

“THINGS ARE NOT WHAT THEY WERE”
– COMPETITION LAW IN A CHANGING CONTEXT
PRE-DINNER KEYNOTE SPEECH AT THE COMPASS
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ABSTRACT: In a speech Peter Freeman discussed the main challenges to competition policy raised by the current populist trend of political dis-satisfaction with market based solutions and the apparent incapacity of competition policy to offer a solution for the continuous growth of tech titans. This speech asks the question whether there is an increasing risk of competition law becoming again, as it once was, “at war with itself”? Ordinary citizens seem to have little idea of what competition policy does for them, and other necessary interest groups seem similarly detached. Business sees the new competition litigation industry as much as a threat as an opportunity, and despairs at the complexity of some competition analysis. Competition law may be seen to be failing. This keynote talk suggests that it may now be necessary to redefine the essential mission of competition policy and to rebase it in values that appeal to the ordinary trader or businessman, and above all to the ordinary citizen.

1. INTRODUCTION

Good evening ladies and gentlemen. My warm thanks to my hosts for inviting me to speak to you this evening.

My purpose tonight is not so much to put you off your dinner but rather to introduce a serious word of warning about the future of our discipline. I think it is in danger; and in to some extent this danger is of our own making.

My reference to ‘things not being what they were’ has several origins. Will Rogers, an American actor who died in 1935, said “*Things ain’t what they used*

* The text is updated to June 2018.

** Chairman, UK Competition Appeal Tribunal. All views expressed are personal to the author and do not represent the views of the Tribunal, of Compass Lexecon, or of any other person or organisation.

to be and never were” (he also said “*everything is funny, as long as it’s happening to someone else*” –which I think is actually quite funny) and, of course, “*Things ain’t what they used to be*” is a Duke (actually his son Mercer) Ellington number, as well as later being in its cockney version the title of a Lionel Bart musical and a Max Bygraves song.

I draw no particular comfort from those precedents. My aim is partly to ask the question “what *were* things like in the past” but also to suggest that things *never were* what we may imagine they were, and in preparing ourselves against the dangers to come, we should be looking ahead, not back.

2. THE DANGERS AHEAD

I do not want to overdramatise, but I am concerned that there may be the equivalent of a runaway train coming down the track towards us, and we are sitting on the line, looking the other way whilst discussing the state of the ballast and the quality of the rails. In more prosaic terms, I believe that competition policy may be under a threat to its very existence at the overall political level as part of a market-based economic policy, as well as in its own terms as a useful means of dealing with competition problems. Let me say a little more about each of these.

At the **political level**, there seems at the least to be a fraying of the consensus on the benefits of the market economy; this may be limited to former state owned enterprises such as water or rail companies; it may not be so limited. It may emanate with different emphasis from different parts of the political spectrum, but it is by no means confined to one part only.¹

It may have been accentuated by possibly misguided attempts to extend competition policy into areas of public service provision such as higher education and public health service provision where it does not really fit well.²

It may be unfairly tainted by association with other perceived failings of the private sector economy, such as high levels of directors’ pay, failure of pension schemes, low real wage growth, tax avoidance by multinationals or oligarchs; or the recent collapse of a major public service outsourcing firm.

1 Political statements in the UK that are hostile to aspects of the market economy are a not uncommon feature of Opposition Labour party pronouncements, whilst senior Conservative Government Ministers have also recently criticised aspects of rail and water privatisation.

2 The UK Secretary of State for Health recently criticised some of the competition based reforms introduced to the National Health Service by his predecessor.

In short, it is becoming increasingly acceptable to suggest that the market economy, as an aspect of “capitalism” is “broken”, and must be controlled or replaced.

Competition is the handmaiden of the market economy; if one falls, so must the other.

Even within the accepted framework of competition policy, political dissatisfaction with market based solutions finds its outlet in a wish by politicians either to over-rule or to interfere. As yet, at least in this country, this is fairly muted. Examples of pressure on competition based solutions include the wish to add public interest considerations to merger control; rejection at a political level of the CMA’s conclusions about measures to be taken in retail energy markets; and most recently the apparent wish by Parliament to conduct its own investigation, in parallel with that of the CMA, into the proposed *Sainsburys/ASDA* supermarket merger.

It is true that the Department for Business in the UK has recently issued a consultation paper on proposed reforms to the consumer protection and competition regimes which restates its commitment to open and competitive markets³. This is welcome, but it remains to be seen how widely or deeply that commitment is shared across the government as a whole.

At the **technical level**, competition policy is at increasing risk of again becoming, as it once was, “at war with itself”. On the one hand, analytical techniques and data handling are getting ever more sophisticated, so that highly intelligent answers are available for ever more complex questions. Yet competition policy seems unable to offer a coherent framework of questioning, let alone finding a solution for, the growth of major corporations using data and its use as a means of market power. Some of these corporations comfortably exceed the scale of a medium sized industrial economy, putting at risk the established political economic order.

At the same time as finding it difficult to deal with such a complex set of issues as those posed by the growth of Google or Facebook, competition policy sometimes seems unable to address more everyday issues such as agreements and abusive practices.

The disagreement over whether a ‘rules based’ approach to competition enforcement is preferable to an ‘effects based’ approach is an example of this difficulty. This is much more than a dispute between lawyers and economists.

³ Department for Business, Energy and Industrial Strategy, 2018

The rules based approach seeks clearer and speedier enforcement, accepting some risk of error in the process. The effects-based approach, on the other hand, wishes to avoid error, but runs the risk of seeking perfection in preference to workable solutions.

The continuing jurisprudential debates over the expanding the categories of “restrictions by object” (an approach apparently favoured by some competition authorities and courts) and whether abuse of dominance should be prohibited without analysis of its effects (the “*Intel* question”) need to be seen in this context.

These differences have the potential to be destructive. For as long as competition policy does not resolve them, it will be perceived as being more concerned with doctrinal issues than with its more essential tasks, and may be seen to be failing.

3. HOW HAS IT COME TO THIS?

We should look forward, not back. But some appreciation of what caused the present difficulty is necessary. There appear to be three main factors at work. First an overall cyclicity in the political-economic consensus ; second some serious setbacks for the market based economy that put a question mark over its fitness for purpose; and finally hubris – competition policy has been so obviously successful and such “fun” that its sponsors and perpetrators have become over-confident.

On *cyclicity*, it is not particularly original to suggest that the span of about a generation is all it takes for old ideas to come back into fashion. One young political activist was recently quoted as saying that the Soviet Union’s state controlled economic model had “*never been given a proper chance to work*”. Faced with such breathtakingly forgiving attitudes, it is not at all surprising that some people might be willing to give it, or parts of it at least, another go.

On *setbacks*, we ignore at our peril the continued loss of efficacy and confidence that came from the 2007-8 credit crisis and the economic recession that followed. The “market” clearly and brazenly failed to correct itself and the “state” was obliged to intervene on a massive scale. It is easy to forget the sense of bewilderment in the competition enforcement community when faced with these events. There had been 20 years of smooth expansion, and then came the storm. As the distinguished financial commentator Martin Wolf said at the time, referring to Dorothy’s experience of a tornado in the Wizard of Oz, “We are no longer in Kansas”.

Finally, and in apparent contradiction to the previous points, there is *hubris*. The world of competition has become so good at what it does, that it is hard for it to imagine anyone not allowing it to continue. Institutions have grown, habits and practices have taken root. Competition enforcement and authorities carrying it out have spread throughout the industrialised world and beyond. The numbers of professional lawyers, accountants and economists involved in competition policy in one form or another, in the public or in the private sectors, has increased dramatically.⁴ Competition enforcement is a veritable industry of its own.

Yet has it perhaps lost the art of talking to anyone other than itself? Ordinary citizens seem to have little idea of what competition policy does for them, and other necessary interest groups seem similarly detached. Business sees the new competition litigation industry as much as a threat as an opportunity, and despairs at the complexity of some competition analysis. The media appear baffled by the inability of competition policy to deal with energy prices, rail fares, foreign take-overs and the internet giants. And for politicians, because there are few votes in competition these days, not many are willing actively to defend it.

4. WHAT HAVE WE LOST?

Well, it wasn't always quite like this, and here we do have to look at how things were. Let us go back 20 years, to the late 90s, when the 'competition spring' was in the air and the future looked bright.

In the EU, we had the new approach to vertical agreements, acquired from the USA; more block exemptions and the run up to Regulation 1/2003 which abolished notifications and promoted the self-certification of competition compliance. A new dawn indeed, plus a reformed, more pragmatic, merger control regime on the way.

In the UK, we also had a new era. The end of the RTPA, the Competition Act (borrowed from the EU, not such a dirty word in those days) and a complete re-casting of the markets and mergers regimes.

Also, this was the era of expansion, with the Global Competition Forum (which did not survive all that long) and the ICN (which did). Countries

4 One distinguished economic consultant was recently quoted as saying that in the late 1980s, there were only two or three economists working on competition cases across Europe and that his firm had grown from 3 economists in 2002 to more than 100 in 2018.

fell over themselves to join the new club and set up their own new authorities. Established countries were only too eager to share their knowledge and experience. An almost Panglossian era of co-operation and improvement opened up.

Significantly, this was also when governments started to cede control of doctrine, (which is only one step away from policy) to the newly established or newly independent agencies. These agencies grew in confidence and stature, and shared their expertise through the ICN, or more focussed bodies such as the OECD, and, in the EU context, the ECN and ECA.

In the UK, surely as an unintended result, government's ability to monitor and influence the activities of the competition agencies has been attenuated. Agencies sometimes seemed to prefer to talk to their colleagues overseas than to their sponsoring government departments. This hollowing out of Whitehall capability is not of course confined to competition policy, but extends to other areas.

This does not mean that Government has washed its hands of competition policy. Far from it. The interest in controlling the outcomes of that policy, if not the activities of the authorities themselves, remains strong. Indeed, there is if anything rather *less* willingness to allow the independent competition authorities a free hand than there was 20 years ago.

5. WHERE DO WE GO FROM HERE?

All is by no means lost. Competition policy has done so much for economic growth and the welfare of citizens⁵. It is instructive to examine the tone of official pronouncements over the past three decades.

Under successive Conservative administrations, competition was given considerable emphasis. In 1988, in the *Liesner Review* of the RTPA, (named after the distinguished civil servant Sir Hans Liesner) we see this:

“..it is the promotion of competition which is at the root of the government's economic philosophy”.

5 The recent Consumer Green Paper (see footnote 3 above) cites airlines, airports and groceries as recent examples of markets where greater competition has brought increased consumer benefits in terms of better quality, prices and choice. (Chapter 1, paras 25 and 26)

In the 1992 Green Paper on *Abuse of Market Power*:

“The Government’s objective is to ensure an effective system of controlling abuses of market power...”

And, in the Labour Government’s seminal 2001 White Paper *“Productivity and Enterprise—A World Class Competition Regime”* it is stated that:

“Vigorous competition is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate... Competition is a central driver for productivity growth in the economy...”

A decade later, the various papers issued by the Coalition Government in connexion with the Enterprise and Regulatory Reform Act 2013 were no less heroic in their claims:

In *“A Competition Regime for Growth”* Consultation Paper (March 2011) it was said:

“Competition is the lifeblood of a vibrant economy and fundamental to growth. Open and competitive markets...enhance productivity and economic resilience.”

This was echoed in the 2012 Consultation Response, where the then Secretary of State (Sir) Vince Cable said in his Foreword :-

“A strong competition regime ensures the most efficient and innovative businesses can thrive...It drives investment in new and better products and quality up. This is good for growth and good for consumers.”

In recent years, governments have been perhaps a little more reticent in their praise of competition as a contributor to economic growth and welfare. Particularly with the change of Conservative administration in 2017, there seemed a somewhat greater emphasis on industrial policy, and in the industrial policy Green Paper published last year, there was little mention of competition.

But perhaps it was too soon to write competition policy off altogether. The more recent Consumer Green Paper of 2018, which I mentioned previously, saw a reversion to the former polemical style:

“We are an open enterprising economy, built on invention, innovation and competition. We believe in the power of the competitive market – competition, open financial markets, and the profit motive are the foundations of the success of the UK. Competition between firms generally drives productivity and long-term economic growth and leads to better outcomes for consumers”.⁶

In its terms, this hardly differs from previous pronouncements, going back even to the 2001 White Paper and before. But so much else has changed in the meantime, and we must hope that what is now being said are not just empty words.

So what is to be done?

The current challenges cannot be met merely by evolving better analytical techniques, or by finding new ways to deal with algorithmic cartel behaviour or by increasing the emphasis on promoting long term innovation, important though those things may be.

We are now, like it or not, in the age of populism. Expertise in the form of sophisticated competition analysis is no longer enough. We have to have a message that appeals to the citizen.

It may now be necessary to redefine the essential mission of competition policy and to rebase it in values that appeal to the ordinary trader or businessman, and above all to the ordinary citizen. Values such as freedom, fairness, progress and prosperity may sound trite, but it is hard to see very much of them in the way competition is enforced at the moment.

Yet competition law had its roots in freedom and protecting the citizen from the over-mighty power of trusts, combinations and monopolies. Concerns with economic efficiency and welfare, however important they may be, came along later. Perhaps it is time to go back to the earlier roots?

This will not be easy. Fairness is a particularly difficult issue, a flexible concept that means what you want it to mean. In a cynical sense, competition is unfair when it succeeds. In another sense unfairness is at the root of good policy. There is little doubt that in today’s populist climate, competition policy must be seen to be fair, and any conceptual difficulties must be faced and overcome.⁷

Freedom means defending the individual and the small business against the larger corporations, what US antitrust law originally saw as the over-powerful

⁶ See footnote 3. Chapter 1, para 21.

⁷ For a discussion of fairness and competition see Nils Concurrences Wahl, 2018.

combines. And progress and prosperity may require competition policy to become involved in the difficult issue of curbing the divergence of wealth between rich and poor.

None of this is easy; much of it is controversial. But it is not clear that carrying on as we are is a wise option. The challenge is there. Ignore it and the runaway train will sweep us all along in its path. Confront it and while there may be a few bruises, we may be able to stop the train, or at least get out of its way.

Enjoy your dinner, and thank you for listening.

BIBLIOGRAPHY

DEPARTMENT FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

2018 'Modernising Consumer Markets' – Consumer Green Paper.

WAHL, Nils

2018 *Liber Amicorum*, Douglas Ginsburg, Volume 1