



CITY UNIVERSITY LONDON

CCRP Event Summary

Roundtable on the UK Competition Regime: 20th January 2012

Throughout the CCRP roundtable conference on the future of UK's competition regime the distinguished panel of speakers and audience members provided powerful insights on the strengths and weaknesses of the existing system as well as on the strengths and weaknesses of the arrangements proposed in the Government's proposals of March 2011. The list of Panel Members is at Annex 1 and the list of Topics covered is at Annex 2.

The meeting took place under the Chatham House Rule so all remarks are unattributed. The main issues discussed were as follows:

1) Creation of the CMA

The first main topic of discussion was the introduction of the CMA and the merger of the OFT and the Competition Commission.

The introduction of the CMA, and the merger of OFT and the Competition Commission provoked intense debate. The proposal for the CMA is based on the notion that it will improve the focus and efficiency of the competition authority, and provide a single voice for UK competition policy in the wider world.

There was general agreement that the current structure allows for an effective separation of powers between Stages I and II within the merger and market inquiry regimes and this, together with the use of specialised expert panels, was helpful in arriving at final assessments which were seen to be objective. It would be important to preserve this in the merged body.

However, it was agreed there were likely to be difficulties, possibly serious, such as: (a) working out how to avoid pressure on panels to confirm Stage I conclusions; and (b) how to create an effective and coherent single body out of two constituent parts with very different organisational cultures.

In addition, there was considerable disquiet and opposition to the removal of consumer protection powers from OFT (or a merged CMA.)

2) Market Inquiries

There was particular concern about how a unified CMA would be able to handle market inquiries. Among the specific issues raised were (a) the potential difficulties in setting a strategy for mounting market inquiries; and (b) how well a sufficiently robust Stage1-Stage 2 process could operate for market inquiries.

It was agreed that a sound process with well-based legal protections was essential if market inquiries could continue to impose structural solutions which had significant effects on property rights (as in the recent airports market inquiry).

Another concern raised was the role of public interest issues in market inquiries. It is proposed to expand it. The discussion did not oppose this in principle but several people expressed misgivings that the definition of 'public interest' might be sufficiently wide as to weaken the primary focus on economic competition issues.

It was argued by some that, as regards regulated industries, in general there were insufficient Market references but this was not accepted by all present.

3) Judicial Treatment of Antitrust

It was recognised that there had been shortcomings in the operation of Competition Act 1998 cases relating to abuse of dominance and cartels. This provoked a lively discussion

about the merits or otherwise of moving towards a prosecutorial system, with the US taken as the main exemplar.

Some participants expressed the belief that the adversarial court system allowed fully for the merits of different views to be tested before judges, who were used to considering technical matters. Others were concerned that technical economic arguments would be misunderstood and considered that cross-examination by QCs was not a very effective means for arriving at the truth. Several examples of poor judge-made antitrust judgements were given. In the end there was no consensus on this matter. However, the economic practitioners were very concerned about the need to safeguard genuine analytical exploration of the issues within whatever system was adopted.

One alternative put forward was to use the “expert panel” system, which appeared to be working well in merger and market inquiries, in order to investigate civil antitrust in a Stage II process, thus avoiding the confirmation bias that can arise when the same set of individuals are responsible for instigation, investigation and decision making. This did not appear to provoke any counter-arguments.

4) Appeals and the Role of the CAT

There was some discussion of appeals and the role of the CAT. These are different in terms of the standard of review as between mergers and markets, sector regulatory appeals and antitrust. There was some questioning of the ability of the CAT to conduct merits appeals given its lack of specialist staff.

Some speakers also suggested that the creation of a unified CMA could have major implications for the future of the CAT. Depending on how the CMA evolved, the CAT might become a more entrenched appeals entity (like the CC currently e.g. in regulatory appeals). Alternatively, the CAT might evolve into a more judicial review body.

There was much discussion of the experience of CAT processes and decisions (including the tobacco companies’ appeal against the OFT’s decision). However, there was general consensus that a clearer specification of the role and process of the CAT was necessary.

There was also some general discussion of the tendency of JR standard appeals in British courts to drift towards more in the direction of merits-standards appeals.

5) Improving the conduct of competition policy

There seemed to be a consensus that the current regime operates with a high benefit to cost ratio (compared, for example, to other parts of Europe). Nevertheless continuing improvements were essential. Some, such as speeding up market inquiries, and closer policy co-operation between the OFT and the CC were already starting to happen. On transparency the OFT, in its antitrust activities, faced particular difficulties such as those surrounding the need to avoid defamation of subjects of inquiries, but was increasing the range of case materials on its web site.

Throughout the meeting, uncertainty was expressed about the conduct of competition policy, *in practice*, under the proposed new regime.

6) Concurrent Competition Powers of Economic Regulators

There was general agreement regarding the benefits of an effective separation of the regulators and competition authority as exists today. Regulators have multiple concerns within their operations and there may be a conflict of interest when dealing with anti-trust cases. The CC and OFT take on a fresh perspective when performing investigations involving regulated companies with fewer preconceptions towards the agents involved. However, there was also general agreement that the regulatory agencies should retain their concurrent competition powers, even if they – and their co-ordination with competition bodies' powers – could be improved.

Importantly, the current system clearly distinguishes between Stage I and II of regulated industry determinations which allows for more in depth analysis and leaves room for

intervention if mistakes are made or there are difficult and finely balanced judgments to be made.

Some people argued for giving a stronger role to the OFT (or Stage I CMA).

7) Other points arising from the Proposals

The discussions touched on various points of uncertainty concerning the introduction of the CMA which could threaten the positive aspects of the current system. These included:

- (i) Introduction of the CMA would imply a complete restructuring of the current system which in turn does not guarantee a higher quality institution and investigatory procedures. Currently there is an important mix of highly qualified individuals on the board or working for the competition authorities. Having this diversity of knowledge and opinions may not be achieved under a single authority.
- (ii) With a common competition authority there would be competition for common resources and this could reduce the focus for the Phase II of investigations. This could decrease the quality of the case analysis and undermine the principle of separate decision making which greatly reduces the danger of confirmation bias. *Very considerable concern was expressed about whether there would continue to be sufficient resources to support the quality of competition policy work with a merged CMA, the idea for which was at least in some part driven by a cost-cutting quango-reducing agenda.*
- (iii) A point of universal agreement at the meeting was that the current system needs improvement in areas that would not be remedied by a proposed merger. Over time both the OFT and CC have improved their handling of cases partly as a

result of the current institutional structure. However, aspects of merger control, competition (dominance) cases, and transparency concerns were all presented as areas in need of improvement. The specific issues where a need for improvement was identified included:

- Improve transparency at the OFT, namely by publishing details of cases in progress on the internet as done by the CC. Publishing investigations online was recommended not least to improving the quality of thinking and arguments of OFT investigations. It was noted that this might require changes to OFT protection against claims of defamation.
- More coordination between the existing competition institutions
- The need for higher size thresholds in merger cases (general agreement)
- Mandatory notification of mergers above some threshold (a majority but not unanimous view)
- Investigations can be too lengthy. Phase II remedy proposals need to be released more rapidly. A possible solution would be the greater use of statutory timescales for cases, particularly for Phase I of Market Inquiries.

In general, it was felt that the competition regime prioritizes the consumers and aims to remedy the important aspects of the current regime to improve the quality of investigations and their outcomes/remedies. Importantly, progress within the outlined areas can be achieved under the current system. There would be significant challenges to form a new competition authority while also improving current issues. It was strongly argued by many that a CC-OFT merger was a distinctly risky decision, as it could significantly damage a system that is fully functioning, continuing to progress and performing well.

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ANNEX 1

List of Panel Members

The Centre for Competition and Regulatory Policy (CCRP) is delighted to host a Round Table on the UK's Competition Regime. The roundtable will focus on the government's competition regime proposals to reform the UK's competition framework.

Round Table Chairman

John Cubbin (Emeritus Professor, City University London and Competition Commission panel member)

Panel Members

Amelia Fletcher (Chief Economist, OFT)

Peter Freeman CBE, QC (Member of CAT and previous Chairman of Competition Commission)

Bruce Lyons (Professor of Economics University of East Anglia and CCP Deputy Director)

Mark Williams (European Competition Policy Director, NERA)

Roger Witcomb (Chairman of Competition Commission)

ANNEX 2

List of Discussion Topics

Topics in the consultation document

Core Topics

Establishment of CMA

A stronger markets regime

A stronger merger regime

A stronger antitrust regime

Other topics

The criminal cartel offence

Concurrency and sector regulators

Regulatory appeals and other functions of the OFT and CC

Scope, objectives and governance for CMA

Decision making