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The Current Legal and Institutional Arrangements for the Enforcement of Competition Law in the UK, and the Options and Issues Arising from Devolution

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[1] Chief Executive of the Competition Commission – the views expressed in this paper are given in a personal capacity and do not in any way reflect a Commission view.

Foreword

It has been a long haul, but worthy of all the effort. These latest research papers mark the final stage in our series of four 'conversations' on issues related to possible constitutional change in Scotland. We are most grateful to the ESRC for providing support for this venture; and to Professor Charlie Jeffery and colleagues at the Department for Government at the University of Edinburgh for being our partners in the venture. Along the way we have had a great deal of support from many people, including a number of DHI Trustees. Their input is much appreciated; and I must also acknowledge the major assistance provided by Catriona Laing and Joan Orr in the DHI office. Catriona has nobly worked with me on organising all the round tables and seminars and Joan has had responsibility for all the publications. The operation would not have been feasible without them.

To remind you all, each 'conversation' has followed a similar format. We have sought draft papers from a number of key and informed parties, to be discussed at a private round table. Then the papers have been re-visited and discussed at a full DHI seminar, with a main speaker and contributions to an extended Q&A/discussion session from all authors. Both round table and seminars were held, as is usual for our events, at the Royal Society of Edinburgh in George Street. The papers have been published on our web site just in advance of our seminars. Generally there has also been significant media interest.

The first 'conversation' covered issues related to macro-economic policies and financial regulation. Then we moved on to welfare and social security matters before tackling the energy sector – in co-operation with the Scottish Council for Development and Industry. Our final topic, for which we have worked closely with the Scottish Government, has been competition policy and regulation. The papers for this last conversation are now being published.

For conversation 4 the round table was held at the RSE on 8th April, ably chaired by DHI Trustee Kyla Brand – who also happens to run the Office for Fair Trading office in Edinburgh but was operating in a personal capacity. (I should also note that for over 8 years I have been a member of the Competition Commission, but my involvement was as DHI Director.) Papers were prepared by Martin Cave and Jon Stern – on the over-arching background and key issues; David Simpson (ex DHI Trustee and ex WICS board member) on the positive experience in the water sector; Iain Osborne based upon his experience as a senior regulator across five different sectors and at the EU, UK and devolved levels; Luis Correia da Silva of OXERA – providing an informed outsider's view; the Netherlands Authority for Consumers & Markets; and David Saunders the Chief Executive of the Competition Commission specifically on competition matters. We owe a huge debt to them all.

It is my firm view that this set of papers, and the various discussions which have taken place, will be of major assistance to the Scottish Government as it considers the best way forward for competition policy and regulation in the event of a yes vote at the referendum next year; and also in the event of a no vote when there might well be scope for beneficial change and possibly further devolution of responsibilities. The whole series has been a great success and this last venture in particular should be seen as making a major positive and constructive contribution to informed decision-making and policy formation.

Nevertheless it is my eternal duty, while Director, to note that while the DHI welcomes the contribution made to debates of this nature, we have no view and as a charity can have no view on the policies considered. It is now for others to make best use of the fruit of our labours.

Jeremy A Peat
Director
David Hume Institute

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Background and history[2]

In any market, effective competition is essential. Well functioning competition helps to deliver a more dynamic economy which can generate economic growth, more jobs and prosperity. A robust competition regime gives confidence to established businesses as well as to those wanting to set up. Competition also forces firms to innovate. They have to become more efficient and find ways to offer consumers better quality and often relatively cheaper products or services. The overall aim of the UK competition regime is to enhance consumer welfare and support economic growth.

The UK's three main competition institutions are the Office of Fair Trading (OFT), the Competition Commission (CC) and the Competition Appeal Tribunal (CAT). In addition most of the sector regulators have competition powers, and all of them have a role in promoting competition.

The **OFT (Office of Fair Trading)** derives from the office of the Registrar of Restrictive Trading Agreements created by the 1956 Restrictive Trade Practices Act. It was created by the Fair Trading Act 1973 and was tasked with operating the law on restrictive trading agreements, for which it kept a register of notified agreements and referred some of them to the Restrictive Practices Court, the law on monopolies, where it could instigate or recommend investigations by the then Monopolies and Mergers Commission, and the law on merger control where it had a similar investigative and advisory role. It also had significant responsibilities in consumer law. Responsibility for these tasks was placed personally on the Director General of Fair Trading, or DGFT, albeit with his office's assistance.

In 1998 the Competition Act gave the DGFT the job of operating new prohibition powers in relation to anticompetitive agreements and the abuse of a dominant position, based on EU law, involving the taking of infringement decisions with the power to search premises and impose fines. Following the 2002 Enterprise Act, the DGFT's functions were formally taken over by the OFT, now established as an independent competition authority. At the same time, the OFT was given the task of enforcing (in conjunction with the Serious Fraud Office) the individual criminal cartel offence. It retained a number of specific consumer protection powers and regulatory responsibilities, for example over estate agents and consumer credit. In 2003 the OFT was 'designated' as a competent UK authority to apply Articles 101 and 102 of the EC Treaty. The OFT is a non-Ministerial Department whose staff are civil servants.

The **CC (Competition Commission)** is the successor body to the Monopolies and Mergers Commission (MMC), whose responsibilities it took over in 1998. The MMC started as the Monopolies and Restrictive Practices Commission in 1948, shrank to the Monopolies Commission in 1956, received merger control responsibilities in 1965 and the titular acknowledgement of this wider role in 1973. Its task throughout had been to investigate and report on cases referred to it by Ministers and/or the DGFT/OFT/regulators. Since 2002 it has had its own decision making power both in substance and on remedies.

[2] With thanks to Peter Freeman CBE, QC (Hon), from whose Beesley lecture of 29 September 2011 I have borrowed much of this section.

It has no statutory role in relation either to the prohibition system adopted in 1998, or under EU competition law. It has remained a body that, on reference from others, investigates monopolies (now markets) and mergers, combined with a major role in utility regulation. The Commission comprises around 30 mainly part-time members, appointed by Ministers for a fixed term; its decisions are made by groups of three to six of them appointed by the Chairman, supported in their investigations by a team of CC staff.

The **CAT (Competition Appeal Tribunal)** began in 1998 as the Competition Commission Appeal Tribunals (CCAT) side of the newly reformed CC, in parallel to what was termed the 'Reporting Side'. At that time, its President was a CC member and (in principle, although not in practice) the staff were common to both functions. By 2002 it became clear that separation from the CC was necessary, mainly because one half of a body could not easily sit in judgment on the decisions of the other half. So the CAT emerged as a separate, specialist Tribunal with the task of hearing full merits appeals from OFT decisions under the prohibition system and applications for (judicial) review from OFT and CC decisions on markets and mergers together with a host of regulatory appeal functions. It has a further role in assessing damages claims and a potential role in receiving competition cases transferred from the High Court. Cases are heard before a panel of three members: either the President or a member of the panel of chairmen and two ordinary members. The members of the panel of chairmen are judges of the Chancery Division of the High Court and other senior lawyers. The ordinary members have expertise in law, business, accountancy, economics and other related fields. The Tribunal's jurisdiction extends to the whole of the United Kingdom.

Presiding over this system is the **Secretary of State**, who in addition to being responsible for the overall policy and the framework in which it is applied retains an intervention and decision making role in matters of specific public interest in merger and market investigations. For national security and financial stability that role is discharged by the Business Secretary but for media matters, it is for the Secretary of State for Culture, Media and Sport.

What this system amounts to is the following:-

(1) For the ***prohibition system*** (i.e. Chapters I and II of the Competition Act 1998, Articles 101 and 102 of the EC Treaty), the law is applied and enforced by the OFT, which investigates, takes decisions and, if appropriate, imposes penalties and, possibly, other remedies. Appeal on the merits (i.e. law, substance and procedure) lies to the CAT and thereafter on matters of law and penalty to the Court of Appeal and Supreme Court. Within their sectors, sectoral regulators for the most part have concurrent power with that of the OFT. Ministers have no role in this area. For the individual criminal cartel offence the OFT, in conjunction with the Serious Fraud Office (SFO), prosecutes in the criminal courts. In Scotland prosecution remains with the Lord Advocate but the OFT has an MOU with the Crown Office. Neither Ministers nor sectoral regulators have any role in this process, which is entirely judicial.

(2) For the ***market investigation regime*** (MIR) the law is applied by the OFT (and sectoral regulators) who investigate and decide whether a reference to the CC is justified (or whether other market interventions within their own powers would be more appropriate), and by the CC which conducts the detailed investigation, decides on substance and, if appropriate, imposes remedies (not penalties).

Appeal for judicial review lies to the CAT and on points of law to the Court of Appeal and Supreme Court. Again, sectoral regulators (mostly) have similar powers to OFT. Ministers retain a role in that they can (a) make a market reference if the OFT decides not to do so, and (b) can intervene on specific public interest grounds other than competition, though neither of these powers has ever been exercised.

(3) For ***mergers***, the system is similar to that for markets save that Ministers cannot make competition references to the CC (although they can, and do, intervene on public interest grounds) and sectoral regulators have no role other than in offering advice and consultation. The 2004 EC Merger Regulation (ECMR) gives the European Commission exclusive jurisdiction to look at all mergers with a Community dimension (unless a case is referred to a national authority, or a national government asserts non-competition public interest jurisdiction). UK merger law is similar to but not identical with the EU law – for example the UK authorities can look at cases involving one party acquiring a material influence over another, whereas the Commission can only look at cases involving the acquisition of a controlling influence. Absent a public interest intervention, the CC, like the European Commission, can only intervene in a merger if it finds that there is a substantial lessening of competition.

In addition, the CC acts, in effect, as the appeal body from the sectoral regulators on licensing, price control and other regulatory disagreements with a range of different tasks, varying slightly across the different sectors. The CC acts on reference from the CAT on appeals in communications cases, and there is a specific adjudication regime for energy code modification appeals. This area of work includes appeals dealing with the supply of gas, electricity, water, sewerage, rail services, air traffic services, airport services, postal services, electronic communications, and, soon, aspects of health services.

Under the Enterprise and Regulatory Reform Act 2013 recently enacted by the UK Parliament, a new **Competition and Markets Authority** (CMA) will be established by bringing together the Competition Commission and parts of the Office of Fair Trading. The CMA will take on all of the current competition responsibilities of the two bodies it replaces, together with the regulatory appeals role of the CC and part of the consumer enforcement role of the OFT. The Act also makes a number of changes of detail to parts of the competition regime – for example imposing additional statutory deadlines, shortening some current deadlines, and changing the criminal cartel test – but doesn't make any fundamental changes. Government amendments made during the passage of the Bill allow the CMA to take over a Competition Act case from a regulator, and allow the Government to remove concurrent powers from a regulator.

The Government's rationale for setting up the CMA, as set out in the Ministerial statement announcing the decision, is that it will lead to:

- Greater coherence in competition practice and a more streamlined approach in decision making, through strong oversight of the end-to-end case management process.

- More flexibility in resource utilisation to address the most important competition problems of the day and better incentives to use antitrust and markets tools to deal with competition problems.

- Faster, less burdensome processes for business.

- A single strong centre of competition expertise, which can provide leadership for the sector regulators on competition enforcement and a single authoritative voice for the UK internationally.

- Increased accountability and transparency.

A strong theme that emerged from the response to the Government's consultation on these proposals was a concern about the risk that the new arrangements will lead to the phase two investigation of mergers and markets that the CC currently carries out, being less independent of phase one and more subject to confirmation bias. In response, the Act enshrines a two phase process for these investigations, with separate independent decision makers operating in groups in the second phase, exercising all the powers of the CMA and accountable to the courts for their decisions (and who will probably look rather like the current CC Members who take decisions and direct the progress of CC investigations).

Scottish Government proposals

The Scottish Government has recently published its proposals for economic and competition regulation in an independent Scotland. The Government's paper sets out two options; one is a combined competition and economic regulator, and the other a combined utility regulator with a separate competition authority. In both cases, the right of appeal against decisions of the regulator would be to an independent Competition Appeal Tribunal or alternatively to the Court of Session. The paper notes that where the route of appeal for regulated companies against their sector regulator's decisions is through the Competition Authority (currently the CC) there will clearly need to be separation of roles and independence of decision making between the sector regulator and the appeal body. It goes on to say that it is possible to achieve this within a combined regulatory body, as demonstrated by the New Zealand model[3], although it is important to ensure that the separation between sector regulatory decisions and competition functions is seen externally to be robust.

The paper suggests the following benefits for both businesses and consumers in Scotland will arise from either option:

- For the first time, economic and competition regulation in these vital sectors will be focused on delivering benefits for Scottish customers and the Scottish economy. This will contribute to the Scottish Government's drive to build a more sustainable economy and a fairer society.

- Industry will benefit from dealing with fewer regulatory bodies and from greater stability and consistency in regulatory decisions.

- Consumers will benefit from having a more powerful regulator, acting on their behalf with strong powers to ensure that markets are working efficiently in Scotland.

- The costs of regulation to industry and the public purse will be minimised ensuring efficient government.

[3] The New Zealand model referred to is the Commerce Commission, which is New Zealand's combined economic regulator, competition and consumer authority, established under the Commerce Act 1986. As well as overseeing and promoting competition, it also undertakes economic regulation within a number of sectors: telecommunications, dairy, electricity, gas pipelines and aviation.

- Scotland will have an opportunity to influence the direction of international regulation policy, by "having a seat at the table" in key regulatory forums and being involved in negotiations at EU and global level.

- A combined regulatory body will be able to deploy resources more effectively and flexibly to the different areas of its work. It will be able to provide a single and, therefore, stronger voice, both in Scotland and internationally, on competition and consumer issues.

Comments for discussion

In relation to the **legal framework** there is a reasonably clear international consensus about the basic components of competition regulation, and about a number of principles of best practice. EU member states all have the basic components, comprising merger control and regulations to deal with abuse of a dominant position and anticompetitive agreements, in broadly common form although with some variations in detail. Articles 101 and 102 of the EC Treaty have to be the starting point, alongside the ECMR. The UK regime is unusual in also having the ability to investigate markets and impose remedies without a finding of any illegal behaviour[4]. Competition authorities internationally have varying degrees of independence from Government, although it is generally accepted that best practice is for competition enforcement decisions to be independent of political control. A clear focus on competition issues rather than wider "public interest" type criteria is also generally regarded as good practice and goes with decisions being made independently of political involvement.

While therefore the basic legal framework that should be adopted is pretty clear and applied across the EU, Scotland will have a choice whether to adopt the market investigation regime that the UK authorities currently operate, and will also be able to consider the procedural details of other parts of the regime such as the degree of separation between initial and more in-depth investigation and the independence of decision making at each stage, who the decision makers are and how accessible they are to external parties, the degree of transparency, appeal rights, whether to operate a mandatory regime for merger notification, merger investigation timetables etc. Many of these issues have recently been debated in a UK context during the process of considering the currently proposed changes to the UK regime. Scottish business representatives are concerned about the impact of having different regimes on each side of the border, with the Scottish CBI quoted as saying that any fragmentation could add further costs and complexity for businesses that operate across the UK. This suggests that it might be better for a Scottish regime to resemble reasonably closely that which applies to the remainder of the UK.

In considering the **institutional arrangements** for competition regulation in an independent Scotland, there is in contrast no single role model to aim for, and the UK arrangements are changing. The institutional architecture that is used to deliver competition regulation (and its relationship to sector regulation where relevant) varies considerably from country to country both within the EU and more widely.

[4] It is also unusual in having a voluntary notification regime for mergers - in most other jurisdictions mergers cannot proceed without permission from the competition authority; in the UK they can but run the risk that the authority can unpick any it finds to be anticompetitive.

There are however some good practice principles that can be applied. The foremost of these, as mentioned above, is the importance of decision making that is independent of politics, and an important secondary consideration is the avoidance of any suspicion of bias or conflict of interest. That may be difficult to achieve if a unitary body is simultaneously a regulator and the appeal body for those regulatory functions.

Appeal arrangements, both in terms of rigour and in relation to institutional structures, also vary widely internationally, although within the EU minimum standards are to some extent underpinned by provisions of the European Convention on Human Rights, including in particular the right to a fair trial before an impartial tribunal.

There are also a number of important practical considerations to bear in mind. It is worth noting that the current UK competition regime is highly regarded internationally, and the response to the UK Government's recent consultation about possible changes suggests that the rigour, transparency and independence of the regime are regarded as highly important, while recognising that aspects of performance and speed could be improved. Any new institutional arrangements should aim to achieve a high quality of analysis, sound and thorough procedures, and an efficient and timely approach to handling investigations. Amongst other things, that implies that they will need to be capable of attracting highly qualified staff and decision makers. It will also be important to consider the relationship with the remainder of the UK. Many cases are likely to involve markets and businesses that span at least Scotland and the remainder of the UK, so some form of co-operation or collaboration arrangement between the competition authorities in the two jurisdictions seems likely to be needed.

There is some recent experience internationally (for example in Spain and the Netherlands) of institutional reforms creating configurations of the kind contemplated by the Scottish Government. The key considerations in considering what institutional structure to adopt seem to me to be largely the practical ones, concerned with quality of outcomes, efficiency and critical issues such as independence and avoidance of bias.

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