

The Competition and Market Authority's response to the Smith Commission

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Introduction

The Competition and Markets Authority is the UK's primary competition and consumer authority. It is an independent non-ministerial government department with responsibility for carrying out investigations into mergers, markets and the regulated industries and enforcing competition and consumer law. The CMA welcomes the opportunity to provide evidence to the Smith Commission to help inform its consideration of which powers might be further devolved to Scotland, in line with the commitment given by the Prime Minister on 19 September.

Please note that the views reflected here - and the information and analysis set out in the paper – are those of the CMA as an expert organisation independent from Government. They should not be taken as being representative of the UK Government's position and they have not been agreed or approved by any department or Minister of the UK Government.

Our evidence is neither a proposal for change or against change to the current devolution settlement. Rather it is our independent and neutral assessment of the issues likely to be relevant in considering any options for devolving competition and consumer powers which we hope the Commission will find informative. The CMA is a new organisation, established in October 2013 and taking on its new powers in April 2014, however this submission draws on many years' experience from the work of the CMA's predecessor organisations (the Office of Fair Trading and Competition Commission).

In line with CMA's stated mission, our priority has been to consider the likely outcomes for UK consumers and businesses, and the wider UK economy, of further devolution. The CMA takes the view that the full devolution of competition policy has significant implications, in particular because competition law focuses on markets, and the geographic extent of many of the markets operating in Scotland extends to the rest of the UK and/or other European states. Devolution of consumer policy or devolving delivery of consumer protection also present some issues in relation to consistency across a single UK market; however, we recognise the views of those who believe there would be benefits from simplifying the delivery of consumer policy in Scotland.

The CMA is happy to provide further information or advice relating to the issues covered in this paper should the Commission require it.

Summary

- A decision on whether to devolve competition policy should reflect the realities of markets and, for most goods and services, the market is UK or wider. The work of the CMA reflects this although market analysis allows for consideration of differences within the UK market and, when appropriate, smaller markets are subject to our investigation.
- In Scotland, many major markets tend to see a large market share held by one or two companies, with competition from companies operating in the rest of UK the likeliest alternative and best prospect for improvement. UK wide scrutiny of these major markets is therefore in Scottish consumers' interests.
- Any new arrangements for Scotland would need to reflect the strict framework of EU law. The European Commission has favoured harmonisation of competition and consumer law – with limited scope for divergence by Member States. This helps reduce uncertainty for businesses operating across borders.
- It is important to be aware of the potential for fragmentation and, therefore, inconsistent application of the law. Policy divergence could cause uncertainty for cross-border firms. Increased compliance costs for business due to scrutiny by two competition authorities may have outcomes that will impact on consumer choice and value.
- Inconsistency in remedies across a UK market could be challenged and lead to complex and costly litigation for both governments although collaboration across authorities could help manage these risks.
- There may be value for money and viability questions around a stand-alone competition authority in Scotland. For example, in the last decade, UK competition authorities have had to review on average one purely Scottish merger a year. Small competition agencies can find it challenging to resource peaks and troughs, and the varying technical demands in this complex area of law and economics.
- There may be benefits from simplifying the delivery of consumer policy in Scotland. There are also benefits from ensuring consistency in consumer protection policy across a single UK market and continued cooperation across the UK through the Consumer Protection Partnership (CPP), to ensure market-wide issues are dealt with.

Background

1. The CMA is an independent non-Ministerial department of the UK Government, funded directly by HM Treasury and with policy oversight from the Department of Business, Innovation and Skills. The CMA acquired its full powers and responsibilities on 1 April 2014 under the Enterprise and Regulatory Reform Act 2013 following the closure of its predecessor organisations, the Office of Fair Trading and the Competition Commission. It has lead responsibility for carrying out investigations into mergers and markets and for enforcing competition law. Whilst it is the UK's sole merger authority, it shares its markets and competition enforcement powers with a number of sector regulators; it also considers appeals of regulatory decisions by the sector regulators. By contrast, the CMA is one part only of the consumer landscape and shares enforcement responsibilities with other consumer bodies. The CMA uses its consumer powers where breaches of consumer protection law point to systemic failures in a market. Following reforms in 2012 and 2013, local authority Trading Standards Services take the lead on most consumer law enforcement, including against single traders at the UK level.
2. The CMA currently has over 500 staff mainly based in London, with representative offices in Edinburgh, Cardiff and Belfast. The representative offices are responsible for building strong centres of intelligence and insight through which the CMA can be more effective in reaching out and responding to the different economic and political dynamics of Scotland, Wales and Northern Ireland. The CMA works in partnership with a range of organisations across the UK and internationally: including Trading Standards services, business groups, sector regulators and consumer bodies.
3. The economic unity of the UK and, in particular, the island of Great Britain, has been said to have been to Scotland's benefit.¹ The effective UK-wide enforcement of competition and consumer law is considered to be one of the central supports for this. Economic regulation of key sectors (tele-communications, energy, postal and financial services) by UK/GB bodies is another – although the design of the respective devolution settlements respects well-recognised geographical definitions of certain markets. Hence,

¹ Calman Commission 2009.

energy and water regulation are devolved to Northern Ireland: water regulation is devolved to Scotland.²

4. The Review of Scotland's devolved powers by the Calman Commission in 2009 concluded that any changes in powers or finance should "not run the risk of significantly undermining the economic aspects of the union". The Commission concluded that competition and consumer powers should remain reserved powers:

The Commission does not recommend changes to the reservation of company law, competition policy, financial services regulation and consumer protection which it considers are vital safeguards for the single market and wider economic Union.

² The water industry in Scotland is regulated by the Water Industry Commission for Scotland (WICS); however, they have no competition powers, unlike Ofcom and Ofgem.

Markets

5. In considering further devolution, it is worth noting the scale of activity conducted by the UK competition authorities in the last 10 years involving Scottish companies and markets. [Annex A](#) provides more detail but in summary, since 2004:
 - The Office of Fair Trading (OFT), Competition Commission (CC) and CMA have investigated 23 mergers involving Scottish firms/markets: 11 of those cases were mergers involving only Scottish companies/markets. The main sectors involved were dairy, retail, public transport, leisure and off-grid energy. It is also worth noting that rail franchises (including the recent Caledonian Sleeper and ScotRail awards) also fall within the CMA's remit in respect of merger control.
 - The OFT and CMA have conducted six Competition Act cases involving Scottish-based firms: four of these involved Scottish firms only. Sectors involved were fuels, financial services, motor industry, construction and dairy. Two were cartels cases. A recent example was the OFT investigation of alleged abuse of dominance in the supply of road fuels in the Western Isles³.
 - The OFT has conducted one consumer enforcement case involving a Scottish-based company only. This was a double-glazing company.
 - The OFT, CC and CMA have conducted 11 markets projects (calls for information, market studies and investigations) involving solely or significantly Scottish markets: property management was the one conducted on a Scotland only basis. Sectors include transport, energy, dentistry and aggregates. The Remote Communities Call for Information was an extensive assessment of market issues facing remote rural communities with a strong emphasis on those in Scotland.
6. As can be seen, Scottish (or smaller) markets are subject to our investigation, but the work of the CMA and its predecessor bodies reflects the fact that there is a single UK market for most goods and services that Scottish people consume. This means that most of our market analysis is carried out on a UK basis, though allowing for consideration of differences within the UK market, both on the supply and demand side. For example, the CMA has recognised

³ [Supply of road fuels in the Western Isles case.](#)

the high level of concentration in banking in Scotland in its provisional decision to refer the Personal Current Account and SME banking markets for Phase 2 market investigation. The current investigation into the energy market is considering whether differing regional positions of the major suppliers, as a result of customer inertia, has any effect on their incentives. Mergers between companies operating in UK wide markets will often throw up issues at a regional or local level. For example, the merger between Breedon Aggregates and Aggregate Industries UK was cleared subject to conditions that will preserve competition and consumer interests in the north-east of Scotland.

7. Defining the market is one of the most important, and therefore contestable, decisions that a CMA project team will make. It has an impact on the extent to which businesses (and their assets) will be under scrutiny and can make a significant difference to outcomes for consumers and, potentially, local economies.
8. It is possible to envisage a Scottish authority investigating either a narrowly-delineated 'local' market (eg buses or property factors) or a regulated⁴ market (like legal services or water). It may be feasible to reach agreement on particular sectors that a Scottish authority would cover or reserve certain sectors to the UK authority. However, what may appear to be a local market, when investigated, can turn out not to be: an example of this being the finding of the Competition Commission in the AG Barr v Britvic Phase 2 merger investigation⁵ that the relevant market was the wholesale market which operated on a GB scale.
9. It is important to preserve the integrity of the unified market for goods and services that are delivered across the UK to avoid market effects that lead to consumer detriment in different jurisdictions. It is otherwise possible that different competition authorities identify different remedies and for these to affect that market differently for consumers and businesses in different jurisdictions. Where a market in Scotland is concentrated as a result of large market share by one or two companies, competition from companies operating across the rest of the UK may, in fact, offer the best means to obtain an improved outcome for consumers and so a UK-wide perspective remains valid. It is important also to guard against influence, based on local issues that could compromise the independence and credibility of analysis and decision-making.

⁴ Devolved regulation.

⁵ [AG Barr v Britvic Phase 2 merger investigation](#).

10. In the event that a Scottish authority is established, for many instances involving either whole-GB or cross-border markets, one could envisage cooperation between jurisdictions to ensure effective investigation and remedy. It may be appropriate to establish the CMA as primary authority in respect of cross-border markets, involving a Scottish authority as appropriate. This may be important for maintaining business confidence and strong compliance. If businesses, especially international businesses, lack confidence in the competition regime it could ultimately weaken confidence to invest.
11. It is also worth noting that there could be considerable complexities in relation to the CMA's current role in considering appeals of sector regulator decisions if there was change to the current arrangements. The CMA's task is generally to determine disputes concerning proposed changes to price controls, terms of licences or other regulatory arrangements under which the regulated sectors operate. Should a Scottish competition authority have similar powers in respect of regulators' decisions as they affect Scotland, there is potential for complex and fragmented decision-making that could impact on the business decisions of firms with unforeseen impact on consumers.

Cross-border effects: businesses

12. Although it is not possible to determine the numbers of businesses and business transactions across national borders within the UK, estimates suggest that the scale of cross-border business between Scotland and the rest of the UK is substantial (£47.6b excluding oil and gas)⁶. Food and drink, financial and business services, other services sectors including tourism and electricity, gas and water supply are all significant sectors for Scottish sales to the rest of the UK.
13. Creating a new Scottish jurisdiction for competition law is likely to have both short-term and long-term impacts on businesses. For larger cross-border firms, familiarisation and compliance costs would be likely to increase. It is possible that there would be increased scrutiny as a result of potentially 'splitting' geographically a currently unified market and also different types of enforcement activity to respond to. The business decisions of cross-border firms (for example on where to locate) may be impacted by different approaches taken either side of the border. For smaller, more place-based, Scottish firms there may be a different approach to enforcing competition law: it is likely to be more localised and so easier to interact with. However, it is possible that market studies or mergers scale down to a level that firms come under scrutiny from a Scottish authority that would not be likely at present. As an example, the Channel Islands merger controls relate to thresholds on the individual islands – Jersey and Guernsey – over which the authority has jurisdiction. This leads to a number of cases involving relatively small businesses (eg individual hotels, petrol stations, greengrocers)⁷. There could also be potentially some effect on CMA competition cases for English firms who supply to Scottish markets, unless the CMA is able to consider the wider market in the round.
14. Divergence in policy either side of the border is likely to most affect cross-border firms with only limited presence in Scotland. Additional costs of compliance with two regimes may make doing business across the border less attractive, leading to a potential lessening of consumer choice in Scotland.

⁶ Based on the results of Scotland's [Global Connections Survey 2012](#).

⁷ [Channel Islands Competition and Regulatory Authority website](#).

Cross-border effects: consumers

15. As consumer protection legislation in the UK is a mix of UK and EU-derived law, devolution of consumer policy could potentially allow some scope for change in Scotland for laws not harmonised by the EU. It is worth noting too that some aspects of contract law are different in Scotland and this potentially already means that some rights and remedies for consumers could differ, although differences on contract law are more theoretical than practically significant. European law would apply, irrespective of the terms of further devolution, and compliance with this would ensure there was an absolute basic level of consumer protection either side of the border. It would be hoped that, as with Northern Ireland, where consumer policy is devolved, there would be parity of consumer protection regulations and good cooperation across jurisdictions to ensure a consistent, targeted approach to enforcement. This would ensure consumers – wherever they were in the UK – had the same rights and so would continue to engage in UK-wide markets.
16. Scotland might seek to enhance this basic level of protection in a way that would provide stronger protection for consumers north of the border. This could be seen to be unfair for English consumers who may be making an identical purchase (of the same good from the same company) and there is potential for confusion amongst consumers, uncertain as to whether certain rights apply for certain purchases, and businesses who trade across borders. This same issue already exists, of course, across EU borders and some consumers do purchase from international markets, arguably without a concern for what rights they have should something go wrong. Evidence, however, suggests that the scale of cross-border purchase in the EU is not substantial, in part because of a lack of consumer confidence: 15% of EU consumers made a purchase from a seller in another EU country and 36% feel confident about purchasing online from a firm located in another EU country⁸. If different regimes are created within the UK confidence and cross-border trade could be expected to dip. The scale of cross-border transactions across the UK does mean that harmonisation of consumer rights is highly desirable to ensure consumer choice and access to the best price is maintained. Even quite slight differences at the level of detailed application of law can have significant implications in terms of potential for consumer confusion and compliance burdens on business. With sales of goods and services to the rest of the UK worth £47.6 billion Scotland has an economic

⁸ European Commission (2013). Consumer attitudes towards cross-border trade and consumer protection. Flash Eurobarometer 358.

interest in removing any disincentive for consumers from the southern side of the Border.

17. Should there be different consumer rights (and potentially different redress schemes) north of the border, it is possible that additional compliance costs for firms would be passed on to consumers. Scotland benefits at the moment from a certain amount of cross-subsidy - for distribution and haulage costs, for example – and it seems likely that for most goods and services, this would continue to apply. However, some firms may feasibly decide that Scottish consumers should be charged higher prices, as sometimes happens now for delivery charges.

Competition regime

18. The CMA is the UK's designated competition authority and responsible for ensuring compliance with, and enforcing against infringement of, EU competition law. EU competition law envisages a single authority and enforcer for each Member State on the basis that each state is economically coherent and distinct (although it will accept designation of more than one competition authority within a state). While there are clearly grey areas, to the extent this is true in practice (eg the island of Ireland being a single market for many goods and services), institutionally, competition law is almost exclusively enforced at the state level in European countries. The CMA is currently the UK's only designated cross-sectoral competition authority.
19. Thought would need to be given to whether and how the CMA could carry out this role in the eventuality that competition policy was devolved to Scotland, and potentially a new competition authority established. The CMA is also the designated authority for EU merger purposes, able to comment on proposals and invite cases to be referred back to UK jurisdiction, and so similar consideration would need to be given to whether and how a Scottish authority would assume a similar designation in respect of Scottish mergers.
20. Unlike ex ante regulation which is rule-based and therefore largely predictable, competition law investigations are ex post and often dependent on both economic and legal analysis which can mean cases have less certain outcomes. This explains why there is a move towards increased harmonisation across EU member states, and internationally. Consistency is important for business certainty and this applies across borders as well as within jurisdictions. It is possible that an inconsistency in decision-making that might apply across a UK market (eg on whether a merger should go ahead, or whether a company should sell certain assets) would be challenged and lead to complex and costly litigation for both governments. Should competition policy be devolved, harmonisation between regimes and considerable collaboration to reduce the risk of challenge would be desirable.
21. The flexibility that Scotland would have within the EU framework for member states is outlined in the following table. It would be possible for restraint to be applied to this flexibility through domestic legislation at the UK level.

	Member State requirement	Flexibility
Institution	One or more designated National Competition Authorities (NCAs).	<p>Could be administrative or mixed administrative /judicial</p> <p>Could have functional separation of duties between investigative and decision-making bodies</p> <p>Can be combined with other functions (eg consumer, utility regulation)</p>
Independence	No specific requirements.	No specific requirements: although NCAs expected to work independently, Ministerial direction and intervention possible so long as doesn't interfere with exercise of powers under EU law
Income	No requirement for certain level of resources but evidence that European Commission will take action if it considers resourcing has gone below a level necessary ⁹	No requirement to be state-funded: could be funded by mandatory levy on companies

⁹ Section 2.5 of European Commission Staff Working Document SWD 231 Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues, 2014.

Application of competition rules	<p>Obligation under Council Regulation 1/2003¹⁰ to enforce rules</p> <p>Member State may not introduce in national law stricter competition rules governing anti-competitive agreements which may affect trade between member states</p>	<p>Procedures (timings, appeal rights, etc) and sanctions</p> <p>Rules on abuses of a dominant position</p> <p>Ability to set priorities</p> <p>Powers to inspect, to request information or accept commitments</p> <p>Type of remedies available</p> <p>Civil or criminal remedies in cartel cases</p> <p>Leniency in cartel cases</p>
Mergers	<p>No requirement.¹¹</p>	<p>Regime can be mandatory or voluntary. Ability to set notification, exceptions, thresholds and market definitions.</p>

¹⁰ [Council Regulation \(EC\) No 1/2003](#).

¹¹ Luxembourg does not have a merger control regime. It is questionable whether it would be cost-effective for Scotland to have one, given there have been only 11 distinctly Scottish mergers in past 10 years.

22. Whether policy divergence could lead to an effect on the economic structure of Scotland and the UK is difficult to say. It may be possible to introduce a mechanism, akin to the European Commission call-in in merger cases¹², where cases which involve markets of a certain size or in a certain sector, are always dealt with at the UK level to avoid any damaging market distortion.
23. Depending on the extent to which power is handed over, arrangements may be needed for involving Scotland in European competition and consumer networks. As with other devolved policy areas where there is an EU legislative framework (eg agriculture, fisheries and climate change), protocols for establishing how Scottish Ministers engage in negotiations and have the opportunity to shape a UK position may be required, as well as procedures for dealing with infringements and penalties, should Scotland not comply.
24. The scenario envisaged by the Liberal Democrat paper on further devolution and reiterated in their submission to the Commission - where Scottish Ministers have a power to ask the CMA to investigate Scottish markets - raises a number of points. The first is whether it is intended through this proposition to provide Scottish Ministers with a different statutory role to Ministers of the Crown. [Annex B](#) sets out what powers are currently available for UK Government Ministers to intervene in the CMA's markets and mergers work. It is worth noting that the UK system of competition controls has evolved since the 1980s, becoming more independent from Government with less opportunity for Ministers to be involved, in order to provide greater business certainty and confidence¹³. There is currently no direct equivalent for UK Ministers of the potentially fairly wide Liberal Democrat proposal and it is worth consideration of what the implications of this difference might be.
25. Safeguards against potentially disruptive intervention in markets due to political expediency are built into the current powers that UK Ministers have (eg requirement to consult, limited number of markets in which public interest interventions in merger consideration may take place).

¹²The European Commission in principle only examines larger mergers with an EU dimension, a combined worldwide turnover of all the merging firms over €5000 million and EU wide turnover for each of the least two of the firms over €250 million or a worldwide turnover of all the merging firms over €2 500 million, and a combined turnover of all the merging firms over € 100 million in each of at least three Member States, a turnover of over €25 million for each of at least two of the firms in each of the three Member States, and EU-wide turnover of each of at least two firms of more than €100 million.

¹³ [Alex Chisholm speech](#) about public interest and competition-based merger control.

26. It is possible that, as a result of a referral from Scottish Ministers, the CMA could investigate a Scottish market and conclude that there was consumer detriment that could be remedied through a policy intervention that the Scottish Government had no legislative competence to act upon. A second consideration is the extent to which Scottish Ministers could, in practice, identify and define a distinct Scottish market for any particular good or service and so be able to exercise this power without potentially interfering with cross-border markets. Thirdly, consideration would need to be given to who would fund this sub-UK markets work and how the CMA would prioritise this work should many such references be made by Scottish ministers. If the UK Government continues to fund the CMA, thought could be given to an intermediate process by which a referral from Scottish Ministers was agreed by UK Ministers.
27. An alternative to providing the fairly wide power proposed by the Liberal Democrats may be to require UK Ministers to consult Scottish Ministers should any Ministerial intervention be made that is likely to have a significant effect in Scotland.

Consumer regime

28. Within Europe, consumer protection is often devolved to federal or regional institutions but equally can be centralised, or some mixture of the two (akin to the UK). The CMA is the UK's Single Liaison Office for consumer matters and leads on discussions with the European Commission and other member states on consumer issues, pulling in input from others where appropriate (eg the National Trading Standards e-Crime team and Trading Standards Scotland). In a scenario where consumer protection was devolved, Scottish consumer enforcement bodies might reasonably expect to play a greater role in agreeing enforcement priorities at EU and international level.
29. Under current arrangements, the delivery of consumer responsibilities (enforcement, advice, education and advocacy) is undertaken in Scotland by Scottish organisations (Trading Standards services and Citizens Advice Scotland) and so there is already scope for Scotland's particular circumstances and needs to be accommodated and addressed. Scotland has two seats at the UK Consumer Protection Partnership¹⁴ table in the form of Citizens Advice Scotland and Trading Standards Scotland.
30. The CMA notes that concerns have been raised about the current consumer landscape in Scotland, particularly in relation to enforcement and education, which might suggest there would be benefits from simplifying the landscape. A report by Audit Scotland in 2013 reviewed the delivery landscape and concluded that there was reduced consumer advice and support being delivered through trading standards service, in large part due to resource constraints¹⁵. A Consumer Futures report this year also concluded that there was overlap between the work of consumer bodies in Scotland but also gaps in provision, caused in part by fragmentation of functions within the UK context¹⁶. The CMA believes there to be some merit in exploring these points when considering a further change to the Scottish consumer landscape. It is not clear that the Scottish situation is very much different to other parts of the UK and the CMA notes the NAO review of landscape changes due in 2015. The NAO's interim report highlighted some areas for further consideration -

¹⁴ The CPP formed in April 2012 includes the National Trading Standards Board, Trading Standards Scotland, the Department of Enterprise, Trade and Investment Northern Ireland, the CMA, the Financial Conduct Authority, Trading Standards Institute, Consumer Council for Northern Ireland, Citizens Advice and Citizens Advice Scotland.

¹⁵ Audit Scotland. Protecting Consumers, 2013.

¹⁶ Consumer protection, representation and constitutional change in Scotland. Consumer Futures 2014.

complexity, accountability, transparency, partnership – which appear to be relevant in the Scottish context.

31. Compliance with EU law would reduce the likelihood of a significantly divergent approach to consumer policy but consumer protection legislation is a mix of UK and EU-derived law: eg the Consumer Protection and Consumer Contract Regulations implement EU directives while the new UK Consumer Rights Bill contains some elements based on long standing UK law. Devolution would allow some scope for change in Scotland for laws not harmonised by the EU and this includes provisions within the Consumer Rights Bill (such as Enhanced Consumer Measures) which could be implemented differently, or not at all.
32. A key consideration for devolved consumer policy would be to agree the definition of the consumer/business which would be covered by any new proposals. It is probable that redress for consumers could only be imposed on businesses based or operating in/from Scotland thereby limiting their impact to consumers who buy from such businesses. Scottish businesses would need to make it clear in pre-contractual information which laws would apply for each transaction.
33. It is also possible that the application of consumer protection enforcement may differ. Stretched resources may constrain any augmentation of the current regime but institutional change may offer some options for mitigating this. There is also a balance to be struck between promoting consumer rights and ensuring a proportionate compliance burden on small businesses. The risk here potentially is of Scotland been seen as 'weak link': should Scottish infringements not be tackled, there may be an incentive for companies to move to Scotland to avoid enforcement action.
34. Additionally, if consumer policy were devolved in a way that gave a Scottish consumer enforcement body responsibility for leading on cross-market national consumer cases of the type currently taken by the CMA, the CMA would no longer have sole ownership of taking a UK wide approach to market problems. This could carry risks for a UK-wide single market approach to resolving systemic problems in markets.

Transition

35. Sufficient consideration should be given to the time and resource needed for transition to any new arrangement (particularly should significant institutional change be made). The establishment of a full Scottish competition and consumer agency could pose some short-term resource challenges. There is a small pool of competition lawyers in Scotland from which to resource a team of the scale one might envisage would be needed. However, growing the capacity of competition and consumer expertise could be to Scotland's advantage.
36. The establishment of an operational Scottish competition authority would be likely to take a minimum of 12 months post-legislation, and more likely 2 years or more, to implement, even should an existing institution form the basis of such an authority. Decisions on how to handle 'in-flight' cases and complaints would be required, with a protocol to cover the hand-over. Thought should be given also to the potential for confusion for consumers and businesses and a programme of public education developed covering rights, obligations, complaints and enforcement that correctly identifies who is responsible for what.

Annex A: CMA/OFT/CC cases with relevance for Scotland since 2004

Completed mergers	Year completed	Outcomes
Cirrus Logic/Wolfson Microelectronics	2014	CMA cleared merger.
Adams Food Ltd/First Milk Cheese Company	2014	OFT cleared merger
Arla Foods Amba/Express Dairies	2014	Referred by European Commission. CC cleared merger.
AG Barr PLC/ Britvic PLC	2013	OFT referred merger to CC. CC cleared merger
Breedon Aggregates/ Aggregates Industries UK Merger	2014	Merger involving aggregate companies based in Scotland referred by OFT to CC. CC recommended divestment of three sites.
Cineworld/ Glasgow Science Centre IMAX	2013	OFT cleared merger
Cineworld/City Screen	2013	OFT referred merger to the CC. CC recommendations included divestment of one cinema in Aberdeen.
Vion/2Sisters	2013	OFT cleared merger.
Edmundson Electrical Ltd/ Electric Centre	2012	OFT accepted undertakings in lieu of reference.
BMI/ IAG Merger	2012	OFT decided not to recall merger from European Commission. European Commission accepted merger subject to certain conditions.
David Sands/Coop	2012	OFT cleared merger
McGills/Arriva	2012	OFT referred to CC. CC cleared merger.
GB Oils/Brogan Oils	2010	OFT accepted undertakings in lieu of reference to CC.

Coop/Somerfield merger	2009	OFT accepted undertakings in lieu of reference to CC.
Cooperative group ltd/Lothian Borders & Angus Cooperative Society Ltd	2009	OFT accepted undertakings in lieu of reference
Stagecoach/ Highland County Buses/ Orkney Coaches	2008	OFT cleared merger
First Glasgow (No2)/Hutchison Coaches	2007	OFT cleared merger
Johnston Press/Archant Ltd	2007	OFT cleared merger
Stagecoach/ Braddell (Scottish City Link) joint venture	2006	OFT referred to CC who imposed divestments of certain routes to a new and independent owner
Johnston Press/Scotsman	2006	OFT cleared merger
First Milk Ltd/ Robert Wiseman Dairies	2005	OFT cleared merger
GB Oils Ltd/Shell Direct UK	2005	OFT cleared merger
Grahams Dairies Ltd/Angus Dairies Ltd	2004	OFT considered but found not to qualify

Competition/consumer enforcement	Year completed	Outcome
Western Isles road fuels	2014	Commitments accepted by CMA
Mercedes Benz	2013	OFT fined companies £2.6m for breaching competition law. Included dealer based in Scotland
RBS/Barclays	2011	OFT fined RBS £28.59m. Barclays secured leniency.
MB designs (Scotland)	2008	Undertakings to Court of Session. In partnership with South Lanarkshire Trading Standards
Scottish processing dairies	2006	OFT issued provisional decision and then closed case due to new evidence emerging during consultation process
Flat roof and car park surfacing contracts in England & Scotland	2006	OFT concluded that a number of roofing contractors colluded in relation to the making of tender bids for flat roof and car park surfacing contracts. One Scottish company fined £1570 reduced to £863 by leniency
Scottish and North East Roofing Contractors	2005	OFT fined companies nearly £830,000 in total (reduced to nearly £560,000 by leniency). Taking into account leniency the OFT fined Scottish firms £87,351

Markets	Year completed	Outcome
Energy	Ongoing	Referral from Ofgem to CMA. Phase two UK wide. Market investigation under way
Banking: PCAs and SMA lending	Ongoing	CMA consulting on referral for full market investigation of UK wide market
Aggregates	2014	OFT market investigation led to reference to CC. Requirement for Lafarge Tarmac to sell cement plant to facilitate entry of a new producer. Included plants in Scotland
Price and choice in remote communities	2012	OFT Call for Information focused on issues faced by remote communities
Dentistry	2012	OFT decided not to refer to CC but announced specific recommendations for Scottish Government
Local bus services	2012	OFT referred market to CC who found that in many areas bus operators face little or no competition. Remedies included: increasing number of effective multi operator ticketing schemes. Introducing restrictions on bus operators making changes to service frequency and ensuring new entrants and competing operators can get access to bus stations managed by other operators
Off-grid energy	2011	Following market study OFT decided not to refer to CC for full market investigation. Undertakings agreed in respect of compliance with consumer protection regulations
Property managers in Scotland	2009	OFT market study recommending a number of significant changes to the property managers market in Scotland. Recommendations taken forward by Scottish Government

Groceries market	2009	CC recommended to Government and Devolved Administrations introducing of Competition Test in planning decisions on large grocery stores
BAA airports	2009	OFT referred to CC who ordered divestment of Stansted & Glasgow or Edinburgh. Edinburgh airport subsequently sold.
Domestic LPG	2006	OFT referred to CC. CC imposed remedies to facilitate tank transfer, standardise information on switching processes and to improve provision of information on suppliers.

Annex B: Ministerial powers currently set out in competition law

Market cases

Public interest interventions

Under section 139 of the Enterprise Act 2002¹⁷ The Secretary of State may intervene in markets cases raising one or more specified public interest considerations by giving a public interest intervention notice to the CMA before a reference is made. Currently, the only specified public interest ground is national security, though the Secretary of State may by order introduce new public interest considerations. The two categories of public interest reference are as follows:

- a) A full public interest reference: this occurs where the Secretary of State requests the CMA to investigate defined public interest issues alongside the competition issues. Following its investigation, the CMA prepares a market investigation report containing its conclusions on both the competition issues and public interest issues. Where the CMA decides that action should be taken by the Secretary of State, it must provide the report to them. The Secretary of State must then decide whether to make an adverse public interest finding, and if so, how the adverse effects should be remedied, taking into account the CMA's recommendations in its report. If the CMA reaches a decision on the reference which does not require action to be taken by the Secretary of State, then it publishes the market investigation report itself and any necessary remedies implementation is undertaken by the CMA. This was introduced by the Enterprise and Regulatory Reform Act 2013.
- b) A restricted public interest reference, where the Secretary of State retains the ability to consider the defined public interest issues him/herself while requesting the CMA to investigate the competition issues. That said, the CMA will consider, as part of its competition assessment, whether any action should be taken by the Secretary of State (or others) and report to the Secretary of State as necessary. This already existed prior to the Enterprise and Regulatory Reform Act 2013 but was never used.

¹⁷ [Enterprise Act 2002](#).

Public interest intervention notices

The Secretary of State may give a public interest intervention notice to the CMA if he/she believes that is or may be the case that one or more specified public interest consideration is relevant to the matter being investigated by the CMA. The CMA has a duty to make the Secretary of State aware of any case that it believes raises a specified public interest consideration. The time limit for issuing an intervention notice depends upon whether the CMA has published a market study notice, but in each case, the ability for the Secretary of State to issue an intervention notice ceases where a reference has been made, undertakings in lieu of reference accepted or the CMA had published a decision not to make a reference (and in the case of where a market study notice has been published, where the time limit for publication of a market study report has expired). Where an intervention notice is in force, the CMA cannot itself make the reference or publish the market study report. The Secretary of State will decide whether the public interest consideration that must be stated in the intervention notice is relevant, and if so, whether to make a restricted or full public interest reference. In this case, the Secretary of State can appoint experts with relevant experience to advise the CMA on the public interest issues during the market investigation. If the Secretary of State decides that the public interest consideration is not relevant, then he/she will make a market investigation reference following the normal procedure (assuming that the CMA had proposed to make such a reference in the first place).

These provisions are discussed in more detail in paragraphs 2.19–2.21 of CMA3, *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach*.¹⁸

Intervening in Competition Act cases relating to international obligations and public policy reasons

Paragraph 6 (1) of Schedule 3 of the Competition Act 1998¹⁹ gives the Secretary of State the power to make an order to exclude the application of the Chapter 1 prohibition (prohibiting any agreement or concerted practice which has the object or effect of preventing, restricting or distorting competition) from an agreement or a category or agreements where this would be appropriate to avoid a conflict between provisions of the Competition Act and any international obligation. This can be retrospective. Similar provisions in paragraphs 6(4) and (5) of Schedule 3 of the

¹⁸ CMA3, *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach*.

¹⁹ Competition Act 1998.

Competition Act 1998 cover exclusion from Chapter 2 prohibition (abuse of dominant market position).

Paragraph 7 of Schedule 3 of Competition Act 1998 gives the Secretary of State the power to make an order to exclude the application of the Chapter 1 prohibition from an agreement or a category of agreements where there are exceptional and compelling reasons of public policy for doing so. This can be retrospective. Similar provisions in paragraph 7(4) and (5) of Schedule 3 cover exclusion from Chapter 2 prohibitions. Three orders have been made in respect of the defence industry.

Mergers

Under the Enterprise Act 2002²⁰, the default position is that the CMA decides whether or not to refer the merger for Phase 2 more detailed investigation. The independent Phase 2 Inquiry Group makes the final decision as to whether any competition issues arise and whether any remedies are required, based purely on whether the merger has caused or may cause a substantial lessening of competition.

However, the Enterprise Act 2002 also allows the Secretary of State three key public interest functions in respect of mergers:

1. The decision whether or not to refer a merger for Phase 2 consideration when defined public interest considerations are relevant, by issuing a public interest intervention notice, and where the Secretary of State has made a Phase 2 merger reference on public interest grounds, the Secretary of State also takes the final decision on whether the merger operates, or may be expected to operate, against the public interest, and on any remedies identified for public interest concerns, having regard to a CMA report provided to the Secretary of State (and any recommendations on how to remedy any adverse public interest effects identified). The form of this decision depends upon whether the case is at Phase 1 or Phase 2. The current public interest considerations as follows:
 - national security (including public security)
 - newspaper and media plurality
 - stability of the UK financial system.

²⁰ [Enterprise Act 2002](#).

An example of such an intervention was the Lloyds/HBOS merger case in 2008²¹, where the public interest ground was the stability of the UK financial system.

2. The Secretary of State can also intervene on public interest grounds in cases falling under the EU Merger Regulation (EUMR)²², through the use of Article 21(4) of the EUMR. This allows Member States to take appropriate measures to protect public security, plurality of the media and prudential rules. This power is invoked by the Secretary of State giving the CMA a European Intervention Notice under section 67 of Enterprise Act 2002. In this situation, the European Commission will examine the merger under the EUMR, but the Secretary of State is able to make a decision on public interest grounds. In such a situation, the CMA must advise the Secretary of State on matters relevant to making a Phase 2 merger reference having regard to certain public interest matters specified in designated legislation as to summarise representations received from third parties relating to the public interest considerations. Having regard to the CMA's advice and summary of representations, the Secretary of State decides whether to make a Phase 2 reference on public interest grounds specified in the European Intervention Notice. The CMA Phase 2 Inquiry Group will report to the Secretary of State on their assessment of whether the merger situation does or might be expected to operate against the public interest and the Secretary of State will then take the final decision on public interest issues and any possible remedies required to resolve such issues.
3. Finally, the Secretary of State can also intervene on public interest grounds in a very limited number of cases that do not qualify under the UK's general merger regime but where a specified consideration is relevant to the merger, such as in certain circumstances in respect of defence industry of certain media mergers. In such a case, the Secretary of State may issue a special public interest intervention notice (SPIN). The CMA must report to the Secretary of State on whether such a special merger situation had been created and summarising representations received relating to the considerations specified in the SPIN.

²¹ [Lloyds/HBOS merger case](#).

²² [EU Merger Regulation \(EUMR\)](#).

These issues are considered more fully in Chapter 16 of CMA2, *Mergers: Guidance on the CMA's jurisdiction and procedure*.²³

²³ CMA2, *Mergers: Guidance on the CMA's jurisdiction and procedure*.