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Functional Separation in the U.K. Competition Regime

Renato Nazzini
University of Southampton

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I. THE “MERGER” BETWEEN THE OFT AND THE COMPETITION COMMISSION

In March 2012, the U.K. Government published its Response² to a consultation on options for reform of the competition regime issued one year earlier, on March 16, 2011.³ The Foreword to the Response presents the proposed changes as “far-reaching reforms, aiming at creating a competition regime that delivers better outcomes for business, consumers and the economy.” In fact, many of the proposals may be described as a desirable “tidy-up” of the system, addressing practical problems that have arisen in the past decade or so.

One change, however, stands out as a deserving the description as a “far-reaching” reform: the merger between the Office of Fair Trading (“OFT”) and the Competition Commission into a newly established Competition and Markets Authority (“CMA”). The CMA will combine the functions of the OFT and the Competition Commission. Such a change is certainly significant in the United Kingdom, where business and the legal profession are used to a structural separation model in mergers and market inquiries. Under the current system, the OFT, if a certain threshold is met, refers a merger or a market to the Competition Commission, which is responsible for the final decision.

The perceived benefits of the current system are many but, on the whole, they can be boiled down to two: (1) clear independence of the decision-maker from the “prosecutor,” which dispels any suspicion of bias and provides a “fresh pair of eyes” in complex cases; and (2) high quality of decision-making, given that the Competition Commission is structured in such a way as to be able to draw on significant expertise and focus its resources on phase 2 investigations without any other conflicting calls on its priorities.

II. ACHIEVING INDEPENDENCE AND IMPARTIALITY OF DECISION-MAKING WITHIN ONE AUTHORITY

While the merger between the OFT and the Competition Commission has clear benefits in terms of efficiency and overall simplification of the system, the vast majority of the respondents to the consultation were keen that the Government should preserve the benefits of the structural separation model within the new CMA. The Government accepted this advice. The proposals are, therefore, to legislate to provide for a separation of phase 1 and phase 2 decision-making in mergers and market cases. Phase 1 decisions in mergers and market cases will be the responsibility of the Board of the CMA, with the possibility for the Board to delegate this responsibility, except for decisions on whether to make a market investigation reference. Phase 2

¹Professor of Competition Law and Arbitration, University of Southampton, UK.

² BIS, Department for Business, Innovation & Skills, *Growth, Competition and the Competition Regime: Government Response to Consultation* (March 2012).

³ BIS, Department for Business, Innovation & Skills, *A Competition Regime for Growth: A Consultation on Options for Reform* (March 2011).

decisions will be made by a panel of experts in the same way as they are currently made at the Competition Commission.

This functional separation model also requires that no executive or any other person involved in a phase 1 decision may sit on a phase 2 decision-making panel in the same case. Phase 2 panellists will continue to be appointed according to the procedures set out in Schedule 7 to the Competition Act 1998, which means that they are appointed by the Secretary of State and not by the CMA Board.

On the other hand, the Government decided to leave to the CMA the issue of the resourcing of cases, which includes whether the same case team will act on a merger or a market inquiry both in phase 1 and phase 2. The Government added, however, “the CMA will be expected to establish principles for operation including adopting work practices that avoid or minimise the risk of confirmation bias.” This strongly suggests that purely carrying on with the same case team from phase 1 to phase 2 will not be an option. However, the possibility of handover meetings between the phase 1 and the phase 2 case teams, or even advice by the phase 1 case team to the phase 2 team, cannot be ruled out and, indeed, would contribute significantly to the achievement of the efficiencies that the merger between the OFT and the Competition Commission is intended to realize.

III. EXTENDING FUNCTIONAL SEPARATION TO ANTITRUST CASES

The functional separation model in mergers and market investigations is highly desirable given that the review of administrative decisions in these areas is on judicial review principles. In the absence of sufficient safeguards of impartiality and independence of the ultimate decision makers within the CMA, there would have been a real risk that central issues in mergers and market investigations would never be decided by an independent and impartial decision maker.

This problem is less acute in investigations concerning breaches of Article 101 or 102 TFEU or the equivalent U.K. law prohibitions (the “Chapter I” and the “Chapter II” prohibitions) because the Competition Appeal Tribunal (“CAT”) has full jurisdiction on the merits to hear appeals against decisions as to whether there has been an infringement of Article 101, Article 102, the Chapter I prohibition, or the Chapter II prohibition.

This is probably one of the reasons why the Government did not feel it necessary to legislate to impose a functional separation model in antitrust investigations. (Incidentally, the reading of the Response is interesting as it shows that the term “antitrust” is now being used in English to denote, according to European usage, the (enforcement of the) prohibitions on anticompetitive agreements and abuses of a dominant position.) However, the Government expressly states in the Response that it decided to “ask the OFT to investigate further means of bolstering the separation of decision-making from investigation so that independence of mind is encouraged and the risk of confirmation bias reduced.” To this end, the legislation on the CMA will make provisions “enabling the statutory procedural rules to cover such important principles as the separation between investigation and decision-making.” The legislation will allow the rules to make provision for the use of panellists in antitrust cases.

In the current debate on compliance of administrative competition procedures with Article 6 of the European Convention on Human Rights, the Government’s proposals are also interesting. In antitrust cases such proposals are not required to make the system compliant with

Article 6 given that, in any event, the CAT's full merits jurisdiction puts the question of the compatibility of the current system beyond doubt. The implementation of a functional separation model within the CMA may provide the blueprint for similar reforms elsewhere in the European Union and beyond.

The question is, however, whether functional separation was desirable at all in the United Kingdom, given the full merits jurisdiction of the CAT, which already makes the OFT, and will make the CMA, in essence a prosecutor rather than a decision maker—albeit a prosecutor that issues a full decision, before a judicial hearing on the merits of the case starts, at the behest of an aggrieved party. The risk, in other words, is that while the Government's aim is to streamline and speed up lengthy and inefficient administrative investigations, the reforms it has introduced entail a further element of complication and administrative complexity that was not legally required, and will probably make little difference to the outcome of individual cases and the likelihood of them being appealed.

Furthermore, there is a question as to whether such a system provides excessive safeguards. An administrative enforcement system with a full merits appeal and functional separation of investigative and decision-making functions gives a person two on-the-merits reviews of his case before an independent and impartial decision maker. This level of safeguard exceeds the safeguards granted in England and Wales to an individual charged with a criminal offence, by which I mean an offence which is criminal under English law. If the Government was uncomfortable with the OFT's combination of investigative and decision-making functions, it could have gone all the way and settled for a truly prosecutorial system, with the CMA acting as prosecutor of cases before an independent and impartial tribunal, probably some version of the CAT.

The strongest argument against such a system rests, in my view, on the policy-making function of competition authorities. In the European Union, such a policy-making function is entrusted to the European Commission. There is a much weaker case for national competition authorities to be given a significant policy-making function beyond their expert contribution to the formulation of EU competition policy through the European Competition Network and other such participative mechanisms as may be provided for or put in place from time to time by EU legislation or, informally, by the European Commission. The Government itself hints that the reason why a prosecutorial model was not adopted is that this reform would have been too far-reaching and could have had a negative impact on cases and deterrence, at least at the beginning. Clearly, it was politically impossible to reduce the level of safeguards for the addresses of CMA decisions by “downgrading” the CAT appeal against such decisions to a form of judicial review.

The vocal “due process” arguments raised from all quarters have thus been accommodated by imposing some form of functional separation within the CMA but without mandating its form. Perhaps this is not too bad after all; more independent scrutiny and less perception of confirmation bias with respect to administrative decisions are not insignificant advantages. The crucial point will be to implement functional separation with minimal duplication of resources and dilution of the decision-making timetables. Investigations in the United Kingdom are already long and to speed them up while putting in place additional procedural safeguards will not be easy. But if it can be achieved, all the better.

Other jurisdictions should be hesitant, however, before adopting the same model. An administrative enforcement system with functional separation of investigative and decision-making functions within the administrative authority, and a full rehearing on the merits before a judicial body, entail unnecessary duplication of resources and, arguably, an excessive level of safeguards. Neither the European Convention on Human Rights nor other constitutional systems such the U.S. or Canadian constitutions require such a high level of protection.⁴

⁴ On this last point, see generally R. Nazzini, *Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Contextual-functionalist Perspective*, 49 CML REV (forthcoming 2012).