



Competition & Markets Authority

Vision, values and strategy for the CMA: Consultation document.

Consultation response from the ESRC Centre for Competition Policy

University of East Anglia, Norwich Research Park, Norwich NR4 7TJ

Date: 11th November 2013

Contributing author: Prof. Bruce Lyons, Prof. Morten Hviid and Prof. Andreas Stephan

The authors retain responsibility for the contents of this consultation response.

The support of the Economic and Social Research Council is gratefully acknowledged.



An ESRC funded Investment. The views and statements expressed are those of the authors and do not necessarily reflect the views of the ESRC.

● The ESRC Centre for Competition Policy (CCP)

CCP is an independent research centre, funded by the Economic and Social Research Council (ESRC), and established in 2004 as a Centre of Research Excellence. CCP's research programme explores competition and regulation policy from the perspective of economics, law, business and political science. CCP has close links with, but is independent of, regulatory authorities and private sector practitioners. The Centre produces a regular series of Working Papers, policy briefings and publications, and a bi-annual newsletter with short articles reflecting our recent research. An e-bulletin keeps academics and practitioners in touch with publications and events, and a lively programme of conferences, workshops and practitioner seminars takes place throughout the year. Further information about CCP is available at our website: www.competitionpolicy.ac.uk

Question 1: Do you agree that the CMA’s vision accurately and adequately describes what the CMA is seeking to achieve? Do you have any comment on it?

There is an apparent conflict between the CMA’s primary duty as set out in the Enterprise and Regulatory Reform Act 2013 s25(3) “to promote competition... for the benefit of consumers” and the CMA’s mission to make “markets work well in the interests of consumers, businesses and the economy”. Several issues arise:

- a) The primary duty looks like a consumer welfare standard (i.e. prioritising consumers over all others) but the mission looks more like a total welfare standard (i.e. also taking business profits and more generally ‘producer surplus’ into account, and possibly also pollution and other externalities). In many cases of the sort that come before a competition authority, these can be in conflict. Why does the wording differ? How should the different wording be interpreted? The lack of consistency between the highest level duty and the mission sets a damaging precedent for confused thinking at the CMA, and could waste valuable resources if parties debate this issue case by case.
- b) In the primary duty, the work ‘promote’ is used in relation to competition. However, in mergers, the standard is to ‘protect’ competition. In particular, could remedies be required to enhance competition, rather than the current situation of only ensuring that the current level of competition is not eroded? This seems a much more minor issue than point a) above.
- c) It is not clear how the CMA’s duty/mission fits with the duties/missions of the other regulators with which the CMA pivotally interacts.

Clarification on the above would be desirable.

Question 2: Do you have any comment to make on the CMA’s proposed strategy or the proprieties set out within it?

- a) The government has set out five sets of issues which it considers to be crucial to growth and which it would like the CMA to have regard to in developing its strategic and operational plans (p10). These are to:
 - Take account of consumer behaviour particularly in markets where there are information problems and asymmetries.

- Take account of longer-term dynamic competition through innovation and the development of new business models, as well as short-term competition in the market.
- Be willing to consider potential competition concerns in business-to-business markets, including the effects of differences in bargaining power between firms in a supply chain.
- Assess specific sectors where enhanced competition could contribute to faster growth, working with the responsible regulator where appropriate; and
- Address emerging competition problems early and increase the number and speed of cases, to the benefit of consumers and the wider economy while ensuring fairness and avoiding undue burdens on business.

While the consultation document acknowledges these issues, it is unclear how the CMA will prioritise them. In particular:

- i. The second bullet is a laudable aim and we support it in principle. However, it is often difficult to assess the evidence on innovation and the stability of new business models, and many competition authorities end up emphasising the short-term competition for which evidence is easier to assess. What will be the CMA's position in cases where there is an apparent tension between long-term and short-term issues?
 - ii. The third bullet (after 'including...') may tempt the CMA into commercial disputes that could distract it from its primary duty. The CMA should be slow to get involved in arguments between two undertakings about how they split the surplus generated from their activities unless they can demonstrate how this harms consumers now or in the future. It is not just that it would be an inappropriate use of CMA resources to referee such an argument – there are other long-standing commercial law means so deal with this.
- b) In terms of delivering effective enforcement (p.11), no distinction is made between mergers, antitrust and market inquiries. This is particularly relevant for the fourth bullet on “case management procedures to improve the rigour and perceived fairness of decision making”. These are very different in the OFT and CC, so we were looking for a clear CMA strategy on decision making, beyond the vague promise of “securing the benefits of collective decision making, drawing on the experience of the CMA panellists where it can add value across a broader range of work and further enhancing the robustness of case decisions to challenge.” The CMA should have these procedures very clearly and visibly in place before it takes over case handling, particularly of CA98 cases (antitrust).

- c) There is no acknowledgement that there can be limits to what competition can achieve and where other complementary policies are necessary. For example, effective competition may not always benefit some important social group (e.g. the poor or vulnerable) or unbridled competition may have negative externalities (e.g. pollution, deserted city centres). In such cases, income support, pollution taxes and planning laws are necessary to provide a balanced policy mix. The acknowledgement of such issues by the CMA would help it focus more sharply on what it can positively achieve, which is a great deal.
- d) Finally, under the heading 'Achieve professional excellent' and as an academic research centre, we would like to see an extra bullet point: "Work with the research community to incorporate practical and robust research results in professional practice".

Question 3: Do you have any comment to make on the CMA's proposed statement of values?

- a) In the Table on p.20, under external 'Fairness', the consultation document states: "we allow everyone their say...". This sounds hollow as there is no commitment to do other than go through the motions. It would be better to add something like "and give careful consideration to the evidence they provide". This would then tie helpfully with the internal 'Objectivity' value that "we are evidence based".
- b) It is not made explicit, but we trust that there is no sense of ordering in a list of values that places 'ambition' first and 'objectivity' last!

BL/MH/AS