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Bruce Lyons
Centre for Competition Policy, University of East Anglia

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The United Kingdom has a unique set of institutions charged with enforcing competition law. The twin pillars are the Competition Commission ("CC") and the Office of Fair Trading ("OFT"). In the coming parliament, legislation will be passed to merge them into a new Competition and Markets Authority ("CMA"), probably with effect from 2014.[2] They each have a high reputation and are regularly ranked alongside the DOJ, FTC, and DG Competition as among the best in the world. OK, few would argue that any of these institutions is unimprovable, but it does mean there is much that could be lost if the CMA is less effective than its predecessors. Should we be worried?

Unlike the U.S. institutions, the relationship between the OFT and CC is strictly vertical. We know that vertical mergers generally have better outcomes than do horizontal mergers so this is a good start. OFT decisions feed into the CC and the CC cannot take any case on its own initiative. The OFT initiates, investigates, and decides all antitrust cases (i.e. restrictive agreements and abuse of a dominant position). For mergers, the OFT acts as the first-phase body (with powers to negotiate remedies) and can refer a case to the CC for deeper investigation and second-phase decisions. U.K. competition law also allows for market investigations, which the OFT can decide to refer to the CC—which has much stronger powers including the ability to impose powerful structural remedies. Both institutions also have other roles (e.g. OFT enforces consumer law, CC conducts regulatory appeals) but in this short paper I focus on core competition law enforcement.

I focus in this paper on institutional change and decision making in the new CMA. There are also other important changes to U.K. competition law, including the removal of "dishonesty" as a requirement for the criminal offense in cartels—it will be replaced by appropriate publication of detailed arrangements as a defense. This, and numerous other relatively small modifications, typically move competition policy in the right direction. Another example is that the primary duty of the CMA will be "to promote effective competition in markets, across the UK economy, for the benefits of consumers." This is a very positive and clear mission statement. But to understand the potential effectiveness of the CMA, we need to understand the organizations that are being merged. The CC and OFT are very different animals.

The CC began life as the Monopolies Commission in 1948. It was established along the lines of a Royal Commission of independent commissioners who were asked to make

[1] Professor of Economics in the School of Economics at University of East Anglia and Deputy Director of the ESRC Centre for Competition Policy.

[2] *Growth, competition and the competition regime: Government response to cons*ultation, Dept for Business, Innovation and Skills (March 2012).

recommendations on certain topics or markets to the appropriate government minister. It evolved considerably over the years but has kept its basic decision-making model.

Members of the CC are now more openly appointed and require an expertise in how markets work. They are appointed part-time for eight years without the possibility of reappointment (i.e. to keep them independent). They also now have full powers of determination and do not simply make recommendations to ministers.

The modus operandi is for each case to be decided by a group of four or five members, typically including a lawyer, an economist, an accountant/finance person, and a former business executive. Unlike the FTC, this group is involved early in the investigation, approves work streams, reads all the evidence submitted (apart from raw data and highly technical reports), reads and comments on draft staff working papers, approves a detailed case report, and decides the case. The group of commissioners also goes on site visits and holds hearings with all main parties both early and later in the proceedings. This gives several opportunities for open discussion between the group of decision makers and the senior management of the firms under investigation (almost always including the CEO). Most decisions can be appealed to the Competition Appeals Tribunal ("CAT") on grounds of judicial review.

The OFT was set up in 1973 and modelled on a Directorate General of the European Commission. It gained major powers following the Competition Act (1998) when prohibitions were introduced into antitrust, and with the Enterprise Act (2002) when cartels were criminalized. The role of Director-General was also split between a chief executive and chairman, along the governance lines of a public company.

Case initiation, investigation, and decision making were by staff and executives. This did not fundamentally change with the new responsibilities; for example, no separation was introduced between the decision to issue a statement of objections and the final antitrust decision. Hearings were not routine and apparently not attended by the decision maker. Until very recently, the identity of the decision maker was not even known. There was a lack of transparency, no formal separation between investigation and decision making, and a perception that the decision maker could be influenced by confirmation bias.

Mergers and markets decision making results have been considered as generally good, though possibly a little cumbersome. However, antitrust decision making in the OFT has received much greater criticism both from commentators and the CAT. OFT decisions are subject to appeal at the CAT on grounds somewhere between judicial and full merits review.

These are the two very different institutions that are to be merged. There will be a CMA Board of executives and non-executives, with the latter having a slim majority. We know from the evidence on mergers between commercial firms that clashes of corporate cultures can result in a disastrous outcome. It is therefore crucial that a consistent approach to decision making should be implemented post merger.

On the face of it, this is not what the government has done. Phase 1 decisions on mergers and markets will be made by the CMA Board in much the same vein as the current OFT Board. Phase 2 decisions on mergers and markets will continue to be made by panels of independent experts as at the CC. This is the status quo for mergers and markets, and it should continue to

work reasonably well in the new CMA, though I would like to see greater separation of the expert panel from the investigation process. The question mark remains over antitrust decision making.

Prompted by criticisms from the CAT, and hastened by the government consultation on reform that included a strong possibility of moving to a U.S. style prosecutorial model, the OFT had already set about improving its procedures. Their proposals were sufficient to head off the switch away from administrative decision procedures although a review in five years time will revisit the prosecutorial model if the reforms are deemed unsuccessful. The government's criteria will be a greater number of decisions, and fewer successful appeals.

The OFT also intends to implement major, if long overdue, reforms prior to the CMA merger. These include: case-specific timetables at the outset of investigations; beefed up role for a procedural adjudicator; improved access to decision makers at more interactive oral hearings; greater transparency of internal challenges to the case team; providing parties with draft penalty notices; more state-of-play meetings; separation between those responsible for investigation and those making the final decision; and introducing collective judgement in decision making.[3] Some readers may be surprised that these were not already in place. The government has decided that this could be enough, with a bit more tightening up and introducing legislation to allow (but not to require) the use of independent expert panellists as decision makers in antitrust cases.

What is the OFT's vision for collective decision making in antitrust? They propose to form a Decisions Committee ("DC") of senior staff including the executive members of the OFT Board, the chief economist, general counsel, and head of policy. The decisions committee will appoint a three-member Case Decision Group ("CDG") whose identities would be made known to the parties to the case. This group will include at least one of the Decisions Committee and at least one member would be a lawyer. It would exclude the senior case officer (known as senior responsible officer ("SRO")) and the chief economist and general counsel (due to their roles in earlier checks and balances).

All this sounds pretty good, but worryingly there is no mention of who else might be a member of the case decision group. As there is no mention of non-execs or expert panellists, it seems probable that the OFT has internal staff in mind. The case decision group would also have to consult with the decisions committee "providing an opportunity for the General Counsel, Chief Economist, head of policy and other senior officials to be consulted and provide their views... The Case Decision Group's decision would be formally adopted by the Decisions Committee."

This has the appearance of an elaborate smokescreen to retain executive decision making in antitrust cases. People involved earlier in the case are brought back in through the Decision Committee to contaminate the CDG's independence; members of the CDG may depend on others in the DC for their careers; and members of the CDG may also mentor or be dependent on the SRO or others in the case team. It might be an improvement for an independent OFT, but when the CMA has a panel of independent experts sitting around waiting for second phase

[3] The OFT is currently consulting on these proposals: *Review of the OFT's investigation procedures in competition cases: a consultation document*, OFT1263con2, March 2012.

merger and market cases, it seems perverse not to mention their potential role in antitrust decisions.

While the OFT proposals as a whole move strongly in the right direction, the collective decision model might pre-empt the adoption of a truly independent panel model ("we've only just changed it, so you have got to give this format a chance and a few years to settle down.") This would leave the CMA with arbitrary twin cultures for decision making. It is unlikely to create a smoothly integrated organization.

To be fair, the OFT say their proposals are intended to provide a firm foundation in the transition to the CMA. However, non-executives on the OFT board appear to be excluded from the decisions committee and there is no hint of the benefits of genuinely independent decision makers even sitting alongside executive insiders. History has a powerful hold on institutions, particularly those with fine international reputations. The status quo is more aggressively defended than attacked, especially in collegial institutions that have no wish to undermine each other. Meanwhile, law-makers in government pay more attention to accountability to parliament than they do to the nitty-gritty of how individual decisions are made. This means that the first chairman, chief executive, and board members of the CMA will be crucial in making it effective and operational. The first thing they will have to get right is a common culture of genuinely independent collective decision making.