

Jonathan Scott's speech to the European Policy Forum's summit on the strategic outlook for economic regulation

It is an honour to join you all today, albeit virtually, to share the CMA's perspective on this important topic of competition enforcement and regulatory alternatives.

My speech today will reflect on the work the CMA has undertaken – both during my time as Non-Executive Director, and more recently as Chair. It will also look to the future – to our shared interests and common concerns – as institutions with functions that are crucial to consumers and the UK economy.

These are challenging times in the regulated sectors, particularly given the cost-of-living crisis. It is critical we work together in our response.

The CMA has an interesting vantage point on the regulatory landscape, given our cross-sectoral role and the fact that we have both competition enforcement powers, as well as powers or functions that are more 'regulatory' in nature. And of course, we also hear appeals.

And the CMA's perspective on this topic is, of course, coloured by the fact that our primary aim is to promote competitive and innovative markets for the benefit of consumers.

My view, is that this aim can best be achieved by a combination of timely, targeted competition enforcement and smart, practical, and proportionate ex ante regulation, developed by drawing on a breadth of market experience, and refined over time.

To achieve this aim it is essential we continue to share best practice, promote coherence, and pool resources. And, where it is necessary, we must make the case for change to regulatory regimes, to meet the challenges of the future.

In this speech I want to touch on the following topics:

- I'm going to start by talking about the Concurrency regime, focussing on the benefits and achievement over the last 2 years, including through the UK Competition Network and UK Regulators' Network.
- I want to talk about the success of the Open Banking regulatory intervention in addressing structural challenges in the retail banking market.
- And of course, I'm going to touch on digital markets – specifically the need for digital regulation, and the limitations of competition enforcement. Here I also want to talk about the enormous promise of the

Digital Regulation Cooperation Forum, or 'DRCF'.

- And finally, I want to call for consistency and coherence in the regulatory appeals regime, given the CMA's independent role in hearing appeals in the regulated sectors.

But before I dive in, I really want to emphasise that this speech is both an opportunity to reflect on achievements but also a call to the regulatory community to continue to collaborate and work together.

In the challenging economic times in which we live, that collaboration is even more valuable and important.

Concurrency

So, what is concurrency and why does it matter?

In short, under the UK competition concurrency arrangements, sector regulators can enforce competition law ex-post, alongside their ex-ante regulatory powers.

Within this regime, the primacy obligation generally requires sector regulators to use their sector-specific regulatory powers only after considering whether it would be more appropriate to use their powers under the competition law prohibitions.

This is designed to ensure regulators consider using their competition powers before exercising their regulatory powers.

There can be certain general advantages of competition enforcement over direct regulation. For example, competition law can encourage participants in a sector to think in terms of the actual effects on the market of the practice concerned. Rather than being directed by the 'black letter' of direct regulatory provisions, such as licence conditions. Of course, there will also be some circumstances where regulation is more appropriate.

The benefits of a concurrent approach to competition enforcement also relate to the division of expertise. The regulators bring their deep knowledge of the relevant sector, drawing on their regulatory functions.

And, alongside this, the CMA, as the competition authority, brings its in-depth competition experience and economy-wide perspective. The CMA also ensures there is a consistency of approach across sectors, both regulated and unregulated.

Competition in the regulated sectors matters, as almost every household and business in the UK relies on their services; from basic utilities like heat, light and water; transport (for example, civil aviation and rail) and financial services such as banking, insurance, and payments.

And these sectors form a large part of the household budget (particularly for low-income families). And while concurrency is not the solution to the cost-of-living crisis, it can play its part. It is therefore important that sector regulators continue to apply their competition enforcement powers where

appropriate, to reinforce the competitive impetus which delivers keener prices and better products and services for consumers.

The last 6 months have seen a relative return to normality, following disruptions caused by the COVID-19 pandemic. However, significant new challenges have arisen such as the large increase in energy prices, and shortages and shipping bottlenecks. These factors have all contributed to large price increases and raised questions about how to ensure resilient markets. These challenges have had, or have the potential to have, an impact on competition and consumers and raise questions for competition enforcers and regulators as to how best to respond.

I emphasise that competition enforcement cannot necessarily address the causes of the current crisis but ensuring that markets are competitive and function well, can be part of the solution.

Against this background there has been proactive enforcement of competition law by the sector regulators. In particular, during the period April 2021-March 2022:

- 5 cases were brought to a close, including the PSR's first infringement decision which led to fines totalling more than £33 million. The PSR's case concerned cartel behaviour affecting pre-paid card services used by public sector bodies to distribute welfare payments to some of the most vulnerable members of society;
- 3 investigations – led by the CMA, Ofgem and Ofwat – resulted in firms signing formal commitments to improve their practices – each at different stages, demonstrating the levels of flexibility to the regime. To highlight one of these, Ofgem's investigation examined whether PayPoint had abused or was abusing a dominant position in relation to the market for OTC top-up services to prepayment energy customers within Great Britain. As part of the commitments, PayPoint committed to donate £12.5 million to Ofgem's Energy Industry Voluntary Redress Scheme;
- Lastly, 4 new investigations were launched – in the digital advertising, electric vehicle charging and financial services sectors.

Collaboration through the UKCN and UKRN

But concurrency is about more than just enforcement of competition law...

Through the concurrency regime, and such initiatives as the UK Competition Network (which brings together the CMA and concurrent regulators), there is a great deal of valuable cooperation that takes place.

This cooperation has an important function in ensuring consistency in the application of the competition regime but also in facilitating the sharing of best practice, knowledge, and resources.

For example:

- In the last year alone, close to 20 formal secondments took place between regulators and between regulators and the CMA. And this is not

accounting for the more informal sharing of resource and expertise often on a case-by-case basis.

- During the height of the COVID-19 pandemic, the CMA and regulators were able to pool intelligence on the impact of the pandemic across the economy and identify solutions to common challenges.
- The CMA drew on the experience of the concurrent regulators in preparing advice to Government on the interaction between competition and consumer law and the Government's wider sustainability goals. Many of the regulators had already given considerable thought to this topic in relation to their own sectors.

And, thinking more widely, sharing insights and expertise has also taken place through the UK Regulation Network, which has membership beyond the concurrent regulators and considers issues of broader importance to the economy. For example, building a better understanding of the rapidly changing cost-of-living crisis on consumers – including the distributional impacts of increased costs and vulnerability. This is to enable the best interventions from government, regulators and charities.

In addition, the CMA has observer status on the Cost of Capital Taskforce. There is real value in having more consistent decisions on cost of capital, and through this initiative, we have all been able to share our experience.

I hasten to add that the outcome of the Taskforce will not bind the CMA in future appeal decisions. Those decisions will consider the issues raised on appeal, based on the facts of the individual case.

Open Banking

So, I've covered competition enforcement but what is there to say about those interventions that are more 'regulatory' in nature?

Ultimately, ex post competition enforcement has its limitations and pro-competitive regulation can be more suited to address structural or systemic issues in markets, given its wider reach and ambit.

Where the CMA is concerned, this is where the markets regime has its advantages, given it allows the CMA to accept undertakings, make recommendations or directly impose remedies on a range of businesses within a market where it finds that features of the market are having adverse effects on competition.

The CMA found that this test was met in the retail banking market investigation. The CMA observed that older and larger banks did not have to work hard enough to win retail customers and it was difficult for new and smaller banks to grow.

To address these issues the CMA proposed a number of remedies including Open Banking, which enables customers and SMEs to explicitly consent to sharing their current account information securely with other third-party providers and requires the banks to cooperate in opening access to that data. These third parties can then, in turn, provide them with innovative applications

and services to save time and money.

This was arguably the most ambitious and complex single intervention that the CMA has undertaken and has sparked significant change across the retail banking industry.

Today, the Open Banking ecosystem in the UK comprises over 330 regulated firms and there are over 5 million user services powered by Open Banking technology. By 2023 it is estimated that 60% of the UK population will be using Open Banking payments.

We will continue to push forward with our programme of work to support the growth of Open Banking and embed the recommendations of a recent 'Lessons Learned review' – for both current and future market investigations. This will include building more effective Board oversight and risk management of the end-to-end strategy for complex remedies.

For example, we are already incorporating these lessons learned for the google privacy sandbox commitments.

Digital markets

Pro-competitive intervention is also essential in digital markets, to preserve and enhance a dynamic and innovative tech sector in the UK.

Digital markets play a fundamental role in modern life, delivering substantial benefits for consumers, businesses, and the economy more widely.

However, the dynamics of digital markets have changed hugely, with a small number of digital firms now holding substantial market power, with the potential to cause significant harm to consumers and businesses that rely on them, as well as to innovative competitors. As a result of this:

- Businesses and customers can face higher prices when advertising and shopping online;
- Innovation is held back – for example, in our recent market mobile ecosystems market study, we identified that app developers and cloud gaming are being restricted in innovation; and
- Big platforms hold huge bargaining power over the businesses and consumers that use them, allowing them to impose less favourable terms.

These competition problems not only impose costs on consumers and businesses. They also impose costs on society, for example by facilitating the spread of abusive material and 'fake news'. And, restricting the revenues that flow to the media services that play a critical role in our democracy.

Existing competition laws are not always well suited to solving the problems in fast-moving digital markets and a new pro-competitive approach is needed to oversee the most powerful digital firms. The Government has published its proposed blueprint for this new regime.

Our existing powers, including targeted competition enforcement, are still important. However, they can be too slow for fast-moving digital markets and

are designed to fix problems, rather than preventing them before they arise. They also aren't designed for some of the specific issues we see in digital markets today.

In contrast, the Digital Markets Unit regime proposed by the Government will provide a bespoke toolkit for tackling these problems and ensuring that digital markets are competitive and innovative. It will set the rules of the game for the most powerful firms upfront; enable us to test and adapt pro-competitive remedies flexibly over time, learning from and responding to changes in the market. And it will help us to spot anti-competitive mergers and intervene quickly to prevent them.

The Government has confirmed its intention to legislate as soon as Parliamentary time allows. We support the final proposals and will work with Government on the draft Bill and with Parliament and stakeholders to ensure it is given the scrutiny it deserves. We are also similarly pleased that Government is taking forward essential reforms to strengthen competition and consumer law, given that the harm caused by algorithms and digital design is not limited to a small number of the most powerful firms.

In the meantime, we will continue to apply our existing tools, including targeted competition enforcement and further markets work. We plan to build on our investigation into Apple's approach to app payments; our market investigation into mobile browsers and cloud gaming; and new CA98 investigation into Google's rules governing apps' access to Play Store, as announced in the mobile ecosystems final report, to name but a few examples.

DRCF

Our work in digital markets cannot take place in a vacuum. We will make the most of long-established relationships with a broad range of regulators, including members of the Digital Regulation Cooperation Forum (DRCF), an initiative it's worth shouting about; where we lead the world and where others are copying us.

This Forum has been convened as a result of the increasing recognition of the overlapping and complex challenges that digital markets pose to individual regulators. These challenges range across competition, privacy and online safety matters.

Bringing together UK regulators through the DRCF is already helping to deliver a coherent approach to digital regulation and achieve more efficient and joined up regulation to address the complex challenges digital services and technologies pose. It is also strengthening the efforts of all of the regulators that participate in their own areas.

The DRCF's overarching goals are to promote coherence between regimes, collaboration on projects and capability building across regulators.

For example, to promote coherence through the DRCF, the CMA, Ofcom and ICO continue to pool their collective experience, to enable more informed decision making about market interventions in online advertising ecosystems.

This year, the CMA and the ICO will continue to work together to monitor the effectiveness of Google's commitments in relation to its privacy sandbox proposals.

We will continue to collaborate in a way that allows regulators to tackle cross-cutting issues. This will build on our multi-regulator work on algorithmic processing (now published), and we will continue to progress our work on algorithmic transparency.

Over the past year we have made encouraging progress to join up on capabilities by developing a combined view on the skills we need. This year, we will build on this so that we can recruit and retain specialist talent across all 4 regulators of the DRCF. For example, building digital regulation skills by developing a 'learning product' for the DRCF members and by sharing our learning plans with each other

And, given the rapidly changing nature of the field, we will stay adaptive and flexible to events during the year.

The need for consistency and coherence in the regulatory appeals regime

My final topic today, finishes where I started: the regulated sectors. This time, on the need for consistency and coherence in the well-established, and independent, regulatory appeals regime.

The regulated utility and infrastructure sectors form a key part of the UK economy, and regulatory references and appeals can currently be made to the CMA in relation to price control and other decisions by 8 different regulators and across 10 different regulated sectors.

There is a continuing case – in some sectors – for the CMA to have a role in hearing price control appeals. This provides an important independent 'check and balance' function. Particularly, for those price control appeals requiring financial and economic expertise. Our role is important, it matters for consumers and – as with everything we do – it is important to do it well. 'Well' in this context means a regime that applies appropriately rigorous standards of review to regulator's decisions, takes into account the interests of consumers at the heart of our thinking, and that is reliable and predictable in reaching robust outcomes, helping ensure the UK remains seen as internationally amongst the very best, most stable environments in which to make long-term investments in infrastructure, ultimately driving good outcomes for consumers.

In our view, this work would be more effective if there were clearer alignment between the different appeals regimes. On that basis we support BEIS's recent paper on economic regulation which proposed more consistency. And we will be working with BEIS on the implementation of any changes.

One area of convergence would be, for example, moving water redeterminations to an appeals standard (as is the case with energy).

Furthermore, we believe there is scope for incremental improvements to the regime. For example, we are open to the option for more flexibility for certain errors of law outside the CMA's financial and economic expertise – such as challenges relating to vires or procedural matters – to be either outside the scope of the CMA's role, or for the CMA to be able to refer such matters to the courts. That could speed up the path to having those issues resolved by a court (which can bring legal clarity) rather than heard by the CMA after having been heard by another regulator, and then again by a court.

This brings me to the end of my speech. I am struck by how much the CMA and our partner organisations have achieved over the years. There is much to be proud of.

However, looking forward, there is more to be done.

I am confident that with our collective expertise and well-established relationships, we can meet the challenges of the future. However, we have to continue to be pro-active in looking to cultivate and harness this collective strength. The successes of recent years should encourage us to redouble our efforts to share experience, expertise, and resources in relation to those knotty problems that we face together.

Thank you.