Thames Water Response to RCCP Consultation

Q1. What are the metrics and indicators the CMA and government could use to better understand and monitor the state of competition in the UK?

i) Competitive assessment using the rationale for the policy

The assessment of competition must be linked to the theory by which it is judged. Chicago School economists argue that the prevention of horizontal market power should be the policies' key objective so this is what should be measured. From this perspective the finding of a concentrated industry is not automatically a cause for concern. For example, if the sector is new, highly innovative, or in terminal decline. From these examples, we would therefore reject the use of a static neoclassical view of perfect competition as a benchmark to aim for during the assessment of competition. Using a more dynamic approach that assumes competition is a process that cannot be captured by static indices such as concentration or profitability seems appropriate.

ii) Methodological considerations

The economic methodology involved could follow Philippon methods in *The Great Reversal* (2019) that compares the effectiveness of US and European competition regimes. This includes a sophisticated analysis of end prices, concentration, market power, free entry investment and productivity. Using cross industry econometrics would require a strong counterfactual and avoid the ambiguities of interpretation and causality. A firm's market share and profitability could be due to it being able to erect barriers to competition or becoming more efficient and fighting off competition. These two scenarios have important welfare implications concerning the competitiveness of the economy and value of competition policy.

An alternative and well-established method is to use a case study approach to investigate competition policy's effectiveness at an industry level. This can also inform Government the competitiveness of the economy for key sectors and help competition policy. This has been done for example by Clarke, Davies, and Driffield *Monopoly Policy in the UK* (1998) or Shaw and Simpson (*The Persistence of Monopoly* 1986). Using this approach, the issue is to select representative cases and not attempt to make generalisations about the economy as a whole. This has a subjective element to it, but this is not a particular problem if the normative framework is agreed in advance.

iii) Institutional Design Considerations

The performance of a competitive market may also be related to institutional design and its related governance structures, but this is not normally assessed though many agree with the proposition. It is as seen to require more qualitative and subjective approaches. Yet functioning institutions are key to the competitiveness of the economy. Competitive markets from this perspective are linked to the degree of independence the wider economy has from political intervention and in a related sense the CMA has from political interference. Indeed, the OECD measures and ranks members intervention and freedom from interference from Government of its institutions using expert panellists and surveys.

Research from the Regulatory Policy Institute has shown that (a) political intervention is usually driven by industrial crisis, poor regulatory performance, or policy failures but not arbitrary political interventions (b) the main constraint on independent regulation is other regulators and Government bodies. It is the organisational and policy ecology regulators inhabit that materially influences the ability of regulators to make decisions. Numerous interactions between the state and regulators have led to long term *cohabitation* and *tolerance*. Our current institutional model appears to be *multi layered* and *heterogenous* that has an impact on the functioning of the economy that warrants

further research. (Eyre and Humpherson *Reform, Cohabitation, Intervention, and Independent Regulation* 2021).

Q2. Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK?

We agree with this proposal, but we would welcome consideration given to the impact of the request on firms of producing it.

Q3. Should government provide more detailed and regular strategic steers to the CMA?

We note that the 2013 model included these features, but they do not appear to have been utilised as much as they could have been. We would like evidence to suggest what these "enhanced" steers would have changed or could have made a difference in policy outcome.

Furthermore, we have seen nothing that makes us think that Government can understand markets better than an independent regulator to define competition policy strategy.

Q4. Should the CMA be empowered to impose certain remedies at the end of a market study process?

No. There is a risk of error as the characteristics of the industry are not yet fully known and certainly the arguments have not been fully represented let alone tested at this point. For market studies the issue has always been the limited opportunities for industries challenging the working hypothesis about the market especially when it may not be obvious to them.

There is also risk that large amounts of information are requested by the CMA without being placed in its proper context.

The CMA would also risk selection biases operating in the investigation. This would potentially and systematically incorrectly filter the large volume of information given to it.

Even in the clearest set of abuses that are both time sensitive or need remedies to prevent corporate failure or serious harm to consumers it does not work well. It seems more likely to us that if such harms were occurring it would also be an abuse of a dominant position for a particular company or companies. This enforcement route would be a faster than a market investigation.

Q5. Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool?

No. We see no real advantage of a single market inquiry tool as we see no reason to think that much will change. Any issues with the market will still require large volumes of information and would probably need to consider the industry in the same way as a market study does today. It would then focus on the areas of concern developing and testing remedies that resembles a market investigation a *de facto* second stage. At least with the existing arrangements it is possible to credibly stop the process if there are no concerns. The second stage allows correction of analytical errors or further refinement can be developed in the market investigation stage.

Q6. Should government enable the CMA to impose interim measures from the beginning of a market inquiry?

Imposing interim measures on an industry without proper investigation increases the risk of mistakes being made, especially if the political pressure is to get a "result." It is better that the careful consideration of the evidence that the investigative processes itself generates.

We note that even carefully considered measures have not always succeeded in the way hoped for or worked within the envisaged timeframe. For example, the default energy tariff has had mixed fortunes however this is what politicians and consumer groups were sympathetic to at the time.

Q7. Should government enable the CMA to accept binding commitments at any stage in the market inquiry process?

Agree. By accepting binding commitments consumer harm should be reduced as quickly as possible. It is worth noting that the impact of a market investigations effectively paralyses an organisation so by accepting commitments companies can move on.

Q8. Will government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?

We agree that periodic reviews and monitoring by the CMA can be a valuable new power to help deliver effective remedies. To make it work the CMA decisions must be made quickly which is the second element of a responsive regime.

As for monitoring there is an asymmetry of incentive. The regulated firm will spend time and resource to remove whereas the CMA or may not have the resources to monitor all the markets. Smaller firms protected by the remedies may not have the expertise or finances to react to keep them in place.

We note that this proposed power may not be used very often. Remedies reviews already exist within the existing framework in cases where market conditions have changed. We do not necessarily see what other circumstances would trigger a review.

Q9. What other reforms would help deliver more efficient, flexible, and proportionate market inquiries?

The neutrality of the CMA is paramount in successful investigations. Since market studies are usually politicised, we would want a clear dividing line between the strategic choice of markets for investigation and the actual market investigation itself, that should be kept out of politics.

We would also note that there is a quality dimension to competition analysis including the use of state-of-the-art econometric analysis, peer review, contact with researchers in the field and acceptance of new economic thinking. This is not a legislative issue but clearly makes a difference to the functioning of the policy. Some encouragement in this area could be made.

Q10. Should the current jurisdictional tests for the CMA's merger control investigations be revised? If so, what are your views on the proposed changes to the jurisdictional tests?

We agree particularly with the safe harbour approach to small mergers and the continued focus on horizontal market power. The tests are straightforward though 1.110 d seems to rule out the possibility of very small mergers with specialist products that are vital to major supply chains. There are likely to be a small number of sectors with these characteristics, but they may be significant in growing markets. This could include for example specialist chip manufactures or niche industrial products.

Q11. Are there additional or alternative reforms to the current jurisdictional tests for the CMA's merger control investigations that government should be considering?

There may be cases in which merger assessment is particularly problematic that may not be covered by these proposals. The consultation mentioned "killer" acquisitions and we are not certain this

potential harm has been fully addressed. There are also variants in this theme for example, if a market is yet to exist for a new product as may happen in tech mergers. The asset may be nothing more than intellectual property, but this is where the value is and where competition can be choked before the market even begins.

We note that firms wanting to merge will spend much management time and resources to agree a deal. If the jurisdictional test moves towards the boundaries towards more subjective assessments of the competitive conditions in the market it will be harder to assess potential deals.

Q12. What reforms are required to the CMA's merger investigation procedures to deliver more effective and efficient merger investigations?

The ability to agree binding commitment earlier than phase 2 investigation is likely to have the most impact on the speed of the process.

Reforms that reduce unnecessary delays seems to us sensible to implement particularly regarding discretion related to control of the timetable. Multinational mergers are as quick as the slowest investigating authority so the ability to alter the timetable may be an advantage. Finally, we have no views on the publication of merger notifications noting only that we did not see an efficiency argument for the change.

We note that the pre notification stage could be an area where the CMA can informally indicate its initial views of the merger including what information is likely to be useful specific to the merger. We would suggest that effective communication at this stage will speed up the process.

Q13. Should the CMA Panel be retained, but reformed as proposed above? Are there other reforms which should be made to the panel process?

The role of independent panellists' dates to at least the nineteenth century with Board of Trade investigations into market failure. It has lasted this long as it has some key advantages in that it guarantees independent decision making (see Cushman *The Independent Regulatory Commission* (1946) See Ch. II, VIII, Eyre and Humpherson *Reform, Cohabitation, Intervention, and Independent Regulation* 2021). This system has been in place since 1948 and we have seen no direct link between their part time status and the speed of case resolution. A more relevant variable to processing speed is the complexity or the ground-breaking nature of a case.

The advantage of many part time panel members is that it prevents a professional class of members emerging that would identify their interests with the organisation they work for. Part time panel members have been able to make compelling and dissenting opinions to the main findings that would simply be not in their interests if they were full time as we have seen in dissenting reports. Panellists are often practicing experts in their own right. They can make their own informed judgements that in some cases are every bit as authoritative as CMA staffers but cannot spare the time for a permeant role.

It is likely that full time members will also cost more than a group of part term panellists.

Finally, the European Commission's DG COMP attracted a lot of criticism over the years precisely because it was both a prosecutor and judge.

Q14. Should the jurisdictional requirements of the Chapter I and Chapter II prohibitions be changed so that they apply to all anticompetitive agreements which are, or are intended to be, implemented in the UK, or have, or are likely to have, direct, substantial, and foreseeable effects

within the UK, and conduct which amounts to abuse of a dominant position in a market, regardless of the geographical location of that market?

Yes. We see no reason why this could not happen, though in practice if a multinational agreement is anticompetitive in the UK is likely to be elsewhere. If this is the case it is not the jurisdiction that is the issue but cooperation with other competition authorities.

Q15. Should the immunities for small agreements and conduct of minor significance be revised so that they apply only to businesses with an annual turnover of less than £10 million?

The issue is about the definition of "minor." Turnover criteria should also be linked to the strategic importance of the industry or service concerned or its regional impact. From this perspective a strategic or regional test should be included in any future reform of merger control.

Q16. If the immunity thresholds are revised for agreements of minor significance, should the immunity apply to a) any business which is party to an agreement and which has an annual turnover of less than £10 million or b) only to agreements to which all the business that are a party have an annual turnover of less than £10 million?

We refer to the answer to question 15 the focus should be on strategic and regional impact. This would lead us to a preference for option a.

Q17. Will the reforms being considered by government improve the effectiveness of the CMA's tools for identifying and prioritising investigation? In particular will providing holders of full immunity in the public enforcement process, with additional immunity from liability for damages caused by the cartel help incentivise leniency applications?

It is likely that for both the detection and ease of winning a case immunity is an effective option for the CMA.

We wonder how effective anonymity is in practice. The parties would probably be able to guess their identity.

We would hope that for some cartels, detection could also come from CMA own investigations following a customer complaint.

Q18. Will the CMA's interim measures tool in Competition Act investigations be made more effective by (a) changing the procedures for issuing decisions and/or (b) changing the standard of review of appeals against the decision?

Just as interim measures protect consumers and affected parties so an incorrect decision will damage the business under investigation possibly leading to closure if they are incorrectly applied. In this event there is no route for redress for the injured party.

In the most blatant of cases both a and b would work, the problem will be using these powers in marginal or ground-breaking cases that require robust analysis and defence. There is a risk that the defendant without proper access to file will not be able mount a proper defence.

Q19. Will the reforms in paragraphs 1.170 to 1.174 improve the effectiveness of the CMA's tools for gathering evidence in Competition Act investigations? Are there other reforms government should be considering?

The proposals are likely to make investigations more effective, but we would suggest that defendants have similar levels of protection as the would have in the criminal system.

Q20. Will government's proposals for the use of Early Resolution Agreements help to bring complex Chapter II cases to a close more efficiently? Do government's proposals provide the right balance of incentives between early resolution and deterrence?

We support the early resolution agreements and think that they are unlikely to impact deterrence as the agreements themselves hurt the company in question.

Q21. Will government's proposals to protect documents prepared by a business in order to seek approval for, and operate, a voluntary redress scheme from disclosure in civil litigation encourage the use of these redress schemes?

We support this proposal.

Q22. Will government's proposed reforms help to speed up the CMA's access to file process and by extension the conclusion of the CMA's investigations?

We support the package of proposals.

Q23. Should government remove the requirements in the CMA Rules on the decision makers for infringement decisions in Competition Act investigations?

The Government should not remove the Case Decision Groups that are integral to the decision-making process. The benefits of having a fresh pair of eyes we think outweighs any delay in the process. In any event we note however complex a case, they often turn on a small number of issues.

Finally, the absence of a Case Decision Group may inadvertently prevent creativity and innovation as fresh thinking about the case will not happen.

Q24. What is the appropriate level of judicial scrutiny for decisions by the CMA in Competition Act investigations?

We see no reason to change the existing rules on the grounds that it creates "risk aversion in the competition authorities." We would argue the opposite. The extensive and far-reaching powers the competition authorities have fully justifies extensive and merits of the case scrutiny. We do not recognise the concept of "gold plating." It is better than the opposite, superficial unevidenced arguments based on behavioural or political biases that can emerge during a particularly contentious investigation.

Q25. What is the appropriate level of judicial scrutiny for decisions by the CMA in relation to non-compliance with investigative and enforcement powers, including information requests and remedies across its functions?

We would suggest the existing system works well and we have seen no evidence presented to the contrary. We would note that it is easy for the CMA to demonstrate non-compliance for these procedural infractions given their nature. The problem if anything is that the CMA needs to be clear what it is asking for in the first place. Much time is spent converting internal company information into the format requested by the Authority.

Q26. Are there reforms which fall outside the scope of government's recent statutory review of the 2015 amendments to Tribunal's rules which would increase the efficiency of the Tribunal's appeal process for Competition Act investigations?

No. We would suggest the CAT has worked well. We do not think the argument that the appeals process should be changed simply because it is resource intensive is convincing compared with the benefit of having a robust appeals process.

Q27. Will the new investigative powers proposed help the CMA to conclude its investigations more quickly? Are the proposed penalty caps set at the right level? Are there other reforms to the CMA's evidence gathering powers which government should be considering?

We are not convinced this is the case. The proposals are very likely to incentivise more information given to the CMA as a precaution to any potential prosecution. What is important for speedy investigation is that the CMA team to have a good working relationship with the information providers. If this happens then the pace of the investigation will naturally quicken.

We note that the penalties are already strong and must prevent false information being given to the CMA. It is a paradox that the more severe the penalty for competition infractions the more powerful incentive there is to present false or misleading information if there is a chance that it prevents detection.

We would add to the package that the CMA should be obliged to give some form of justification for resource intensive information requests.

Q28. Will the new enforcement powers proposed improve compliance? Are the proposed penalty caps at the right level? Are there other reforms to the CMA's enforcement powers which government should be considering?

Agree. The proposals will improve compliance, with a fine set at 5% of daily turnover.

Q29. What conditions should apply to the CMA's use of investigative assistance powers to obtain information on behalf of overseas authorities?

We would suggest the conditions should be reciprocal with the other authorities, with a vital national interest caveat on such topics as national security.