

The CMA in the 2020s: a dynamic regulator for a dynamic environment

Introduction: Three Institutional Challenges

The global adoption of competition laws is one of the most remarkable developments of our time. In the first century after Canada and the United States enacted the first national competition laws, roughly thirty jurisdictions created competition law systems. Since 1989, the number has risen to over 130. In no other area of economic policy have we seen so many nations establish new regulatory systems in so relatively short a period of time. The United Kingdom (UK) was a relatively early adopter. Its competition law regime took form in the late 1940s, and a series of reforms since the late 1990s, including the formation of the Competition and Markets Authority (CMA), has enhanced the system's substantive commands and institutional framework. The continuous refinement and thoughtful implementation of the UK regime have placed the nation in the front ranks of competition systems around the world.

Notwithstanding impressive competition policy accomplishments, the UK can take nothing for granted. The CMA and many other competition authorities face major challenges whose successful resolution is vital to their effectiveness. Three institutional challenges stand out. The first is to accurately diagnose and correct competition problems amid extraordinary commercial dynamism, especially in digital markets. The second is to sustain legitimacy and effectiveness in the face of severe public doubts about the value of markets and the quality of public administration. The third is to preserve the degree of independence needed to perform core policy making functions without destructive political interference.

The competition policy reforms introduced today by Lord Andrew Tyrie and Andrea Coscelli take important steps to address all three challenges. In my remarks today, I will describe the challenges and suggest how the proposed reforms strengthen the CMA's capacity to fulfill the promise that inspired its creation just over five years ago. My views about the future of the UK competition regime are deeply informed by my experience abroad – in serving as the chair and a member of the US Federal Trade Commission and studying competition agencies in many other jurisdictions.

Dealing with Extreme Commercial Dynamism

From the time of the earliest experiments with antitrust law in North America to the present, competition agencies have struggled to adapt their programs to meet the demands imposed by intense commercial dynamism. For example, in the late 19th century and early 20th century, a stunning wave of technological innovation transformed markets. Among other developments, this period witnessed the introduction of the airplane, the automobile, the motion picture, the radio, the steamship, the telephone, the wireless, and the

deployment of energy systems that employed alternating current. These innovations unleashed a torrent of new products and services and knit together previously discrete geographic regions into unified markets. Today's still more remarkable revolution in communications, information services, and transportation is simply the latest iteration of a longstanding process of innovation-driven upheaval that has tested the capacity of competition agencies.

Yesterday and today, commentators frequently have argued that competition law is ill-suited to identify, correct, and deter misconduct in fast changing markets. Agencies are said to suffer from several fundamental weaknesses. They know too little about new business models, products, and services, they intervene too slowly, and their remedies are ineffective. By this view, competition agencies peddle earnestly on bicycles in futile pursuit of industries that move with the speed of race cars.

The Frayed Political Bargain

In many countries, citizens and their elected officials are ambivalent about reliance on market mechanisms (and large firms) to spur economic progress. To reconcile this ambivalence, many governments have made what Professor Jonathan Baker has called a political bargain with their citizens. The bargain goes like this: markets and firms (including large firms) will serve as the economy's essential infrastructure in return for the government's commitment to create robust regulatory mechanisms to ensure that private initiative serves public ends.

Effective competition policy and consumer protection are vital to the legitimacy and durability of this arrangement. The political bargain unravels if citizens believe that firms frequently or mainly prosper through deceit and the suppression of rivalry. If competition and consumer protection policies fail, or are widely seen to be inadequate or irrelevant, irresistible pressures grow to introduce comprehensive regulatory controls on entry and terms of service, or to expand public ownership.

In the United Kingdom and many other nations today, the regulatory bargain is under tremendous stress. The financial crisis of 2008 badly damaged public confidence in markets and public institutions, and the bitter residue of that experience lives on. A number of observers today liken competition and consumer agencies to the financial service regulators who were blind to the dangers posed by various commercial phenomena in the run-up to the 2008 financial crisis, slow to respond when hazards become manifest, and adrift in their search for effective solutions. A downpour of literature warns that similar behavior has characterised antitrust enforcement policy in the United States. One implication of this literature is that officials in other nations, including the United Kingdom, must be vigilant lest regulatory complacency yield similar outcomes.

Independence, Accountability, and Effectiveness

As the significance of a competition system grows, the almost universal

tendency is for agencies entrusted with implementation to attract greater attention from public officials. The increased scrutiny sometimes takes the form of pressure from legislators and ministers to exercise the agency's powers in specific ways – for example, to bar one merger or to clear another.

What is the proper relationship between a competition agency and the political process? There is general recognition that the agency should act autonomously in making decisions about what to investigate, whom to prosecute, and what sanctions to impose. This is the core of independence that ensures competition law is not simply a mechanism for elected officials to reward friends and punish adversaries.

At the same time, scholars have pointed out that complete isolation from the political process is unattainable and unwise. An agency that exercises formidable powers and receives substantial appropriations of public funds rightly can be expected to be accountable for its policy choices. Without this accountability, the agency's legitimacy would correctly be questioned. An ongoing conversation with legislators and ministers also can provide an indispensable foundation for an agency to obtain needed expansions of authority and resources.

Especially in times of social discontent and political turmoil, there is a premium upon the ability of a competition agency to take steps to preserve a necessary degree of independence and to make itself accountable for its policy choices – among other means, by facilitating a well-informed discussion about the establishment of agency priorities and the selection of individual projects.

The 2020 Reform Initiatives

So why undertake another round of reforms? A simple answer is that the pursuit of better practices always has been a certifying characteristic of the CMA and its predecessors, the Office of Fair Trading (OFT) and the Competition Commission. In the past 40 years, I have had the opportunity to see over 60 competition agencies up close and to study many others (there are over 130 competition law regimes in the world today) at more of a distance. By disposition, I am not given to excessive optimism. On a sunny day, I can spot the wisp of water vapour that eventually forms clouds and yields rainstorms. Nonetheless, I am convinced that, compared to its peer institutions (in academia, we grade on a curve), the CMA is unsurpassed in the intensity and persistence of its efforts to get things right, in what it does and in how it does it.

A second reason to press forward with improvements is that standing still will not surmount the challenges I have described earlier. The CMA is being measured, and will be tested, in absolute (not relative) terms by the results actually delivered to consumers and by how well consumers and others outside 25 Cabot Square – for example, political leaders, business organisations, and civic bodies – perceive the CMA to be fulfilling its promise to make markets work well for consumers. In particular, how well are we confronting the modern variants of the critique posed during the late nineteenth century and

early 20th century beginnings of modern competition law: not smart enough, not fast enough, not effective enough.

The 2020 reforms have considerable promise to help answer these critiques and to ensure that competition and consumer policy do their part to fulfill the political bargain I mentioned earlier: to ensure that markets give UK consumers meaningful choices among products and services and enable them to choose among those alternatives free from fraud and duress. As mentioned by Andrew and Andrea, the 2020 initiatives do three things:

- They will make the CMA smarter by engaging the agency – beyond the important measures it already has undertaken – to understand markets better, to see clearly the sources of market failure, and to seek corrections, either directly by applying its own powers or by recommending policy improvements to other public institutions. These reforms anticipate a still greater emphasis on learning how consumers behave in a variety of market circumstances. Increased efforts to study and report on the state of competition will reinforce the CMA's position as a vital resource for the United Kingdom of first-rate microeconomic policy analysis.
- They will increase the awareness of the CMA's work and the institution's legitimacy by providing fuller explanations of its priorities, plans, and selection of projects. Among other ends, this will raise public awareness of the agency's work and spur consumers, civic societies, and business organisations to suggest ways in which the CMA's allocation of resources could serve society better.
- The reforms will make the CMA a more visible and effective advocate for compliance with existing competition and consumer protection laws and for statutory and regulatory changes that will serve consumer interests. Here the agency can emulate the custom of other agencies – notably, Australia's Competition and Consumer Commission – that publicises the application of all of its policy tools to make the agency's work accessible and understandable to public officials and, most important, individual consumers.

All of these measures, I expect, will pay additional dividends in the form of preserving necessary autonomy and increasing accountability. By increasing its knowledge, the CMA strengthens its reputation as an expert body, and I believe the greater expertise makes public officials more inclined to trust its judgments and resist interference in the exercise of law enforcement duties. The reforms also emphasise fuller disclosure of information about what the CMA does and why it does it. This is a powerful accountability device that ensures the agency will answer for its policy choices and encourage debate about its program.

Possibility for a Valuable and Enhanced Constructive Role Globally

I see the reforms as being important for another reason that goes beyond the foremost objective of securing better market outcomes for consumers. The CMA is a highly respected brand around the world. This is the product of decades of

effort to serve as a clear voice for sensible policy. With its new role in a post-Brexit environment, the CMA today has an extraordinary opportunity to inform the development of good policy norms globally.

Conclusion

In discussing the rationale for the merger of the OFT and the Competition Commission, Lord David Currie and Alex Chisholm, the first Chairman and Chief Executive of the new CMA, respectively, spoke of their aim as being to make an already distinguished competition and consumer regime “even better.” So it is today with the 2020 initiatives. We are well aware of the exceptional dynamism of markets in our time. To be effective, regulatory agencies must be no less dynamic in their pursuit of knowledge, in the application of their policy tools, and the pursuit of improvements that enable them to fulfill their obligations in the face of commercial dynamism. The 2020 initiatives are the CMA’s commitment to be even better.