Speech: Martin Coleman GCR Live speech

Introduction

The global debate about whether competition law and policy are up to meeting the challenges of changing business models and behaviour has several themes:

- Is competition law appropriately addressing how technology, data and new business models are changing the way industries are structured and businesses engage with the marketplace? Some have asked if competition enforcement systems are up to the job of reviewing dynamic markets.
- Is the traditional assessment of consumer welfare, primarily on the basis of allocative efficiency, too narrow? How far should distributional issues be taken into account? In the UK we are increasingly focusing on whether our competition regime, and remedies, take sufficient account of the circumstances of vulnerable consumers.

This debate has moved beyond the competition specialists, to the centre of the political and public policy arena. President Trump is reported to have said that he has heard a lot of people talking about monopoly particularly in relation to large technology companies. When Elizabeth Warren announced her bid for the presidency there was press comment about her concerns over antitrust under-enforcement and her view that the agencies need to be more vigorous in challenging corporate power. On my side of the Atlantic, the Financial Times, in an editorial last month, said Brexit will demand the reworking of British government “Nowhere will this be more important than in competition policy”.

One issue is how far the traditional approach of competition law – Articles 101 and 102 of the EU Treaty; the Sherman Act; the UK Competition Act – is capable of addressing concerns. Whether the tools are there, and they just need to be applied differently or more rigorously, or whether reform is needed to make them work better.

This morning I would like to talk about a tool that is available to us in the UK but in few other jurisdictions – market investigations.

To be clear, it is not my intention to argue that the UK approach is necessarily appropriate for other jurisdictions. Policy needs and priorities differ between countries. What works in one country is not necessarily appropriate in another. My objective rather is to describe the UK system, and give some examples of matters we have dealt with, as a contribution to the debate on competition policy reform which is underway in many countries.

Let me start by making an important distinction, using UK terminology, between market studies and market investigations. A market study is a review of a particular sector of the economy by a competition agency that informs the agency’s wider agenda. It may lead to enforcement action under antitrust laws or to recommendations for reform but the agency has no powers to impose remedies directly as a result of the market study. Under a market

investigation regime, if there is a finding that the market is not working effectively, the agency can take legally-binding measures to improve the competitive structure or process.

While most competition agencies can conduct market studies, for example the European Commission can conduct sector inquiries, I am only aware of the UK, Mexico and Iceland where the authority is empowered to design, implement and enforce forward-looking remedies to address the restraints on competition identified.

There have been some calls to introduce market investigation tools, akin to the UK, elsewhere. One prominent economist has suggested that, to address concerns about the behaviour of technology companies that may not possess market power as traditionally defined, agencies should be allowed to investigate whether there are problems in certain markets, and instruct businesses to undertake actions to ensure the markets remain "vibrantly competitive" (speech by Jorge Padilla). In the USA an eminent competition lawyer, in evidence to the FTC, described UK market inquiries as a 'great tool' that 'perhaps we should consider adopting' (transcript of FTC Hearing #2 on Competition and Consumer Protection in the 21st Century, p. 47-9 and p.120).

Policy

Let me put the UK regime in a policy context. We believe that to be effective in ensuring that competitive markets do their job of boosting productivity, incentivising innovation and low prices and enhancing aggregate consumer welfare, while addressing legitimate concerns about exploitative and unfair behaviour, a suite of tools is needed.

We cannot expect a single mechanism, the prohibitions on anti-competitive agreements and abuses of dominance, important as they are, to deal with all circumstances which could impede the benefits of a competitive market. Behaviour may fall short of an anti-competitive agreement but still be restrictive of competition; unilateral conduct may be distortive or restrictive but not infringe the test for abuse of dominance. It may not be the conduct of specific companies that is the principle problem but rather the way the markets have evolved, the circumstances of consumers or other features.

An advantage of market investigations is that, if there is an adverse finding, one is not imposing a penalty for previous behaviour – there is no suggestion of illegality – and one is not laying down a general rule that will apply to markets of very different characters. The outcome is a tailored forward-looking remedy that applies to the specific circumstances of a particular market with the purpose of making the market work better.

The markets regime allows us to hear from a wide range of stakeholders and often this gives a voice to consumers (and their representatives), whose interests we seek to protect across all our tools, but whose views the adversarial process in competition enforcement may not always be best placed to take account of.

Overview of the regime

So a market investigation is a detailed examination into whether any aspect of a market or markets, be it structural, supplier or customer conduct, or regulation, is preventing, restricting or distorting competition – that is having an adverse effect on competition. We do not use a theoretical benchmark. We often use the term 'a well-functioning market' in the sense of a market without the features causing the adverse effect on competition, rather than to denote an idealised, perfectly competitive market (there is an important difference between market studies and market investigations. A market study can look into anything that may adversely affect either competition or the interests of consumers. But when it comes to market investigations, the CMA must identify and address adverse effects on competition before action can be taken. There is an argument that the scope of market investigations should be aligned with market studies so the CMA could order legally enforceable remedies to address consumer detriment, without having to demonstrate an adverse effect on competition).

We might have to examine realities of consumer behaviour, such as how consumers respond (or do not respond) to market signals. When needed we will assess the dynamic nature of the relevant sector, including the effect of technological change. As well as more conventional economic analysis we may consider complex questions of behavioural economics, accountancy and technology. We often consider the effectiveness of any existing sector regulation and the potential for new regulation.

These are major investigations. They can expose serious failings and lead to the imposition of tough remedies so their implications for consumers and the relevant industry can be profound. Such investigations are therefore high profile and resource intensive for us, and for the parties concerned.

Because of this the decision to start a market investigation is one of the few matters that the legislation explicitly reserves to the CMA board. The board will consider whether a reference is proportionate taking into account the features of the market and their possible impact, the significance of the sector, how far alternative approaches might be available and, if there were to be an adverse finding, the availability of possible remedies.

The inquiries are led by members of the CMA's independent panel that I chair (that is, not CMA staff), usually 4 or 5 people, supported by a CMA staff team. The panel is drawn from a variety of backgrounds: competition law and economics; other professions such as accountancy and people with business and consumer experience. Proper account must be given to fairness of process and rigour of the analysis within a statutory framework.

Markets we have investigated have included:

- retail banking
- supply of gas and electricity
- investment consultancy
- payday lending
- audit services

- airports
- private healthcare

Our most recent investigation was into investment consultancy and fiduciary management – important services for pension scheme trustees helping them to manage over £1.6 trillion of investments with a major influence on pension scheme outcomes, affecting up to half of UK households.

It is vital that competition within these markets works well.

Examples of how the system works

Let me give you a flavour of how the system works by briefly describing aspects of 3 investigations: retail banking; airports and energy supply.

Retail banking

On retail banking we found that personal and small business customers were not responding to variations in price and quality, and the scale of this was significant given the gains from switching that many customers could make. Competition for their business was not effective and the underlying driver was consumer inertia.

This is not a novel issue and not unique to the UK. What is new, is the potential for data and technology to unlock the market. Our remedies included an order to set up Open Banking. This required the nine largest banks to agree and adopt common open standards for Application Programming Interfaces, so customers could share their data securely with other banking service providers, manage multiple accounts through a single app and easily compare products. As of December 2018, there were around 50 of these service providers live in production, and 200 in the approvals pipeline, including some major tech companies. We believe that this has the potential to materially change the banking industry for the benefit of consumers, harnessing the opportunities presented by technology and breaking down traditional barriers.

There are 3 aspects of the regime that the banking inquiry highlights. First, there was no infringement of antitrust prohibitions. The market problems arise on the demand-side as much from any actions by the banks. Second, the Open Banking remedy was complex and could not be easily delivered in a traditional antitrust enforcement case even if there was proof of an infringement. Its implementation, required co-operation and technical oversight. Third, while there is much focus on digitisation being a cause of competition concerns, digitisation also can offer solutions. The Open Banking remedy would not have been possible in the absence of modern technology.

Airports

The Open Banking remedy is only a year old. We have had longer to evaluate the effectiveness of the remedies imposed in another high-profile investigation in 2009. The Competition Commission (the CMA's predecessor) ordered BAA to sell 3 of its airports, after finding that its common

ownership of all the main London airports, and 2 of the main airports in Scotland, precluded competition to the detriment of passengers. An order of divestiture is a less frequent outcome of a market investigation.

Three years on from the sale of the last of the airports we instructed an independent consultant to conduct an evaluation of the effectiveness of this robust remedy. It showed that all 3 airports grew passenger numbers above levels observed at comparable airports. Under new owners, the airports sought to attract airlines and passengers outside their traditional target market and the evidence indicated that the quantifiable benefits associated with the remedies would total around £870 million by 2020.

Energy supply

Because the issues that we consider in market investigations often have a high public profile there can be significant public debate about our remedy package. This sometimes crystallises around whether positive competitive outcomes are best achieved through measures that change the structure of markets; remedies which seek to change supplier and customer behaviour short of direct price intervention, or through the imposition of price caps.

This was highlighted by our energy market investigation when we decided not to impose a wide price cap on standard tariffs for direct debit customers – the default tariffs for customers who have not opted for a cheaper non-standard deal. We found that there would be material and persistent savings to a significant number of customers if there was more switching to non-standard tariffs. That these opportunities go unexploited was evidence of weak customer engagement. Vulnerable consumers – people with low incomes, low qualifications, living in rented accommodation or above 65 – in particular were not benefitting from better deals.

We found that suppliers gained a position of unilateral market power concerning their inactive customer base and had the ability to exploit this by pricing materially above a level that can be justified by the costs incurred in operating an efficient business.

Our principal remedy were measures to enhance customer engagement and make it easier for competing suppliers to target non-switchers. We considered whether to impose a wide price cap, at least until such measures had an opportunity to come into effect, but, with the exception of the most vulnerable customers who were on prepayment meters – that is who paid for energy in advance of consuming it – we decided that attempting to control outcomes for the substantial majority of customers would – even during a transitional period – risk undermining the competitive process, likely resulting in worse outcomes for customers in the long run.

The UK government took a different view. It agreed with the minority opinion of the CMA inquiry panel that a temporary cap on prices would provide protection to consumers while the remedies are implemented and the conditions for effective competition are established. The government legislated to require the energy regulator, Ofgem, to impose a limit on the price a supplier can charge for customers on prepayment and standard tariffs. The

reason for this is concisely set out on the Ofgem website: “Ofgem and the UK government have introduced price caps so if you are less active in the market you don’t get left behind or pay an unfair price for your energy.”

This illustrates differing approaches. On the one hand, the traditional view of competition agencies to be wary about imposing direct price controls for fear of undermining longer-term measures that make markets more responsive while, on the other hand, a proper policy concern about fairness and speed of action, particularly when dealing with vulnerable consumers.

Conclusion

There are therefore a range of instruments in our toolbox and at the market study stage we can take a holistic view as to whether there is a problem and the best tool to tackle it: antitrust enforcement; consumer law or a market investigation.

The antitrust prohibitions are essential to deter and punish, and to compensate those who suffer loss. Market investigations serve a different function. They allow for deeper understanding of the existence and extent of market problems and possible solutions. They protect consumers by opening the possibility of remedies that change market structures, adjust supplier behaviour or influence customer decision-making.

They also serve another purpose. As competition agencies there is always the danger of becoming detached from the world in which consumers, the ultimate beneficiaries of effective competition enforcement, operate. We use language, and apply concepts, that people can find it hard to relate to. We operate in a procedural framework which can sometimes make wider engagement difficult. This is understandable when antitrust enforcement decisions can have significant implications for a businesses’ rights and lead to financial penalties and actions for damages.

The market investigation process takes us directly to the frontline of interaction between the competition regime, consumers, businesses and other stakeholders. It does not obviate the need for due process and proper analysis, but the width and depth of the investigation facilitates broader interaction between the agency and those who operate in the market. We believe that this is good for us as an authority and helps address the concern, that some have voiced, about the risk of disconnect between competition enforcers and the public whose interests we serve.