

Kluwer Competition Law Blog

The CMA's New Prioritisation Guidelines: Towards Inclusive and Sustainable Growth?

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On 30 October 2023, the British Competition and Markets Authority (CMA) published its [new prioritisation principles](#). These principles aim to guide the CMA's choice of work when enforcing the competition rules, particularly as the CMA does not have the resources to act in all instances.

Seemingly little has changed in the text since the previous version of these principles was published almost ten years ago. However, a careful comparison shows significant changes in language that may point to fundamental shifts in the direction of competition policy in the UK towards a more sustainable and inclusive selection of enforcement targets.

In this blog post, we briefly introduce the concept of priority setting by competition authorities and take a look back at the development of Prioritization principles by the UK's competition watchdog. We argue that while changes seem incremental, their impact could be significant if implemented carefully.

The history of the OFT's and CMA's Prioritisation Principles

Setting priorities by competition authorities is a fundamental component of effective, expert-driven enforcement, which is independent of politics. As competition authorities are constrained by scarce financial and human resources, [it is neither possible nor desirable, that they enforce every possible law infringement](#). The power to choose which cases to pursue and which to disregard is a precondition for preserving society's resources to tackle the most harmful infringements. Such power affords authorities the autonomy to focus on matters of genuine economic and doctrinal importance, and hence, can contribute to credible enforcement priorities. It is an inherent feature of proactive, instead of reactive regulatory oversight.

The UK was one of the first competition authorities to publish prioritisation principles in Europe, detailing a positively formulated and dedicated programme for setting its priorities. The Office of Fair Trading (OFT) first published a '[Competition Prioritisation Framework](#)' in 2006, explaining the way it conducted the decision-making process concerning prioritisation decisions. This was a short think-piece laying down the initial process of prioritisation decisions. The OFT noted that the strategy for the enforcement of competition law should be listed in the authority's annual plan, including the desired portfolio of cases (mix of large and small cases, and different types of

restrictions of competition), the selection of priority sectors, the authority's policy objectives and priorities.

Based on this plan, the OFT laid down a six-step process of prioritisation: (i) estimation of direct consumer benefit that would arise from intervention; (ii) estimating the deterrent effect as a result of enforcement; (iii) consideration of aggravating and mitigating factors that may strengthen or weaken the need to take action in any particular case; (iv) examining issues related to policy (e.g., priority sector), precedent (e.g., need for policy clarity), and profile (e.g., raising awareness of the OFT); (v) consideration of the OFT's resources that would be required to achieve the desired outcome based on the evidence needed and the complexity of the case; and (vi) estimating the likelihood of success, that is the probability that the case will lead to the desired outcome (often an infringement decision). These first set of principles reflected a strong budget rationalisation goal, aiming to make the best use of its limited resources in terms of the real outcomes for UK consumers and to ensure that the OFT made the appropriate decisions about which projects and programmes of work it would undertake across all areas of its responsibility. The OFT was pressured, like other parts of the British Government, to deliver measured benefits to consumers of five times its annual budget over a period of 3 years. This agreement was part of the OFT's settlement in the [Comprehensive Spending Review 2007](#) of the UK, which was based on the Government's desire to halve the real rate of growth in public spending.

Less than a year after the publication of the Prioritisation Framework, in late 2007, the OFT launched a [consultation](#) on the way it prioritises cases. The consultation, and the [2008 Prioritisation Principles](#) adopted on its basis, introduced eight criteria under the four headings of Impact, Strategic Significance, Risks and Resources. These principles were the first to determine that consumer welfare should guide the selection of enforcement targets. They declared that the OFT focuses its efforts and resources "*on deterring and influencing behaviour that poses the greatest threat to consumer welfare, and intervene in order to protect consumer welfare and, in the process, drive higher productivity growth*".

A similar structure and substantive focus were reproduced in the [2014 Prioritisation Principles](#) adopted by the CMA, the OFT's successor. In July 2023, the CMA announced that it was considering updating its priorities principles, given the change in responsibilities and functions following Brexit, its ambition and strategy as set in its 2023/2024 Annual Plan, and the need to streamline and simplify the text of its previous principles. After the [consultation](#) received only a few responses, in October 2023, the CMA adopted the text of the draft principles with no amendments.

The 2023 Prioritisation Principles: from consumer welfare to inclusive growth

The most important change in the CMA's 2023 Prioritisation Guidelines is the disappearance of the consumer welfare standard for guiding the selection of cases. In fact, the term consumer welfare is no longer to be found in the new principles. Instead, the CMA is guided by a more inclusive and sustainable growth approach, frequently referring to concepts of fairness.

This shift is evident already in the first paragraph of the Principles: while the 2014 version prominently emphasized the role of economic aims ("*the CMA's mission is to make markets work well in the interests of consumers, businesses and the economy*"), the 2023 version refers to wider

and more social aims (“*the CMA’s purpose is to help people, businesses, and the UK economy by promoting competitive markets and tackling unfair behaviour*”). Notably, the new principles use the term ‘people’ rather than ‘consumers’, as the addressees of competition policy, indicating that all members of society should benefit from its enforcement efforts. The new principles also regard reducing the disparity across the different regions of the UK, noting that by promoting competition, the CMA “*drive(s) innovation, productivity, and growth across the UK economy and across all 4 nations of the UK*”. This focus was welcomed, in particular, by a [national charity working with rural communities](#), pointing in its response to the public consultation to the importance of the CMA’s intervention in rural areas where populations are dispersed and there may not be enough consumers to form a big enough market to create effective competition, as well as in peripheral, low income, estates where the residents do not have sufficient economic power to be of interest to competitive markets, and for marginalised groups and those with very specialised needs.

The shift is also apparent in the framing of the ‘impact’ criteria for prioritisation. In the older version, the impact was defined and measured in terms of economic welfare, that is, what would be the likely direct and indirect effects on consumer welfare in the markets or sectors where the CMA’s intervention would take place, alongside any additional economic impact. The new version does not use such economic metrics but measures how substantive is the likely ‘positive impact’ of the CMA’s action. It includes the impact resulting from combating breaches of competition and consumer law that lead not only to “*poor value for consumers in terms of price, quality, service or the range of products and services available*”, but also and importantly, that “*may cause physical harm, emotional distress or online harms (such as the misuse of personal data)*”. The new Principles are also the first to emphasise that the selection of enforcement targets aims to benefit “*people who need help the most*”, namely to protect “*vulnerability*” taking a “*range of forms*”.

Finally, the shift towards inclusive and sustainable growth as a guiding prioritisation principle is reflected by the interpretation of the ‘Strategic Significance’ criteria for prioritisation. The new version clarifies that such criteria should be interpreted not only with reference to the CMA’s existing portfolio of cases and strategy, but also uses the language of Amartya Sen’s [Capability Approach](#): according to the CMA, the selection of enforcement targets should fit the medium and long-term ambition that “*people are empowered to make the choices that are right for them*”, to “*empower competitive, fair-dealing businesses to compete*”, and that the “*whole UK economy can grow productively and sustainably*”. Such an approach allows authorities to [appreciate the micro-level forms of agency exercised by those with limited alternatives](#), and open up different ways that marginalised groups could seek to be more empowered.

A new era of competition law prioritisation?

The CMA’s new prioritisation principles align competition law enforcement more closely with new indicators adopted in the past decade to measure the success of economic policies by the British Government (such as those offered by the [Office of National Statistics Inclusive Growth Commission](#), [Public Health England](#)) and international organisations, including the UN’s [Agenda for Sustainable Development](#), OECD’s [Framework for Policy Action on Inclusive Growth and Better Policies for 2030](#), and the [World Bank’s Data for Better Lives](#) approach. Such measures move away from narrow economic growth to inclusive and sustainable growth, encompassing wide-ranging quality-of-life and well-being parameters and aiming to distribute wealth fairly across society and create opportunities for all.

This new prioritisation approach brings the CMA closer to British regulators in other areas of market regulation, who have already adjusted their interventions to the needs of “*vulnerable citizens*”, that is people who are significantly less able to protect their interests in markets, and/or significantly more likely to suffer substantial harm. It also brings the CMA closer to other competition authorities, such as the Competition Bureau Canada, which has been moving towards **more inclusive competition law enforcement and promotion** through a deep understanding and investigation of the implications of their work on diverse groups of people. The Competition Bureau sees ‘**inclusive competition law and policy**’ as an “*important part of an inclusive economic recovery*”.

Only time could tell if, and how, the new British Prioritisation Principles would affect a more sustainable and inclusive selection of enforcement targets by the CMA. In the meantime, the new principles invite new research and impact agendas to map and inform relevant vulnerabilities and enhance access to justice by vulnerable groups and civil society organisations representing them.

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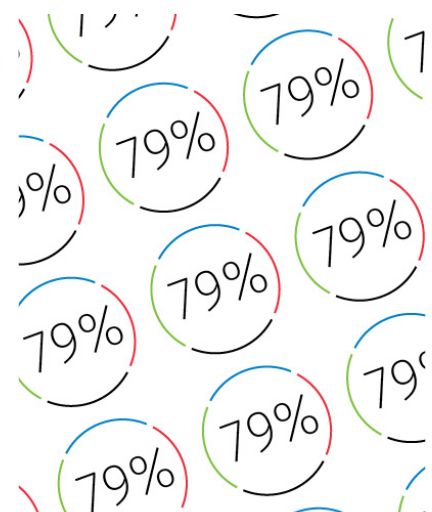
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