

Unclassified

DAF/COMP/WD(2014)105

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

18-Nov-2014

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

DAF/COMP/WD(2014)105  
Unclassified

**ROUNDTABLE ON CHANGES IN INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES**

**-- Note by the United Kingdom --**

**17-18 December 2014**

*This document reproduces a written contribution from the United Kingdom submitted for Item VIII of the 122nd meeting of the OECD Competition Committee on 17-18 December 2014.*

*More documents related to this discussion can be found at <http://www.oecd.org/daf/competition>.*

**JT03366490**

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## UNITED KINGDOM

### 1. Introduction – overhaul of the UK enforcement landscape

1. Major changes to the UK's competition and consumer enforcement landscape have taken place over the course of 2013 and 2014. At an institutional level, the regulatory changes represent the most significant reforms to the competition and consumer landscape in recent decades.

2. By way of background, in 2011 the UK Government commenced a programme of wide-ranging reforms to the competition, consumer protection and consumer credit regimes. This involved the transition of the Office of Fair Trading's (OFT) and Competition Commission's (CC) functions to a range of successor organisations.<sup>1</sup> The competition functions of the CC and the OFT were taken over by the Competition and Markets Authority<sup>2</sup> (CMA). Certain OFT consumer functions were transferred to other organisations and responsibility for consumer credit was transferred to the Financial Conduct Authority.<sup>3</sup>

3. The Enterprise and Regulatory Reform Act 2013 (the Act) created the CMA and brought into effect a number of significant institutional changes to the UK's enforcement regime. The CMA formally took up its powers on 1 April 2014.<sup>4</sup>

4. The CMA is now the UK's lead competition and consumer authority. Its primary duty is to promote competition for the benefit of consumers, both within and outside the UK.<sup>5</sup> Its aim is to make markets work well for consumers, businesses and the economy. Its [Vision, Values and Strategy document](#) sets out the CMA's high-level aims. The CMA's overall ambition is to be one of the leading competition and consumer agencies globally.

5. In terms of institutional design, this contribution focusses on the following factors: the CMA's (I) independence and (II) its multi-functional enforcement powers.

### 2. The CMA and independence

6. The CMA is a body corporate established under section 25 of the Act. It is an independent non-ministerial government department. The CMA is supported by, and works with, the Department for Business, Innovation and Skills (BIS) - the department for economic growth ([gov.uk/government/organisations/department-for-business-innovation-skills](http://gov.uk/government/organisations/department-for-business-innovation-skills)).

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<sup>1</sup> The OFT and the CC both ceased to exist on 31 March 2014

<sup>2</sup> [gov.uk/cma](http://gov.uk/cma)

<sup>3</sup> [fca.org.uk/](http://fca.org.uk/) (formerly the Financial Services Authority)

<sup>4</sup> The CMA came into being on 1 October 2013 in shadow form

<sup>5</sup> Section 25(3) of the Act

7. As a non-ministerial department, the CMA has the freedom to prioritise<sup>6</sup> its resources and its activity. The CMA has full operational freedom to make its case decisions independently, in line with the relevant legal framework.

### **2.1 The Board and decision-making<sup>7</sup>**

8. The CMA is led by a board consisting of the Chair and at least five Members appointed in accordance with the Act (the Board), at least one of whom must be the designated chair of the Panel.<sup>8</sup> Members comprise executive members (who are also employees of the CMA) and non-executive members (who are not CMA employees). Non-executive members are drawn from a range of backgrounds and are appointed for the skills and experience they bring, rather than as representatives of particular interests.

9. Appointments to the Board are made by the Secretary of State and are overseen by a Commissioner for Public Appointments who ensures those appointed are free from personal and political patronage (to ensure independence from the Government). The Civil Service Commission regulates recruitment to the Civil Service: it is independent from both Government and the Civil Service. Civil Service Commissioners chaired the selection panels for all CMA Board appointments and the most senior tier of the CMA's executive team.

10. The Board's functions are set out in the [Board Rules of Procedure](#)<sup>9</sup> (the Rules). The Rules note, at paragraph 1, the CMA will carry out its functions independently, impartially and fairly. The Rules also set out the policy on conflicts of interests to which the Board must adhere.

11. The Board is under a duty to ensure the principles of good corporate governance are observed at all times and establishes the overall strategic direction of the CMA within the framework laid down by the Act. The Board must ensure the CMA fulfils its statutory duties and functions and makes appropriate use of public funds having regard to any opinions and reports of the CMA's Accounting Officer.<sup>10</sup>

12. Key CMA operational decisions are reserved to the Board.<sup>11</sup> The matters reserved for Board involvement are listed in Annexe A to the Rules and include, for example, whether:

- the duty to publish a market study notice under section 130A of the Enterprise Act 2002 (EA02) applies
- to propose to make, or to make, a market investigation reference under section 131 EA02.

13. Other decisions of the CMA are delegated by the Board to the executive, under its general power of delegation, or are required by statute to be made by another part of the organisation.

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<sup>6</sup> [gov.uk/government/publications/cma-prioritisation-principles](http://gov.uk/government/publications/cma-prioritisation-principles) sets out the CMA's policy on prioritisation

<sup>7</sup> For further discussion, please see *Institutional Design and Decision-Making in the Competition and Markets Authority*, David Currie, Alex Chisholm & Tim Jarvis (Competition Policy International, Volume 10, Number 1, Spring 2014).

<sup>8</sup> Constituted in accordance with Part 3, Schedule 4 of the Act

<sup>9</sup> [gov.uk/government/publications/cma-board-rules-of-procedure](http://gov.uk/government/publications/cma-board-rules-of-procedure)

<sup>10</sup> The CMA's Chief Executive is the Accounting Officer for the CMA and is accountable to Parliament for its use of public money

<sup>11</sup> In accordance with the statutory framework

## 2.2 *The Panel*

14. Certain CMA decisions cannot be taken by the Board and must be taken by a separate panel. As an example, once referred to a Phase 2 investigation, merger and market decisions must be made by a group drawn from a separately appointed panel of experts (the Panel) who are not CMA staff.

15. Members are appointed to the CMA Panel by BIS for up to 8 years. They are appointed through open competition for their experience, ability and diversity of skills including in competition economics, law, finance and business.

16. The Panel members<sup>12</sup> are not only independent from Government, they are also independent from the CMA Board.<sup>13</sup>

17. The Secretary of State for BIS has designated a Chair of the CMA Panel and Deputy Chairs of the CMA Panel who are known as ‘Inquiry Chairs’ when they chair merger and market inquiries referred for Phase 2 investigation by the CMA Board, and regulatory appeals in relation to price controls, terms of licences or other regulatory arrangements (see further in relation to regulatory appeals below).

18. Further details as to the CMA’s governance including its Board, Panel and various Committees can be found at: [gov.uk/government/organisations/competition-and-markets-authority/about/our-governance](http://gov.uk/government/organisations/competition-and-markets-authority/about/our-governance)

19. In terms of corporate structure, the CMA’s structure chart as at October 2014 can be found at: [gov.uk/government/publications/cma-structure](http://gov.uk/government/publications/cma-structure). Broadly, there are two delivery directorates: an enforcement directorate (covering competition and consumer enforcement) and a markets and mergers directorate.

## 2.3 *The Strategic Steer*

20. As noted above, the CMA is independent from Government. A new feature in the recent landscape changes has been the requirement for the Government to provide the CMA with a strategic steer. Whilst at the time of the reforms certain concerns were raised that such a statement risked weakening the CMA’s perceived independence, the Steer is a public document setting out the Government’s high-level aims and expectations for the CMA in an open and transparent way. The Government has published its strategic steer for the CMA, applicable for the period 2014 – 2017 (the Steer<sup>14</sup>).

## 2.4 *CMA Annual Plan and Performance Framework*

21. The CMA’s first [Annual Plan 2014 to 2015](#) includes an indication as to how the CMA takes account of the Steer in developing its strategy and operational planning. Also set out in the Annual Plan are a number of CMA commitments. In particular, the CMA’s performance management framework (agreed

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<sup>12</sup> In addition to Phase 2 decisions on mergers and markets, Panel members are also used on Case Decision Groups in the context of competition enforcement cases

<sup>13</sup> As set out in Schedule 4 of the Act at paragraph 49(1)

<sup>14</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/245607/bis-13-1210-competition-regime-response-to-consultation-on-statement-of-strategic-priorities-for-the-cma.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/245607/bis-13-1210-competition-regime-response-to-consultation-on-statement-of-strategic-priorities-for-the-cma.pdf)

with the Government<sup>15</sup> alongside the CMA's budget) is included in the Annex to the Annual Plan (the Performance Framework).

22. The Performance Framework sets out the performance the Government expects from the CMA and describes how the CMA will fulfil the performance reporting requirements of the Act. The CMA Board is accountable for the success of the CMA as a whole and the delivery of the objectives set out in the Performance Framework.

23. The CMA must report annually on a number of benchmarks, including:

- The delivery of a target of direct financial benefits to consumers of at least ten times<sup>16</sup> its relevant costs to the taxpayer (measured over a rolling three-year period)
- The ratio of direct financial benefits to consumers and costs for its principal tools
- Its assessment of wider benefits of its work, for example on growth, business and consumer confidence in markets, compliance with competition law and deterrence of anticompetitive behaviour.

24. Whilst the CMA has regard to the Steer<sup>17</sup> and remains accountable to the Government for its performance assessed by reference to the Performance Framework, its decision-making remains fully independent from Government, as set out above.

25. In the context of UK merger control, a recent article considers the evolution of the public interest test and competition-based scrutiny.<sup>18</sup>

### **3. The CMA: a multi-function authority**

26. In combination with its competition enforcement role, the CMA's functions include both (A) consumer powers and (B) various roles in relation to the regulated sectors.

#### ***A. Combining consumer and competition functions***

27. The CMA's predecessor, the OFT, long combined both competition and consumer enforcement powers. Not all aspects of UK consumer protection were, however, dealt with by the OFT. For instance, matters of product safety did not fall within the OFT's remit.

28. In the last few years, consumer enforcement in the UK has been substantially overhauled. The CMA's consumer role remains significant but is now very different to that carried out by the OFT.<sup>19</sup>

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<sup>15</sup> The Department for Business, Innovation and Skills (BIS) published a performance management framework against which the CMA's performance will be measured

<sup>16</sup> For every £1 the CMA spends, it aims to generate £10 of direct benefits for the consumer. Previously, the OFT had an 8:1 target.

<sup>17</sup> It is not bound to follow it

<sup>18</sup> *The Public Interest and Competition-Based Scrutiny of Mergers: Lessons from the Evolution of Merger Control in the United Kingdom*, Alex Chisholm and Nelson Jung (CPI Antitrust Chronicle October 2014(1))

<sup>19</sup> The OFT's consumer role had already changed in the period prior to the OFT's abolition. For example, the Consumer Direct advice service was transferred in 2013 to Citizens Advice Service

29. In summary:

- Most of the OFT's consumer functions were transferred to other organisations, such as Citizens Advice, Trading Standards Services (TSS) and the FCA (credit regulation)
- TSS have been given a new national enforcement role (previously, TSS could only take local action) and now lead enforcement of the Consumer Protection from Unfair Trading Regulations<sup>20</sup>
- New bodies have been set up such as the National Trading Standards Board<sup>21</sup> and National Tasking Group<sup>22</sup>

30. In overview, the CMA:

- Is not under a duty<sup>23</sup> to enforce consumer legislation but retains primary expertise and lead enforcement of the Unfair Terms in Consumer Contract Regulations<sup>24</sup>
- Focuses on high impact consumer enforcement cases, pursuing complex and precedent-setting cases where the CMA expects to achieve an impact across entire markets
- Works with international enforcement partners and carries out international consumer advocacy. The CMA acts as the UK's Single Liaison Office, ensuring compliance under the EU Consumer Protection Co-operation Regulation<sup>25</sup> and co-ordinates the UK's interaction with EU and international enforcers. The CMA's international role also comprises engagement in the International Consumer Enforcement Protection Network (ICPEN) – for which it will take on the annual chair with effect from summer 2015 – and, alongside BIS, the OECD Committee on Consumer Policy
- Investigates markets that do not appear to be meeting the needs of consumers, responding to super-complaints, and conducting in-depth analyses of such markets with the aim of identifying and addressing market failures
- Shares its powers to enforce consumer protection with other UK partners. Together with other enforcers, the CMA is a member of the new Consumer Protection Partnership (CPP).

31. Further information as to the CMA's approach to the use of its consumer protection powers is set out in the following guidance: [gov.uk/government/publications/consumer-protection-guidance-on-the-cmas-approach-to-use-of-its-consumer-powers](http://gov.uk/government/publications/consumer-protection-guidance-on-the-cmas-approach-to-use-of-its-consumer-powers)

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<sup>20</sup> [legislation.gov.uk/uksi/2008/1277/contents/made](http://legislation.gov.uk/uksi/2008/1277/contents/made)

<sup>21</sup> (NTSB) responsible for prioritising national and cross-local authority boundary enforcement in England and Wales against unfair or unlawful Practices

<sup>22</sup> A sub-group of the NTSB with its own decision-making ability which brings together representatives from across English Welsh TSS, along with representatives from the CMA

<sup>23</sup> The duty has been changed to a power (Articles 10 to 13 of the Public Bodies (The Office of Fair Trading Transfer of Consumer Advice Scheme Function and Modification of Enforcement Functions) Order 2013

<sup>24</sup> 1999 [legislation.gov.uk/uksi/1999/2083/contents/made](http://legislation.gov.uk/uksi/1999/2083/contents/made)

<sup>25</sup> Regulation (EC) No 2006/2004 on co-operation between national authorities responsible for the enforcement of consumer protection laws

32. The CMA considers it is of critical importance that it has the ability to look at markets from both competition and consumer perspectives. Its competition and consumer functions are fully complementary. Using both competition and consumer powers, the CMA aims to help markets work well, empowering consumers to exercise informed choice and maximising consumer welfare. As set out above, for every £1 spent by the CMA, it aims to generate £10 of direct benefits for the consumer.

33. The CMA places the interests of consumers at the heart of its work and has issued a policy statement to that effect (available at: [gov.uk/government/news/the-cma-working-for-us-all](http://gov.uk/government/news/the-cma-working-for-us-all)). The impact of the CMA's work on consumers is the key factor in everything the CMA does. A recent example of work carried out by the CMA, on behalf of the CPP, is its review of problem debt (available at: [gov.uk/government/news/cma-concludes-review-of-problem-debt](http://gov.uk/government/news/cma-concludes-review-of-problem-debt)). The project looked at how over-indebtedness affects consumers' decision-making about the goods and services they buy.

34. Even in the absence of competition law or consumer law breaches, the CMA recognises that in some markets the structure of markets or conduct of suppliers or customers can mean that competition is ineffective. The UK's markets regime allows the CMA to look at specific markets or practices, rather than particular breaches by businesses, and to consider how competition can work better. The markets regime in the recent landscape changes has been broadened in scope, made faster and reinforced.<sup>26</sup> Further detail as to the UK's markets regime can be found at [gov.uk/government/collections/cma-markets-guidance](http://gov.uk/government/collections/cma-markets-guidance). The markets regime provides an important tool in the armoury of the CMA as a multi-function authority, enabling the CMA to look at systemic market problems from competition and consumer angles.

### ***B. Sector regulation and 'concurrency'***

35. The so-called 'regulated sectors' represent an important part of the UK economy, accounting for around 25% of the economy. These sectors are: energy (gas and electricity); water and sewerage services (in England, Wales and Northern Ireland); rail; air traffic control; airport operations; telecoms, broadcasting, spectrum and postal services; healthcare services in England; and, from April 2015, financial services and payment systems.

36. Sector regulators have powers to apply some aspects of competition law in relation to their particular industry sector, powers which are exercisable 'concurrently' with the CMA. These aspects are the prohibitions on anti-competitive agreements and abuse of dominance under Articles 101 and 102 TFEU<sup>27</sup> and the UK national equivalents<sup>28</sup> and the power to make a Phase 1 market study and refer a market for a full Phase 2 market investigation by the CMA Panel. These competition powers are in addition to the sector regulator's regulatory powers.

37. Although this 'concurrent' application of competition law by sector regulators alongside the CMA has been a longstanding feature of the UK enforcement landscape, the new regime (established by the Act) made a number of changes to enhance the concurrency arrangements. In particular, significant emphasis was placed on the importance of competition law in the areas covered by sector regulation. Changes were also made to improve co-ordination between authorities with concurrent powers.

<sup>26</sup> For instance the CMA's investigative powers have been bolstered

<sup>27</sup> Treaty on the Functioning of the European Union. The CMA and the regulators with concurrent competition powers are designated as national competition authorities for the purposes of Regulation 1/2003 (Council Regulation (EC) No 1/2003 of 16 December 2002)

<sup>28</sup> Under the Competition Act 1998 (CA98)

### **3.1 Greater emphasis on competition law enforcement**

38. The reforms were driven by the Government's view that use of concurrent competition powers by the sector regulators had historically been insufficient. Now, under [Schedule 14](#) to the Act, sector regulators are expressly required to consider whether the use of their competition law powers is more appropriate before taking enforcement action under their sector-specific regulatory powers. This is intended to strengthen the overall role of competition law as an enforcement tool in the regulated sectors.

### **3.2 Concurrency practicalities**

39. The [Concurrency Regulations](#)<sup>29</sup> provide for the performance by the CMA and the sector regulators of their concurrent functions under the UK and EU prohibitions on anti-competitive agreements and abuse of dominance. This includes:

- Allowing for the exchange of information between the CMA and the regulators (reg 3)
- Determining who should exercise concurrent functions in relation to a case (reg 4)
- Resolving disputes as to who should exercise concurrent functions in relation to a case, including specifying the circumstances in which the CMA must decide which person is to exercise concurrent functions in relation to a case (reg 5)
- Transfer of a case from one authority to another (reg 7)
- Providing the CMA with the power in certain circumstances to take over a case that has been allocated to a regulator (following consultation with the relevant regulator) and up until the point when a statement of objections has been issued - after which the agreement of the regulator must be obtained (reg 8<sup>30</sup>).

40. The CMA has published guidance as to the use of concurrent competition powers and how such powers are co-ordinated with the sectoral regulators: [Regulated industries: Guidance on concurrent application of competition law to regulated industries](#).

41. The CMA has entered into bilateral Memoranda of Understanding with most of the sector regulators. These Memoranda are available on the CMA website at: [gov.uk/government/organisations/competition-and-markets-authority/about#corporate-reports](http://gov.uk/government/organisations/competition-and-markets-authority/about#corporate-reports)

### **3.3 Reporting on concurrency**

42. The CMA must now report annually, to Parliament and to the public, on the operation of the concurrency regime. In order to provide a baseline against which future performance can be assessed, the CMA published a baseline report when the new arrangements came into effect in April 2014: [gov.uk/government/publications/baseline-annual-report-on-concurrency](http://gov.uk/government/publications/baseline-annual-report-on-concurrency)

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<sup>29</sup> [Competition Act 1998 \(Concurrency\) Regulations 2014 \(SI 2014/536\)](#)

<sup>30</sup> The Regulation 5 and 8 powers do not apply to Monitor in respect of cases that are principally concerned with the provision of healthcare services by the NHS in England. Unlike other economic regulators, Monitor does not have duty to promote competition

43. The CMA's Sector Regulation Unit facilitates a strategic dialogue with the sector regulators on the promotion of competition and ensures effective co-operation and co-ordination between the CMA and the sector regulators through the new UK Competition Network (UKCN).

44. The UKCN brings together the CMA with the sector regulators having concurrent powers, although the healthcare regulator, Monitor, attends the UKCN with observer status. The UKCN's principles are set out in its Statement of Intent, which is in Annex B to the [Regulated industries: Guidance on concurrent application of competition law to regulated industries](#).

45. As well as facilitating co-operation under the concurrency arrangements, the UKCN acts as a forum for the CMA and the sector regulators to consider more generally how best to promote competition and competitive outcomes for the benefit of consumers in the regulated sectors.

### **3.4 Regulatory appeals**

46. In addition, the CMA inherited the Competition Commission's responsibilities for references and appeals against the decisions of certain regulators. Regulators may make regulatory references to the CMA or be appealed to the CMA in relation to certain price controls, access charges and other licence modifications (regulatory appeals).

47. With effect from 1 April 2014, the CMA has responsibility for regulatory appeals in the aviation, communications, energy, railways, health and water sectors. In appointing groups to and staffing such cases, the CMA ensures that there is no conflict between its role as an appeal body and any role supporting the relevant sector regulator in its exercise of its concurrent competition powers.

## **4. Concluding remarks**

48. This contribution has set out in overview the substantive overhaul of the UK's competition and consumer enforcement landscape and institutional design in the last couple of years.

49. As the CMA is a fledgling authority, established only in April this year, it is still early to evaluate the effects of the changes now embedded in the UK's new regime. The CMA is playing a role in monitoring the operation of the new arrangements. For instance in the new consumer landscape, it will discuss with partners whether any improvements are necessary in light of its experience.

50. The UK, through the CMA, looks forward to sharing with the OECD its experience in the years that follow when it becomes clearer how the above changes to institutional design have, in practice, shaped the UK's approach to competition and consumer enforcement.