2000, there has been further consolidation, sometimes on large scale as in the case of Morrisons' acquisition of Safeway but also by "creeping" acquisition of one or two stores at a time by the major supermarkets. It is important for authorities to be alert to the implications of grocery retailers increasing market share not by organic growth based on consumer preferences (i.e. shoppers voting with their feet) but by store acquisitions which, in the absence of new market entrants, inevitably reduce competition. At some point, the perceived benefit of any merger or acquisition – a benefit which is seldom tested after the event – will be outweighed by the risk of increased retail margins, increased consumer prices and greater distortion of competition between suppliers. We are also keen that merger analysis considers fully both upstream and downstream factors.

29 In terms of scope of merger analysis, we are keen to see this consider fully both upstream and downstream effects. In the grocery market, an AEC was found in the CC's 2008 market investigation concerning large retailers passing unexpected costs and excessive risks to their suppliers, yet no merger inquiry by the OFT or CC since this finding was made has included a detailed assessment of upstream effects. Consumers' access to a choice of products at a range of differing qualities and to new products is a fundamental aspect of consumer welfare so it is surprising that, where upstream competition problems have already been found (and the chosen remedies not fully implemented and assessed to be effective), merger analysis does not take such aspects into full consideration. Initiatives to improve the UK's merger regime need to take account of such requirements.

30 SCOPE, OBJECTIVES AND GOVERNANCE

Prioritisation

We support the principle that the high level objectives for the single CMA should include keeping economically important markets or sectors under review. The grocery market is a good example where such an approach would be relevant, having been investigated on two occasions since 1998 (excluding the Safeway / Morrison merger) and on each occasion been found to be concentrated and to have competition problems. The market continues to consolidate, with ongoing acquisitions of both a large number of stores (eg One Stop (Tesco)'s acquisition of Mills Group and Asda's acquisition of Netto) and individual stores (ie "creeping acquisition") which have not been subject to detailed scrutiny. Furthermore, the Competition Commission's (CC) remedy following its 2008 report has yet to be implemented in full and faces dilution in the forthcoming political stage of its introduction, raising concerns over its effectiveness. This is one example where a duty (whether statutory or otherwise) to keep important sectors under review is desirable.

31 **National consumer enforcement**

We await the forthcoming consultation on '*institutional changes for the provision of consumer information, advice, education, advocacy and enforcement*'. Suffice it to say at this stage, we have concerns over the concentration of consumer enforcement on the Trading Standards Service which is locally or regionally structured. We fear this would lead to weaker enforcement of consumer protection matters that have a national dimension.

32 We are also concerned that such a measure would weaken a consumer protection regime that is already flawed. A case in point is the enforcement of the Consumer Protection from Unfair Trading Regulations (CPRs), specifically in relation to misleading similar "parasitic" packaging. This is packaging that closely mimics the packaging of familiar brands in order to dupe shoppers and free ride on the hard won reputations of branded goods. On implementation of the CPRs, BIS emphasised the duty on the OFT and TSS to enforce in this area. In practice, neither have been willing to do so, despite being presented with examples and evidence of how such similar packaging misleads consumers. The proposed change to the consumer enforcement regime holds no prospect of improvement in this situation.

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