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It Takes One to Tango: The Single U.K. Competition And Markets Authority

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I. INTRODUCTION

The focus on good institutional design, as an important component of strong competition policy and enforcement, has become a priority of antitrust agencies around the globe. Both the “external design” of the agency, i.e. the place the authority occupies in the administrative structure of a state and the “internal design,” i.e. the system and procedures for antitrust enforcement and for the development of competition advocacy have been the subject of deliberation among trans-governmental participants in networks (i.e. the ICN, the ECN, and the OECD).² In the research community, the work of industrial organization and developmental economists on the relationship between competition and productivity growth has been further enriched by the recognition that institutions and their performance also affect society’s ability to generate economic growth.³

The U.K. competition regime is widely perceived as one of the best in the world and could not remain inattentive to calls for growth, particularly in the aftermath of the financial crisis. Improvements in its institutional performance and the level and length of decision-making were envisaged as fundamental to the Government’s strategy to support the recovery of the economy and the country’s prosperity. Following a lengthy consultation process, the Government decided to go down the path of institutional reform, by announcing the merger of the two principal U.K. competition authorities, i.e. the Office of Fair Trading (“OFT”) and the Competition Commission (“CC”), into a single Competition and Markets Authority (“CMA”),⁴ to be fully operational by April 2014.⁵ Changes are being introduced also to each of the regimes for antitrust, mergers, and markets, aiming to improve the robustness of decisions and to streamline the regime.

Such radical institutional changes are hard to accomplish.⁶ Partly because institutions are path dependent, and partly because any change in the *status quo* involves costs, actors are not

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² See OECD Global Forum on Competition, Optimal Design of a Competition Agency, (Feb. 3, 2003), available at <http://www.oecd.org/dataoecd/58/29/2485827.pdf>.

³ See Ma Tay-Cheng, *The effect of competition law enforcement on economic growth* (7) J. COMPETITION L. & ECON. 301 (2011); ECONOMIC DEVELOPMENT: THE CRITICAL ROLE OF COMPETITION LAW AND POLICY (Eleanor Fox & Abel Mateus eds., 2011); DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE, p. 3 (1990).

⁴ BIS, *A competition regime for growth: a consultation on options of reform* (March 2011), available at <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657-competition-regime-for-growth-consultation>

⁵ BIS, *Growth, competition and the competition regime: Government response to consultation* (March 2012), available at <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/g/12-512-growth-and-competition-regime-government-response>

⁶ E. Fox, *Antitrust and Institutions: Design and Change*, (41) LOYOLA UNIV. L. REV. 473, at 474 (2010).

attracted to an alternative institutional arrangement, even if it may provide higher aggregate returns in the long run. Furthermore, because “institutions work in complex ways akin to an ecosystem,”⁷ interference in the operation of one body may affect the working of another body. Nevertheless, it will be shown that the proposed merger is not followed, at least at this stage, by profound changes in the decision-making process of the two institutions; a fact that mitigates the risk of externalities to the judicial bodies of the U.K.’s competition landscape. Overall, the institutional reform falls short of the expectations of a watershed event, rather suggesting the symbiosis of the two authorities under a single roof.

Given the breadth of the developments we will not discuss each of them in detail, but rather concentrate on certain features of the CMA, which may render the symbiosis and interaction with other bodies of the U.K.’s competition ecosystem less harmonious.

II. THE CMA AND SECTOR REGULATORS: A DANGEROUS LIAISON?

The Government imposed on the CMA a primary statutory duty of “promoting effective competition in markets, across the UK economy, for the benefit of consumers.” This primary focus on competition with emphasis on consumer interest is in line with the development of competition policy around the world and thus warmly welcome. Nevertheless, it inevitably clashes with the wider socio-economic duties enshrined in the statutes of Sector Regulators. Although both the CMA and the sectoral bodies have as their objective to further the interest of consumers through the promotion of competition, the latter are required to do so only “where appropriate.”

In order to address this tension as well as the small number of cases brought by the Regulators under the Competition Act 1998 (CA 1998), the Government decided to strengthen the primacy of general competition law over sector regulation, by imposing an obligation on the Sector Regulators to use their competition powers in preference to their sectoral powers, wherever legally permissible and appropriate. The CMA will also have an enhanced role in supporting sectoral bodies to initiate competition inquiries and, most controversially, it will have the power to take cases away from them in certain circumstances.

The U.K. Office of Communications (“OFCOM”) is already required by the EU Regulatory Framework to consider whether the use of *ex post* competition powers would be more effective in addressing potential competition concerns before imposing *ex ante* regulation. Tension might, therefore, arise if the CMA interferes with OFCOM’s discretion to choose the appropriate basis of its action in a market characterized by structural barriers to entry. In such cases business would prefer OFCOM to use in a timely manner its *ex ante* sector-specific powers to deal with undertakings enjoying Significant Market Power, rather than to rely on *ex post* competition powers, particularly given the long duration of competition investigations.

The balance, however, might tip in favor of the CMA’s intervention, when OFCOM seeks to address a strategic barrier to entry. Such was the issue debated in OFCOM’s Pay TV Consultation,⁸ issued in the context of OFCOM’S market investigation into the functioning of

⁷ D. Sokol, *Antitrust, Institutions and Merger Control*, (17) GEORGE MASON L. REV. 1055, at 1055 (2010).

⁸ OFCOM, Pay TV Statement (March 31, 2010), available at http://stakeholders.ofcom.org.uk/consultations/third_paytv/statement/

the pay television segment. The regulator was concerned by BSkyB's incentive, as an integrated retailer with market power, to foreclose rival retailers through terms of sale of premium content. OFCOM, controversially, chose not to act on the basis of its competition law powers under CA 1998, but on the basis of its *ex ante* sectoral powers under Section 136 of the Communications Act 2003 in order to ensure "fair and effective competition" in broadcasting markets.

The wholesale must-offer ("WMO") remedy imposed on BSkyB required the latter to offer its two premium sports channels to retailers on non-Sky platforms, at retail-minus prices. The market for premium television channels, however, did not present a structural impediment to competition that would have warranted such a large-scale regulatory intervention. The premium sport channels were not a necessary input for a rival firm to compete with BSkyB at the retail level, but a competitive advantage the latter held over its competitors. Would OFCOM have followed the same path under an enhanced duty to use its competition powers first coupled with a strong oversight by the CMA? It is likely that the CMA would have intervened to prevent OFCOM's departure from the philosophy underpinning the EU Regulatory Framework and from well-established competition law principles.

For jurisdictional reasons, the WMO did not extend to movie channels, whose investigation is still pending before the CC. It will be interesting to compare the remedies the specialist body will impose with the WMO remedy designed by OFCOM.

Finally, the merger of the administrative functions of the OFT with the quasi-judicial ones undertaken by the CC in appeals about price controls might jeopardize the successful implementation of the concurrency regime and lead to a loss of certainty for business. Institutional arrangements should make it clear whether the CMA has exercised its concurrent powers and when it assumes a decision-making role.

III. THE SUSPICIOUS ROLE OF THE GOVERNMENT

Although the status of the CMA as a Non Ministerial Department ("NMD") is in line with the depoliticisation of the U.K. competition landscape, the Government has added to confusion by announcing its intention to outline its long term goals in relation to competition and growth in an "annual high level strategic steer," upon "which the CMA can reflect." While the CMA will not be bound by the document, such public statements may distort its priorities.

Similarly, it proposed to extend the power of the Secretary of State ("SoS") to intervene in market investigations on public interest grounds.⁹ In the future, the SoS will be able to appoint independent experts to the CMA panel to advise him (or her) on public interest issues, rather than relying on the CMA for the preparation of a set of remedies, as currently stipulated in the legislation (EA s 141). This is a significant improvement. The rationale behind this reform is to avoid the need to create *ad hoc* committees with no power to adopt decisions, like the Independent Commission on Banking, by addressing competition and public interest issues in a holistic manner once and for all.

⁹ In the mergers regime, the EA (section 58) makes provision for only one public interest consideration, that of national security, on the basis of which Ministers can intervene. It permits, however, the SoS to specify further public interest considerations. To date the SoS has intervened on the basis of considerations of media plurality (*BskyB/ITV*; *NewsCorp/BskyB*) and of the stability of the U.K. financial system (*Loyds/HBOS*).

On the face of it, such an arrangement might reduce predictability for business, and distort the CMA's primary focus on competition. Most crucially, because the SoS will take the decision on the appropriate remedies, there is a danger that the latter may be influenced by political rather than economic considerations. Notwithstanding these concerns, with the appropriate checks and balances—some already included in the Government's response—this approach may strengthen the effectiveness of the markets regime. We would further add that the legislation must specify tightly what constitutes a “public interest issue,” and, second, that the SoS should not be allowed to override the competition analysis made by the Authority.

IV. STRENGTHENING THE ANTITRUST REGIME: WHAT FUTURE ROLE FOR PRIVATE ENFORCEMENT?

In the forefront of antitrust, the Consultation revealed that the OFT prosecutes far fewer cases than other agencies in EU states which follow the Commission's administrative model of enforcement, and that its decisions take a long time. High profile, resource-intensive cases, such as the *Imperial Tobacco* case, raised the question of whether the evidential difficulties could have been exposed at an earlier stage, had the OFT followed a prosecutorial model of enforcement. An institutional separation of investigatory and decision-making functions would additionally alleviate concerns of confirmation bias, enhance the parties' right to be heard, and, finally, speed up the process by reducing the number of appeals.

Numbers, however, rarely speak for themselves. They do not tell us much about the accuracy of the agency's decisions or the effects of the case on the economy. Measuring an agency's performance involves a much richer set of benchmarks¹⁰ than simply counting the number of cases initiated in a given period of time. A radical move towards a prosecutorial approach without a prior evaluation of the OFT's performance against well-defined, internationally developed standards would irreparably hurt the reputation of the U.K. regime and be extremely disruptive to the CMA's and CAT's operations, probably leading to an “enforcement gap.” Most crucially, it would add an obstacle to enforcement, as the CMA would still have to collect information in order to defend its case before the court. It is thus very welcome that the U.K. competition regime remained loyal to its very first foundational choice.

Private enforcement, on the other hand, could significantly contribute to boosting the effectiveness of the antitrust regime, by playing a key complementary role to public enforcement. First, private individuals directly harmed by anticompetitive conduct, in order to litigate their cases successfully, dispose of more information than an antitrust agency constrained by fewer resources. Second, private enforcement is a powerful tool both in terms of allowing plaintiffs to recoup their injuries and in deterring future anticompetitive conduct. The evidence so far paints a gloomy picture of private actions in the United Kingdom, as the Courts have ordered very few injunctions based on competition claims, while plaintiffs have not been able to secure a final judgment awarding damages.

Regrettably, the Government did not discuss the effectiveness of private enforcement along the lines of improving public enforcement, but decided to address the topic in a separate

¹⁰ See W. Kovacic, H. Hollman, & P. Grant, *How does your competition agency measure up?*, EUROP. COMPETITION J. 25 (2011).

consultation.¹¹ Even in this unorthodox way, the proposals on private actions include three main options that could make it easier for consumers and small businesses to bring claims under competition law before the courts:

1. The proposals significantly depart from the EU's narrow focus on actions for damages to include the possibility of the CAT awarding permanent and interim injunctions, thereby broadening the toolkit of available remedies.
2. Claimants are encouraged to bring stand-alone actions, mostly adjudicated before the High Court, to the CAT. The specialist tribunal, having considerable expertise and experience in establishing liability for competition law infringements, could indeed gradually become an attractive venue not only for follow-on actions but for stand-alone ones as well.
3. The proposals discuss the possibility of granting the CMA powers to order infringers to implement consumer redress schemes, as a form of settlement.

V. DUE PROCESS AND RIGHTS OF DEFENSE

Given that the CMA will combine investigatory, decision-making, and prosecutorial functions, it is crucial to assess whether the OFT's proposed changes to its CA 1998, already underway,¹² suffice to enhance its administrative model of enforcement and provide for a greater separation of the decision makers from the case-investigation team.

The most significant proposal concerns the move towards a collective decision-making process for certain decisions, such as infringement decisions. Under the proposed structure, a Decisions Committee constituted by the OFT's senior staff, not including the Senior Responsible Officer ("SRO"), will be the decision maker for each case in which a Statement of Objections ("SO") has been issued. This division of labor between the SRO, accountable for the investigation of the case, and the Decisions Committee, accountable for the delivery of the infringement decision, represents a sensible effort to address perceptions of confirmation bias. Most importantly, the enhanced engagement between the parties and the decision makers sought in the consultation (e.g. state-of-play meetings or oral hearings aligned with the Commission's new Best Practices for antitrust procedures), while promoting procedural fairness and transparency, renders the internal checks and balances more imperative.

Nevertheless, the Government could have opted for a two-stage antitrust process, as currently exists in the mergers and markets regimes, whereby the panel of independent experts would hear the parties' oral submissions following the SO and would ultimately decide on whether to issue an infringement decision. Such an internal separation between the investigatory body and the adjudicative body has been adopted by the French *Autorité de la Concurrence* and has proved beneficial in guaranteeing strong and fair decisions.¹³

¹¹ BIS, *Private actions in competition law: a consultation on options for reform* (April 2012), available at <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf>

¹² OFT, *Review of OFT's investigation procedures in competition cases: a consultation document* (March 2012), available at http://www.of.gov.uk/shared_of/policy/OFT1263con2

¹³ Bruno Lasserre, *The New French Competition Authority: mission, priorities and strategies for the coming five years*, p. 2, available at http://www.autoritedelaconcurrence.fr/doc/intervention_bl_autorite_trustubusters_09.pdf.

Finally, the OFT has decided to extend the trial period and the remit of the Procedural Adjudicator (“PA”) to include responsibility for chairing oral hearings in CA 1998 cases. Contrary, however, to the revised remit of the EU Hearing Officer, his mandate does not cover the investigative phase. This is a serious shortcoming, as it is in this phase that the parties may need to call upon the Procedural Adjudicator whenever they feel compelled to reply to questions that may force them to admit an infringement.

VI. THE HOLY GRAIL OF CONSUMER ENFORCEMENT POWERS

What remains to be determined is the scope of the CMA’s activities with regard to enforcement of consumer protection. The OFT has repeatedly stressed the importance of an integrated regime, by declaring that its competition and consumer policy are “interdependent.”¹⁴ This interdependence clearly manifests itself in the course of market studies and market investigations. Most of the high profile market studies initiated by the OFT to date (i.e. consumer contracts, payment protection insurance) have demonstrated that issues of competition policy and consumer protection are highly interwoven. It is thus feared that hiving off the consumer protection role from the new CMA to the Citizens Advice and Trading Standards, as envisaged in the Consultation, will severely affect the performance of the markets regime.

A combined reading, however, of the proposals discussed in the Competition Consultation document, along with those enshrined in the on-going Consumers Consultation,¹⁵ reveals that the Government does not endorse an absolute separation of consumer and competition enforcement in the markets regime. On the contrary, it suggests that the CMA will retain competence to conduct market studies, where there are possible competition problems.¹⁶

The Consumer Consultation document further reflects on the role of the CMA in conducting market studies on both supply- and demand-side market failures and assigns it the power to impose consumer law remedies, should this prove to be the best way in which to address “structural market problems.”¹⁷ In the absence of structural market problems, market studies, as well as the consumer and advocacy role of the OFT, will be entrusted to the Citizens Advice, whereas consumer enforcement cases, which do not fall within the remit of the Citizens Advice, will be assigned to the Trading Standards.

Even if a complete takeover by the Citizens Advice of the consumer protection role previously entrusted to the OFT in the markets regime is eventually avoided, it is still difficult to see how this arrangement will work in practice. The nagging issue is how best to allocate market studies between the CMA and the Citizens Advice, in order to avoid duplication.¹⁸

¹⁴ Philip Collins, *New Decade, New Government- Reflections on possible evolution of the UK’s competition and consumer regimes*, available at http://www.of.gov.uk/shared_of/speeches/689752/0610.pdf

¹⁵ BIS, *Empowering and Protecting Consumers: consultation on institutional changes for provision of consumer information, advice, education, advocacy and enforcement* (June 2011) available at <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/11-970-empowering-protecting-consumers-consultation-on-institutional-changes>

¹⁶ See Competition Consultation document, *supra* note 4 at ¶9.2.

¹⁷ See Consumer Consultation Document, *supra* note 15 at ¶1. 24.

¹⁸ See M. Ioannidou, *Reforming the UK Competition Law Regime: The Consumer Perspective*, 11(1) COMPETITION L.J. 28, at 31 (2012).

So far, the OFT has advocated a holistic analysis with respect to market studies, allowing consideration from both a competition and a consumer angle.¹⁹ It is therefore unrealistic to expect the CMA to be able to identify the existence of a structural problem in a market and assume jurisdiction, without first delving into a resource intensive and painstaking examination. Furthermore, the OFT has developed a considerable expertise, albeit recently, from the cross-fertilization of competition and consumer policy, which will be hard for the Citizens Advice to develop, let alone to deal with the requirements of national enforcement. Finally, significant economies of scale and of scope will be lost by devolving most of the OFT's mixture of enforcement action, market tools, and advocacy powers to local authorities, rather than transferring them to a single national consumer authority. We can only hope the Government rethinks separation.

VII. ACCOUNTABILITY IN THE CMA: MIND THE GAP

The preservation of a “fresh pair of eyes” in the decision-making process in mergers and markets investigations was the most daunting task the Government had to address in its effort to create a “powerful single advocate voice.” Through the retention of the CMA Board structure for Phase I investigations and the assignment of the in-depth Phase II decisions to a panel of independent experts, the Government signaled its willingness to preserve the “best of both worlds” into the unified agency. It is equally important that the CMA continues to benefit from an expert and diverse panel, both in terms of employment and of business background.

The quality and objectivity, however, of the CC's decision-making did not solely stem from the abovementioned features, but also from its governance structure. The CC's Council could be called at any time to explain or defend the agency's decisions to Parliament and to Courts. The Government's intention to limit the Board's authority in Phase I decisions, and prohibit the executive from participating in Phase II, begs the question to whom will the independent experts be accountable, especially in light of their powers to impose far reaching remedies to any anticompetitive effects found.

Even more alarming is the fact that the Government has not explicitly banned staff teams working in Phase I from working on the same case in Phase II, leaving the matter to the CMA's discretion. Such an arrangement might seriously jeopardize the fresh pair of eyes function of the panel and open the door to confirmation bias.

This problematic governance structure might undermine the CMA's ability to hold a central position in the UK's complex ecosystem. Unless these serious flaws are remedied in the legislation, the CMA should anticipate the CAT to exercise a hard-look review in the way it reaches its decisions.

VIII. CONCLUSION

There is much that is positive in the new CMA, including the removal of duplication and the presence of increased efficiencies. A strong leadership coupled with the motivation and recruitment of the appropriate staff in the transitional period can correct some of the suboptimal

¹⁹ See OFT, Market studies: guidance on the OFT approach (June 2010), available at http://www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft519.pdf, ¶2.3.

features of the CMA's substantive and institutional framework and ultimately give teeth to the U.K.'s new creature.

What, however, has been less emphasized in the discussions surrounding the reform is the role of the CAT in this new institutional setting. The reduction in regulatory competition following the merger of the OFT with the CC could be compensated by an increased competition between the CMA and the CAT. Although the Tribunal's peculiar dual jurisdiction still remains in place, it should be expected to exercise both a greater scrutiny of the merits and a heightened standard in the course of judicial review in its effort to correct the suboptimal features of the CMA and to bolster the quality of its decisions. Along with its probable enhanced role in private actions, the CAT might, indeed, slowly transform the U.K. competition regime into a "quasi-prosecutorial" one.