Review of Competition Policy by John Penrose MP: Contributions Towards an Issues Statement

The Centre for Competition Policy is a leading inter-disciplinary research centre focused on competition and regulation based at the University of East Anglia. Contributors to this short paper include Steve Davies, Sean Ennis, Amelia Fletcher, Morten Hviid, Bruce Lyons, Catherine Waddams. It should not be assumed that all contributors agree on all of the comments made.

Introduction

In its market investigations the CMA publishes an Issues Statement at an early stage. This outlines initial issues and potential remedies. It doesn't set out findings or conclusions. In the same spirit, this submission from the Centre for Competition Policy at UEA sets out a set of questions that we feel it would be useful for John Penrose to consider in his Review of Competition Policy. We do not at this stage express views on the appropriate conclusions.

As is noted in the Terms of Reference for this Review, in February 2019 the CMA's then Chair, Lord Andrew Tyrie, sent a letter to then Business Secretary, Greg Clark, highlighting a number of reform proposals (henceforth 'the Tyrie Letter'). Where we consider these proposals especially worthy of further consideration, we discuss them below. Exclusion from the list below does not necessarily denote disagreement.

We do not include specific discussion of *ex ante* digital regulation, which is being taken forward by the CMA-led Digital Taskforce, but we are generally supportive of the apparent direction of travel in this area. *Ex post* competition law is unlikely to be sufficient to address the competition problems emerging in this sector, for the reasons set out out by the Furman Review.[1] We would note, however, that there has so far been much talk but less action in this space, in the UK and internationally. The time for legislation must be drawing near.

We also do not address the issue of state aid/subsidy control, as this remains subject to ongoing negotiation with the EU. Nor do we consider the new UK Internal Market legislation.

Overall objectives of CMA

1. Should the CMA's overarching duties or obectives be revised?

The CMA's existing primary duty is "to promote competition, both within and outside the UK, for the benefit of consumers". However, vigorous competition alone will not necessarily deliver good consumer outcomes. Instead of competing to offer consumers great value, firms may instead compete to mislead consumers, for example, or they may compete only for the more active and informed consumers while exploiting others.

[1] https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel

Such concerns can be addressed through a blend of consumer law and regulation. In particular, the consumer policy regime plays a critical role in providing a framework for competition, within which it is more likely to deliver good outcomes.

The CMA is a key player in the UK's consumer policy regime. This regime is under-funded and overly fragmented, and the CMA plays a much-needed national level role in taking on market-wide and precedent-setting cases.

However, unless one takes a very broad interpretation of the wording, it is not clear that this important consumer-orientated function is reflected in the CMA's existing primary duty. To date, this has not in fact deterred the CMA from its activity in this area, but the statutory framework does not currently provide any certainty that this will continue.

Overall effectiveness of the competition regime

2. Should the decision-making and appeal processes be aligned across the CMA's competition tools, such that CA98 processes mirror those for market investigations and mergers?

Currently, market investigations and mergers follow a statutory two-phase process, with Board/executive decision on a reference to Phase 2, but then the final Phase 2 decision being taken by a Panel of independent expert decision-makers. The process is also highly transparent.

By contrast, while Competition Act 1998 ('CA98') cases also follow a two-phase process, with a Competition Decision Panel ('CDP') being introduced after the Statement of Objections has been issued, there is no statutory requirement for independent members, and the process is far less transparent. At the same time, the appeal standard for mergers and market investigations is Judicial Review, while for CA98 decisions it is Full Merits.

The Tyrie Letter proposes a move from Full Merits to Judicial Review for CA98 decisions, which would enable the CMA to achieve a greater throughput of cases, to the benefit of consumers. However, that Letter said nothing about changing the governance around such cases within the CMA. Having a different governance structure at the CMA could be a sensible *quid pro quo*, were a reduced appeal standard adopted, that achieves an appropriate balance between parties' rights of defence and effectively promoting competition. We note that this was a 2019 recommendation of the Digital Competition Expert Panel (sometimes known as the 'Furman Review') and is also discussed in a forthcoming Chapter (attached) by Professor Bruce Lyons.

Overall effectiveness of the Market Investigations regime

3. Should the CMA's enforcement powers for Market Investigation Orders be strengthened?

The CMA has no direct ability to impose sanctions for breach of a Market Investigation Order. It can only go to Court to obtain a court order, breach of which could then be penalised. Even then the penalties are typically low. This is unlikely to provide effective enforcement mechanism for breaches, especially for larger multi-national firms. Another challenge arises where parties' assets are located outside the UK or integrated into other parts of their global business. The Tyrie Letter highlights the need for reform in this area.

4. Should the CMA have greater flexibility to revisit Market Investigation remedies to improve their effectiveness?

Market Investigation Orders cannot be revisited once they have been formally imposed, if they are found to be imperfectly designed or ineffective. There is only a provision for parties to request that remedies be altered or removed if they can demonstrate that there has been a 'material change in circumstances' since they were imposed, and this is only ever used to weaken remedies, not strengthen them.

It is interesting to note the parallel experience of market studies carried out by the UK Financial Conduct Authority. These can also give rise to remedies, but because this is done through changes to regulatory rules, there is flexibility to trial remedies and revisit. In some cases, the FCA has completely abandoned specific remedy proposals, following testing, with the remedy package being substantially revised to make it more effective.

Such flexibility is arguably in the interest of both firms and consumers; no one gains from costly, ineffective Orders. The Tyrie Letter highlighted the potential for a change in the CMA's powers to enable it, within a fixed period of time, to revisit its remedy package while continuing to rely on its substantive findings on competition. Procedural safeguards may be needed to enhance legal certainty and to limit the risk of incessant lobbying activity.

These issues are discussed in a recent paper on the UK Market Investigations Regime by Professor Amelia Fletcher (attached and available at: http://competitionpolicy.ac.uk/publications/working-papers/working-paper-20-06).

Overall effectiveness of the merger regime

5. Should mandatory notification be introduced for acquisitions by the largest firms?

The CMA's voluntary notification system has a number of benefits, most specifically that it gives wide scope to the regime to capture mergers that might fall below the thresholds of other authorities. This has been valuable for allowing the CMA to review a number of digital mergers, where the turnover of the target firm is

currently very low, as well as a number of acquisitions – such as Ryanair/Aer Lingus – where minority shareholdings raise significant concerns.

However, there are concerns that the CMA can also miss mergers, or be too late 'to the table' to influence the direction of travel on the merger assessment of these mergers internationally. This is important, since the CMA's merger remedies must be proportionate to the UK harm, and the CMA sometimes requires a degree of international consensus on a merger if it is to achieve truly effective remedies. It is also in the nature of a voluntary regime that it is 'non-suspensory', and this can result in the CMA reviewing mergers post-completion, when 'unscrambling the eggs' can prove complex. Such concerns will increase post-transition period.

Given the benefits of both approaches, the Tyrie Letter discusses a hybrid approach, with mandatory notification for acquisitions above a (reasonably high) threshold, but voluntary notification below this threshold.

Overall effectiveness of consumer regime

6. Should the CMA (and other consumer law enforcers) have better sanctions (and especially fining powers) for consumer cases?

The lack of enforcement powers in the area of consumer law is one of the more serious problems highlighted in the Tyrie Letter. It is noteworthy that the UK sector regulators, while having concurrent powers for consumer law enforcement, typically utilise their regulatory powers when addressing poor treatment of consumers, since these are so much more powerful and effective. While it is not specifically about 'competition' it would be a lost opportunity if the Penrose Review did not address this area.

7. Should an alternative funding mechanism be found for Trading Standards?

Trading Standards are funded locally and have been increasingly deprived of resources as local authority budgets have fallen. At the same time, they are sometimes expected – under the Home Authority model – to take difficult and high cost cases against large and well-resourced national or multi-national corporations which are infringing consumer law. They are not in a position to meet these expectations effectively, given the current funding model.

8. Should the CMA be made the 'home authority' for more multi-national companies, and particularly for the global digital platforms?

Where consumer cases relate to market-wide issues or precedent-setting issues, the CMA can already play a role, and has had a number of recent successes in the digital consumer policy space. However, its responsibility in this area could usefully be clarified.

Even with enhanced funding, it is unrealistic to expect Trading Standards to take highly complex, hard-fought cases against the biggest digital platforms. Indeed, given that these platforms typically follow a similar business model across all the countries they serve, any major consumer cases should ideally be taken in coordination with other consumer authorities internationally. The CMA is well-positioned in this regard, having invested in building up its these links for example through its work with ICPEN.

9. Should consumer law be revisited in the context of issues arising in the digital economy?

Substantial thought is being given to competition issues arising in the digital environment, but there has so far been less focus on consumer issues arising, and whether these are covered effectively by existing (analogue) consumer law. It is not clear that this is well-designed to deal with, in particular:

a. misleading choice architecture (sometimes known as 'dark patterns' or 'user steering');

b. unfair algorithms (including personalised marketing or pricing, and the choices open to consumers in this space);

c. subscription traps (easy to sign up to, much harder to exit);

d. ongoing service contracts (which feed into the 'loyalty penalties' debate);

e. the responsibility of platforms not to carry fraudulent products, misleading advertising, fake reviews.

These consumer issues are also relevant for the effectiveness for the overall competition regime, for two key reasons. First, if the consumer regime is ineffective, then more vigorous competition can drive worse behaviours, not better, creating harm for consumers. This is not the type of competition anyone wants to see. Second, if consumers make poor decisions, this can itself dampen competition, create barriers to entry and expansion, and even help to drive markets to tip towards monopoly.

10. Should BEIS revisit the Consumer Rights Act (2015) post-transition period?

This Act implements the EU Directive on unfair terms. It states that a term is unfair 'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer'. However, there is no clear legal understanding (in English or other law) of 'good faith'. The CMA guidance says it "embodies a general principle of 'fair and open dealing'" and that "It is not a technical concept but one that looks to good standards of commercial morality and practice". The trouble is that there is no agreement on what is meant by 'fair and open dealing' or 'good standards of commercial morality

and practice'. This results in regulatory fire-fighting as each new practice evolves. Furthermore, there is no clarity for business in what innovative pricing practices would be acceptable and which ones would not.

Regulation should not hinder the emergence of (non-deceptive and non-hindering) business models that are central to a dynamic economy but, just as importantly, trust in the market economy requires a shared understanding of acceptable "commercial morality". This is particularly necessary for business compliance. More clarity could therefore usefully be given on what these warm words mean, so that firms can compete and innovate effectively, while ensuring that they act responsibly, in the interests of consumers and in compliance with law. This may require an amendment to consumer law.

There has been a suggestion that the 'nudge' agenda might usefully be applied to reduce so-called 'sludge' by firms to exploit consumers, but this approach is fundamentally problematic not least because it would require regulators to form a view of what is best for consumers in a huge array of transactions. Research at CCP by Professor Bruce Lyons and Professor Robert Sugden suggests a more self-enforcing way forward with an explicit standard of *transactional fairness*, as illustrated by their response to the FCA's consultation on 'Guidance for firms on the fair treatment of vulnerable customers'. Their short note also covers what the FCA might call 'non-vulnerable' consumers (a more general technical paper on transactional fairness is also available).

Competition law and the public interest

11. Should public interest exceptions in mergers be extended, but made into 'one-way' valves?

Merger law plays an invaluable role in ensuring effective competition. It arguably also has a greater long-term impact on our lives than other aspects of competition policy. Cartels often collapse, even absent competition law enforcement. But if an anti-competitive merger occurs, its impact can be felt for decades.

There can quite properly be other 'public interest' rationales for intervention in mergers too. Exception is currently possible on the basis of media plurality, national security or financial stability, and post-transition period this list can potentially be extended.

Currently such exceptions act as a 'two-way valve'. Mergers that are not anti-competitive can nevertheless be blocked on public interest grounds; while mergers that are anti-competitive can nevertheless be allowed on public interest grounds.

However, the apparent symmetry between these two options is false. There is little evidence that mergers – on average – generate significant benefits for acquiring

firms, let alone consumers.[2] So the expected cost of blocking a merger on non-competition grounds is relatively low. By contrast, the CMA only blocks mergers on competition grounds if they are likely to generate substantial harm. So the expected cost of allowing such mergers is high.

Thought should therefore be given to making public interest exceptions a 'one-way valve', allowing additional grounds for intervention against mergers but not allowing anti-competitive mergers. We would note that the only merger that has so far passed through the public interest valve in the 'wrong' direction was Lloyds/HBOS. Many commentators feel that was a poor decision, with long-lasting effects.

12. Should competition law be revisited to better enable firms to come together in pursuit of public interest objectives?

When firms come together to fix prices or share markets, this can quite properly be attacked under competition law, and where firms are found to have infringed the law, the CMA can impose high penalties, seek director disqualifications and even (albeit this is rarely used) criminal sanctions.

There are concerns, however, that this regime also acts to prevent firms from coming together with more positive ends in mind, whether this be standards-setting or climate change measures. Although there are EC Guidelines that endeavour to enable such positive interaction, concerns persist, partly driven by the rather narrow position taken in past EC precedent. This is a difficult area, as it all too easy for firms to come together for one reason and stray into other areas. At a minimum, clear new guidance will be needed so that the CMA can share its understanding with business in relation to what is and is not allowed in relation to standards-setting and climate change issues. However, it is not clear that the law is currently in the right place.

The role of Government in promoting competition

13. Should Government ask the CMA to carry out a competition-focused study into levelling up the playing field between new digital and traditional business models?

The dramatic growth of digital business models over recent years largely reflects the efficiencies and innovative services they provide. However, in some cases, their growth may also have been facilitated by distortive regulation, legislation or taxation, providing an unlevel playing field between new digital business models and traditional firms.

While some instances of such distortions have been identified and addressed, for example by Transport for London in relation to Uber, we are not aware of a

[2] Not a CCP product, but a useful and up to date summary of the literature in this area can be found at: https://ecgi.global/sites/default/files/working_papers/documents/finalrenneboogvansteenkiste.pdf.

comprehensive review of such distortions that could provide useful evidence on the scale of the problem and potential solutions.

14. Might Government be willing to strengthen its commitment to considering competition-focused advice from CMA?

The CMA has a responsibility to provide "information or advice in respect of matters relating to any of the CMA's functions to the public, policy makers and to Ministers". In practice, this tends to involve encouraging Government to utilise competition more effectively to achieve its own public interest objectives.

The CMA can provide such advice at any stage, but it often does so at the completion of a market study or market investigation. Such advice frequently reflects substantial work and evidence collection.

However, the impact of this advice on Government policy is variable. While it is absolutely right that Government should be the final arbiter in these areas, its commitment to properly considering the CMA's advice could usefully be strengthened. Without this, many potential benefits of competition may be lost, and the rationale for the CMA carrying this sort of advice work weakened.

15. Should the CMA be asked to provide competition advice to Government on how to reshape public procurement law post-transition?

Competitive procurement practices can play a crucial role in driving good outcomes for public sector purchasers and taxpayers. The existing EU rules have both pros and cons from a competition perspective. The CMA could usefully bring a competition focus to the design of any revised requirements in this area.

Data and privacy

16. Should more be done to facilitate competition-enhancing data portability?

Data portability can play an important role in enabling competition and innovation, through enabling consumer switching and multi-homing, and through allowing innovators to gain access to crucial data that was previously unavailable to them.

BEIS has just set up smart data working group to develop thinking in this area, and any new digital regulator would also be likely to have a role in overseeing the development of data portability. However, to make this work, there may be a need for underlying facilitating legislation. This could include, for example:

- strengthening the data portability provisions that are conferred by GDPR. (These are currently silent on the format in which data is provided, the need for 'real time' data portability, or the requirement to utilise open APIs);

- strengthening the regulation of third parties that gain direct access to ported data, including allowing for clearer allocation of liability and rights of redress in case of data breach or other consumer harm. This should increase consumer trust in the making use of data portability provisions;

- facilitating the development of Personal Information Management Systems, which would better allow consumers to track their data and its use;

- giving the Information Commissioner's Office a secondary objective to promote competition (as was advocated in the Furman Report).

The UK's role in the global economy

17. Should Government do more to support effective collaboration between CMA and competition and consumer authorities globally?

The CMA is already an outward-looking authority, participating actively in international fora such as OECD, ICN and ICPEN. It has also led the global discussion in a number of areas, most recently in its market study into digital advertising and on the need for digital regulation.

In a post-transition environment, however, there will be a greater need for the CMA to collaborate effectively with other authorities, especially when dealing with mergers or poor conduct by large multi-national corporates. Effective international collaboration can partly be driven by the culture of the institution, which the Government should continue to support, but there can also be legislative blocks, for example around the sharing of information across borders. Could Government do more to unblock these?