

18 October 2002

## CONSULTATION ON MERGERS PANEL

I am writing to seek your views on the future of the Mergers Panel.

As you know, the Enterprise Bill will change responsibilities for UK merger control. In particular, the new law will give the OFT responsibility for determining which mergers should be referred to the Competition Commission for further investigation (other than references made on exceptional or special public interest grounds). Among other things, the Bill will introduce a new right of appeal (along judicial review lines) to the Competition Appeal Tribunal against OFT reference and other merger-related decisions. It also provides for my current responsibilities as Director General to be transferred to a corporate body, to be known as the 'Office of Fair Trading', with a Board.

Against this background, we have been reviewing our internal procedures to determine what should be changed. The creation of the Board, the removal of the Secretary of State from the vast majority of merger control decisions, which are to be based on an explicit competition test, and the introduction of the new right of appeal make it timely for us carefully to revisit our procedures to ensure that they are effective, efficient, fair, and transparent.

An important element of our current procedure for those merger cases that potentially raise serious competition issues is the Mergers Panel. The current constitution and function of the Panel are described in the appendix to this letter. In sum, the Panel currently performs two functions: it is a way of gathering information on a merger from those Government departments and regulatory offices which have expertise in the area; and it is a forum for testing the OFT Mergers Branch's preliminary analysis with competition experts from the Treasury and the Department of Trade and Industry ('DTI'). Importantly, the Panel is not a decision-making body in any sense.

Outside OFT, however, the Panel can meet with suspicion. We believe much of that perhaps results from misunderstandings of the Panel's role and operation. When explained, many concerns about the Panel seem to be allayed. Nonetheless, we are keen to ensure that our procedures are well understood and that they command the confidence of the competition law community, business and others. The Bill provides us with a good opportunity to engage in this process. Whatever the outcome of our consultation we hope that there will be enhanced transparency in our working methods and institutions.

The purpose of this letter is to invite your views on whether the Panel should be retained and if so, what its future role and shape should be.

We see four broad options for the future: retention of the status quo, creation of a new Panel, having an exclusively OFT Panel, or indeed having no Panel. We should emphasise that we have a completely open mind about the merits of these options or indeed of any other options you may wish to suggest.

#### **A. Retention of the status quo**

A strong argument for retaining the current framework is that, at least from an OFT perspective, it works well. The Panel is an efficient and effective means of obtaining information from other Government departments where they have particular expertise. The more relevant information we have about mergers under review, the better. That can only strengthen the base of evidence on which OFT decisions are founded and thus enhance them. The Panel also provides systemic discipline over Mergers Branch, because it tests OFT officials' substantive thinking. The task of preparing papers for the Panel also helps to ensure that the issues are clearly set out and therefore contributes to achieving decisions on time.

The arguments against retention are two-fold. First, there is a perception in some quarters – albeit a wrong one – that the Panel itself is a decision-making body. Second, there are concerns that those attending hold an unduly privileged position in influencing decisions by the OFT; in other words, that Government commentators have a privileged position over other third party commentators particularly when they are Government 'sponsor' departments for the industry/business in question or might be perceived to have their own interest in the outcome (*e.g.*, as a competitor to the merging parties). It should also be noted that the Competition Commission no longer attends Panel meetings and does not receive any papers relating to the reference decision at the time of the Panel meeting.

In any event, perceptions about the function and constitution of the Panel need to be addressed.<sup>1</sup> But it might well be possible to allay concerns, while retaining what is an effective process.

- We could make clear that the Panel is not a decision-making body; *e.g.*, moving the 'last cigarette meeting' (*i.e.* the last opportunity parties have to address competition issues provisionally raised by Mergers Branch in advance of the Panel meeting and the decision meeting) to after the Panel meeting might help with this. But this could reduce the information available to the Panel meeting.

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<sup>1</sup> Related concerns have been raised regarding the function and timing of the 'last cigarette' meeting at which the merging parties are afforded a final opportunity to present their arguments or respond to concerns raised (or questions posed) by the OFT before the Mergers Panel meets. For example, it has been argued that a 'last cigarette' meeting could more effectively be held after the Panel meeting, which would allow the parties to respond to any further information gathered at the Panel meeting or to address outstanding competition concerns, although this would reduce the information available to the Mergers Panel and this reduces the value of its discussions to me in reaching a decision. There is also a case for arguing that some kind of preliminary decision-meeting should be held with the Director General in advance of the 'last cigarette' meeting so that points raised by the Director General can be put to the parties. That said, ultimately a decision must be taken in what is rightly a limited amount of time.

- On those rare occasions where a Government department is in some way a competitor of the merging parties, we could ensure that it was precluded from attending.
- Where a Government department is a customer of the merging parties, we would, however, wish to invite it to attend the Panel as it is precisely in this sort of instance that the Panel's role as an information-gathering forum is especially valuable.

## **B. Creation of a new Panel incorporating some non-OFT members**

A new Panel would have the considerable advantage of beginning life unencumbered by perceptions about the role and function of its forerunner. A new Panel could retain all the benefits of the existing system. It could be a standing Panel or constituted on a case-by-case basis.

A new Panel would, ahead of the final decision, act as a forum for information gathering and peer review of OFT analysis. In addition to external members, such a Panel might be attended by OFT Mergers Branch officials, senior officials from other competition branches within OFT, OFT lawyers, and the OFT's Chief Economist. It might also sometimes be attended, depending on arrangements for decision making in future yet to be agreed by the Board, by one or more members of the Board.

The existence of a Panel to challenge thinking is, we think, a strong discipline on reference decisions, particularly if it includes non-OFT-staff members. External members might include DTI and the Treasury. One might also characterise non-executive Board members as bringing an external perspective to these discussions. External membership would include the sectoral regulators, reflecting their expertise in particular markets. For example, in assessing future communications mergers, we would expect to pay very close attention to the views of Ofcom. This would reflect our close working relationship with sectoral regulators in enforcing UK competition laws, even though there is no concurrency on mergers.<sup>2</sup>

We would welcome views on the merits of external membership of any reformed Panel.

Although Government departments other than DTI and the Treasury would not be entitled to attend meetings of a reformed Panel, this need not affect our ability to obtain information from interested other Government departments ('OGDs'). Views and information could be gathered from OGDs during the normal third-party inquiry period: e.g., through written questions and, if required, individual meetings. Currently, the Panel provides a forum in which the views of OGDs can be critically tested. There is nothing to say, however, that the views of OGDs could not be so tested in the future in a different forum.

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<sup>2</sup> The OFT alone has jurisdiction to apply the merger provisions of the Fair Trading Act 1973 ('FTA') and the Enterprise and Communications Bills (as currently drafted) will not change this position.

This approach would address most of the counter-arguments mentioned above, but would not address the points raised about the timing of last cigarette meetings.

**C. Having an exclusively OFT internal forum for discussion**

A further option is to adopt the above procedure, but restrict attendance at the Panel to OFT representatives alone. In this context, the Panel would be useful as an OFT-only forum for scrutinising Mergers Branch's preliminary analysis. It would be quite possible, and arguably more consistent with professional, impartial analysis carried out by an independent competition authority for the OFT Mergers Branch to carry out its investigation (including consulting OGDs as appropriate) and make recommendations for a final decision solely on the basis of information collected and assessed by the OFT.

Such a Panel would have no information-gathering function. Arguably, the discipline of putting up a case for scrutiny should act as an intellectual discipline for case teams, but the utility of such a Panel would be principally determined by the willingness of Panel members to challenge Mergers Branch analysis. Perhaps this is most likely to occur if non-executive members of the OFT Board were to participate in Panel meetings.

**D. Having no Panel**

It is also worth considering whether we should dispense entirely with even an internal forum for discussion.

This would entail two central changes from the current process. First, the OFT would no longer benefit from the disciplines on substantive thinking and timing imposed by the Panel process. Second, the final decision would not benefit from the views of OGDs critically examined at Panel meetings. These issues are debated above and the same considerations apply.

This letter is intended to provoke debate and comment. We very much look forward to receiving your views on the issues raised. We would especially appreciate receiving any responses, sent to Carole Bowley in the Mergers Branch, by 29 November 2002.

Thank you.

**John Vickers**  
**Director General of Fair Trading**

## **Appendix: The current function and constitution of the Mergers Panel**

The Mergers Panel operates as an information-gathering and discussion forum. Panels are summoned to discuss a merger when it is believed to raise possible competition concerns that would benefit from airing to a wider audience of competition and sector experts from across Government.

### **Constitution**

Panel meetings are usually chaired by the OFT's Director of Competition Enforcement, Margaret Bloom, and in her absence by the Director of Competition Policy Co-ordination, Vincent Smith. On occasion, Panels have been chaired by myself and by the Director, Mergers. Panels are attended by representatives of Mergers Branch and by representatives of any interested OFT sectoral branch. Standing non-OFT Panel members are the DTI (which is represented by its Consumer and Competition Policy Directorate), and the Treasury (which is represented by its Finance, Regulation and Intuition Directorate). The Competition Commission no longer attends Panel meetings.

In addition, Panel meetings are also attended by Government departments responsible for the relevant sectors of business or industry, and by representatives of sector and other regulators as appropriate. In electricity cases, for example, Ofgem will attend.

### **Function and operation**

The OFT may call a Panel to discuss a particular case. Other Government departments may also call for a Panel where there are particular (factual or analytical) issues that they wish to put to OFT. This happens rarely. The OFT is under no obligation to accede to an OGD's request for a Panel, but in practice will do so because of the importance attached to obtaining the widest range of facts and views concerning a merger.

The thoughts expressed by each attendee at the Panel are summarised for me as part of the decision meeting following the Panel. This current practice meets the two objectives of the Panel. First, it ensures that all available information from within the broad Whitehall and regulatory community is available to me when reaching my decision on reference. This is of particular importance when the Panel attendees include regulators with responsibility for the industry sector in question or Government departments with sector sponsorship or promotion responsibilities. In both cases, information from these sources can be important in obtaining a complete picture of the competition issues.

Second, DTI and the Treasury representatives normally express a view on the merits of OFT's preliminary reasoning. This is an important sounding board for OFT. Their contributions represent a useful check on the coherence and cogency of OFT's preliminary views. DTI and the Treasury views on the question of reference are reported to me as part of the decision-making process.

The Mergers Panel does not take any sort of decision and does not reach a consensus view on the advice to be submitted to me for approval. Neither do the relevant OFT officials strive for consensus among themselves; indeed variety of views is encouraged in the interest of reaching a robust final decision. The

decision meeting with the Director General, which is attended only by those OFT officials who attended the Panel, has available all information gathered in the course of the investigation. The ultimate decision whether to refer a given merger rests with me (or my deputy in my absence).