



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to a competition regime for growth: a consultation on options for reform

June 2011

About Consumer Focus

Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland.

We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

Consumer Focus tackles the issues that matter to consumers, and aims to give people a stronger voice. We don't just draw attention to problems – we work with consumers and with a range of organisations to champion creative solutions that make a difference to consumers' lives.

The Government's review of the UK's competition regime provides a welcome opportunity to embed and sustain the many excellent features of the current regime while strengthening and improving its efficiency and effectiveness. Consumer Focus, the statutory consumer watchdog, is pleased to contribute to the Government's consultation on competition regime reform.

Effective competition and properly functioning markets are essential ingredients for sustainable economic growth and job creation. They are of profound importance to the achievement of the Government's economic agenda. They are also crucial for the delivery of important benefits to consumers: choice, value for money, quality products and services and dynamic improvements as a result of innovation. Effective competition reduces the need for intrusive regulation, which can be costly and have unintended consequences. As the UK's main consumer advocate, we consider that interventions to promote effective competition – wherever it can be achieved – are a vital part of the armoury of policy responses needed to deal with problems of consumer detriment.

We therefore support the Government's general objectives for reforming the competition framework, and in particular the emphasis on ensuring that the right cases get selected – which means focusing hard on the areas of greatest public advantage from competition interventions – and on improving the robustness and speed of decisions. But it is essential that in reforming the framework, any changes strengthen and improve the current regime rather than inadvertently weaken it.

We are for example concerned by what appear to be arbitrary distinctions between consumer and competition issues and the characterisation of the Consumer and Markets Authority (CMA) as a 'pure' competition body.

To this end we urge the Government to reform the regime along the following lines:

1. Design the new Competition and Markets Authority from first principles

We fully support the proposal to bring together work currently carried out by the OFT and the Competition Commission (CC) into a single competition authority with a broad span across the economy. We can see synergies and scope for improved process and outcomes by bringing work together into a single body. We would urge the Government to take the opportunity to design the CMA as a modern competition and markets body based on the functions it needs to carry out to deliver a coherent, efficient, fit for purpose entity, rather than take the alternative approach of bolting together predecessor organisations.

Criteria that we would like to see built in to the Government's blueprint for the new organisation include:

a) **Clear over-arching objectives with a strong emphasis on the consumer interest**

The new organisation needs to be based around:

- a clear and universally applied set of criteria for understanding the public interest, and within that the consumer interest
- an agreed methodology for assessing detriment
- a clear evidence base for policy positions taken

b) **Listening and connected**

The new organisation will need to build and maintain mechanisms for:

- gaining insight into public and consumer concerns and experiences

- understanding the diverse interests arising in different sectors of society, and in particular nations, regions, communities and minority groups
- picking up market intelligence
- leveraging the input of experts in all relevant fields
- understanding the position of stakeholders of all kinds, including Government and business
- effective networks of consumer and public interest bodies in all areas where this will assist with the organisation's objectives
- empowering feedback from all involved in its work
- independent monitoring of the impact of its investigations

c) Flexible and fleet of foot

This means:

- priorities should be set on the basis of where competition investigations have the potential to make the biggest incremental difference
- an ability to deploy and redeploy resources swiftly and effectively across the organisation, with a flat, flexible structure
- facilitating cross-sectoral working and comparisons especially where there is evidence of similar types of competition constraint in different areas eg account switching
- learning from the results and impact of previous CMA investigations

d) Independence from vested interests

The OFT and CC have in recent years had a good record here, and their work has received strong international recognition. But it is vital that this is retained.

There must be complete independence from Government. In this context we do not support the proposal to allow specific Ministerial requests for the CMA to investigate public interest considerations in cases other than mergers. This may in our view put at risk the CMA's independence or the perception thereof.

There should be a strong and independent Board, drawing on the widest possible range of expertise and experience, including consumer experience, and able to set clear strategic and operational goals for the organisation as a whole.

We support the model of part-time members on enquiries although there should be fewer than the CC currently has, in order to build individual expertise and produce greater consistency, and they should have greater breadth of experience than is presently the case.

2. Set a clear statutory framework

In our view it is essential that the new CMA is given clear and unambiguous statutory objectives. At the heart of these should be the need to:

- maximise the benefits of competition for the UK economy as a whole
- ensure that markets work in the interests of consumers

We recognise that the CMA might also have an important role as an advocate for competition generally, eg in debates on wider public policy issues, but we think this should be secondary to the more tightly defined objectives set out above.

Clarity of purpose and objectives, laid down in statute, is crucial in terms of enabling bodies discharging public functions, like regulators or competition authorities, to focus and prioritise their work, and to be held accountable for what they do.

We also think it will be necessary to develop a series of ‘*have regard*’ obligations, which should include in particular the interests of:

- consumers who are vulnerable either because of personal characteristics or circumstances
- consumers in the UK’s different nations and regions, and in remote areas
- younger and older consumers and those with disabilities
- future consumers as well as consumers today

It may be helpful here to draw together a list of examples from the statutes of other regulatory bodies as a means of identifying appropriate parallels.

We welcome the proposal that economically-important markets are kept under review by the CMA and consider that this should include markets that are of particular importance to consumers, for example where they provide essential services and/or represent a particularly large proportion of consumer spending.

3. Maintain concurrency but improve co-ordination between sector regulators

We support the view that sector-specific economic regulators should retain concurrent competition powers and agree the desirability of having consistently strong obligations on all sector regulators to use competition powers wherever appropriate.

In view of the strong consumer interest in regulated markets we believe there is great merit in developing a dedicated expert consumer advocacy unit to represent consumer interests in sectors subject to economic regulation. This unit would have a vitally important role in relation to the CMA as well as the sectoral regulators – it would be a source of expertise both on specific sectoral issues and on cross-cutting issues. We would expect it to be a regular contributor to the CMA’s investigations adding very substantial value especially where the consumer interest is complex and the consumer voice otherwise weak. A unit of this kind would also be in a strong position to help the CMA identify cross-sectoral issues and remedies and to prioritise future work plans. We have attached a more detailed note on this.

With regard to financial services we support the inclusion of a statutory objective to promote effective competition for the new Financial Conduct Authority, which would also allow the development of arrangements and relationships parallel to those currently in place between the competition authorities and regulators such as Ofgem and Ofcom.

4. Strengthen and enhance the super-complaint regime

Openness to super-complaints should be an important feature of the CMA as an organisation, which should substantially enhance its effectiveness.

Super-complaints are a highly effective, relatively low-cost mechanism for enabling issues which give rise to significant consumer detriment in markets that are not working properly to be investigated by a body with the skills, status and statutory powers to take action to put things right. Consumer Focus believes it is essential to maintain and further strengthen the super-complaint regime in the new landscape.

In our view it is essential that the integrity of the current super-complaint regime is retained. We recently convened a roundtable of bodies with super-complainant status, and the general view was that this has been a very useful tool in the armoury of consumer bodies, leading to tangible action to reduce consumer detriment. There was however a shared view that the regime could be improved. The participants are writing separately to BIS about our shared conclusions. Key points include: the need for faster outcomes for consumers; more learning across markets; more and better evaluation of remedies; and clear and consistent expectations by regulators of consumer bodies in line with the OFT guidance. We consider it important that the new body should not place unnecessary burdens on organisations making super-complaints.

The CMA should be able to receive super-complaints in the full range of issues that may give risk to consumer detriment, as at present, because of the inextricable links between dysfunctional demand (or consumer) side of markets and the proper competitive functioning of the market. It is suggested in Chapter 9 of the document that consumer organisations' market analysis is similar to OFT's market studies, with the proposal that consumer bodies could conduct what are described as 'pure consumer studies'. We are unconvinced by this analysis, and think the document overplays the ease with which consumer and competition issues can be unpicked from one another. One of the successes of the current regime has been a growing understanding of consumer behaviour when analysing competition issues. The approach in the document potentially represents a step backwards and could also have the effect of rendering the super-complaint regime narrower and less effective, with consumer bodies able to refer far fewer instances of detriment to the CMA and other regulators.

We support extending the range of bodies designated as able to make super-complaints to those who represent small businesses in so far as the problems faced by many micro and very small businesses are similar in kind to retail consumers. However, we would like to see the regime designed in such a way as to prevent SMEs from challenging efficiency-enhancing practices by larger businesses.

The suggestion that 'only organisations that represent primarily SMEs should be able to qualify as designated super-complainants' (para 3.16) appears to be intended to exclude organisations representing big businesses. This is sensible but there is a danger that this might have the unintended consequence of also excluding bodies that cover domestic and SME consumers. The majority of Consumer Focus's work in the energy and postal sectors is about domestic customers, but we do have considerable insight into SME experiences too. It would be a missed opportunity if the new arrangements prevented us, or our successors, making super-complaints about major issues affecting SMEs as consumers.

Clearly the current criteria applied to super-complaint applicants remain relevant, and it will be important that SME super-complaints should be able to demonstrate among other things access to information, in-house expertise, market intelligence, and the ability to understand complex markets and present evidence clearly.

In the current arrangements, only certain regulators can receive super-complaints. The current list does not include the Financial Services Authority, even though six of the 15 super-complaints made so far have been concerned solely with financial services. In such instances, super-complaints are made to the OFT, which then liaises with the FSA. This is plainly an inefficient way of working, slowing things down and requiring the OFT to build expertise on issues where it may not have existing knowledge. The forthcoming establishment of the Financial Conduct Authority and Prudential Regulatory Authority to replace the FSA provides an opportunity to remedy this anomaly. The healthcare regulator Monitor should also be able to receive super-complaints.

5. Ensure an effective markets regime

We fully support a strong and effective markets regime that includes the use of 'horizontal' powers and the ability to investigate practices across markets. We strongly urge the Government to grant the CMA powers to look at any market issues, including but not exclusively structural or behavioural competition issues, which may give rise to significant consumer detriment. Both market studies and more formal investigations need to be carried out by a body with the requisite skills and analytical capability, stature, powers and resources to do the necessary work and achieve results that deliver benefits for consumers and the wider economy.

6. Maintain the strict independence of the competition and markets function

It is essential for the integrity of the competition and markets regime for it to be wholly independent of Government, industry and other interests, aligned purely to the discharge of its statutory duty to promote effective competition and markets in the interests of consumers. To this end we do not support the proposal that the CMA should be required to report to Government on request on specific public interest issues (other than mergers, as now) as we believe this could compromise its actual or perceived independence.

7. Ensure effective remedies and deterrence

We believe there should be a review of remedies as part of the Government's review process, learning lessons from other sectors and other jurisdictions. We also recommend a new statutory requirement for the CMA to review the effectiveness of any remedies imposed, for example three years after their introduction, as experience suggests that this would be beneficial.

8. Improving effectiveness

There are four key areas where we can see scope for major improvements on the current regime.

First, as the consultation document points out, there is significant potential to streamline processes and shorten timescales for decision making. Both would help deliver certainty and results more quickly for business and consumers alike and we generally support the proposals to streamline processes.

We support the establishment of time limits for phase one and phase two investigations, with suitable exemptions, although we are concerned that the proposal for an 18-month time limit at phase two is insufficiently radical and may be seen as representing business as usual. The new arrangements should aim to speed up both phases.

Second, we are concerned about the extent to which the current system is 'gamed' by some businesses and the increasing use of the appeals process to either buy time or seek to challenge decisions on process rather than substance issues. Either consumer advocate bodies should be given symmetrical powers to appeal competition decisions or the appeals process should be far more tightly bounded, while still protecting the proper rights of businesses and individuals.

Third, consumer advocacy bodies should have symmetrical powers of appeal, alongside regulated firms, on decisions taken by economic regulators. This would provide more balance in the wider system of economic regulation.

Fourth, we would like to see more emphasis on collective redress, which is a significant omission from the consultation document.



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