

Unclassified

DAF/COMP/GF/WD(2016)77

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

24-Nov-2016

English - Or. English

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

Global Forum on Competition

INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution by the United Kingdom

-- Session III --

1-2 December 2016

This contribution is submitted by the United Kingdom under Session III of the Global Forum on Competition to be held on 1-2 December 2016.

Ms Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division,
Tel: +33 1 45 24 18 77, Email: Lynn.Robertson@oecd.org.

JT03406161

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

DAF/COMP/GF/WD(2016)77
Unclassified

English - Or. English

INDEPENDENCE OF COMPETITION AUTHORITIES: FROM DESIGNS TO PRACTICES

-- United Kingdom --

Introduction

1. Significant institutional reforms of the UK's competition enforcement regime have occurred in the last few years, one of which is the creation of the Competition and Markets Authority (CMA).¹ The Enterprise and Regulatory Reform Act 2013 (ERRA 2013) brought together the Office of Fair Trading (OFT) and the Competition Commission (CC) under the CMA.² The opportunity for the reforms enabled the UK government to reflect on, and enhance, the institutional design including to ensure independence.

2. The CMA considers that effective market regulation needs to be independent of government while also requiring sensitivity to political currents. In the UK, the CMA's independence is enshrined in statute, and further supplemented by robust processes established by the CMA to maintain this independence.

3. This submission provides, in part one, a brief overview of the structure of the UK competition regime and the role the CMA holds in it. Part two focuses on the CMA's independence, including the means and extent of its structural, financially, organisational and operational independence. The submission concludes, in part three, by explaining how the CMA is held accountable.

1. The UK institutional framework

4. The CMA is the UK's lead competition and consumer authority and its primary duty is to promote competition for the benefit of consumers within the UK as well as outside the UK.³ The CMA is a member of the European Competition Network (ECN).

5. The CMA is responsible, in particular, for:

- applying and enforcing the prohibitions on anti-competitive agreements and abuse of dominance under Article 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and their UK national equivalents, Chapter I and II of the Competition Act 1998 (CA 1998),
- conducting market investigations, under the Enterprise Act 2002 (EA 2002); and
- reviewing mergers (again under powers in the EA 2002).⁴

¹ The CMA, which came into being on 1 October 2013 in shadow form, formally took up its powers on 1 April 2014.

² The OFT and CC both ceased to exist on 31 March 2014. Some functions were transferred to other organisations: for instance, the OFT's responsibility for consumer credit was transferred to the Financial Conduct Authority.

³ ERRA 2013, Section 25(3).

6. CMA decisions are appealable to the Competition Appeal Tribunal (CAT).

7. Additionally, the CMA has powers to make proposals or give information or advice to government in relation to any of its functions (see section 7 of the EA2002). The Small Business, Enterprise and Employment Act 2015 formalised and expanded the CMA's role in this regard, and in relation to legislation-making in particular. That Act inserted into the EA 2002 a new power for the CMA to make and publish written recommendations to government ministers on the impact of proposals for legislation on competition within any UK market for goods and services. The CMA issued such recommendations for the first time in December 2015.⁵

8. A distinctive feature of the UK competition landscape are the “concurrency” arrangements. Sector regulators, in addition to their regulatory powers, are equipped with powers concurrent to those of the CMA to:

- apply and enforce the prohibitions under TFEU (Articles 101/102) and CA 1998 (Chapters I/II),
- undertake a Phase 1 market study and refer a market to the CMA for an in-depth, Phase 2, market investigation.

9. The sector regulators, like the CMA, are National Competition Authorities for the purposes of enforcing the EU competition provisions and are members of the ECN.⁶

2. The independence of the CMA

The UK institutional framework seeks to ensure the CMA's independence in several ways including structural, financial and organisational independence as well as guaranteeing operational independence in decision-making. This part considers each of those aspects in turn.

2.1 Structural independence from government

10. The independence of the CMA is vital for its ability to make markets work well for the benefit of consumers. To that effect, the CMA was created as a non-ministerial department, accountable to Parliament for its use of public money and to the courts including the CAT for its decisions.

11. As an independent government department, the CMA is led by a Chief Executive and Chairman and a Board consisting of executive and non-executive directors.⁷ The institutional framework in the UK is structured to ensure that the CMA is free from influence from ministers, while equally ensuring transparency of CMA decision-making and sound accountability.

⁴ The CMA also has wider powers, beyond competition law, including enforcement of the criminal cartel offence and of certain consumer protection laws. It also considers appeals against certain regulatory decisions of UK sectoral regulators (for example, appeals in relation to certain price controls, access charges and other licence modifications).

⁵ <https://www.gov.uk/government/publications/energy-bill-cma-recommendations-to-ministers>.

⁶ In order to enhance coordination between the CMA and the sector regulators, the CMA has adopted a separate memorandum of understanding with each regulator, which sets out the practicalities of the relationship between the CMA and the respective regulator.

⁷ <https://www.gov.uk/government/organisations/competition-and-markets-authority/about/our-governance>.

2.2 *Financial independence*

12. The CMA is financed by public funds and its budget is set by Her Majesty's Treasury. The CMA's budget is set three to five years in advance, as part of the UK Government's spending review – setting the CMA's budget in advance helps to avoid the budget set for the CMA being (or appearing to be) related to or influenced by, or influencing, the CMA's decision-making.

13. An aspect of financial independence is having sufficient resources for the authority to perform its functions. The CMA believes that a certain level of resources is critical to ensure effective enforcement and therefore are a prerequisite for adequate independence. Related to this, the CMA considers it important that a competition authority equally has the freedom itself to prioritise how and in which areas it uses its resources.

2.3 *Organisational independence*

14. The Board leads the CMA and is accountable for the CMA as a whole and for the delivery of the CMA's objectives. The Board consists of the Chairman and a number of appointed executive (CMA employees) and non-executive members. Non-executive members, who are drawn from a range of professions and backgrounds and are appointed for their expertise, skills and experience, further contribute to independent decision-making by bringing in an external view.

15. Certain key operational decisions are reserved to the Board, including for example, the decision on whether to propose to make, or to make, a market investigation reference under section 131 of the EA 2002.

16. The Chief Executive, who oversees the day-to-day running of the CMA, is the Accounting Officer for the CMA and is accountable to Parliament for its use of public money.

17. The CMA also has a Panel consisting of appointed members who are not CMA staff, and which is independent of the Board as well as of government. Decisions on merger and markets cases that have been referred to a Phase 2 investigation are reserved to the Panel. Panel members also act (alongside CMA staff and/or Board Members) as members of the three-person "Case Decision Groups" that are responsible for taking final decisions on infringement and on penalty in CA 1998 cases.

18. Senior officials – appointments, remuneration and termination

19. Appointments of the Chairman, Board members and Panel members are made by the Secretary of State for Business, Energy & Industrial Strategy and are overseen by a Commissioner for Public Appointments who ensures that those appointed are free from personal or political bias.

20. Appointments to the Board, including the Chairman, are for a term of not more than five years.

21. Appointments to the Panel are for a term not more than eight years. Re-appointment of Panel members is limited and only to ensure continuation of a CMA Panel constituted to take a decision on an investigation.

22. The Chief Executive is also appointed by the Secretary of State, following consultation with the Chairman, for a term of not more than five years.⁸

⁸ ERRA 2013, Schedule 4.

23. Terms and conditions for the appointments as well as remuneration of members are determined by the Secretary of State. However, the CMA pays the Panel members' salaries and make provision for other payments, such as, pensions.

24. The Chairman, Board and Panel members may resign from their post at any time by giving a written notice to that effect to the Secretary of State; they can only be removed from office, by the Secretary of State, on the grounds of: incapacity; misbehaviour, or; failure to carry out his or her duties.⁹

25. The CMA Board Rules of Procedure (the Rules)¹⁰, which set out the functions of the Board, specifies that the CMA will carry out its functions independently, impartially and fairly. To further ensure independence, the Rules also set out the CMA's policy on conflicts of interests to which Board members must adhere. Furthermore, the CMA maintains a register of board members' outside interests including details of current employment (remunerated or otherwise), activities and directorships, details of relevant investments (including funds and investment trusts), membership of other organisations, past activities, as well as positions held by family members.

2.4 Operational independence

26. The CMA's operational independence is guaranteed by its decision-making processes as well as its ability to set its own activities, each of these aspects are addressed in this section.

2.4.1 Prioritisation

27. The CMA's independence enables it to choose and prioritise its work and select the method and tools it uses to achieve its objectives. The CMA is free to initiate own market studies and inquiries, as well as freely determine which cases to pursue. The CMA's statement of its prioritisation principles sets out how the CMA chooses its work.¹¹

2.4.2 Decision making

28. Within the UK competition regime, the CMA functions both as investigator and decision-maker. It is therefore important to ensure robust scrutiny and independent decision-making between these stages, in particular to avoid the risk of confirmation bias.

29. In Competition Act investigations, decisions up to the issuing of a Statement of Objections are taken by the Senior Responsible Officer. Once a Statement of Objections has been issued, a "Case Decision Group" is convened to take decisions including whether to issue an infringement decision. As noted above, the Case Decision Group is made of three individuals not previously involved in the case, including one or more Panel members.

30. On markets and mergers, Phase 1 decisions are made by the CMA Board, whilst decisions on Phase 2 are the responsibility of the Panel. However, to ensure continuity in the work, some members of the case team are retained in the second phase of the investigation.

⁹ No such removal has ever taken place.

¹⁰ www.gov.uk/government/uploads/system/uploads/attachment_data/file/511598/CMA_Board_Rules_of_Procedure.pdf.

¹¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299784/CMA16.pdf.

2.4.3 *The Strategic Steer*

31. One of the changes brought about by ERRA 2013 was to enable the government to give the CMA a “Strategic Steer” (Steer). The Steer outlines the government’s long-term goals for competition and growth as well as its aims for the CMA for the length of Parliament.¹² Crucially, while the CMA is to have regard to the Steer, it is not bound by it. Therefore, rather than acting to limit or weaken the CMA’s independence, the Steer in fact serves simply to make transparent the high-level communication between the CMA and government.

32. It is important that public bodies, including the competition authority, are sensitive to both political currents and political realities. It is the CMA’s view that it is important (and consistent with regulatory independence) for there to be a continued dialogue between the regulator and government as well as other stakeholders, on a “no surprise, no veto” basis: the Steer achieves just that in an open and transparent manner.¹³

33. The Steer has been set with the CMA’s legal duties and its Performance Management Framework (see below) in mind, and the CMA retains full independence in how it approaches its work, its selection of cases and the tools it uses to tackle them. In carrying out those functions which are demand-led (and over which the CMA does not have full prioritisation discretion), for example merger control, market investigations referred by the sector regulators and regulatory appeals, the CMA applies the appropriate legal tests for each function, irrespective of the Steer.

3. **Accountability**

34. The CMA’s powers entail great responsibilities - in addition to an independent and forceful competition authority, a healthy competition regime also requires accountability for the authority’s decisions via a strong and robust appeals system, either to an independent expert tribunal or to the general courts. Authority accountability is multi-faceted, however, and includes also accountability to stakeholders and the government. This final part looks at how the CMA is, in line with the above, held accountable in the wider competition regime.

3.1 *Appeals of the CMA’s decisions*

35. Decisions by the CMA under its competition enforcement powers¹⁴ can be appealed to the Competition Appeal Tribunal (CAT). Such appeals are subject to a “merits review” which allows the CAT to rehear the facts in full, and can be brought by any party to an agreement in respect of which the CMA¹⁵ has made a decision or any person in respect of whose conduct the CMA has made a decision. In determining an appeal, the CAT has a number of options, it may:

- confirm or set aside all or part of the decision;
- remit the matter back to the CMA;

¹² For the latest Steer, see <https://www.gov.uk/government/consultations/competition-regime-competition-and-markets-authority-governments-strategic-priorities>.

¹³ Speech by the CMA Chair Lord Currie, <https://www.gov.uk/government/speeches/the-case-for-the-british-model-of-independent-regulation-30-years-on>.

¹⁴ i.e. Decisions involving an infringement of the CA 1998 (i.e. Chapter I and Chapter II) and/or Articles 101 and 102 TFEU.

¹⁵ Or any of the sectoral regulators.

- impose, revoke or vary the amount of any penalty that has been imposed;
- give such directions, or take such other steps as the CMA could have given or taken, or;
- make any other decision which the CMA could have taken.

36. If the CAT confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based. In brief, the CAT may substitute its own view for that of the CMA.

37. Applications against decisions made by the CMA in respect of mergers and market investigations, under the EA 2002, are subject to judicial review, where the normal grounds of judicial review under UK law apply. Those grounds are: (i) illegality or error of law; (ii) unreasonableness or irrationality; (iii) proportionality; and (iv) procedural fairness) of judicial review apply. When conducting such reviews, and in contrast with a ‘merits review’ the Court cannot review the facts, as established by the CMA.

3.2 *Transparency of the CMA’s decisions*

38. As part of the CMA’s commitment to transparency, decisions adopted in antitrust and merger investigations, as well as the results of market investigations are published on the CMA’s website (redacted to protect commercially sensitive information), setting out the CMA’s thinking and reasoning in detail. In addition, the CMA regularly consult on remedies in merger cases as well as at on various matters during its market investigations (including provisional findings and provisional remedies).¹⁶

39. The CMA has also published a statement of its prioritisation principles, setting out publicly the bases on which it decides the matters that it chooses to investigate.

3.3 *Reporting on the CMA’s activities*

40. As a public body, the CMA is accountable to government and its stakeholders. Pursuant to ERRA 2013, every year, the CMA publishes an annual plan, which it puts before Parliament, and a Performance Management Framework.

41. The CMA’s Annual Plan, on which the CMA consults, sets out the CMA’s approach to its work and how the CMA proposes to deliver on its responsibilities: it explains how the CMA will continue to deliver its published vision, values and strategy for the coming period.¹⁷

42. The CMA’s Performance Management Framework sets out the performance government expects from the CMA and describes how the CMA will meet these expectations. For example, the CMA is expected to deliver direct financial benefits to consumers of at least ten times its relevant costs to the taxpayer, measured over a rolling three-year period.

¹⁶ Where the CMA proposes to accept legally binding commitments from a party to an antitrust investigation under the CA 1998, it will also consult publicly on the content of those commitments and its views on how they address the CMA’s competition concerns.

¹⁷ The CMA’s latest Annual Plan (2016/2017) can be found at: <https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2016-to-2017>

43. The Government expects the CMA to have a beneficial impact on consumers, on business behaviour and on productivity and growth in the economy, and to make robust decisions and implement effective and proportionate remedies. To this effect, the CMA reports annually on a number of benchmarks, including the delivery of a target of direct financial benefits to consumers; the ratio of direct financial benefits to consumers and costs for its principal tools; and 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.¹⁸ Nevertheless, and particularly given the statutory, organisational and other safeguards of independence described throughout this paper, the requirement of producing an annual performance report does not affect the CMA's independent decision-making.

¹⁸ The CMA's latest impact assessment (2015/2016) can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537539/cma-impact-assessment-2015-16.pdf