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The Competition and Markets Authority: a reboot for the 2020s

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July 2021

About the author

The Rt Hon Lord Tyrie was Chairman of the Competition and Markets Authority from 2018 to 2020. He was MP for Chichester from 1997 to 2017. He has chaired numerous Parliamentary committees, including the Treasury Select Committee and the Liaison Committee – the committee of Select Committee Chairs. He was also appointed by Parliament to chair the Parliamentary Commission on Banking Standards in the wake of the Libor scandal. He has written extensively on public policy issues.

Acknowledgments

I am extremely grateful to Robert Colville, Bobby Duffy, George Murkin and Robyn Staveley for their helpful suggestions and editorial work. I would also particularly like to thank the CMA staff, many of whose ideas have found their way into this paper.

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Introduction


Public and political sentiment across the West has been turning against free markets and open economies, and for some time. The change of mood predates the financial crash. But the events of 2008–9 amplified it. And the scale of the change has only recently become widely appreciated. Partly as a result, the promotion of competition from abroad – and especially from China – is increasingly treated as a threat, rather than an opportunity. And the promotion of competition domestically is seen in a growing number of countries to be antithetical to the development of new, more interventionist, industrial strategies.

Some might call this a crisis of capitalism, and by extension a crisis of legitimacy in the institutional settlement that has developed to underpin it. Regulators and other public authorities that were once seen as harnessing the forces of capitalism for the public good are now being cast – by the left and the right – as part of the problem: unaccountable guardians of an economic order that serves the few at the expense of the many.

This is far more than mere populism. Much of it is justified. The task for those who believe that competitive markets are the surest route to prosperity is to contribute to restoring trust in that settlement, and to show that it can continue to serve the interests of millions of people.

Competition authorities are only a part of this picture. But they are in the frame.¹ The remoteness of some of them, and their failure to listen, understand and respond to the public's growing and legitimate concerns have, in the

1 Regulators with competition remits include the FCA; Ofcom; Ofgem; PSR; and the PRC of the Bank of England.



view of many,² played a role in the demise of the political consensus in support of markets. Some competition authorities are now waking up to this. In the EU, Margrethe Vestager has argued for the need to demonstrate the benefits of robust competition policy to consumers (she also said that we should just call them “people”). I’ve heard variations on the same theme from a good number of my erstwhile counterparts in competition authorities from other jurisdictions, and not only within the EU. The need for these bodies to talk directly to their “final customers” is gradually becoming better appreciated.

Against this backdrop, a growing number of studies are highlighting how weaknesses in antitrust enforcement and merger control have led to a decline in the strength of competition. Thomas Philippon and Jonathan Baker have described the experience in the US. In the EU the picture is more mixed; much of the hard evidence remains elusive and many of the protagonists’ conclusions, in what is now a vigorous debate, remain controversial. Nonetheless, there appears to be growing evidence in major jurisdictions of similar trends.³

The platforms, and digital technology, have brought huge gains for consumers. But they have also brought new and deeply concerning forms of detriment. Not least among them has been an aggravation of the trend of weakening

2 See, for instance, John Penrose MP, *A Shining City Upon A Hill: Rebooting Capitalism for the Many, Not the Few* (2018); The Economist, Regulators across the West are in need of a shake-up (November 2018). Rachel Reeves, among many others, has made similar remarks. John Penrose has also developed a number of proposals for reform in *Power to the People: Stronger Consumer Choice and Competition So Markets Work for People, Not the Other Way Around*, published 16 February 2021 by BEIS.

3 For example, a recent (2019) OECD study found a rise in industry concentration across both Europe and North America between 2000 and 2014, with roughly 75 per cent of industries in both continents becoming more concentrated over this period.

competition. The Furman Review⁴ in the UK, the Vestager Report⁵ in the EU and the Stigler Report⁶ in the US – as well as the Competition and Markets Authority’s own market study⁷ – have all concluded that the market power of online platforms is getting stronger, and that competition policy has struggled to keep pace with the changes to markets and business models wrought by digitalisation.⁸

There is a growing appreciation that traditional tools of competition policy – merger control and ex-post antitrust enforcement – are ill-equipped to deal with the challenges posed by digital platforms, and that wide-ranging reform is probably needed, including regulation and ex-ante scrutiny.

This is not just a supply-side problem. On the demand side, consumer law and policy have failed adequately to protect consumers from exploitation and rip-offs. These have often been enabled or facilitated by digital, which has exposed holes in consumer protection frameworks, just as it has in competition laws.

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4 HM Treasury, *Unlocking digital competition, Report of the Digital Competition Expert Panel* (2019).

5 European Commission, *Competition policy for the digital era* (2019).

6 Stigler Center, *Stigler Committee on Digital Platforms: Final Report* (2019).

7 Competition and Markets Authority, *Online platforms and digital advertising market study* (2019).

8 The CMA has recently reinforced earlier announcements that they are seeking out possible antitrust actions.



holes in consumer protection frameworks, just as it has in competition laws.

I have spoken a number of times about the growing sense of vulnerability felt by previously confident and capable consumers. We are all vulnerable now. This sense not only weakens the competitive process (which depends on confident consumers as well as vigorously-competing firms); it can all too easily create the political conditions favourable to anti-competitive government action, including more protectionist trade policy and more interventionist industrial strategy.⁹

In the UK, the protectionist agenda may not yet have taken root to the same degree. But in many ways, the challenge posed by the apparent demise of public and political support for market competition is greater here. It comes just at the point when the CMA is to acquire additional (and in the case of the Office for the Internal Market, the Digital Markets Unit and possibly the Office for Subsidy Control, novel) responsibilities, and just at the moment when the Government wants to “reform itself” (that is, its machinery),¹⁰ and is seeking to become more demonstrably responsive to the electorate’s concerns.¹¹

9 Jonathan Baker, and more recently Bill Kovacic, have referred to the “political bargain” that supports free markets: namely, that markets and firms (including large firms) will serve as the economy’s essential infrastructure in return for the government’s commitment to create robust regulatory mechanisms to ensure that private initiative serves public ends. As Bill Kovacic puts it, “If competition and consumer protection policies fail, or are widely seen to be inadequate or irrelevant, irresistible pressures grow to introduce comprehensive regulatory controls on entry and terms of service, or to expand public ownership”. I agree.

Bill Kovacic, *The CMA in the 2020s: a dynamic regulator for a dynamic environment* (2020).

10 Michael Gove, *The privilege of public service*, Ditchley Lecture (2020): “If this Government is to reform so much, it must also reform itself”.

11 There is little doubt that non-departmental public bodies are within the scope of this ambition: Ofqual, the Electoral Commission and Public Health England have already been singled out for reform or abolition.

As I will illustrate, the very low levels of public awareness of the CMA, and its facelessness – that is, the absence of visible leadership – pose particular problems for its legitimacy, and make it an easy target for attack.

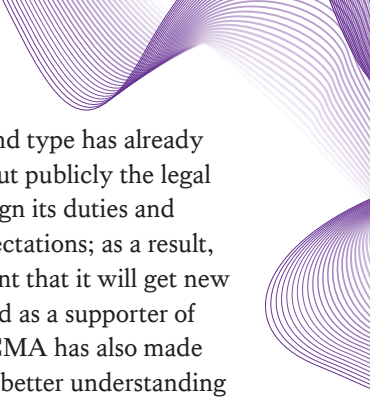
If you do not accept the case that competition policy needs to adapt to all this – and some believe that the tools of the 20/30-year-old technocratic “competition settlement”¹² are up to the job – then there is no need to read further. Indeed, some believe that, in acting on these problems, through the articulation of a legislative reform agenda, among other things, that I “politicised” the CMA as Chairman. That charge has two possible meanings, and they are quite distinct.

The first is that I brought political considerations to bear on the CMA’s decision-making.¹³ There was never any danger of that, though the fact that it was thought possible reveals how poorly even many otherwise well-informed observers understand the CMA’s decision-making processes, and how little practical protection they provide from allegations of bias and capture. Politicisation of the CMA is a growing risk; but as I set out below, the source of that threat has not been from within.

The second possible meaning is that I tried to bring the CMA closer to political life: that is, to recognise and adapt to a changing political landscape. On that count, I’ve been and, as ex-Chairman remain, very active. I will set out below why and how I made it a priority. The Government and the CMA will now have to decide whether it remains so. Avoidance of a decision would amount to de-prioritisation.

12 I’ve set out what this settlement consists of elsewhere, including in the opening to my May 2019 remarks at the Social Market Foundation.

13 The related charge that, as a former Conservative MP now sitting on the cross-benches in the Lords, I am not sufficiently distant from party politics, has scarcely been put to me as a serious concern by anyone in Parliament or the press. Not so from the top of the CMA, internally.



Some important progress of the second type has already been made. The CMA has now set out publicly the legal changes that would be required to align its duties and powers with public and political expectations; as a result, it has secured a manifesto commitment that it will get new powers. HMT has now been recruited as a supporter of important parts of the agenda. The CMA has also made important statements of intent about better understanding and responding to the concerns of ordinary consumers. Completing what has been started – making legislative reform a reality, and turning the CMA’s recent rhetoric on consumers into demonstrable action – will be essential if it is to secure legitimacy as it takes on wider post-Brexit responsibilities. It will be doing so in a political environment increasingly hostile both to unelected power, and to the principles on which independent competition authorities were founded.

There remain significant obstacles to completing this work. I hope that interventions such as this, made possible by my resignation, and bolder strategic thinking by the CMA, will provide the opportunities – a trigger – to tackle these. A good deal of political will and direction will also be needed as I recently pointed out in the *Financial Times*.¹⁴ But much of the government’s energies may understandably remain absorbed in urgent and even bigger issues, at least for the short term. The opportunities for the government, economically and politically, are large, but the risk will remain that ground made at the CMA will now be lost.

For example, at the last Chancellor’s request,¹⁵ the CMA was gearing up to analyse aspects of the problem more systematically. It was starting to address questions such as what is really happening to competition in the economy,

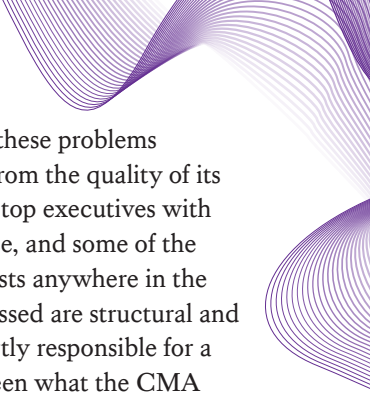
¹⁴ Andrew Tyrie, *The UK competition regulator is not fit for purpose*, Financial Times (2021).

¹⁵ Letter from Sajid Javid MP and Andrea Leadsom MP to Dr Andrea Coscelli (5 February 2020) (see Annex III).

in which sectors and why. It was intended to develop this work at pace; advice to Government on how to sustain competition, thereby improving consumer welfare, was being earmarked for development in the CMA. It was intended to turn the advisory tool into a major lever in the CMA's kit bag. It is certainly not that at the moment. It was also intended that the CMA would become a repository of expertise in this field, drawing on a good deal of data that is already collected across a patchwork of Government bodies, academic institutions, and the private sector. All this ground could easily be given up, lost in the pressure of very short-term priorities. The early auguries are not good.¹⁶

The risk will be that, with the political community distracted, and without strong guidance from them, the CMA retreats to a place with which its senior team are perhaps more intellectually and culturally familiar, but which, for reasons set out below, leave it vulnerable. Robust Board leadership could do much to prevent this. But Government direction is also needed, if this work is to be developed and adequately resourced.

16 The recently published report (initiated under my Chairmanship in February 2020 in response to a request from the then Chancellor of the Exchequer and the Secretary of State for BEIS) into the state of competition in the UK contains no commitment to any subsequent reports, nor to any further development of this work. Yet both were required of the CMA in the terms of reference for the work, agreed by the CMA with the Treasury and BEIS, prior to its commencement. Furthermore, both were anticipated in a letter from the current Chancellor and Business Secretary, following the report's conclusion, which states that "we [the two ministers] believe there is value in regular reporting, and hope that this preliminary assessment will provide a baseline for further work". The full text of the commissioning letter from ministers and the terms of reference, are in Annex III. A number of studies of sectoral markets in which the CMA currently has considerable expertise, put underway as part of the state of competition work, have not materialised, at least, not so far. Nor does the report contain any specific recommendations to Government, or to other public authorities, for bolstering competition. To put it mildly, it is surprising that a year-long study into the state of competition in the UK could have found nothing sufficiently untoward to merit a recommendation for remedy; the initial response was incomplete and in some respects defective.



In as much as the CMA can address these problems directly, the obstacles do not derive from the quality of its people. It has a high-quality cadre of top executives with a strong commitment to public service, and some of the highest-quality lawyers and economists anywhere in the civil service. What needs to be addressed are structural and cultural vulnerabilities. These are partly responsible for a gap – now large and growing – between what the CMA chooses to do and what many politicians and Ministers think it should be doing.¹⁷

The structural vulnerability is a mismatch – partly derived from statute, partly from delegation of authority – between what the Board is assumed to be responsible for, and the authority that the Board exercises in practice.

The cultural vulnerability – which may in part reflect the statutory framework – derives from the powerful influence of the Senior Executive on the Board whose development, while readily explicable, has permitted a relatively narrow interpretation of the CMA's functions and role in the economy to determine the shape, strategy and priorities of the organisation. With it has come a correspondingly narrow measure of performance (largely successful casework) to define perceptions of its own success. The 2020s programme¹⁸ of structural and statutory reforms designed to enable the CMA to act much more directly and visibly in response to consumer detriment, and its strategy work now in train, could and should map out a route for widening that interpretation.

17 The recent competition levels work, among other things, amply illustrates this. See preceding footnote. I first flagged this up in a note setting out my first impressions to the Senior Executive Team almost two years ago. I have informally and frequently reiterated the point to them, and to NED members, also recently in writing to my interim successor.

18 Launched by Andrea Coscelli, Bill Kovacic and me on 25 February 2020 at Policy Exchange.

In what follows, I set out the importance of focusing on these vulnerabilities, their origins, and the steps the CMA in general and the Board in particular might usefully take to assuage them. And I also allude to the crucial roles that the Government and Parliament respectively can and should now play to facilitate reform. This is, in many respects, a first-rate institution and a credit to the staff right across the organisation. And in the areas to which it currently gives priority it is often producing high-quality work. But its development is incomplete, to say the least. All organisations have strengths and weaknesses: the CMA has more than its share of both.

The growing legitimacy deficit: some causes and consequences

The Competition Act and the Enterprise Act marked a fundamental shift in control and responsibility for competition policy and enforcement from Ministers to unelected officials. But the changes that have occurred in the 20 years since that legislation was passed have in many respects been just as profound. At least four features of this “hidden wiring” are worth pointing out.

First, competition policy and enforcement have become even more technical than hitherto, thanks partly to what some might call the “mission creep” of the appeals system, and to the barnacles of case law that have accumulated on the primary legislation.¹⁹

A lucrative consultancy industry has developed to help large companies secure merger deals, and to survive antitrust scrutiny, deepening a system that apparently, and ironically, is likely to favour the largest, most deep-pocketed firms.²⁰ The CMA (and its predecessors) has had little choice but to join the arms race, with the result that huge intellectual energy is now expended in getting cases through, and the

19 Between 2000 and 2005, the Office of Fair Trading’s abuse of dominance decisions were on average 87 pages long. Since the CMA was created in 2014, the average has been 618 pages. The duration of appeals before the CAT has also become more protracted: early cases took no more than a few days. The average in the four cases since the CMA was established has been 11.

20 Ironically, because if there is to be any bias based on size, a greater competition benefit is likely to be derived when it is in the direction of challenger firms, which more often than not are smaller.

business of casework preoccupies the top of the office,²¹ at the expense of strategic thinking and other work, the latter at any particular moment apparently less pressing, but at least as important for the long-term future of the CMA.

This growing procedural and technical complexity may have provided more legal certainty (although I have my doubts about even that), but it has certainly come at a cost. I have set out in various public remarks the consequences. For the CMA itself, an important consequence is even more insularity, and detachment from the real economy, than was inherited from the constituent bodies that formed it, particularly the Office of Fair Trading.²²

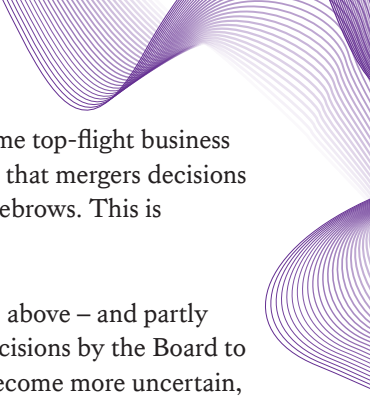
A casualty has been visibility, and with it, deterrence. Two-thirds of businesses do not know that the CMA enforces competition law in the UK. Two-fifths have never heard of it. And one in 10 openly admit to discussing prices with businesses in the same sector, apparently unaware that it's illegal.²³ Among the wider public, awareness and knowledge of the CMA's work is very low. These are very bad figures.

Second, decision-making has become impenetrable, partly as a result of well-intentioned efforts to maintain the independence of Phase 2 mergers and market investigations, which had previously been achieved through the institutional separation of the OFT and the Competition Commission in 2013. These arrangements may preserve independence, but they have failed to do so in a way that is understood by the outside world (beyond a specialist

21 With the exception of the Attorney General's Office and the National Infrastructure Commission, the CMA has a higher proportion of Senior Civil Servants (Grade 5 and above) than any other Ministerial Department, Non-Ministerial Department or Executive Agency.

22 Five years after it was abolished (ie in 2018), 62 per cent of consumers said they had heard of the OFT: the same proportion as had heard of Which?. The figure for the CMA in March 2020 stood at 19 per cent – roughly in line with the Office for Product Safety and Standards.

23 Competition law research 2018 – a report by ICM on behalf of the Competition and Markets Authority.



“competition community”). Even some top-flight business journalists sometimes appear to think that mergers decisions are determined by the Chairman’s eyebrows. This is completely untrue, of course.

Third, partly as a consequence of the above – and partly because of extensive delegation of decisions by the Board to the Executive – accountability has become more uncertain, and more fragmented: that is, it is far from clear to an outsider who makes the key decisions in the CMA and who should therefore be held accountable for them. And that is to understate the opacity.

Fourth, the so-called “consumer protection landscape” – that is, the set of publicly-funded organisations responsible for promoting, protecting and enforcing consumers’ rights – has become more confused, and even more poorly understood.²⁴ Setting out where the CMA’s responsibility begins and ends in respect of consumer protection is hard enough. The organisation has scarcely tried to do so. Still less has it tried to assist consumers in understanding not just who is responsible for what, or where to turn when things go wrong.

Together, these features – complexity, invisibility, impenetrability and fragmented accountability – have

²⁴ Most of the CMA’s powers to enforce consumer protection legislation are shared with other authorities, including Trading Standards. Following a review in 2012, the Government stated that the CMA’s enforcement role should be limited to particular areas, rather than seeking to duplicate the work of Trading Standards. In particular, the CMA was asked by the Government to use its consumer powers “in markets where competition is not working appropriately due to practices and market conditions which make it difficult for consumers to exercise choice”, and to be “the lead enforcement authority for unfair contract terms legislation and source of business guidance in this one area”. Consumer enforcement in other areas falls predominantly to Trading Standards, which, in the words of Peter Vicary-Smith is “slow, overburdened, and inadequate to deal with large problems, global companies and fast-moving markets”. The sector regulators also have consumer enforcement powers, but these are very rarely deployed, not least because their supervisory and rule-making powers provide a faster and more direct route to addressing consumer harm.

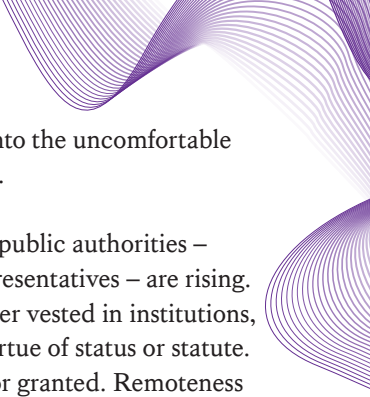
created a legitimacy problem that is summed up in a widely read piece in *The Economist*, written shortly after I took up my role:

When you come into contact with the competition establishment in the rich world—regulators, academics, lawyers—the cruellest comparison is with financial watchdogs before the 2008-09 crash. They are the proud custodians of an internally logical set of rules, developed over years, that do not seem to be producing good results and cannot easily be communicated to anyone outside the priesthood. Most competition authorities are unwilling to be held accountable for the level of competition in the economy; indeed they go further and insist that it is impossible to measure. Given the profound consequences of a rise in corporate power, that is an unsustainable position and will have to change.²⁵

I had no contact with the author of this piece, but I could not have put it better myself! Of course, it was not written only with the UK in mind; and the legitimacy problem is one faced by competition authorities around the world. But the CMA is worse off in a number of ways. Its decision-making is especially complicated. Its accountability is especially unclear, in contrast to the European Commission, the Bundeskartellamt, and a number of other antitrust authorities, which have prominent leaders who are more clearly accountable for the choices and performance of the organisations that they run.

The CMA is now taking on new responsibilities after Brexit – certainly in the form of major antitrust and mergers cases, and monitoring the operation of the UK Internal Market; eventually perhaps (and uniquely among national regulators across the world) in some form of state aid regulation – all of

25 *The Economist*, *Regulators across the West are in need of a shake-up* (November 2018).



which will, sooner or later, thrust it into the uncomfortable front line of scrutiny for the first time.

Moreover, the standards expected of public authorities – from the public and their elected representatives – are rising. Public trust and credibility is no longer vested in institutions, or those who lead them, simply by virtue of status or statute. Legitimacy can no longer be taken for granted. Remoteness is no longer acceptable. The point was made starkly in Michael Gove’s Ditchley lecture, given on 29 June 2020, in which he asked:

Can we [those in public service] prove that we have made a difference? Can we demonstrate the effectiveness of what we have done with other people’s money? Can we prove that the regulations and agencies we have established have made clear, demonstrable, measurable, improvements to the lives of others? And can we prove that in a way that our fellow citizens can recognise and appreciate?²⁶

One of the CMA’s bigger problems is that – even by British bureaucratic standards or those of similar authorities in a number of other jurisdictions – it is particularly remote.

Brexit, and now coronavirus, provide the Government with an opportunity to reshape the state. It wants to use new post-Brexit freedoms to subsidise domestic industry to promote

²⁶ Similar points were made by Stephen Barclay, the Chief Secretary to the Treasury, in a speech on the Spending Review (28 July 2020): “I want this Review to tie expenditure and performance far more closely together than has been the case up to now. For decades the most innovative companies have made a habit of setting clear objectives and then relentlessly tracking, measuring and evaluating the outcomes of their work. This approach should not just be confined to Silicon Valley. We must not forget that the public will judge success not by how much is spent, but by what they experience in their daily lives.”

its levelling up agenda.²⁷ It wants “buy British” procurement policy²⁸ and a reshoring of global supply chains.²⁹ In short – and notwithstanding occasional protestations to the contrary – parts of Government may not easily perceive the “clear, demonstrable, measurable improvements” that an organisation like the CMA brings to the lives of others. These policies could be taken further. A worst-case outcome could be that the CMA falls victim to the ill-considered reformist zeal of a future administration. If the CMA is effectively to protect itself,³⁰ it will need to recommend a new design for itself.

This will be a shock for a body that has hitherto judged its performance much more narrowly. On many of those narrower criteria it is more successful than many other public institutions. But a new set of challenges is rapidly emerging to which it can ill afford not to provide a positive response.

27 See, for instance, comments by Boris Johnson to LBC Radio, 29 November 2019: “The ramifications of state aid rules are felt everywhere [...] We’ll back British industry by making sure we can intervene when great British businesses are struggling [...] when I look sometimes at what EU rules have meant for UK companies – and I saw examples the other day up in Teesside of how fantastic British business was finding it very difficult to develop our potential in wind-turbine technology because of EU rules – there will be ways in which we can do things differently and better.” Also see the recent FT article (27 July), Cummings leads push for light-touch UK state-aid regime after Brexit.

28 “When we leave the EU, we will be able to encourage the public sector to ‘Buy British’”, Conservative Party 2019 Manifesto.

29 The Times, Boris Johnson wants self-sufficiency to end reliance on Chinese imports (22 May 2020).

30 Much of what any government does will be unpopular; but public opinion can always be marshalled behind a bonfire of the quangos, especially if they are poorly understood, remote from daily life, or unable to articulate the difference they make in the language ordinary people can understand.

How to respond: some proposals

The preceding section suggests that the CMA has a significant and growing “legitimacy deficit” to address. Success needs to be measured in broader terms than hitherto. It will need to demonstrate its contribution in a way that convinces elected representatives and the wider public that the CMA still deserves to wield the powers that have been conferred on it. A crucial task will be not only to secure the new duties and powers which I set out in a letter to the Secretary of State a little under two years ago.³¹ It will also need to demonstrate an early willingness to deploy them to their fullest extent, and in a way that improves the welfare of ordinary consumers.

A good start with the above can be made by deploying more fully its existing powers, of which more below. After all, and whether fairly or not, the question will be asked: why supply new tools to a body which has apparently shown itself unwilling or incapable of fully using its existing set?

If the CMA fails to “demonstrate its effectiveness”, there are at least three steps the Government – any government – might take. The first would be to apply greater scrutiny to the CMA, whether through BEIS, or through another


³¹ Letter from Andrew Tyrie to the Secretary of State for Business, Energy and Industrial Strategy (25 February 2019), reproduced at Annex IV.

oversight body.³² An oversight body for regulators that provides more robust and regular scrutiny than the NAO's stretched resources permit has long been a proposal that commands significant cross-party support. I will shortly be publishing proposals designed to assist Parliament with remedying this difficult area of Parliamentary oversight. A second, more profound – but not unlikely – change would be to reverse some of the independence conferred by the Competition Act and the Enterprise Act.³³ The third would be a dismemberment of the CMA in its current form. While less likely, the risk of this, and the adverse consequences for staff morale of such a process, should not be discounted.

It has been put to me by senior civil servants and others, and even leaving aside the economic case, that the complexity of modern competition policy and enforcement would make it impractical to repatriate powers to Ministers. I doubt that complexity offers much, if any, protection; possibly the reverse. It is true that this is a complex field of policy. But not uniquely so. The tax system is complex. But the

32 The sense of dissatisfaction with performance of regulators has been growing since before the financial crash, and the need to address it has been the subject of discussion by Ministers for the best part of a decade. There have, as a result, been modest incursions into the independence of various regulators, through devices such as remit letters, strategic steers and framework agreements with parent departments. A more fundamental examination of the relationship between regulators (including the CMA), government and Parliament would not be inconsistent with the Government's declared agenda; and the recent Treasury consultation on the post-Brexit financial services regulatory framework is doing just that in respect of the financial regulators. In addition, the Government and Parliament have commissioned a range of reviews into the effectiveness of the regulators, including the [Regulatory Futures Review](#); the National Infrastructure Commission's [Regulation Study](#); and the National Audit Office inquiry on [regulating to protect consumers](#), followed up by the [Public Accounts Committee](#). Meanwhile, outside bodies such as [Citizens Advice](#) have accused the regulators of having failed to protect consumers. The evidence suggests that they may have a point.

33 Some independence has already been chipped away by new grounds for public interest intervention (most recently "public health"); also by lowering the threshold for interventions in respect of mergers perceived as important for national security. Further erosion is likely to take place as a result of the National Security and Investment Bill.



Chancellor sets tax rates, assisted by advice from experts in the Treasury and HMRC (like the CMA, a non-Ministerial Department).³⁴

Nor does it necessarily follow that such delegation results in decisions that are more objective, or less “political”. Technocrats are humans, not machines. They have views and prejudices, often shaped by their interactions with like-minded colleagues. They can be influenced by vested interests. And they are motivated by incentives – not least (and quite understandably) the advancement of their careers.

Moreover, what is often disparagingly called the “administrative state” is inherently more fragile in a Parliamentary system, where MPs reasonably prefer accountability to flow through Ministers, who are answerable directly to them.³⁵ “Non-Ministerial Departments” like the CMA are treated with particular circumspection, since they can exercise much of the power

34 For the vast majority of people working in this field, the post-CA98, post-EA02 framework is all they have known. Ministerial involvement in antitrust and mergers is a historical relic. But on a longer view, the norm in the UK has been for competition authorities to act in an advisory capacity; and what might seem a radical change to the competition community may quite reasonably be cast as a resumption of a longer statutory tradition of periodic intervention.

35 In contrast to states where there is a “Napoleonic” administrative tradition (eg France, Italy and Spain), in which political culture and weaker Parliaments afford more tolerance of regulatory authority and powerful, centralised bureaucracies.

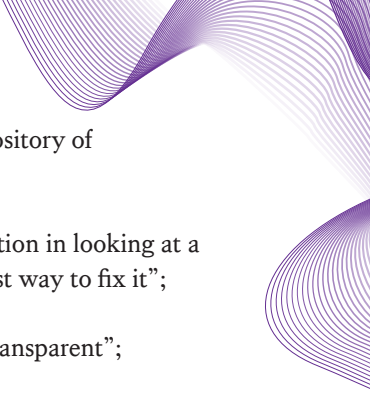
of traditional Whitehall Departments, with only a fraction of the Parliamentary accountability.³⁶

I set this out because it helps to frame the context: namely, that – although I largely disagree with it – the case for the reassertion of Ministerial control over competition policy is not only a respectable one, but one that carries greater political attractions now than at any time in recent decades. The CMA as an institution has, so far, struggled to develop its own role in influencing that case. It has scarcely been heard in Parliament, particularly in the Commons, which matters most. With a bolder approach, it can do much more to shape the environment in which it operates, build support for robust competition policy, and strengthen legitimacy in its independent application of it. This is part of the agenda that in my view the CMA needs to advocate. Even more important, the Government will need to provide a strong lead: without it (and like many public bodies) the CMA is unlikely to translate deeply reformist rhetoric (whether its own or that of others) into robust internal reform.

So what would a new or rebooted competition and consumer protection authority look like? Over the longer term, the CMA needs a strategy to implement the ambitions of the 2020s agenda. Here is the current Chief Executive's, Andrea Coscelli's, own description of this³⁷:

36 The circumspection is shared by the Treasury, which states in its Managing public money guidance that: "[NMD's] limited degree of parliamentary accountability must be carefully justified. It can be suitable for a public-sector organisation with professional duties where ministerial input would be inappropriate or detrimental to its integrity. But the need for independence is rarely enough to justify NMD status. It is possible to craft arrangements for NDPBs which confer robust independence. Where this is possible it provides better parliamentary accountability, and so is to be preferred." It is also shared by outside experts, such as the Institute for Government, which described NMDs in a 2013 report as an "antiquated category"; that there should be a presumption against new ones; and that existing NMDs should be included in the scope of the Cabinet Office's triennial review process. [Jill Rutter, *The strange case of Non-Ministerial Departments*, October 2013].


37 Extracts from a speech by Andrea Coscelli: *Closer to consumers – competition and consumer protection for the 2020s* (25 February 2020).

- 
- “bolster the CMA’s role as a repository of microeconomic expertise”;
 - “unify every part of the organisation in looking at a problem and working out the best way to fix it”;
 - “make our case selection more transparent”;
 - “explain better the criteria we use for choosing what we do, and how we use those criteria”;
 - “look at every possible problem in the round, working out the most effective and efficient answer”;
 - “get more leverage out of the evidence and knowledge we have accumulated, by effecting change through others – whether Government or regulators”;
 - “not shy away from publicly advocating to Government in support of consumers and competition, especially where Government’s actions threaten to harm them”;
 - “earn the trust, confidence and recognition of consumers. Let them know we’re on their side”.

It’s worth considering how success in meeting those ambitions might be assessed by the outside world. Some features of successful implementation of the 2020s agenda might include:

- An institution demonstrably using its powers to their fullest extent, and deploying all its functions – across enforcement, markets and advocacy (and with much less unbalanced weighting between them) – to maximise consumer welfare.

- Much more attention to ensuring the creative release of energies and ideas from the ranks below the most senior handful of executives. A more “fleet of foot” institution internally, with shorter reporting lines to the top.
- Much more systematic data and information collection about the state of markets and consumer experiences across the economy: developed bottom-up through the development of contacts with the outside world – consumers, businesses, whistle blowers and representative bodies; top-down through analysis of concentration, profitability, entry, exit and other market dynamics.
- A well-resourced economic policy function to analyse this information and deploy it internally, in the service of priority-setting, and externally in the service of constructive policy advice, thereby making a reality of the policy advisory function already embedded in statute, and further supported by the current Strategic Steer from BEIS.
- Reflecting, as a consequence of the above, a much stronger and more complete understanding of the microeconomy, and a new found preparedness to explain the limits of its powers and across the full range of tools, an institution that is clearly responsive to consumer concerns, and able to demonstrate that it is weighing up the consumer welfare benefits of one course of action or area of investigation against another.
- Capable of explaining its contribution to economic and consumer welfare in a language that its ultimate customer – the wider public – can understand.
- Recognition of the CMA across Whitehall and Parliament as the leading repository of knowledge on consumer detriment and on the shortcomings of



competition across the economy and of policies of government bodies whose job is to address them.

- Sufficient confidence to set out publicly where its own responsibility to address this detriment ends, and that of other public bodies, and particularly the Government, begins. Firm messaging privately and where appropriate, publicly to support this. The latter gives teeth to the former.
- Deployment of a much higher public profile, among businesses and the wider public, to secure far more effective deterrence. This would both contribute to and derive from a stronger institutional reputation.
- A stronger public profile for the Chairman and the Board – acting as a visible standard bearer to explain to Parliament and in the media the CMA's choices over its discretionary work – and the Chief Executive (partly subject to legislative change) in taking, explaining, and holding him or herself accountable for major case decisions.
- Major reform of the CMA's opaque governance. Clear lines of responsibility for decisions, capable of explanation to a wider public. Much higher levels of transparency of the above.
- Reflecting its higher profile, and its preparedness to act flexibly, a much greater use of soft power – including ex-ante intervention – to secure changes to business conduct and address detriment – all the more important in the fast-changing market places made possible by digital technology.

A moment's reflection on the above suggests that there is a long road to travel. Despite appreciable progress in becoming more consumer-focused – including some important enforcement work – the CMA too often finds

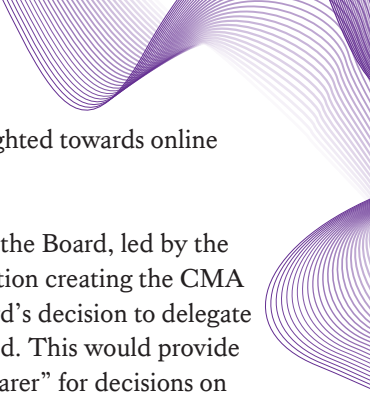
itself bogged down in recondite cases that make a small or negligible contribution to economic welfare. To the outside world, as was explained at the start, it can appear out of touch: detached from the real economy and the lives of ordinary consumers. To Parliamentarians, it also looks unaccountable: before I had arrived, as far as I'm aware, its senior team and its Chairman had never appeared before the BEIS Select Committee. Its international collaboration takes place below the parapet. Its soft power is weakened by lack of public and Parliamentary awareness about its work. It has had little say on the key microeconomic questions of the day; it misses opportunities to help Government harness the benefits of competition. Few people know how it chooses its discretionary casework.

Legislative reform would help remedy much of the above. But a good deal of it need not persist, even in the absence of legislation. Here is the outline of some decisions and changes at the CMA that could be introduced relatively quickly and without primary legislation³⁸:

i. Return the Board and the organisation's leadership to the original intentions of the 2013 legislation.

Currently, all crucial decisions about initiation of casework, except of markets studies and market investigation references, are taken not by the Board, but by a small team of the most senior executives, who meet as a Pipeline Steering Group (PSG) for this purpose. The Board has delegated this responsibility. So the Board, and particularly the Chairman, may carry the notional can but all these decisions are merely reported to the Board. The decisions of the PSG, over time, largely determine the shape of the organisation, its discretionary case work and the balance of resources across its tools. It is thanks in large part to the PSG, that, for instance, the antitrust portfolio has been weighted towards pharmaceuticals and musical instruments;

³⁸ This is also addressed in my article in the Financial Times of 24 February 2021.



or that consumer enforcement is weighted towards online harms.

Case initiation should be returned to the Board, led by the Chairman, for decision, as the legislation creating the CMA almost certainly intended – the Board’s decision to delegate this job to the PSG should be reversed. This would provide a clear and accountable “standard bearer” for decisions on case initiation. They are taken invisibly at the moment. It would create a much clearer and more readily explicable sense of purpose for the CMA, not least by integrating a meaningful Board strategy with case initiation; these are weakly aligned at the moment. It would also bring to an end a major part of the current mismatch between what the Board is assumed to be responsible for, and the much more limited authority that it currently elects to exercise in practice. It is reform of this type, rather than protracted discussions over Annual Plans, which will give practical substance to strategic rhetoric, and which can ensure that the priorities set by the Board are reflected in the shape and choices of the organisation. The arguments for reversal of the delegated authority are set out in more detail in Annex I.

Public debate – with Parliament more closely involved – is now needed. Leaving the current arrangements unimproved – invisible to a wider public, impenetrable to all but the expert community, would be a serious mistake. The opportunity afforded by a likely forthcoming consultation on proposals for reform of competition and consumer protection should therefore be taken to initiate engage in that debate. The Government will need move to legislation quickly, both to tackle digital detriment and to bolster consumer protection, if consumers are to see benefits in this Parliament.

ii. Develop public explanation and advocacy.³⁹

The CMA can and should do much more: to explain and hold itself accountable for its choices; to deploy its expertise to inform and contribute to public debate on economic policy; and to advise and assist Government on pro-competitive, pro-consumer policy. All three can strengthen the CMA's legitimacy and deepen its roots in the UK's economic life. Among the initiatives that should be considered are:

- Regular and transparent publications setting out the problems being reported to the CMA and how it is responding to them. Through these, or other, mechanisms the CMA should find a much better way to manage and shape external expectations: by explaining why it has focused on some problems but not others; by setting out how those choices are constrained and conditioned by the legislative framework (not least, the limitations of the markets tool).
- The development of the profile of the Chairman and Chief Executive as the “public faces” of the CMA, directly accountable for the shape of the institution and its case portfolio (in the case of the former), and its decisions (in the case of the latter).
- The development of direct contact, from current regulatory levels with consumers and businesses, particularly smaller and challenger firms, not just as a means of explaining what the CMA does but as a tool for the collection of information about detriment.
- Development of much stronger links with consumer bodies and parliamentarians. There is a thirst for greater direct communication with the CMA in Parliament. I am reminded of this each time I go to Parliament. A meeting early in September last year, when a CMA

³⁹ See Annex II.

official and I saw a well-informed MP about leasehold, was yet another illustration.

- Integration of advocacy and state of competition analysis into the pipeline process, thereby ensuring that opportunities arising from casework to help the other government agencies and departments improve public policy are more readily identified and taken forward at an early stage of CMA work. This will require a good deal more than the 1 per cent of staff time (see also Annex II, particularly its footnote 4) currently devoted to the function and is consistent with the ambitions of the 2020s agenda.

iii. Construct a much more substantial economic policy function.

As already explained, this can support advocacy, state of competition and other contributions to public discourse on markets, and help to build the CMA's status as a repository of expertise on the microeconomy. Are levels of competition falling or rising; in which sectors and why? With an economy the size of the UK's its public authorities should be able to answer these questions. But currently they can't.

iv. Identify the elements of the Covid-19 Taskforce – a talented rapid reaction group created to respond at speed to coronavirus detriment – that should be developed and embedded into “business as usual”.

- An online complaints form, promoted via social media and other channels. Done well, this form can help consumers navigate the complex complaints landscape, not least by directing matters that fall outside the CMA's remit to other relevant bodies. This would also provide some reassurance to the “final customers” – the public – that their often legitimate concerns are not neglected.

- A “joined-up pipeline”, to maximise the effectiveness of the CMA’s tools in addressing, and being seen to address, “real-world” problems, including those identified through complaints.
- Deeper analysis and triage of complaints, to inform case identification and prioritisation and greater public awareness of how to make a complaint.

Taken together, the above can and should facilitate much more direct contact with the CMA’s ultimate consumers. Contact is negligible at the moment.

Abandoning these innovative practices – which are not only well-aligned with the 2020s agenda, but have been successful at a practical level during the Covid crisis – could well be interpreted unkindly by the outside world: a clear signal of retreat from a frontline, consumer-facing role, back into the inscrutable technocratic box with which many non-specialists identify the current CMA.

v. Get the reform agenda over the line.

This is important work. But the inadequacies of the statutory base should not become an alibi for inaction on the above. As for the proposed measures themselves: internally, the temptation will be to prune the reform programme back to measures that are necessary to ensure more effective casework delivery, but which would be insufficient to deliver the wide-ranging improvements to the CMA’s performance now required, some of which only more extensive statutory reform can unlock.

Externally, Whitehall – particularly BEIS – may instinctively want to revert to the status quo ante: that is, to pursue mainly limited changes to the consumer enforcement regime that were set out in the Consumer Green Paper⁴⁰ over

40 Department for Business, Energy and Industrial Strategy, *Modernising consumer markets: green paper* (2018).



three years ago. The core planks of the reform programme would thereby be weakened or set aside.

I very much hope that both instincts will be resisted. The likely BEIS instinct, in particular, should be robustly challenged. Treasury enthusiasm may be greater – sparked, no doubt by the need for constructive proposals to assuage the coronavirus supply-side shock – and will need to be sustained and supported.⁴¹ All of the senior team should look for opportunities to make the case for reform publicly and not just, or even mainly, with specialist audiences, both before and after publication of the likely forthcoming consultation document. Alongside this will be the need to harness the support of consumer and business organisations and to secure the backing of supportive parliamentarians. Much of this could turn out to be kicking at an open door, particularly if some momentum is created. I have not noticed enough so far but I remain optimistic. With the Covid crisis receding, a renewed focus on these issues can and should be forthcoming. And the case for reform, well understood for many years, is becoming more unarguable month by month.

⁴¹ HMT carries disproportionate weight, and when allied to Number 10 is usually decisive. But the attention of both is easily distracted. The spending departments often prosper in the legislative middle and end-game. Much of this agenda is still, and understandably, second-order from a Downing St perspective, given Covid and other immediate challenges.

Annex I

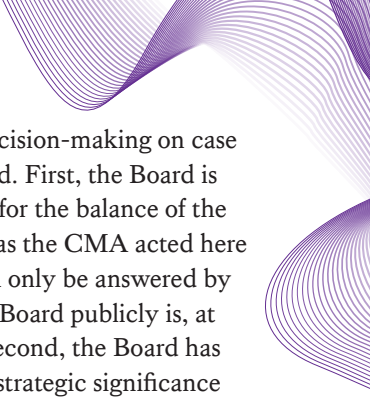
Case selection: a proposal for reform

At present, the Pipeline Steering Group (PSG) – a Committee of XCo¹ – considers and makes decisions on case selection across the CMA’s “discretionary” functions. Even where case initiation decisions are reserved to the Board (only 15 per cent of total discretionary casework) as in the initiation of market studies, the PSG is still responsible for filtering potential candidates, so only those that meet with the approval of the most senior executives find their way to the Board for consideration.

The proposed cases brought to PSG far exceed (by a ratio of 3 to 1) the number taken forward. Its decisions therefore carry huge significance. Individually, a PSG decision marks the point at which a project “takes off” and gets resources that it needs.

Taken together, over time, PSG decisions determine the shape of the organisation, its discretionary casework and the balance of resources across its tools. It is thanks in part to the PSG, that for instance, the antitrust portfolio is weighted towards pharmaceuticals and musical instruments; or the consumer enforcement is weighted towards online harms.

1 Membership consists of the Chief Executive, the Executive Directors for Enforcements and Markets and Mergers; the General Counsel; the Chief Economist; and various Senior Directors.



The Board has chosen to delegate decision-making on case initiation.² But this should be reversed. First, the Board is naturally assumed to be accountable for the balance of the discretionary case portfolio: “Why has the CMA acted here and not there?” is a question that can only be answered by reference to a strategy, for which the Board publicly is, at least in principle, held responsible. Second, the Board has value to add in thinking through the strategic significance of cases, and the external risks and opportunities that they bring. Third, direct Board accountability for case initiation would better enable the organisation to resist external pressure to take on certain cases. The CMA needs to be responsive but on the basis of independence, and seen to be so. Fourth,³ most importantly of all, it is what Parliament almost certainly thought that it was doing when it legislated in 2013. It is with these, and other, points in mind that I have sought to think through how to return case selection to the purview of the Board.

So how could this be accomplished in practice? Detailed deliberation over case selection would not be appropriate at a full Board, except perhaps in rare cases, where the CMA might be “betting the ranch”.⁴ Instead, a small sub-Committee – probably chaired by the Chairman, with perhaps one or, at most, two other NEDs and the CEO as

2 PSG operates under sub-delegation from XCo. Until recently, it was set up as an advisory group. As part of its Corporate Governance internal Audit in 2017, the Government Internal Audit Agency found that PSG had effectively turned into a decision-making body, despite not having appropriate delegation from the Board. As a result, the terms of reference for PSG were revised to make it a Committee of XCo. It is in the recondite detail of such legal changes that the character of institutions is often shaped.

3 The consumer investigation into leasehold, for instance, was taken forward only as result of vocal public pressure from the Housing and Local Government Select Committee and the APPG on Leasehold Reform.

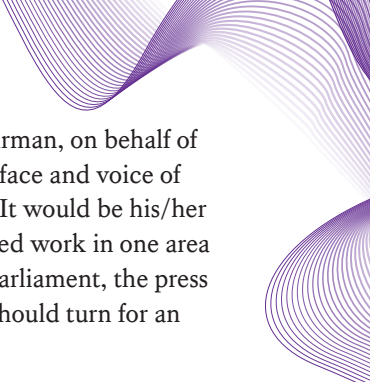
4 It has been put to me that “chaos” could occur were the full Board “let loose” on PSG type decisions. Although an exaggeration, there is some force in this point: the Board is not best suited to the taking of very detailed resource allocation decisions – hence the proposal for a sub-committee set out in the main text. The Board could perhaps formally agree that it would not normally reject recommendations from its own sub-committee.

additional members (the latter probably in a non-voting capacity) – should be empowered to make recommendations to the Board about which cases to take forward. They would do so on the basis of advice from the Executive about resource implications and availability; the scope and substance of the case proposals; legal and economic considerations; the likely outcome and exit strategy. This last is not currently given sufficient consideration, is particularly important and is discussed further, below.

It would be of crucial importance that the sub-committee take account of the criteria established by the Board at each annual Strategy review. This would turn what used to be described to me as “another Board talking shop on strategy” into something much more substantive.⁵ Even more important, it would ensure a much more direct link between strategy, Board decisions, and public accountability: it would henceforth be the Chairman’s direct responsibility to explain the shape of the case portfolio to Parliament and the public – or, in other words, to account for why “this case was taken, and not that one”. The buck would stop with him or her. Again, it would return the decision-making structure to Parliament’s intention.

In sum, on the crucial area of individual case selection, the sub-committee should assume direct responsibility. The full Board should retain responsibility for ensuring alignment of the strategy with the sub-Committee’s work, and any “bet the ranch” power in the hands of the Board should be very much the exception, rather than the norm. The return of the Board to the original intentions of Parliament would be accomplished. And the benefits of such an approach – visible public leadership in a standard bearer for those crucial decisions; power and accountability properly

⁵ Whether the Board strategy in practice shapes PSG decisions, or whether the strategy largely endorses and attempts to give coherence to the accumulated decisions of PSG, bears serious scrutiny. Having heard both arguments from senior and other staff and having read a good deal of the paper flow, I lean firmly to the latter view.



aligned – would be reaped. The Chairman, on behalf of the Board, would become the public face and voice of all major decisions on case selection. It would be his/her duty to explain why the CMA initiated work in one area with detriment, but not in another. Parliament, the press and public would know where they should turn for an explanation of these major decisions.

Annex II

Competition advocacy

Definition

Most competition authorities are charged with “advocacy duties”, a curiously legalistic term whose implementation owes – or should owe – at least as much to political economy as to law. Advocacy may loosely be defined as the deployment of expertise to inform and contribute to public discourse on economic policy, and the provision of advice to government on pro-competition and pro-consumer policy.

The World Bank and OECD have offered an explanation of what competition advocacy means in practice:

“(T)he mandate of the competition office extends beyond merely enforcing the competition law. It must also participate more broadly in the formulation of its country’s economic policies, which may adversely affect competitive market structure, business conduct, and economic performance. It must assume the role of competition advocate, acting proactively to bring about government policies that lower barriers to entry, promote deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace”.¹

The above emphasises the negative effect of government intervention. A more neutral position with respect to the scope for government policy to improve the competitive environment beyond strict enforcement, and also one that

1 The World Bank and OECD, *A Framework for the Design and Implementation of Competition Law and Policy* (1998) Chapter 6, p. 93. Cited in Clark, J., *Competition Advocacy: Challenges for Developing Countries* (2005) OECD Journal: Competition Law and Policy, vol. 6/4.



emphasises the crucial role of raising public awareness, forms part of the International Competition Network's definition:

“Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition”.²

Under Section 7(1) of the Enterprise Act 2002, the CMA has responsibility for making proposals, or giving information and advice, “on matters relating to any of its functions to any Minister of the Crown or other public authority (including proposals, information or advice as to any aspect of the law or a proposed change in the law).” The Small Business, Enterprise and Employment Act 2015 added new subsections to Section 7, specifying that the CMA may make a “proposal in the form of a recommendation to a Minister of the Crown about the potential effect of a proposal for Westminster legislation on competition within any market or markets in the United Kingdom for goods or services” and that it “must publish such a recommendation in such manner as the CMA considers appropriate for bringing the subject matter of the recommendation to the attention of those likely to be affected by it”.

The Government's own “strategic steer” is emphatic, exhorting the CMA to be a “strong and independent voice” and to “raise objections at the highest levels if ministers or civil servants are failing to use competition or protect consumers effectively”.³

² ICN Conference Naples, *Report of the Advocacy Working Group: Advocacy and Competition Policy* (2002).

³ Department for Business, Energy and Industrial Strategy, *Government's strategic steer to the Competition and Markets Authority* (July 2019).

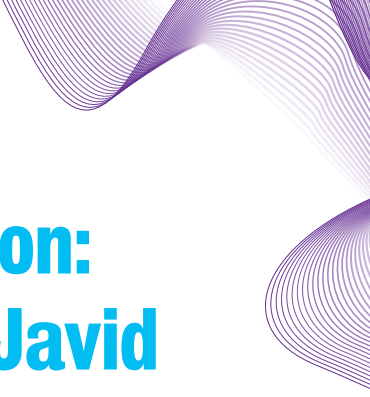
CMA performance

The CMA currently spends less than 1 per cent of its total resources on advocacy, with 899 full time staff equivalent working in the CMA as a whole and an advocacy staff complement in single figures.⁴ These numbers suggest a sizeable gap between the statutory duties and both ministerial and parliamentary expectations on advocacy, and the current level of activity. My impression is that much of Whitehall is scarcely aware that such work can and should be taking place. As for firms, of the 40 per cent who have heard of the CMA, I would be surprised if even a tiny portion were aware.

Notwithstanding the paucity of resources, the CMA's current advocacy team make a good number of bricks with scarcely any straw; there is already much "behind the scenes" activity to influence government policy. But most of it is "below the parapet". The small scale of the advocacy function means that a great deal of detriment is left unidentified. And detriment which is identified often remains partly or wholly unaddressed by wider advocacy proposals.

The development of it will require the leadership of the CMA to venture beyond the well-trodden classical interpretations of a competition regulator's core function, primarily mergers and antitrust. It will require adaptation to a much higher profile, and on issues less familiar to them, ones of which the CMA's remedies may, on occasion, provoke considerable public challenge and controversy.

4 Figures for the financial year 2019–20, the most recent available. I have heard it argued that the above numbers greatly understate the true amount of CMA resources devoted to advocacy. The argument runs that much quiet advocacy takes place as the product of individual cases or projects – work that scores against the respective cases (in mergers, antitrust or market investigations, etc) and not against the advocacy budget. But the converse might be equally true: a better resourced advocacy team might be able to contribute heavily to the work of the teams attempting to remedy perceived detriment, much more than is currently possible on such limited resources. The scope for a more creative approach of this type was recently and vividly



Annex III

State of competition: Letter from Sajid Javid MP and Andrea Leadsom MP to Dr Andrea Coscelli (5 February 2020)

Dear Andrea,

Competition at the heart of the UK economy

Ensuring competition is working effectively right across the country is at the heart of this Government's vision for the economy. In our Manifesto, we committed to tackle consumer rip-offs and bad business practices and to support disruptors taking risks on new ideas and challenging incumbents. As you know, free and fair competition is critical to reducing the cost of living by providing consumers with better deals, incentivising firms to innovate, and driving productivity and long-run economic growth.

However, our existing understanding of how well competition is working across the economy ("the state of competition") is limited. While the CMA collects valuable information on competition in particular markets through its markets work, merger control regime and antitrust enforcement activities, unlike other key drivers of economic success, such as GDP growth or the employment rate, there is no agreed way to measure and monitor the state of competition across the whole economy.

This has come into sharp focus in recent international academic and policy debates where a number of studies have suggested that competitive pressure across advanced economies, including the UK, could be weakening.¹ Preliminary BEIS research at Annex II sets out our initial view on the limitations of the existing methodologies that need to be addressed to deliver a robust assessment of these issues.


An expert analysis of the state of UK competition is needed to fill this gap and enable Government to determine on an ongoing basis what, if any, additional action is needed to promote competition across the UK economy. Delivering an expert state of competition assessment We are therefore commissioning the CMA to prepare and publish a regular state of competition report to raise our collective understanding of the level and nature of competition across the UK economy.

Delivering an expert state of competition assessment

We are therefore commissioning the CMA to prepare and publish a regular state of competition report to raise our collective understanding of the level and nature of competition across the UK economy.

We recognise this will not be a straightforward task and no other competition authorities currently publish such metrics. However, we are confident that as a world-leading competition authority publishing influential and innovative research, the CMA has the expertise to lead this agenda, working with the academic community, the Office for National Statistics and others, and that substantial progress can be made in understanding the state of competition across the economy. As such, we anticipate the scope, depth

1 For example, recent analyses such as De Loecker and Eeckhout (2018) “Global Market Power” suggest mark-ups, the extent to which firms charge prices above their marginal costs, are increasing across advanced economies.



and breadth of reports will continuously improve as our understanding of the issues improves.

We have agreed that you will publish the first report in Summer 2020 which will include the CMA's preliminary assessment of these issues. The CMA will work with Government to confirm the regularity of subsequent reports as part of the CMA's regular reporting. The terms of reference for this commission are set out at Annex I.

Driving evidence-based economic policy

This work will provide the CMA, Government and the public with valuable evidence to inform whether and where any additional action on the part of the CMA or Government may be required to boost competition across UK markets.

The ambition is that these reports will also provide both the CMA and Government with information to better target our respective resources and tools towards raising competition in particular sectors or national, regional or local markets that may be found to be of potential concern.

We look forward to receiving the first report and continuing to work closely with you more generally to deliver competitive outcomes across the UK economy.

Yours sincerely,

The Rt. Hon Sajid Javid MP
Chancellor of the
Exchequer

The Rt. Hon Andrea Leadsom MP
Secretary of State for
Business, Energy and
Industrial Strategy

Annex IV

Letter from Andrew Tyrie, CMA Chair, to the Secretary of State for Business, Energy and Industrial Strategy (21 February 2019)


Dear Greg,

In August, you requested that I advise you on legislative and institutional reforms to safeguard the interests of consumers and to maintain and improve public confidence in markets. This followed earlier conversations, with both you and the Prime Minister, indicating an interest in such a piece of work.

The attached provides preliminary advice. Work is continuing at the CMA on a number of these proposals.

The UK is widely held to be an excellent place to do business,¹ one in which innovative, dynamic firms can thrive. The impartiality of its legal framework and high standards of business conduct are also well recognised. A

¹ The UK is ninth out of 190 countries in the World Bank's Ease of Doing Business rankings.



robust competition framework, one well- adapted to rapidly-changing markets, has been and will remain an essential support to that environment. By preventing, among other things, anti-competitive behaviour, whether from cartels or abuse of a dominant position, the competition framework plays a crucial role in enabling businesses to enter markets and challenge incumbents. Markets, mergers and consumer protection legislation all contribute to the same end.

As you suggested in the summer, there is certainly scope for strengthening and updating that framework, particularly in the light of economic and technological developments in recent years. We must ensure that it continues to pay for businesses to do the right thing, and not to engage in anti-competitive or unfair trading practices. Doing so can only bolster the UK's domestic productivity, and its international competitiveness.

The central challenge is that, despite relatively recent legislative changes, the UK has an analogue system of competition and consumer law in a digital age. Similar observations have been made about comparable regimes elsewhere in the world.² The ability of the CMA to act quickly to prevent harm to consumers in fast-moving markets is impeded by a complex web of interacting pieces of legislation that have accumulated on the statute book over many decades. It is impenetrable to non- specialists. It also lacks a clear and unifying purpose.

Much of the legislation is interpreted by a specialist tribunal. It is held to provide high-quality judgments. Nonetheless, I am told that aspects of the tribunal's procedure have departed from the relatively quick and simple process originally intended; in some cases, this can allow businesses to "game the system", resulting in unduly long and costly proceedings. In these proceedings (and in its own

² See, for example, *The Economist*, 15 November 2018, special report on antitrust.

administrative proceedings) the CMA's counterparties comprise large teams of private-sector lawyers, deploying Byzantine procedural and technical complexity on behalf of their clients. The result is often years of protracted legal dispute, of intellectual interest and commercial benefit to firms and the competition "establishment", but far removed from the concerns of ordinary consumers.

The legal framework is not broken, and the CMA is effective – and domestically and internationally respected – for its deployment.³ But carrying on roughly as we are is not a prudent option. This is primarily for two related reasons⁴:

- First, the growth of new and rapidly-emerging forms of consumer detriment, caused in part by the increasing digitalisation of the economy, requires more rapid intervention, and probably new types of intervention. Competition authorities and policymakers in many jurisdictions are coming to the same conclusion. They are considering how best to secure the many benefits for competition and consumer welfare of the growth

3 Recent successful outcomes include the securing of a binding court order against the ticket resale site viagogo over concerns that it was breaking consumer protection law; and changes in the care homes sector, including residents receiving £2 million in compensation from a leading care home provider for having paid upfront compulsory fees.

4 Brexit, too, poses challenges for the CMA, not least from a greater workload of large, complex cases previously reserved to the European Commission, and the assumption of responsibility for monitoring and enforcing State aid rules. But whatever the UK's future relationship with the EU, far-reaching reform is likely to be needed, to ensure that the CMA can meet the reasonable expectations of Parliament and the wider public in the years to come.

of the digital economy, while addressing the consumer detriment that has accompanied it.⁵

The UK has greatly influenced the development of competition law and policy internationally, and the spread of independent, pro-market competition regimes. It now has the opportunity to help shape the response to the challenges that many jurisdictions now face. The Chancellor has appointed an independent expert panel, chaired by Professor Jason Furman, to consider the challenges posed by digitalisation for competition policy, to which the CMA has contributed.⁶

⁵ See, for example, the US Federal Trade Commission's public hearings on Competition and Consumer Protection in the 21st Century, which have considered (among other things) Collusive, Exclusionary, and Predatory Conduct by Digital and Technology-Based Platform Businesses; and Privacy, Big Data and Competition. See also the German competition authority's (the Bundeskartellamt's) position paper explaining its decision to investigate whether Facebook is abusing its market power by imposing unfair conditions on its users ("Background information on the Facebook proceeding", 19 December 2017), and its Decision, published on 15 February, that imposed restrictions on Facebook's processing of user data. The European Commission has recently appointed a panel of experts to consider the "future challenges of digitisation for competition policy", which is due to report by 31 March 2019.

⁶ A number of measures that specifically address the challenges posed by digitalisation are proposed in the Annex to this letter (see, for instance, proposals to extend the CMA's information-gathering powers in Section 6). Further ideas that have been discussed as part of the global debate on competition policy and digitisation – some of which have been discussed as part of the CMA's engagement with the Furman Review – include:

- broadening or supplementing the prohibitions on anti-competitive agreements, so that it explicitly extends to spontaneous collusion, e.g. by price-matching algorithms or artificial intelligence, even in the absence of a conscious "meeting of [human] minds";
- whether explicit prohibitions on unilateral conduct that exploits economic dependence or inequality of bargaining power, even in the absence of an established dominant market position, are needed; and
- whether, as part of the merger control regime, the CMA should be able to look at a series of acquisitions by a business over a given period in the round, rather than individually.

The work required to assess the merits of these proposals is at an early stage.

- Second, there are increasing signs that the public doubt whether markets work for their benefit. Perhaps they are not mistaken: the growth in market power – reflected in rising concentration and profitability across a number of sectors – may well enable large firms to collect excess rents.⁷ And technology may have helped business to take better advantage of that market power, by enabling them more effectively to target and segment consumers according to their willingness to pay. The Government's, and Parliament's, growing concern is therefore well-founded.

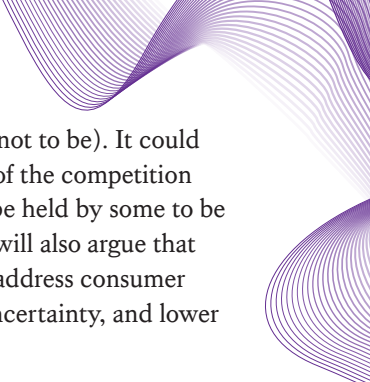
Two broad routes to reform are available: either attempt a fundamental rewrite of the statute book, or try to amend and improve what we have. The first has many attractions (scope for simplification, clarity, transparency and effectiveness). But it would probably take at least two years to be able to attempt a fundamental rewrite. Doing so while the extent of UK alignment with existing EU law post-Brexit remains unknown (and would probably remain unknown during any transition period), would be a near-impossible task. Furthermore, the disturbance of existing bodies of jurisprudence that would come with a new corpus of law could introduce enormous uncertainty, both for businesses and consumers, at a time when there is more than enough.⁸

Given the above, and particularly your request that I attempt to offer a preliminary view as soon as possible, what follows is an attempt at the second route.

This route also has drawbacks. It would still require primary legislation. It would not be wholly immune from complexities and uncertainties arising from the Brexit negotiations. It may be seen as not trenchant

7 In the UK, economy-wide profit margins have risen from around 1.2 in 1980 to close to 1.7 today.

8 UK businesses also have a legitimate interest in international regulatory alignment.



enough (and could possibly turn out not to be). It could well stir opposition from many parts of the competition “establishment”. The proposals will be held by some to be too wide-ranging and radical. Some will also argue that giving the CMA wider discretion to address consumer detriment would increase business uncertainty, and lower investment and output.

These points need to be considered carefully. But for legislators to rely on the sustainability of the existing, unamended, law – in short, to do nothing – is not a prudent option, given the manifest need to address the perception and reality of the growth in consumer detriment. The purpose of the proposals set out in this letter is the reinvigoration of an institutional settlement that has served the economy well: the delegation of competition policy and enforcement from Ministers to independent and impartial authorities. Failure to take action to bolster the effectiveness of the institutional settlement, and preserve public and political confidence in it, could ultimately contribute to its demise. In any case, it is highly probable that addressing the shortcomings of the current legal framework will increase overall economic performance: the counterpart to consumer detriment is often excess rents.

Therefore, what follows is probably the most practical early route to ensuring that the CMA can better meet the expectations of Parliament and the wider public, and address the Government’s very reasonable concerns about the growth of consumer detriment.

Reflecting those expectations, the intention of the proposals is to focus the work of the CMA more directly on protecting the interests of the consumer. They include changes that:

- impose more stringent duties and responsibilities on the CMA, including an overriding statutory duty to treat consumer interests as paramount, and a new statutory

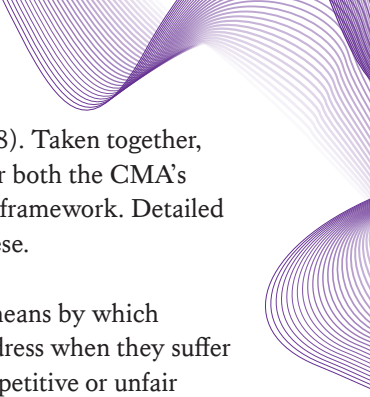
requirement on the CMA to conduct its investigations swiftly, while respecting parties' rights of defence;

- strengthen or augment the tools available to the CMA in order to carry out these duties more effectively; and
- require the CMA to relinquish or share some of its existing powers and functions – for example, in the field of regulatory appeals and of criminal cartel enforcement – so that it can focus more effectively on its core responsibilities.

The proposals are the product of careful consideration by senior CMA staff, and discussion at Executive and Board level. The Annex to this letter, divided into eight sections, sets them out.

In summary, the proposals consist of a new statutory duty on the CMA, and the courts, to treat the interests of consumers, and their protection from detriment, as paramount (Section 1). This new duty would be backed by new functions and powers, including powers to investigate, and to intervene quickly, to stop market-wide consumer detriment (Section 2). Consumer law enforcement would be strengthened, the intention being to make it responsive enough to address detriment in fast-moving markets, and robust enough to deter wrongdoing (Section 3).

Measures are proposed to improve individual responsibility for competition and consumer law compliance (Section 4). The CMA's investigative capabilities would be bolstered through proposals to protect and compensate whistleblowers (Section 5), and to broaden the CMA's information-gathering powers (Section 6). There are also proposals to simplify and expedite court scrutiny of the CMA's decisions (Section 7). Changes to the mergers regime will be required to cope with the increase in the CMA's case load after Brexit, including compulsory notification above a threshold (merger notification is currently voluntary, in contrast



to most other jurisdictions) (Section 8). Taken together, the reforms may have implications for both the CMA's institutional and its decision-making framework. Detailed work has yet to be undertaken on these.

Consumer empowerment – finding means by which consumers can more easily obtain redress when they suffer the consequences of illegal, anti-competitive or unfair trading practices – could play an important role in restoring public confidence in markets. The CMA will consider whether, in addition to recent reforms,⁹ further steps could be taken to facilitate or encourage consumers to obtain redress directly.

The proposals contained in this letter are intended to enable the CMA to intervene earlier and more robustly to tackle consumer detriment, and to penalise and deter wrongdoing when it occurs. Taken together, they would mark a decisive shift in favour of the consumer and of businesses that behave fairly and competitively, and against those businesses that, among other things, take advantage of consumer vulnerability.

The success of the proposals will rest in large part on the CMA being able to carry the confidence of the public and the business community, particularly in its use of new powers of intervention. This in turn depends on the CMA acting – and being seen to act – with the political independence expected of it by Parliament.

In practical terms, for the CMA, the proposals would be likely to lead to more, and more successful, action to protect consumers. Reform of the “markets regime” would increase the scope for the investigation and remedy of market-wide

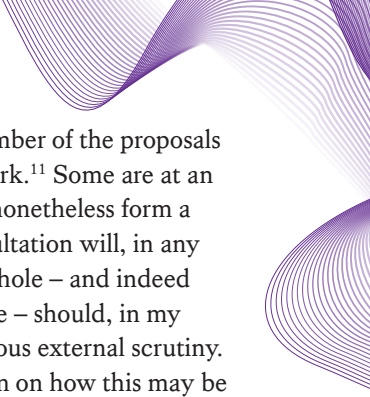
⁹ Including the provisions of the Consumer Rights Act 2015 on private actions under competition law which, among other things, introduced a so-called “opt-out” collective actions regime (whereby claimants may automatically be included in the action unless they opt out, in a manner decided by the Competition Appeal Tribunal on a case by case basis).

detriment. This would increase the value to the CMA of using the markets regime, rather than relying mainly on enforcement against individual firms, to address detriment. Nevertheless, enforcement of competition and consumer protection laws – backed by stronger deterrents – would continue to play an important and mutually supportive role; it is likely that these reforms would enable cases to be concluded faster than they are now, creating scope for an increase in the case load and the CMA's ability to address consumer detriment.

In both markets and enforcement work, the proposals would enable the CMA to make greater use of interim measures to address consumer detriment and anti-competitive behaviour pending a final decision on whether the law has been broken. Such measures, or something similar, will be essential if the CMA is to respond to the challenges thrown up by rapidly changing markets, and to do so sufficiently quickly to prevent irreversible harm to consumer trust.

The CMA would probably also become a good deal more visible: in protecting consumer interests; as a contributor to public discourse on the role of markets; as an adviser to Government on how best to promote competition and the consumer interest;¹⁰ through its communication with businesses, not only about their strict legal obligations, but also about what constitutes acceptable standards. This external communication and engagement – much of it new to the CMA – is an important part of building trust in the institutional framework not just of competition law and policy, but also of the economy as a whole.

10 Under section 7 of the Enterprise Act 2002, the CMA has responsibility for making proposals, or giving information and advice, “on matters relating to any of its functions to any Minister of the Crown or other public authority (including proposals, information or advice as to any aspect of the law or a proposed change in the law).”



If you agree with the approach, a number of the proposals will require a good deal of further work.¹¹ Some are at an early stage of development, but can nonetheless form a basis for discussion. And wider consultation will, in any case, be required: the package as a whole – and indeed any fundamental reform of the regime – should, in my view, be submitted to open and rigorous external scrutiny. I would appreciate an early discussion on how this may be accomplished.

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ANNEX: REFORM PROPOSALS

1. An overriding “consumer interest” duty on both the CMA and the courts

A new statutory duty, binding on the courts (including the Competition Appeal Tribunal), as well as on the CMA, is required to ensure that the economic interests of consumers, and their protection from detriment, are paramount.¹²

The CMA’s current statutory duty is to “promote competition, both within and outside the United Kingdom, for the benefit of consumers”.¹³ It does not have a primary duty directly to protect consumers. The current duty

11 The CMA’s capacity to give priority to this work would be impeded by a ‘no deal’ Brexit.

12 The concept of “economic interests” was contained in the Fair Trading Act 1973 and the Enterprise Act 2002, in the descriptions of the general functions of the Director General of Fair Trading, and the Office of Fair Trading, respectively. It would probably be necessary to qualify the duty to ensure that the CMA was not drawn into territory better occupied by other specialist authorities (including, for example, product or food standards and safety, or environmental effects on consumers).

13 Ofwat has a consumer objective (among others) to “protect the interests of consumers, wherever appropriate by promoting effective competition”; the FCA has an operational objective (among others) of “securing an appropriate degree of protection for consumers”; Ofcom has a duty (among others) to “further the interests of consumers in relevant markets, where appropriate by promoting competition”.

can leave the CMA constrained from acting to protect consumers' interests unless doing so through purely competition- based remedies.

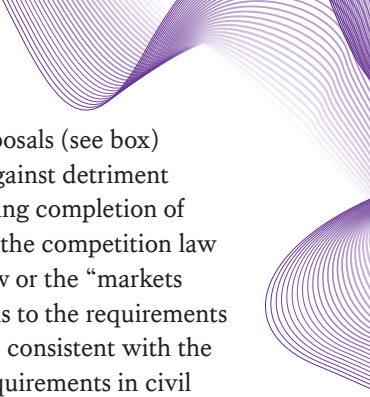
This constraint matters because interventions based on competition alone are not always sufficient to protect the interests of consumers, or to do so in a timely manner. This was already the case prior to digitalisation. It is more so now. Digitalisation has dramatically improved consumer welfare, and has given small firms access to vastly larger markets. But it has also created new forms of consumer detriment (for instance, through harvesting of personal data, or from personalised pricing that takes advantage of vulnerabilities). And it has created new forms of vulnerability, among those without internet access, or without the skills, confidence or time to trade effectively online. Such evidence as there is suggests that the scale of consumer detriment is rising.¹⁴

It is notable that the CMA's public (but non-statutory) strategic aim is to "make markets work well in the interests of consumers, business and the economy".¹⁵ Arguably, this already goes beyond the current statutory duty, and is a better reflection of what the public expects of the CMA. This should be put on a statutory footing. It should also be made clear that the consumer interest is paramount.

An overriding statutory duty to promote the consumer interest would give clear legislative authority to the CMA to address consumer detriment, including new and emerging forms of detriment, and including the protection of vulnerable consumers. And it would ensure that concerns about consumer detriment, and how best to remedy it, are uppermost in the CMA's mind when deciding whether, when and how to intervene in markets.

14 See, for instance, Oxford Economics/Citizens Advice, "Consumer detriment – counting the cost of consumer problems", October 2016, Chapter 8.

15 "Vision, Values and Strategy for the CMA", January 2014, page 1. The Government has ensured that both its existing and its proposed new strategic steer for the CMA are in line with this aim.



This duty would underpin other proposals (see box) that better enable action to protect against detriment to be taken on an interim basis, pending completion of formal investigations, whether under the competition law prohibitions, consumer protection law or the “markets regime”.¹⁶ This would include reforms to the requirements on access to file in competition cases, consistent with the corresponding evidence provision requirements in civil litigation.

In its investigations, the CMA undertakes extensive evidence gathering and analysis before issuing final decisions. But, as a consequence, these investigations can be slow and can leave consumer detriment unchecked for long periods, certainly longer than consumers appear to expect. This is a particular concern in digital markets, given the pace of developments.

A consumer interest duty would not only influence how the CMA conducts and prioritises its work. It would also influence the work of the courts charged with applying competition and consumer protection laws, and with reviewing the CMA’s decisions. The duty would ensure that the interests of consumers – and what they stand to gain and lose – would be at the forefront of the courts’ consideration, decisions and interpretation of the law. The conduct of the CMA would be subject to appropriate judicial scrutiny with that aim in mind. It would therefore embed a consistent purpose at all stages of the UK competition regime.

¹⁶ Interim measures are particularly important in fast-moving markets. There is a risk that, by the time appeal routes are exhausted, the harm will have become entrenched or the market will have “tipped”, rendering the competition authority’s decision, even if upheld, ineffective.


The new statutory consumer interest duty should not constrain the CMA from intervening to promote and protect the competitive process.¹⁷

Some illustrations of the likely implications of the duty on the CMA and the court, and how it interacts with other reform proposals, are set out in the box below.

Likely implications for the CMA and the courts of the “consumer interest” duty, in combination with other reform proposals

- The CMA needs to be able to act swiftly, on an interim basis, to prevent consumer detriment in competition enforcement cases, pending final determination of its investigations. With a consumer interest duty in mind, the CMA would be likely to intervene more frequently and directly on an interim basis to protect the consumer interest. And if such interventions were challenged, the reviewing court would be subject to the same duty, implying a need to give particular weight to the protection of the consumer interest on an interim basis. For the same reason, the application of the duty might be expected to raise the bar for companies seeking to set aside the CMA’s infringement decision (where it contained directions to cease infringing conduct) on an interim basis. There would probably need to be strong reasons why the courts would allow the continuance of practices which have been found to be illegal by the CMA, pending the outcome of an appeal.
- As well as supporting its existing powers to act on an interim basis, the duty would also reinforce specific

¹⁷ In particular, the duty should not constrain the CMA from enforcing so-called “object infringements” of competition law, which it can currently enforce without a requirement to inquire as to the effects of the infringement in the relevant market. Nor should the duty, or proposals in Section 2 to broaden the scope of market investigations, constrain the CMA from investigating and ordering remedies directly to address competition problems.



proposals in Sections 2 and 3 of this Annex for new legal provisions to widen the CMA's use of interim measures. These proposals would – for the first time – allow the use of interim measures in the “markets regime” to address adverse effects on consumers (pending the completion of a full market investigation), and also, in consumer protection law enforcement, to put a stop to trading practices and contract terms that may be unlawful (pending a final CMA decision).

- The duty would support other proposals in Section 2 to make the markets regime more effective. In particular, it would reinforce changes that broaden the scope of market investigation references to address adverse effects on consumers, by putting beyond doubt the CMA's mandate to impose remedies to tackle consumer harm. And it would require the court to take account of the consumer interest when reviewing the legality of such remedies.
- Under the new duty, there may be greater scope for the CMA to proceed more quickly with its investigations (for example, to avoid prolonging consumer detriment), and the court may be more inclined to support the CMA in this objective. Proposals in Section 6, intended to strengthen the CMA's investigative powers and to ensure that firms comply with reasonable deadlines to produce information, could further expedite the investigative process, and enable swifter action to address consumer detriment.
- The duty and the proposals in Section 7 would enable the court to narrow the points of challenge on which it needs to hear oral argument or evidence, and lead it to afford a “margin of appreciation” to the CMA's findings of fact and analysis following a detailed investigation, provided that it had been properly conducted.

2. A more effective and flexible regime for market studies and market investigations

Under its existing powers, the CMA is able to examine, and then take steps to resolve, market-wide problems. This so-called “markets regime” is divided into two phases.

Phase 1 “market studies” can be used to look into matters that “adversely affect the interests of consumers”, which the CMA can address with non-binding recommendations. Statute requires that market studies be completed within a year. A market study may lead to a more detailed Phase 2 “market investigation”,¹⁸ the focus of which is to identify “adverse effects on competition”. Again, statute requires that market investigations must be completed within 18 months,¹⁹ after which the CMA may order legally enforceable remedies that address the adverse effects on competition.²⁰

On the face of it, the markets regime is a powerful tool. It can, in principle, be used to put a stop to consumer detriment, without having to resort to protracted enforcement action, and without involving penalties which encourage legal challenge. Few jurisdictions have such a regime. It is, apparently, being examined with interest by agencies in other countries. The US Federal Trade

18 A market study is not a prerequisite to a market investigation: provided the statutory reference thresholds are satisfied and the CMA has consulted in accordance with s169 of the Enterprise Act 2002, an investigation can be launched immediately.

19 The CMA may extend this period by up to a further six months if it considers that there are special reasons why the investigation cannot be completed, and the report published, within 18 months.

20 Market investigations are led by independent “panels”, comprising individuals from a variety of backgrounds (law, economics, public sector, business); the panels are supported by CMA staff but the independent panel members are the sole decision-makers - not the CMA Board, or CMA staff.



Commission, in its recent hearings on the US competition framework, has acknowledged its benefits.²¹

In practice, however, the markets regime has some significant defects.

First, there is a difference in scope between market studies and market investigations. Market studies can look into anything that may adversely affect either competition or the interests of consumers. But when it comes to market investigations, the CMA must identify and address adverse effects on competition before action can be taken.

This distinction matters because, on completion of a market study, the CMA is restricted to making non-binding recommendations. It is only after a market investigation that the CMA can order legally binding remedies. And because of the difference in scope, these remedies can only be used to address detriment that results, or may be expected to result, from adverse effects on competition. If the scope of Phase 2 market investigations were more closely aligned with that of Phase 1 market studies,²² the CMA could order legally enforceable remedies to address consumer detriment, without having to demonstrate an adverse effect on competition. This would give it greater scope to take direct action to address, for instance, unfair trading practices


21 See, for instance, Transcript of FTC Hearing #2 on Competition and Consumer Protection in the 21st Century, pages 47-9 and page 120.

22 For instance, by changing the reference test in section 131 of the Enterprise Act 2002 (which relates to “reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition”) to include matters which fall within the scope of the CMA’s market study function (in the language of section 130A of the Enterprise Act 2002, this is to “consider the extent to which a matter in relation to the acquisition or supply of goods and services... in the United Kingdom has or may have effects adverse to the interests of consumers”).

across a sector, or the exploitation of a particular consumer vulnerability wherever it arose.²³

Second, the time required for the CMA to reach a point where it can order legally-binding remedies (i.e. only at the completion of a Phase 2 market investigation) is ill-suited to the modern economy, where new markets are constantly emerging, business models are changing rapidly, and consumer detriment can arise quickly. From the point at which a market study is initiated, it can be over three years before remedies are ordered under a subsequent market investigation, and longer still before they are implemented. This is not always unreasonable: understanding the underlying causes of problems in markets, and devising appropriate remedies, takes time. However, meeting growing demands for swifter intervention in the face of consumer harm may require the CMA to be given the ability to impose

23 The CMA is also closely considering global developments, including how the competition regimes in other countries are adapting to the challenges of digitalisation. By way of example, the Chapter II prohibition of the Competition Act 1998 sets out that a firm may be in breach of the law if it both (a) has a dominant position and (b) abuses that dominant position. The law in some other countries, such as Germany, goes beyond this to encompass the concept of one business exploiting the “economic dependence” of another. Recent proposed reforms in Germany include extending its doctrine of economic dependence to encompass all firms and not just SMEs, since in digital markets relevant dependencies may arise for large firms as well as small ones. The aim of these kinds of proposals is to capture asymmetry of power in business-to-business relationships which may not be caught by the current definition of dominance. In developing the current package of proposed reforms to the UK regime, the CMA has given careful consideration to changing the substance of competition law prohibitions, for example by introducing an explicit prohibition on unilateral conduct that exploits economic dependence or inequality of bargaining power, even in the absence of an established dominant market position; or by broadening or supplementing the prohibitions on anti-competitive agreements, so that it explicitly extends to spontaneous collusion, e.g. by price-matching algorithms or artificial intelligence, even in the absence of a conscious “meeting of [human] minds”. It is expected that many of the concerns about the nature and scale of consumer detriment can be addressed through markets tools, particularly if adapted by the proposals in this section, and in combination with the proposed new statutory duty. This should be kept under close review (and it is possible that further changes to the substantive competition provisions may be required).



legally enforceable requirements on firms on an interim basis, pending the completion of its market investigations. Further consideration is being given to assess the merits of introducing such “interim measures” in the markets regime, which will need to take careful account of the consequences for businesses of swift interim action based on provisional analysis.

Third, the existing regime allows the CMA to accept binding undertakings from firms about their practice and conduct (for example, at the end of a “Phase 1” market study), in lieu of a full “Phase 2” market investigation. But the CMA’s ability to enforce these undertakings is weak. This element of the markets regime would be made more effective, first, by allowing the CMA to accept undertakings at any time (for instance before or during a market study); and second, by enabling the CMA to fine firms that breach such undertakings.²⁴

Fourth, once it has completed an investigation, the remedies that the CMA orders are binding: they are a source of law intended to set the parameters within which firms can act. But the powers currently in the markets regime to sanction firms that fail to comply with the remedies ordered are

24 The CMA can also accept binding undertakings and commitments in other contexts: as part of competition and consumer enforcement investigations, and from firms that are merging. Likewise, there are no fines available for breaches of such undertakings. The CMA can “enforce” undertakings by way of a follow-up order or by relying on that promise in court (for example, through civil proceedings for an injunction or for interdict). But this does not provide meaningful deterrence, in the sense that the business, having been forced to fulfil an undertaking by a court order, is currently no worse off for having initially failed to comply with the undertaking. Fines for breaches of undertakings and commitments across the competition, consumer, markets and mergers regimes would greatly facilitate early resolution of the CMA’s investigations.

By way of comparison, the European Commission already fines for non-compliance with its competition commitments. In 2013, it imposed a €561 million fine on Microsoft for failing to comply with its commitments (in that case, to offer users a browser choice screen, enabling them easily to choose their preferred web browser).

extremely limited.²⁵ A straightforward solution would be to enable the CMA to fine firms that failed to comply with the rules that it set. This would put the CMA closer in line with a number of other regulators.²⁶

There may be further reforms that can be made to make the implementation of remedies following a market investigation, and the review of those remedies, more effective and flexible. Work is under way to explore these issues.²⁷

The implementation of the four recommendations above, taken together, would undoubtedly improve the effectiveness of the markets regime a good deal, providing the CMA with a more powerful set of tools to stop exploitative practices. For instance, if, during a market study, the CMA identified a practice that might be harmful to consumers, it could order it to stop, pending an investigation, under threat of a fine for those who might flout its order.


The reformed regime could also enable the CMA more effectively to influence the conduct of those businesses whose practices raise concerns, without the need for formal work in the form of market studies or market investigations. This is because the power to order legally-

25 For instance, if an energy company failed to comply with the pre-payment meter price cap that the CMA introduced following its market investigation, the CMA would have no direct means to penalise it for doing so.

The CMA can obtain a court order to enforce its remedies, breach of which would be contempt of court. But apart from any reputational impact, a business is no worse off from ignoring the CMA's requirements and waiting for the court order.

26 For example, the Financial Conduct Authority, Ofcom, Ofgem and the Civil Aviation Authority have such powers.

27 For example, there could be merit in providing the CMA with greater flexibility to order additional remedies within a reasonable timeframe following the conclusion of a market investigation, without going through what could turn out to be another three-year cycle. There may also be merit in simplifying the scope of the existing powers by which the CMA may propose remedies (set out in Schedule 8 of the Enterprise Act 2002).



binding requirements to remedy consumer detriment, and the power to do so by way of interim measures pending full investigation – at both a firm and a market-wide level – would provide a stronger incentive for these firms to listen, engage and take steps to address the CMA’s concerns in advance of formal work, than currently. Weighing on the minds of management in deciding whether to co-operate with the CMA would be the alternative: direct intervention, in the form of legally-binding requirements.

This informal communication with these businesses, through which the CMA could signal expected standards of conduct, would certainly be a major improvement. At the moment, communication with these businesses takes place principally through lawyers. Understandably, the legal advice will often be framed with an eye on how they might deter or delay the CMA from scrutinising their client. An acid test of whether reforms of the markets regime were sufficiently robust would be whether direct and meaningful engagement with these businesses, and their management, began earlier.

Many of these exchanges would occur in private. Early public communication of problems in markets, and sources of consumer detriment, could also encourage improvements to behaviour. For instance, an announcement that the CMA was concerned about certain practices or markets, and minded to investigate, might in itself be sufficient to secure engagement with firms and improve standards.

Such engagement, prior to the start of “formal” markets work, would also be assisted by wider information-gathering powers set out in Section 6. Legal protections may also be required to ensure that the CMA is adequately protected from defamation liability,²⁸ and that its communications with

²⁸ This could be achieved by changes to the law to give the CMA privilege, or qualified privilege (e.g. where there is no malice or bad faith) against defamation proceedings. There is precedent for this in respect of the CMA’s published reports and decisions, in the Enterprise Act 2002 s108.

firms do not prevent or prejudice enforcement proceedings, or any subsequent action under the markets regime.²⁹

A more radical reform would be to remove the distinction between market studies and investigations, leaving a single regime for examining market-wide competition and consumer concerns. This could make the markets regime simpler and more effective; but the implications for decision-making would need to be carefully considered. Work is under way to examine the merits of this.

A still more fundamental reform that has been put to us could be to consolidate rule-making powers over the regulated sectors in a single, existing, authority, or by the creation of a new oversight body for the economic regulators, with powers of direction to ensure consistency of approach to consumer protection. Whether or not this has merit needs a good deal of careful consideration, and the engagement of a large number of external parties. Such work is not primarily the responsibility of the CMA. It would best be undertaken by a free-standing review of the regulatory regime as a whole.³⁰

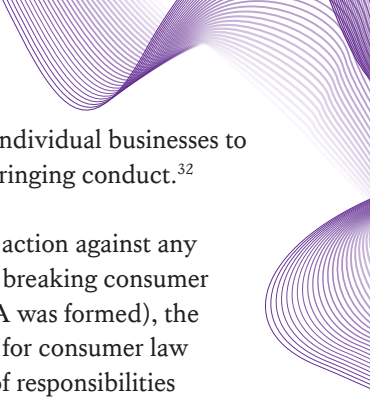
3. Consumer protection law enforcement

The CMA has powers to enforce certain consumer protection legislation, particularly in relation to unfair trading and unfair contract terms.³¹ It currently carries out

29 Further work is under way to assess what protections may be required to enable the CMA to communicate more routinely with businesses, including whether the FCA's exemption from liability for damages, and the requirement it places on regulated firms to be open and co-operative, provide relevant points of comparison.

30 The National Infrastructure Commission has recently been asked by HM Treasury to look at regulatory consistency as part of its review of infrastructure regulation.

31 A full description of the CMA's consumer enforcement powers can be found in Annex A to the CMA's *Consumer protection: enforcement guidance*, August 2016.



this enforcement function by taking individual businesses to court, and seeking orders to cease infringing conduct.³²

In principle, the CMA can take such action against any business in the UK that it suspects of breaking consumer law. In 2012 (shortly before the CMA was formed), the Government reviewed the landscape for consumer law enforcement, including the division of responsibilities between different enforcement bodies. It decided that the CMA should use consumer enforcement primarily to address market-wide conditions and practices which make it harder for consumers to exercise choice (as well as having a lead role on unfair terms legislation and international liaison). Other cases were to be handled by Trading Standards (see box, below).

This means that, in practice, the CMA uses consumer law enforcement against individual businesses largely to improve market-wide conduct. The effectiveness of such a consumer protection regime relies heavily on the credible deterrence that can come through the enforcement of the law. Currently, deterrence is weak in the UK, both in comparison with the competition enforcement regime, and by international standards.³³ The CMA's consumer law powers are unfit for its current purpose, and far short of what

32 This “backward-looking” enforcement work, which is intended to address failures by firms to comply with existing law, can be contrasted with the “forward-looking” markets regime, where the CMA can set parameters within which firms must operate in the future. Consumer law enforcement cases are often launched in the light of practices uncovered in work under the markets regime. For instance, enforcement action against hotel booking websites was initiated after a market study on digital comparison tools; and enforcement action on care homes took place in conjunction with a market study in the same sector.

33 For example, in August 2018, the Australian Competition and Consumer Commission was given stronger fining powers for breaches of Australian consumer law. Fines were increased from a maximum of Aus \$1.1m to Aus \$10m, or three times the benefit obtained by the company, or 10 per cent of annual turnover. These changes aligned the maximum penalties under consumer law with those available under Australian competition law.

would be required to enable the CMA effectively to fulfil a consumer interest duty.³⁴

Three major weaknesses stand out.

First, where the CMA concludes that consumer law has been breached, it has no powers to order the cessation of illegal practices. Instead, it must pursue businesses through the courts in order to obtain a binding remedy. This differs from the enforcement of competition law, where the CMA decides itself whether the law has been broken, and gives directions and imposes fines on offending firms.

Second, even when the CMA wins in court, no civil fines are available (again by contrast with competition law enforcement).

Third, the CMA can secure undertakings from a firm, as an alternative to taking it to court. But the CMA cannot fine the firm if it fails to comply with the undertaking.³⁵

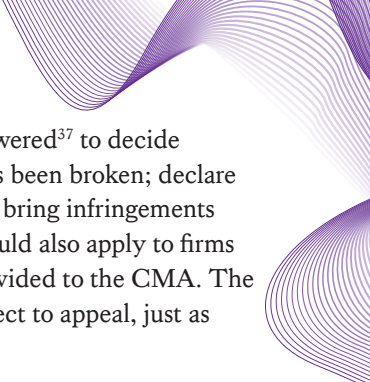
From a commercial perspective, for the minority of firms that are prepared to risk breaking the law, there may often be no business case for compliance. Deterrence, in short, is very limited.

The Government has already proposed to introduce legislation to give the courts the power to impose civil fines up to 10 per cent of global turnover for breaches of consumer law.³⁶ But more far-reaching changes may be required to address these shortcomings.

34 The CMA's work on the loyalty penalty also identified gaps in the consumer protection regime, and made recommendations to address these (see "Tackling the loyalty penalty", 19 December 2018, pages 138 to 141).

35 See also footnote 24 in Section 2 of this Annex, which discusses the same limitations of undertakings and commitments in other contexts.

36 BEIS, *Modernising Consumer Markets – Consumer Green Paper*, April 2018, page 57



First, the CMA could itself be empowered³⁷ to decide whether consumer protection law has been broken; declare the fact publicly; direct businesses to bring infringements to an end; and impose fines. Fines could also apply to firms that have breached undertakings provided to the CMA. The CMA's decisions would then be subject to appeal, just as they are in competition cases.

Second, in urgent cases, the CMA should also be able to order the cessation of practices that it suspects may be harming consumers on an interim basis, pending a final decision on whether the law has been broken. Powers to impose such interim measures to address suspected breaches of consumer protection law would reflect the CMA's existing powers in respect of competition law breaches, and proposals in Section 2 for similar measures in the markets regime.

Third, the deterrent effect of the enforcement regime would also be enhanced by reforms to improve personal responsibility for breaches of consumer protection law, including director disqualification. These reforms are discussed in the next Section.

Fourth, there is a strong case for entrenching a division of responsibilities for consumer law enforcement between the CMA and Trading Standards (described in the box below) in law.³⁸

³⁷ As it already is for competition law infringements.

³⁸ The boundaries established by the Government in 2012 could also be re-examined; however, a recasting of the institutional landscape for consumer law, for a second time in six years, could be a destabilising upheaval for all the agencies concerned, distracting them from their main job of tackling consumer law breaches. At the very least, cross-agency consultation should be conducted prior to any change in this field.

The CMA's responsibilities for consumer protection law enforcement

Most of the CMA's powers to enforce consumer protection legislation are shared with other authorities, including Trading Standards.^a Following a review in 2012, the Government stated that the CMA's enforcement role should be limited to particular areas, rather than seeking to duplicate the work of Trading Standards.^b In particular, the CMA was asked by the Government to:

- “[use its] consumer enforcement powers as remedies... in markets where competition is not working appropriately due to practices and market conditions which make it difficult for consumers to exercise choice”;
- be “the lead enforcement authority for unfair contract terms legislation and source of business guidance in this one area”; and
- retain its “role on international consumer law and policy liaison”.

Where an issue falls outside the CMA's remit it is passed to the relevant local Trading Standards Service or appropriate team of specialists in National Trading Standards or Trading Standards Scotland (e.g. the e-Crime team) for consideration. For issues which may have an impact on consumers across a significant part of the UK, and where coordinated enforcement action is most likely to be needed, the CMA will raise an issue for discussion at the national level. The CMA attends both the National Tasking Group (England and Wales) and the Tasking and Coordination Group (Scotland), where national issues are discussed. These are sub-groups of National Trading Standards and Trading Standards Scotland respectively. For Northern Ireland, the CMA can pass issues to the Northern Ireland Trading Standards Service.

^a *Other authorities with powers to enforce certain consumer protection legislation include the Civil Aviation Authority, the Financial Conduct Authority, Ofcom and the Information Commissioner.*

^b *BEIS, “Empowering and Protecting Consumers: Government response to the consultation on institutional reform”, April 2012, paragraph 6.42.*

4. Individual responsibility

Personal sanctions for competition law infringements

Almost all successful competition law enforcement results in fines being imposed on firms. The current regime allows for civil (rather than criminal) fines of up to 10 per cent of worldwide turnover to be imposed on infringing businesses. But the burden of these fines does not necessarily affect individuals directly responsible for misconduct. Other competition authorities, such as those in the Netherlands and Germany, impose civil fines on individuals for serious competition law infringements, such as price-fixing, bid-rigging, market-sharing, resale price maintenance, and serious abuses of dominance.³⁹ In the UK, the Financial Conduct Authority (FCA) may impose fines on regulated individuals for breaches of its rules.⁴⁰

39 In Germany, for instance, individuals' fines are set having regard to income and the level of participation in the infringement, with a maximum of €1,000,000. In the years 2008-2016 the Bundeskartellamt fined 333 individuals a total amount €24.4 million (an average of €73,000 per individual).

40 For instance, under section 66 of the Financial Services and Markets Act 2000, the financial regulators can issue unlimited financial penalties and publicly censure approved persons for breaches of regulatory requirements. Successive financial regulators struggled to take action against individuals, particularly at senior levels, because individual responsibilities were poorly defined and/or because it was difficult to provide an evidential trail linking a senior figure to a regulatory breach. The Senior Managers and Certification Regime – a recommendation of the Parliamentary Commission on Banking Standards – introduced for banks in 2016, and currently being extended across the financial services industry, is designed to address some of these problems, and make it simpler for the financial regulators to hold individuals responsible.

Individual responsibility does apply to a degree in competition law enforcement (see box). But it is arguable that personal responsibility for competition law compliance could be further bolstered, and the deterrent of enforcement enhanced, if the CMA were also able to impose individual fines directly on individuals for serious competition law infringements. This would, however, be a significant change in competition law enforcement. A good deal of further work would be required to assess the merits of such a change. This work would need, among other things, to examine the impact on deterrence, and whether a system could be devised to identify who was responsible for infringements without lengthy legal argument.

There could also be merit in bolstering the consumer protection law regime by introducing mechanisms to reinforce personal responsibility. For instance, the CMA could be given the ability to seek disqualification of directors – just as it can do under the competition regime – to protect the public from company directors whose involvement in consumer law infringements makes them unfit to be involved in the management of a company. The scope of such disqualification powers would need to be carefully considered; disqualification should probably apply only for most serious breaches. Work is under way to develop this proposal, and examine its merits.

Board-level responsibility

Business standards – what firms and their employees choose to value or disregard – are set from the top. This has been a lesson from the banking crisis. Measures to establish a clear line of responsibility to the boards of public companies for competition and consumer law compliance could be considered. These could include:

- ♦ A requirement on companies to appoint a board director with responsibility for assessing and reporting on risks to competition and consumer law compliance.

- A requirement on auditors to make a report to the company if, during the course of their usual work, they identify practices that may raise competition or consumer law compliance risks. There would be a corresponding duty on company directors to attest in annual reports (or otherwise record and report) that these risks have been noted and addressed. Such changes could be considered as part of Donald Brydon's review of UK Audit Standards. Mr Brydon may also wish to consider the merits of a further requirement on auditors to report to the CMA and to the Financial Reporting Council any suspected infringements of competition or consumer law that they identify during their work (see Section 5).

The detailed work required to establish the merits of either of these proposals has not yet been undertaken. In any case, changes of this type would require extensive consultation.

Individual responsibility in competition and consumer protection law enforcement

Individual criminal responsibility exists in competition law, but it is limited to hard-core cartel activity (a subset of competition law infringements). In practice, it has been difficult and costly to apply, and invoked relatively rarely. Because hard-core cartel prosecutions are only a small part of its overall enforcement work, the CMA does not maintain the scale of specialist expertise normally possessed by agencies with powers of prosecution. Primary responsibility for cartel prosecutions may sit more naturally with an agency that routinely brings criminal prosecutions, such as the Serious Fraud Office, and the case for this merits reconsideration.

Directors of companies that have breached competition law may be subject to disqualification from directorships of any UK company for a period of up to 15 years. This power was introduced in 2002, but was unused for many

years. More recently, the CMA has started to use these powers, with three director disqualifications since December 2016, and possibly more in the pipeline. But the process is wholly reliant on the courts. Moreover, not all individuals responsible for competition law breaches will be company directors.

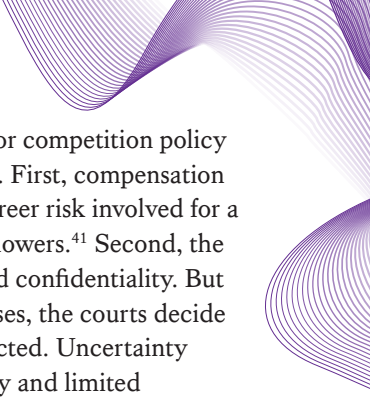
In consumer protection law, limited individual responsibility arises in the following ways:

- The new remedy of “enhanced consumer measures”, introduced by the Consumer Rights Act 2015, can apply to individuals as well as to companies. These measures – which are intended to secure changes in behaviour going beyond simply stopping the infringing conduct – can, for instance, require directors to take certain steps, such as to implement a compliance programme.
- Breach of the *Consumer Protection from Unfair Trading Regulations* can be a criminal offence. By contrast, breach of unfair contract terms legislation cannot be.
- In the case of sole traders, enforcement against the business is, of its nature, enforcement against the individual.

5. Whistleblowing and other sources of information

Whistleblowers

Information from whistleblowers is essential to the CMA’s work. It is the starting point for a great deal of enforcement against cartels, and an important source of intelligence on markets which develop consumer detriment. In addition, the knowledge that people might “blow the whistle” is itself a deterrent to wrongdoing by companies.



The current whistleblowing regime for competition policy is inadequate in a number of respects. First, compensation may be nugatory in relation to the career risk involved for a high proportion of potential whistleblowers.⁴¹ Second, the CMA makes great efforts to safeguard confidentiality. But when whistleblowers become witnesses, the courts decide whether their confidentiality is protected. Uncertainty about the protection of confidentiality and limited financial compensation risks severely curtailing effective whistleblowing.

Whistleblowers need a straightforward means of reporting wrongdoing, and a strong motive to do so, in the form of both better incentives and protections. The compensation cap needs to be raised considerably. Reducing the risks to whistleblowers, through appropriate financial compensation, and by providing stronger protections of confidentiality, could greatly increase the quality and quantity of intelligence that the CMA receives. It could sharply improve firm behaviour. And it could send a message to the public that the Government and its regulators take issues identified by whistleblowers seriously, and value the contribution they make to integrity and standards in commercial life.

Financial compensation

The CMA compensates whistleblowers for information about cartel activity out of its budget.⁴² The £100,000 limit that it has set on such payments is far too low. It is unlikely even to cover the loss that a typical whistleblower would incur from losing his or her job. It is very unlikely to compensate either for the resulting damage to the whistleblower's career prospects, or for the distress suffered. Neither does it reflect the wider economic and social benefits that attach to successful enforcement of the law.

41 The CMA's informant rewards policy limits compensation to £100,000.

42 The CMA's total Resource DEL budget (before depreciation) for 2019/20 will be £68.74 million.

The maximum compensation should be set at a much higher level. It should be commensurate with the financial impact, the loss of career prospects, and the distress that whistleblowers may encounter. But the current budgetary constraint on the CMA is a major impediment to doing so.

HM Treasury receives all fines imposed by the CMA. Since the CMA's operational launch on 1 April 2014, these have amounted to £67.7 million.⁴³ The practice of returning fines to the Consolidated Fund should continue. But a framework needs to be developed with the Treasury to enable the CMA better to compensate whistleblowers, without budgetary consequences. If the higher compensation available under such a framework encouraged more whistleblowers to come forward, the CMA might return more fines revenue to the Consolidated Fund than currently.⁴⁴

43 The figure rises to £157 million if the fines decided in respect of the *Phenytoin* case are counted towards the total. However, the decision in this case is subject to appeal. Proposals in this Annex, if implemented, would probably increase the fines revenue returned to the Consolidated Fund substantially, in a number of ways:

- Sections 2 and 3 propose new fines for breaches of undertakings, commitments and orders.
- Section 3 proposes new fines for consumer law infringements.
- Section 4 proposes new personal fines for competition law infringements.
- Section 6 proposes higher fines for failure to comply with information requests, and new fines for failure to comply with information notices, and for providing false or misleading information.
- Section 7 proposes to bring competition law fines in the UK more closely into line with those in other jurisdictions: this would be likely to result in higher fines than currently.

44 For original information leading to successful enforcement action, the US Securities and Exchange Commission pays whistleblowers between 10 per cent and 30 per cent of any resulting fines. Since the programme began in 2011, the information received by the SEC has led to enforcement action resulting in \$1.7bn in fines. It has paid out over \$300m to whistleblowers under the programme. There can be behavioural effects from linking payments to whistleblowers directly to the fines that result from the information they provide, and this is not the CMA's recommended approach.



Confidentiality

It can prove difficult for the CMA, and for competition authorities in other jurisdictions, to build a competition enforcement case on the basis of evidence from a whistleblower who wishes to remain anonymous, often for good reasons. If the whistleblower becomes a witness, the CMA may be required by the court to reveal the whistleblower's identity to the defence. The risk of disclosure means that whistleblowers (particularly those in cartel cases) will sometimes choose not to become witnesses, with the result that it may not be possible for the CMA to pursue the case.

The protection of whistleblower anonymity in competition enforcement cases, while respecting the legitimate rights of defence of the businesses under investigation, has long proved challenging for competition regimes worldwide. There are no easy solutions, even by the deployment of legislative protection. Nonetheless, the current arrangements in the UK merit re-examination. In particular, there may be merit in changing the law to make it explicit that, when the courts decide whether a whistleblower's identity should be revealed, they must give due weight to the importance of anonymous whistleblowing to competition law enforcement in the public interest.

Reporting requirements on auditors

Auditors may identify potential lapses in consumer and competition law compliance during the course of their work. But currently there is no requirement on auditors to alert the respective authorities to suspected infringements. By contrast, in the financial services sector, auditors are legally

required to communicate suspected breaches of regulatory requirements to the relevant financial regulator.⁴⁵

Alongside a reformed whistleblowing regime, a robust reporting requirement on auditors to report suspected infringements of competition law identified during the course of their usual work to the CMA and the Financial Reporting Council could supply useful information. And, just as importantly, it could provide a strong incentive on boards and senior management to maintain high standards in their firms. There may be merit in such a requirement being considered as part of Donald Brydon's Review of UK Audit Standards.

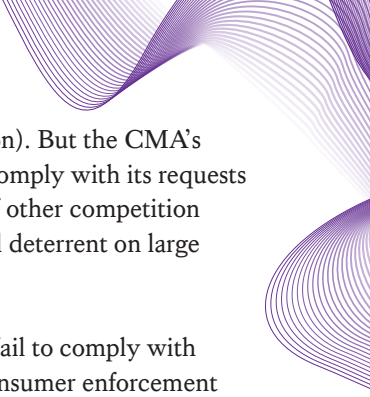
6. Investigatory and information-gathering powers

The CMA would greatly benefit from better investigatory and information-gathering powers, to improve the quality of the evidence on which it bases its decisions, to enable it to conclude its investigations, and to put a stop to consumer detriment, in reasonable time. There is considerable scope both to broaden the range of the CMA's powers, and to strengthen the available sanctions for non-compliance, bringing the UK into line with other jurisdictions.

Penalties for non-compliance

The CMA can require a firm to produce information for the purposes of an investigation (whether as part of its markets work, or in the context of a merger review or a

45 Section 342 of the Financial Services and Markets Act 2000 allows HM Treasury to make regulations prescribing circumstances in which an auditor must communicate matters to the Financial Conduct Authority or to the Prudential Regulation Authority that they have become aware of in the course of their work. Under the current regulations, the circumstances include those where the auditor reasonably believes that there has, or may have been, a contravention of any regulatory requirements that may be deemed by the regulator to be of material significance. The requirements also apply to information received by auditors working for firms that may not be involved in contraventions, but have close links to those that do.



competition enforcement investigation). But the CMA's powers to sanction firms that fail to comply with its requests are significantly weaker than those of other competition authorities in Europe.⁴⁶ A meaningful deterrent on large businesses is lacking.

No fines at all are levied when firms fail to comply with so-called “information notices” in consumer enforcement investigations. If firms fail to comply with an information notice, the CMA must apply to the court. Only with the benefit of a court order requiring information to be produced is there an incentive to comply: non-compliance with the order would be grounds for contempt proceedings.

A turnover-based fines regime for non-compliance with both competition and consumer protection law enforcement investigations, with a similar limit to that of other authorities, is almost certainly required. This should create a stronger incentive to comply with investigative requirements, and increase the timeliness and completeness of information provided to the CMA.

Penalties for provision of false or misleading information

Just as the commercial incentive for un-cooperative parties to comply with the CMA's investigations is weak, so too is their incentive to be honest. The CMA's ability to tackle consumer harm depends on its investigations being based on evidence that is truthful and accurate.

⁴⁶ They are capped at £30,000 for a fixed fine, and £15,000 for each day of non-compliance (although a combination of these may be imposed). The French Competition Authority can impose administrative fines of 1 per cent of total turnover on firms that obstruct its investigations: in December 2017, it fined Brenntag, a chemical distribution company, €30 million for failing to provide requested information and documents. The European Commission can impose a fine of 1 per cent of total turnover in the previous year under its administrative penalties powers – as well as a fine of 5 per cent of average daily turnover – for (among other things) failure to supply complete and proper information (for both antitrust and merger proceedings).

It is a criminal offence to provide the CMA with false or misleading information in competition, merger and markets cases. Although, in principle, this should provide a powerful deterrent, the bar to a successful prosecution is high. For the relevant offence to be made out, the false or misleading information must have been provided to the CMA knowingly or recklessly. Civil fines for the provision of false or misleading information are needed. These should apply across all of the CMA's tools (including the enforcement of consumer protection law) to provide a more cost-effective and flexible sanction, to sit alongside the threat of criminal prosecution for the most unacceptable conduct.⁴⁷

Deadlines

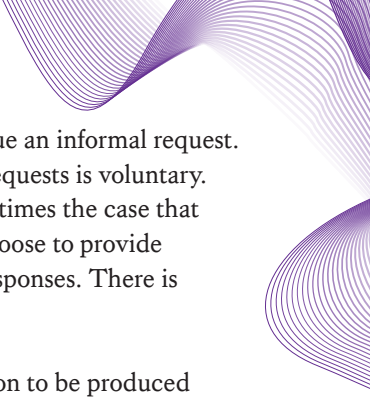
Firms can challenge (including by way of judicial review) the CMA's deadlines for the provision of information, on the grounds that they are unreasonable. This is an entirely proper protection of their procedural rights. However, when reviewing such decisions, it is important that the courts take account of the importance of the CMA completing its investigations as swiftly as possible (even when not subject to statutory deadlines), while of course respecting the parties' rights of defence. The CMA could also be made subject to an explicit statutory requirement to conduct its investigations swiftly, while giving due consideration to parties' rights of defence.⁴⁸

Extending the scope of the CMA's formal information-gathering powers

The CMA has no general powers to require information to be produced. To gather information outside the context of

47 The criminal sanction does not apply to false or misleading information provided in consumer protection enforcement cases. There may be a case for extending it to cover such cases. Work is under way to consider this.

48 The CMA already has "a duty of expedition" in the context of its mergers work (Enterprise Act 2002 section 103). Such a duty could also apply in respect of its other investigations.



a “formal” investigation,⁴⁹ it must issue an informal request. Co-operation from firms with such requests is voluntary. This is often sufficient. But it is sometimes the case that businesses refuse to co-operate, or choose to provide superficial, selective or misleading responses. There is nothing to stop them doing so.

A general power to require information to be produced could assist in the identification and response to problems in fast-moving markets. In particular, a general information-gathering power could better enable the CMA to monitor⁵⁰ developments in the digital economy, including the growth in the use and sophistication of algorithms.⁵¹ A general power could also enable more comprehensive responses to

49 That is, outside the context of a market study, a market investigation, a merger inquiry, or a consumer or competition enforcement case.

50 Consistent with the CMA’s general function (under section 5 of the Enterprise Act 2002) of obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions.

51 In the digital economy, how firms obtain data and make decisions to act has changed and continues to change. For example, firms now deal with a wider variety of complex data types such as “clickstream data” from websites or location and “orientation data” from mobile phones. They often store data in the cloud, including on servers outside the UK. And much firm decision-making, especially regarding rapid changes in prices or regarding the personalisation of price and non-price elements such as ranking or listing, is taken by algorithms.

The way in which machine learning algorithms take decisions can be difficult to understand. And it may not be technically possible to transfer an algorithm, the historical data that inputted into it and results that were outputted to an outside agency, to allow the agency to interrogate the algorithm.

Given these factors, there can be marked and increased information asymmetries between firms and competition authorities in the digital economy. It has been suggested that addressing these asymmetries may require competition authorities to be able to require firms to help them understand complex data types, including by giving them access to data wherever it is stored, or having firms analyse algorithms on the authority’s behalf. These powers may be needed even before the agency has decided whether to start a formal investigation.

“supercomplaints”.⁵² A good deal of further work would be required to consider the appropriate scope and limitations of such a power.

With or without a general power, the CMA’s existing information-gathering powers will need some reform. First, the powers need to keep pace with the way information is obtained, used (including to make decisions) and stored as a result of digitalisation.⁵³ Second, consideration should be given to whether the powers are sufficiently effective to investigate companies located outside the UK. Work is under way on both these issues.

Other tools

Further investigative and information-gathering tools may also need to be considered, and work is continuing on whether anything can be learned from the powers available to other regulators. For example, the FCA has powers under section 166 of the Financial Services and Markets Act 2000 to obtain an independent expert’s view of aspects of a firm’s activities that cause it concern.⁵⁴ A similar power in the competition enforcement context could reduce the disparity of technical expertise between the CMA and very large firms.

There may also be merit in introducing reporting mechanisms, so that certain businesses are required to inform the CMA of mergers and acquisitions they undertake. This could help the CMA keep abreast of merger

52 The Enterprise Act 2002 makes provision for designated consumer bodies (including, for instance, Which? and The National Association of Citizens Advice Bureaux) to make so-called “supercomplaints” to the CMA about “any feature, or combination of features, of a market in the United Kingdom for goods or services is or appears to be significantly harming the interests of consumers”. Within 90 days after the day on which a super-complaint is received, the CMA must say publicly how it proposes to deal with it.

53 See footnote 51, above.

54 The costs of engaging the independent expert are borne by the regulated business.



activity, which it could then review and consider whether to ‘call in’. A similar measure has recently been proposed by the Australian Competition and Consumer Commission following the interim findings of their digital platforms inquiry.⁵⁵

7. Court review of CMA decisions

Standards of review

Decisions of the CMA are subject to appeal to or review by the courts (most often the Competition Appeal Tribunal (CAT) although some decisions fall to be judicially reviewed by the High Court;⁵⁶ judgments can also be appealed to the higher courts).

This is essential. The CMA and other regulators should be subject to a judicial process by which those it considers to have breached the law can challenge its decisions. This is in addition to the internal checks and balances in the CMA’s own decision-making process, which have been strengthened since 2014 by the introduction of the “Case Decision Group” system. Under this system, those who make the final decision on a Competition Act case cannot be those who conducted the initial investigation, diminishing the risk of confirmation bias.

The current arrangements provide a robust framework for challenge. But the appeal system, particularly for competition enforcement cases, has, over time, developed

⁵⁵ The report recommended that large digital platforms be required “to provide advance notice of the acquisition of any business with activities in Australia and to provide sufficient time to enable a thorough review of the likely competitive effects of the proposed acquisition”. (ACCC, Digital Platforms Inquiry – Preliminary Report, December 2018, page 64).

⁵⁶ For example, the High Court reviews CMA decisions to close a competition investigation case on the grounds of administrative priorities, or other administrative decisions taken as part of an investigation which are not specified in statute as appealable to or judicially reviewable by the CAT.

in such a way as to diverge from the “tightly controlled procedural regime” envisaged when the CAT was first established. This regime was intended “to minimise the traditional difficulties presented by competition cases – those of Byzantine complexity of issues, hypertrophic growth of documentation and evidence, and inordinate duration of proceedings”.⁵⁷

Two examples of this gradual divergence are striking.

First, contrary to the original intention – and initial CAT practice – under which proceedings were primarily paper-based, and hearings lasted no more than one or two days (see box, below), there is now increasingly extensive use of oral witness evidence and cross-examination, with the result that hearings on a single appeal often last for four weeks or more.

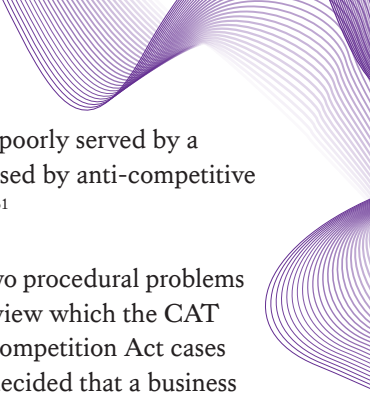
Second, the appeal process is complicated and prolonged by the admission, at appeal stage, of new evidence that could have been provided to the CMA before it came to its decision. Again, this contrasts with the CAT’s original intention of avoiding “hypertrophic growth of documentation and evidence”.⁵⁸

The result is a more protracted and cumbersome appeal process than was originally intended for, and by, the CAT. Parties found by the CMA to have breached competition law can exploit this – leading to a situation where, as noted by the National Audit Office in its most recent report on the UK competition regime, many lawyers regard the UK as “the best jurisdiction in the world to defend a competition case”.⁵⁹ This entails greater cost, delay and uncertainty than

57 Charles Dhanowa, written evidence to the House of Lords Select Committee on Constitution Inquiry into The Regulatory State, 26 June 2003.

58 Ibid.

59 National Audit Office report, *The UK competition regime*, February 2016, paragraph 2.15.



necessary.⁶⁰ And it leaves consumers poorly served by a process that allows the detriment caused by anti-competitive behaviour to persist for long periods.⁶¹

Underlying, and exacerbating, the two procedural problems identified above is the standard of review which the CAT is required to apply to decisions on Competition Act cases – that is, cases where the CMA has decided that a business has participated in an anti-competitive agreement, or abused a position of market dominance. Whereas the CMA's decisions on mergers, and on remedies following market investigations, are subject to ordinary judicial review, the CMA's decisions on Competition Act cases are subject to a “full merits” standard. This means that the CAT reviews all of the CMA's findings of fact, its economic assessment and its application of the law in the relevant decision.⁶² However, it appears that the appeal stage in these cases has moved beyond a review of the CMA's findings, and the evidence and reasoning to support those findings.⁶³

After Brexit, the CMA will be taking on large, complex cases currently reserved to the European Commission, including many in digital markets. This will increase the importance of addressing concerns about the effectiveness and efficiency in the current appeal process.

This can be achieved through two changes:

60 The absorption of resources on litigation has an opportunity cost for the CMA's work in other areas.

61 Both in the case at hand, but also more broadly because of the weaker and less immediate deterrent effect the CMA's enforcement activity has, as a consequence of the extensive litigation it faces.

62 This question was subject to consultation in 2013 (BIS, “Streamlining regulatory and competition appeals – consultation on options for reform”, June 2013).

63 It appears to be a means by which opponents can re-argue the merits of the case as new: in other words, to have a “second bite at the cherry”. In addition, there is a low bar for parties to obtain an order from the CAT, setting aside the CMA's requirements to cease infringing conduct, pending the outcome of their appeal.

- by moving away from the current “full merits” standard, either to a judicial review standard,⁶⁴ or to a new standard of review, setting out specified grounds of permissible appeal;⁶⁵
- by amending the CAT’s rules of procedure, to facilitate a faster review process. This would include addressing the specific procedural problems identified above, through greater restrictions on the admissibility of new evidence and less reliance on oral testimony.

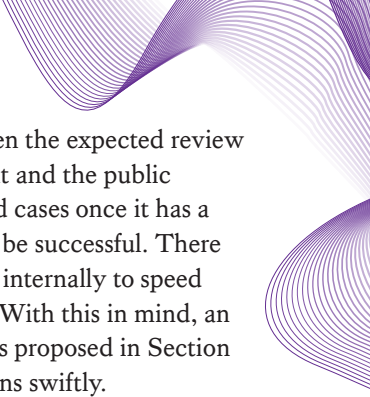
Such changes would reduce the duration of proceedings to a level that more closely reflects the original intentions for the CAT. They would also bring it more closely into line with international practice (see box).

A number of more radical proposals, such as bringing the CAT within the umbrella of HM Courts and Tribunals Service, or having competition appeals heard by the High Court, rather than the CAT, have been suggested to us, but work is now required to establish the merits of these.

It is not just a protracted appeals process that can delay the rectification of anti- competitive behaviour. The CMA’s preparation of cases can also be time-consuming. There are a number of reasons for this. First a number of investigations are highly complex. Second, the CMA takes particular care in ensuring the cases it takes forward are robust, and

64 The inherent flexibility of the judicial review standard allows the court appropriately to discharge its obligations under the European Convention on Human Rights (ECHR), including under Article 6 (Right to a fair trial).

65 For instance, instead of rehearing the entire case, the CAT would review whether the CMA’s decision was based on material errors of law or fact, or a breach of essential procedural requirements. The CAT would retain full jurisdiction over fines. The EU General Court considers competition appeals on specified grounds: namely, 1) lack of competence, 2) infringement of an essential procedural requirement, 3) infringement of the EU Treaties or any rule of law relating to their application and 4) misuse of powers. It also has unlimited jurisdiction in relation to fines. A move to specified grounds of appeal in the UK would be compatible with Article 6 of the ECHR.



prepared to the highest standard, given the expected review by the courts.⁶⁶ And third, Parliament and the public expect the CMA only to take forward cases once it has a high degree of confidence that it will be successful. There is always more that the CMA can do internally to speed up case preparation and progression. With this in mind, an explicit statutory duty on the CMA is proposed in Section 6, requiring it to conduct investigations swiftly.

The duration of UK competition appeals

The reforms proposed in this section are intended, in part, to reduce the duration of competition appeals, and thereby bring anti-competitive behaviour to an end more quickly.

Measured by “end-to-end” appeal time (time from appeal being lodged to judgment being handed down), the UK can appear to deal with cases more promptly than other jurisdictions.^a This is at least partially because the UK is unusual in having a tribunal dedicated solely to hearing competition appeals. In many other jurisdictions, competition appeals have to wait their turn to be heard in general courts.

However, once the appeal comes before the court, the UK appears to be an outlier in terms of the length and frequency of oral proceedings. Hearings lasting three to four weeks are not uncommon (e.g *Pay for Delay* and *Phenytoin*). The forthcoming appeal by Royal Mail against a decision of Ofcom is listed to be heard for a five-week period. By contrast, hearings in competition appeals in the EU General Court often last less than a day, and those in France often take less than two days.

⁶⁶ The CMA needs to plan for each case to be litigated through the courts, even if in practice some cases settle as the parties accept a discount on the fines when they believe their likelihood of success in the courts is low (or when they want to reduce the management and legal costs of protracted litigation).

Perhaps more importantly, oral proceedings of this length appear to be inconsistent with the original intentions for the CAT when it was founded in 2003. Charles Dhanowa, the CAT's first (and current)

Registrar and co-architect of its procedural rules, wrote in that year that:^b

“As a result of the emphasis on written procedure, the oral hearing stage before the Tribunal has been relatively short, with complex issues being argued in hearings taking 1½ days (*GISC*), four days (*Napp*), one day (*Aberdeen Journals*) and one day (*Bettercare*).”

The CAT's first President, Sir Christopher Bellamy, spoke in similar terms in 2003. He said that the procedure was:^c

“essentially based on that of the Court of First Instance of the European Communities, which means that it is a system that is based on the exchange of written submissions, on case management by the Tribunal, and on a short oral stage”

In an essay published the same year, he wrote that:^d

“in the majority of [CAT] cases the oral hearing lasts a day, or at the most 2 days, although two cases so far have lasted 4 days. But this may be seen against the background of the English system, where heavy cases may easily last for 4 to 6 weeks in court, perhaps longer”.

^a See, for instance, European Commission, “EU Justice Scoreboard 2018 – Quantitative data”, Fig. 18).

^b *Written evidence to the House of Lords Select Committee on Constitution Inquiry into The Regulatory State*, 26 June 2003

^c *Proceedings of Symposium on Globalization of the Judiciary (5-6 September 2003), published in Texas International Law Journal, 39 (3), Spring 2004*

^d *Some Reflections on Procedure in Competition Cases, in Hoskins, M. and Robinson, W. (eds.), A True European: Essays for Judge David Edward, 2003, page 189.*

Fines for competition law infringements

The CMA has legal powers to impose fines of up to 10 per cent of business turnover for competition law infringements.⁶⁷

In practice, however, competition law fines in the UK are well short of the statutory maximum, and are markedly lower than those imposed by the CMA's national counterparts in France, Germany, Spain and Italy (despite a similar maximum fines threshold operating in these jurisdictions).⁶⁸ This weakens deterrence. The UK is not only one of the best jurisdictions for companies to defend a competition case; it is one of the best jurisdictions to lose one.

One explanation for the lower fines imposed for competition law infringements in the UK is the approach taken by the CAT to the CMA's fining decisions. In the vast majority of cases, the CAT has lowered the CMA's (and formerly the

67 In doing so, the CMA must have regard to the seriousness of the infringement and the need for specific and general deterrence. Fines imposed under the Competition Act 1998 are "civil" (or "administrative") fines, rather than criminal fines. In the legislation, they are formally described as "penalties".

68 For instance, over the period 2012-14, the UK imposed fines totalling of £66m. Over the same period, Spain imposed fines totalling of £525m, Italy £306m, France £1,423m and Germany £1,384m (National Audit Office report, *The UK competition regime*, February 2016, Figure 14.

OFT's) fines on appeal, in some cases by over 80 per cent.⁶⁹ For those that have broken competition law, appealing against the CMA's fining decision appears to be a one-way bet.

Fines are determined by detailed CMA guidance, approved by the Secretary of State. This has been shaped by CAT judgments.⁷⁰ The CAT, like the CMA, is required to "have regard" to the guidance when setting the amount of a fine (including when the CAT substitutes its own fine for that of the CMA). However, in practice, the CAT typically provides little or no explanation for the size of the "substituted" fine, making it difficult to determine whether the guidance itself, or the CMA's application of it, was responsible.

Both the guidance (as approved by the Secretary of State) and the CAT's scrutiny of the CMA's decisions taken with reference to that guidance, need to be examined together, if an increase in fines – and the improvement in deterrence that can come with it – is to be secured. To that end, the CMA is planning to review the guidance on competition law fines, and if appropriate, make proposals for amendment to the Secretary of State. More radical changes, such as statutory tariffs, may also be considered. At the very least, the CAT should be required, by law, when it varies the CMA's fine, not just to follow the guidance, but to explain in detail how it has done so.

69 See, for instance, *Kier Group and others v OFT* [2011], in which fines imposed by the OFT (Office of Fair Trading, the predecessor of the CMA) on six construction companies for bid-rigging were reduced by the CAT by between 80 and 94 per cent.

70 For instance, in a series of judgments handed down in March and April 2011, the CAT substantially reduced the fines imposed by the OFT for bid rigging in the construction industry. The CAT in these cases concluded, among other things, that "the Minimum Deterrent Threshold, used by the OFT at Step 3 of the Guidance, was by its nature and application such as to give rise to penalties [i.e. fines] which were excessive and disproportionate". The OFT updated its guidance in September 2012 partly in response to this.

Regulatory appeals

The CMA handles references and appeals of certain decisions made by the sector regulators, concerning, among other things, licensing conditions, industry code modifications, tariff methodologies and price controls.

There is a strong case for removing responsibility for review of these economic regulatory decisions from the CMA. These could be consolidated in the courts. Were the courts to take on these functions, it would simplify appeal arrangements across the regulatory landscape, and also enable the CMA to put more resources into the investigation and remedy of consumer detriment.

8. Merger control after Brexit

Brexit could have major implications for the merger control regime in the UK. The CMA will need to review a larger number of multi-jurisdictional mergers that would previously have been considered by the European Commission.

The Competition Statutory Instrument (SI) for EU Exit⁷¹ has already provided for essential changes to domestic legislation to ensure that merger control (and other aspects of competition law) in the UK remains operable in the event of a “no deal” Brexit. But whatever the outcome, further changes to the procedural framework, the statutory timetable and the decision-making structures for merger control are likely to be needed, if the CMA is to be able to work effectively with international counterparts.

The changes required to the UK’s regime will be dependent to some degree on Brexit negotiations and any subsequent transition. This has created uncertainty although work is under way to develop a set of proposals to address these

⁷¹ The Competition (Amendment etc.) (EU Exit) Regulations 2019.

challenges. In the meantime, and in addition to the wider set of proposals being developed, the CMA is recommending the following reforms at this stage. (These are in addition to those that the Government is contemplating in the context of national security.)

Irrespective of Brexit, it is widely recognised that merger control might need to adapt to meet the challenges of the digital economy. The CMA is involved in the consideration of this question, including through its engagement with Professor Furman's review of competition in the digital economy.


Mandatory and suspensory notification of certain mergers to the CMA

Post-Brexit, when large, multinational firms merge, they are likely to put, as a priority, engagement to secure consent for the merger with the largest jurisdictions (in particular the EU, the US and China), before engagement with the UK. This reflects the fact that the merging parties do the most business in those jurisdictions. It may also reflect their legal advisers' judgement that the approach of the European Commission and of the US agencies will influence that taken by other authorities.

Some merging parties may also have an incentive to "game" the system, by agreeing to remedies in some jurisdictions that they can seek to secure from others.

These problems are likely to be compounded by the UK's "voluntary" and "non- suspensory" regime for merger notifications.⁷² This provides greater scope for some

72 This means that merging parties can choose whether or not to tell the CMA about what they are doing, and they are permitted to complete the merger without the CMA's prior approval. If the merger may have anti-competitive effects, there are, however, serious risks for the parties in not notifying. For instance, they could subsequently be investigated by the CMA and then ordered to sell the acquired business, after the transaction has been completed.



merging parties to fulfil their obligations in the mandatory jurisdictions, and wait and see whether the outcome can assist them in their engagement with the UK. And in any case, merging parties are generally likely to prioritise dealing with jurisdictions operating mandatory notification requirements, before turning to those with voluntary regimes.

From the perspective of UK consumers, the consequences of some merging parties engaging with the CMA late, after remedies have been negotiated and agreed with the other authorities, will almost always be negative, compared with a situation where the CMA is able to negotiate and agree remedies in conjunction with other authorities, and at an early stage. Consumers need adequate protection from this. A way for the UK to ensure that it has appropriate influence over the process would be to require mandatory notification to the CMA of mergers above a threshold set at a level to catch larger mergers that are typically reviewed by multiple international competition authorities. This means that large companies currently notifying their transactions in Brussels under a mandatory notification regime would do the same in the UK post- Exit, thereby avoiding any additional business burden. This would be accompanied by a “standstill obligation” designed to prevent parties from proceeding with the transaction prior to the CMA’s approval.⁷³

For those mergers below the threshold the system would remain voluntary, with parties notifying the CMA only where they consider that there is a risk to competition, and the CMA retaining the ability to review cases at its

⁷³ Consideration should also be given to the introduction of a “short-form notification” process or other mechanisms to minimise the impact on businesses in relation to non-problematic mergers.

discretion.⁷⁴ This would save the businesses concerned (generally small and medium-sized enterprises), and the CMA itself, the burden of dealing with notifications of unproblematic cases, while retaining the important discretion to examine small mergers that nonetheless raise concerns (for instance, acquisition of small but growing competitors, or potential entrants, by large digital platforms, such as Google).

Cost recovery

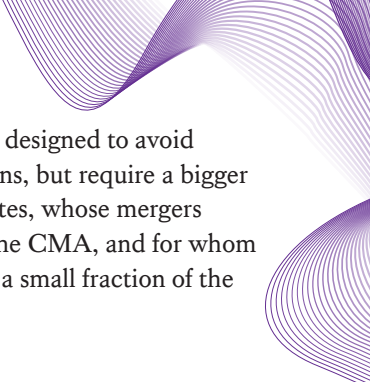
Currently, the CMA recovers around half of the total cost of its mergers work from fees paid by merging parties. Brexit will increase the absolute cost of the work considerably.

A number of defensible approaches can be taken to the funding of merger control. One, taken by, for instance, the German authorities, is that, since merger control is a requirement imposed by the state on companies, which would otherwise be free to organise their business as they see fit, the costs should be borne by the public sector. Another is that the merging parties – those with the most direct interest in the outcome of the merger control process – should pay in full or part for the process – cost recovery.

Merger control fees in the UK are returned to the Consolidated Fund. There is no financial interest for the CMA in proposing one approach over another. The case for higher, or full, cost recovery, rejected in 2011,⁷⁵ may merit reconsideration, partly in the light of Brexit, and the expected rise in higher value mergers that the CMA will be required to review as a result. Any changes to the level

⁷⁴ The exercise of this discretion would also need to be subject to a separate threshold (for instance relating to the share of supply and/or turnover of the merged entity), so that the CMA's ability to review mergers of multinationals was limited to cases where they had (for instance) a material UK market share and/or turnover.

⁷⁵ BIS, *A competition regime for growth, a consultation on options for reform*, March 2011, paragraph 11.6.



and structure of merger fees could be designed to avoid additional costs for smaller transactions, but require a bigger contribution from the largest corporates, whose mergers often demand intensive scrutiny by the CMA, and for whom merger control fees are generally just a small fraction of the overall transaction costs.

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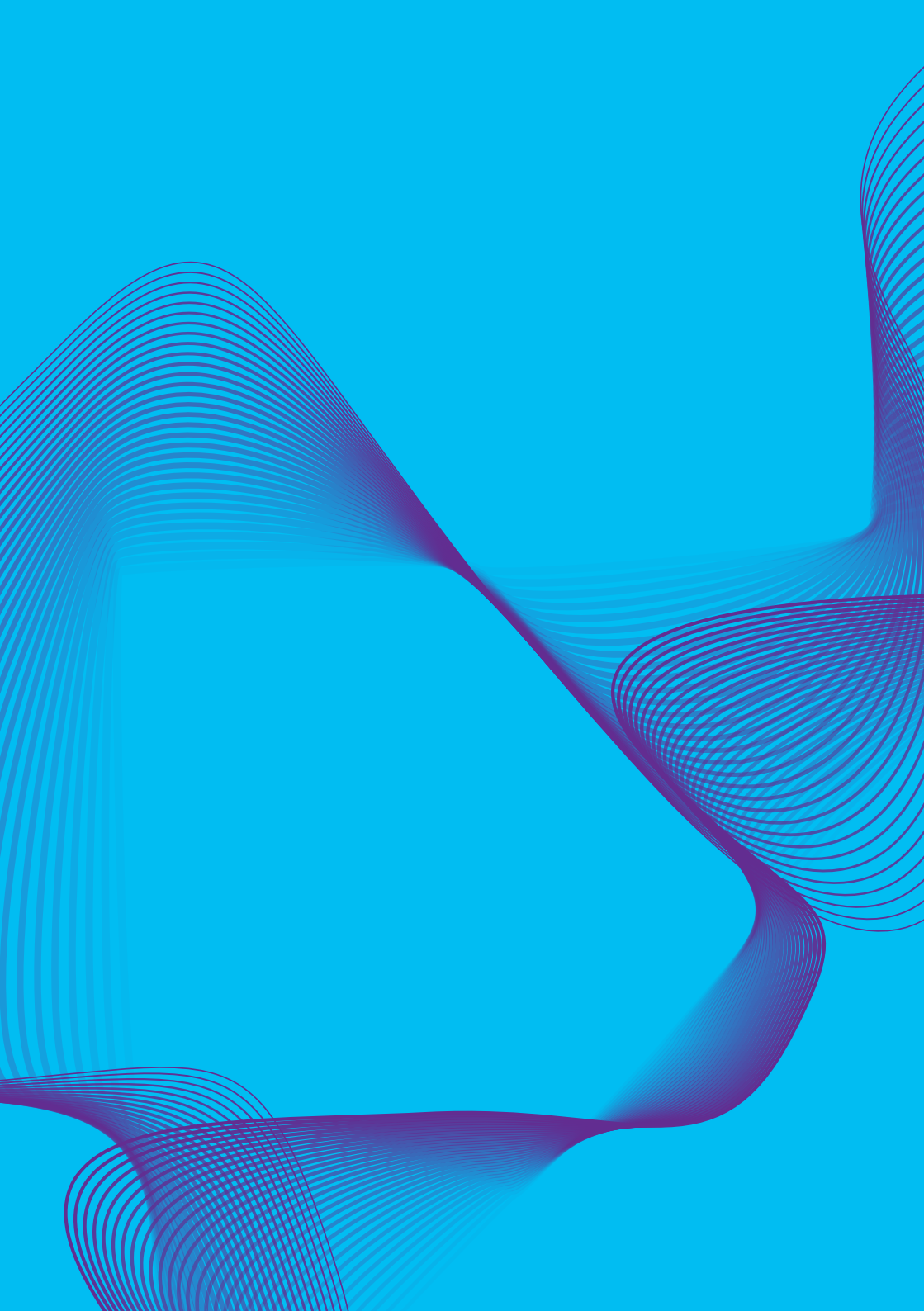
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