INFORMATION, MARKETS, AND THE DIGITAL AGE

Sir Marcus Smith[1]

President, UK Competition Appeal Tribunal

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1. It is frequently said that we live in a digital age and that competition and markets law must adjust to this new technology. The focus is on the technology, and it is by reference to technology that new forms of regulation – the "digital markets units" that are springing up all over the place – tend to define themselves.

2. But it is in the processing of information and data that these technologies present their current threat, not necessarily in the technology *per se*. All the technology does is make the processing and use of this information faster, and easier, and more capable.

3. "More capable" of course covers a multitude of goods or evils (and, probably, the same capability can be both good and bad). We all know that advertisements on digital platforms are dynamically chosen by reference to the digital footprint of the viewer in combination with an electronic (and generally "Dutch") auction according to pre-defined parameters. I do not wish to suggest that we should be unconcerned about these potentialities. My focus is on the question of how we choose to regulate them.

4. Additionally, technology will present threats on other fronts, and perhaps require other forms of regulation. AI is perhaps the most important of these. Notwithstanding the fanfare of concern surrounding AI, the age of AI is yet to come. Clearly, some form of regulation is called for, but most suggestions focus on the control of AI through its "human master", without recognising the real problem – which is that genuine AI is likely to be autonomous. My sense is that the law of persons – legal, not natural, persons

[1] Viewed expressed are personal to the writer, and do not necessarily represent those of the Competition Appeal Tribunal. I am very grateful for the comments of one of the CAT's referendaires, Charlotte McLean, on an earlier version of this paper. I bear responsibility for all errors and infelicities.

– may have to be pressed into service. These fronts are of course worthy of considerable discussion, but I am not going to discuss them today.

5. What I am going to suggest is that there is a danger in regulatory "misfiring" if we focus too much on what may be the wrong thing. I am going to suggest that as regards information and data:

   (1) It is information abuse and control that we are – or ought to be – concerned about as competition lawyers.

   (2) Forms of regulation that focus too much on specific market phenomena, rather than the fundamentals, may be short lived.

   (3) Regulation of cartels and monopolies – through Articles 101 and 102 TFEU or the Chapter I and Chapter II prohibitions or their US equivalents – should not be relegated to the back row because our regulators or competition authorities have a lot of shiny new powers.

   (4) But there may be other forms of regulation – other than market controls – that are more appropriate in the case of information and data.

6. Information claims or data abuse claims are pretty common these days. In the UK, there was a group litigation action in the High Court – *Lloyd v. Google* – which received a setback in the Supreme Court when it was held that loss was an individual issue and not something that could be established on a class-wide basis. That trend continued in *Prismall v. Google*. In the CAT, where these constraints do not exist, we have had a number of information actions, notably *Gormsen v. Meta*, a collective proceeding where the CAT refused certification, and sent the class representative off to try again.

7. I am going to use the uncertified allegations in *Gormsen v. Meta* to illustrate some of the points I want to make. I am, for this purpose, going to treat as hypothetically accurate the contentions there advanced. I should stress that these were – and in any certified claim, if certified, would be – disputed by Meta, and it would be a matter for trial to resolve such disputes.

8. The claim (not, I stress, certified) was essentially that Facebook (or Meta) was underpaying for the data it received from subscribers to Facebook, and making excessive profits in the services (based on that data) that it provided to third parties wanting to sell their products to those subscribers. Meta disputed this.

9. Additionally, Meta stressed that the data they harvested was not provided to third parties: what was being provided was a connection, a link, between buyers and sellers of products. Again, this is a fact specific point, which I mention to show the complexities thrown up. Actual provision of data – particularly if capable of disaggregation – brings up different issues of privacy and personal data protection (which are not necessarily market or competition issues).

10. When you articulate it that way, you can see that one "two-sided market" (i.e. the "sale" of social media services for free; and the sale for valuable consideration of advertising services) itself facilitates other markets – markets for the sale of the products of the third parties. The point is that Meta (and other digital platforms) provide links between the "eyeballs" of certain buyers and the vendors of certain products. The value in the technology lies in bringing together the willing and interested buyer and the willing seller. This is the stuff of competitive markets. The whole point of a market is to bring together buyers and sellers so that transactions can be concluded.

11. Advertising – and it can be extraordinarily tacky and manipulative and psychological – is, for all its deficiencies, a tool for promoting products through the provision of information. I am of course using the term most broadly. I am, perhaps, putting a very rosy gloss on advertising. In the UK, our advertising standards regulator seeks to ensure that advertisements are "legal, decent, honest and truthful". I am not sure how many advertisements would actually meet this rather high standard if stringently applied. But I would venture to suggest that controlling the subject matter and substance of advertisements – with all the free speech implications that this entails – is not a matter for competition law at all. Regulation and control may well be needed: but that control ought to apply generally, and not merely where there is market power. In short, I question whether this is the true province of competition law.

12. Of course, these days, more than content is in issue. Advertisements are – as I have said – targeted. We ought to be concerned about the targeting of manipulated advertisements to persons vulnerable (e.g. betting services to gambling addicts) but again this is not an area – I would suggest – that should necessarily be seen through the prism of competition law.

13. As well as a transactional lubricant, advertising is, also and inevitably, a cost to the producer or seller; and that cost (economists, or some economists, will tell us) is (or may be) "passed on" to the ultimate consumer. We can see this in *BGL v. CMA*, a decision concerning "most favoured nation" clauses in the context of price comparison websites for home insurance products. Basically, home insurers subscribe to these websites, their products are compared with others, and if the buyer chooses, the website provides a "click through" to the home insurance provider enabling a sale at minimal additional effort on the part of the buyer.

14. I would very much like to get into behavioural economics at this point – to what extent is a manipulated choice, a choice? What is the position where a search engine or price comparison website relegates some search results to the bottom (or, perhaps, even worse, middle) of a very long list. This is an area where competition law has – rightly – reacted. I would only say that what is and what is not "free" choice in a "free" market is itself a difficult question. There have been "snake oil" sales since time immemorial, and we will have to balance *caveat emptor* with consumer protection.

15. Price comparison websites thus do – or can do – far more than simply provide comparisons. They close sales. And they charge accordingly – some 20% or 30% of the premium of any concluded business, as we record in the *BGL* judgment.

16. Although, of course, this a cost to the producer (here: the home insurance provider), that cost will probably (I will assume that the economic theory is right on this) be passed on to the ultimate consumer. It is, on this basis, the ultimate consumer who pays for the advertising.

17. Let me return to the hypothetical case I constructed out of the *Gormsen v. Meta* case, where (as you will recall) the claimant class representative was saying that the class were overpaying for social media services.

18. I appreciate that it is hard to visualise an excessive pricing case where the price paid is zero, but (as a matter of strict logic, at least) this is not impossible. The point is that a free provision of a product (e.g. data acquired through subscription to social media services) can (at least as a matter of logic) be too low a price if (and this is a big assumption) the data has a value that is substantially above the cost (or perhaps value) of the social media service itself.

19. Let us assume, for the sake of argument, an excessive price along these lines, such that the digital platform charging that excessive price needs properly to compensate the provider of the data. In short, the data will need to be paid for. Because we are now in the realms of the hypothetical, I am going to refer to the hypothetical digital platform providing social media services and not to any more specific entity. If data has to be paid for, that will increase the digital platform's cost base, which cost it will try to pass on to its buyers (of advertisement services), who will try to pass the cost on to their consumers. On these facts – assumed – what we are really talking about (unless the cost cannot be passed on) is a <u>redistribution</u> of a cost arising out of a claim, where one set of consumers are compensated (the buyers of the social media services) at the (ultimate) expense of another set of consumers (the purchasers of the goods that are advertised, whether they see the advertisements or not).

20. The driver of this is the sale and processing of information, which is a central part of a functioning market. If we go back to theories of perfect competition, one of the assumptions made is that the buyers in that market have good market information. One can see why this is necessary for a properly functioning market. Unless a buyer knows their options – their choices – they will not be able to choose. Information is critical. – even if a two-edged sword in the respects I have described.

21. Because freedom of choice is important, all kinds of information <u>may</u> matter. Even advertisements. It may be that I should not be persuaded by the handsome footballer shaving himself and looking good to buy the latest razor. The improvement will, I fear,

be marginal! But if I am is that a good or a bad thing? Am I to be permitted to be beguiled by the psychological wiles of the advertiser?

22. Expenditure on advertising obviously has an effect on demand – otherwise prudent producers or sellers of products would not incur the expense. Ought we to be distinguishing between "beneficial" and "deleterious" forms of demand stimulation? We are getting very close to regulating the form of markets – and whilst markets are clearly dependant on regulation for their operation (there is no such thing as a free market) – we do need to be clear why we are imposing certain types of normative regulation or constraint.

23. For my money, information and data is where it is "at" for the next 10 years or so. Topics that I cannot cover – but which matter – are:

    (1) Information exchanges between competitors.

    (2) Abuse of information by means other than creation of information exchange in markets. Examples – less or more closely related to my chosen topic – abound:

        (i) Differentiated pricing.

        (ii) Taking account of "private" characteristics for e.g. the rating (i.e. the pricing) of risk in insurance policies or contracts of future health protection.

        (iii) Bias in the AI assessment of data e.g. for job applications.

    To an extent, these are all connected – but they raise different, and critical, considerations. I cannot go into them now.

24. My concluding thought is this. We lose or de-emphasise or relegate the "old" methods of analysis – collusion and (in particular) abuse of dominance – at our peril. Going back to my digital platform example, it may be that it is not a case of an excessive price to the "buyer" of social media services, but an excessive price to the buyers of advertising services. The interaction between these two markets of course makes the problem a

difficult one analytically: there are network effects which mean that controls on or in relation to one market will have consequences in the other, conjoined, market – even if completely different products are being sold. But that makes it all the more important to be very clear what problem is being addressed in which (competition) proceedings.

25. The fact that markets are populated by digital behemoth does not actually assist in resolving the problem, and specific digital regulation may be more distraction than cure. Indeed, it is clear that the regulation of information involves far more than just competition or markets law, and we need to be sensitive to that, also.