

Enlightening the Constitutional Debate – The Real Economy
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I shall discuss the possible way forward for competition policy and regulation in Scotland in the event of further constitutional change. I shall do this in the context of such policies at the UK level, and taking account of the EU dimension. Amongst the issues to consider are the following:-

- Many elements of competition policy and regulation are now subject to policies developed at the EU level. Indeed there is a growing consistency of policies globally.
- For the UK a major development, as from early 2014, will be the coming together of the Competition Commission (CC) and the Office for Fair Trading (OFT) to form the Competition and Markets Authority (CMA). The OFT is represented in Scotland but not the CC. However, the chairman designate of the CMA (Lord David Currie) has recently, in the course of a debate in Glasgow, committed to a presence on the ground for the CMA in Scotland. This is most welcome, given the ever increasing need to take account of policy and market differences.
- Competition policy remains a reserved function, as do most elements of regulation of utilities, etc. (I shall not be dealing with financial regulation in this presentation.) However, the water industry in Scotland, which has evolved over a very different path from that elsewhere in the UK, is subject to Scotland-specific regulation. The Water Industry Commission for Scotland (WICS) has established a very strong reputation for innovation and for driving efficiency.
- This is a clear demonstration that elements of regulation can be devolved effectively, albeit provided the structure and resourcing of the devolved authority is appropriate. As policies diverge in other such sectors there may again be a case for different regulation regimes, with or without independence. Clearly the greater the degree of further devolution the more this is likely to be the case.
- In competition policy it is already necessary to take account of differences across markets within the UK. This applies to both sector/market studies (a function of such authorities unique to the UK) and merger, etc. inquiries. Such differences can relate to policy differences, as policy in a variety of areas evolves differentially under devolution; and it can be due to variation in other characteristics, in a similar way that markets may differ across regions of England.
- However, there remain a large number of instances where there is a market which is best examined at the UK level – rather than or in addition to local market analysis. In some such instances it may not be rational or cost-effective to undertake separate Scottish and rest of UK studies.
- Looking forward to possible independence the Scottish Government has indicated that it is minded to bring together in one body, in an independent Scotland, the functions of competition policy and economic regulation in an array of sectors, including energy, transport, communications and water. It believes that this would permit a more cost-efficient system and a more powerful regulator looking to the interests of consumers. But they accept that there would be instances where this new body would need to work closely with its counterparts in the rest of the UK.
- Such regulators have been successfully created in other parts of the world and a new such body has just been created in the Netherlands.
- However, there are a variety of issues to be considered if such an approach is to be implemented. It will be crucial to bring together the quality and quantity of skilled staff to undertake the work – these people are much in demand internationally. Also it will be important to maintain operational independence from Government; and the integrity of the

distinction between the work of regulators and competition assessors. Economies of scale and scope must not be achieved at the cost of the integrity of the distinct roles of different components of a new multi-faceted organisation. Close links would be required with the relevant authorities in the remainder of the UK and in the EU.

- At the heart of the work of the CC, and also in the CMA from next year, is a group of highly experienced and independent 'members' who oversee all inquiries and are responsible for the final decisions reached – including remedies to be implemented. This approach is highly commended for any new body in Scotland.
- There will also be a need for a judicial function, to hear appeals, etc., a role largely undertaken at present by the Competition Appeals Tribunal (CAT). The equivalent of the CAT will need access to certain technical skills (e.g. economics and accountancy) as well as legal skills.
- Whether under independence or further devolution there will be an increasing need to appropriately reflect the Scottish dimension in competition policy and regulation. Similarly under either policy variant there will continue to be a need to work within the constraint of EU policy and in many instances in (at least) close co-operation with authorities in the rest of the UK. More efficiency may be feasible but the technical complexity, importance to the business environment and resource cost of appropriate policies should not be underestimated.