Jonathan Scott: Keynote speech to the Law Society, 2021

Personal reflections on current context

Thank you for the opportunity to come and talk to you today. Most speakers save their personal reflections for the end of their remarks, but I wanted to start by sharing my thoughts on the context in which we are currently operating and how things have changed since I started working in private practice in this field in the early 1980s, long before I served at the CMA, first as a Non-Executive member of the Board and more recently as the Chair.

Some of you in this audience will be legal advisers of large corporates. My reflection is that all your jobs are more difficult than they were early in my career. Why? One reason is that it seems to me that many big corporates might no longer be as concerned to protect their reputations as they were in the past.

On the face of it, that might look like a strange proposition. Companies seem more likely than ever before to commit themselves to statements of corporate purpose and to acknowledge publicly their obligations to stakeholders. They are also subject to greater external scrutiny than ever before, including through social media, if they fail to meet their legal or moral obligations. Surely this should lead companies to be more concerned with their reputations and more likely to behave ethically than in the past? But if that was the case, we enforcers might expect to see fewer breaches of competition and consumer law, and yet we are busier than ever. And the coronavirus pandemic has seen over 100,000 consumers contact us with concerns about companies behaving unfairly.

So we are left with this paradox, but I think it is a genuine phenomenon. When I started practicing, I think the large majority of corporates shared a desire for risk management, by which I mean they cared about their reputations enough to do something proactively to protect them. Spin forward to the first decade of this century, and we have what the authors of a 2007 Harvard Business Review article termed a mode of "crisis management – a reactive approach whose purpose is to limit the damage". But at least in a crisis management mode, as the authors noted, "executives know the importance of their companies' reputations." The problem, they diagnosed, was that "most companies, however, d[id] an inadequate job of managing [them]". Firms, they said, "tend[ed] to focus their energies on handling the threats to their reputations that ha[d] already surfaced." It is my belief that we have moved further still along this spectrum to a point where I think that corporate reputation is now insufficiently cared about in too many Boardrooms such that even the adverse reaction to a reputationally damaging event may be lacking. The sheer volume of social media content, on such a wide range of subjects over such a short space of time, might reduce the salience of an individual claim. The storm may pass quite quickly, and there is no crisis to manage.

Furthermore, if a company has taken a strong ethical stand on one issue, it might give it – as the academic literature suggests – 'moral licence' to behave less ethically elsewhere. And incentives to avoid the repeat of unlawful activity in the future might be wholly absent, particularly if liability for financial penalties is insufficient to deter and is seen merely as a cost of doing business. And this latter point is for me a real concern. This amounts to the loss of the first line of defence for competition and consumer protection enforcement authorities: deterrence at the level of the undertaking. Deterrence at the individual level is perhaps a different matter, and I will return to the important theme of personal responsibility.

This shift towards greater corporate reputational risk tolerance is perhaps also symptomatic of a wider shift in incentives and attitudes. Firms may be less concerned about competition law liability if the wider operating environment questions the orthodoxy of free, open, competitive markets being the best way to promote consumer welfare.

One can no longer take for granted that politicians and the public think that competition is simply a good thing. There is less trust in markets – less trust that competition will deliver better outcomes for consumers and productivity benefits for the wider economy. Relatedly, over time, as infringement decisions and judgments become longer and longer, and regime complexity is piled upon complexity, the system we operate in becomes more and more removed from the comprehension and concern of ordinary people. This is a real issue – it means that the wider political environment in which we are operating is less stable than it has been in the past.

In this way, you will see that the CMA is facing a difficult examination question, and in an increasingly challenging set of examination conditions.

To add to this wider context, the backdrop for the CMA is one of seismic change. We have taken on significant new roles in the Office for the Internal Market and the shadow Digital Markets Unit. The Government has consulted on the design of the UK Subsidy control regime, and it is not yet clear what role there might be for the CMA. Following the UK's Exit from the EU, we are responsible for a larger and more international caseload. COVID-19 has presented its own enormous operational and policy challenges, and the after-shocks are still being strongly felt across the economy, affecting all our functions. I have been very proud of how the CMA has responded to these manifold challenges, and in many respects, I feel it's a crucible in which we have learned a lot in a short space of time.

What we have achieved in the last 12 months

This brings me on to talk a bit about what we have achieved in the last 12 months – my highlights.

I was delighted that, in May, the CMA was awarded the title of 'Government Agency of the Year' by the Global Competition Review. This award is a testament not just to the efforts and commitment of the CMA's workforce in the face of all the difficulties and uncertainty thrown up by the pandemic over the past year, but also to the impactful and cutting-edge work that we

are undertaking.

COVID-19

I am particularly proud of how the CMA responded to the COVID-19 pandemic and how we have put the post-Covid response at the heart of our work. The COVID-19 taskforce, with its strong, visible, public-facing approach, and its cross-function, cross-tool perspective is, to my mind, an exemplar of the best form of public service response to a crisis such as this. The response covered all conceivable pillars. First, we took a policy response – providing advice to businesses, consumers and the Government. Second, we took a behavioural influencing response – to get the message out there that we are watching, and that bad business behaviour would not be tolerated – what is sometimes referred to as soft power. Third, we took a genuinely robust enforcement response, securing hundreds of millions of pounds in refunds for consumers from events and holidays cancelled due to the pandemic.

The recession and economic adjustment to the pandemic create a number of risks to competition and consumers. That's why we have made "protecting consumers and driving recovery during and after the pandemic" an organisational priority for the year ahead. This is reflected in our casework especially around consumer cancellation and refund rights, and also in our advocacy, which is focused on supporting and advising the Government as it makes policy to support the recovery. And it is reflected in a stepping-up of our engagement with business, consumer and third sector organisations, to deepen our understanding of how markets and consumers' experiences are changing.

Digital

In respect of digital markets, the CMA has come very far, very quickly. Setting up our Data, Technology and Analytics (DaTA) unit was ahead of its time and is continuing to help us to stay ahead by understanding how firms are using data, what their machine learning and AI algorithms are doing and what consequences they are having. We were quick out of the blocks with our 2019/20 Online Platforms and Digital Advertising market study giving us the best possible start. Then in December 2020, our proposals for the new digital competition regime were set out in the advice of our Digital Markets Taskforce, advising the Government on the design and implementation of a new pro-competition and pro-innovation regime for the most powerful digital firms.

When implemented, the new regime will govern the most powerful tech firms – those with 'strategic market status' (SMS) – meaning those with substantial, entrenched market power and where the effects of that market power are particularly widespread or significant.

The Digital Markets Unit (DMU), now in shadow form in the CMA pending the legislation to equip it with formal powers, will ensure the 'rules of the game' are clear up-front. It will work with stakeholders to understand the issues and with powerful tech firms to ensure they comply.

And elsewhere in the CMA, we are already using our existing levers, to better understand digital markets and to pursue a busy portfolio of digital enforcement. Examples include the antitrust cases regarding the Google privacy sandbox and the Apple app store, and consumer enforcement regarding fake and misleading online reviews. Our Chief Executive, Andrea Coscelli, has spoken about this two-pronged approach, at the Fordham conference in late 2020, and in his Bannerman lecture this February. We are staying ahead of the curve by using the powers we already have to address issues wherever we can, while simultaneously building capability and knowledge so that we can hit the ground running from day one of our new regulatory regime.

And I think there is a clear opportunity for the UK to lead the way and to support competition and innovation in digital markets. We see this already, with US Congress proceedings paying close attention to the CMA's work on digital markets, and with the tailored regulatory approach mapped out in our Taskforce advice garnering broad praise at home and abroad.

We recognise that the new pro-competition regime for digital markets will not exist in isolation but as part of a wider evolving regulatory landscape which also includes the new online harms regime, to be overseen by Ofcom, and data protection and e-privacy regulation, overseen by the ICO.

The Digital Regulation Cooperation Forum (DRCF), which is an initiative the CMA has driven, brings together the CMA, ICO, Ofcom and the FCA, building on existing relationships, to ensure a greater level of cooperation and coherence in digital markets and across digital regulatory approaches given the unique challenges posed by regulation of online platforms. Again, we are ahead of the game – leading the way with others following us.

We must also consider how we coordinate with international partners. The most powerful digital firms operate across multiple jurisdictions globally, and regulators in many jurisdictions are investigating and addressing very similar challenges using different approaches. There are likely to be significant efficiencies from regulators working together, both to understand the issues and in devising solutions. We will continue to strive to look for ways to work with other agencies in this regard.

All of this reflects how we are helping to influence and shape digital regulation, at home and abroad, helping to lead thought in this area. We will be ready for action on day one of the DMU proper, when the Government has equipped it with the regulatory tools needed for the job.

Post-Brexit

I have been very proud of how we have navigated the end of the Transition Period, and Brexit more generally. This is the product of many years of hard work and preparation, covering everything from recruitment and building capability for a greater caseload, to supporting the requisite legislative changes and preparing clear accompanying guidance to help give clarity to the firms we work with. This has been no small change – we estimated that with Brexit we would see an uptick in cases of around 5 to 7 antitrust cases and 30 to 50 merger cases at Phase I. In the end, it was COVID rather than the

end of the Transition Period that felt more disruptive, but I think that is thanks in no small part to the way we have taken our Brexit preparations so seriously. That said, Brexit comprises a supremely complex set of changes, the effect of which is not yet fully evident in UK markets. We are mindful of the ongoing adaptation which is likely to be required.

Enforcement outcomes

I think the CMA is also showing itself to be a stronger and swifter organization, and this is benefiting specific and general deterrence. I often ask myself what would have made me sit up and take note as an adviser. In an age when, as I have suggested, corporate reputation might not be the driver of compliance it once was, we are acutely aware of the deterrent value to be derived from director disqualification. Prior to my appointment on the CMA Board in October 2016, there had been no use by the CMA of its Competition Disqualification powers.

Since November 2016, there have been 23 Competition Disqualification Undertakings and one Competition Disqualification Order. That's with an average director disqualification period of 5 years and 2 months. You can expect this trend to continue.

We have gone in hard in sectors where we detect cartelisation. We have completed 5 cases in the construction sector with 1 ongoing (See: Investigation into the supply of galvanised steel tanks for water storage, Design, construction and fit-out services, Supply of groundworks products to the construction industry, Roofing materials , Supply of precast concrete drainage products: civil investigation and Supply of construction services, which is open).

In the pharmaceutical sector, our work has shown immediate reward for the public purse. We secured fines totalling more than £3.4 million, and a payment of £1 million directly to the NHS, in our case regarding the supply of nortriptyline, a drug relied on by thousands of patients every day to relieve symptoms of depression. And our investigation into the supply of fludrocortisone, a drug that is relied upon by thousands of patients with Addison's Disease, resulted in fines totalling almost £2.3m and a payment of £8 million directly to the NHS. You will see also, from the commitments secured from Essential Pharma regarding the supply of drugs used to treat bipolar disorder, that we are also challenging ourselves to act as expeditiously as possible. The Department of Health and Social Care had requested that the CMA impose 'interim measures' to pause the withdrawal of the drugs while the investigation is ongoing. As it happened, our investigation was opened in October 2020. And our commitments were published, and the case closed in December 2020. Watch this space for further updates on other antitrust activity in the pharmaceutical sector.

Looking forward to the next 12 months

We have many exciting challenges and opportunities ahead, and these are set out in our Annual Plan. I don't want to rehearse the content of our Annual

Plan here, but I'd encourage you all to read it if you haven't already. Instead, I wanted to focus, in particular, on some of the policy issues currently flashing on the CMA radar screen.

There are some very hot irons in the fire and in the coming twelve months there are some important milestones.

The DMU has a lot on its plate; the scale of the regulatory task is considerable. I have said personally to Government officials that digital legislation, empowering the DMU, needs to be forthcoming as soon as possible. While this was absent from this year's Queen's Speech, I very much trust and hope that it will be in next year's. And we will press on building greater digital cooperation – including through the DRCF. We will lay the foundations to regulate better, together; reducing the risk of divide and rule; and presenting a consolidated, joined-up, intellectually robust regulatory approach.

Reform

Similarly, I look forward to seeing what materializes from BEIS in terms of competition and consumer regime reform.

Now we are out of the Transition Period, we are carrying responsibility for the biggest and most complex competition and merger investigations which previously would have been the exclusive preserve of the European Commission. And post-Covid, we will carry responsibility for coming down like a ton of bricks on anyone attempting to stifle the economic recovery and damage consumer confidence through anti-competitive or unfair activity. We know that exceptional and desperate circumstances like those we have faced and continue to face can be fertile territory for anti-competitive activity – perhaps particularly cartels. Part of our role in helping the UK economy rebuild following the pandemic is by acting quickly and decisively against breaches of competition and consumer law, protecting consumers and confidence in markets.

What does this add up to? I think that post-Brexit, post-Covid, and absent any legislative help, the outlook for the competition and consumer protection regimes to deliver for UK consumers is extremely challenging.

And we have sped up our work. CA98 case timescales have improved considerably since the days of the OFT, as the post-implementation review of the Enterprise and Regulatory Reform Act showed. But we acknowledge we must continue to be bold, challenge ourselves to carry out our work as expeditiously as possible, and not be risk averse. But the environment in which we operate, especially in light of the nature and extent of court review of our decisions, means that we must get the minutiae of our work right. And that takes time.

With this in mind, we must also be realistic about reform priorities, and where it is most important to target the very limited legislative space available post pandemic. I've said as much to Government. To my mind, a key tenet of the BEIS reform initiatives must therefore be how we impart greater

speed, at all stages of the process. This is hard enough at the best of times. I say it is harder still in an operating environment when infringing the law, and being publicly censured for it, might not be a sufficient deterrent on large firms, and where big parties with deep pockets and no shortage of very talented advisers who know only too well how to hold us up. That's not meant to sound an offensive note. I state it as fact.

One aspect of this, and it was recognised by John Penrose MP in his report published in February, is that administrative penalties for non-compliance with the CMA's investigatory requirements should be bolstered. It is important to be able to adequately incentivise compliance and deter failures to comply. For example, in our Amazon/Deliveroo merger, when Amazon delayed proceedings by failing to provide complete information, we fined them circa £60,000. When Facebook did similar to the European Commission, it fined them circa €110mn.

So, over the past couple of years, we've compared notes with BEIS on a pragmatic, targeted suite of regime running repairs that aim to make the existing regimes as swift, strong and supple as possible. I look forward to seeing BEIS's statement of intent on this in due course and hearing your own reactions and contributions to the debate.

Work is also in train on revised, clearer guidance on the CMA's approach to financial penalties in CA98 cases. Look out for a consultation on our draft revised CMA73 guidance in the coming weeks.

And in terms of CA98 decision-making, you should be under no doubt about the importance to which the CMA attaches to fines that are truly impactful and a deterrent, reflecting the seriousness of the infringement and the desirability of deterring both the undertaking on whom the penalty is imposed and others from engaging in anti-competitive activity.

International engagement

International engagement and collaboration is of ever-growing importance for the CMA, just as it is for our counterpart agencies across the globe. We have been clear in our Annual Plan that we see building international relationships as key to our success, both bilaterally and in multilateral fora.

The UK's presidency of the G7 has given us a fantastic opportunity to help push forward the digital agenda with a group of likeminded partners, building on the work of the French presidency. Developing a shared view of the many challenges in this area will support more targeted and effective collaboration in this area in the G7 and beyond.

With so many markets international in scope, case cooperation has the power to transform an investigation. We were very pleased to see the Trade and Cooperation

Agreement with the EU explicitly recognises the importance of cooperation and envisages a cooperation agreement between the parties to further facilitate

working together. In a similar vein, last year we signed the Multilateral Mutual Assistance and Cooperation Framework with our counterparts in Australia, Canada, New Zealand and the US. This sets out a shared vision for deeper cooperation between the participants, and we look forward to building towards that vision.

Doing cases in parallel can also have a real impact, particularly when issues affect multiple jurisdictions and action by only one authority is not a sufficient deterrent. It is important that work is complementary and adds value and impact – it should not be purely duplicative. Earlier this month we launched an investigation into whether Facebook has gained an unfair advantage over competitors in providing services for online classified ads and online dating, through how it gathers and uses certain data. In parallel, the European Commission also launched its own investigation into Facebook's use of data. The CMA is seeking to work closely with the European Commission as the independent investigations develop.

We have also joined forces with counterparts in the US, Canada and Europe to form the Multilateral Pharmaceutical Merger Task Force. This group has come together to consider the approach taken to investigating mergers in the pharmaceutical sector. The goal is to identify concrete steps to review and update the analysis of pharmaceutical mergers, tapping into expertise from competition authorities with whom the CMA cooperates frequently, as well as others with relevant experience, to ensure the most effective enforcement in these crucial markets. The work aims to ensure that CMA investigations include fresh approaches that fully analyse and address the varied competitive concerns that these mergers and acquisitions raise. We have been inviting views to inform this work – I believe the consultation closes tomorrow, so it's not yet too late to share your thoughts with the US FTC!

Sustainability

Sustainability has been one of our Annual Plan priorities for some time now, and the fact that the UK will be hosting COP26 this year in Glasgow puts this in fresh focus.

In January we published a high-level document to help businesses and NGOs to navigate competition law when considering sustainability agreements. We hope this document will provide clarity and avoid competition law deterring businesses from taking part in environmental initiatives for fear that they may inadvertently breach competition law. But it's only a start. We have also launched an investigation into misleading green claims, and a market study looking at charging points for electric vehicles. In both cases, as with our digital markets work, we are trying to anticipate issues in these areas, rather than coming to the party late.

Sustainability is an increasingly lively area of international debate, and rightly so. The contributions of agencies like the Dutch ACM are raising interesting questions about the interplay between competition law and sustainability objectives. We very much look forward to playing our part in the evolving thinking on this topic, considering the role of competition and consumer enforcement in a wider cross-economy response to the threat posed by

global warming.

Block Exemptions

Another big area of work for us, and a new role following Brexit, is the review of the retained Block Exemptions. Under the legislation implementing Brexit, EU Block Exemptions have been retained in UK law, with the same expiry dates as the corresponding EU Exemptions. The CMA has a role in advising the Secretary of State for Business what to do when the retained Block Exemptions expire.

The first retained Block Exemption to expire will be the retained Vertical Block Exemption Regulation or 'retained VBER'. On 17 June we published a consultation on our proposed recommendation to the Secretary of State. Our initial conclusion is that the Vertical Block Exemption remains relevant and useful, and we propose replacing it with a UK Vertical Block Exemption Order. We also recommend that the opportunity is taken to update the Block Exemption in certain key areas to reflect market developments. These changes are evolutionary rather than revolutionary, and primarily seek to clarify and rationalise the way in which the Block Exemption operates.

Throughout our review, we have been guided by what is best for UK businesses and consumers. We are grateful for all the input we received as part of our targeted stakeholder engagement over the spring; law firm and in-house lawyer engagement was strong, and most welcome.

The consultation is due to run until 22 July, and we are very keen to hear from you on our proposed recommendation. We do listen and we will take into account consultation responses in our final recommendation, which we hope to deliver to the Secretary of State in the Autumn, allowing sufficient time for a replacement Block Exemption to be put in place by the date of the expiry of the retained Exemption.

In due course, we will be turning our attention to the next Block Exemptions to expire – the horizontal block exemptions and guidelines and motor vehicle Block Exemption.

Conclusion

I will conclude with a second personal reflection, which has gradually dawned on me since I joined the CMA Board.

I've been struck by how easy it is to get lost in the 'competition bubble' – to lose sight of the fact that what we do should be to the benefit of consumers. As Chair of the CMA, I'm even more conscious of how important it is we remember just why we exist as an organization. The enforcement of competition law can look, not just to practitioners on both sides, but more importantly to the general public / consumers who we exist to serve increasingly like The Great Game: a running battle played out in secret in the lonely passes and deserts between Civil Servants and corporates (and their advisers). It's taken me 30 to 40 years in the competition law field to understand just why we do what we do and who we are we serving.

You, me, all of us in this virtual room – we are all custodians of a regime that exists for benefit of consumers and society, and we forget this at our peril. I was struck that some of the banners waved on the terraces in response to the announcement of the European Super League could just as easily apply to the world of competition and consumer enforcement: “It’s our club, not yours”. We must take heed.

Thank you for your attention.

And I am happy to take questions.