Speech: Reflections on the past; ambitions for the future

Almost 4 years on from the creation of the Competition and Markets Authority (CMA), we face opportunities and challenges that would have been hard to predict back in 2014. However, before I turn to what lies in store for the CMA, I'd like to reflect on some of the key developments and achievements over the last year or so.

Back in the latter half of 2016, as we considered the implications of the Brexit referendum for the CMA and for competition law enforcement in the UK, we took a decision to set up a small policy team focused on preparing for EU Exit. This allowed the vast majority of CMA staff to concentrate on our day job of delivering robust and effective casework. A review of our project milestones last year shows that this decision has clearly paid off.

Key developments and achievements in competition law enforcement

The continued step-up in our competition law enforcement activities has been widely recognised by external commentators. In each of 2016 and 2017 we launched 11 new Competition Act 1998 (CA98) investigations, 60 per cent higher than the annual average between 2010 and 2015. Further, in 2017 we issued 9 CA98 decisions comprising 6 infringement decisions, 2 commitments decisions and 1 no grounds for action decision.

For many of you, this emphasis on the ramping-up of our enforcement activities won't be new. But we repeat the message because it is so important. It is essential to have a strong record of vigorous and effective enforcement of competition law – both to stop anti-competitive conduct in the specific case, but also to deter others from engaging in such practices. And we have also seen this ramp-up mirrored by greater enforcement activities amongst regulators with concurrent powers.

More broadly, there is of course a constant need to spread our finite resources across the full range of the CMA's activities (a challenge which will not diminish as we exit the EU). We have an active 'pipeline' of potential CA98 cases and, although inevitably decisions on priorities have to be taken, we are always keen to receive complaints and other information about potential anti-competitive practices. To help achieve this, we are also running a proactive communications campaign to target businesses with messages that seek to educate, raise awareness and encourage reporting of cartels.

In this context, we also welcome the Chancellor's announcement last November to provide the CMA with an extra £2.8 million a year from this April so that we can "take on more cases against companies that are acting unfairly" (this is in addition to, and separate from, funding that is likely to be required

in connection with EU Exit as the CMA's portfolio of cases expands further).

The breadth of sectors and conduct covered by our infringement decisions last year is self-evident, ranging from market-sharing and price coordination in furniture parts, price-fixing amongst estate agents, resale price maintenance in the online sale of light fittings and an online sales ban in respect of golf clubs (the latter currently under appeal). Our most recent infringement decision, issued at the end of last year, concerned geographic market sharing between joint venture partners in the specialist laundry market. Although a relatively small case, it was an important one for 2 reasons:

- first, because the practice came to our attention in the context of a merger review (again demonstrating the benefits of joined-up working across tools)
- and second because it serves as an important reminder that parties to a joint venture must review the legality of the entirety of their arrangement both at the outset and for the duration of a joint venture

Alongside these infringement decisions, we are continuing to pursue several investigations looking at alleged excessive pricing and related conduct in various pharmaceutical markets. This is an important aspect of our enforcement portfolio currently but is carefully balanced alongside a range of other cases.

One further important milestone that came at the very end of 2016 was that the CMA secured its first competition company director disqualification for a competition law breach, by way of a formal undertaking (following an infringement finding in respect of an online pricing agreement). We consider it very important that company directors are held to account for their involvement in competition law infringements – and likewise take proper responsibility for the conduct of their companies and employees. You should therefore expect to see us taking further action in this area in future, including more frequently pursuing parallel investigations into the conduct of companies and their directors.

Improving pace without compromising rigour and fairness

Of course, the portfolio of cases and number of infringement decisions is only part of the story. At the inception of the CMA, we were rightly under some pressure to improve the pace of delivery of our competition casework. As a senior management team, we have consistently sought to do so without compromising rigour or fairness. As General Counsel, I am naturally particularly concerned to ensure that our legal analysis and our review of the evidence are robust, that we respect parties' rights of defence and that we follow proper procedures. We achieve this by having our legal advisors embedded in case teams throughout the lifetime of the project along with detailed review and oversight at key junctures by our most senior lawyers. We further ensure robust and fair enforcement through the operation of our Case Decision Groups (CDGs), comprising senior staff and CMA panel members who have had no prior involvement in the case and who therefore operate as

independent decision makers. Having now seen the CDGs operate at first hand across a number of cases, it is very clear to me that they can provide effective and independent challenge to the case teams.

Defending our decisions

Where we reach an infringement finding, it is of course open to the parties to exercise their rights of defence before the Competition Appeal Tribunal (CAT) and our objective is to issue decisions which withstand judicial scrutiny. 2017 saw some important litigation against our CA98 decisions. By way of brief summary:

- In January 2017 we successfully defended the application for interim relief by Flynn Pharma Limited in the context of the broader Phenytoin excessive pricing case. This was an important outcome because it meant that the immediate effect of our infringement finding – which included directions to reduce the price of the medicines in question – was not suspended by the ongoing appeal. This carried an immediate and direct benefit to the NHS and ultimately tax payers and patients.
- In February and March 2017, over the course of a five-week hearing, we defended the substantive challenge to our infringement decisions in the Paroxetine ('pay for delay') case. We are awaiting judgment from the CAT.
- In July (judgment in October) 2017, we successfully defended the substantive challenge to our infringement finding in the Balmoral Tanks information exchange case. The case was important in highlighting that the exchange of competitively-sensitive confidential information, even at a single meeting, and even when the party refrained from joining others in actual price-fixing or market-sharing, can be a breach of competition law. The case sends a clear message that any business invited to join a cartel must distance itself clearly, absolutely and unequivocally. Balmoral Tanks has sought leave to appeal to the Court of Appeal which was refused by the CAT but remains outstanding before the Court of Appeal.
- In October and November 2017, over the course of a four-week hearing, we defended the substantive challenge to our infringement decision in the excessive pricing case against Pfizer and Flynn Pharma. We await judgment.

We take the defence of our decisions very seriously and the opportunity to challenge our decisions is an essential part of the overall competition regime. However, important litigation can also arise in what might be termed 'satellite' matters. I've already referred to the interim relief challenge related to our directions to reduce the price of Phenytoin sodium capsules.

Last year we also saw important litigation related to our ability to obtain warrants in Competition Act cases. The issue in the litigation was whether the CMA could rely on material protected by public interest immunity for the purposes of defending a challenge to the warrant without disclosing it to the party in question. The judgment went against us in part at first instance, but we have appealed to the Court of Appeal and believe resolution of the

point is important to maintain the effectiveness of our investigative powers. Our appeal is currently pending in the Court of Appeal on an expedited basis.

Most recently, last month we challenged the admission of new evidence by the golf club manufacturer Ping in our defence of the infringement decision related to their online sales ban. This was an important challenge for the CMA. As you may be aware, the CAT's Rules provide for the admission or exclusion of new evidence based on the consideration of a number of factors including the standard of review; whether the evidence was previously made available to the respondent and if not, why not; the prejudice suffered by admitting or excluding the evidence; and whether the evidence is necessary for determination of the case. In this case, the CMA objected to the admission of new evidence filed by Ping in circumstances where we had specifically requested that it respond to the relevant issues prior to reaching our infringement decision and Ping took a deliberate decision not to do so without, in our view, good reason. We argued that withholding evidence from the investigation only to deploy it on appeal risked prejudicing the CMA's ability to make informed decisions and defend the decision it had made but also, more broadly, risked undermining the scheme envisaged by Parliament for investigating alleged competition infringements where all relevant evidence is presented to and considered by the CMA before it reaches a decision (rather than the CMA merely being an advocate in a prosecutorial system). Disappointingly, the CAT found against us and allowed the new evidence to be admitted. We await the reasons for this decision. However, it remains a real concern to us that while companies must properly be able to exercise their rights of defence, this should not operate to subvert the intended functioning of the regime by Parliament by in effect substituting the CAT as a first instance decision-maker. And this is not just for the CMA's benefit. We believe it is in parties' best interests to put their case fully to the CDG as an independent decision-maker in our administrative process.

These 3 instances of satellite litigation are illustrative of a broader point. The CMA recognises the importance of effective judicial scrutiny. However, we will vigorously defend the exercise of our powers to ensure the effective and intended functioning of the UK competition regime as a whole.

Key developments and achievements in consumer law enforcement

Although the focus of this conference is competition law, it's also important not to lose sight of our consumer law enforcement work. There is a common theme here in terms of the ramping-up of the CMA's enforcement activities. By way of example, in 2017 we announced commitments received to improve terms and conditions by cloud storage providers and higher education providers. Earlier this month, we announced commitments from major online gambling operators in response to our ongoing investigation in the sector. Last year, we also announced investigations into possible breaches of consumer law by care home providers, secondary ticket providers, car hire price comparison sites, an online dating operator and hotel booking sites.

I spoke earlier about the need for the CMA to balance our finite resources across our different areas of work. Equally important is our ability to join up across different tools. Our market study tool can act as a particularly effective platform from which to launch further competition and/or consumer enforcement activity. This is evident from the work we have done in this space over the last 12 months.

Key developments and achievements in market studies and investigations

The CMA completed 2 major market studies in 2017. The first of these was the CMA's report in September, into digital comparison tools (DCTs). This contained important recommendations around market practices and regulation, but also led the CMA to open follow-up competition and consumer law investigations into, respectively, practices in the home insurance and hotel online booking sectors. Similarly, at the end of November, we published our report into the care homes market. Again this contained recommendations, including to government, but also led to specific consumer law enforcement action. In both cases we demonstrated the flexibility of our toolkit but these studies also reflect the breadth and balance of our markets portfolio with DCTs signalling our interest in important digital markets and care homes focusing on protecting consumers in a position of vulnerability. And it is important to remember that our markets work often has a long-running impact. For example, we continue to be involved in the implementation of remedies following our banking market investigation, notably the roll-out of 'Open Banking', and we continue to support regulators consulting on changes in the legal services market following our 2016 market study.

We also took the opportunity last year to consult on certain changes to our market investigation process. These changes included earlier consideration of remedies; reducing the number of set-piece consultations; earlier, flexible interaction with stakeholders; and enhanced efficiencies between market studies and investigations while maintaining independent decision-making. Some of these changes are now being put to the test during our ongoing investigation into investment consultants.

Key developments and achievements in mergers

On the mergers front, we are taking incremental steps to improve our streamlining across phase 1 and 2 cases whilst maintaining independent decision-making at phase 2. This includes greater continuity of staff involvement and enhanced alignment of evidence gathering across both phases. 2017 was another busy year for the CMA in our merger reviews, both at phase 1 and phase 2, with 8 phase 2 inquiries completed last year. Notable milestones included the fast-track reference and subsequent clearance of the Tesco/Booker merger; the decision to clear the merger between 2 Manchester hospital trusts based upon an assessment of relevant customer benefits; and, of course, the ongoing review of the Fox/Sky acquisition.

Importantly, we also successfully defended a challenge to our 2016 decision

to prohibit the completed vertical merger between Intercontinental Exchange, Inc. (ICE) and Trayport.The CAT upheld the CMA's findings that the merger between the 2 companies was likely to result in a loss of competition and that in order to resolve this, ICE must sell the Trayport business. However, the CMA was asked by the CAT to reconsider its additional requirement that the companies terminate an agreement entered into during the original investigation and which would significantly expand their commercial relationship.

On remittal, the CMA concluded that termination of the agreement was necessary and that the loss of competition identified in the original merger investigation would not be comprehensively remedied if the agreement remained in place. The requirement for ICE to sell the Trayport business had been put on hold until the remittal investigation was concluded. That sale was completed in December 2017.

This case, and the subsequent litigation, demonstrates again that the CMA will not shy away from action to defend its decisions and ensure that the outcomes of our investigations are fully effective.

Continuing the theme of effective enforcement, again in a merger context, in November last year we imposed a penalty of £20,000 on Hungryhouse in respect of its failure to provide certain documents in response to a s109 notice without reasonable excuse. In that case, the failure to comply had a clear adverse impact on the inquiry, resulting in significant further information gathering and risked the Inquiry Group's decision being taken on the basis of incomplete evidence. As those of you who have been involved in recent phase 2 merger investigations will be aware, we will routinely use our compulsory information gathering powers where appropriate. This is important in light of the statutory timescales under which we operate and our obligation to take fully evidenced decisions. This case was the first time the CMA has imposed a penalty under s110 of the Enterprise Act but you may recall that in 2016 we similarly imposed an administrative penalty on Pfizer under s40A of the Competition Act for failure to comply with a section 26 notice without reasonable excuse. The message is clear and consistent across all our tools: we are determined to be an effective enforcer and, in doing so, our expectation is that parties to our investigations – and their advisors – comply in a complete and timely manner with their own obligations in respect of our inquiries.

What lies ahead for the CMA?

So, finally, we turn our eyes to the future and of course the big question is how the UK's exit from the EU will affect the CMA and UK competition law enforcement. I know there is a separate session on this topic later today but I would like to give you an overview of what the CMA sees as the key opportunities and challenges – as well as a sense of the practical steps that we are taking now to prepare for Exit.

I should say at the outset that, as I hope this review of 2017 has demonstrated, the priority for the CMA is – and remains – to deliver

effective outcomes across all our tools. So, a critical objective for the CMA, both in the run-up to and after Exit, is that we maintain that track record of delivery. In fact, for reasons I'll come on to, we think that Exit offers us some very positive opportunities to consolidate and extend the impact of our work.

As we speak, it is fair to say that certain aspects of what the future landscape will look like (and indeed the timing of potential changes) remain uncertain. What does seem likely, at least as things stand at present, is that, post-Exit, the CMA will take on a greater role in both merger control and antitrust enforcement.

In merger control, as you know, the European Commission currently has an exclusive review function over mergers affecting the UK market which meet the EU merger notification thresholds. If this one-stop-shop jurisdiction falls away, these mergers will instead or additionally fall to be reviewed by the CMA as regards their UK impact – assuming they meet our jurisdictional thresholds and present a potential competition concern. This raises the prospect of parallel review of major international transactions by both the Commission and the CMA (as well as other agencies). It also means that other more UK-focused deals that previously fell within the Commission's jurisdiction may now fall to be reviewed by the CMA. Overall, we estimate this is likely to lead to an increase of around 30-50 additional phase 1 mergers cases per year – and roughly speaking might result in something like an additional 5 phase 2 cases per year. This has some obvious implications: first, we are likely to need additional resources to support this activity, particularly if we want to maintain a balanced portfolio of work across our other tools at the same time and continue our focus on local and regional cases as well as national (and international) ones; and second, we need to be in a position to work effectively with the Commission and other agencies when conducting a parallel review of international deals. The need for parallel reviews isn't new to us of course, but it is likely to be happening on a significantly greater scale post-Exit.

I'll come back to how we propose to address those challenges in a moment but clearly this change also presents an opportunity for the CMA as we are likely to play a major role in the assessment of a number of complex international and national deals that would previously have been reviewed – as regards their UK impact – only by the Commission. Whilst we think the current system has worked well, these changes will in a sense bring decision-making closer to UK markets and consumers. This is an exciting opportunity for the CMA as an organisation and for the staff who work for us.

It's a similar story in the case of antitrust enforcement. Assuming the UK ceases to participate in the current arrangements for case allocation under Articles 101/102 and Regulation 1/2003, the CMA will be in a position to investigate the UK aspects of major antitrust cases which would previously have fallen within the exclusive competence of the European Commission. Of course, the CMA will have some discretion over the number and nature of the enforcement cases we take on. But equally, it is important that the loss of the Commission's jurisdiction in this regard does not result in an enforcement gap to the detriment of UK businesses and consumers. As a rough

estimate, we think this might result in us taking on an additional 5-7 complex cartel/antitrust cases per year.

As with mergers, this will have inevitable resourcing implications and will also require effective parallel working with the Commission. But at the same time, it presents an opportunity for the UK authority to be directly involved in such cases.

Preserving cooperation

A key priority for the CMA is to maintain effective cooperation arrangements with the European Commission, national competition authorities and other competition agencies. In particular, currently under Regulation 1/2003 there are provisions governing the exchange of evidence including confidential information as well as provisions to facilitate overseas enforcement. In order to ensure that the CMA is in the best position to conduct investigations effectively in parallel with the Commission (and other agencies), we believe it will be important to replicate a number of these provisions – especially to enable the reciprocal exchange of confidential information. Timing is an important factor here because it is desirable to have such arrangements operational at the point at which the CMA takes on these enhanced roles. It's worth noting that this issue is particularly significant for antitrust enforcement since in the case of merger control, the incentives mean that parties are often content to offer waivers enabling the exchange of information in any case. And of course the benefits are two-way – for example we recently assisted the Romanian competition authority to gather evidence in the UK.

We will also want to ensure we have appropriate cooperation mechanisms in place with agencies outside the EU. To some extent these already exist but we are keen to negotiate deeper agreements with key jurisdictions, whether at an agency or inter-governmental level, in particular to ensure we can exchange confidential information and other evidence and cooperate on enabling effective remedies and enforcement of our respective laws.

Consistency or divergence?

Another important consideration for the CMA, and indeed the UK competition law regime more broadly, in ensuring we maintain effective enforcement, is the extent to which we maintain a consistent application and interpretation of antitrust law with the EU – given that the Competition Act provisions are modelled on the EU competition law prohibitions.

Section 60 of the Competition Act currently requires UK courts and competition authorities to ensure as little divergence as possible from EU law. This requirement is likely to fall away post-Exit. However, the extent of future divergence remains uncertain, taking account of the limits on departing from existing jurisprudence currently contained in the European Union (Withdrawal) Bill. The CMA has encouraged the Government to provide clarity in this respect.

In general terms, the CMA sees many benefits in retaining broad consistency with the application of EU competition law: it provides consistency for business, especially those engaged in cross-border trade; facilitates parallel investigations; minimises the risk of divergence (including as between different UK courts and institutions) and reduces the prospect of litigation over previously-established principles. It is also likely to foster mutual and ongoing respect between UK and EU agencies and courts. On the other hand, there may be some real benefits to loosening the ties in terms of allowing UK institutions the freedom to depart from current or future EU case law where that is considered appropriate and creating the platform for the UK regime as a whole to develop a global position as a thought leader in the evolution of competition law enforcement. Either way, the CMA's assessment will be informed by a baseline of economic principles which are broadly shared by the wider competition community.

Overall, therefore, when we look forward to the CMA's role post-Exit we see real opportunities to be a leading actor in global competition law enforcement. We stand ready to take on a decision-making role in respect of some of the largest and most complex mergers, cartels and antitrust cases, informed by our familiarity with UK markets and having the interests of UK consumers as our primary concern. We are already in discussions with other leading competition authorities in jurisdictions such as Australia, Brazil, Canada, Korea and Japan to understand how they work alongside the EU and US authorities on global cases.

The greater uncertainties, and potential risks, from our perspective relate to timing and transitional arrangements. Notwithstanding the Government's intention to agree an implementation period of around 2 years, it currently remains uncertain whether that will be secured and, even if it is, whether and how that will apply to merger control and antitrust enforcement. For planning purposes, we are therefore looking at various scenarios including transfer of jurisdiction from the Commission to the CMA in March 2019 and March 2021, in both cases with and without some form of transitional arrangements for 'in-flight' cases. From our perspective, we are keen to ensure a smooth transition as and when jurisdictional changes take effect, both in order to avoid unnecessary duplication but also to minimise the risk of enforcement gaps and ensure UK consumers are properly protected.

One particular question that has been raised is whether the UK will have a domestic state aid regime and if so, whether the CMA will have a role in enforcing that. Clearly this remains a matter for Government and isn't something I propose to discuss today.

Practical preparations

However, I would like to end with a few words about what practical steps the CMA is taking now to prepare for Exit.

First of all, we continue to provide the government with support regarding the policy implications for Exit on the competition and consumer protection regimes in the UK.

Alongside that, we are planning to ensure operational readiness for our post-Exit role. Of course, at the moment this has to reflect uncertainties as to timing and also the potential scope of our enhanced role. But as I mentioned earlier, our current planning is predicated on an assumption that we will take on a significantly increased merger and antitrust review role. If we are to deliver these additional cases efficiently whilst maintaining something like our existing portfolio of other enforcement and markets work (including more local cases), this clearly necessitates increased resources. We are therefore planning internally for what our additional resourcing needs would look like post-Exit and considering a range of recruitment initiatives that might help to deliver this. We are optimistic in this regard since – as mentioned earlier – EU Exit provides a great opportunity for our staff to work on an even more interesting range of complex and important cases.

More immediately, we are already launching several recruitment campaigns in light of the additional enforcement funding we received as part of the Budget announcement at the end of last year.

As part of this growth, we are significantly expanding our office in Edinburgh with plans to have around 30 members of staff in place there within the next 2 years (including several relocating from London as well as opportunities to recruit directly in Scotland). We see this as a really exciting opportunity to attract talented staff who are keen to work for the CMA but may not previously have wanted to be based in London. Going forward, staff based in Scotland will work as integrated members of cross-office project teams but will also enable us to ensure that we are alive and responsive to more local concerns. This will enhance our ability to operate as a truly pan-UK agency but also provides an important additional expansion platform as we gear up for Exit.

Alongside these operational plans, we remain focused on maintaining a leading role as a world class competition authority through our active engagement with organisations such as the International Competition Network (ICN) and The Organisation for Economic Co-operation and Development (OECD) as well as our continued participation in the European Competition Network (ECN) and, on the consumer side, the International Consumer Protection and Enforcement Network (ICPEN) and EU Consumer Protection Cooperation Network (CPC) networks. Likewise, we continue to build on and develop our strong working relations with a wide range of agencies both within and outside the EU, recognising that those relationships will be critical to maintaining our effective enforcement role post Exit.

By way of closing comment, I'd like to take you back 5 years to a period that we happily termed "transition" – the period for creating the CMA through the merger of the OFT and the Competition Commission. At the time, our objectives were clear: more effective and timely competition law enforcement; rigorous internal checks and balances to ensure our decisions withstood judicial scrutiny; greater streamlining across merger and markets work without undermining the benefits of independent decision-making at phase 2; and a clearer and more effective role for the CMA in consumer enforcement. I believe we have performed well against those objectives. What we didn't know then of course, was that 'transition' would mean something altogether

different by 2018. Undoubtedly there are both opportunities and challenges ahead, but I don’t doubt our ability to continue to deliver and maintain the position we have established as a serious player in competition law enforcement across the globe.