Speech: UK Competition Law enforcement: the post-Brexit future

It was around the beginning of this year that I was first invited to speak at this conference about the impact of Brexit on competition law. Since then, there have been two relevant, and important, developments.

What's happening on Brexit?

The first is that, at the start of the year, we had been expecting that, by June, the United Kingdom would have left the EU. As some of you may have noticed, we haven't. We were expecting that this conference would be held in the post-Brexit future. It isn't.

We had envisaged that the position by now would have been clear. Either we would have been in an implementation period, to be followed by a 'future economic partnership' between the UK and the EU, with perhaps the 'backstop' taking effect in-between. Or we would have left the EU without a deal, and with no implementation period, the UK competition authorities and courts taking immediate responsibility for cases that would previously have been subject to EU jurisdiction. Either way, we would have been in a position, by now, to describe the new post-Brexit competition law regime. We would have known where we stood.

Instead, we have no more certainty than we had at the beginning of the year. We don't know whether the withdrawal agreement will be passed, whether there will be a future economic partnership, or a backstop, or perhaps a no-deal Brexit. Indeed, some say that it isn't certain whether there will be any Brexit at all.

The CMA's role post-Brexit

In the circumstances, on Brexit there is not much to add to what we have said before. Post-Brexit, the Competition and Markets Authority – for which I work – can be expected to take responsibility for a swathe of competition cases affecting the UK that previously would have been reserved to the European Commission – under merger control rules, and under the prohibitions on anti-competitive agreements (including cartels) and abuses of a dominant market position. These are typically the larger and more complex cases, having cross-border effects. It is the Government's intention that the CMA should also take responsibility for administering a new UK national state aid regime. All this remains the intention for the post-Brexit era – but as to when this will happen, and on exactly what terms, the position is, as at today, uncertain. Tomorrow, of course, all might become much clearer.

Issues to be resolved

The fundamental questions about the UK competition law system post-Brexit also remain the same. To what extent, under the various scenarios, will there

be the possibility for UK competition law decisions, judgments, rules and procedures to diverge from those under EU case law? As many of you will know, a statutory instrument has been adopted which provides for a new section 60A of the Competition Act requiring the CMA, and the sector regulators and the courts (including the Competition Appeal Tribunal), to apply the UK competition prohibitions consistently with pre-Brexit EU case law, subject to a number of exceptions that give the flexibility to diverge in certain specified circumstances – for example, where there are differences between UK and EU markets, or where there have been developments in forms of economic activity since the relevant EU case, or in the light of 'generally accepted principles of competition analysis'. In practice, this new section 60A would only apply in the event of a 'no-deal' Brexit: if the UK leaves with a deal, the question will not arise during the implementation period, and once the implementation period is over, the degree of permitted divergence might well depend on the terms of a future UK/EU economic partnership.

So, too, will the question of the extent of any future cooperation and evidence-sharing between the UK and the competition authorities in the EU – both the European Commission and the national competition authorities of Member States. Pre-Brexit, these have been subject to EU Regulation 1/2003 and the practices of the European Competition Network. The position post-Brexit remains to be decided and may well be subject to the terms of any future economic partnership.

The CMA's preparedness for Brexit

But, amidst this uncertainty, one thing is without doubt. The CMA was prepared and ready to take on its new expanded post-Brexit functions as at 29 March this year, when the UK was expected to leave the EU – and might have left without a deal and without an implementation period, in which case we would have acquired those new expanded functions with immediate effect, subject to all the necessary legal instruments being enacted. And the CMA remains ready to take on those new expanded functions. To get to this position, the CMA has spent the period since the referendum in planning for its expanded role, recruiting additional staff, setting up systems, drafting guidance and assisting the Government in the development of policy and legislation.

'Business as usual' at the CMA while preparing

Naturally, all this preparatory work for Brexit has involved considerable effort, and some diversion of staff time and resources.

But I am pleased to say that it has not deflected us from our 'day job' applying the UK's competition and consumer protection laws. On the contrary, to the best of our ability, we have managed to remain focused on delivering high-quality case work that makes a difference in people's everyday lives, and, despite the inevitable diversion of resources, we succeeded in meeting many of our ambitious objectives.

Notwithstanding Brexit preparations, we have scrutinised some fairly significant mergers – as some of you may have seen.

We have also been using our 'markets' powers to examine some pretty important sectors – sectors that are critical to our country's business life and economy, such as in our market study into audit services, and sectors that affect all of us as ordinary citizens, including the most vulnerable – such as in our current market investigation into funeral services.

Our competition law enforcement casework

And in the area for which I am responsible – the enforcement of the competition law prohibitions on anti-competitive agreements, including cartels, and abuses of a dominant market position – we were able, notwithstanding Brexit preparations, to launch 8 new Competition Act investigations in the year to March 2019, only slightly down on the 10 we had launched in each of the 2 previous years. Less impressively, we issued only 1 infringement decision in the year, with £1.6 million of fines – although that was followed in April by another infringement decision and £7 million of fines – but that primarily reflects the fact that in the previous couple of years we had launched an ambitious programme of significant investigations into the pharmaceutical sector, which require very thorough and detailed investigation, and on which we are steadily making progress – with results to be seen.

And although those have been the only recent infringement decisions, in February we also issued a formal 'no grounds for action' decision, in relation to a rebate scheme in the pharmaceutical sector. This was a second example of our determination that, where we don't find that there is sufficient evidence from our investigations to support an infringement decision, we won't simply bury the case by closing it on grounds of 'administrative priority' if it is sufficiently advanced – but, instead, we will issue a properly reasoned decision that can provide useful guidance to businesses on what we consider is, and is not, permitted.

We have also, this past year, successfully defended a number of our decisions on appeal – as well as being unsuccessful in others. Most notably, in February this year, the Court of Appeal upheld our decision (which had been endorsed by the Competition Appeal Tribunal) on the information exchange aspect of the steel water tanks case. This sends a clear signal to any company that any anti-competitive exchange of pricing information with its competitors, even if it occurs at only one meeting, and even if the company refrains from participating in actual price-fixing, can constitute an infringement of competition law and can incur fines.

Personal responsibility – disqualification of directors

Perhaps more significantly, in the field of competition law enforcement, we have – as we said we would – ramped up our activity in seeking the disqualification of directors of companies that have been found to be in breach of competition law. This is a power that was conferred on the UK competition authorities back in 2002, but was essentially unused until December 2016, when we secured our first director disqualification. As at today, we have now secured 9 director disqualifications, in relation to 4 different infringement cases, and there are more in the pipeline.

We are determined to protect the public from individuals who, in their business activities, are involved in anti-competitive practices – and to send a clear message about the personal responsibility that business people have for ensuring compliance with competition laws. This is in addition to our powers to investigate, and prosecute, individuals under the criminal offence for cartels.

As I have often said – but will not shy from repeating – the purpose of all this enforcement activity is not to generate impressive statistics, but to protect millions of our fellow citizens up and down the country – all of us – from practices that restrict or frustrate competition, and so deprive us of the important benefits that vigorous competition brings: the downward pressure on prices, the incentive on businesses to improve quality and service standards and to innovate, and the spurs to improve efficiency and productivity, which in turn ultimately assists economic growth and job creation. We do this in our enforcement cases in order to put a stop to wrongdoing which we uncover, and to deter others from engaging in similar wrongdoing.

It is our public duty to enforce competition law to secure these benefits for consumers, and as the past year has shown – even in the midst of having to prepare for Brexit – we will not flinch from our determination to fulfil that duty.

Our consumer protection law casework

I should add that – although not strictly relevant to a conference such as this, which relates to UK competition law – we have also been active, and successful, in our function of enforcing consumer protection law, which is also within my area of responsibility.

We have protected consumers from abuses in the 'secondary' sale of tickets for concerts, plays and sporting events – including securing a court order against the online platform viagogo, the first time we have launched civil court proceedings to enforce the rules.

We have secured formal commitments from operators of online hotel booking sites, such as Expedia and Booking.com, to ensure greater transparency on those sites so that consumers are not misled.

We have obtained compensation for residents of care homes for the elderly in relation to fees that were unlawfully imposed.

We have launched investigations into practices which make it difficult for consumers to cancel or switch subscriptions – in the supply of anti-virus software and in online video games – making it harder to shop around, and so perhaps resulting in the 'loyalty premiums' (higher prices for non-switchers) that has been the subject of widespread concern, including a 'supercomplaint' to us made by Citizens Advice.

And we continue to take action to protect ordinary consumers, including the most vulnerable, from unlawful practices that can cause them great harm.

The CMA's reform proposals

I said at the beginning that there have been two relevant, and important, developments since the start of this year when I was first invited to speak here.

The first, as I said, was the fact that the UK did not leave the EU on the expected date.

The second came in February, when the CMA's new chairman, Andrew Tyrie, wrote to the Secretary of State for Business, Energy and Industrial Strategy – who is the UK minister responsible for competition policy – setting out proposals to reform the UK's competition and consumer protection system. This was in response to a request that the Secretary of State had made several months before. The aim is to make an informed contribution, grounded in the CMA's experience of the system, to the Government's formulation of policy in this area.

The thinking behind our reform proposals is not that system has failed and needs to be uprooted. Rather, it is that the system needs to be adapted to meet new challenges that are fundamentally changing the environment in which we operate.

One of these challenges is the accelerating digitalisation of the economy. This has brought many benefits to consumers and the economy, including through the increased competitive pressures on businesses arising from, for example, online sales channels, price comparison websites and online reviews. But it also creates potential new forms of consumer detriment, and raises new questions about competition law and policy. Do major online platforms give rise to harmful market power? And does their control of data mean that digital markets are less contestable than once thought? In retailing, what is the proper balance between, on the one hand, facilitating new competition from online commerce, and, on the other, preventing 'free-riding' on bricks-and-mortar suppliers that removes incentives for investment in quality and service for consumers? Are the terms and conditions of digital comparison tools, such as price comparison websites, unnecessarily or harmfully restrictive? Do pricing algorithms facilitate harmful price collusion?

And over and above these, and other, specific issues is the plain reality that these are fast-moving markets. Is the system nimble enough to prevent consumer harms before it's too late?

Another challenge underlying our reform proposals is the concern, felt by many, that the UK's competition and consumer protection system is currently too weak, and too cumbersome and slow, to tackle consumer harms – so that many practices that harm ordinary consumers, including the most vulnerable, go uninvestigated, unaddressed, unpunished and undeterred. This is part of a wider public unease, particularly pronounced since the financial crisis a decade ago, that the economic system is not working properly for people.

These are not concerns unique to the UK. They are faced by competition authorities and policymakers across the world – as many of you will have seen

in a special report on these competition issues which was published in The Economist magazine last November. In the United States, for example, the Federal Trade Commission has recently been conducting a series of public hearings on the future of competition and consumer protection.

These are global questions, and it would be odd if the UK were not to face up to them. In the CMA we strongly believe that it would be irresponsible to duck them.

Although this is a worldwide issue, there is one aspect that is specific to the UK – and that brings us back to Brexit. If the system as a whole – the CMA, the economic regulators, the courts – is to be able to cope with the much larger and more complex cases that will come our way in a post-Brexit world, then making the system nimbler, swifter and more effective becomes absolutely imperative.

Some of you will be familiar with the main elements of the CMA's reform proposals, set out in our chairman's letter to the Secretary of State. They have been published, and are available for all to see on our website.

Let me mention some of the most important proposals. We would like market investigations to be able to address a range of adverse effects on consumers, and not be limited to adverse effects on competition – that would bring the legal test for market investigations into line with what already applies for market studies. In merger control, we would like there to be a mandatory notification system for larger cross-border transactions, such as those for which the CMA will take responsibility post-Brexit. We want to see the consumer protection law enforcement regime strengthened, with the CMA empowered to declare certain practices illegal and to order them to cease – rather than having to go to court for this – and to impose fines for illegal practices and, in cases of urgency, interim measures; that would put our consumer protection law enforcement powers on a consistent footing with our competition law enforcement powers under the Competition Act.

I would like to focus now on the proposals that are relevant to the aspect of CMA competition activity for which I have responsibility – competition law enforcement; that is, the application of the prohibitions on anti-competitive agreements, including cartels, and on the abuse of a dominant market position. Here no radical overhaul is proposed; we think that the basic framework is right.

But we are proposing a series of specific reforms which, we believe, will improve enforcement – making it stronger, swifter, more effective and fairer in tackling, and deterring, illegal anti-competitive practices – and so enabling the system to be better at protecting our fellow citizens from the harms that such anti-competitive practices can inflict.

Let me highlight some of these.

First, we propose that the entire system be underpinned by a new statutory duty to protect consumers. This statutory duty would not apply only to competition law enforcement, but to all aspects of the competition and

consumer protection system, including market studies and market investigations, consumer protection law enforcement and so on. The duty would be imposed on the CMA, but also on the other institutions in the system applying competition and consumer protection laws: the sector regulators where they enforce these laws, and the courts, including for example the High Court and the Competition Appeal Tribunal.

Some people say that there is no need for this new duty, because the purpose of competition law and consumer protection law is, in any case, to protect consumers. But we think it will give a strong focus, in our activities, on the interest of consumers whenever different considerations need to be balanced. The application of laws and procedures in this area is necessarily often complex. For good reasons, the analysis – the scrutiny of evidence, and the legal and economic argumentation – is inevitably detailed and technical. Procedures, designed to ensure natural justice and to protect the rights of parties – as they should be – can sometimes makes the process quite complex and involved. Some commentators have queried the reference in our chairman's letter to 'Byzantine procedural and technical complexity', but if the public sees the way some of these important cases, designed to tackle real harms to people, meander through the system, it is hard to see how they could take any other view.

It is absolutely right and proper that there should be rigorous analysis and procedural fairness – how else can the right decisions emerge? – but these legitimate goals should not be given effect in such a way that the system and the institutions that apply it are overwhelmed, or that we lose sight of the central purpose of the law in this area, which is to protect consumers. The purpose of the new statutory duty, as we conceive it, is to help us ensure we do not lose sight of that central purpose. We believe that it will assist us all in this respect.

Second, as a further discipline on us at the CMA, we propose that we be subject to another statutory duty – to act as swiftly as possible, consistently with rigour and procedural fairness.

A third proposal arises from the obvious fact that, in order that we can apply the law and tackle consumer harms, we need to be aware of possible infringements. One source of this is 'whistleblowers', often from inside the businesses concerned, who take personal risks – sometimes considerable risks – in drawing wrongdoing to our attention. At present, we compensate whistleblowers for providing us with information about cartel activity – but this is subject to a £100,000 limit. We believe that we might be able to uncover more wrongdoing if we give people a greater incentive to take the risk of whistleblowing, and we propose setting the maximum compensation at a much higher level.

Fourth, once we have launched an investigation, we need to have access to relevant information. Without all the relevant information, we will not have the evidence base to enable us to reach the right conclusion. Although we are empowered to require businesses to produce information for the purposes for an investigation, the sanctions for non-compliance with our statutory requests for information are significantly weaker than those of other

competition authorities in Europe. So, we would like the current cap – of £30,000 for a fixed fine, and £15,000 for each day of non-compliance – to be substantially raised.

Fifth, the information we obtain needs to be accurate. Again, this is essential for a robust evidence base, and to help us reach the right decisions. At present, the only sanctions we have against the provision to us of false or misleading information involves the full weight of criminal procedures. We would like this to be combined with a more flexible instrument, by way of civil (or administrative) fines on those who provide false or misleading information.

Sixth, I spoke earlier about the importance of personal responsibility, as well as corporate liability, in competition law enforcement. It is human nature that a person will be more concerned about compliance if his or her own personal interests are at stake, as well as those of the company. With this in mind, we have suggested that the Government considered the possibility that, in addition to existing personal liabilities, the CMA could be given the power to impose civil fines directly on individuals involved in serious competition law infringements, such as price-fixing, bid-rigging, market-sharing, resale price maintenance, and serious abuses of a dominant position. Other competition authorities, such as those in Germany and the Netherlands, have such powers.

Let me turn now to the aspect of our proposals which has generated perhaps most concerns. It is what we say about the system for appeals against our competition enforcement decisions. Ultimately this is a matter for the Government and Parliament to decide, but I would like to spend a little time explain the thinking behind our suggestions in this area.

We have approached this question as we have approached all our reform proposals – by asking whether, as things stand now, the appeal system enables harms to consumers to be tackled as effectively or as swiftly as the public, and the legislature, expect – and indeed as was intended when the statutory regime was designed.

Let me be clear at the outset: Our thinking is not driven by a desire to weaken judicial oversight over the CMA, and we have no interest in that. It is, rather, about returning the appeal system to what was originally intended when the Competition Appeal Tribunal was set up: a ‘tightly controlled procedural regime’, which avoids ‘hypertrophic growth of documentation and evidence, and inordinate duration of proceedings’. [See Charles Dhanowa, written evidence to the House of Lords Select Committee on Constitution’s inquiry into ‘the regulatory state’, 26 June 2003.]

A central element of our proposals on appeals against our competition enforcement decisions is that the standard of appeal should no longer be ‘full merits’ – that is, the Competition Appeal Tribunal reviewing all aspects of the decision, and assessing whether it considers the CMA has got it right not just legally and procedurally, but also in its factual and economic assessment. We are proposing that this should change either to a judicial review standard, or to a new standard of review setting out

specified grounds of permissible appeal.

This sits alongside proposals to tackle features that we believe unnecessarily slow down the appeals process – that there should be less reliance on oral testimony allowing for shorter oral hearings, and also that there should be greater restrictions on the admissibility of evidence that the party under investigation had not previously given the CMA in advance of the CMA making its final decision on a case.

It has been put to me that our proposals about reforming the appeals process are a case of the CMA being 'sore losers'. But the fact is, as I said earlier, we have a good record of winning cases on appeal. We don't win every case, and we wouldn't expect to. No competition authority ever does. But-while there may be cases where we disagree legally with the Tribunal's judgment – we really don't have a problem with the overall proportion of cases that we have won and lost on appeal.

In any event, the 'sore losers' jibe can't explain why similar reforms of the appeals process have been proposed by others, such as the recent report on digital competition by a panel chaired by Professor Jason Furman.

A more serious concern that has been expressed is that, like lots of law enforcement agencies, we are impatient with legal constraints and due process that stand in the way of our 'getting results'. I think that this is a challenge that we, like any enforcement body, always need to take heed of, and we need to be careful that we do not succumb to the temptation of disregarding legal constraints and due process.

But, in all candour, I do not think that is the case here.

Ever since I took on the role of CMA Executive Director for Enforcement, I have emphasised the need for the CMA to abide by the highest standards of procedural fairness and analytical rigour in our casework. In the first speech I gave setting out my thoughts on how we should approach competition law enforcement, I said that:

> We genuinely welcome the discipline and accountability that the [Competition Appeal] Tribunal's rigorous and effective oversight brings to our work.

and that this is because we need to get our decisions right. We want to combat, and deter, anti-competitive practices, but we do not want to overreach, which could have a counterproductive 'chilling' effect on legitimate business activity.

That remains very much my view, and that of the CMA and its Board. I would add that I have the highest regard for the professionalism, integrity, dedication and rigour of the Tribunal and of the people who work in it and lead it. That remains true even on those occasions where we might disagree with a particular ruling that the Tribunal has made.

But two decades after the current system was established, it is reasonable to assess whether it is working as intended – or whether some of the ways it has developed have led to unintended consequences.

I would contend that there has been a divergence from the original intention in two important ways.

First, the appeal process is slower than was intended. Oral evidence is used more extensively, new evidence is admitted. It was originally envisaged that the appeal process would be 'based on the exchange of written submissions… and on a short oral stage', with oral hearings taking no more than about one or two days. [See statements from the Tribunal's first President, Sir Christopher Bellamy, and its first (and current) Registrar Charles Dhanowa, made in 2013 and cited in footnote 56 of Lord Tyrie's letter to the Secretary of State of Business, Energy & Industrial Strategy, dated 5 February 2019.]

Current practice has moved a long way from this, with two recent Competition Act appeals – pay-for-delay and phenytoin – each involving hearings of about four weeks.

Why does this matter? I have said that one of the concerns about the system that our reforms are trying to address is that it moves too slowly to address harms caused to consumers. The detriments endured by consumers, and the related harms to our economy, endure for far too long. If the outcome of cases remains uncertain and unresolved for too long, with penalties and remedies in doubt, and compensation delayed, that is unfair and, moreover, weakens public confidence in the system. This would matter in any case, but it particularly matters in the context of fast-moving digital markets.

The system needs to move more nimbly and swiftly. All parts of the system. That is why we're proposing that we at the CMA should be subject to a new duty to act with expedition, as I said earlier. And for the same reason, we also think that steps need to be taken to speed up the Tribunal's process: less reliance on oral testimony, less admission of new evidence – as originally intended.

Secondly, the proposal to move away from a 'full merits' review, to a more defined review standard, is aimed at enhancing the ability of the system to address consumer harm effectively. This is not a question of seeking weak judicial oversight. It is more about putting the UK in line with international best practice. The National Audit Office, in its most recent full report into the UK's competition regime, in February 2016, noted that many lawyers and commentators regard the UK as 'the best jurisdiction in the world to defend a competition case'.

Which is a way of saying that the UK is seen as less able than other jurisdictions to protect consumers from anti-competitive practices. Plainly, that is not an acceptable place for the UK to be. It cannot have been what anyone intended our competition regime to become.

To repeat. We have no wish to weaken the appeal system. We want to bring it closer to its original intent.

And that is the approach that underlies our reform programme as a whole.

A balanced package of measures that builds on the existing system, but calls for it to be adapted to make it fit for the new world we are entering – post-financial crisis, post-digitalisation and post-Brexit.