

The Can Challenge: Exploring the Conditions for Creating a Viable Market in Deposit



ALSO IN THIS ISSUE

Damages Claims for Bid Rigging: How to make them more popular in the EU P4

Regulators Beware! Lessons to be learned from deploying landlords to enforce the 'right to rent' P7

Indirect Network Externalities in the Tablet PC Market: The role of application quality P12

The Roots of the Uneven Playing Field in Audiovisual Advertising P14

Best of the Blog | Why the CMA is wrong in its proposals for reform and what should be done instead P16

The Can Challenge: Exploring the conditions for creating a viable market in deposit



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The Voluntary and Economics Incentives Working Group Report (February 2018) highlighted the possibility of having a Deposit Return Scheme (DRS) on drinks containers in the UK. This article shares initial findings from a field experiment that tests two possible mechanisms by which DRS could be conducted so as to investigate which yields greater participation and engagement. The incentive schemes were implemented at three different locations across Norwich and early results indicate that one scheme outperforms the others in terms of incentivising recycling behaviour. For competition economists, these results also indirectly raise some interesting questions regarding how and who should operate this scheme. This article elaborates these and offers a conjecture as to how a DRS scheme might be implemented in the UK.

A Deposit Return Scheme (DRS) is a recycling mechanism that adds a small charge to a receptacle at the point of purchase. This charge then acts as a rebate when it is returned for re-use. Typically, these are applied to aluminium cans and both glass and plastic bottles. Whilst successful DRS schemes have run for many years in Germany, Norway and Sweden, to date, no equivalent scheme exists in the UK. However, in February 2018, the Voluntary and Economics Incentives Working Group Report highlighted and recommended the possibility of implementing a DRS and, as such, the Department for Environment, Food & Rural Affairs (DEFRA) launched a public consultation in January 2019.

This research contributes to discussions in this topical policy area by investigating the extent to which the dynamics of implementation might optimise DRS uptake

by consumers. We employed two different incentives mechanisms, namely a piece-rate rebate (as occurs in many existing schemes) and a more novel Tullock-Style Lottery scheme. Expected payoffs were made equivalent between the two mechanisms, but the former offered a small but certain prize whilst the latter provided the chance to win more substantial money, albeit with a high level of uncertainty. These were explored through a field experiment across three different demographic groups and involved 1200 participants in total. By conducting this research, we sought to uncover which types of incentive most greatly stimulate efforts to recycle, in order to offer some suggestions as to how this soon-to-emerge market might be most efficiently run, and where particular pitfalls might arise. Treatment groups were subject to the timeframes illustrated

	Monitoring Period [P1] (10 Weeks)	Break (4 Weeks)	Payment Period [P2] (10 Weeks)
Students (UEA)	25/09/18 – 14/12/18	15/12/18 – 14/01/19	15/01/19 – 25/03/19
County Council			
Social Housing	15/01/19 – 25/03/19	26/03/19 – 28/04/19	29/01/19 – 30/06/19

Table 1: Timeline of Treatments

in Table 1. This enabled a baseline usage to be established and therefore an assessment of the impact each incentives treatment held. Note that for logistical reasons two treatments occurred before the other.

Our results show early promise, as Figure 1 illustrates, for the recycling habits of the County Council. Here, six floors were randomly allocated into a Lottery (2), Payment-Per-Can (PPC) (2) or Baseline (2) treatment. The results of Figure 1 show that, against the overall recycling rates in Period 1, the Lottery incentive (L) had the biggest average growth rate (82%), outstripping both its Payment-per-Can (P) (39%) and Baseline (B) (-12%) counterparts. Even against their respective P1 levels, the increased recycling by this treatment was by far the most effective (39% L; 24% P; 18% B). However, there is considerable heterogeneity across demographic groups and, whilst not displayed here, the student treatment did not respond to the incentives to any extent whatsoever. Not only does this defy the intuition one may hold over income effects driving behaviour, but it also poses a wider question within experimental economics about the extent to which one can expect student samples to be representative of wider social behaviour.

Because of the disparity in effects we see between the County Council and the student treatments, we now eagerly await the results for the social housing treatment. If they replicate the findings of the County Council, this provides us with stronger evidence that not only could a DRS stimulate a greater propensity to recycle, but that doing so through a lottery system offers a unique and, we believe, more effective system for enhancing pro-environmental outcomes. If, on the other hand, the social housing tenants react similarly to students, we might conclude that the impacts of DRS are

not so influential when imposed upon people in domestic or residential settings, and that the results at the County Council are driven through the novelty this being provided at their place of work.

Alongside the direct impacts on recycling, these emerging findings pose some important questions for competition economics. Recycling in this manner requires co-ordination across drinks producers for receptacle re-use. If private

firms operate a DRS, does this affect onward collusion and how is this monitored? Equally, if a lottery-based DRS is more effective (as our early findings imply), does this create a trade-off against how easily one can implement such a scheme? Finally, if the DRS is placed in the hands of the private sector, an engaging system could be highly detrimental to local councils and their finances through revenues lost from their recycling of these waste materials (as occurs currently).

Our initial recommendations would be that the UK Government seriously considers the novel approach of employing a lottery-driven DRS. We see environmental advantage in doing so but do acknowledge potential drawbacks as well. There are also some unique market-based opportunities here. By way of example, a dual-system (e.g. offering a choice of lottery or payment-per-can to consumers) could be 'hosted' by supermarkets. This in turn could stimulate competition through the means and generosity by which lottery prizes are awarded. Yet this simultaneously creates a further role of regulation and legislation to ensure that a self-selection based DRS is run fairly and with accountability.

Overall, this field study is already providing some interesting areas for debate, and once this research project has completed its full cycle it is our belief that it could be highly informative, and in some ways provocative, for the UK Government and its onward decision making on how to implement a socially efficient DRS.

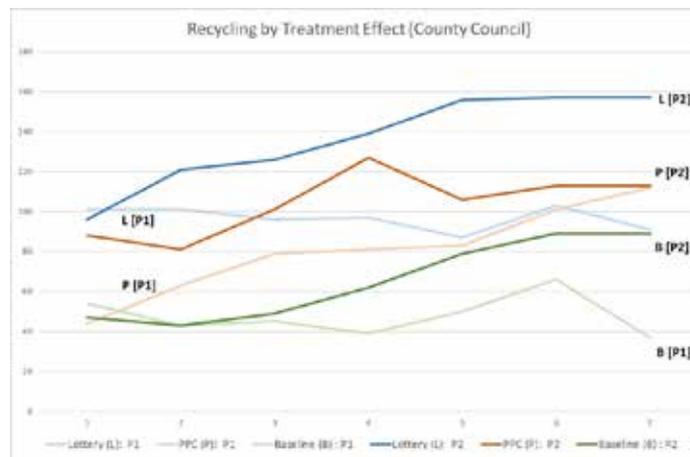


Figure 1: Treatment Effects for the County Council

References:

1. Note we also have 'between-subject' baselines as well. This means that some groups were never incentivised. This aimed to account for seasonal trends in canned drinks consumption.

Damages Claims for Bid Rigging: How to make them more popular in the EU

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It is estimated that the annual direct cost to consumers and other victims of hardcore cartels in the EU, including bidding rings, ranges from approximately 13 billion Euros (on the most conservative assumptions) to over 37 billion Euros (on the least conservative). In a time of economic crisis in which attempts are made to reduce public expenditure in any possible way, private enforcement of EU competition law by public authorities in the EU Member States may secure budget savings. Private enforcement is not only a deterrent against this anticompetitive conduct but also a means of restorative justice that can return taxpayers' money. Thus, the paper makes a number of recommendations that would enable contracting authorities to access compensation more easily in case they fall victim to colluding suppliers.

Bid rigging is a very deliberate breach of the law that involves overpaying taxpayers' funds - money that could otherwise be invested in public services. The delinquency of bid rigging has been underlined by the Court of Justice of the European Union, which highlights its huge impact on the consumers who are deprived of the advantages of competition, as most of the rigged projects are public tenders financed by taxes. Prices are inflated without reflecting the accurate cost, so consumers and taxpayers have to pay more for products and services, without any choice of other by-products of true competition and society's resources are not allocated properly.² Indicatively, it has been estimated that such collusive practices in the domain of public procurement can raise the price of a product or service by more than 10 percent, sometimes much more.³ The magnitude of the problem that EU Member States face when it comes to bid rigging renders necessary research on private enforcement by procurement entities, i.e. the entitlement of procurement authorities to damages in case they are victims of collusive tendering. In this article, I draw on my recent research to identify the reasons why

private enforcement by procurement entities is not being used enough and make some recommendations to address them.

Private enforcement is not only a deterrent against this anticompetitive conduct but also a means of restorative justice that can recover taxpayers' money.⁴ Whilst public procurement authorities can bring damages actions, the Damages Directive 2014/104/EC does not provide a framework for encouraging contracting authorities to use private enforcement, and for this reason its practical relevance in the area of public procurement seems limited. The Damages Directive does not provide any advantages over claims according to longstanding national tort laws and general competition law when it comes to public authorities in public procurement. In view of the Damages Directive's failure to address damages for bid rigging properly, I make recommendations in order to deal with some of the hurdles that contracting authorities face when seeking damages for bid rigging.

I argue that the high litigation costs that public authorities usually face is the first reason that the level of private enforcement among contracting authorities is low in relation



“ Bid rigging is a very deliberate breach of the law that involves overpaying taxpayers’ funds - money that could otherwise be invested in public services. ”

to bid rigging.⁵ One possible way to deal with this issue is to form a ‘Competition Damages Litigation Fund’, i.e. a supply of money collected from contracting authorities for the purpose of using it for covering the competition damages litigation costs. A ‘Competition Damages Litigation Fund’ would permit the collection and saving of money for this specific reason, every time the national courts of a particular EU Member State award damages to the relevant contracting authorities for the anticompetitive activities of economic operators in the context of public procurement. It could be counter-argued that it is sufficient for every contracting authority to collect its own damages awarded by the national courts, however, a single account for competition damages litigation is an essential tool for consolidating and managing procurement entities’ cash resources. In EU Member States with highly-fragmented public sectors the establishment of ‘Competition Damages Litigation Funds’ would enable aggregate and efficient control and monitoring of the damages awarded to various contracting authorities, while such funds would prevent idle balances being maintained in several bank accounts.

At the same time, instituting such funds would facilitate reconciliation between banking and accounting data and demonstrate that damages claims for bid rigging in public procurement are a priority in the public agenda. The management of these fund could be left to the Auditor General in each EU Member State, who would be in charge of calculating and paying the arising litigation costs and regularly informing the contracting authorities about the balance of the account. Something similar already happens in the UK, where the Accountant General of the Senior Courts is responsible for controlling the money paid into courts.⁶ In the UK there is also a Court Funds Office which provides banking and investment services by accounting for any money being paid into and out of court and by looking after any investments made with that money.⁷

Similarly, whenever the residual funds of the “Competition Damages Litigation Fund” are beyond a specific and predetermined amount of money at the end of each year, the Auditor General of each EU Member State may distribute them pro rata to the involved contracting authorities so they can be applied for their indirect benefit, such as for the

purchase of new furniture for their premises, the organization and conduct of a new procurement process, etc. The fact that part of this money may remain in the administration will also be an extra incentive for public officers to become more interested in discovering bidding rings and in claiming damages for bid rigging. In order to prevent abuse in light of this incentive, another recommendation could also be to restrict the compensation of the defendant's fees to the statutory attorney fees. In this way, situations of abuse on behalf of the defendants would be prevented. Germany is an illustrative example of this, despite the 'loser pays' rule that applies there.⁸

The concern of contracting authorities that the initiation of litigation against colluding economic operators may spoil their cooperative relationship is the second reason that contracting authorities are reluctant to pursue an action against businesses engaged in bid-rigging practices. In order to deal with this concern, I recommend contracting authorities' claims be assigned to a third party that would also have an interest in bringing an action. It has been suggested that special courts/ institutions, such as audit agencies, procurement oversight agencies, like the National Anti-Corruption Authority of Italy, or private agents, like law firms and taxpayer associations, could be identified as having proper incentives to sue as a third party.⁹ This already takes place in Germany, where claimants can assign their claim to third party funders or special purpose vehicles (SPVs).¹⁰ In the above list of third parties with a proper incentive to sue, the competitors of the bid riggers that were not selected for the award of the public contract due to the manipulation of the bidding process could also be included.

The contracting authorities' difficulty in specifying and quantifying the financial harm is the third reason that the level of private enforcement among contracting authorities is low in relation to bid rigging. The introduction of statutory or pre-established damages might be a good solution to this problem. Specifically, I suggest that contracting authorities should have the option of asking for the recovery

of statutory/ pre-established damages before the final judgment, instead of actual damages. This could be a lump sum calculated by the national courts on the basis of pre-determined factors. These factors could mutually be agreed by the litigants before the initiation of the legal proceedings. For example, they could be the tenders submitted by "maverick bidders,"¹¹ the identification of procurement opportunities, the preparation of relevant documentation (an invitation to tender / offer) and the conduct of the whole procurement procedure, or the provision for possible complaints and litigation.¹² Such an evidence-facilitating device already applies in the domain of intellectual property, where judicial authorities are enabled "in appropriate cases" to set "the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees that would have been due if the infringer had requested authorization to use the intellectual property right in question".¹³

Private enforcement in the domain of public procurement currently operates in the slow lane. The aforementioned suggestions will enable contracting authorities to access compensation more easily.

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Regulators Beware!

Lessons to be learned from deploying landlords to enforce the ‘right to rent’

Tola Amodu, Lecturer in Land Law

As regulators know, the route of “command and control” regulation can be highly unstable in terms of outcome and potentially counterproductive.¹ With this in mind, one of the canons for “better” regulation is to know your environment so as to foster compliance on the part of those being regulated. The UK Government seems to have overlooked this when enacting the housing provisions under the 2014 Immigration Act. The Act, as amended, contains a raft of measures creating what the Government has termed a, “hostile environment” for unlawful migrants. One particular strategy deployed is to use third parties to perform the function of immigration officials to secure regulatory compliance with the immigration rules. In the private rented sector however, its application challenges some long held views as to the nature of rights and interests in land, in such a way as to undercut the effectiveness of the strategy. The subordination of private rights to public goals (epitomized by the provisions), which the regulatory regime embodies, was bound to give rise to contestation. What was hardly anticipated was its source.

The use of third-party actors is nothing new. Accountants and auditors have been co-opted into enforcing financial regulation. Employers have had to ensure that employees satisfy immigration legislation. In depriving unlawful migrants of a right to access services, Part 3 of the 2014 Immigration Act (as amended) creates a new regime where private sector landlords too are co-opted. They can incur both civil penalties and, in the event of persistent non-compliance, criminal liability punishable by way of imprisonment for up to five years, if they rent out accommodation to those who have no lawful right to remain in the UK. Known commonly as the “right to rent”, these provisions require checks to be made by landlords as to the lawful migration status of those renting property before the tenancy commences and for its duration should any new occupiers reside there. Where occupiers lack the required status, the landlord has a duty to report this to the Home Office if liability is to be avoided.

These rules caused furore when first introduced in December 2015 as a pilot in the West Midlands.¹ Many feared the provisions would create a, “toxic and racist environment for access to housing”.² The Residential Landlords Associations (RLA), an association representing over 30,000 private landlords, considered the duties imposed to be onerous and those representing equality and human rights groups including the Joint Council for the Welfare of Immigrants at that stage expressed concern that the provisions’ application could lead to unjustifiable discriminatory practices against those who were British citizens or who had a lawful right to remain in the country, if they looked different or had foreign sounding names. Echoes of the Windrush scandal were clearly in the minds of those expressing concern. Nevertheless, the provisions came into force more generally on 1 February 2016.

The right to rent legislation brings into play much wider



“In redefining the landlord/tenant relation, this challenges the fundamental idea of the private nature of property. Governmental objectives take precedence over the landlord’s choices as to whom to let her property. Such a strategy cuts across one of the fundamental rationales of property rights and interests – that of ownership.”

concerns than those traditionally associated with regulatory enforcement. While employers and finance professionals have assumed their enforcement role with relative ease, the experience with the transfer of enforcement obligations onto those renting property indicates how context and culture can impact upon regulatory effectiveness. The requirements confound the autonomy of landowners to create rights and interests in, or dispose of their property, as they see fit. This idea is epitomized by the phrase, “my home is my castle”. Historically, regulation of the private rented sector has focused on housing condition and the duties owed to tenants and has not eroded what has been perceived as the primacy of the private law and the supremacy of private rights. The legislation refocuses the purpose of regulation. Instead of confining the reach to the landlord and tenant relation, the ambit is now far wider and has the ultimate objective of controlling unlawful migration by using the landlord to ‘police’ immigration. In redefining the landlord/tenant relation, this challenges the fundamental idea of the private nature of property. Governmental objectives take precedence over the landlord’s choices as to whom to let her property. Such a strategy cuts across one of the fundamental rationales of property rights and interests – that of ownership. With ownership comes the right to exclude, dispose of or share your interest. Instead, the right to rent rules inhibit that autonomy.

It was hardly surprising therefore that a challenge would be made to the provisions. What was surprising was the source of the first and, to date, only challenge. The recent

first instance decision of *R (Joint Council for the Welfare of Immigrants) v. SS for the Home Department*, was a judicial review brought by the JCWI on the basis of the human rights implications of the provisions, namely that they were in breach of Articles 8 (the right to respect for private and family life, the home and correspondence) and 14 (prohibiting discrimination) of the European Convention of Human Rights. It was supported by both human rights bodies and the RLA. All those challenging the Home Office argued that the checks that landlords had to undertake to comply with the law had potentially discriminatory effects. Landlords would pursue a discriminatory strategy not because they wished to but because market forces would cause them to minimise the risk of possible liability with the result that discrimination may reasonably result.

The alliance between civil liberties groups and the landlord association represented a previously unthinkable alliance. Historically, landlord and tenant groups interests have been in opposition, if not competition, on regulatory matters. Private sector landlords' interests have been given primacy often by reason of their having

a recognizable legal right to property; one that those renting from them have not. The landlord and tenant relation, being founded primarily in contract, was subordinated to the interests in the land itself. As a result, tenant protection derives largely from statute and the policy strategy deployed by successive governments has been not to upset that balance. The right to rent provisions, however marked a sea change in regulatory approach within the domain (shifting from a relatively discrete approach to one focusing heavily on securing state goals) and, arguably that is what galvanised historically opposing groups to coalesce and bring the legal challenge. Government's failure to recognise the limits of regulation resulted in, at first instance, the provisions being declared incompatible with the Human Rights Act 1996.

While the case is now being appealed, some more general inferences can be drawn from the decision. The transposition of tactics from one domain to another is not wholly unproblematic. Regulators should not ignore the context in which they regulate and should understand the historical or cultural attributes of the regulatory domain if they wish to deploy efficient and effective strategies.

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09:30 – 10:00 **Registration**

10:00 – 10:10 **Introduction & Welcome** Sean Ennis, CCP Director

Session 1 **Algorithms, AI and Cartel Risks**

Chair: Michal Gal

10:10 – 12:00

Ariel Ezrachi University of Oxford
Sustainable and Unchallenged Algorithmic Tacit Collusion

Vincenzo Denicolò University of Bologna
Artificial Intelligence, Algorithmic Pricing and Collusion

Kai-Uwe Kühn School of Economics & Centre for Competition Policy, UEA
Algorithmic Price Setting: Does the threat of collusion increase?

Timo Klein Tinbergen Institute, University of Amsterdam
Autonomous Algorithmic Collusion: Q-Learning under sequential competition

12:00 – 13:00 **Lunch**

Session 2 **Algorithmic Personalisation**

Chair: Bruce Lyons

13:00 – 14:30

Michal Gal University of Haifa, Israel
Personalization of Prices, Products, and Laws

Amelia Fletcher Norwich Business School & Centre for Competition Policy, UEA
Ranking Rankings: Or how to protect consumers from being misled when searching online

Wynne Lam Norwich Business School & Centre for Competition Policy, UEA
Competitive Imperfect Price Discrimination and Market Power

14:30 – 15:00 **Break**

Session 3 **Privacy and Competition**

Chair: Morten Hviid

15:00 – 16:30

Paul Bernal UEA Law School
Underestimating the Value of Privacy

Gregor Langus Compass Lexecon
Privacy, Targeted Advertising and Competition Policy

Elias Deutscher UEA Law School & Centre for Competition Policy
How to Integrate Privacy Concerns into Merger Control?

Session 4 **AI for Enforcement, Monitoring and Evaluation**

16:30 – 17:30

Stefan Hunt Competition and Markets Authority
Advanced Analytics for Agencies and Authorities: What's changed and what's changing?

Peter Ormosi Norwich Business School & Centre for Competition Policy, UEA
Machine Learning in Social Science Research

Session 5 **Apps**

17:30 – 18:10

Michael Kummer School of Economics & Centre for Competition Policy, UEA
Market Concentration and Privacy in Online Markets: Evidence from the Mobile App Industry

Franco Mariuzzo School of Economics & Centre for Competition Policy, UEA
Platform Competition in the Tablet PC Market: The role of application quality

09:00 – 09:20 **Keynote Speaker**
Tommaso Valletti European Commission
Competition Policy in a Digital Era: A View from Europe

Session 6 **Panel: AI in Practice**
Chair: Amelia Fletcher

09:20 – 11:00
Imran Gulamhuseinwala Open Banking Implementation Entity
Derek McAuley University of Nottingham
Danilo Montesi University of Bologna
Peter Wells Open Data Institute
Sebastian Wismer Bundeskartellamt

11:00 – 11:30 **Break**

Session 7 **Online Advertising**
Chair: David Currie

11:30 – 12:50
Gabriele Rovigatti Bank of Italy
From Mad Men to Maths Men: Concentration and buyer power in online advertising
Tommaso Valletti European Commission
Attention Oligopoly
Sally Broughton Micova School of Politics Philosophy, Language and Communication Studies & Centre for Competition Policy, UEA, and CERRE Research Fellow
The Playing Field for Relationships and Data

12:50 – 13:50 **Lunch**

Session 8 **Panel: How to Unlock Digital Competition**
Chair: Sean Ennis

13:50 – 15:50
Oliver Bethell Google
Cristina Caffarra Charles River Associates
Andrea Coscelli Competition & Markets Authority
Sarah Court Australian Competition and Consumer Commission
Philip Marsden Bank of England, Enforcement Decisions
Howard Shelanski Georgetown University Law Centre, Washington DC
Tommaso Valletti European Commission

15:50 – 16:20 **Break**

Session 9 **Panel: Regulatory Compliance Over AI**
Chair: Andreas Stephan

16:20 – 17:20
Jonathan Kewley Clifford Chance
Paolo Palmigiano Association of In-House Competition Lawyers (ICLA)
Anne Riley Independent Antitrust Compliance Consultant
Thomas Sharpe QC One Essex Court

17:20 – 17:30 **Final Remarks** Sean Ennis, CCP Director



Indirect Network Externalities in the Tablet PC Market: The role of application quality

Thanh Doan, PhD student in Economics

Each tablet PC device runs on an operating system, which has its own digital store to distribute software (mobile applications or apps) to their device users. “Apps bring devices to life”, said Andrew Ahn, the product manager of Google Play.¹ They generate a significant indirect externality on the vast demand for these mobile devices. According to Statista, in 2014, around 840 million people over the world own a tablet PC and this figure is projected to rise around 1.28 billion in 2021. This makes questions about how this externality manifests important to device producers and app store providers. This article presents recent research that found that the quality of apps has a significant positive impact on the tablet PC demand and profit, with the impact being larger for Apple than for Android devices.

Does quality matter more than variety? How do we measure quality?

The concept of indirect network externalities adopted in the literature is that the number of complementary goods (“software”) increases the value of the primary good (“hardware”) and attracts more demand for the hardware. This is the variety effect. However, this is not always the

case. Stremersch et al. (2007) examined the Game Boy market and found that the number of games in the catalogue did not drive the demand for the handset but instead the presence of a “killer application,” in that case Tetris, did.² The smartphone and tablet PC markets share the same story. Here we focus on the latter.

Since the first launch of the new generation of modern

tablet PCs in the late 2000s, the tablet PC market has been dominated by two operating systems: Apple iOS and Google Android, which account for over 80 percent of market shares. The number of mobile applications in the 5 leading app stores (Google Play, Apple App Store, Windows Store, Amazon App Store, BlackBerry World) exceeded 5.3 million by the third quarter of 2018. Google Play and Apple App Store dominate 80% of the application market with around 2 million apps in each store.³ Garg and Telang (2003) used the publicly available data from Apple's App Store and found that top ranked apps (high-quality apps) extract 150 times more downloads than other paid apps ranked at 200. Thus, users draw most of their attention to the high-quality apps in the store.⁴ This suggests that the benefit tablet PC users derive depends mainly on the quality of applications rather than the quantity. Our starting point was therefore that if indirect network externalities on the tablet PC market were to exist, they would be generated by quality.

It is always difficult to measure product quality. However, with the development of retail commerce on the Internet, product quality can be measured by the rating of user reviews. When users download and use an application, they can write a review and rate this application on a scale from 1 to 5. New users can see the number of reviews and average user rating for each app. An app that receives a higher average rating and more positive reviews is more likely to be downloaded. Hence, our investigation used average user rating as a proxy for application quality.

What are the impacts of application quality on the tablet PC market?

Our study⁵ examined the role of application quality in the competition between Apple iOS and Google Android in the tablet PC market. To do this we utilized quarterly data on tablet PC characteristics, prices and sales, on mobile application average user rating and income for 5 European countries. We aimed to quantify the indirect network externalities from application quality to the tablet PC market. The investigation discovered that application quality has a significant positive impact on tablet PC demand. We then examined the positive impact in the context of the asymmetry between Apple and Android: Apple is vertically integrated with iOS, whereas Google licenses Android free to many other tablet manufacturers.

We conducted a counterfactual experiment to examine the impacts of an increase in application quality in a store on the demand and profit of tablets produced for that store and the competing store. The new equilibrium suggested that Apple would gain more than Android-based tablet producers from the increase in application quality, both in terms of

market shares and profits. The likely reason for this result is that Android-based tablet producers face more fierce intra-platform competition. Additionally, another interesting finding is the increase in the application quality of one store also generate a negative cross-effect to the other store. For instance, a higher application quality in Apple App Store would lead to a decrease in the demand for Android-based tablets. This is simply because of the demand shift from Android tablets to iPad when iPads become more valuable to users.

Practical implication: app quality control

The indirect network externalities generated by the quality of mobile applications is a vital factor driving the demand for tablet PC and smartphone devices, which raises a practical issue of quality control by the application stores. Our results suggest that Apple has a greater incentive to improve the application quality as it can generate indirect quality externalities and increase the profit in smartphones or tablet PCs market. Apple, which controls both the application store and tablet PC production, is keener on keeping the high quality of applications by updating app review guidelines, and in 2016 it moved ahead of Google in updating its app review guidelines and removing all the outdated and spam apps, for instance, apps that were never downloaded or updated.⁶ Though Google does not control the tablet PC market, the presence of low-quality applications in Google Play may potentially damage the value of Android-based tablets and reduce users' demand, which in turn threatens its profit. About one year later, Google started its fight against "bad" apps and eliminated over 700,000 applications and 100,000 developers using machine learning techniques.⁷

Another important question is how can Android-based device producers enlarge the application quality externality since they do not control the application store? While it is not always profitable to build their own application store, one can think of developing their exclusive apps either by themselves or third-party developers, which are pre-installed in the device. If the pre-installed apps are in high-quality and useful, they would generate a stronger externality and attract more users to buy that device. Equally important, these apps also become a competitive advantage compared to other tablet PC producers. Finally, although the application store can use the review process to control for the application quality, the developers still play the largest part in producing high-quality application for users. Therefore, a potential direction of future research is to investigate whether the developer has an incentive to develop a high-quality app and whether competition among developers has any impact on the application quality.

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The Roots of the Uneven Playing Field in Audiovisual Advertising

Sally Broughton Micova, Lecturer in Communications Policy and Politics

In October 2018 the revision of the Audiovisual Media Services Directive (AVMSD) was completed, defining a new category of service and bringing it into the scope of the Directive. It defined video sharing platforms (VSPs) as having some responsibility for the content they carry derived from the way their algorithms curate this content and justified bringing them into scope, in part because it determined these VSPs compete directly with audiovisual media services (AVMSs) for audiences and advertising. Online advertising revenues have been overtaking broadcast and print media revenues across Europe, though television has been holding steady in many jurisdictions. Online advertising includes search options and various kinds of display ad placements including those on the online media owned by broadcasters and print publishers. This makes identifying the dynamics of competition between AVMSs and VSPs from these figures difficult. When the new AVMSD has been implemented, VSPs will have to comply with the same qualitative rules for advertising, a move that the drafters claimed would level the playing field between them and AVMSs, but it seems there will still be a long way to go.

This article presents some of the findings of an extensive qualitative investigation into the dynamics of competition in the market for audiovisual advertising that I and Sabine Jacques (UEA Law), undertook on behalf of the Centre for Regulation in Europe (CERRE), of which CCP is an institutional member. Based on these findings we recommend greater transparency throughout the advertising ecosystem, more collaboration and innovation among services on standardized metrics, and investigation by competition and data protection authorities in the way data is generated, owned and used by all players.

Our conclusion that indeed the field is not level may seem obvious, however what we found was that the ways it was not level are only slightly to do with differences in the rules around advertising, which are much broader than the scope of the AVMSD. The study covered Belgium, France, Italy and the UK and included a comparison of the legal frameworks and interviews with people mainly from media agencies and advertisers, but also those dealing with advertising within AVMSs and VSPs. It was clear from these accounts that despite the apparent rise in the use of programmatic tools for purchasing ad inventory, the business still relies heavily on direct, often personal, relationships. Deals involving volume and duration discounts and rebates are still the norm for online and offline and mostly taking place at the national level. There was evidence that for large global brands some of the decision-making is being done transnationally at a higher level, and across the board there is increasing pressure to meet Key Performance Indicators (KPIs) set within procurement processes and demonstrate short-term impact.

In this context scale becomes more important than ever, as does the ability to speak the language of procurement driven KPIs with metrics and tools for measurement. Those currently existing for linear television are universally trusted and valued because they are commonly established by industry and independently audited in all the jurisdictions we investigated. Those available for online inventory provide more detail and are often connected to purchase or other action by individual consumers, however they are used by agencies and advertisers with a dose of suspicion because of the lack of independent auditing. Agencies engage in complex modelling and econometrics to guide their strategies and struggle with the lack of comparability in the metrics they have available. There is a need for the video-on-demand (VOD) and addressable TV options available from AVMSs to have metrics as trusted and standardised as their linear services, and for them to innovate further in generating metrics that speak to the increased need for details and short-termism among advertisers.

There are efforts underway within joint industry committees and other bodies to develop and standardize metrics. There is a need for these processes to be accelerated and for AVMSs to be able to cooperate on those and other efforts to pool resources for the nurturing of relationships with advertisers. There is innovation in advertising inventory and AVMSs need to be able to cooperate on 'selling' these to agencies and advertisers by educating them on the options, offering training and trials, and other means similar to those used by the large VSPs for the roll out of their tools and

inventory innovations. For this to happen, in many national jurisdictions there will need to be a review of media plurality rules to ensure that AVMSs are able to cooperate where more scale is needed while maintaining diversity of content and views for audiences.

Another source of unevenness in the playing field is the varying capacity to generate and utilise data. AVMSs are beginning to amass their own databases on their audiences beyond the usually viewing metrics through logins to their VOD services, addressable TV arrangements, and other means, yet these still pale in comparison to the ability of large VSPs to process and utilise data from their vast userbases and proprietary programmatic and reserve buying platforms. Large agencies have also invested in their own platforms and agencies and large advertisers purchase data from a variety of third-party vendors to complement the access they have from the buying side platforms. When using buying side platforms agencies and advertisers usually own the data generated from their campaigns either because they also own the platform or have a contract with one that gives them that ownership of the data, albeit usually to be used only within the environment of the platform. The data generated from campaigns is combined with data about users in the design of campaigns and targeting. Not only are AVMSs not able to match the amount of data on their audiences, but they often do not have access to the same kind of campaign data for their online offering as they do for their linear TV offering. Respondents from VSPs and AVMSs expressed genuine concern for data protection, not just in terms of compliance with GDPR, but also as part of their relationship with audiences, and they shared a clear respect for this right with many from agencies as well. Several of our respondents from all categories raised issues about dominance in relation to data access and use. Our findings led us to suggest national competition authorities work together with data protection authorities to investigate.

The investigation of possible unhealthy dominance or unfair competitive practices in this market will require greater transparency than currently exists. The audited measurement of linear TV and reporting requirements on AVMSs in each jurisdiction provide some transparency in terms of where advertiser money is going in terms of what inventory it is being spent on, and therefore with what content it is associated, and in terms of what prices and margins are being paid. There is no equivalent transparency for VSPs or the other non-linear options in most jurisdictions. In France, there have long been trading rules for advertising that require transparency stemming from the Sapin Law, and these were extended to online advertising in 2015 and to programmatic systems in 2018. Respondents in the other jurisdictions voiced significant concerns about the margins taken by various players in the programmatic and reserve buying systems, and advertiser and AVMS respondents reported suspicions about agency margins and the consequences for their planning. For these reasons and the need to enable regulators to investigate potential issues with dominance in various parts of the advertising ecosystem, we recommend other states follow France's lead and introduce thorough transparency rules and potentially EU policymakers should work on guidance or even harmonisation at the EU level.

Best of the Blog

Spring 2019



Why the CMA is wrong in its proposals for reform and what should be done instead.

Bruce Lyons, Professor of Economics

The Chairman of the CMA, Lord Tyrie, has written a [44-page letter](#) (including annex) to the Secretary of State for Business, Greg Clark, setting out a long list of legislative proposals.¹ Two motivations are given: “First, the growth of new and rapidly-emerging forms of consumer detriment, caused in part by the increasing digitalisation of the economy, requires more rapid intervention, and probably new types of intervention... Second, there are increasing signs that the public doubt whether markets work for their benefit.” I agree with the spirit of these points and that they require action. However, I disagree with some of the CMA’s key proposals. Lord Tyrie appears particularly frustrated with the lengthy appeals system which limits his ability to act firmly and swiftly. Unfortunately, the overall package of proposals would reverse hard-won progress in competition policy over the last 20 years and lead to a paternalistic, arbitrary and unrestrained Consumer Interest Authority. In this blog, I briefly explain some of my concerns. I then set out two alternative proposals that would more directly and appropriately address public concerns over unfair pricing and result in better decisions without prolonged appeals.

The CMA Proposals

There are nine sections to the proposed legislative changes, but I focus on three: a) “consumer interest” to replace competition as an “overriding statutory duty” [p.10]; b) new powers to impose legally binding interim remedies during a phase 1 market study, which would also “enable the CMA more effectively to influence the conduct of those

businesses whose practices raise concerns, without the need for formal work in the form of market studies or market investigations.” [p.17]; c) more limited standard of review for CA98 cases (illegal agreements and abuse of dominance [p.36].

The consumer interest as an overriding statutory duty

I am a great fan of the old OFT strapline of “making markets work well for consumers”.² It captures both the fundamental importance of competitive markets and the regulator’s focus on who markets should benefit. The regulator’s job was to ensure that consumers have a competitive range of opportunities to choose from, and then leave them to make their own choices. Cutting out the role of markets/ competition and fast-tracking to “the consumer interest” risks a wide-ranging and paternalistic determination of what is the consumer interest. This echoes the language and problems of previous “public interest” tests. There is a worrying absence of any discussion in the Tyrie letter of how the consumer interest will be determined. What exactly is the consumer interest other than in relation to what the market provides?

If the proposed overriding statutory duty is to be consumer interest, what does this mean for intermediate business customers? It might be tempting to interpret the consumer to include business customers were it not for the single mention of business-to-business relationships in the 44 pages. This is buried in footnote 23 on p.14 where we learn, amongst other things, that the CMA has been considering

“introducing an explicit prohibition on unilateral conduct that exploits economic dependence or inequality of bargaining power, even in the absence of an established dominant market position”. This indicates a particular concern for business suppliers over business customers. It does not suggest that the CMA equates business customers with consumer interest.

Anticipated use of interim measures in the markets regime

The markets regime provides the CMA with uniquely strong powers to intervene in markets where firms are not suspected of illegal practices, but where markets do not seem to be working well for consumers. Market investigations have been used recently to promote competition through demand-side remedies which help consumers become better informed and better able to switch suppliers (e.g. energy, retail banking). It is quite right for Lord Tyrie to observe that the markets regime can be a very lengthy process and I agree that interim measures could be part of the solution. However, my concern is with the combination of interim measures and an unspecified consumer interest. Without clear principles to guide business compliance, they would be left to wait for a tap on the shoulder from the Consumer Interest Authority.

The aim seems to be to incentivise firms to cooperate before a market study has to be opened, and the arbiter of consumer interest will tell them what to do: “Weighing on the minds of management in deciding whether to cooperate with the CMA would be the alternative: direct intervention, in the form of legally-binding requirements. ... Many of these exchanges would occur in private. Early public communication of problems in markets, and sources of consumer detriment, could also encourage improvements to behaviour. For instance, an announcement that the CMA was concerned about certain practices or markets, and minded to investigate, might in itself be sufficient to secure engagement with firms and improve standards.... Legal protections may also be required to ensure that the CMA is adequately protected from defamation liability...” [pp.17-18]. The CIA, possibly guided by media or political opinion, would decide which firms and in which markets pricing should be controlled – without the necessity for either an investigation or an objective definition of consumer interest.³

Limited standard of review for CA98 enforcement cases

The CMA’s complaint is that the “merits” standard of review by the CAT in CA98 cases (Ch.1 anticompetitive agreements and Ch.2 abuse of dominance cases) is over-burdensome. It is less worried about appeals in markets and merger cases, which are subject to a more limited “judicial review”. The CMA asserts that the solution to lengthy appeals is to change the standard for CA98 to judicial review (or similar standard). However, the letter shows no appreciation of why the different standards currently exist and so of what needs to be the quid pro quo for such a change.

As the letter points out: “Market investigations are led by independent ‘panels’, comprising individuals from a variety

of backgrounds (law, economics, public sector, business); the panels are supported by CMA staff but the independent panel members are the sole decision-makers – not the CMA Board, or CMA staff.” [p. 13 footnote 20]. In contrast, CA98 cases are decided by Case Decision Groups, which are dominated by internal staff, albeit not those who conducted the initial investigation. A just system requires a level of review appropriate to the degree of intervention and the independence of prior scrutiny a decision has received. Despite claiming to the contrary, CDGs do not provide sufficient challenge and independence to justify the lesser standard of judicial review.⁴ The CMA’s power would be insufficiently restrained if the standard of review was reduced without appropriately changing decision making.

I have previously proposed two reforms that would much more directly address the causes of the problems highlighted in the Tyrie letter, and do so without the dangerously negative side-effects of the CMA’s own proposals.

My Alternative Proposals

I have previously proposed two reforms that would much more directly address the causes of the problems highlighted in the Tyrie letter, and do so without the dangerously negative side-effects of the CMA’s own proposals. First, the CMA should develop a coherent, objective and enforceable set of ethical principles of unfair pricing to guide business compliance and fill the gap between consumer policy and competition policy. Second, the CMA should accept that its inconsistent decision-making structures, squeezed together as a compromise at the time of the merger of the OFT and CC, need wholesale reform. The former would help address public and political concerns about market outcomes, especially with the growth of default renewal contracting and digital markets. The latter would speed up the appeals system without undermining the quality of decisions.

Proposal 1: Adoption of explicit principles of unfair pricing

The CMA has recently responded to a super-complaint by Citizens Advice on the [Loyalty Penalty](#). It talks a lot about fairness and unfairness, and makes many important observations. It still needs to distinguish more clearly between fairness and efficiency. Most importantly, it stops short of developing principles that can be used by business for compliance and by the CMA for intervention. The FCA has attempted to take such a step in its consultation on [Fair Pricing in Financial Services](#).

In our [response to the FCA](#), Bob Sugden and I agree that it is right to think about what fairness means in practice, even though we are critical of some of their specific proposals. We argue that there is a gap between consumer law and competition law, which permits pricing practices that most people would consider unfair. We root our approach in ethical principles, but we also think that unfair pricing undermines public faith in markets, encourages arbitrary interventions, incentivises expensive avoidance strategies, and so reduces the overall efficiency of a market economy.

There is no space to develop those principles in this blog but we distinguish separate concepts of *distributional unfairness* (where pricing practices are biased against the poor) and *transactional unfairness* (where the information and/or framing for purchase decisions is biased, whatever the consumer's wealth). We also suggest a simple, first-look, intuitive ethical test:

Can the firm provide a reasonable explanation of its pricing practice, locating it as part of a business model based on mutual benefit, and would the firm be willing to give this explanation to its customers and expose it to public debate?

We illustrate our approach to identify unfair price discrimination using a three-stage test that considers: a) the basis for discrimination (e.g. misleading or suppressed information, characteristics of purchaser), b) the effect of discrimination (e.g. higher prices to poorer or more vulnerable consumers, expensive avoidance strategies by others), and c) pro-competitive justifications (e.g. efficiency, competition).

The CMA should propose and consult on a set of such principles of unfairness, which may or may not require new legislation to enforce.

Proposal 2: a) A genuinely independent expert panel system to decide all cases (market investigations, phase 2 mergers, illegal agreements, abuse of dominance); b) the CAT to apply judicial review to all cases first decided by such a panel

I first made this proposal in 2011, when the merger of the OFT and CMA was being considered and [before the CMA was formed](#). I repeated the arguments last year in my [submission to the Competition Law Review](#) being conducted by BEIS. Only when Proposal 2a) is in place can Proposal 2b) be justified, and so facilitate more rapid review. To be clear, there is absolutely no reason to have two different decision-making structures at the CMA other than haste and compromise in negotiating an institutional merger rooted in very different histories: i) the OFT was initially set

up on the lines of a European Directorate General, and ii) the Competition Commission had its roots as a Royal Commission of independent experts. It is very long overdue to have a single system of independent experts making decisions. This is not to say that the current system of independent panels for markets and mergers has got it right. Unlike the present system, a panel should not be involved in the general conduct of the inquiry or editing of staff working papers, though it should continue to conduct hearings. There should also be a smaller set of rotating members, each with greater time commitment to the role.

The Tyrie letter is silent on reform of decision-making but, unfortunately, there is reason to believe that the CMA may be waiting to propose a move further *away from* decision making by independent panels.⁵ The outgoing Chairman of the CMA flagged the direction of travel in his [Beesley Lecture](#) in November 2018. He argued that the CMA is caught in a vice between, on the one hand, the rise of litigation, with firms challenging decisions through appeals processes that are “over-elaborate and over-done”, and on the other hand, political pressure for fast, effective intervention. To tackle these, he argued for reform in both the appeals process and the structure of decision-making at the CMA. The Tyrie letter adopts a similar position on the former but is silent on the latter, so I rely on Lord Currie's thoughts. Lord Currie complained that the CMA Board was in a position of ‘responsibility without power’. He was particularly concerned that the Chairman and Chief Executive should be given greater influence. In my formal [Beesley response](#) to his lecture, I argued exactly the opposite. More than ever, we need an independent system that cannot be accused of caving into either political pressure or institutional groupthink.

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The CCP [Competition Policy Blog](#) comments selectively on a variety of issues related to competition policy. It could be on something in the news, on policies from either the Government or agencies, or it could be on a new piece of academic research that particularly catches our eye. All our posts are founded in our understanding of the latest academic research and have been written to be accessible to practitioners, academics, students and journalists.

References:

1. “The proposals are the product of careful consideration by senior CMA staff, and discussion at Executive and Board level.” [p.6]
2. Though Andrew Motion, then Poet Laureate, once suggested to me that the institutional aim would sound better if it was “making markets work wonderfully”!
3. There is even a suggestion that the markets regime may be made “simpler and more effective” by removing the crucial check against groupthink that is currently provided by a market investigation [p.14].
4. I will write a [separate blog](#) about two “factual” claims in the Tyrie letter that serve to reinforce concerns about drawing conclusions and imposing remedies on the basis of unchallenged evidence.
5. The Tyrie letter does offer the prospect of removing the distinction between the two stages of the markets regime but says only that decision-making “would need to be carefully considered”. In the wider context of the letter, the suspicion must be that he has in mind elongating the first stage which has internal decision-making and possibly new powers to impose interim measures. The tone of the letter does not suggest a desire to jump to stage two with independent panels.

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Director's Letter: News from CCP



Professor Sean Ennis

Since the last issue of the Research Bulletin, CCP has settled into new space in Earlham Hall, in the old stables. We no longer hear the echoes of horse hooves on the bricks, but we are still reminded by original hand-painted signs to “Clean tools after use” and “Keep this shed tidy”. Please do come visit if you are in Norwich. Shortly after CCP’s move, I came into post at UEA to serve as a Professor of Competition Policy at the Norwich Business School and CCP’s new Director. I have been delighted and excited to meet CCP’s current members, a superb and broadly based faculty and student body in its four member schools, constantly regenerating and drawing on its existing expertise while opening up to related areas. We also have highly engaged outside members, in economic regulators, and will increasingly be welcoming external sponsors into the fold, while always maintaining a focus on top quality independent research.

Morten Hviid, our previous director, has moved back to his primary appointment in the UEA Law School and I thank him for all his help in the transition. There are a number of other personnel changes. Lili Samkharadze from NBS has left UEA for a consulting opportunity. Catherine Waddams is now retired and recognised as a Professorial Fellow. We have been joined by two new research assistants, Bryn Enstone and James Craske. We have also been joined by Professors David Currie, Frances Bowen and Raphael Markellos. Our postgraduate students have been particularly productive over the last year, as evidenced by their contributions to this very issue.

Departing from the historic pattern, this year’s annual conference will be held in central London from 6-7 June, on the timely topic of “Machine learning and AI as Business Tools: Threat or Blessing for Competition.” The London location should allow easier access for the policy maker, national academic and practitioner audience, including those from the tech industry. The conference follows closely on the heels of major reviews in the UK and at the EU, such as the Furman Review, to which CCP’s Amelia Fletcher contributed

as a member of the expert panel. Touching on themes of algorithmic pricing, targeted advertising, consumer protection and the use of AI to enhance the position of the consumer, this conference will be of interest to economists, policy makers, competition lawyers, data scientists and web, IT and algorithm developers.

We will hold a second conference this year in honour of the life’s work of Catherine Waddams, at UEA, on 16 September. The title of this conference will be “The Objectives of Economic Regulation: Feasibility and Public Acceptability.” We hope to see you there as well.

Work has just concluded on a CERRE project led by Sally Broughton Micova, on competition within audiovisual advertising (see page 14) and continues on a Bureau Européen des Unions de Consommateurs (BEUC) funded project on Network Tariffs, led by Catherine Waddams. Stephen Davies is conducting a comprehensive review of anticompetitive laws and regulations in the Philippines, and I am undertaking a new CERRE project comparing nationalised to private operations of water systems. In addition, several faculty are providing advice to BEIS. We are actively positioning ourselves to participate in other projects that can yield interesting and policy-oriented research.

Recent Working Papers

Antibacterial resistance and the cost of affecting demand: The case of UK antibiotics Farasat Bokhari, Franco Mariuzzo & Weijie Yan, CCP Working Paper 19-3

Commitment decisions in the antitrust enforcement of Korea: A comparative study with the settlement systems of the US and the EU Dong Myong Kim, CCP Working Paper 18-14

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