Martin Coleman: Speech to the Law Society, 2022

The Competition and Markets Authority's (CMA) panel of independent members make decisions in the most complex mergers, markets and economic regulation cases. This gives the panel a critical function in the competition policy firmament and protecting the interests of UK consumers. The effective and efficient working of the panel is therefore key to ensuring good outcomes and reaching robust, objective and well-reasoned decisions. My aim today is to give those who appear before the panel, their advisers and the wider public some insight into how the panel goes about its business.

This is a particularly opportune time for such a discussion because merger control constitutes the largest element of the panel's workload and, since the beginning of 2021, the CMA's role in the mergers regime, and therefore that of the panel, has been greatly expanded to give us jurisdiction over the largest mergers which were previously reviewed exclusively by the European Commission.

It is also appropriate because the recent review of the UK competition system has culminated in a government commitment to legislate to further adapt the regime to recognise the new demands of markets in the 21st century. The proposed legislation will preserve the current structure of the competition regime including the role of the panel. The government's consultation, which preceded its legislative plans, involved significant contributions from a broad range of stakeholders including those most familiar with the UK system. It indicated a broad consensus around the benefits of the CMA panel model. Its independence and wide range of experience was generally considered to be a key contributor to trust in the wider competition regime.

This is very pleasing but, as the government consultation also made clear, there is no room for complacency. In a time of considerable debate about the scope for competition policy to remain relevant and effective in the face of huge changes brought about by technology and economic and social developments, the phase 2 system is not immune from scrutiny and challenge. We must ensure that the system continues to efficiently serve its purpose of ensuring that markets deliver lower prices, better quality and innovation to consumers of all kinds while guaranteeing fair process for parties under investigation.

There are 33 panel members, including 6 inquiry chairs, who serve as members of groups deciding phase 2 mergers, market investigation references and appeals from and / or rehearings of the decisions of economic regulators. They may also serve, along with senior CMA staff, as members of case decision groups for Competition Act 1998 cases. Some members, as well as having general responsibilities, have specialist roles, for example in relation to utilities, communications or newspapers.

To give an indication of the relative volume of work, for the period from

2019 to date there were 31 phase 2 mergers, 2 Market Investigation References (MIRs), 4 regulatory appeals and 14 Case Decision Groups (CDGs).

I shall focus in this talk on merger inquiries and market investigations. This is not to understate the importance of economic regulation cases and CDGs but the policy drivers and procedures in those areas are very different.

While the panel is part of the CMA it is not a subsidiary body under the supervision of the CMA Board. The panel is an integral part of the CMA of equivalent status to the Board. Schedule 4 of Enterprise and Regulatory Reform Act 2013 describes the composition of the CMA as being members of the Board and the panel. Each have their own functions and are components of the institutional CMA. Members of the panel and members of the Board, are appointed by the Secretary of State following a competitive public appointment process, once appointed the members assume responsibility, as either panel or Board members, within their constituent part of the regime. The Competition and Tribunals Appeal (CAT), in Meta Platforms, Inc v CMA, described the position as follows: 'The 'CMA panel' is distinct from the CMA Board, and with a very specific (statutorily laid down) composition'.

The CMA panel exercises its functions through the appointment of its members to groups that conduct investigations and make decisions in individual cases. This organisational model was designed to ensure that one could have the benefits of a coherent joined-up and relatively speedy process while ensuring that investigation and decision-making, in cases which could result in significant remedial action, is in the hands of independent decision makers.

So how do we safeguard the independence of groups, which is core to the system, while ensuring that the system as a whole operates in an efficient, coherent and predictable manner? We do this in part through formal processes and structures built into the statutory system and in part through the adoption of a number of operational practices and norms.

Independence

Groups are required by statute to act independently of the CMA Board. This is more than a formal statutory requirement. The importance of being independent, and the need for challenge (including challenge to the phase one decision and the views of members of the staff team), is hard-wired into the culture of the Panel from the initial induction that members receive, through the regular seminars that members attend and the working methods of individual inquiry groups. But independence is not just assured through the statutory regime and the procedures that we adopt. There are a number of features of the system that give rise to behavioural checks and balances that reinforce independent thinking and help avoid confirmation bias. These include the fact that the panel sits outside of the CMA management hierarchy; the fact that membership of groups changes from inquiry-to-inquiry, the same set of members rarely sit together in more than one inquiry and the diversity of background of panel members.

Membership of the Panel

It is unquestionably the case that competition policy draws strength from a coherent community of practice. There is real benefit in drawing on a recognised body of knowledge and analysis and being able to learn from the literature and broader experience in the UK and beyond. But, like any community, there is always a risk of groupthink and failure to question established thinking. The independent panel system is able to draw on expertise and experience, and benefit from a diversity of background and thought, that goes beyond the narrow confines of the established UK community of competition lawyers and economists. This is incredibly important. It keeps groups grounded, minimises the risk of blind-spots and ensures that a range of skills and experience is brought to bear on the evaluation of evidence.

Panel members are selected through a competitive process in which rigorous criteria are applied. We have members, such as myself, who have come to the role after a career as a competition specialist but the majority of the panel come from a broader background, the characteristics they have in common being that they have made a mark in their earlier careers and have the ability to absorb complex information and effectively probe and challenge. If they do not have good knowledge of competition policy and practice on appointment, they must have the ability to acquire this rapidly.

So we have individuals who have been leaders in investment banking, accountancy, private equity, Financial Times Stock Exchange (FTSE) 100 businesses and smaller businesses. We have people who have been leading consumer advocates. The panel includes business school and economic faculty academics and those who have served in senior roles with other regulators including a former Director General of the Takeover Panel. Among our lawyer members, apart from competition lawyers, we have former partners in leading firms who have specialised in corporate law and intellectual property and the former General Counsels (GCs) of 2 major British companies as well as a former High Court judge. This diversity of background means that, in addition to knowledge of competition policy, members bring skills that are highly relevant to modern merger investigations, for example understanding of corporate or consumer decision-making, business transfer arrangements and transaction valuation.

While we benefit from the range of thought that comes from a varied professional background we need to do better on some other aspects of diversity. We do reasonably on geographic diversity with members from the across the 4 nations of the UK and a number of English regions. We improved our gender diversity after the last panel appointment round though there is more progress to be made as there is with representation of people from ethnic minority backgrounds.

Part of my role as Panel Chair is to appoint members of the panel to serve on a particular inquiry group. In making such appointments we look for a range of professional expertise – legal, economics, business and consumer, depending on the inquiry. While knowledge of the relevant business sector can be helpful it can also be beneficial to have people who are new to the sector and are able to challenge without any preconceptions about how the sector

operates. Inquiries absorb a significant amount of time of members, and members are appointed to a group at relatively short notice, so ensuring proper availability during the period of the inquiry is important as, of course, is the avoidance of potential conflicts.

Groups are fortunate to be able to draw on the specialist advice available from CMA staff with considerable knowledge and experience, not just in competition law and economics, but areas including data analytics, technology, accountancy and business and finance analysis. Groups are able to apply that advice in the context of their own judgement and expertise.

The number of staff serving a group will depend on the size of the inquiry, to give an indication, on the Cargotec / Konecranes merger inquiry that I recently chaired and which was a fairly substantial case we had in phase 2 a group of 4 (including me as the chair) being supported by around 12 full time equivalent staff drawn from a list of 23 individuals from across different disciplines including legal, economic and financial analysis.

As well as the assigned staff project team, there is scope for the group to draw on additional senior members of the CMA staff (for example, the chief economist or the general counsel) to assist in considering specific issues or questions, or because that advice is sought by the group as part of peer review or in testing specific concerns or hypotheses.

Effective operation

At the more formal level ERRA requires that at least one member of the Board is also a member of the panel. The practice has been to have 2 such panel Board members. This ensures that the Board, in its policy making and allocation of resources, is aware of the needs and perspective of the panel and that the perspective of the panel is continuously reflected in Board discussions and decision-making processes.

The practice has also been to appoint a Chair of the panel to whom is delegated certain powers formally vested in the Chair of the CMA including, as mentioned earlier, the power to appoint members of the Panel to groups. The Chair of the Panel also serves a wider function of ensuring the cohesive operation of the system.

The other formal linkage between the Board and the panel is that the Board makes rules of procedure for groups and issues guidance to which groups must have regard. This includes the Merger Assessment Guidelines and Market Investigation Guidelines. It is through the application of the statutory tests and consideration of these Guidelines and policies that there is coherence of approach between the phase one and phase 2 processes and coherence across phase 2 decisions. The role of guidance in achieving consistency was recognised by the CAT in the Ecolab / the Holchem case. Individual groups must, and do, consider the relevance of the Guidelines for each case and apply them as they consider appropriate. In markets cases it is also open to the Board to give an advisory steer to the Group when it refers a market for an in-depth review.

All members of the panel are provided with support and training to help them perform their role. Although the panel members collectively (that is outside their participation in groups) have no formal responsibilities, all the panel members meet about every 6 weeks. We call these sessions panel seminars. They are not decision-making occasions and we do not discuss live cases other than to receive updates on administrative progress. The sessions serve the purpose of ensuring that all panel members have a common understanding of competition law and policy (especially in new or rapidly changing areas), are kept abreast of the work of the CMA and can exchange ideas and experiences.

To give some examples of topics at recent seminars: we considered a presentation on research that the CMA had commissioned on innovation and competition; we had a discussion on how the counterfactual had been assessed in some recent cases and the challenges that had presented; we reviewed a completed merger investigation with observations from the group and staff team on what went well and what they felt could have been handled better. We sometimes have speakers from other jurisdictions, for example we recently had a session on the likely policy approach of the new leadership of the Federal Trade Commission (FTC) and the Department of Justice (DoJ) and the implications for merger control. Panel members are free to, and do, participate in the wider training available to members of CMA staff including Professor Richard Whish's annual updates on developments in EU and UK competition law. Members receive a tailored monthly bulletin with links to important developments in competition law including selected academic articles, law firm and consultancy publications and the like.

Each panel member has an annual review with the Panel Chair which is an opportunity to discuss personal development and performance issues. This relates to procedural and broader learning related matters – there is no discussion of the position the member has taken on decisions in specific cases. We seek through this process to identify opportunities for further learning and development and ensure that panel members feel that they are being given an appropriate range of experience and responsibility. It is also an opportunity to learn how the system as a whole might be improved for example IT support, document management, procedural efficiency and the like.

The lynchpins of the panel system are the inquiry chairs. There are presently 6 Independent Commissioners (ICs). While panel members are called on to serve in individual inquiries as and when needed and are paid a daily rate for their involvement, the ICs are appointed to serve on a more permanent basis for 3 or 4 days a week and receive a fixed level of remuneration. Their role is to chair inquiries and at any one time an IC will typically be chairing one or 2 inquiries. The ICs regularly meet as a group and we use this as an opportunity to brief each other on developments in cases we are chairing and, where appropriate, sound out each other on issues that may be presenting a challenge. Decisions are of course for the relevant inquiry group.

Conduct of inquiries

The parties typically get repeated opportunities to engage directly with decision-makers. In a merger inquiry they will meet the group at least 3 times in-person (at the site visit, the main party hearing and the remedies

hearing) and have many opportunities to make written submissions to the group (including responding to: the Issues Statement, Working Papers and Provisional Findings) before a decision is taken. This is a considerably higher level of engagement than in most administrative regimes. To give an idea of the scale of contact with the staff team and group, in a recent inquiry that I chaired there were 10 meetings or calls with the main parties, 15 submissions by the main parties, 20 sets of main party responses to information requests and 34 calls or meetings with third parties. Third party calls are usually led by the staff team with transcripts or recordings made available to members.

The staff team is often the face of the CMA in dealing with the parties but it is important to note that everything that the staff team does is under the overarching guidance of the group and no submission or request of any materiality is addressed by the staff without obtaining a view from the group. Everything that the parties and others submit to the CMA together with the relevant evidence collated by the staff team is available to the group and groups engage in vigorous internal discussion and debate drawing on this material.

One occasionally hears of parties to mergers and others hoping to influence groups through approaches to government. In thinking about the role of government in the work of the CMA, it is important to distinguish between our various functions. The CMA has a statutory role of giving advice to Ministers on competition issues. For example, the Business Secretary has recently requested advice in respect of the road fuel market. It is also open to Ministers to make suggestions of areas that would be suitable for market studies, though the ultimate decision to launch a market study or to make a market investigation reference is one for the CMA Board.

It used to be the case that there was an important role for Ministers in merger cases with Ministers making the decision whether to refer a merger for a phase 2 review and which remedies, if any, to impose at the end of such a review. The Enterprise Act 2002 changed that. Other than in exceptional public interest cases, there is no role for Ministers in merger decisions. In my time on the panel, no Minister, official or special adviser has indicated to us any opinion on how a group should decide a merger case and attempts to influence government to do so potentially detract from what the parties and their advisers should be doing to inform and persuade groups.

The main face-to-face points of contact between the group and the main parties to an inquiry are the site visit and the hearings.

Site visits serve 2 purposes: They are an opportunity for the group to see how a product or service is made, delivered or utilised and, even when there is little site to see as with a largely digital business, having the opportunity to understand as much as possible about the relevant markets and businesses helps us make better decisions.

They also are a chance for the business people and their advisers to meet the decision makers in a less formal setting than the hearings and to explain the context of the merger or market and outline how the business operates.

The site visit is not an occasion for direct advocacy of the parties' case but rather a chance to explain and to contextualise the issues that the inquiry will be addressing.

While the site visit is the parties' event and it is for the parties to decide the format (although we do encourage them to consult with CMA staff to maximise the value of the visit) the formal hearings are led by the group. When I took on the role of Panel Chair, and based on my experience as a practitioner, the hearings were the part of the process that I felt had worked least satisfactorily. In some cases they had appeared to be a checklist of questions for the sake of form with little real probing. We have sought to incrementally change the approach to hearings by focusing on issues that cannot be adequately addressed in written representations and questionnaires. This may be because of their complexity or because there are different views on a topic that need to be explored or because the evidence is equivocal. The focus is on the value of an oral exchange in clarifying issues and arguments rather than seeking to cover all topics just to tick the boxes.

For the hearing to work to best advantage it is important that we hear directly from individuals with appropriate roles in the business. Advisers attend to give their client support, to ensure that their client's interests are properly protected and occasionally to deal with questions about data that they may have helped to collate, but it is the business people who have the knowledge, insight, colour and 'war stories' that bring a case to life. We have also heard that business people appreciate a process that enables them to have direct access to, and interact with, the decision-makers.

The level of seniority of the attendees must be sufficient for them to be able to explain the strategic and operational decisions that may be under discussion, for example why did the company decide to develop product X but not product Y? It is sometimes helpful for senior representatives to be supported by colleagues who have more front-line operational experience, for example why is it not possible to develop software Z to perform certain tasks?

Very occasionally we have seen advisers seeking to lead the responses to questions in hearings, with the business people playing a subsidiary role. There may be advisers who have such a good understanding of their client's business that they can explain its workings more convincingly than the business people, but we have yet to meet them.

None of this is to downplay the importance of advisers in the process as a whole. Effective advisers help us to make better decisions and to ensure fair process which of itself is an important objective. They support their clients in navigating a system which, although as streamlined as we can make it, may be difficult to fathom for those unfamiliar with it, and assist their clients to marshal their efforts on the questions that matter and will make a difference to the outcome, and not on unnecessary or dead-end escalations. We are mindful of the burdens which an inquiry places on the businesses affected and recognise that advisers have an important role in preparing and presenting the parties' arguments and assisting the parties to respond to the

numerous requests for data and documentation during the inquiry. Everyone benefits from these efficiencies.

Advisers are, quite properly, focused on their client's case and how to advance it. This is important to us but good advisers understand that we have a wider perspective. We are conducting an investigatory process and we are not confined to only considering the evidence and perspectives of the main parties. We must seek to understand how a merger or market features may impact a broader range of stakeholders than the main parties such as customers (direct and indirect), suppliers and competitors. Some of these stakeholders may be well resourced and sufficiently motivated to directly input into our proceedings. Others may not be but that does not mean that their interests or their views do not matter when we are considering the impact of a deal, or a market, on consumers, now and in the future.

We sometimes have to seek out and probe third parties, who may not be represented before us and who may not have any familiarity with our process, in order to ensure that we are getting the full picture. Such parties may not necessarily articulate their concerns in the language of law and economics that we use in our processes. They may not always be familiar with our terminology, for example what we mean by a remedy's 'composition risk'. That does not make their contribution less valid and when we explain in everyday language the types of issues that we want to understand this helps the party articulate why a proposed remedy might, or might not, give rise to such risks.

In some cases, the use of standardised questionnaires to gather views or test remedies may work well, for example where stakeholders are well informed or the questions being asked are relatively straightforward, but they may be less effective in other circumstances, for example where we are seeking input on more nuanced points or where, perhaps based on prior engagement during the process, we believe stakeholders likely will not have fully thought through the issues. In such cases more structured interviews may be more productive. In each case, the question has to be: what approach is most likely to help the group get the information and insight it needs to take an objective and properly reasoned decision in the time available?

We expect parties to tell us when they think we are wrong and we expect them to tell us this in clear language. The process depends on such exchanges and we welcome them. Indeed we encourage advisers to engage with us on the specific issues we identify during the various stages of the inquiry rather than merely repeating points made in the parties' initial submissions. We have had cases where we have been told that we must be guilty of bias or that CMA staff must be in breach of the civil service code or committing misfeasance because they have not properly taken on board a parties' arguments.

These are grave allegations and where parties genuinely believe such contentions are supported, we would certainly want to be made aware of that and would wish to investigate. But, precisely because they are so serious, they must be backed up with evidence. Doing something a party does not like, or putting forward a proposition with which a party disagrees, is not

evidence of bad faith or improper motive. Solicitors will want to bear in mind the framework for ethical and competent practice set out in the Solicitors Regulation Authority's Code of Conduct. In particular the requirement that a solicitor may only make assertions or put forward statements, representations or submissions to a court, tribunal or inquiry which are properly arguable.

Multi-jurisdictional cases

Let me return to a theme that I mentioned at the outset – the enhanced role for the panel in multi-jurisdictional mergers following EU exit. Groups made decisions on multi-jurisdictional mergers before EU exit. I chaired the Sabre / Farelogix merger inquiry where we had jurisdiction in parallel with the US Department of Justice (DoJ). In fact since we have had independent jurisdiction from the EU, 16 parallel cases have been launched with the EU compared with 14 cases investigated in parallel with the DoJ / FTC.

One should bear in mind that these cases are the tip of the iceberg because, under the UK's voluntary merger notification regime, there are a considerable number of cases that may have been considered by the EU or other authorities that the CMA looked at through the mergers intelligence process but that were not called in at all. 155 of the 827 cases considered by the mergers intelligence function in 2021 and 2022 were multi-jurisdictional cases though we do not track how many of these involved the European Commission.

EU exit was significant for 2 reasons:

First, we now have jurisdiction to review some of the world's largest mergers, where any effects in the UK previously would have been reviewed only by the European Commission, raising the prospect of parallel investigations between the Commission and the CMA.

Second, our close geographic proximity and similar economic characteristics to many EU member states means that there are more likely to be cases where the UK and EU market circumstances are very similar.

We recognise that in many cases parties benefit from consistency across jurisdictions and we strive to achieve this where it is possible within the legal framework. There are 2 elements to consistency: consistency of process and consistency of outcome.

We generally seek to align our timing and processes with other jurisdictions to the extent possible and the total length of our phase 2 merger process is not hugely dissimilar to that of the EU assuming that both the UK and EU process start on the same date. The timing of key landmarks within the process do differ, so the Commission's statement of objections may typically be earlier than our provisional findings and we have a longer period at the end for remedy implementation.

One also has to recognise that, although the formal phase 2 timelines may not be too different, alignment can be significantly impacted by the timing of pre-notification and phase 1 processes and 'stop the clock' decisions. In

2021 and 2022, it took the CMA about 16.2 months on average to go from announcement to the final report in a Phase 2 investigation. It took the EU about 19.2 months on average to get to the same position in Phase 2 cases in 2021.

What I particularly would like to comment on is consistency of outcomes. Looking at completed cases that the UK and EU have considered in parallel, there were 3 where there was some divergence. In one the merger was cleared by both authorities in phase one subject to undertakings but each authority found Significant Lessening of Competition (SLC's) in some different markets (S&P / IHSM merger inquiry); a second merger was cleared at phase 1 in the UK but went to phase 2 in Brussels where it was conditionally cleared (Facebook / Kustomer merger inquiry) and the third, Cargotec / Konecranes merger inquiry went to phase 2 in both jurisdictions and was abandoned after the CMA indicated its intention to prohibit the merger reflecting concerns about the scope of the remedies package which had been accepted by the Commission.

Such concerns were also indicated by other regulators, including the US DoJ and Australian ACCC. A fourth case, Veolia / Suez merger inquiry, was cleared subject to remedies at the end of phase 1 in Brussels and referred to a phase 2 inquiry in the UK and this remains ongoing.

There are a number of reasons why one may end up with different outcomes in cases: First, market circumstances may differ between jurisdictions. In such cases one might expect different outcomes.

Second, the evidence we receive may differ, perhaps reflecting particular local circumstances, though if we thought another agency had received very different responses from the same stakeholders in the same markets, we would expect to query this as part of our process.

Third, the assessment of the evidence may diverge. Phase 2 cases are hard. There are rarely clear-cut answers. Judgements have to be made, by different sets of independent decision makers. We have good working relationships with other competition authorities and one of the benefits of this is that we can, where the legislation allows, seek to understand such differences in interpretation and consider whether we have got it right as regards UK consumers.

This was certainly the case in Cargotec / Konecranes where there was broad engagement with the Commission and extensive efforts made to understand any potential differences within our respective assessments. But ultimately the group has to bring to bear its judgement on the issues. Fourth, the Parties may approach different authorities in different ways, for example, offering undertakings or commitments in one jurisdiction but not in another.

Finally, there may be differences in the substantive tests in different jurisdictions including the approach to remedies, for example authorities may have different thresholds for accepting remedies, and may reach different assessments as to the effectiveness of particular remedies (including of the risks associated with the remedy)

So when we consider a phase 2 case in parallel with other jurisdictions we keep good contact with the case teams in those jurisdictions and, to the extent permitted, we seek to keep each other informed of relevant information and developments and we are open to learn from the thinking of other authorities. But ultimately the decision in a phase 2 case is for the group applying UK legislation, having regard to the relevant Guidelines.

We have a test we must apply to determine if there is an SLC and a test we apply to decide on the appropriate remedy. We cannot as a matter of law depart from these tests in order to seek to achieve a consistent outcome with another jurisdiction. And neither should we. Our role is to protect the competitive process in the UK and through that the interests of UK businesses and consumers. It would be an abrogation of that responsibility to clear a merger we otherwise considered to be problematic; to prohibit a merger that we did not consider gave rise to a substantial lessening of competition or to impose a remedy that we did not believe would be effective or that would be unduly risky.

To conclude, members of the CMA panel play a critical role in the most complex cases considered under the UK competition regime. Supported by an extremely high quality and committed staff team, we apply expertise from across British business and finance, the professions, academia and consumer advocacy to address these issues and in doing so bring an independent approach which optimises outcomes and gives confidence in the integrity of the system.