

The Future of Competition Enforcement in the UK

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November 2018

The topic of this opening address is rather an ambitious one – I don't have a crystal ball so cannot give you chapter and verse on the future for competition enforcement in the UK – but there are some predictions I am reasonably confident about and I will share those with you today. You might be expecting me to spend most of my timeslot focusing on Brexit – it is difficult to speak about the future of anything right now without reflecting on the impact of Brexit and that is certainly true for competition enforcement. There are, however, other developments that will affect the future of competition enforcement in the UK, regardless of Brexit, so I also plan to speak about some of those this morning.

The journey to date

But before we turn to the future, I want to say a bit about the journey of the CMA to date. The CMA is now 4 and a half years old and, since its creation from the Office of Fair Trading and the Competition Commission, has established a good track record on enforcement, making progress in dealing with some of the concerns that were expressed about the regime in the past. That does not mean that we have overcome all the challenges, as there are many we are still working on, but, as recognised by Global Competition Review and others, the CMA is on an upward trajectory and we are committed to continuing that trend.

One of the key concerns expressed in the past about our Competition Act case work was the speed of cases, with some OFT cases taking several years. It was also felt that there were not enough investigations and numbers of infringement decisions were too low.

In terms of case duration, if you take all the Competition Act infringement decisions issued by the CMA since April 2014, the average duration is 21 months. This compares with an average over the lifetime of the OFT of 40 months. That's a pretty positive statistic for the CMA but, to be fair to the OFT, the declining duration of cases resulting in a finding of infringement was a trend that started in the OFT - in its last two years, the average duration of OFT infringement cases was 24 months. Having worked in both organisations, I think it is fair to say that the CMA has built strongly upon the OFT legacy to develop and embed its investigative techniques to try to ensure that cases maintain momentum while also ensuring fairness and rigour. This includes having what we call a stop/go decision usually about six months after case opening where we review the evidence collected to date to see if it looks like an enforcement case or if it should be closed. An example of a case closing at this point is [our investigation](#) into a suspected abuse of a dominant position by Unilever plc in the supply of single-wrapped impulse ice cream in the UK. This case was closed on the basis that there were no grounds for action after the CMA had assessed whether

the promotional deals offered by Unilever were constructed in such a way that they were likely to produce an exclusionary effect to the detriment of competitors. The CMA concluded that Unilever's were unlikely to have had an exclusionary effect. The investigation was purposely structured so as to be able to reach a view on this point relatively early on. Having reached this conclusion, we were able to close the case, produce a short decision explaining the reasons for our view and then moving the team on to more promising cases.

Turning to case numbers, we have also made good progress on the number of Competition Act cases we are pursuing at any one time. In the 5 years April 2010 to March 2015, we (or our predecessor the Office of Fair Trading) opened an average of around 7 competition enforcement cases a year. More recently, that level of activity has increased, with case openings rising to 8 in year to March 2016, 10 in the following year and 10 again in the year to March 2018. This rate of case openings has slowed down a little this year given the scale and complexity of the cases we are still investigating – most of those cases we opened last year are still ongoing and we're having to use some resources to prepare for Brexit. So far this year, we have opened 7 new cases, five of which are in a single sector and being dealt with by a single case team. Despite this slight slowdown in case openings, the overall number of open Competition Act cases – currently 22 - is still at a high level compared with previous years.

Another area where the CMA has made significant progress is that of Competition Disqualification Orders. This is where an individual is disqualified from being a director of any company in the UK, for a period of up to 15 years, as a result of their involvement in a competition law infringement. The UK competition authorities were given this power in 2003 but it was never used by the OFT. The CMA [secured](#) its first ever disqualification of a director in December 2016 when an individual involved in [fixing prices of posters sold online](#) gave a disqualification undertaking not to act as a director for the next 5 years. Since then, in April this year, we [secured](#) the disqualification of two directors involved in an [estate agency cartel](#), for 3 and 3 and a half years. The CMA is sending a clear message with these disqualifications that directors and managers may be held personally liable if their business breaches competition law, in addition to their company being corporately liable to fines and potentially damages. These are the first disqualification undertakings, but we do not expect them to be the last. It is our intention to continue to use our powers in this regards and to actively consider director disqualification orders in appropriate cases going forwards.

The reason all of this matters is that when businesses compete fairly this puts downward pressure on prices and is a spur to higher quality and innovation in goods and services – but these benefits are jeopardised when competition is weakened by anti-competitive agreements and practices. By issuing infringement decisions, imposing fines and disqualifying directors, the CMA not only directly punishes those who have engaged in harmful anticompetitive practices but also raises awareness of the consequences of getting caught, which drives compliance among other businesses bringing further benefits to ordinary consumers.

Raising awareness of the law

As well as the 'stick' of decisions, fines and disqualification orders to drive deterrence, the CMA is also committed to raising awareness of competition law. We know that most businesses want to comply with the law and we want to help them to do so. One way we do this is by undertaking compliance work on the back of our infringement decisions. We often talk about an 'end-to-end' approach to cases which means it's not the end of the case when we issue an infringement decision. We don't completely disband the case team the day after we've issued the decision, but we use them, along with our specialist communications team, to develop targeted compliance messages for the industry concerned, explaining the infringement we have found and communicating to businesses how they can ensure they do not break the law. This often involves speaking at trade association and other industry events and engaging in direct discussion with businesses.

Follow up compliance is particularly important in markets where we have prioritised an investigation because we suspect the conduct is widespread within a sector as was the case with our investigations into resale price maintenance in the [bathroom fittings](#), [catering equipment](#) and [lighting sectors](#). In all those cases, we sent several warning letters to other suppliers and also engaged with trade associations in the sector to highlight the decision and the consequences of breaking the law. [Research](#) conducted by DotEcon for the CMA suggests that this compliance activity is working to raise awareness of competition law in the relevant sectors. DotEcon carried out a survey in sectors where the CMA had issued infringement decisions and found a clear link between CMA/OFT intervention and greater levels of understanding of the law. The evidence also suggests that awareness of cases pursued by the CMA/OFT changes businesses' perception of being caught and prosecuted, ultimately deterring infringing behaviour by others. Raising awareness of competition law remains a priority for the CMA because we know that businesses awareness is worryingly low. Our [latest research](#), based on surveying 1200 businesses, shows that less than a quarter of businesses claimed they were very or fairly familiar with competition law, and 16% had never heard of competition law. We are continually reviewing how we get our messages across and recently launched a new [cartels awareness campaign](#) targeting industries including construction, manufacturing, recruitment, estate agents and property management and maintenance. These are sectors identified as particularly susceptible to cartels. Previous similar campaigns have driven a 30% rise in the number of tip-offs to the CMA's cartels hotline and we hope we will have a similar impact with our latest campaign.

This type of compliance work is particularly important with Brexit which is creating a significant increase in regulatory and compliance work for businesses, potentially crowding out competition and other compliance messages and activities.

Other parts of the story – consumer protection, markets and mergers

The focus of this session is the CMA's competition enforcement work but that is only a part of the story as the CMA's remit also includes enforcement of consumer protection laws and our markets and mergers work.

Enforcement of consumer protection laws is a very important part of what we do and is critical for improving the experience of consumers in their everyday interactions with business. Current work in this area includes looking at [product endorsements](#) made by celebrities on social media sites, where the fact that these are paid advertising is often not disclosed to the users of the site, and considering the way [hotel online booking sites](#) present their results. As a result of recent work on the back of our [care homes market study](#) the CMA [secured](#) more than £2 million in compensation for residents of a major care homes group as part of [an investigation](#) into compulsory 'upfront fees'. We are also [investigating](#) misleading practices in the 'secondary' online selling of tickets for concerts, and sports events where we have for the first time [issued court proceedings](#) against a business - in this case, the secondary ticketing website viagogo. Court proceedings have not been necessary in previous cases because the businesses involved have voluntarily given legally binding undertakings that they will change their behaviour. Taking this action against viagogo is an important step as we want businesses to be clear that we will use the full power of the law where necessary to change behaviour which we consider is harming the interests of consumers.

Another significant part of the CMA's work is reviewing mergers to ensure they will not substantially lessen competition and we have been very busy in this area this year considering mergers as diverse as [Sky/Fox](#), [JLA/Washstation](#) (involving university laundries) and [SSE/Npower](#). We are currently in the midst of the probe into the proposed [Sainsbury's/Asda](#) merger which is generating a huge amount of interest in the CMA because the outcome really matters to consumers.

Finally, we have our markets work, where we are able to look at how a whole market is working and not just focus on specific businesses as we do elsewhere. Our current inquiries include investment consultants, funerals and the audit market and we are also working on a response to a [super-complaint](#) from Citizens Advice about the loyalty penalty, whereby customers who don't switch suppliers across a range of services end up paying a significantly higher price than those who move – there are concerns that the customers who lose out most from this behaviour are vulnerable consumers who are less likely to switch providers.

Measuring the difference we make

As you can see, the CMA is involved in a diverse set of markets affecting millions of households and businesses across the UK. The CMA's interventions can make a real difference to people's everyday lives bringing about significant benefits for consumers.

One way of measuring our success is to consider how we match up to the Government's ambitious target of securing £10 of measurable consumer benefit for every £1 of taxpayers' money spent on our work. For the period 2015 to 2018 the expected direct financial benefit to consumers from the CMA's work was £3.3 billion. The ratio of direct benefits to cost was 17 to 1. The largest project contributing to this year's estimates was the care homes market study, where we made recommendations to government which we expect to have an enduring effect on the care home industry. We have exceeded the 10:1 ratio in every year since the CMA was created. These figures in fact underestimate our impact because they count only the direct benefit of our work in a particular case and do not include the wider

deterrent effect that comes from our interventions. When we issue an infringement decision and a penalty, other businesses, especially those in the same sector, become aware of the fine imposed and they are reminded to check their competition law compliance, which brings further benefits to consumers. Similarly, when businesses see problematic mergers being blocked, it may deter them from entering into similar arrangements themselves.

So, the CMA has achieved a lot in its first 4 and a half years and we are proud of those achievements. This does not mean for a moment that we are complacent and consider we have overcome all the challenges, but we believe we are well placed to tackle those that remain, including Brexit.

What lies ahead?

So, what are the challenges we face in our competition enforcement work? I will come to Brexit shortly, but I want to set out some other challenges that exist regardless of Brexit.

More legal challenge

The first challenge is that because we are running more cases the CMA faces more legal challenges to its work. That includes appeals to our infringement decisions and fines but also procedural challenges to the way we conduct our cases. Four of the CMA's infringement findings have been subject to appeals and in each case we have not yet reached the end of the process. This means the CMA has to be prepared to commit resources to a case well beyond any final infringement finding and be resilient in the face of appeals. In the last year, we have also received the first ever challenge to a warrant for carrying out a dawn raid as well as various challenges to our Procedural Officer around legal representation at witness interviews. One of these decisions has recently been published clarifying that the attendance of legal advisers of an undertaking at an interview held under section 26A of the Competition Act is not a "significant procedural issue" and therefore not within the Procedural Officer's remit. Such challenges are likely to continue to grow as we take on larger and more complex cases following Brexit.

Longer case duration

I also want to return to the issue of case duration. I have presented some positive statistics on the CMA's progress in this area and we are proud of that achievement. However, if you take a closer look at the numbers, it is clear that some of that progress is driven by cases which are settled, that is, the parties admit they have broken the law and agree to a streamlined procedure. Settlements are a good thing – if parties want to settle it usually means the CMA has uncovered compelling evidence of an infringement – and settlement allows us to conclude the case more quickly and move the case team on to other things. However, more complex contested cases, and especially those with many parties, can take significantly

longer to resolve and the CMA would like to find ways to shorten the duration of these cases too.

One factor which contributes to longer case duration is the quantity of documentation that needs to be reviewed in order to identify relevant evidence -sometimes hundreds of thousands of documents need to be sifted. At the other end of the process, if we identify a large quantity of relevant material, then giving the businesses we're investigating 'access to our file' – as we are required to do to ensure parties' rights of defence – becomes a hugely time-consuming process. Every document has to be reviewed for confidentiality and redacted as necessary. This also involves parties in significant work identifying confidential material.

If we could find ways to complete evidence review and access to file more quickly, we could make real progress on reducing the time taken in complex investigations. There are no silver bullets here, but we have recently started to explore the use of predictive coding or computer assisted review to help us with identifying relevant evidence. This sounds like we're letting a computer do all the work but all it really means is taking a more sophisticated approach to searching than the standard approach of simply plugging in search terms. Rather, predictive coding involves a human being identifying a sub-set of relevant documents and then iteratively using coding to try to teach a computer to identify similar documents in the main population. We are at an early stage of using such techniques, but I would not be surprised if we used them more regularly over the next few years hopefully allowing us to speed up the evidence review part of our investigations.

With access to the file, it is less easy to identify where we can streamline the process. We have set up a specialist team to assist with redacting documents for confidentiality and preparing the file for disclosure trying to ensure we follow best practice, and we are continually reviewing our processes in light of experience but there are no easy answers. One step we have taken is to review our procedures guidance and we will shortly be publishing updated guidance which covers access to the file among other things.

Our preferred approach to access to file is intended to ensure that the process is as efficient as practicable, both for addressees of a Statement of Objections (SO) and for the CMA. The general approach is that the CMA will provide parties with copies of all the documents that are directly referred to in the Statement of Objections when the SO is issued and will also provide a schedule containing a detailed list of all the documents on the CMA's file. Businesses will have a reasonable opportunity to inspect additional documents listed in the schedule upon request and the CMA may wish to consider the use of a confidentiality ring and/or data room to facilitate this access.

We think that this process, which has already been used successfully in many cases and which fully respects rights of defence, may reduce the number of documents that need to be redacted for confidentiality – to the benefit of parties and the CMA - but much depends on how many documents the parties seek to review on top of the key documents relied on in the SO.

The impact of digitalisation

The final challenge I want to highlight before turning to Brexit is the impact of digitalisation in the form of pricing algorithms and artificial intelligence, which pose fundamental, and important, questions for the detection of anti-competitive practices – as well as conceptual questions for the application of competition law more generally. These are questions which are being considered by competition authorities and governments around the world and the CMA is at the forefront of thinking about such issues. We recently [published](#) the results of a study into pricing algorithms and whether they could be used to support illegal practices. We found that there was little evidence of companies using algorithms to show personalised prices but that they were sometimes used to change the order in which products are shown to shoppers. The study also found that algorithms can be used to help implement illegal price fixing and, under certain circumstances, could encourage the formation of cartels. However, the risk of algorithms colluding without human involvement is currently less clear. In compiling this research, the CMA examined a wide range of literature and gathered information from firms offering legal price setting services. We also conducted online mystery shopping tests across various websites. The research increases our expertise at a time of widespread scrutiny of pricing algorithms and the findings will now be used to inform work across the CMA's portfolio. We have also set up a new data science team which will help us to expand our expertise in the digital sector. Stefan Hunt heads up this unit which will focus on:

- understanding how firms use data and algorithms in their business models and what implications this might have for competition and consumers
- developing how the CMA obtains and uses data in its ongoing work
- engaging with the tech business, academic research and government data communities in the UK and internationally

The UK's exit from the EU

Tackling all these challenges is something the CMA would have wanted to do regardless of [Brexit](#), but Brexit makes it imperative that we are working as smartly and efficiently as possible so we are ready to take on larger and more complex cases. So what does Brexit mean for the future of competition enforcement? In my comments this morning, I'm not going to focus too much on what might happen if we are in a 'no-deal' scenario but rather take a slightly longer-term perspective. However, it is important to emphasise that the CMA has contingency plans in place for 'no deal' and has recently published [guidance](#) for businesses setting out the way it intends to proceed for mergers and antitrust cases involving the European Commission or EU law in the event of a 'no deal' outcome. If you're interested, you can find this [guidance](#) on the [CMA's webpages](#).

Whether it is from 29 March next year, or following an implementation period, the effect of Brexit is that the CMA will have responsibility for cases which were previously the remit of the European Commission. The main impact is in merger control and competition enforcement. In merger control: whereas previously the UK authorities were prohibited from examining the competition effects of mergers and acquisitions subject to the EU Merger Regulation – typically the biggest M&A transactions, and sometimes the most important – we will in future be ruling on the competition aspects of all mergers and acquisitions affecting UK markets where they meet our national jurisdictional thresholds.

The other big impact of Brexit is that the CMA will take responsibility for enforcing a new national [State aid regime](#), which is a topic of discussion in its own right. But my focus today is on competition enforcement, so what will Brexit mean for cartels and anti-competitive agreements and conduct?

The impact on competition enforcement

Whereas until now the national competition authorities were prohibited from applying competition law to cases over which the European Commission chose to exercise its jurisdiction – again, typically the bigger cases – post-Brexit the CMA and concurrent regulators will be able to tackle all anti-competitive practices that affect UK markets, UK consumers and UK businesses, and not just the ones that the European Commission does not pursue. Post-Brexit, it will be the UK's own national institutions and courts that will be taking some of the bigger decisions that were previously reserved for determination elsewhere.

You may have noticed that the CMA has already opened its first “Brexit” case. In October we launched an [investigation](#) into the Atlantic Joint Business Agreement involving four airlines: American Airlines, British Airways, Iberia, and Finnair.

Following an investigation under EU competition law, in 2010, the European Commission accepted commitments from the parties in relation to 6 routes to address potential competition concerns: 5 of the 6 routes were between London and the UK. The commitments will expire in 2020, at which point the European Commission may re-assess the agreement, but there is no requirement for it to do so. As 5 of the 6 routes subject to commitments are from the UK, and given Brexit, the CMA has decided to review afresh the competitive impact of the agreement in anticipation of the expiry of the commitments.

Taking on these larger cases clearly presents a major change and challenge for the CMA, but it is also an opportunity and one we intend to embrace fully, to ensure that UK consumers, businesses and, ultimately, the UK economy achieve the full benefits of effective competition enforcement.

Many other national competition authorities, including for example those in Australia, Brazil, Canada, Japan, Korea, the US, and others already apply their own competition laws – and can examine any merger or anti-competitive practices, that affect their consumers and businesses and the CMA is well placed to perform this role alongside the leading independent players in the world of competition. We already play a thought leadership role, contributing to shaping competition law and policy on the international stage, and this will be even more important after Brexit.

Rising to the challenge

We are under no illusions that this will be easy, and the journey may be difficult at times, but we are confident we can rise to the challenge. To ensure we are ready to take on this bigger enforcement role, the CMA has been given additional funding to allow us to recruit significant additional high calibre staff. We are also significantly

expanding our office in Edinburgh giving us access to talent north of the border and also allowing us to build even stronger relationships with consumers, businesses and other regulators in Scotland as well as the Scottish government and Parliament.

Growing so significantly presents its own challenges as we try to recruit and assimilate large numbers of new staff, but we recognise the importance of doing this well so are spending significant time and energy on getting it right.

While the CMA is enhancing its own processes and recruiting additional staff to ensure we are prepared for Brexit, the Department for Business, Energy and Industrial Strategy (BEIS) is at the same time conducting a review of the 2013 Enterprise and Regulatory Reform Act (ERRA). ERRA introduced various changes to the powers of the CMA and concurrent regulators designed to encourage more enforcement of breaches of competition law and facilitate faster, effective and high-quality decision making. The ERRA included a requirement to review after five years how well the regime has worked. The review will assess the extent to which the reforms have achieved their stated policy objectives, including the quality of the CMA's decisions and the strength of its powers, whether we tackle the right cases, and whether the current system works for business. BEIS will carry out this work in the context of the challenges the regime faces, one of which is Brexit. This timely review will consider if any changes are needed to ensure the end-to-end process, including litigation, is fit-for-purpose for the large and complex cases we expect post-Brexit.

Doing some of these larger multijurisdictional cases will also require the CMA to work more closely with our counterparts in other competition agencies around the world. The terms of future economic partnerships, including with the EU, are yet to be developed but this is important to the CMA, as a global player working with oversea authorities, taking on complex, global cases and in relation to global businesses.

To diverge or not to diverge...

So, more people doing more cases, and some much bigger cases, working alongside other agencies, are pretty certain outcomes for the CMA (and concurrent regulators) from Brexit but what about the substance of UK competition enforcement? To what extent will the CMA, the Competition Appeal Tribunal, and other UK competition authorities and courts, be free to diverge from EU jurisprudence and, even if they are free to do so, will they want to?

We don't yet have firm answers to these questions. But under the Competition Statutory Instrument that will apply in a no-deal scenario, section 60 of the Competition Act 1998, under which the CMA, sector regulators and the UK courts must interpret the UK competition prohibitions in a way that is consistent with the decisions and principles laid down by the Court of Justice of the European Union, will no longer apply, including to cases already opened on or before 29 March 2019. Instead a new provision, section 60A, will apply to such cases.

Section 60A provides that competition regulators and UK courts continue to be bound by an obligation to ensure no inconsistency with the pre-exit EU competition case law when interpreting UK competition law, but that they may also depart from such pre-exit EU case law where it is considered appropriate in the light of particular specified circumstances. It then gives an exhaustive list of these circumstances, including: where there are differences between markets in the United Kingdom and markets in the European Union and where a different approach is justified because of generally accepted principles of competition analysis or the generally accepted application of such principles.

This approach provides certainty for business that UK competition law will not differ too radically from elsewhere in Europe, but it is also helpful that, at the margins, we have the opportunity to diverge from EU law when considering issues where there are legitimate differences of view on the right approach – an example might be vertical agreements, where there is legal and economic debate about their effects.

What I've just outlined is the approach in a 'no-deal scenario' and we do not know where we will ultimately end up but, if a deal is struck and we follow a similar approach, the future of competition enforcement is likely to involve the CMA and other UK authorities taking decisions which are largely in line with EU jurisprudence with some divergence in certain areas beginning to emerge over time – evolutionary rather than revolutionary. It's also worth noting existing block exemptions will continue for the time being and protections gained to date will not be removed for past behaviour. We expect block exemptions to continue to be an important part of the UK competition regime, deal or not deal.

Prepared and committed to protecting consumers

There is much more that could be said about Brexit and the challenges and opportunities it raises and CMA colleagues have spoken at some length on the subject in other speeches which you can find on the CMA's webpages. The overall message is that the CMA will be a very different body from now, taking on bigger and more complex global cases but also committed to protecting UK consumers in purely national and local markets. We expect to be working together with other competition authorities, including the European Commission and national agencies within and outside the EU. The CMA is prepared for the challenge and we are committed to ensuring that UK consumers are protected by an effective and efficient competition authority.

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