Department for Business Innovation & Skills: Options to Refine the UK Competition Regime – A Consultation

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Consultation response from the

Centre for Competition Policy

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This consultation response has been drafted by the named academic members of the Centre, who retain responsibility for its content. While the response represents a collective view, Bruce Lyons drafted the responses to Q1-Q4, Morten Hviid drafted the responses to Q6, Q11, Q13, Q14, Sebastian Peyer drafted the responses to Q15-Q17, and Andreas Stephan drafted the response to Q12.

The Centre for Competition Policy (CCP)

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Question 1 (paragraph 47) ***In light of the fact that the CMA has been in operation for over 2 years, is the government right to consider changes to the way that the CMA panels and decision making processes work?***

A major focus of this consultation is on second phase mergers and market investigations. The last two years have not seen a high case load for mergers, averaging 8 outcomes p.a. (i.e. Phase 2 decisions plus mergers abandoned by the parties after referral to Phase 2), compared with 9 p.a. over the previous five years and 13 p.a. in the five years before that.[1]

However, the last two years have not been 'typical' for market investigations. Two major new investigations were launched almost simultaneously in 2014. Even though no new investigations were opened in 2015, the energy and retail banking market investigations have been large and complex, drawing heavily on a behavioural economic analysis of consumers, which is highly relevant but requires a relatively new methodology for market investigations. There has also been a substantial and lengthy appeal and remittal for the CMA to deal with during the same period. This case load can be seen in the context of an average of 1.6, typically much smaller, lower-profile new market investigations over the previous ten years.

For these reasons, the two-year period may not give a fair basis for the CMA to be judged. Nevertheless, there were foreseeable flaws in the CMA panel system and decision making processes. It is also notable that the consultation mentions the new CA98 antitrust decision making process only in passing. We highlighted the danger of inappropriate decision making structures in 2011 when we provided a response to the consultation prior to the merger of the OFT and CC to form the CMA:[2]

> "*Decision making*. This is arguably the biggest issue of all. The OFT has a model of decision making that was apparently based on the European Commission (DG Comp). Case teams investigate and this is followed by an executive decision. The identity of the decision maker has been opaque, at least until the last couple of months when the OFT has begun naming an individual executive for each case. In contrast, the CC arose out of the Royal Commission model of decision making. This has a panel of named, part-time, non-executive experts brought together to advise the staff case team from the start and then to decide each case. In terms of corporate culture, the style of decision making could hardly be more different. We also know that many commercial mergers fail because it is impossible to weld two incompatible cultures together. Success in commercial mergers often depends on either wholesale adoption of the better approach or the careful design, bottom to top, of a rational decision making structure that is seen as such by all parties. The CMA requires the latter.
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> … The proposed merger of the OFT and Competition Commission is a great opportunity to review how decisions should best be made in a competition authority."

Unfortunately, this opportunity was passed up and the CMA was created as a chimera, largely retaining the CC decision making for mergers and markets, and a modified form of OFT decision making for antitrust. Although, as explained above, the last two years are insufficient to provide a serious analysis of the consequences, it may still be worth addressing some of the inherent design flaws.

Question 2 (paragraph 47) ***If yes, on which areas considered in this consultation should the government focus its intervention?***

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[1] These merger statistics are based on CMA financial years as published by the CMA. The Phase 1 trend is not dissimilar.

[2] CCP response to 'A competition regime for growth: a consultation on options for reform'. See http://competitionpolicy.ac.uk/documents/8158338/8262284/6.+BIS_consultation_response_june_2011.pdf/847eadca-dbd4-4b58-bc93-a66eb92c1df9. The quotes from our response combine answers to questions 2, 22 and 24 to that consultation.

Refinements to the existing panel system

- Streamlining of inquiry group role

We agree that the key roles for the group are a) to determine an AEC/SLC and b) to decide on appropriate remedies. They should do this on the basis of an independent assessment of the evidence they receive from main parties, third parties and CMA staff analysis. We were unaware that much group time is taken up by directing specific information requests or dealing with confidentiality issues [#34]. Far more important is the group's role in reviewing versions of staff working papers. These, along with submissions and hearings, should be the core input for group decision making. Working papers should be independent factual assessments and it has always been a concern that this independence can be compromised by decision makers being involved in their drafting.

- Improving inquiry group accountability to the CMA Board

If this accountability relates to, for example, the extension of the period required for investigation, then this would be quite appropriate. However, there would be a dangerous muddling of decision making responsibilities if the Board were to try to nudge a panel in a particular direction. This should be avoided. Consistency in decision making can better be addressed in other ways (e.g. reducing the number of panel members).

Improvements to the constitution of panels

- Panel size and time commitment

In our 2011 response to the consultation prior to the merger of the OFT and CC to form the CMA, we wrote:

> "The CC members system provides an excellent array of relevant expert talents, including economists, lawyers, finance and business people with employment backgrounds in the private sector, public sector and universities. This allows for an important skill mix to be available in each panel. However, the current system includes far too many members each taking too few cases.
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> It would be better to move to a much smaller set of members in a rolling system with greater commitment (3-5 days p.w.) for 2-3 year terms."

It should be unsurprising that we support a reduction of the number of panellists along with a greater time commitment. The exact size must make allowance for potential conflicts on specific cases, but twelve does not seem unreasonable.

We are unenthusiastic about the appointment of ad hoc experts who have no experience of the panel system. It would be difficult to get them up to speed on the processes and requirements, though former panellists may be a reasonable possibility (subject to relevant safeguards about over-use and loss of independence). We also have substantial reservations about using staff on secondment from other regulators as panellists.

The use of senior CMA staff as panellists would be a major step change and alter the culture of the panels. This may be a serious possibility if a compromise is necessary for the same decision making process to be introduced for antitrust (CA98) cases. Otherwise, it would signal a drift towards executive decision making in phase 2 mergers and markets. It would likely lead to a more prosecutorial approach, appeals on the merits (i.e. not just judicial review), and ultimately to a court based system. A great virtue of genuinely independent panels is that the system would limit the grounds for appeal.

- Experience of panel members

It has always been a very positive feature of panels that they balance law, economics, finance and business experience. It is not clear what #43 is suggesting.

- Length of appointment

The appropriate duration of appointment in a reasonable range (say 3-5 years with greater time commitment than at present) should be consistent with recruitment of the most appropriate people. Re-appointment options 'where appropriate' (at least without a substantial gap in time) would severely compromise independence from the Minister.

Question 3 (paragraph 47) *Do you have any further comments on the UK's approach to decision making in market and merger investigations?*

Once again, we quote from our evidence in response to the 2011 consultation prior to the merger of the OFT and CC to form the CMA. We have seen no evidence that contradicts what we said then:

> **"**There are plenty of alternative models and most countries seem to have their own distinctive styles. Much of the reputation of different agencies results from the expertise of its staff, including economists, lawyers and administrators. This can sometimes paper over the cracks of a fragile formal decision-making structure. In the long term, however, a robust institution is one that provides a well-informed challenge to both firms and its own staff. Unfortunately, there is a serious danger that the proposed Competition and Markets Authority (CMA) will be given a hotch-potch of superficially targeted, but in practice incompatible, decision processes by which different bits of competition law are enforced by a divided institution. How different are the *skills required to gather and interpret evidence* in different elements of competition law (e.g. mergers, agreements, abuse of dominance, market inquiries)? The answer is 'very little'. The essence of competition law, appropriately interpreted through the lens of economic effects, is that it requires a blend of law and economics skills to implement. This is true of assessing the likely effect of a merger or rebate scheme or exclusive contract on price or investment or innovation incentives. In both the OFT and CC, staff with economic and legal skills gather the evidence. A similar blend of skills is necessary to balance the evidence and decide a case, though decision makers need additional, wider experience, and do not necessarily require all the technical skills for compiling economic evidence. The UK system, despite its common law roots, falls firmly in the European tradition of agency-led inquisitorial cases. The courts are for appeal against agency decisions (unlike in the adversarial US system). There is also almost no private action in prosecuting competition cases in the UK. Unless the chosen [decision making] options result in fundamental changes, *agency-led inquiries* will continue at the core of the system. Given that *similar skills are required by decision makers* for most categories of competition case, who should make those decisions? The current UK system has two institutions with very different processes for making decisions based on a staff investigation…
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> *…This mix and associated differences in decision making bodies cannot be justified.*
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> Spurious arguments are sometimes wheeled out to justify what is essentially a historical accident. For example, 'mergers are different because they are prospective, so require skills to predict likely effects', but current practices (e.g. restrictive contracts) also need an assessment of what would happen in their absence. Another argument is that 'anticompetitive agreements and abuse of market power are illegal, so subject to fines while proposed anticompetitive mergers or uncompetitive markets are not', but this is an Alice-in-Wonderland justification for having the illegal activity decided by executives while mergers and markets are decided by a panel of independent experts.
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> *If there is to be a unified decision making structure, what should it be?*
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> Executive decisions are speedy and usually reliable when implementing relatively straightforward rules. In cases where issues must be balanced and nuanced, however, there is value in widening the decision-making base. Also, when the decision is based on evidence provided by their own staff, an executive can quite naturally be influenced by staff management and support issues. A panel's strength is in the diversity of experience it brings

to a judgment, and the ability to debate key issues between equals. Furthermore, a non-executive panel will also be less influenced by organisational priorities or career concerns, though it may be a little slower to reach its decision.

Executive decisions are perfect for phase one decisions, including whether to open a serious antitrust investigation; and decisions by a non-executive panel have exactly the right qualities for deciding second phase cases. The latter require impeccable credentials not least because they can involve the transfer of private property (e.g. a fine or preventing the sale of business).

*This does **not** mean that the CMA should straightforwardly adopt the CC model*. There are some strong positive attributes to CC panels, most of which are not found in other jurisdictions. For example, panel members read all the evidence as it comes in. They also undertake site visits which provide insight into the businesses under scrutiny, and they have face-to-face hearings with the executives responsible for the businesses and business practices. This provides an unrivalled access of firms to decision makers but in a structured and open environment. It allows the decision makers to ask direct questions face-to-face about any aspect of the business they consider relevant; and it allows the firms to rebut the staff case in front of the decision makers. However, other features of the CC panel system require reform. There is a serious confusion between leading the investigation and independent decision making. Although there is a staff inquiry director, the panel continually reviews internal documents and can influence the direction of the inquiry.

This continues with the drafting of chapters for the preliminary and final reports. This inevitably compromises the appearance of impartial review of the evidence in reaching a decision. The panel should stay at a distance and only draft its decision/conclusions.

The clinching issue for a unified structure of decision making, with nonexecutive panels deciding all phase two cases (including antitrust), is that we need a coherent appeals system. Currently, natural justice and the Human Rights Act mean that decisions taken by a panel (i.e. the CC) are subject to judicial review (i.e. the court can require the CC to investigate certain points more carefully and to reconsider its decision), while executive decisions (i.e. OFT antitrust) are appealed 'on their merits' (i.e. the court can replace the OFT's decision with its own decision). Judicial review is consistent with the inquisitorial approach of agency decisions. Indeed, it is used by the European Court in relation to all European Commission decisions. JR keeps the agency on its mettle but does not unbalance decision making.

Unfortunately, 'merits' appeals completely unbalance a competition case. Agency staff in the OFT (and, indeed, Brussels) search for unbiased evidence on which to present the basis for a decision. If such a decision is appealed 'on its merits', the firms involved have every incentive to present one-sided evidence to the court. In a full-blown adversarial system (as in the USA), the agency might respond by selectively emphasising its most powerful evidence of anticompetitive behaviour. However, that cuts against the grain of an inquisitorial system where the agency is itself in search of the truth.

Furthermore, the court (i.e. CAT) does not have a full complement of staff to investigate cases, even though it does have a panel to decide them. Antitrust cases often involve several firms (horizontally or vertically related or both) who are party to an appeal. The CAT can then face technical expert evidence from, possibly, half a dozen well-funded defendants selectively supporting one side of the case plus one modestly funded OFT expert trying to support the middle ground. *It is not possible for the OFT to shift from inquisitor to prosecutor between decision and appeal*. In such circumstances, a 'merits' appeal system cannot be expected to work well. It is far better to have cases decided by an independent panel and subject to appeal on grounds of judicial review.

Reading the options and apparently preferred option in the consultation, I am very concerned that the proposed CMA will fail to have a rational decision making structure. History has a powerful hold on institutions, particularly those with fine international reputations. The status quo is more aggressively defended than attacked, especially between collegial institutions that have no wish to undermine each other. Meanwhile, law-makers in government pay more attention to accountability to parliament than they do to the nitty-gritty of how individual decisions are made. The complex set of options set out in the current consultation might too easily muddle into place."

It did. It may not be a coincidence that the CMA was joint 8th (alongside Australia, Brazil and Spain) in the Global Competition Review 2015 rankings of competition enforcement agencies, falling behind France, Germany, Japan and Korea. The separate CC and OFT had been regulars in the elite group alongside the US agencies and European Commission.

Question 4 (paragraph 55) Which, if any, of the options for reducing the end-to-end time taken for market investigations should the government pursue?

- ~~Option1~~ – reduce the statutory timetable from 18 months to 12 months and retain the 6 month permitted extension NO
- ~~Option 2~~ – retain the current 18 month statutory time limit and remove the right to extend the timescale NO
- **Option 3** – retain the current 18 month statutory time limit and allow the CMA Board to determine the timeline of a market investigation linked to its scope YES
- None of the above

It would be unwise to restrict the duration of an investigation arbitrarily. It takes time to get the feel of a market and understand where the key issues lie. Opinions provided by the firms and third parties are framed by self-interest so a factual base is essential for a sound judgement. Facts take time to collect and appraise, as can be seen in all the current inquiries. For example, prices are not easily compiled and compared especially when individual consumers have different requirements or usages and so purchase different tariff schemes. Product and service qualities can be even harder to compare. Mistakes can be made and data rooms are important for checks and testing. Remedies also need feedback to understand their proportionality, strengths and limitations. These data and feedback processes take time. Excessive haste would:

- severely undermine the quality of analysis, leading to more mistakes and worse decisions; and
- be counterproductive as a lack of robust evidence (or data errors) increases the duration of a case due to appeals and remittals.

Question 5 (paragraph 55) Please provide any comments on the current system or government's proposed approach to amending it.

See answers to Q1-Q4 above.

Question 6 (paragraph 55) Should the government amend the powers of the CMA to allow it to revisit remedies imposed following market investigations where they are shown not to be working?

This is a difficult questions because there are arguments on both sides and without further evidence, it is hard to judge the merit of each.

On the one hand it would seem reasonable to design remedies such that it is clear what would constitute a success or failure, possibly with an inbuilt review date. On the other hand this is likely to lengthen the remedy design period and lead to more arguments and strategic behaviour by interested parties.

Secondly, retrospective analysis of intervention is now seen as good practice. If the CMA could use these to revisit the remedies rather than their effectiveness, this may affect both how and when retrospective analysis is carried out and with what support from interested parties.

Moreover, the possibility to revisit remedies relatively quickly would allow the CMA to be more creative in design but also less careful in the accompanying analysis.

Question 7 (paragraph 74) Is the government right to believe that there is no legislative change required in relation to the CMA's merger assessment powers?

NO COMMENT

Question 8 (paragraph 74) If no, please set out where you believe that the government should seek to legislate and why.

NO COMMENT

Question 9 (paragraph 89) Do you agree with the government's proposal to allow for a parallel fining power on the civil standard of proof for parties who provide false or misleading information?

NO COMMENT

Question 10 (paragraph 92) Which, if any, of the options for amending the level of fine that the CMA's can impose for breaches of requirements in merger and markets investigations should the government pursue?

- Option 1 – Increase the maximum penalty that the CMA can award from the current levels of £30,000 for a fixed fine and £15,000 for a daily fine or allow the penalty to be calculated by reference to turnover
- Option 2 – allow the CMA to impose a daily penalty by reference to an earlier date – the date it considers a person had no reasonable excuse for not complying with its request.
- None of the above

NO COMMENT – we have no relevant empirical evidence to offer at this point.

Question 11 (paragraph 92) If fines should be increased, what do you think would be an appropriate approach and level?

It is not clear whether the question relate to fines in general or the specific fines for non-cooperation.

In the former case, theoretically the fines should be set at a level which would deter behaviour without leading to over-deterrence. In practice this is not easy. A lot of the writing and discussion about the inadequacy of fines originate from hard-core cartel cases. In the simplest of cartel cases, such as naked price-fixing, there is little relevant concern for over-deterrence. In other areas of antitrust in which a fine might be imposed, the concern for over-deterrence is more real. For example, the precise lines between legality and illegality when it comes to information sharing and unilateral information disclosure are still far from clear. Very high fines might for example have a chilling effect of firms seeking to establish industry standards on safety measures. Where there is a legitimate concern regarding over-deterrence, private damages offers an additional level of complication. For deterrence the relevant amount should be the total liability in case an action is found to violate completion law. That would include the cost to the firm of the CMA enquiry, the fine, the cost of any private litigation and the damages awarded. There is a tendency to see these as separate, but they are clearly all costs arising from the finding of a breach of the law.

In the latter case, it may be difficult to judge whether parties have provided accurate, useable and timely information, especially with digitally stored information. The presentation by Professor Gavil at CCP's summer conference 2015 may be useful in setting out the issues [

http://competitionpolicy.ac.uk/documents/8158338/9330040/Andy+Gavil+-+CCP+Conference+2015.pdf/e60ffb41-4050-42b4-b53a-51dffc0e0c63]. If it is difficult to be sure whether a violation of the rules have occurred, then increasing the fine may make the firms more prepared to appeal.

Question 12 (paragraph 97) Is the government right to seek to designate the CMA as a prosecutor under SOCPA for criminal cartel cases?

The government is right to seek to designate the CMA as a prosecutor under SOCPA for criminal cartel cases. One criticism of the current regime is that the criminal offence may have a chilling effect on the CMA's leniency programme in relation to cartels. This is because individuals may be unsure whether their firm will be the first to approach the CMA and therefore result in their benefiting from no-action letters. The employees of the second and subsequent firms to come forward risk being prosecuted under the cartel offence. By contrast, the civil enforcement regime against undertakings provides discounts in fines of up to 50% where immunity has already been claimed and so being second or third through the door is clearly still worthwhile. (see Andreas Stephan 'Four Key Challenges to the Successful Criminalisation of Cartel Laws' (2014) Journal of Antitrust Enforcement 2(2): 305-332)

The ability to enter into agreements with assisting offenders under sections 72-74 of SOCPA will provide greater reassurance to prospective leniency applicants and assist firms in their internal compliance efforts. This is because it will make it more likely that the courts will reward cooperating defendants with shorter or suspended sentences, as is appropriate to reflect their level of cooperation. However, such agreements do not amount to a US style plea agreement – they are simply brought to the attention of the court and are not binding as to a particular outcome. It is right that the CMA's designation under SOCPA should complement and not replace no-action letters provided to the employees of the revealing firm.

Question 13 (paragraph 105) Do you agree that the government should introduce a statutory time limit of two months for appeals against PSR decisions that are heard by the CMA?

Might the time have come to streamline processes and remove all appeals function from CMA and hand it to the CAT which after all is a specialist dedicated appeals tribunal? One would also have to consider whether the CAT should only carry out JR or also look at appeals on the merit [in which case one might want the CAT to have access to relevant analysts].

Question 14 (paragraph 112) Do you agree that the Competition Service should be abolished and that the CAT should assume its functions?

It is actually rather difficult to find out that the Competition Service does. The very sparse information on their website states:

"The Enterprise Act 2002 created the Competition Service; a body corporate and executive non-departmental public body whose purpose is to fund and provide support services to the Competition Appeal Tribunal. Support services covers everything necessary to facilitate the carrying out by the Competition Appeal Tribunal of its statutory functions and includes, for example, administrative staff, accommodation and office equipment."

There is no information about who the staff is or what they do – however the examples provided in the paragraph might suggest that very little would be lost from a merger.

Question 15 (paragraph 116) Do you agree that the jurisdiction of the CAT should be extended to allow it to hear cases (or elements of cases) which relate to breaches of articles 53 and 54 of the EEA agreement as well as breaches of UK competition law and Articles 101 and 102 of TFEU?

Yes. This makes sense.

Question 16 (paragraph 120) Is the government right to allow the CAT to hear Judicial Review applications in respect of matters arising in the conduct of ongoing CA98 cases?

Yes. This makes sense.

Question 17 (paragraph 122) Is the government right to give the CAT a power to give declaratory judgments in private actions for damages?

Yes. This makes sense. The injunction powers of the CAT have been positively received and the power to give a declaratory judgement strengthens the CAT's role as the main forum for competition litigation. Declaratory judgements are common in other jurisdictions like, for example, Germany where they are frequently sought by claimants (see Sebastian Peyer, PRIVATE ANTITRUST LITIGATION IN GERMANY FROM 2005 TO 2007: EMPIRICAL EVIDENCE, Journal of Competition Law & Economics (2012) 8 (2): 331-359. doi: 10.1093/joclec/nhs011.)

Question 18 (paragraph 124) Is the government right to seek to amend ERRA to ensure that the government has a comprehensive power to make rules allowing the CAT to exercise judicial supervision of all aspects of warrants in competition investigations?

NO COMMENT