

Rebooting the CMA: some essential reforms

How the CMA can improve economic performance and contribute to 'levelling up'

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In my paper, *The Competition and Markets Authority, a reboot for the 2020s*,¹ I set out the importance of remedying the structural and cultural shortcomings of the Competition and Markets Authority (CMA). What follows draws heavily on this paper. That paper sought to identify their origins and the steps that CMA in general, and the Board in particular, might usefully take to assuage them. It also alluded to the crucial roles that the Government and Parliament respectively can and should now play to facilitate improvements. The CMA is, in many respects, a first-rate institution and a credit to the staff right across the organisation. In the areas to which it currently gives priority it is often producing high-quality work. But its development since the legislation that created it is incomplete, to say the least. All organisations have strengths and weaknesses: the CMA has more than its share of both.

Background and current aims of the CMA

What would a new or rebooted competition and consumer protection authority look like? Over the longer term, the CMA needs a strategy to implement the ambitions of 'the 2020s agenda' – a package of proposals for reforming and improving the organisation – set out in speeches by the CMA's Chief Executive, Andrea Coscelli, Bill Kovacic, Non-Executive Director CMA and me in February 2020.

Here is Andrea Coscelli's own description of the reforms required:²

- 'bolster the CMA's role as a repository of microeconomic expertise';
- 'unify every part of the organisation in looking at a problem and working out the best way to fix it';
- 'make our case selection more transparent';
- 'explain better the criteria we use for choosing what we do, and how we use those criteria';
- 'look at every possible problem in the round, working out the most effective and efficient answer';
- 'get more leverage out of the evidence and knowledge we have accumulated, by effecting change through others – whether Government or regulators';
- 'not shy away from publicly advocating to Government in support of consumers and competition, especially where Government's actions threaten to harm them';
- 'earn the trust, confidence and recognition of consumers. Let them know we're on their side'.

It's worth considering how success in meeting those ambitions might be assessed by the outside world. Some features of successful implementation of the 2020s agenda might include:

- An institution demonstrably using its powers to their fullest extent, and deploying all its functions – across enforcement, markets and advocacy (and with much less unbalanced weighting between them) – to maximise consumer welfare.
- Much more attention to ensuring the creative release of energies and ideas from the ranks below the most senior handful of executives. A more 'fleet of foot' institution internally, with shorter reporting lines to the top.
- Much more systematic data and information collection about the state of markets and consumer experiences across the economy: developed bottom-up through the development of contacts with the outside world – consumers, businesses, whistle blowers and representative bodies; top-down through analysis of concentration, profitability, entry, exit and other market dynamics.

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¹ Centre for Policy Studies, The Policy Institute, King's College London, July 2021.

² Policy Exchange on 25 February 2020: available at <https://www.gov.uk/government/speeches/andrea-coscelli-closer-to-consumers-competition-and-consumer-protection-for-the-2020s>. My remarks, and those of Bill Kovacic are also available using the same link.

- A well-resourced economic policy function to analyse this information and deploy it internally, in the service of priority-setting, and externally in the service of constructive policy advice, thereby making a reality of the policy advisory function already embedded in statute, and further supported by the current Strategic Steer from BEIS.
- Reflecting, as a consequence of the above, a much stronger and more complete understanding of the microeconomy, and a newfound preparedness to explain the limits of its powers and across the full range of tools, an institution that is visibly responsive to consumer concerns, and able to demonstrate that it is weighing up the consumer welfare benefits of one course of action or area of investigation against another.
- Capable of explaining its contribution to economic and consumer welfare in a language that its ultimate customer – the wider public – can understand.
- Recognition of the CMA across Whitehall and Parliament as the leading repository of knowledge on consumer detriment and on the shortcomings of competition across the economy, and also of policies of government bodies whose job is to address them.
- Sufficient confidence to set out publicly where its own responsibility to address this detriment ends, and that of other public bodies, and particularly the Government, begins. Firm messaging privately and where appropriate, publicly to support this. The latter gives teeth to the former.
- Deployment of a much higher public profile, among businesses and the wider public, to secure far more effective deterrence. This would both contribute to and derive from a stronger institutional reputation.
- A stronger public profile for the Chairman and the Board – acting as a visible standard bearer to explain to Parliament and in the media the CMA's choices over its discretionary work – and for the Chief Executive in taking, explaining, and holding him or her to account for major case decisions.
- Major reform of the CMA's opaque governance. Clear lines of responsibility for decisions, capable of explanation to a wider public. Much higher levels of transparency of the above.
- Reflecting its higher profile, and its preparedness to act flexibly, a much greater use of soft power – including *ex ante* intervention – to secure changes to business conduct and address detriment – all the more important in the fast-changing market places made possible by digital technology.

Where we are now?

A moment's reflection on the above suggests that the CMA is a long way from where it needs to be. Despite appreciable progress in becoming more consumer-focused – including some important enforcement work – the CMA too often finds itself bogged down in recondite cases that make a small or negligible contribution to economic welfare. To the outside world, as was explained, it can appear out of touch: detached from the real economy and the lives of ordinary consumers. To Parliamentarians, it also looks unaccountable: before I had arrived, as far as I'm aware, its senior team and its Chairman had never appeared before the BEIS Select Committee. Its international collaboration takes place below the parapet. Its soft power is weakened by lack of public and Parliamentary awareness about its work. It has had little say on the key microeconomic questions of the day; it misses opportunities to help Government harness the benefits of competition. Few people know how it chooses its discretionary casework.

Legislative reform would help remedy much of the above. But a good deal of it need not persist, even in the absence of legislation. Here is the outline of some decisions and changes at the CMA that could be introduced relatively quickly and without primary legislation.³ What follows is readily implementable. It requires a little boldness and some determination.

³ This is also addressed in my article in the *Financial Times* of 24 February 2021.

Suggestions for rebooting the CMA, even in the absence of a new statutory framework

(i) Return the Board and the organisation's leadership to the original intentions of the 2013 legislation

Currently, all crucial decisions about initiation of casework, except of markets studies and market investigation references, are taken not by the Board, but by a small team of the most senior executives, who meet as a Pipeline Steering Group (PSG) for this purpose. The Board has delegated this responsibility to them. So the Board, and particularly the Chairman, may carry the notional can but all these decisions are merely reported to the Board.

The decisions of the PSG, over time, largely determine the shape of the organisation, its discretionary casework and the balance of resources across its tools. It is thanks in large part to the PSG, that, for instance, the antitrust portfolio has been weighted towards pharmaceuticals and musical instruments; or that consumer enforcement is weighted towards online harms.

Case initiation should be returned to the Board, led by the Chairman, for decision, as the legislation creating the CMA almost certainly intended. In other words, the Board's decision to delegate this job to the PSG should be reversed. This would provide a clear and accountable 'standard bearer' for decisions on case initiation. They are taken invisibly at the moment. It would create a much clearer and more readily explicable sense of purpose for the CMA, not least by integrating a meaningful Board strategy with case initiation; these are weakly aligned at the moment. It would also bring to an end a major part of the current mismatch between what the Board is assumed to be responsible for, and the much more limited authority that it currently elects to exercise in practice. It is reform of this type, rather than protracted discussions over Annual Plans, which will give practical substance to strategic rhetoric, and which can ensure that the priorities set by the Board are reflected in the shape and choices of the organisation. The arguments for reversal of the delegated authority are set out in more detail in my paper on Rebooting the CMA.⁴

Public debate – with Parliament more closely involved – is now needed. Leaving the current arrangements unimproved – invisible to a wider public, impenetrable to all but the expert community, would be a serious mistake. The opportunity afforded by a likely forthcoming consultation on proposals for reform of competition and consumer protection should therefore be taken to engage in that debate. The Government will need move to legislation quickly, both to tackle digital detriment and to bolster consumer protection, if consumers are to see benefits in this Parliament.

(ii) Develop public explanation and advocacy⁵

The CMA can and should do much more: to explain and hold itself accountable for its choices; to deploy its expertise to inform and contribute to public debate on economic policy; and to advise and assist Government on pro-competitive, pro-consumer policy. All three can strengthen the CMA's legitimacy and deepen its roots in the UK's economic life. Among the initiatives that should be considered are:

- Regular and transparent publications setting out the problems being reported to the CMA and how it is responding to them. Through these, or other, mechanisms the CMA should find a much better way to manage and shape external expectations: by explaining why it has focused on some problems but not others; and by setting out how those choices are constrained and conditioned by the legislative framework (not least, the limitations of the CMA's 'market studies' and 'markets investigations' tool).
- The development of the profile of the Chairman and Chief Executive as the 'public faces' of the CMA, directly accountable for the shape of the institution and its case portfolio (in the case of the former), and its decisions (in the case of the latter).
- The development of direct contact, from current nugatory levels with consumers and businesses, particularly smaller and challenger firms, not just as a means of explaining what the CMA does but as a tool for the collection of information about detriment.

⁴ The Competition and Markets Authority: a reboot for the 2020s, Annex I, page 32.

⁵ The Competition and Markets Authority: a reboot for the 2020s, Annex II, page 36.

- Development of much stronger links with consumer bodies and Parliamentarians. There is a thirst for greater direct communication with the CMA in Parliament. I am reminded of this each time I go to Parliament. A meeting early in September 2020, when a CMA official and I saw a well-informed MP about leasehold, was yet another illustration.
- Integration of advocacy and ‘state of competition’ analysis into the pipeline process, thereby ensuring that opportunities arising from casework to help the other government agencies and departments improve public policy are more readily identified and taken forward at an early stage of CMA work. This will require a good deal more than the 1 per cent of staff time currently devoted to the function and is consistent with the ambitions of the 2020s agenda.⁶

(iii) Construct a much more substantial economic policy function

As already explained, this can support advocacy, state of competition and other contributions to public discourse on markets, and help to build the CMA’s status as a repository of expertise on the microeconomy. Are levels of competition falling or rising? In which sectors and why? With an economy the size of the UK’s its public authorities should be able to answer these questions. But currently they can’t. As a result the Government and its agencies are left without advice and valuable information. Answers to these questions could and should be acting as a driving force for significant improvements in economic performance, and far more than is currently possible, or even attempted. Resources allocated to this function from the CMA’s budget have been nugatory. This is a particular concern given the potential value of such work to improving public policy. As I have argued, although a great deal of data is collected, the Government lacks a coherent and overall assessment of micro economic analysis – a counterpart to extensive macro-economic analysis undertaken by the Bank of England, the Office of Budget Responsibility and the Treasury. In his recent persuasive report John Penrose makes similar points.⁷

(iv) Identify the elements of the Covid-19 Taskforce – a talented rapid reaction group created to respond at speed to coronavirus detriment – that should be developed and embedded into ‘business as usual’

- An online complaints form, promoted via social media and other channels. Done well, this form can help consumers navigate the complex complaints landscape, not least by directing matters that fall outside the CMA’s remit to other relevant bodies. This would also provide some reassurance to the ‘final customers’ – the public – that their often legitimate concerns are not neglected.
- A ‘joined-up pipeline’, to maximise the effectiveness of the CMA’s tools in addressing, and being seen to address, ‘real-world’ problems, including those identified through complaints.
- Deeper analysis and triage of complaints, to inform case identification and prioritisation and greater public awareness of how to make a complaint.

Taken together, the above can and should facilitate much more direct contact with the CMA’s ultimate consumers. Contact is negligible at the moment. Abandoning these innovative practices – which are not only well-aligned with the 2020s agenda, but have been successful at a practical level during the Covid crisis – could well be interpreted unkindly by the outside world: a clear signal of retreat from a frontline, consumer-facing role, back into the inscrutable technocratic box with which many non-specialists identify the current CMA.

(v) Get the reform agenda over the line

Legislative reform is important. But the inadequacies of the statutory base should not become an *alibi* for inaction on the above proposals. Merely by arguing publicly for a comprehensive package of legislative reforms, and by gathering public support for them, the culture of the CMA will change for the better. But I have not heard the case

⁶ The Competition and Markets Authority: a reboot for the 2020s, Annex II, particularly footnote 4.

⁷ Power to the people: independent report on competition policy. ‘The Penrose Report’: <https://www.gov.uk/government/publications/power-to-the-people-independent-report-on-competition-policy>.

for these reforms made by the CMA recently. As for the proposed measures themselves: internally, the temptation will be to prune the reform programme back to measures that are necessary to ensure more effective casework delivery (that is, to bolster the quality of existing product in areas already accorded priority) but which would be insufficient to deliver the wide-ranging improvements to the CMA's performance now required, some of which only more extensive statutory reform can unlock.

Externally, Whitehall – particularly BEIS – may instinctively want to revert to the *status quo ante*: that is, to pursue mainly the limited changes to the consumer enforcement regime that were set out in the Consumer Green Paper over three years ago.⁸ The core planks of the reform programme would thereby be weakened or set aside. The Government has recently published another policy paper on competition and consumer protection policy. This incorporates some of the proposals that I set out to Rt Hon Greg Clark, Secretary of State for BEIS in 2018. Although a step in the right direction, this latest paper has apparently dropped a number of important proposals from the original report including the imposition on the CMA of an overriding 'consumer interest' duty and a duty 'of expedition', both binding on the courts and the CAT.⁹

Conclusion

I very much hope that both instincts – to revert to the status quo and to prune back the more far reaching proposals – will be resisted. The likely BEIS instinct, in particular, should be robustly challenged. Treasury enthusiasm may be greater – sparked, no doubt by the need for constructive proposals to assuage the coronavirus supply-side shock – and will need to be sustained and supported.¹⁰ All of the senior team should look for opportunities to make the case for reform publicly and not just, or even mainly, with specialist audiences, both before and after publication of the likely forthcoming consultation document. Alongside this will be the need to harness the support of consumer and business organisations and to secure the backing of supportive parliamentarians. Much of this could turn out to be kicking at an open door, particularly if some momentum is created. I have not noticed enough so far but I remain optimistic. When the Covid crisis recedes, a renewed focus on these issues can and should be forthcoming.

The case for reform, well understood for many years, is becoming more unarguable month by month. The CMA can and should be playing a bigger role, not just by facilitating improvements in economic performance but also by addressing some of the widespread and growing consumer detriment. That detriment, among other things, fuels the need for levelling up. Most needed now – as it was a decade ago when reforming the financial regulators in the wake of the financial crash – is the political will to act.

⁸ Department for Business, Energy and Industrial Strategy, *Modernising consumer markets: green paper* (2018).

⁹ *Reforming competition and consumer policy* BEIS 20 July 2021: <https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy>.

¹⁰ HM Treasury carries disproportionate weight and, when allied to Number 10, is usually decisive. But the attention of both is easily distracted (as they certainly both are at the moment). As a result, the spending departments often prosper in the legislative middle and end-game. Much of this agenda is still, and understandably, second-order from a Downing Street perspective, given Covid and other immediate challenges.