

Speech: Fordham Competition Law Institute Annual Conference 2018

Keynote speech

I am pleased to be here and grateful for the opportunity to share my thoughts on a topic which, given my professional background as an economist, a sectoral regulator and now the head of a competition enforcement agency, has occupied me for quite some time: the bringing together of regulatory oversight and competition enforcement. For me, this dual approach is key to fostering dynamic competition and for dealing with new and fast-moving markets, both areas of focus for the CMA.

As competition professionals we spend some of our most valuable time understanding how markets work or, perhaps more accurately, how and why they don't work so well, to decide whether to intervene to improve outcomes for consumers. At this moment, the CMA's own portfolio of cases covers sectors as diverse as pharmaceuticals, supermarkets, musical instruments, price comparison websites, energy, online hotel booking and funeral services. Unlike sectoral regulators, such as the UK communications regulator Ofcom where I spent a number of years, we who work in competition authorities can't claim to be truly a specialist in any of the sectors we investigate. Our work is too wide-ranging for that. What we are experts in, however, is understanding the forces that influence how markets develop, and at identifying the impact of structural features or behaviour on the competition that we know to be essential to the effective operation of any market, and of course on the consumers who purchase whatever the goods or services may be.

I strongly believe that dynamic competition brings about the most innovative products and services, the widest choice and the best value for money to the benefit of consumers. Our focus is, and must remain, ensuring that the operation of markets and businesses allow for the emergence of new, innovative business models and market players, and that consumers get a good deal. The markets that already exist should support innovative businesses gaining a commercially-viable foothold if, for example, they are more efficient or have new attractive features which will better satisfy customers' existing – or future – demands.

I recognise of course that it is often very difficult to predict what those demands might be, and which technologies and models will take hold and flourish and which will quickly fade – and I will touch later on cases where subsequent events have arguably confounded some of our predictions. That is why we focus on allowing markets and firms to experiment with new business models.

This brings me to the key focus of my speech today: I believe that such conditions can best be achieved by the combination of timely, targeted competition enforcement and smart, realistic ex ante (rule-making) regulation which should be developed by drawing on a breadth of market experience. This

means that we need to be agnostic in our interventions and call for deregulation or greater (or different) regulations where appropriate in specific markets we look at, with a relentless focus on what we think would work best for consumers. I want to describe to you the benefits as I see them of a model which draws on lessons learnt from both regulated markets and competition enforcement, and explain why I believe that bringing together both is beneficial across the wider economy and not just in markets which have been traditionally subject to economic regulation.

The benefits of a combined approach

There is general recognition that competition and regulation have been working well together in certain industries, for example telecommunications and aviation. In the UK, many of our sectoral regulators have competition law powers held 'concurrently' with the CMA's powers, meaning that the sectoral regulators can enforce competition law breaches in the industries they are responsible for. The CMA has a close working relationship with the sectoral regulators and we continually share knowledge and experience, not only when considering which authority is most appropriate to launch enforcement action. For example, we have been greatly assisted by Ofcom, when assessing complex telecommunications mergers like [BT/EE](#) and [Three/02](#) and likewise the UK's energy regulator, Ofgem, in our investigation into the energy market and our current investigation into the SSE/Npower merger. The assistance is reciprocal and the CMA routinely supports the sector regulators in areas where we have greater expertise (e.g. unannounced inspections in antitrust cases).

Sometimes regulation has been needed to deal with a particular structural situation, for example where a historic monopolist controls necessary infrastructure, or in the case of persistent market failures. But regulators haven't just taken a static view to fixing historic problems. Nor should regulation be characterised as being at the other end of the spectrum to the benefits of a free market economy. In areas like communications where new technologies have made the market unrecognisable in a relatively short space of time, the regulator has been able to assess the landscape when a new business model emerges and determine whether anything needs to change to make it work in a competitive way. An example is the decisions in recent years to allow network sharing agreements between mobile operators and the imposition of caps for mobile operators with a strong market position during certain spectrum auctions. Similarly, in a recent pioneering initiative, the UK's Financial Conduct Authority created a "regulatory sandbox" allowing businesses to market-test innovative products, services, business models and delivery mechanisms without bumping up against existing regulation. Early indications suggest that that this innovative approach to regulatory oversight is enabling new products to be tested, reducing the time and cost of getting new ideas to market, improving access to finance for innovators and ensuring appropriate safeguards are built into new products and services. In these ways, smart regulations assist market forces in creating the right conditions for competition to flourish.

This sort of active regulatory oversight is not, however, a feature across

the majority of the UK economy, outside of directly regulated sectors. The result is that, in those sectors, it can happen that markets which at the outset look promising for competition develop in less than satisfactory ways, sometimes to the extent that competition authorities need to step in. I want to briefly discuss a few recent cases.

We have recently made recommendations as part of a [market study](#) that the heat networks market (Heat networks distribute thermal energy in the form of steam, hot water or chilled liquids from a central source of production through a network of pipes to multiple properties for the use of heating, cooling or hot water. Heat networks comprise both district heating, where heat is distributed from a central source through a network to multiple buildings, and communal heating where heat is supplied within a single building to multiple occupants.), which is expected to grow very significantly as part of the Government's decarbonisation agenda, could benefit from some regulatory oversight by the UK's energy regulator, Ofgem, given the sector's monopoly features. We also identified other aspects of regulation including building regulations and leasehold and tenancy arrangements which need to be updated to deal with the shortcomings we identified in this market.

The online secondary ticketing market (websites which allow users to re-sell previously purchased tickets for entertainment such as concerts and sporting events) is one which we have identified as having unsatisfactory outcomes for consumers, despite at first sight seeming a good way in which to open up an additional market to sellers and buyers. This is a market which has been under review for quite some time, by the CMA and our predecessor the Office of Fair Trading (OFT), using our consumer protection law powers. Enforcement action for suspected breaches of consumer protection law was launched by the CMA in December 2016. This has so far resulted in [commitments from three secondary ticketing websites](#) to ensure that consumers get a better deal and we have just launched enforcement action in the courts against a fourth, viagogo, since it refused to make the changes the CMA considers necessary (There is also ongoing enforcement action being taken in a number of other jurisdictions including Australia, France, Germany and Switzerland). We hope and believe that good outcomes can be achieved in a timely way through consumer protection enforcement. If that were not the case, it may well be a need for the Government to impose specific regulation on the sector (for instance a licensing regime).

Another example is app-based cab services, such as those offered by firms like Uber, Lyft and others: these technology-enabled business models have transformed private hire vehicle markets in many cities across the world but have raised concerns over passenger safety, congestion and employee rights. More competition is generally good, opening up the possibility of innovative services and often more affordable services, particularly benefiting the less well-off. But it seems clear that there are multifaceted consequences emerging from these new business models and regulation must be consistent and appropriate across the board. Many will ask: why should traditional business models adhere to regulations that new ones can circumvent? Recently the CMA has been represented on a group of experts advising the UK Government on the

future regulation of taxis and private hire vehicles. Our advice to the government recognised that regulation is necessary across the operators, for example to protect the safety of passengers and drivers, but we insisted that it should not be disproportionate or excessive. Otherwise it may unnecessarily create barriers to competition and to new market entry and ultimately be counter-productive for passengers, for example by making taxi rides unaffordable for some with possibly increased safety risk if they then choose other ways to get home which might be less safe.

In addition, a plethora of existing regulation can inadvertently cause problems for businesses and for competition, especially in new markets which the regulations were not designed for. On the one hand, loopholes in regulation can allow a new entrant harnessing a new technology to take hold of the emerging market while established players are hamstrung by regulation. On the other hand, regulation can be a barrier to entry, stifling experimentation and innovation. In either case we don't have the level playing field we need for effective competition – the conditions aren't right. For example, there is currently debate in the UK as to whether there is a level playing field in taxation between bricks and mortar stores and Amazon, or between independent coffee shops and Starbucks if Amazon and Starbucks are able to engage in complex international tax planning to reduce their corporate tax rate that is not available to smaller, domestic companies? Or as to whether there is a level playing field between independent hotels and Airbnb if hosts on the latter are illegally sub-letting their properties without proper enforcement?

All these examples highlight that existing laws in a number of sectors may not be well designed to deal with a new business model. Public bodies around the world have applied clunky and temporary solutions using various property regulations to deal with Airbnb hosts and users on the site taking advantage of loopholes and lack of enforcement to run professional letting operations, without the costs imposed by regulations on competing hotels. This risks inconsistency in dealing with a market and uncertainty for the consumers who are finding their holiday booking cancelled at the last minute and those who are listing their property on Airbnb in good faith. Ideally, we should look at the market as a whole and consider where, on the one hand, there are old regulations not fit for purpose and, on the other, where there are loop-holes being exploited by new business models. Recently, the European Commission and EU consumer authorities, including the CMA, contributed to a call for Airbnb to align its terms and conditions with EU consumer rules and increase transparency in their presentation of prices.

Our aim is to use all the tools and skills available to us to make markets work better for consumers

The sort of active economic regulation which I outlined earlier should be seen as complementary to the enforcement of competition and consumer law across the economy and it's the right balance between them which really delivers for the public. To develop effective regulation, you must understand the dynamics of competition and to truly enhance competition you must help to build level playing fields where efficient and innovative players can thrive.

That is why competition authorities need to be at the heart of this work. I would like to demonstrate three ways in which the CMA tries to achieve this position.

Our priority setting

First, we are making sure that how we set our priorities, as well as our institutional design, reflect the core principles of competitive markets. For example, one of the priorities set out in our Annual Plan for 2018/2019 is ensuring that markets can be trusted. Consumers drive competition when they have the ability and confidence to exercise informed choices. This is particularly the case in digital commerce, where new business models that could benefit consumers will only grow if they are trusted and used by consumers. Consumers are wary of new technology and if they put their trust in and are let down by one company in an emerging sector, they are likely to be less willing to adopt the products of other start-ups in the same or related sectors. We will therefore be focusing some of our consumer protection work in the next year on conduct which could damage consumer trust.

We have also established, within the CMA, a new Digital, Data and Technology team and are building our digital forensics capability to enhance our understanding of the digital economy and make sure our practices, interventions and capabilities keep pace with the evolution of business models and practices.

The fast pace of change can be particularly challenging for those who are most vulnerable in society, such as people on low incomes and the elderly, and we consider it especially important to understand and help to solve the particular difficulties facing them. The CMA is undertaking a programme of work on vulnerable consumers, which includes both market-specific aspects of vulnerability (that is, when it is the characteristics of the market itself which means that users are inherently vulnerable and may not be able to engage effectively, for example when we need to make a purchase at a stressful time (such as choosing a funeral provider), or if we feel under pressure to make a choice with limited time to consider other options.), which potentially affect a wide range of consumers, and the issues faced by certain groups of vulnerable consumers. The work will develop our thinking and inform our prioritisation of projects, analysis of markets, and design and implementation of remedies. As part of this work, to date, we have co-hosted three stakeholder roundtables with relevant partner organisations on different dimensions of vulnerability: with Citizens Advice on consumer vulnerability in digital markets, with the Joseph Rowntree Foundation on low income consumers, and with the Money and Mental Health Policy Institute on consumer vulnerability associated with mental health problems. We have also recently hosted a symposium with many national and international experts to capture insights for our work in this area.

Using our powers flexibly and in an integrated way

Secondly, we take direct action against anti-competitive behaviour using our powers to intervene in suspected antitrust breaches, investigate proposed and

completed mergers and conduct wide-ranging market studies. As I mentioned, such work is targeted and complementary to our wider engagement with other public agencies to create the right conditions for dynamic competition.

We make sure knowledge and experience of the ways different markets are working is used effectively in the agency. For example, merger cases may be the source of an antitrust investigation if we discover certain agreements or understandings between parties (see [Cleanroom laundry services and products: anti-competitive arrangement\(s\)](#)). Similarly, a merger investigation should not exist in a vacuum if one of the parties has been previously considered to potentially hold a dominant position (see [ATG Media Holdings Limited/Lotissimo merger inquiry](#)).

We also need to select the right cases to launch, using the right tools at our disposal. As mentioned earlier, market studies and investigations allow us a wider oversight than individual enforcement cases and enable us to take a step back to assess where the structural or behavioural issues or pressure points are in a market that we sense is not working well. We have also used the wider insight that our market study work gives us to pinpoint problematic behaviour and to target enforcement work appropriately. Our market study into 'digital comparison tools' (such as price comparison websites) has led to both a [consumer protection law investigation into the practices of hotel booking sites](#) and also an [antitrust investigation into 'most favoured nation' clauses used by a price comparison website](#).

Online digital markets such as these are an area of priority for us, as I am sure they are for many other authorities, given the great potential they hold but also the uncertainty of the impact of new technologies on competition and the speed of market development. Making digital markets work well is also an area of priority highlighted by the UK government in its recent ['Modernising Consumer Markets' Green Paper](#) which is well-aligned with our Annual Plan. In such markets it may be appropriate to seek to resolve competition concerns swiftly and we will pursue interim measures to stop the alleged anti-competitive practice for the duration of our investigation. Alternatively, binding commitments from the parties can also end harmful behaviour quickly in appropriate cases. We secured such binding commitments in our [online auctions investigation](#) to end a potential abuse of dominance and we did so in eight months.

We also aim to learn more about the development of markets from the cases we run, reflecting on whether our predictions match up with the future reality. Merger control in particular is inherently prospective and, while we always work hard to assemble and triangulate different sources of evidence to determine the impact of a merger on the future competitive landscape, predictions are particularly hard in fast-moving markets where the past is not always a good guide to the future.

And it gets very difficult where we are having to make calls about the future development of new technology. I am thinking, for example, of the Facebook / Instagram merger where, in 2012 the OFT had to reach a view on how Instagram and Facebook would evolve. Although the OFT considered the potential for Instagram to compete as a social network, led by the views of third party

respondents, the OFT did not anticipate the growth of Instagram into the large photo and video-sharing social network it is now, or that Facebook would move from an online friendship circle to a global public forum:

While Facebook is predominantly used by off-line friends using their real identities to connect online and share experiences (including photos), Instagram is predominantly used to share artful images by individuals often using pseudonyms.

the evidence before the OFT does not show that Instagram would be particularly well placed to compete against Facebook in the short run.

Another example where we had to make such a call on market development is more recent, in the merger of two digital food ordering platforms, Just Eat and Hungry House. Third parties considered that the two platforms were close competitors and on one reading they had a combined market share of over 80% (by order volumes on food ordering platforms). However, the restaurant food ordering and delivery industry is dynamic and evolving. While Just Eat was in a strong position, it was being challenged by well-funded competitors, with strong brands and technological and logistics experience and expertise. After our clearance, shares in Just Eat went up but recently decreased by 10% after Deliveroo, one of the competitors which we anticipated the growth of, announced significant expansion plans.

Because we recognise that making decisions about the future evolution of markets is inherently difficult and uncertain, we are always looking to evaluate our decisions and remedies and have a team who undertake systematic reviews of the impact of past mergers as well as the effectiveness of any remedies put in place.

The CMA also undertakes important work enforcing consumer protection law. In addition to the work on the secondary ticketing market, we have also recently looked at potentially unfair practices in a number of other digital markets such as hotel online booking, [online gambling](#), [online dating](#) and [cloud storage](#).

The hotel online booking sector is a good example of a digital market that might not be working well for consumers in some respects and that competition authorities have used a variety of tools to try to fix. The market contained some unfavourable behaviour and practices and there have also been acquisitions by key players with the [Priceline/Kayak](#) and [Expedia/Orbitz](#) mergers that were considered and cleared by ourselves and other competition agencies in recent years.

In terms of anti-competitive practices, the use of wide most favoured nation (MFN) clauses (Wide MFNs require the provider to ensure that the retail price of each of its products on the platform with which it agreed the wide MFN is no higher than the retail price of the same products on other platforms, the provider's own website, and possibly also on other channels (e.g. off-line).

This guarantees that the platform benefiting from the wide MFN will not be undercut in price terms by the other channels covered by the clause.) by booking platforms has been scrutinised and found to be problematic in several jurisdictions. Notably, the German Bundeskartellamt found that MFNs in the hotel online booking sector have an anti-competitive effect since they remove the economic incentives for the platform to offer lower commissions to the hotels. Commitments have also been accepted by the French, Italian and Swedish competition authorities in the hotel online booking sector concerning the removal of wide MFNs. Several national competition authorities' investigations into the hotel online booking sector were also closed once Booking.com and Expedia offered informal assurances to remove their wide MFNs. Narrow MFNs (a narrow MFN requires the provider to ensure that the retail price of each of its products on the platform with which it has agreed a narrow MFN is no higher than the retail price of the same products on the provider's direct sales channel.) have also been prohibited through legislation (or decisions by competition authorities) in a number of EU countries.

In the UK we have launched consumer law enforcement action this year [against a number of hotel booking sites which we think may be breaching consumer protection laws](#) in ways that could harm the workings of competition and consumer choice. The behaviour we're investigating includes lack of transparency about how hotels are ranked, pressure tactics, claims regarding discounts and hidden charges. So again, a combination of interventions can help address problems in a market.

Our role as an expert adviser to government

Finally, we seek to fulfil our role as a guardian of competition through advocacy and stakeholder engagement and in particular by providing advice to government. We seek to support initiatives to increase innovation and productivity and will challenge those that risk unnecessarily restricting or distorting competition. Private hire and taxi regulation, as described earlier, is a good example of such advocacy.

International cooperation

In seeking to use competition and regulation to best effect, we also learn from the experiences of others and share our own experience to broaden the knowledge on which we can all rely. Now more than ever, my intention is for the CMA to work to maintain and deepen what I hope are already close relationships with other competition and consumer authorities. With the UK's exit from the European Union coming ever closer, we know that we will soon be dealing with an increased amount of parallel international work. Being outside the Union where co-operation is obliged gives a different dynamic to how we work with other authorities on cases with a global reach. We wish to remain a key member of an international community of competition law enforcers and policy makers and continue the mutually beneficial and co-operative relationships that we have all worked so hard to build in forums such as this one and through organisations such as the ICN, ICPEN and the OECD. The European Commission will obviously remain a key partner on many

cases. I attend many conferences and workshops and never cease to be impressed by the level of understanding, insight and engagement shown by those within our community. This is a valuable asset which we should protect.

Conclusion

As we face a new political environment, to maintain trust in markets it is important that competition authorities generate better and faster outcomes for consumers through our work. We need to be neutral across tools and across institutional boundaries and should have a relentless focus on adding value for consumers, whether through safeguarding or unlocking competition, or through regulatory interventions to protect consumers. Under my leadership of the CMA there will be no zealotry for competition, and we will confidently promote tough regulation where that's the best way to safeguard consumers' interests. Equally, we will vigorously champion the benefits of competition as one of the most powerful forces for ensuring people get a good deal from businesses. And often, we and our regulatory partners will use competition and regulation together to drive the best possible outcomes across the UK economy.

I am grateful to Cleo Alliston for his considerable help with the drafting of this speech.