Institutional Design and Decision-Making in the Competition and Markets Authority

BY DAVID CURRIE, ALEX CHISHOLM, & TIM JARVIS[1]

In this article, we set out how the reforms to the U.K. competition regime and the creation of the CMA will enable us to deliver "marked improvements" and meet the expectations on us to enhance the rigor of decision-making and to make more decisions, more quickly, with no attendant drop in quality. We look at institutional design and the governance structures within which decisions are made in the new agency. We describe how they build on what existed before and accommodate the pre-existing features of the U.K. system which have been carried forward into the new agency; and how we have taken the opportunity to enhance the rigor and transparency of decision-making, further developing reforms started under the previous regime. We examine the different types of decisions that will be made by the CMA and how the decision-making processes have been designed to ensure that robust, transparent, and timely decisions become synonymous with the new U.K. system. In doing so, we also touch on issues that, while not new, are nevertheless crystallized in the process of institutional reform: What is meant by independence of decision-making? How is the relationship between the agency and its government sponsors managed?

I. INTRODUCTION

The institutional design of competition authorities has attracted less academic interest than either the policy and practice of the authorities themselves or the analytical tools they adopt. However, the recent major reforms in, for example, Spain, Brazil, and the Netherlands have increased the attention being devoted to the impact of institutional reform on the outcomes and policy goals pursued.[2] What has been described as the "engineering" of agency design and implementation is seen as having a causal effect on the extent to which the theoretical benefits of competition policy may be realized. Put simply, "if theory is not grounded in the engineering of effective institutions, it will not work in practice."[3]

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The recent redesign of the competition institutions in the United Kingdom and the creation of a single agency, the Competition and Markets Authority ("CMA"), which began its work in April 2014, is likely to attract particular attention. The reforms were motivated not to address significant failings but instead to build on a system widely considered to be one of the world's best. As has been noted: "to take the risks that come with such a drastic renovation makes sense only if the new regime promises marked improvements upon the performance of its already distinguished predecessor."[4]

In this article, we set out how the reforms to the U.K. competition regime and the creation of the CMA will enable us to deliver "marked improvements" and meet the expectations on us to enhance the rigor of decision-making and to make more decisions, more quickly, with no attendant drop in quality. We look at institutional design and the governance structures within which decisions are made in the new agency. We describe how they build on what existed before and accommodate the pre-existing features of the U.K. system

which have been carried forward into the new agency; and how we have taken the opportunity to enhance the rigor and transparency of decision-making, further developing reforms started under the previous regime. We examine the different types of decisions that will be made by the CMA and how the decision-making processes have been designed to ensure that robust, transparent, and timely decisions become synonymous with the new U.K. system. In doing so, we also touch on issues that, while not new, are nevertheless crystallized in the process of institutional reform: What is meant by independence of decision-making? How is the relationship between the agency and its government sponsors managed?

THIS MEANS THAT THE KEY STRATEGIC DECISIONS OF THE CMA ARE MADE BY THOSE APPOINTED BY, BUT ACTING INDEPENDENTLY OF, THE GOVERNMENT

II. INSTITUTIONAL DESIGN

The CMA has been established as a non-Ministerial Government Department led by a board. Importantly, this means that the key strategic decisions of the CMA are made by those appointed by, but acting independently of, the Government. This is not a unique structure in the United Kingdom and includes some well-developed safeguards against any perception of undue influence by the government of the day. For example, public appointments, such as those to the CMA board, are overseen by a Commissioner for Public Appointments who ensures that the best people get appointed to public bodies free of personal and political patronage. Needless to say, the relationship between the CMA and Government goes wider and is more nuanced than simply the appointment of the board. This is a theme to which we return in our concluding comments at the end of this article.

Non-executive board 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. In line with its political traditions, the United Kingdom has not drawn on a model of interest group representation, more common in continental Europe, whereby different interests are specifically represented in decision-making bodies and decisions result from a negotiated settlement of those interests. The CMA's mission is to bring benefits to business, consumers, and the economy: the board individually and collectively works to that mission and, where necessary, balances any competing demands. In doing so, it takes into account, is informed by, and is held to account by specific representative, interest groups as well as, of course, its Government sponsors and, ultimately, parliament. These interests are not, though, specifically represented on the board in what risks being a mechanistic and token way.

IN LINE WITH ITS POLITICAL TRADITIONS, THE UNITED KINGDOM HAS NOT DRAWN ON A MODEL OF INTEREST GROUP REPRESENTATION, MORE COMMON IN CONTINENTAL EUROPE, WHEREBY DIFFERENT INTERESTS ARE SPECIFICALLY REPRESENTED IN DECISION-MAKING BODIES AND DECISIONS RESULT FROM A NEGOTIATED SETTLEMENT OF THOSE INTERESTS

One advantage of the approach taken to the CMA board is to facilitate the appointment of the brightest and the best in the United Kingdom and internationally, from public service, business, and academia. This has been borne out in practice. Appointed following fair and open competition and an interview chaired by an independent Civil Service Commissioner,[5] the non-executive members of the CMA

board are generally acknowledged to consist of an unparalleled group of individuals. Collectively, they have experience of promoting competition and protecting consumers through their leadership of highly regarded competition institutions and regulators in the United Kingdom and abroad (OFCOM, Competition Commission ("CC"), the European Commission's Directorate-General for Competition ("DG Comp"), and the U.S. Federal Trade Commission ("FTC")) as well as those with a history of contributing to economic growth through their experience in business.

The rest of the board is made up of the executive team which brings further experience from highly regarded regulators in the United Kingdom and abroad (Commission for Communications Regulation ("ComReg"), Ofcom, Office of Gas and Electricity Markets ("Ofgem"), and Office of Fair Trading ("OFT")) and senior roles in the private sector with law firms and economic consultancies. In line with good models of corporate governance, the non-executive members of the board, including the chair, form the majority of the board; thus they are part of the leadership team but also have an important role in holding the executive to account.

The board is responsible for setting the strategic direction of the CMA. It is accountable for all decisions of the organization and directly responsible for some key operational decisions that are reserved to it. For example, an important feature of the U.K. regime is the power of the competition authority to commission a detailed investigation of a particular market where it is concerned competition may not be working effectively, even though there may not necessarily be any contraventions of competition law.[6] Such an investigation may result in action being taken to promote competition with significant consequences for the businesses operating within that market. Given the significance of the CMA's markets work, and the decisions on which areas to carry out an initial market study and whether to refer that market for a detailed investigation by a CMA group, it is important that these decisions are made by the board, based on consideration of the evidence.

THE TWO PHASES OF MERGERS AND MARKETS WORK, PREVIOUSLY UNDERTAKEN BY SEPARATE ORGANIZATIONS, ARE NOW CARRIED OUT WITHIN ONE ORGANIZATION, THE CMA

Other decisions of the CMA are delegated by the board to the executive or are required by statute to be made by another part of the organization. For example, decisions on mergers and markets, once referred for a phase 2 investigation, are required to be made independently of the board by a group drawn from a separately appointed panel of experts who are not CMA staff. This mirrors the arrangements prior to the creation of the CMA under which decisions on mergers and markets referred by the OFT were made by groups of independent members acting on behalf of the CC.[7] A key difference, discussed in more detail below, is that the two phases of mergers and markets work, previously undertaken by separate organizations, are now carried out within one organization, the CMA.[8]

It is neither practical nor desirable for the CMA board to make decisions on individual enforcement decisions that require a detailed analysis of the evidence in a case and the potential application of the relevant legislation. Similarly, although it adopts and publishes prioritization principles, which are important for transparency and demonstrating consistency, the board cannot practically make each decision about which

cases to pursue. Such decisions are therefore delegated by the board to the executive, the CMA staff, under the board's general power of delegation. The board does, though, determine and guide how these decisions are made, the processes involved, and the resources which are drawn on to analyze the evidence and inform the decisions.

Broadly, therefore, in addition to the board, there are two other sets of decision-makers within the CMA: the staff and the Panel. Before considering the decision-making processes in more detail, we briefly summarize below how the staff and Panel are accommodated within the new institutional design represented by the CMA.

III. CMA'S INSTITUTIONAL DESIGN

A. The Staff Structure

An early priority was to get in place an executive team that would lead the new CMA. As we note above, the OFT and CC were both highly respected agencies and the simplest and quickest option would have been to draw the new executive team from these organizations. However, we were keen that the new organization would be, and would be seen to be, strong relative not only to the OFT and CC but also to the wider competition community. We therefore put all the top 30 senior positions out to public advertisement and a process of open competition regulated by the independent Civil Service Commission.

WE WERE KEEN THAT THE NEW ORGANIZATION WOULD BE, AND WOULD BE SEEN TO BE, STRONG RELATIVE NOT ONLY TO THE OFT AND CC BUT ALSO TO THE WIDER COMPETITION COMMUNITY

It was an endorsement of the quality of the leadership teams in the legacy organizations that around 80 percent of these posts were filled by former OFT and CC staff with some moving to new roles, ensuring the best fit of people to roles at the senior level within the new organization. Importantly, we were also able to attract talent from the private sector and those with senior level experience in other regulators. This has given us a very strong senior team to take the organization forward.

The CMA has been structured around two delivery directorates: an enforcement directorate, and a markets and mergers directorate. These are both headed by executive directors who sit on the board.[9] The executive directors of markets and mergers and enforcement are responsible for the management and delivery of the cases and projects in their areas. However, most staff working on projects are not exclusively allocated to these directorates; they largely work flexibly across a number of areas of the CMA's responsibilities.

THUS PROJECTS AT THE CMA WILL BE DELIVERED BY MULTI-DISCIPLINARY TEAMS, WHICH SHARE EXPERIENCE AND SKILLS OF THE ENTIRE U.K. COMPETITION LEGISLATIVE FRAMEWORK

This is because, in considering how the new agency would work, a key driver was the need to deliver projects quickly and efficiently taking advantage of the synergies available from having a combined staff team drawn largely from the legacy organizations. We therefore established a new Project Management Office

("PMO") that would collect data on the CMA's most valuable resource—its people—and use this to allocate staff to cases in the most efficient way.

In this way, we are able to exploit the synergies from co-locating staff working on different competition tools, such as enforcement under the Competition Act 1998 and merger control under the Enterprise Act 2000, and embed matrix working across all projects. Thus projects at the CMA will be delivered by multi-disciplinary teams, which share experience and skills of the entire U.K. competition legislative framework. It also enables us to manage more flexibly the inevitable ebbs and flows in case work and ensure that decisions about which cases to pursue are driven entirely by the evidence and according to our prioritization principles and strategic objects.

Similarly, we have established a new Research, Intelligence and Advocacy unit that has as one of its main objectives the identification of cases and projects for the CMA to pursue. Again, the unit itself is very lean but it draws on the expertise of staff from across the organization through the PMO to identify cases and carry out initial research. This makes the best use of staff experience and skills but also gives those staff different opportunities from the detailed case work that forms the majority of their work experience. Also, by concentrating intelligence in one place, the unit helps us to make the best choices when prioritizing cases to pursue, and enables us to be proactive as well as reactive when identifying potential cases.

INSTEAD IT DECIDED TO ENHANCE THE CONCURRENCY REGIME AND CLEARLY ESTABLISH THE CMA AS THE LEAD BODY IN A NEW U.K. COMPETITION NETWORK

There are exceptions to this generic model. For example, civil and criminal cartel work requires particular skills and experience that we did not want to spread too thinly throughout the organization. Similarly, the speed of throughput of phase 1 mergers work benefits from a dedicated team. However, even in these two examples we expect to see staff transfer between these and other areas of the CMA's work especially where efficiencies might be obtained. For example, a strong cohort of staff with experience across both phases of a merger inquiry will ensure that consideration of a merger is seen as an end-to-end process. Synergies can be gained, such as in the way data and other evidence are collected, which should increase efficiencies and reduce the burden on the businesses involved. Thus we hope to address the feedback from businesses and their representatives some of them felt that, if their case was referred for a phase 2 inquiry, they were starting again and having to provide the same information more than once.

Finally, the CMA's structure reflects reforms and enhancements to the regime under which sector regulators have concurrent competition powers in relation to the industries they regulate. In the policy debate that led to the recent reforms to the U.K. competition system and the creation of the CMA, there was much focus on the extent to which this aspect of the pre-existing regime had worked. Critics pointed to a lack of use of these powers by the regulators and what they perceived as regulators' preference for regulation to seek to protect consumers. They argued that such regulation often had unintended consequences on competition and consequential detrimental effects on the very consumers who it was aimed to protect. One solution proposed was to scrap the concurrency regime and, in line with other regimes such as Spain and the Netherlands, transfer all competition powers away from the regulators to the national competition agency, the CMA.

The U.K. government rejected this solution, if not entirely the criticisms of the pre-existing concurrency regime. Instead it decided to enhance the concurrency regime and clearly establish the CMA as the lead body in a new U.K. Competition network. In doing so, it sought to retain the valuable complementarity of the sector knowledge of the regulators with the economy-wide perspective and body of competition knowledge embedded in the CMA.

This enhancement of the concurrency regime is manifest in the CMA structure in the form of a new Sector Regulation and Concurrency unit. This unit works closely with the sector regulators, sharing our specific competition expertise and, where needed, enhancing the operational capability of competition work across the regulated industries. The early focus of the CMA's work on two regulated sectors, banking and energy, shows how the complementarity the government sought to retain is being embedded in the new agency. For example, the CMA published a joint assessment of the state of the energy market with Ofgem and the OFT. This informed Ofgem's decision, in June 2014, to refer the energy market to the CMA for a phase 2 market investigation. Similarly, the CMA has also worked closely with the Financial Conduct Authority in its market study on competition in SME banking.

IN REFORMING THE U.K. COMPETITION REGIME, THE GOVERNMENT RECOGNIZED THE VALUE OF THE PANEL MODEL AND IT HAS BEEN INCORPORATED INTO THE NEW STRUCTURE

B. The Panel

One of the historic strengths of the U.K. regime has been the use in phase 2 merger and market decision-making, and regulatory appeals, of groups of independent specialists drawn from an appointed panel. All case decisions at the CC were made by groups of what were members of the Commission. Neither civil servants nor members of staff, their responsibilities were to direct an investigation, examine the evidence from it, and decide its outcome. They provided the much valued fresh pair of eyes to a case and importantly a level and breadth of expertise and experience which no public body could seek to attract on a salaried, permanent basis.

In reforming the U.K. competition regime, the government recognized the value of the Panel model and it has been incorporated into the new structure. The legislation establishing the CMA, the Enterprise and Regulatory Reform Act 2013, specifically provides for a panel of members to be appointed by the Government and required to make decisions on certain cases independently not only of the Government but also of the CMA board. Pre-existing CC members transferred to the new CMA panel and new appointments have been made. The Chair of the Panel, and another member of it, also sit on the CMA Board. As under the previous system, most panel members have wide outside interests and act as part of decision-making groups at the CMA on a call-down basis as required. We have, however, increased the cadre of Panel Deputy Chairs—who support the Panel Chair by chairing individual groups on mergers and market inquiries and investigations—and who adopt regular work patterns enabling them to act as a general source of expertise for the CMA as a whole.

Thus, in both our highly skilled workforce, which can work flexibly and efficiently, and our experienced CMA panel members, the CMA has an exceptional pool of talent to inform its decision-making. Designing the agency to accommodate and attract these people is only one part of the process; applying their skills to ensure robust and transparent decision-making on decisions delegated by the board, and protecting the decision-making process on decisions which are statutorily required to be taken independently of the board, has been an equally important task. In the following section, we review how decisions on particular cases and projects will be made at the CMA and how we believe we have built on what worked well before and facilitated the marked improvements we are seeking. Finally, we briefly consider what all this means for the perennial question of institutional independence and what we mean by independent decision-making.

IV. DECISION-MAKING AT THE CMA

The enforcement record of one of the CMA's legacy organizations, the OFT, had been subject to some scrutiny during the consultation on the institutional reforms which led to the creation of the CMA. Notable setbacks, such as the withdrawal of criminal cartel proceedings against British Airways executives and adverse findings in the Competition Appeal Tribunal on enforcement cases in the construction and tobacco sectors, had generated much external commentary and some criticism. The extent to which this criticism was or was not justified goes beyond the scope of this article but the OFT had already taken steps to learn lessons from these cases[10] and the CMA has built on these steps.

ONE OUTCOME FROM THIS REVIEW WAS NEW GOVERNANCE ARRANGEMENTS FOR COMPETITION ENFORCEMENT DECISIONS INCLUDING USING DEDICATED GROUPS OF SENIOR STAFF, CASE DECISION GROUPS ("CDGS"), TO MAKE SPECIFIC DECISIONS IN COMPETITION ENFORCEMENT

The then Chief Executive of the OFT launched an organizational review of enforcement procedures in the wake of the adverse decisions on the tobacco and construction cases. One outcome from this review was new governance arrangements for competition enforcement decisions including using dedicated groups of senior staff, Case Decision Groups ("CDGs"), to make specific decisions in competition enforcement. The intention was to ensure that decision-making was made at the appropriate level of the organization with sufficient quality assurance of analysis and robust challenge to developing thinking.

We have developed these proposals further at the CMA taking advantage of the new institutional design features described above. We have been able to use the new resource offered by the CMA Panel and we are now using panel members on Case Decision Groups. Furthermore, at earlier stages of a case, before the Case Decision Group is appointed, senior decision-makers are supported and challenged at key decisions or milestones by others with appropriate skills and expertise. The same principles of support and challenge at decision points are also embedded in all our decisions. For example, decision meetings in phase 1 merger investigations are attended by three senior members of staff taking the roles of chair, decision-maker, and devil's advocate to ensure an appropriate level of support and challenge.[11] These processes are intended to enhance the level of challenge at key decision points, increasing the robustness of decisions, and ensuring that the risks are understood and accepted.

THERE ARE IMPORTANT PROTECTIONS AGAINST THESE RISKS IN THE LEGISLATION AND WE HAVE TAKEN STEPS TO PROTECT THE PROCESS AGAINST SUGGESTIONS OF CONFIRMATION BIAS

As noted above, Phase 2 decisions on mergers and markets will continue to be made by groups of independent panel members. However, the ERRA 2013 introduced shorter statutory timescales for phase 2 markets and, crucially, brought this phase of decision-making within the new unitary authority. In doing so, it set the CMA the challenge of taking advantage of the synergies offered by a unitary authority to facilitate faster decision-making while retaining the independence of decisions between the two phases.

To facilitate a more efficient end-to-end process, and take advantage of potential synergies between phases, the CMA would normally expect to have a degree of case team continuity between, for example, a market study (phase 1) and a market investigation (phase 2) case team. This should reduce the time taken for respective decision-makers at each phase to get up to speed on the issues and background. As noted above, it should help reduce the burdens on business and address concerns that parties are providing the same information twice during different phases of an investigation.

However, a theme of responses to the government consultation on changes to the competition regime was that, while there was a recognition that there was scope for reducing timescales and streamlining the regime in these ways, creating a two-phase process within a single organization raised two potential risks: an undermining of the independence of decision-making at phase 2, and confirmation bias.

There are important protections against these risks in the legislation and we have taken steps to protect the process against suggestions of confirmation bias. The independence of phase 2 decisions is enshrined in the legislation. When making decisions on phase 2 mergers and markets, CMA groups must act independently of the board.[12] In practice, this means ensuring a clear separation between the different decision-making parts of the CMA at phases 1 and 2. To take the example of markets work, if the CMA Board decides that a market investigation reference is to be made, it refers the matter to the Chair of the Board, who is responsible for constituting the market reference group that will undertake the market investigation. To distance further the board from the decision-making group, the Chair of the Board will delegate these responsibilities to the CMA Panel Chair (or one of the Deputy Panel Chairs). The CMA Panel Chair must ensure that any Board member who might reasonably be expected to be a member of the market reference group does not participate in the Board's consideration of whether to refer the matter.

THERE ARE OTHER AREAS OF OUR PROCESSES FOR DECISION-MAKING WHERE WE HAVE BEEN INFLUENCED BY PRACTICE OUTSIDE THE UNITED KINGDOM

Thus, the panel members are new decision-makers at the second phase, who will not have made the decision to initiate or refer the case. As such, the Phase 2 process remains a "fresh pair of eyes" review from independent decision-makers.

Our decisions not only need to be robust; they need to be fair and transparent and seen to be so. We have considered carefully how we can build on the experience of the legacy organizations and reflect feedback from our stakeholders. For example, parties now have access to the decision-makers during a phase 1 merger case addressing a key concern of respondents during the consultation about the reforms to the competition regime. Similarly, and in line with best practice in the United States, we are continuing the practice of offering parties "state of play" meetings during enforcement investigations. We offer each party under investigation separate opportunities to meet the case team including the decision maker. We will advise about likely timescales and generally share our provisional thinking on the case.

There are other areas of our processes for decision-making where we have been influenced by practice outside the United Kingdom. Drawing on the model of the Hearing Officer at DG-Comp, we have introduced a new role of Procedural Officer. Operating independently from case teams, the Procedural Officer adjudicates on disputes about CMA case-team decisions on certain significant procedural issues—such as deadlines for parties' submission of information and the confidentiality of information that the CMA proposes to disclose or publish. The Procedural Officer also chairs oral hearings with parties in enforcement cases and reports on procedural issues to the relevant decision-maker following such hearings. We are confident that the Procedural Officer will play an important role in reviewing disputed internal procedural decisions, taking account as appropriate concerns expressed by parties, and in giving confidence to parties about the rigor and fairness of our decision-making processes.

INDIVIDUAL CASES MAY END UP BEFORE THE COURTS BUT THE COLLECTIVE IMPACT OF OUR DECISIONS WILL DETERMINE HOW EFFECTIVE WE ARE AS AN AGENCY

IN TERMS OF THE WIDER COMPETITION REGIME, IT IS WORTH NOTING THE INCREASING NUMBER OF PRIVATE DAMAGES ACTIONS FOR BREACHES OF COMPETITION LAW AND THE CURRENT U.K. AND EU INITIATIVES TO MAKE THIS PART OF THE REGIME MORE EFFECTIVE

Inevitably, of course, some of our decision-making processes and the decisions themselves will end up being challenged in the courts which will decide on disputes between the CMA and those affected by our decisions. A robust appeals system through the courts is important for reasons of natural justice. The possibility of appealing decisions is an integral and essential part of the competition regime, providing parties with a route to challenge decisions they perceive to be wrong. Decisions of the Competition Appeal Tribunal and the higher courts are also important for us in setting out what is expected of us; for example, in terms of process and the standard of evidence.

This important check on our decision-making is currently under review by the Government as part of its wider recent consultation on ways of streamlining regulatory and competition appeals. The CMA has not sought to influence the outcome of this review but we note the responses of our legacy bodies and very much support the aim of making appeals focused, faster, and more efficient while also allowing for robust decision-making and proportionate regulatory accountability.

Individual cases may end up before the courts but the collective impact of our decisions will determine

how effective we are as an agency. If we are to be effective, our decisions need to result in increased competition and act as a deterrence to anticompetitive behavior for the benefit of consumers, business, and the economy as a whole. To demonstrate our performance against this ambition we will publish annually an assessment of the impact of our work against a performance framework developed by our government sponsors. This includes a challenging requirement to demonstrate direct financial benefits to consumers of ten times our costs, which will help ensure our decisions are well targeted and have impact. We will also continue the practice of our predecessor organizations by undertaking regular surveys of external stakeholders and our own staff and responding appropriately to the assessment of our performance by others.

In terms of the wider competition regime, it is worth noting the increasing number of private damages actions for breaches of competition law and the current U.K. and EU initiatives to make this part of the regime more effective, including, in the United Kingdom, giving the CMA a limited role in facilitating redress where infringing businesses wish to offer redress voluntarily. We think that greater numbers of meritorious private actions are to be welcomed as they can complement strong public enforcement and because we consider it important that those who suffer harm from breaches of competition law obtain effective redress. It will be important, however, to ensure that the public and private aspects of the overall regime work well to reinforce rather than undermine each other. In that respect, we particularly welcome the proposals to preserve incentives to engage with the CMA's cartel leniency program.

THE 2013 REFORMS HAVE ENHANCED THE REGIME BY, FOR EXAMPLE, REQUIRING US TO OPERATE TO SHORTER TIMESCALES AND GIVING US ADDITIONAL POWERS OF INVESTIGATION.

V. AN INDEPENDENT AUTHORITY

When we consider the independence of the CMA's panel groups, and the independence of their decisions from the decisions of other parts of the organization at phase 1, issues can be managed internally taking into account the inevitable scrutiny our processes will rightly receive from those affected directly by our decisions. The process of institutional reform and the creation of the CMA highlighted, however, a broader question of independence, which is currently the subject of much discussion internationally: the independence of national competition agencies from government influence.

As we have noted elsewhere, the U.K. regime has evolved over the past few decades from one where governments could influence outcomes on the basis of poorly defined public interest considerations to one where the regime is independent and respected, with a considerable body of case law, and where public interest considerations apply only in clearly defined and limited areas.[13] The 2013 reforms have enhanced the regime by, for example, requiring us to operate to shorter timescales and giving us additional powers of investigation.

A new feature of the regime in the legislation is a requirement that the Government give us a strategic steer. This has led some to argue that this risks weakening our independence.[14] In our view, these arguments do not take sufficient account of the need for any regulator, including competition authorities, to be sensitive

to political and commercial realities. It is important that national competition authorities have an ongoing dialog with Government and other stakeholders such as consumer organizations and business. It is through such dialog that the authority can ensure that it is reflecting the views of these stakeholders and that it is not operating within an "ivory tower" informed only by a theoretical understanding of how markets, competition, and the economy work.

The specific risk arising from the essential dialog with government is that it is covert and therefore, how it influences the activities of the competition authority becomes the subject of speculation. The requirement for a public strategic steer makes the high level communication from Government open and transparent. The CMA board is not bound by the steer but, quite rightly, is required to have regard to it. We would argue, therefore, that rather than undermining our independence, the strategic steer enhances transparency and helpfully hones the framework of delegation to the CMA laid down in legislation.

VI. CONCLUSION

Ultimately, however, the CMA's independence will be earned by its record. We will be judged by how we engage with the big competition issues and how we change the way they affect consumers, business, and the economy. Doing this successfully will require high quality, transparent decisions that stand up to detailed scrutiny from the courts and stakeholders. This involves bringing together the right people with the right skills in the right organizational structure and establishing decision-making processes that ensure decisions are robust and are the product of a fair and transparent process.

We have sought to summarize in this article how we have set up the new organization to fulfil these ambitions and to bring about the "marked improvements" that are expected of us. Institutional design is important. It defines who makes decisions and how they are made. Ultimately, it is on the quality of these decisions, and the impact they have, that the CMA and the 2013 reforms will be judged. ▲

[1] David Currie is Chairman of the CMA; Alex Chisholm is Chief Executive; and Tim Jarvis is Director of Executive Office, Governance and International.

[2] *See*, for example, William E. Kovacic & David A Hyman, *Competition agency design: what's on the menu?*, GWU Legal Studies Research Paper No. 2012-135 (November 2012).

[3] William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110(6) Mich. L. Rev. 1019 (April 2012).

[4] *Id.*

[5] The Civil Service Commission regulates recruitment to the Civil Service, providing assurance that appointments are on merit after fair and open competition. The Commission is independent of Government and the Civil Service. Civil Service Commissioners chaired selection panels for all board appointments and the most senior tier of the CMA executive team.

[6] *See* Andrea Coscelli &Antonia Horrocks, *Making Markets Work Well: The U.K. Market Investigations Regime,* 10(1) Competition Pol'y Int'l (Spring/Summer 2014) for further details.

[7] References for phase 2 market investigations could also be made by sectoral regulators. This remains

the case under the CMA.

[8] Except where a market reference is made by a sectoral regulator.

[9] Together with the Director of Corporate Services and the Chief Executive.

[10] *Enforcement of consumer and competition law – lessons in best practice and cultural changes*, speech by Clive Maxwell, then Chief Executive of the OFT, January 2014

[11] Mergers: guidance on the CMA's jurisdiction and procedure, ¶7.45 (January 2014).

[12] Schedule 4 to the Enterprise and Regulatory Reform Act 2013, ¶49(1).

[13] David Currie, *The Case for the British Model of Independent Regulation 30 years on*, The Currie Lecture (May 2014).

[14] Response to consultation on statement of strategic priorities for the CMA, Department for Business Innovation and Skills, ¶15 (October 2013).