

**The UK Competition and Markets Authority:
a new institution to tackle a new set of challenges**

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I am most grateful for the opportunity to attend the CCP's annual conference, and to speak with you today. The chance to exchange views with so many competition luminaries from around the world would be sufficient in itself. But it is also particularly useful for me to be debating with you the subject of *institutional design* in competition regimes. With over 120 systems of competition law in the world today – many of them recently established or reformed – there is so much we can learn from each other. It is also particularly timely from my perspective, as we will be launching the new Competition and Markets Authority, the CMA, on 1 October this year, and so have less than 4 months remaining to finalise plans for the new organisation.

Today I am going to tackle three simple but searching questions about the new UK competition regime:

- (1) Why now?
- (2) Why like this?
- (3) So what?

In doing so I will be stating my personal opinions, based on 10 weeks in the job, and I reserve my right to develop my thinking as I learn more – including from gatherings such as these.

I should also make it clear that I claim no special insight or monopoly of wisdom about how the forthcoming institutional and other changes came into being. They result from a complex, multi-dimensional and multi-party process – in which I myself played no part at all (unlike the UEA/CCP which I know contributed strongly to the consultation process).

The Department for Business, Innovation and Skills has published all the consultation documents produced by the Government and interested parties¹, and the legislation establishing the new regime – the Enterprise & Regulatory Reform Act 2013 received Royal Assent on 25 April this year following agreement by both Houses of Parliament and is being prepared for publication². So you can form your own view on what lay behind the reforms – and many of you I am sure already have.

We also have the prospect of further guidance from Government on what it expects from the CMA, in the form of a Strategic Steer, which we expect over the summer. And the CMA Board will itself be formed this summer and will soon want to adopt its own positions on our strategy and priorities. So this is just my personal take at this point in time – though one that is shared by the CMA's Chairman, David Currie.

WHY NOW?

Building a new public regime, especially when this involves complex primary legislation and a new institutional structure, is a great labour, and typically one that runs into entrenched positions and other obstacles to reform. Hence, as the former Chairman of the US Federal Trade Commission, Bill Kovacic, has pointed out on various occasions, it generally occurs in response to some acknowledged large-scale failing, such as has occurred in the financial sector in recent years.

A second typical reason for undertaking this great labour is the desire to reduce public expense; this it seems, is the prime motivation for the creation of our sister agency in the Netherlands, the Authority for Consumers and Markets.

A third reason to act might be to fulfil some new responsibility arising from a development in the law, as occurred in 1998 when the Competition Act implemented the structure of European competition law into UK law.

A fourth explanation is the need to give effect to some new policy development, which can either require, or at least occasion, institutional reshaping. This might be outright 'new build', or new in combination. Recent examples that spring to mind are the addition of water regulation to the responsibilities of the energy regulator in Ireland, or the combination of energy in the UK with climate change, energy having previously lived a separate life, and also one in combination with the industry department.

The odd thing is that none of these conventional explanations seem to apply to the new UK competition regime.

¹ <http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/Consultations/competition-regime-for-growth?cat=closedwithresponse>

² <http://services.parliament.uk/bills/2012-13/enterpriseandregulatoryreform.html>

Taking each in turn:

First, the two existing authorities, the Office of Fair Trading (OFT) and the Competition Commission, continue to enjoy public respect, and to be rated internationally as amongst the best in the world. The consultation exercise certainly uncovered some areas in need of improvement, but also a great deal of satisfaction with key aspects of the current system, which indeed some commentators would have left entirely undisturbed.

Secondly, the Government's statements have been clear on the desire to see a more efficient and effective regime, that makes good use of scarce public resource, but they have not pursued a substantial reduction in expense as a goal in its own right. Quite rightly, I think, the Government has recognised that securing a step-up in the effectiveness and positive economic impact of the national competition authority is a much more valuable prize than a comparatively modest saving in input costs.

Thirdly, there is on this occasion no big legal change required by changes in the European Framework or a key judicial ruling. The new legislation makes a number of very useful legal changes – for example, to the information-gathering powers and interim merger measures available to the competition authorities – but more radical changes, notably a move to a prosecutorial model of enforcement, though seriously considered by the Government, were not in the end adopted.

Fourthly, while the wider context for competition policy continues to evolve, there is no indication of a major new spur or change in direction, but rather a desire for reinforcement of the traditional economic goals of enhancing supply-side efficiency and innovation, and demand-side choice and value, building on the competition reforms of the Enterprise Act 2002.

So we have to look elsewhere for answers to 'Why now?'

From the consultation exercise in 2011 and 2012, and my own soundings since I started in post at the end of March, I can discern half a dozen contributory strands to the case for regime change now. Strands which I will label: economic, legal, business, consumer, financial and organisational.

- 1) **Economic:** the core motivation appears to have been to use the new agency, with new powers and duties, to make a strong contribution to economic performance, including growth and recovery. The new legislation gives the CMA a very clear duty to *promote* competition – a progressive agenda. It also places an explicit duty on each regulator (with the exception at this time of Monitor) to consider bringing cases under Competition Act 98 before using sector-specific powers. The CMA will actively encourage these sectoral regulators to do so.

In parallel, a strong competition mandate has been given to the new Financial Conduct Authority, building on the previous award of competition powers and responsibilities to agencies such as the Health Regulator, Monitor, and the Civil Aviation Authority. So across the board, the promotion of competition is being advanced as a key economic goal in the UK, both through the design of policy instruments, and in the enforcement of competition law.

- 2) **Legal:** a prime concern here has been to improve the quality, robustness and speed of decision making in the antitrust enforcement regime, including by adding procedural safeguards and performance expectations. Government and others want to see more cases, brought to conclusion more rapidly, but also with all due process, including protection against confirmation bias. There has also evidently been a wish to see more strong enforcement cases coming through, especially in the criminal or “hardcore” sphere, and hence the plan to make criminal cartel prosecution a more practical proposition, in particular through the removal of the 'dishonesty' requirement.
- 3) **Business:** the business community appears to attach prime importance to the speed, transparency and predictability of the competition regime. It is also naturally concerned to restrain the direct costs (in the form of administrative charges) and indirect costs (in providing information and arguing a firm's case), and accordingly to minimise unnecessary duplication and burdensome requests.
- 4) **Consumer:** the desire to ensure that the consumer voice continues to be heard, and the consumer interest to be defended, within the context of the newly reformed consumer landscape, can be seen as the key concerns here. Consumers and consumer groups will want to see evidence that the Authority is reflecting their key concerns and acting on them.
- 5) **Financial:** as in any merger situation, cost efficiencies through stripping out duplication and reducing overheads are anticipated, and the new agency will have to show that its positive economic impacts in terms of consumer welfare are a substantial multiple of its operating costs.
- 6) **Organisational:** this strand reflects the desire both within the existing agencies, ie the OFT and the Competition Commission, and amongst key stakeholders, to take the opportunity of reform to adopt more flexible and productive working practices within the unitary authority, correctly aligned to deliver a well focused strategy. Such a move can mitigate the “feast or famine” tendencies observable in recent years in the amount of Phase II work before the Commission’s Panels.

I appreciate these broad headings are a somewhat crude simplification of the submissions made during the public consultation. And that some organisations and some individuals will hold multiple perspectives – not all of them compatible.

But I do consider these 6 strands as being key to achieving the 'planetary alignment' needed to bring about this change at this point in time.

I would also like to highlight 3 key influencing factors I believe will help shape the change:

- **The institutional perspective** – in any established organisation, most of the clay for the potter to work with is the people, practices and know-how built up over previous years. Happily, and not surprisingly, the CMA will inherit fine material from the legacy organisations.
- **The popular perspective** – we would be kidding ourselves if we thought competition policy aroused much popular interest. But like me you will recognise that a sometimes technical area does have its brief moments in the glare of public attention. And when that happens, the public had better like what it sees.

That is perhaps especially the case for the advocacy and enforcement work of the OFT today, where a groundswell of popular support, or indignation, can be critical to achieving the desired outcomes, especially where the markets or functions concerned are ones of direct daily consumer experience such as banking, fuel, transport and food. The improvements successfully negotiated by the OFT in the transparency of airline ticket prices online is a case in point, with the investigation flowing from a super-complaint from *Which?*, itself based on a petition from consumers. Much of the enquiry and appeal work of the Competition Commission will also be subjected to rigorous public scrutiny and debate, especially when the enquiries reach decisions on key markets, such as Payment Protection Insurance and airports in recent years, and audit and motor insurance prospectively.

- **The international perspective** – international developments may not have created a *need* to change, but they certainly have provided inspiration and encouragement. And it is very much part of our ambition for the new Authority to win the respect of our international peers by running an exemplary agency within a world-class regime. And through this, to help stimulate international business and investor confidence in UK markets.

WHY LIKE THIS?

I have gone back today in search of what led to this regime change, as I regard these aspirations and expectations as critical for forming our understanding of what we should aim to achieve with the new Competition and Markets Authority. As well as helping David and myself to shape the initial mission, strategy and operating plan for the CMA, we need to continue to adapt ourselves to what the Harvard academics call the 'authorising environment', so that we retain legitimacy, relevance and the wide stakeholder support we need to be influential and effective.

So what are the key shaping insights that David and I have taken from these reflections, as we work up our plans for the new agency?

Overall, we are clear that we should seek *evolution* rather than revolution: our task is to build on what we have, refine it and reinforce it, not to discard wantonly or start over. We are now working intensely with the integrated transition teams within the OFT and the CC to identify which of the structures and working practices of the existing organisations are well suited for the new Authority, and which are in need of revision. Next month you will begin to see some of the early fruits of this work, when we publish our first set of draft guidance for consultation.

But looking beyond this, we want to take this evolutionary reformist approach, to build a *learning organisation*, one that is capable of honest self-criticism, and passionately committed to continuous improvement.

Our second key 'take-away' is that we must give equal weight to both enforcement and markets and mergers work. The idea advanced in some quarters that we should evolve towards becoming purely an enforcement agency has clearly been rejected by the Government. The unique flexibility and power of the UK markets regime must be preserved, and maintained in good order through the institutional changes. But neither our markets work, nor the operation of the well respected mergers regime, should stop us from achieving the improvement in enforcement performance that is needed. Instead they should be complementary, and at times mutually supportive, where enforcement may be informed or inspired by a market study or investigation – or vice versa. Having all the competition tools under one roof makes it easier for the new authority to apply the right ones to the right cases to achieve the greatest economic impact. And mixing people with different experience of the various tools will help us spread insights and good practice.

Thirdly, it is plain that we have to maintain the successful marriage between consumer and competition work, a marriage which has proved so essential to the OFT's success over the years³ and that of other international agencies. Indeed last month I was fortunate to be able to attend the conference in Dublin Castle to mark this year's European Competition and Consumer Day, and on the panel for this part of the discussion were the heads of the American, British, Dutch and Danish competition and consumer authorities, who all testified eloquently to the power and centrality of the combination.

Turning now to the 6 specific strands I have picked out, and to the future directions they light up:

³ See, for example, the speech given by John Vickers as Director General of the OFT to the Social Market Foundation in February 2002 – 'Competition is for Consumers' www.of.gov.uk/news-and-updates/speeches/2002/0102 - and in his opening remarks at the 2005 European Competition and Consumer Day www.of.gov.uk/news-and-updates/speeches/2005/0705

- 1) **Economic:** reflecting the centrality of our economic mission, we need to make sure top-class competition economics is at the heart of our work. To ensure that the cases we pursue, and the decisions we reach, are made so as to make a really telling contribution to the way markets work, and to the sum of consumer welfare. To focus our efforts, so that we devote sufficient resource to key strategic areas of the economy, such as financial services and infrastructure. To be able to measure and demonstrate this, through the kind of economic impact evaluations developed by OFT with the help of UEA Professor Steve Davies.

Even beyond this, we want to develop a position for the CMA as a highly respected and trusted source of advice and economic research to other parts of Government on how to avoid anti-competitive effects in their own policies and regulations, and how instead to use the power of markets and consumer choice to bring gains in allocative and dynamic efficiency, productivity, innovation and responsiveness to users.

- 2) **Legal:** we must put a strong emphasis on well-conducted and well-focused enforcement, maintaining a proper balance between the pursuit of efficiencies and throughput, on the one hand, and the need for sound, evidence-based decision making and effective safeguards for due process, on the other. We need to build on the recent enhancements that the OFT have made to their procedures, and to explore the potentialities of the combined agency for wider use of Panel members. We need to make a renewed effort to make the criminal regime a clear and present reality in the UK. And we need to win at least a fair share of cases that go to the courts, so that the CMA, in Peter Freeman's phrase "justifies itself on appeal"⁴. And of course the CMA will inherit the CC's current role as an appeal body in its own right, for certain decisions of sectoral regulators; a weighty responsibility.
- 3) **Business:** we believe the business community should welcome a more active enforcement, since most anti-competitive behaviour has multiple business victims, either rival challenger firms being unfairly treated by dominant incumbent firms, or business customers being adversely affected by cartels or collusion by upstream suppliers. Business is also much concerned by the efficiency and effectiveness of the merger regime, and we are keen to explore the scope here for gains by resolving more potential "substantial lessening of competition" (SLC) mergers at Phase 1 stage. We also want the CMA to be conscious of the need to provide affected parties with updates on the status of enquiries and investigations, and to pursue these cases with thoroughness but also all due pace to a point of conclusion. And to seek not to burden business with excessive information requirements.

⁴ Peter Freeman was Chair of the Competition Commission 2006-2011, Deputy Chairman 2003-2006. The quotation is from an article in the Journal of Antitrust Enforcement, Vol. 1, No. 1 (2013) pp 4-23

- 4) **Consumer:** in the consumer landscape we need to adopt a more strategic stance, working constructively with our partners in Trading Standards, the sector regulators, Consumer Futures and the Citizens Advice Bureaux, and ensuring between us that the new regime is as effective as possible. We also need to use our consumer responsibilities to help keep us grounded in areas of real current consumer concern. And to ensure in our communication of our mission and our work that we can explain the positive impact we are making on consumer welfare as measured by improvements in choice, price, quality and service.
- 5) **Financial:** we will address duplication and harvest the efficiencies from moving to the unitary authority. We also want to tighten up our project management and move more decisively towards electronic working, including through use of electronic document and records management and workflow. Although our budget and the performance framework for the CMA is not yet determined, we would intend to recycle savings into frontline work. And of course we expect to be held to full account for the success of the merger, and for our ongoing use of public funds.
- 6) **Organisational:** We will stick with many of the hallmarks of the current regime, such as the enquiry practices developed by the Competition Commission over the years, and core features of OFT procedures for handling of Phase 1 mergers, but also take the opportunity to refine these where appropriate. We also need to innovate, to rise to the demanding new timetabling challenges set by the legislation, and to the opportunities of the unitary agency. From international examples – including from agencies represented here today – we can see the strength of separating investigation from case decision, and of robust powers for gathering information; of the need for multi-disciplinary teams, and for a dedicated cartel unit. And we are working up some new ideas of our own – for a central research and intelligence unit, for a skills academy, for a project management office, and for a national cross-sectoral competition network.

Overall, then, we want to see an organisation that:

- makes a really positive economic impact, both through direct interventions and advocacy;
- is forceful and legally robust in the enforcement domain;
- is properly responsive to both consumer and business voices, correctly focusing its work in addressing areas of particular weakness or harm;
- provides a leading example of an efficient and cost-conscious public agency;
- takes the best available lessons from national and international models, refining continuously our working methods to optimise outputs and outcomes; and
- continues to offer interesting work and career development opportunities to the most talented competition practitioners.

In short, as David Currie said in a speech in Glasgow earlier this week, our aim is “to take the best from the OFT and the Competition Commission and add a few genes to create a world-class high-performance organisation which will be more than the sum of its parts”⁵.

SO WHAT?

I hope I have been able to give you some feeling for how David and I are setting about creating the new Competition & Markets Authority.

How it will be both different from its predecessor bodies, and preserve their acknowledged strengths.

As ex communications regulators, we can warmly agree with Bill Kovacic's dictum that “Good policy runs on an infrastructure of institutions, and broadband-quality policy cannot be delivered on dial-up quality institutions”⁶. We are determined that the new institution we are building will meet the high expectations that have been set for it.

In the final part of my speech today I want to explore further why this all matters.

With an audience such as this I hardly need to restate the economic benefits associated with an effective competition and consumer regime. Indeed the fact we now have over 120 competition regimes around the world is rich testimony to how widely accepted these benefits are.

But it is perhaps worth recalling briefly the scale of these benefits.

Let me draw on a recent World Bank Investment Climate compilation of research findings⁷:

- price drops of 20-40 per cent after international cartels broken up
- employment rates boosted by 2.5-5.0 percentage points by reforms to state controls and barriers to competition
- GDP gains of 2.5% from competition policy reforms in Australia
- net benefits of €100 million a year from merger control in the Netherlands
- consumer savings from cartel enforcement in the US over 8 years of some US\$ 1.85 billion.

Furthermore, the risks of anti-competitive behaviour and consumer harm are especially high in periods of prolonged economic weakness such as we are experiencing now. Firms under pressure may over-step the mark in their efforts to shore up profitability. Consumers are experiencing tight budgets, and in some cases real financial hardship, leaving them exposed to exploitative practices, as in recent reports on the payday sector.

⁵ www.gov.uk/government/speeches/the-new-uk-competition-and-markets-authority-what-does-it-offer-to-scotland

⁶ www.ftc.gov/speeches/kovacic/2009horizontalmerger.pdf

⁷ 'Encouraging Thriving Markets for Development', Markus Kitzmuller and Martha Martinez Licetti, World Bank, *Viewpoint* Note No. 331, August 2012

And adverse tendencies to suppress competition in the market, if left unchecked, can seep out of industrial organisation into the area of political economy, with siren calls on policy-makers to ease up on competition to help firms re-establish their profitability, or to put on additional scale to take on international rivals. It is essential to resist such calls because the evidence continues to show that sharp competition is the best spur to the efficiency and innovation needed for firms to sustain profitability and achieve international competitiveness.

A robust competition policy is also vital for growth by stimulating business efficiency and productivity. Competition rewards businesses that innovate to satisfy consumers, and encourages new entry and new investment into the market.

Difficult as it is to isolate competition effects on overall economic growth and performance, there is empirical research that links growth to competition policy.

An empirical research paper produced for the European Commission by the LEAR economic consultancy and published in the Review of Economic and Statistics Studies, finds a robust positive and significant effect of competition policy on Total Factor Productivity growth for 22 industries in 12 OECD countries over the period 1995-2005⁸. This and other research also finds that strong institutions to enforce competition policy are vital if these benefits are to be achieved.

An OFT research paper 'Competition and growth', published in November 2011⁹, concludes: "There is a substantial and growing body of evidence supporting the link between competition and economic growth, with competition driving growth through [...] contributing to a better utilisation of capital, labour and natural resources, and promoting innovation and better management".

As this OFT paper points out, this is especially the case in times of moderate economic growth and fiscal constraints: "With macroeconomic tools likely to prove insufficient and their use restricted by the need for fiscal consolidation, microeconomic instruments (such as the removal of unnecessary regulatory burdens and the protection and promotion of competition) become all the more important".

Today it is easy to call to mind key developments that have driven economic growth over the last two decades in mature western economies. Developments such as the lowering of trade barriers and financial restrictions; freer circulation of capital, labour and technology; rising standards in education and professional training; increased female participation in the workforce; more extensive use of ICT; and falling input costs from Asian producers. But it is rather harder, is it not, to foresee which comparable combination of developments will power growth over the next two decades.

⁸ www.learlab.com/pdf/lear_r_1252939920.pdf

⁹ www.oft.gov.uk/shared_of/economic_research/oft1390.pdf

And as is widely recognised, without economic growth, many of our benign current social structures with their fiscal supports will be simply unsustainable.

So in this wider context of significant economic challenges, it is vital that we make full use of what has been proven to be one of the most reliable instruments at our disposal for improving performance and stimulating growth, namely a vigorous and skilful competition policy, implemented by strong institutions.

Thank you very much for your attention.

Alex Chisholm, CMA CEO designate

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