

Speech by Laura Carstensen, Deputy Chairman, Competition Commission

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What is a good competition authority?

Good afternoon. Thank you very much for inviting me to speak to you. I am here, I suppose, as Deputy Chairman of the Competition Commission (CC) but I would like if I may to refer to other credentials which I think relevant for the purposes of today's talk.

Prior to becoming this grey-suited, grey-faced quangocrat I did a 20-year apprenticeship at Slaughter and May where I was a competition partner—indeed, that is how I met Denise (also an alumna of Slaughters, as it happens) when she was General Counsel of Asda, a client of my firm and of mine, for many years. My practice covered mergers, market inquiries and of course antitrust (cartels and abuses of dominance cases) and was pretty evenly split over the years between UK and EU competition law.

So I am very comfortable in this forum where I recognize many faces; and in fact my formation as defence counsel to major corporates is probably a relevant contributory factor to the approach I take to the matters I am going to discuss today.

So, 'What is a 'good' competition authority?' I confess that I hoped when I chose that title that it might prove topical and indeed it has. The Secretary of State for Business, Dr Vince Cable, has as you may know announced that in the new year the Government will consult on proposals for merging the competition functions of the Office of Fair Trading (OFT) into the CC to form a single competition authority.

This is therefore the right time to be considering, even though this must necessarily be at a high level ahead of the publication of the Government's consultation document, what the informing principles of any such merger should be.

Now, unlike the case for many of the changes that are afoot to abolish, merge or reform a host of public bodies, the drivers here are not to be found in the prospect of substantial cost savings, nor the need to address institutional (or regime) weaknesses. The Government's comments on the intended consultation are at pains to make this clear.

Both the OFT and the CC are well-regarded domestically and internationally. We all know how little weight is to be given to league tables (and yet how keenly we all look to see our rankings) but for several years now the independent 'Rating the Regulators' survey run by *Global Competition Review* (to which some of you may well have contributed) has placed the CC—accompanied only by the US DoJ/FTC—in the top 'Elite' ranking. The OFT has over that time also been consistently highly ranked in the next, 'Very Good' tier, above DG Comp and other European national competition agencies.

So, whilst we can all no doubt think of ways the system could be improved—I certainly have a private wish list and I imagine Dr Cable does too—the fact is that there is no clear, serious fault with the present regime or the present institutions. And in those circumstances any reform based on merger of the institutions needs to prioritize the achievement of two things: first, achieving incremental improvements which will result in a new system greater than the sum of its parts and, secondly, not losing or diluting characteristics of the present system which have contributed to its excellence. And let me say at the outset that the CC will be an enthusiastic supporter of a merger which achieves those objectives.

It would be presumptuous perhaps for me to share my private wish list of incremental improvements with you ahead of the Department for Business, Innovation and Skills' (BIS) consultation. But I can quite properly discuss these virtues of our present system which I believe we in the legal and business community—the users of the system—should champion, if need be, as necessary to be carried over into any new institutional design.

At the thought of a speech on the design of institutions your collective hearts may be sinking. But bear with me. The question really is this: when standing your trial what would make you trust the process to deliver a fair result (even if not the one which you, being unavoidably partisan, would ideally like) and what would make you uneasy as to that? After all, it might be efficient to collapse the High Court, the Appeal Court and the Supreme Court into one and decree that one bite of the cherry would serve for justice to the defendant. But efficient process does not necessarily equate to fair process (though fair process can be efficiently executed and that should absolutely be a priority).

The CC is often said to have come into being with the Competition Act in 1998. In truth the body now called the CC celebrated its 60th anniversary in 2008, having begun life as the Monopolies and Restrictive Practices Commission in 1948. It is an institution with reputation and history and with all the depth of experience that 60 years of operation brings. The fact that it is a body with a long history and pre-EU origins (indeed the UK can congratulate itself on having a longer-established competition authority almost than any developed economy except the USA means that in some respects, if compared with the more recent template of the OFT or DG Comp, the CC looks anomalous. In a sense, what I want to say to you today is that anomaly should not necessarily be eschewed. Many institutions forming part of our national fabric are anomalous by this token but nonetheless entirely serviceable and often excellent. And I have observed that the apparently anachronistic often comes to be seen, on the next turn of the intellectual fashionability cycle, to be leading edge!

The Commission's original role was to apply a 'public interest' test to markets and restrictive agreements (mergers were added in 1973) and make recommendations to ministers who took the final decisions. Over the intervening decades the public interest test was replaced with a competition test, the CC became determinative in competition cases not advisory and a significant body of regulatory appeals work was added to the workstream (ranging from judicial-style adjudications through to full redeterminations of regulators' decisions. The one 'missing piece' in the CC's portfolio as a modern competition authority, you might say, is antitrust cases where, rather than the CC being the 'phase 2' body, the Competition Appeal Tribunal (CAT) in effect performs that role by undertaking merits reviews on appeal rather than its usual Judicial Review appeal role; I may there have given you a glimpse of my personal wish list for incremental improvements.

Let me also in this scene-setting preamble address a couple of common misconceptions.

First, the CC, as a second-stage review body, does not choose its own cases—a fact which is sometimes overlooked by those criticizing a claimed lack of proactivity in investigating particular deals or markets. I am all for proactivity and a well-primed pipeline. The National Audit Office recently published a report, 'The Competition Landscape' noting the tendency of sectoral regulators to hold onto cases involving market failure for too long, focused on a regulatory solution, thereby underutilizing the market inquiry regime. Dr Cable has noted the same proclivity of first phase review bodies in his recent speeches about the scope for reform. I agree whole-heartedly. The pipeline can and should be made to work more effectively—and workflow as between phase 1 and 2 is an area where a single competition authority should be able to achieve improvement.

And to those who complain about length of process I would counter that the CC is the *only* part of the competition process subject to strict statutory timescales—neither the OFT (other than in respect of mergers pre-notified using the mergers notice procedure) nor sectoral

regulators nor the CAT are. Again, we perhaps have been a bit reticent about this fact but we are the 'bit of the system' which is used to working to deadlines and we do. Can we go faster? Maybe—we are always looking for ways to do so consistent with fair procedure; ay, there's the rub. It is interesting that whilst business in general tends to demand greater speed, business in particular (ie when it is their case under consideration) tends to value a careful approach and adequate time allowance both for them to assemble their case and for us to consider it.

Anyway, enough preamble; let me now review those characteristics of the CC system which should in my view be firmly embedded in any replacement single authority.

First, independence from the executive. This is pretty uncontentious. There is a wide measure of agreement across developed economies that competition authorities should be independent from the executive so that decisions can be reached on objective grounds, untainted by political expediency. Indeed, in his recent speech to the CBI, Dr Cable referred to the fact that 'the UK's competition regime is regarded as one of the best in the world, particularly because of its independence'.

In his recent Beesley lecture addressing the future for utility regulation Professor George Yarrow of Oxford noted that there is a risk of dysfunctionality for any bureaucracy which is in regular contact with the political system and that in practice one of the central objectives of such bodies may become over time 'to convey a good impression of themselves, irrespective of that which is the case'. It is this incentive, to impress an outside audience, which can lead to perverse incentives in terms of prioritizations, to mission-creep and a bias towards soft rather than hard enforcement (which in turn can lead to a loss of confidence and even competence around hard enforcement). And this risk must be avoided in any reform by ensuring that the single competition authority is insulated in every possible way and at all levels of its operation from political influence.

This does not mean a monastic refusal to engage with current realities. The CC's willingness to do so was amply illustrated by speeches our present Chairman Peter Freeman made on the issues at play in the decision taken by the last Government to relieve the Lloyds/HBOS merger from competition scrutiny and in a wide-ranging speech given prior to the setting up of the Independent Commission on Banking under John Vickers delineating what a market inquiry into banking under current laws could—and, just as importantly, could not achieve. In fact independence is characterized by the ability and willingness to speak truth to power and this entails engaging with current realities whilst studiously avoiding predisposing yourself on matters that may in due course come before you to be determined.

Independence does, I think, mean that a merged authority should be a non-departmental public body (like the CC) not an executive agency; it does mean that funding should not be by reference to meaningless 'targets achieved' (explicitly or de facto).

Second, impartiality. Harold Wilson said in the 2nd Reading Debate in Parliament of the 1948 Bill 'I can certainly and most willingly give this House a pledge that the Commission will be impartial'. The impartiality of the CC is hard-wired in its structure, its procedures and its culture. It is why I jibe slightly when we are called a 'phase 2 body', a borrowing from the EU model which imports the sense that the inquiry builds on an initial finding of a problem. But when a case comes to the CC from a first stage decision by the OFT or a sectoral regulator there is no such underpinning assumption—there is an impartial fresh look by different people working in a different way.

Corporate bodies like natural persons have fundamental rights—the right to a fair hearing in particular. So if we are to move to a single authority let us ensure that fair process—not just the bare minimum judged necessary to comply with the ECHR—is embedded. That means as a minimum a procedure which respects the right for parties to know the case against

them, to make representations to the decision-maker(s) and, naturally, the possibility of appeal.

DG Comp is of course a single authority with limited Judicial Review-type appeal lying to the General Court. Now although certain procedural safeguards have been built in over time the fact remains that many practitioners remain uneasy with that model and it is undeniable that it is more challenging for a single authority conducting both phases of a case to demonstrate that there is not a greater predisposition to making an adverse finding in cases which it had itself selected for heightened scrutiny than where those cases are sent to be scrutinized in depth elsewhere.

Institutions are staffed by people. People are prone to group think. People are also subject to performance reviews, organizational cultural influence and the pursuit of career objectives. To ignore the possible effects of these things in institution design is to be blinkered. Actually of course these things can be usefully harnessed. The first phase of a competition inquiry requires a copper's nose for a case, persistence and ferreting skills. These are strengths of the OFT; it has successfully cultivated that skill set and that mindset. But, having stood the case up to the best of its ability someone—arguably someone else—needs to take the decision whether to trigger phase 2. Now by whom should this phase 2 heightened scrutiny be done?

Well first principles suggest to me: not the person who selected the case for investigation in the first place and not the person who decided it merited heightened scrutiny at phase 2. This separation is what our current system delivers. At the CC we investigate what we are sent. We do not suggest candidates for investigation nor do we express a view as cases go through the initial review process. Think about this: if the CC were to express a view (privately or otherwise) on a deal or a market your company is involved in prior to its coming to the OFT's notice or whilst the OFT was looking at it, would you feel you had had a fair crack of the whip at the first stage or were likely to have one at the second stage. Of course not.

So what does that imply for institutional design? First, transparency as to who the decision-makers and decision-influencers are at each stage and, second, demonstrable separation of decision-making at phase 1 and phase 2.

As to the first of these, let me say that the degree of transparency parties encounter at the CC frequently draws comment of a favourable kind from parties more used to process elsewhere. Transparency promotes a fair process, intelligent interaction between parties and decision makers, and contributes to the quality of the CC's decision making. In merger and market investigations important submissions and evidence are made available to the parties to an investigation as it unfolds. So too are the CC's working papers and other relevant materials. This is both in advance of, and subsequent to, publication by the CC of provisional findings. This is not a high level or cosmetic process. The degree of transparency adopted enables parties to the CC's inquiries to understand in detail the development of the CC's investigation and thinking and to develop its response in turn. This has clear benefits both for the parties and for the CC in the quality of the final decisions taken.

The levels of transparency currently adopted in the CC may arguably exceed those that are necessary for a legally fair process. But they are an important procedural safeguard and facilitate the taking of difficult decisions. There is wide public support for the levels of transparency adopted in the CC and I believe that the extension of the same approach to the activities of a single authority, at both phases, would promote public confidence in the competition law enforcement process and its outcomes. This is a question not only of transparency as a feature of fair procedure but of accountability in an institution performing a key economic role within a democratic system.

As to the second, separation of decision-making, the question (in a single authority model) is one of the sufficiency of separation. At present we have complete separation. In a single authority scenario the challenge would be to build in sufficient separation to embed fair procedure whilst allowing the realization of efficiencies. But if we allow considerations of cost savings—short term and relatively small—to prevail over considerations of fairness we will regret it, there will be reputational damage to our system and we will end up retro-fitting piecemeal procedural safeguards under fire.

My own view is that a divisional structure headed by a non-executive supervisory board would provide the best safeguard. If we would be uneasy with the head of the OFT influencing the conduct and outcome of cases at the CC, or the head of the CC influencing the OFT's decisions on what to investigate and whether to clear or refer (and we should be!), then we cannot, surely, be easy with any model whereby the leadership of the corresponding parts of a single authority would have those oversights. And that takes you, as a governance matter, to a non-executive board overseeing a divisional organization in my view.

Aside from structure, we have in the CC model, a legacy from 1948, a further guarantee of impartiality: the member system. Ten in 1948, some 45 now. Selected then on the basis of personal recommendation (and non-recommendation) and now on the basis of a transparent and robustly fair public appointment process.

The basic requirement at the outset (as set out in a memo of 11 October 1948 unearthed by Peter Freeman on the occasion of our 60th anniversary) was 'people who can see one jump ahead'. And then there was gender. Harold Wilson promised, (as reported in a note of 27 July 1948) from RC Bryant to Sir James Helmore (Permanent Secretary at the Board of Trade) to 'consider a capable woman who shopped at the Co-op but was not in politics'.

Our members today include several former eminent competition partners of leading City law firms, a cadre of financial experts (with backgrounds at the most senior level in banking and accountancy), a 'faculty' of eminent economists (from both academia and consulting) and to round off the mix a cohort of senior business people. Now none of these people are employed by the CC—nor am I; nor would I wish to be—nor, I imagine, would they. When not appointed to an Inquiry Group they pursue their lawful affairs, costing the CC and the taxpayer nothing. When appointed to an Inquiry Group they cost the taxpayer very little. It is simply not about money for individuals of that calibre and at that stage in their careers. It is about acting *pro bono publico* and intellectual stimulation. They bring the most extraordinary range of experience and expertise in the most cost-effective way.

But even that isn't the principal reason for urging retention of the member system. The reason I urge it is that the member system in and of itself embeds independence, impartiality and transparency. The way we handle inquiries is that a panel of members is appointed by the Chairman and that panel is chaired by the Chairman or Deputy Chairman (or sometimes by a regular member). That Inquiry Group *is* the CC for the purposes of that case and the CC's decision is taken, openly and accountably, by them on the CC's behalf. The Inquiry Group is supported by a staff team—economists, lawyers, statisticians, business advisers and administrators—organized and led by an Inquiry Director. Now within that team there will be continual challenges and sense-checks on the analysis and emerging conclusions as a result of its multi-disciplinary nature; the same will be true within the Inquiry Group. Currently I am chairing the inquiry into Movies on Pay TV and my group consists of an economist, two bankers and a businessman with a press background. But also the staff economists will have to satisfy the challenges of the member economist, the lawyers similarly, the business and financial advisers ditto. There are in fact multiple embedded checks and balances on zealotry of any stamp as a result of the member system—for make no mistake, members are very actively engaged in cases, they are not rubber stampers—which I consider superior to any mechanism such as peer review or devil's advocate (though they too have their place).

In the CC's model parties to investigations are given direct access to the members and staff of the CC—at a site visit in a relatively informal context; in a series of formal hearings, as well as in formal meetings at staff level. At hearings the parties to an investigation make oral submissions to the decision makers on the matters they consider to be of particular significance. They also respond directly to questions put to them by the decision makers on matters of fact and analysis. Access to the decision maker promotes fairness, intelligent interaction between parties and decision makers, and contributes to the quality of decision making.

Baroness Kingsmill, herself a former Deputy Chairman of the CC, has tabled a question in the House of Lords to be answered later this month. It reads simply 'to ask Her Majesty's Government how they will ensure that companies are judged by a panel of their peers following the proposed merger of the Competition Commission and the Office of Fair Trading'. This is a feature of our system that business tends to value: if they wish to retain it now is the time to say so.

Fourth, the deliberative approach. Back in 1948 Herbert Morrison said 'We want to leave them free to come to a conscientious judgment (as to what they conceive the public interest to be)'. Well, nowadays we judge against more specific criteria—SLCs and AECs—but it is still very much a matter of conscientious judgement. Deliberation is the opposite both of a prosecutorial approach (where a hypothesis of guilt underpins everything) and of an administrative approach (where the decision in the case is taken by bureaucratic process, an office-holder or board of some kind taking a decision based on staff work but without necessarily being engaged in the detail of the case or being accessible to the party under investigation).

The deliberative approach entails thoughtful consideration and exploration of all sides of an issue: being (in fact) a seeker after truth. On your side of the fence, formerly my side too, it may be hard—particularly if you have experienced other competition authority models—to believe that characterization. However, it is true. It is said that the ideal judge should have *aequo animo*, equanimity—unruffled even-mindedness—in the face of the evidence and arguments of all parties. This is what, in my experience, characterizes the CC. And it is what I, standing my trial or running a client's case, would wish to encounter, rather than a bureaucrat on a mission.

So, if there is a decision taken to have a single competition authority in this country we should aim to learn the lessons of the past and of other jurisdictions. We should identify the excellence in what we have now and design to keep it:

- Independence
- Impartiality
- The member system
- The deliberative approach

These characteristics will best deliver the intellectual rigour, procedural fairness and fearless enforcement that a single competition authority should deliver. Without them, it will struggle to do so, whatever the good intentions behind its creation.