

Select Committee on the European Union

Internal Market Sub-Committee

Corrected oral evidence: Brexit: competition

Thursday 14 September 2017

10.10 am

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Members present: Lord Whitty (The Chairman); Lord Aberdare; Baroness Donaghy; Lord German; Lord Liddle; Lord Mawson; Baroness McGregor-Smith; Baroness Noakes; Baroness Randerson; Lord Wei.

Evidence Session No. 1

Heard in Public

Questions 1 - 19

Witnesses

I: Lord Currie, Chairman, Competition and Markets Authority; Dr Andrea Coscelli, Chief Executive, Competition and Markets Authority; Sarah Cardell, General Counsel, Competition and Markets Authority.

II: Dr Steve Unger, Ofcom; Jonathan Spence, Ofgem; Richard Moriarty, Civil Aviation Authority.

Examination of Witnesses

Lord Currie, Dr Andrea Coscelli and Sarah Cardell.

Q1 The Chairman: First, Lord Currie, thank you very much for coming, and thank you for the written documentation that the CMA has already provided us with. We have a number of questions for you today, most of which you will have had notification of, but the session may be a little more informal at times than that suggests. This is a public session—you have a huge audience behind you—and it is being broadcast. Would you like to make an opening statement on behalf of the CMA, or do you want to go straight into questions?

Lord Currie: We are very pleased to be here and to be able to help the Committee by giving you our views. I do not think it needs an opening

statement, except perhaps to say that Brexit has big implications for the CMA, which no doubt we will explore in questions.

The Chairman: Thank you very much. I will kick off with the first question in that case, which gives you an opportunity to expand anyway. Could you set out in general terms the role of the CMA in UK competition policy and enforcement? What are the implications of Brexit for the way in which you operate and the kind of cases that you take? If you can, please also cover whether the absence of the European competition structure applying to this country, in any direct sense anyway, would necessitate changes within the CMA, either to its role and mandate or to its capacity and resources.

Lord Currie: The overall role of the CMA is to enforce competition law, both European and UK. Of course, UK competition law is very much in parallel with European law, so the two are very consistent. The big implication for us as an organisation is that, on some of the very big cases that currently are dealt with in Brussels—a good example would be the recent Google case—when we are no longer part of the European Union, we as a competition authority will be taking action alongside the European Commission and alongside other competition agencies around the world, such as the Department of Justice, the FTC, the Japanese authority and so on.

We will be involved in much bigger and arguably more complex cases than we typically deal with currently. We will have to deal with mergers. We will also be involved in the enforcement cases. The extra workload, the complexity and the likely litigation that follows such cases are things that we as an agency will have to step up to. That implies significant expansion in our activities.

Dr Coscelli: That is a good summary. We have a fairly big programme of cases at the national level, and we have been working closely with the Commission and other international agencies on some of these complex cases, but in an advisory capacity. We need to step up and be able in future to deliver these cases and to defend them in court. Some of these cases, as David says, are very significant.

The Google case is a very good example, because the UK market was one of the main markets. Essentially, this was a big investigation by the European Commission on behalf of consumers in the 28 countries. When you look at the decision, the UK and German markets comprised a significant majority of what the Commission was looking at, and a number of the complainants were UK businesses. In future, we need to be able to work alongside the Commission and get the right results for UK consumers and UK businesses in these cases.

The Chairman: In terms of forward planning, have you made any estimate as to the approximate additional workload that will come your way and the resources that that implies?

Lord Currie: Yes, we have. We are in discussion with our sponsoring departments, BEIS and the Treasury, and I think that our needs as an organisation in that regard are well understood.

Dr Coscelli: We have publicly said that we expect a 30% to 50% increase in mergers coming our way. However, these will tend to be bigger and more complex mergers, which it will have a bigger impact on resources than that.

On the antitrust side, looking again at the cases in the last few years and the UK element of those, we think that we will do between five and seven large extra antitrust cases a year. Again, that will mean an increase of at least 50% on our current workload in that area.

Q2 **Lord Aberdare:** My question follows on from that. Could you tell us a little about your engagement with government in relation to the implications of Brexit, both short term and long term? Which departments have you have been in touch with? What is your assessment of how satisfactory the process is, and are there any issues that you would like to make us aware of?

Lord Currie: We have been fully engaged with BEIS and the Treasury, both on the mechanics of exit—we can talk more about those—and very particularly on our resource needs and the fact that, in order to be ready, we will need to step up resources ahead of that time; there is a build-up. We have had good engagement, and the need is understood. Obviously, until the cheque is actually signed, we cannot be absolutely certain, but we are positive, and things are looking good. We have had good engagement on the issues that matter.

We can talk more about some of the key issues. Information sharing is one of them, which is a matter that we absolutely have to get right if our cases are able to be pursued. We can talk in more detail about that, but there has been good engagement. Andrea, you have been more involved in the actual discussions.

Dr Coscelli: I would agree with David. Certainly, our points are well understood. This is an area in which a number of professionals have spent quite a lot of time looking at the implications. There is a very good report, as you might have seen, from the Brexit Competition Law Working Group, which tried to bring together a number of professionals, who also said very similar things about our need for resources.

The central point is that, if you want to keep the kind of activity that we are doing at the moment for the UK economy, such as going after cartels, looking at domestic mergers, looking at mergers in the nations and specific regions, we need some extra resources, because obviously there will be these bigger cases coming in. Technically, we could take on the extra cases and squeeze out some of the things we are doing at the moment. Our conversations with government are very positive, in the sense that government is very much hoping that we do not need to end up in that place and that we can have the extra resources. Certainly, we

have received quite a lot of support for the points we have made. As David said, at the end of the day, it is about the public finances overall.

The other point it is important to make is that the European Commission has levied very significant fines over the years in areas of antitrust. If you try to do a simple exercise about the portion that would have been allocated to the UK market, this would be substantially higher than any increase in cost on our side. Even if technically the fines go to the consolidated fund and not us, in terms of the overall impact on the public purse we expect that the extra funding will allow us to bring in more money than we cost.

Lord Currie: This is an unusual position for a government department to be in.

The Chairman: You are slightly presuming the outcomes of your cases.

Lord Currie: We have to get the cases right, because of course if we lose them we pick up litigation costs and so on. However, we are confident that we can do that.

Q3 **Baroness Randerson:** Looking to the Government, what competition issues do you consider to be a priority for their Brexit negotiations? As a more detailed approach to that, what competition provisions may need to be included in the potential UK-EU trade agreement?

Sarah Cardell: In general terms, as Andrea and David have said, we think that we have the architecture in place already with the framework that we have now, so we will be able to deliver on both the merger and the antitrust sides. Having said that, there are still some important issues that we think it is useful and helpful to address to make sure that we are in a position to deliver as effectively as we can. They fall into two groups: certain issues need to be addressed directly with the European Commission and other agencies; others are more domestically focused.

On the negotiations, the key issues for us are to ensure, as Andrea said, that we have the right framework for co-operation and information sharing, both with the European Commission and with the member state agencies. At the moment, under the European regulation, a very clear framework has been set up that enables the European Commission and member state authorities to share information, including confidential information, about cases. It enables us to work very closely together when co-ordinating investigations and assisting with each other's investigations. Those are all critical aspects to enable us to deliver going forward. The efficacy of that regulation will obviously fall away within the UK, so it is really important that we put arrangements in place that replicate or at least deliver the equivalent co-operation.

On information sharing, it is particularly important to note that although there are a number of other co-operation agreements in place around the world—we can talk in more detail about those—there are not that many that replicate the sharing of confidential information on cases, particularly on the antitrust side. That is key to enabling us to deliver effectively,

particularly where we may well be working in parallel going forward. To take the Google example again, if we were to pursue that sort of case in the future, we would want to work very closely with the Commission, which may pursue a parallel investigation. It obviously makes sense, then, for us to be able to share information and evidence in real time. To have that in place is key.

The other aspect for us in the negotiations is to think about the transitional arrangements that we have in place for live cases on the antitrust side but also for cases on the antitrust side that relate to the pre-exit period but have not necessarily been initiated at the point of exit. Again, we can provide more detail with our thoughts on that.

Those are the two key issues to be addressed in the negotiations. Separately from that, there are issues that we think we need to address in the domestic regime. On your point about what specifically might be included in a trade agreement, that is where the co-operation and the information-sharing provisions become particularly relevant. You can have that through some sort of bilateral arrangement with agencies, but you can also incorporate it into a broader trade agreement.

Q4 Baroness Noakes: Shifting to what opportunities there might be following Brexit in antitrust policy and enforcement, do you see opportunities for charting a slightly different path in the UK? I imagine there are things that you have sought to have changed in the past in relation to the EU being able to make rules in this area. Do you have a wish list of things to achieve?

Lord Currie: I am not sure I would describe it as a wish list. On the opportunities, a key change will be that the CMA will be involved in making decisions on key mergers that impact on UK consumers and business, which hitherto were dealt with in Brussels. We have good co-operation with DG COMP in this area; it listens carefully to what we say, but being the decision-maker is a significant difference that could be of benefit, because sometimes those decisions might go in a direction we did not care for.

More broadly, it is possible that over time there will be areas of competition enforcement where our practice moves somewhat away from the European one. There is a high degree of convergence at present, but there may be good reasons why, in some areas, we would want to go in a different direction. That is not just a matter for the CMA, one should emphasise; it is a matter for the competition system as a whole, including the courts and the Competition Appeal Tribunal.

Baroness Noakes: Are there any particular areas that you would mark out where there is potential for divergence over time?

Dr Coscelli: Internationally, it is important to bear in mind that there is a fairly global system on competition, and there is a strong push for convergence. There are two international fora—one is the OECD and the other is the International Competition Network—where historically the UK

agencies have always taken a very active role. There is a big push for convergence. In a sense, we and the European Commission are a big part of that, but there are lots of other agencies.

If you look in simple terms at the three key areas we work in, on mergers and cartels there is very strong convergence internationally. In those areas, you would not expect us to do something very different from what is happening now, even if, as David says, clearly on specific mergers at the margin we would be making decisions rather than advising. However, in the area of non-cartel enforcement, such as the Google case and how you deal with big online platforms, there are different approaches around the globe. For instance, the US agencies have historically been in a slightly different place than the European Commission has.

That will be the area where over time you would imagine the CMA establishing more of an individual identity: being very much part of that debate but potentially diverging a little more from what the European Commission does. That is something for which we will have to wait and see. It is probably an important area.

Lord Currie: It may not just be diverging; it may be leading, as it were. We may take a somewhat more innovative approach, which others subsequently follow. That has happened in a number of areas. It would mean that we could play that leadership role, since we would be the decision-maker.

Baroness Noakes: Do you think it would have any impact on the level of criminal prosecution activity that you would undertake following Brexit?

Sarah Cardell: We do not really expect it to have a significant impact. Effectively, at the moment, the criminal and civil regime in the UK works well in parallel. Indeed, we have been able to pursue criminal investigations in relation to a parallel European Commission investigation. When that jurisdiction falls away from the EU and comes back to us, we do not really think it will make a significant difference to the criminal enforcement side of things.

Q5 Lord Liddle: This question relates to what you say in your paper about changing your legal obligation at present to secure no inconsistency with ECJ judgments. You are talking about a move to a position where you have to have regard to them. "Having regard" is a pretty woolly phrase. There has been a discussion of this in relation to the European Union (Withdrawal) Bill; one of the members of the Supreme Court has said that it is inappropriate for judges to be instructed by Parliament to follow law "as appropriate". That is in a clause in the European Union (Withdrawal) Bill. Do you think that this having regard is a sound basis for action?

The second point is really a question of politics, which is difficult for you to comment on, I suppose. In the negotiations, it is clear that Michel Barnier puts a very high degree of importance post Brexit on there not being regulatory competition between the UK and EU jurisdictions. He

wants to secure in the agreement provisions that we will not do that. Do you think that your wish here to loosen the legal requirement under which you operate would be interpreted by Mr Barnier as opening the door to regulatory competition?

Lord Currie: On that last point, there is a high degree of co-operation among the competition authorities, not just within Europe but internationally. The notion that we would be competing in some way with other agencies is very far from realistic. Sarah may want to talk about the first point and the precise meaning that we attach to the phrase.

Sarah Cardell: You are absolutely right. The current set-up is that we have an obligation under the Competition Act, as it stands, in effect to avoid any inconsistency. That will obviously fall away. We and others in the regulatory community have thought quite carefully about whether we should just let that fall away or whether we should replace it with some sort of looser connection, as you say.

Our view, on balance, is that it is important to retain some sort of looser connection. The essence of the architecture of the UK regime is very closely bound up with—the language mirrors it pretty much exactly—the EU legislation and provisions around anti-competitive agreements, abuse of dominant position and all the case law that has followed on from that.

It is beneficial to retain that connection both for certainty and predictability for enforcement on the agency and judicial side, and for businesses to be able to operate in a predictable environment. It is not an absolute connection—we can talk about what “have regard” means—but we think it is beneficial to retain a connection, to keep that body of case law and precedent and to set a framework where there needs to be a good reason for departing from that.

Going back to David’s point, we clearly believe that it retains the scope for some flexibility to move away where we and the courts think it is appropriate. However, we also think it is helpful to have that overarching consistent approach. Particularly in the early years, it is in no one’s interest to have a huge amount of litigation, challenge and uncertainty about all sorts of concepts that are effectively settled and understood.

Bear in mind that we are enforcing, but there are also stand-alone damages claims under the Competition Act. There could be the potential for courts and agencies to take different views where litigants are pursuing that. We think that could create quite an unsettled and unpredictable environment, and that it is better to have an overarching, consistent framework where you have some sort of discipline, not to impose a requirement to follow that but to give it due regard, in effect. There is something particular about the competition regime, because of its origins, that makes that a sensible approach.

Dr Coscelli: On your final point, our view is that if you take the logical consequence of our current view on exit, “having regard” would be

perceived on the European side as trying to keep a degree of co-operation, as opposed to regulatory competition.

Q6 Baroness McGregor-Smith: What opportunities does Brexit present for the UK to review national interest criteria in mergers and acquisitions? Could you go through the advantages and disadvantages of this for us?

Lord Currie: There is the opportunity to widen the public interest criteria that are currently already in place. Whether we wish to do that is an issue that we would need to consider, but it certainly opens the options to do so. The potential advantage is that we may be able to do things to restrain mergers that are seen to have undesirable consequences. Equally, we have to bear in mind that there may be reciprocal action by other countries against companies that want to take mergers through, so the broad extension of the public interest criteria could have damaging effects on long-term investment and so on.

It is a difficult and important public policy question. It is not for us to decide. We are the people who implement whatever criteria are put in place. It is for government to decide whether it wishes to go down that road. We have published papers that set out the arguments for and against and on balance we are somewhat loath to extend it unduly. There are possibilities in the area of critical infrastructure, where you could put a different regime in place.

Dr Coscelli: As part of the debate and documents published by the Government over the last year, there are two areas. As David says, the important point to bear in mind is that this debate was not really possible when we were part of the European merger regime. With exit, there is an opportunity to have a debate and decide whether one wants to be in a slightly different place.

There are two areas. One is the control over acquisition of critical national infrastructure. This is an area where our understanding is that the Government could desire to move closer to a regime like the American regime, where there is a competition authority like us looking at the competition aspect, and there is a separate review looking at well-defined critical national infrastructure and whether it is in the public interest for certain acquisitions to go ahead.

Our position on that is that, again, it is for the Government to decide. We do not really see a major problem with it. It clearly is for the Government to decide what is critical national infrastructure, and what extra layers of checks and balances are needed for that. We think that can live very well alongside our regime. There are some technical points about making sure the two things work well together, but that does not create problems.

The second area is going back a bit in time to when the assessment of mergers potentially by a competition authority like us took into account factors other than the competition aspects. Our position there is that there has been a move globally over the last 20 years away from that to a slightly more defined and clearer competition test. That is what we

apply, the European Commission applies and the authorities all over the world apply.

The problem with trying to change that test goes back to the reasons why 20 years ago in this country, and in many other countries, people started moving away from it: the subjectivity of the assessment, the risk in investment and the risk of bringing politics back into the process when assessing whether certain possible buyers are more desirable than others. We know from history that this is a very difficult assessment to make and can create problems.

We submitted a paper in the context of the discussion on industrial strategy making these points, but obviously it is for the Government to decide, and there are many variants. At the moment, there are three criteria for public interest: media plurality, financial stability and national security. There are legitimate questions about whether something else needs to be added and whether these particular criteria need to be widened. That is clearly for the Government to decide.

Baroness McGregor-Smith: Again, we come back to the resourcing point. If the criteria are widened, what kind of resources would you need to supplement anything else that you were given? Not only that, but how would you get the calibre of people that you would need under your current pay restraints?

Dr Coscelli: In a sense, this applies across the piece. In many ways, we are having good discussions with government. There are policy discussions about possible changes in our remit, but we are also having proper discussions about what that would imply for resources. In this particular area, it will be done in the same way as we were discussing earlier about the expansion for Brexit.

Baroness McGregor-Smith: How far on are you in that debate about the calibre of resources and where they could come from?

Dr Coscelli: That is something we are spending quite a lot of time on as a management team. We are thinking quite hard about how to attract and retain talent. We have done quite well over the last few years as the CMA in establishing an agency that has a good reputation. We are quite successful in attracting talent, from both the private sector and other public sector bodies.

Pay is an issue, as it is across the public sector. In some instances, that makes it more difficult to attract or retain people. We are trying to use all the levers that we have to do that. For instance, we are now thinking about expanding our office in Scotland, to tap into talent there. We want to see where talent is and what we can do to attract people and keep them in the CMA.

Lord Currie: The key point on resources, which I made earlier, is that we need approval for the extra cash that we need. We are more than self-funding in terms of fine income, so that is not necessarily a difficult

decision. We need the cash, but then we need the time to attract and recruit the talent and get them up to speed in terms of the work. We need to start having action relatively soon, given the timescales that we are talking about.

Baroness McGregor-Smith: Could you give us any practical examples of how you would attract good talent? What have you done so far over the last few months?

Lord Currie: We are doing it all the time.

Sarah Cardell: On the legal side, for example, we draw lawyers predominantly from private practice, competition groups within city law firms, within broader law firms and from other areas of government, as Andrea said. We have pretty much a rolling programme anyway. Every six months or so, we will be recruiting junior and mid-level lawyers to come into the group. Because of the nature of our stakeholder engagements, we have a lot of engagement anyway with those groups; we are very visible to them. As Andrea said, they have seen a lot of the progress that the CMA has made over the last few years in ramping up our enforcement and the cases that we are delivering.

It is quite an exciting prospect for people to come to work at the CMA post Brexit and to get involved in the kind of cases that we will be taking on, on both the mergers side and the antitrust side. In a sense, that is all looking good. On the legal side, for example, we have been running open evenings where people have been able to come in and find out more about us. They may not necessarily be looking to move right now, but it is just to give them a better insight into what it is like to work in the CMA. We have a good platform for that.

Dr Coscelli: We have worked quite hard on flexible working. We have invested quite a lot in digital. At the moment, people have laptops and cloud computing and can work from home very easily. We support part-time working. For instance, on the legal side, there are many excellent lawyers with young families who decide to work four days per week; that is something we support and works well. We work quite hard on diversity and inclusion, having open evenings to try to widen the type of professionals coming into the CMA. We have invested quite a lot in the academy and on induction.

There are lots of professionals in our area whom we can try to attract into the CMA, but we are also trying hard to widen the net and take people who have lots of promise and we can support. We support quite a lot of further education and legal degrees to try to bring people in. All these things are working quite well. However, there is likely to be a fairly significant step up in recruitment. It is going to require a very significant effort from us as a management team to accomplish that.

Lord Currie: It is fair to say that if you ever wanted to be competition specialist, whether an economist or a lawyer, we have established a

position where having the CMA on your CV is a very strong positive. That is a very helpful position when it comes to recruitment.

Lord Mawson: To build on that, you clearly have a lot of experience in this field. As you look ahead from where you are now—I realise there are still lots of unknowns for all of us—does it look full of opportunity, possibility and things you get excited about, or do you worry about it? Instinctively, what is your feel?

Dr Coscelli: It is a combination of both. The current system works quite well and has been refined over a number of years; there is lots of trust and good will in the system. The view from us, businesses and advisers is that the system works quite well. If you look at the destination, to simplify, we will be like the agencies that the Canadians, the Australians, the Japanese and the Brazilians have. We have spent quite a lot of time over the last six to nine months talking to them, because we think this is the relevant benchmark for us in the future. These agencies are doing quite well. They are very involved in the global convergence discussion. They work very closely with partner agencies on international cases. They are confident that they can deliver good outcomes for consumers in their countries.

Personally, I think we are in a good place, and the destination is highly likely to be a good place. The risks are really in the transition, going from A to B. As Sarah was saying earlier, there are all these issues relating to transitional agreements and making sure that the information-sharing agreements and co-operation agreements are in place. I think that eventually they will be in place because the global co-operation is there. However, there is a lot of complexity, and there are significant cases with very important commercial interests that will be caught up by the transition. We need to make sure that these cases are dealt with appropriately, because there is a risk that if there are loopholes and some investigations fall through the cracks, UK consumers will pay the price for it. That is the key focus for us at the moment

Q7 **Baroness Donaghy:** My question is about the transitional situation. Clearly, I am assuming that there might be a difference between pre-Brexit and post-Brexit. Who do you think should have jurisdiction over UK aspects of EU antitrust cases both pre- and post-Brexit?

Sarah Cardell: The most important thing from our perspective is to have clarity about the arrangements rather than necessarily having a strong preference one way or the other as to which way it should go. It is important to make a distinction. At the point of exit, there will be live cases that the Commission has already initiated, and there will be a question of whether it continues with those cases or whether the UK aspects of those cases come to us. Separately, there is a question of as yet unlaunched cases that relate to pre-exit conduct, and whether the Commission should take those or whether we should take those.

Clearly, we do not want a situation of uncertainty, either for the businesses affected, or indeed for us, where we are pursuing parallel

investigations or there is competition between the agencies about who should be taking those cases on. It is really important from our perspective that that is resolved. There are pros and cons as to which way it falls. One might think that there is a certain efficiency, where a case is already under way, in it staying with the agency in question. That may depend on the extent of the progress: if it is a well-advanced case or if it is at a relatively early stage.

Likewise, in relation to an as yet unlaunched case, it could be logical for it to stay with the Commission; I think they have expressed a view that that may be their preference. If that were the case, we would certainly need mechanisms in place to ensure our ongoing influence and involvement in those cases, as we have now. At the moment, those mechanisms would fall away, so we would need that to be replicated in some way. We would obviously want to ensure that we were in a position to protect UK consumers. It is really a question of resolving those issues to ensure that we have that clarity and close working. In a sense, we could work with either of those outcomes.

Baroness Donaghy: If the antitrust directions or commitments are made pre-Brexit, what kind of arrangements should be made for ongoing monitoring and review, which you have mentioned? Who should enforce the UK aspects of those commitments?

Dr Coscelli: It depends a little on the granularity of the discussions. In an ideal world, you would distinguish. If you can imagine a global case where there is a global remedy—let us take Google or Amazon—were we to duplicate the effort made by the Commission, which effectively looks at a single type of conduct for the whole of Europe, it would be inefficient for us and take resources away from doing other things.

On the contrary, there might be cases that are mainly about the UK market. Logically, we would like to be in a position to take decisions after exit on that. You could either have a scenario where you look through all of them—there are not that many—and decide who does what; or, if there is not the bandwidth in the negotiations for that level of granularity, you have to accept a rule that is either one or the other. Again, the first-order effect for us is clarity, and the second is whether it is us or the Commission. We are quite relaxed about it.

The Chairman: We now go into an area that is not currently in your remit, which is state aid.

Q8 **Lord German:** Unfortunately, I am old enough to remember, pre-EU, the arguments about regional assistance and how that happened within the UK. Do you think that we will need some form of enforcement body for state aid in the United Kingdom as a domestic issue? If so, would the CMA be pitching for that work?

Lord Currie: I do not think we as an organisation take a view as to whether we should have state aid. That is a matter for government. That may be part of the broader negotiations, and it may be it is necessary in

order to achieve other objectives. There may be a case in its own right for a state aid approach within the United Kingdom to ensure the effective working of our own internal market. There is a debate going on in government, and that is for government to determine.

If there is to be an agency, we are not pitching for extra work; let me put it that way. We have enough to do, we have enough responsibilities, we need to expand. Having said that, it is fair to say that the sorts of skills required for enforcing a state aid regime are the sorts of skills that we have. We have no experience in this area, but then, in the United Kingdom, nobody has, because we have not had to administer such a regime. I could see that this might be a task that has our name on it, but let me emphasise that we are not looking to take it on.

Lord German: Let us assume that the job has to be done. Presumably this issue will come up in trade negotiations. Since the EU, of course, we have had devolution inside the United Kingdom, which has meant that there are now four governments responsible for providing assistance that comes under state aid rules. At the moment, that is all regulated firmly by the European Union. Would you agree that there is likely to be a need for a regime that happens to be in the United Kingdom in order to ensure that we can deal with the issues that will come out in trading with the EU and/or the UK?

If you were asked, would you like to tell us what sort of resource you might need to undertake that role from where we are at the moment? Of course, it is an area in which we do not have any certainty, but it might be a feeling that you have. If you were asked to do this work, what sort of resource would you need, and where might those skills come given that there are not any skills presently in the UK?

Lord Currie: It is entirely plausible that such a regime would be required, and therefore that an agency would be required to administer it. If we were told to do it, clearly we would do; we would step up and do the job effectively in the way that we do all our tasks. It would add, I would emphasise, to the expansion that we have to undertake anyway, and we would have to find the skills. There may be an element of learning involved in that process, given the lack of experienced people in the UK itself. It would be a challenge, but it is a challenge we could rise to if required.

Sarah Cardell: On the skills, for example, there are lots of lawyers within law firms who are well experienced on the other side in dealing with state aid applications. That is a pool for us to draw upon potentially, if we were required to.

Dr Coscelli: We have people who have some experience from the other side when they were in private practice. The other point to bear in mind is that we have, as some of you might know, a pool of panel members to work as independent decision-makers on some of the cases we do. That could be of help if we were to do state aid, because every few years we

do the recruitment for the panel members. In terms of the skillset, that is something we could take into account.

Lord German: Finally on this point from me, your income stream in your current work comes because you are taking litigation with companies. This is litigation that would involve governments, so one might assume that the income stream is not as certain as it might be in other forms of litigation. Taking governments to court is not something you are familiar with, I would guess.

Lord Currie: No. We have an advocacy role within government for competition, and that is a role that we take seriously, but it is not potentially in conflict. That conflict element could be more awkward to manage, because we like to work co-operatively with government. Having to say no is not necessarily the best place for that. That is something that is entirely manageable. On the income stream point, it is for government to decide whether it wants such a regime and at what level it wants to fund it.

Lord Liddle: To take a very practical example of this, which I do not quite understand, the Government have given undisclosed assurances about the future of the Nissan business in Sunderland. Presumably, this might be of interest to the European state aid authorities, because of the level playing field within the single market. At present, the Commission would have some jurisdiction to examine the validity of any payments that were made to Nissan. What would happen after Brexit? Would the Commission still have that jurisdiction on the grounds that this was affecting conditions of competition within the European market? Would you be completely outside that question, as it were?

Lord Currie: I am not sure that we are in a position to answer that sort of question. This is not an area of our responsibility.

Lord Liddle: Yes, I see.

Lord Currie: It is not something we have spent time thinking about. It is possible, as we said in response to the earlier question, that this might come our way, in which case we would have to answer the question and questions of design would come up. However, we are not actively engaged in those considerations.

The Chairman: You may say that this is also beyond your remit, but it appears to me on state aid provisions and on mergers, particularly mergers that relate to foreign investment, that the history is that the Brits have been the more liberal about this in trying to restrict the areas of objection to mergers and foreign takeovers, and making sure there are pretty tight criteria on state aid.

Once the Brits are out of all that—because we have written quite a lot of this competition law in Europe, directly or indirectly—will the continental powers, by which I obviously mean the French primarily, turn out to be a little more protective of existing industries, both by objecting to

takeovers and by state aid? In that case, there is the potential for quite significant divergence, even though within the UK there will also be pressure for state aid if Brexit goes wrong.

Lord Currie: That is certainly a possible scenario. I was an economic forecaster in the past, but I have given up my crystal ball. I have given it up even more in the area of politics, given events over the last few years. Certainly, it is a broader point that UK influence within Europe will fall away and that will have implications, potentially, for the direction in which Europe goes.

Sarah Cardell: Although we would lose that direct influence, as David and Andrea have mentioned, particularly on the competition side, we are very much part of the international network. We have the OECD and the ICN; they are key fora for ensuring that consistency and convergence, in which we would expect to play a very leading role.

Lord Currie: That is a very important point, which we should have emphasised earlier. The level of co-operation internationally in this area is very high, and the degree of convergence that is happening through mechanisms such as the ICN and the OECD is very high. Our international engagement is high, and we would maintain and continue that. That broader international engagement inside Europe is a very important one.

Q9 **Lord Mawson:** Tony Blair at the moment is encouraging us to think ahead about the type of country we are going to be in five or 10 years' time. It seems to me that Lord Liddle is saying that these are real issues that are going to become very real quite soon, I suspect. I just wondered what sort of thinking you as an organisation are doing about those scenarios five or 10 years ahead, because these things, I suspect, will become very real.

Lord Currie: I am not sure that we are thinking 10 years ahead, but we are very focused on the challenge that is coming for us, to step up the competition regime and for us as an authority to be able to sit alongside the European Commission, the Federal Trade Commission, the Department of Justice and other international agencies. That is a significant change in the competition regime, and a significant change in the nature of our agency.

Dr Coscelli: As I said before, we are spending quite a lot of time with the agencies that are the benchmark for where we will be in five to 10 years' time. The Japanese agency, for instance, spends more time working with its own government and advising them on free trade agreements and trying to discuss some of the issues that you raise in relation to subsidies in free trade agreements. This is not something that we have done historically, because it was done by the European Commission. As a domestic agency within the European Union, that was not our role. We have good, useful benchmarks of major agencies that are supporting governments in large economies to play in this field. That is where we are heading.

The Chairman: We are reaching the end of our time, but there is one of our supplementary questions that I really am quite anxious to get an answer to.

Baroness Noakes: This supplementary question concentrates on co-operation agreements with third countries. Are you aware of any precedents of useful agreements between the EU and other third countries that could form the basis of how we proceed in the future? I assume that we will need co-operation agreements. Indeed, you emphasised that in relation to the EU going forward.

Dr Coscelli: We have looked at a couple of the recent agreements, which are promising for us. One is the EU-Canada agreement, the other is the EU-Switzerland agreement. The EU-Switzerland agreement has some very interesting provisions about exchange of confidential information in antitrust cases. There are some other issues compared to the current situation, but there are a number of positive things there.

The Canadian agreement, as you know, is very recent; there is more co-operation and exchange of information there. These are the types of agreements that we would like to build on in future. We certainly see our role together with government. It is not completely clear whether these agreements should be done together with a free trade agreement or could be done separately. These are things we are exploring at the moment. However, this is what we are using to build on.

Baroness Noakes: For access to confidential information, you presumably will need an agreement. You mentioned that was available in relation to Switzerland. Is it in the Canadian agreement?

Dr Coscelli: It is not, to my knowledge.

Sarah Cardell: No. As I mentioned earlier, it is quite unusual at the moment that we have that, but we think it is very important. It is particularly important to have it on a reciprocal basis, because in our current legal framework we can make that disclosure in appropriate circumstances, but we cannot mandate anybody else to disclose in reverse.

The Chairman: You mentioned the ICN. There is also the ECN network of European competition authorities. Do you anticipate that you will be completely locked out of that, or is there any sort of associate engagement? I am not sure what the position is with Norway at the moment, for example. Might there be continuous engagement with the other national competition authorities?

Lord Currie: That is a matter to be determined. Clearly, we will want to work closely with our European counterparts, whether we are formally part of the ECN or not. That co-operation is absolutely essential, but the precise mechanisms are to be determined.

Dr Coscelli: We have been very clear with government that it will be quite important for us to be an effective enforcer. It would probably be

very much in the interest of the European Commission and other national authorities for us to remain in the tent as much as possible. Whether this can be delivered through the negotiations we will have to wait and see. From our point of view, we would like to retain the current arrangement with the ECN as much as we can, because it is very effective both in relation to actual cases and in relation to our policy discussions and trying to make sure that we are all effective at taking care of issues in our respective countries.

The Chairman: I am going to draw the formal questions to an end. Is there anything else you have not registered with us that you would like to at this point?

Lord Currie: No, I do not think so.

The Chairman: Is there anything else my colleagues wish to press?

Lord Wei: I have one question on innovation that almost goes back to the beginning. We are thinking about digital, especially given the difficulty of some of these cases. Sometimes the actions taken can happen so fast that by the time you complete a big antitrust case the whole thing has moved on and the industry has completely changed. Does being part of the European regime constrain the ability to innovate in relation to less formal mechanisms for dealing with competition, such as yellow cards or using technology to signal to players that they need to be careful, without starting formal negotiations? Does the current regime limit that? Would Brexit enable you to look at other tools than just the formal methods?

Lord Currie: That is a very interesting question. Clearly, there is a big challenge, which all competition authorities face in this area: competition policy and enforcement are not fast moving, and these are fast moving sectors. How you intervene is absolutely critical. Clearly, we would have freedom to try new things, and I hope we would do that as an agency in response. Quite what form they would take, I am not certain.

Dr Coscelli: I agree. There is certainly a debate going on where everyone is trying to help each other and find solutions. The opportunity here, as you say, is that at the moment we can experiment with our national cases, for instance thinking about the interim measures and trying to be faster and more effective as an enforcer. That is clearly not something we can do for the big cases done by the European Commission, so in future we will potentially have that freedom, from the perspective of the UK aspect of the case, to innovate and to do different things.

The Chairman: Thanks very much. You will be aware that this Committee took a big interest in online platforms, way back before the referendum, and whether things were moving on too fast. Thanks very much for your time. If there is any further material you think would be useful for our inquiry, please send it in or communicate with Pippa Patterson here, the Clerk. We are going on to talk to a subset of sectoral

competition authorities and regulators. I assume Brexit does not mean any change in the relationship between the CMA and the sectoral regulators, as far as you are aware.

Lord Currie: No. We have good relationships with all the sectoral regulators through the UKCN, and that will continue.

The Chairman: Very good, thank you very much indeed.

Examination of Witnesses

Dr Stephen Unger, Jonathan Spence and Richard Moriarty.

Q10 **The Chairman:** Thank you very much for coming. We have three diverse sectors facing up to the post-Brexit competition situation. Although you will have different perspectives on it, do not feel there is an absolute obligation for you each to reply to each of the questions, although in some cases you are going to have to. I remind you that this is a public meeting and that it is being broadcast. It is probably best if I ask the opening question, and if you feel the need to make a general statement, please do so in response to that, if that is okay. I gather, Mr Moriarty, that you may have to leave early. Is that correct?

Richard Moriarty: At 12.10 pm. I do apologise.

Q11 **The Chairman:** Okay. Let us hope that we are more or less through by then. My opening question is simply this: in general terms, what is your organisation's role in the competition and enforcement framework and how does that relate to the European one?

Dr Steve Unger: First, at Ofcom, we have concurrent powers in relation to antitrust and market investigations with the CMA, so much of what the CMA has said we would also have an interest in. We probably have a fair bit of common ground with the CMA in relation to our sector. Secondly, overlaid on that we have our own competition framework, also derived from European law, which allows us to impose competition-related conditions on electronic communications networks. The added complication for us is the interaction between the general points that have been made by the CMA and our particular sector or framework.

Richard Moriarty: The Civil Aviation Authority is also a concurrent competition authority that is narrower in scope; it relates to UK airports and air traffic control, although we do provide expertise and input into airline mergers for cases that are conducted in Brussels or by the CMA. We, too, would support the evidence that the CMA gave you earlier. The only emphasis that I would add is to do with co-operation. By definition, aviation is internationalised; 90% of flights in this country leave our shores and two-thirds of those go into the EU, so the ability to be able to co-operate and share confidential information is perhaps more of a premium in this sector.

Jonathan Spence: From the Ofgem side, our position is very similar to that of the other two regulators. We are a concurrent regulator. We have the same powers in that regard as the other regulators. Our jurisdiction covers both licensed entities—licensed energy suppliers—and commercial services related to that. As with the other regulators, we are members of the UKCN and would share the same views expressed by the CMA about the system. That is all from our perspective.

Q12 **Lord Liddle:** Just as a softball, in each of these sectors what do you see as the main objectives of competition policy that you are dealing with? Obviously, there are considerations relating to the public interest, broadcasting, gas and electricity networks, natural monopolies and all that sort of stuff, so it is a very broad question, but how do you see what you are trying to achieve in terms of competition?

Dr Steve Unger: Much of what the CMA has said I would echo. There are two specific areas where we would apply particular emphasis. First, in the communication sector, perhaps most importantly, the importance of competition as a driver of investment and innovation cannot be overstated. There is a fair bit of evidence that, for example, investment in fibre networks across the world and investment in new mobile technologies across the world have been driven by competition. For us, competition is not just about consumer choice and prices; it is also very much about investment and innovation. Over the next 10 years, that is going to be really important for the UK.

The other set of issues that is also specific to our sector is essentially a set of public interest questions, some of which you have touched on and some of which intersect with competition policy.

Richard Moriarty: Certainly, from the Civil Aviation Authority's perspective, we would share that the objective should be about the end user and the impact on consumers. Competition and liberalisation has driven a lot of benefit for passengers in this country. The UK is amongst the world's best-connected countries for aviation and we would encourage that to continue. There was a time when the Civil Aviation Authority regulated the quality of catering on flights. I am very keen that we do not return to those days.

Jonathan Spence: We are very much in a similar space to both the other regulators. We view competition as a key mechanism for driving improved consumer outcomes. We would also share the emphasis that Ofcom has put on innovation in the market and bringing new products and services to market, because they will ultimately benefit consumers. In terms of applying competition policy, what we are really looking at is ensuring that the markets we are regulating operate transparently and effectively, and that the consumers get the best outcomes from those markets.

Q13 **Lord Aberdare:** Could you tell us something about your engagement with the CMA and with government in relation to Brexit? Is there enough of it? Is it working well? What are the competition issues that are to the

fore and, perhaps above all, are you ahead of the rest of us in getting some clarity about the environment in which you are trying to plan your own future directions?

Dr Steve Unger: The answer to your third question is probably no. On the first, we are working very closely with government at the moment, particularly our sponsoring department, DCMS, in particular to work through the detail of the sectoral competition framework, how that would have to be handled, particularly in the context of the Repeal Bill. That framework, in a number of different places, makes explicit provision for the European Commission to have a role and working through what the intent is behind the European Commission's role, and how that intent is best reflected post Brexit: that is a very important piece of work that we have been carrying out over the summer.

That has been the main focus. We have also worked closely with the CMA in the past, particularly over mergers and especially the mergers that affect our sector. However, that has not been the main focus over the last few months.

Jonathan Spence: From our side, we have worked quite closely with the CMA. Our main interaction has been through the UKCN. We have had the level of engagement we would expect and hope. We have also been working with our sponsoring department, BEIS, on more general aspects, not necessarily specifically on the competition aspects of Brexit. In terms of the information we have received from both, we have a very close working relationship and have had no concerns about that. In response to the last element, we are in a similar space; we do not have a huge amount more visibility than others, perhaps.

Q14 **The Chairman:** Do any of you see any specific problems for your sector? I address this question primarily to Mr Moriarty, because we have looked at aviation a little and we have heard various pronouncements from Mr O'Leary about this. Part of the European regime on aviation relates to ownership and restrictions on ownership, particularly for what we would call cabotage within the EU. Outside the EU, do you see any particular anti-competitive aspects of the current EU regime that would impact on us harder?

Richard Moriarty: Our view on some of the ownership control issues is that if there is an opportunity to be a little more liberal, that would be better. At the moment, we do not have restrictions on who owns shares in Heathrow Airport and we do not regulate who owns our air traffic control, yet I need to enforce who owns various airlines in this country. The influx of private capital into this sector has really driven the competition and innovation that we have seen. The only thing I would say is that many chief execs of the airlines will say that what really matters to them and to consumers and our economy is the access to the European markets, and if signing up to things like ownership control is the price of that access, they will do so. It has to be seen in that broader picture.

Lord Aberdare: Dr Unger, did I understand that you are expecting

legislation will be needed in your area?

Dr Steve Unger: No. It is the SIs that would follow on the Repeal Bill.

Baroness Randerson: As a follow-up question to the CAA, are you satisfied that the Government have fully developed their ideas on how they are going to deal with the fact that we have signed up to the agreements that you were referring to, which are worldwide agreements, but we signed up as part of the EU? The industry tells me that they are worried, because transport needs to be taken first and perhaps the Government have not fully grasped this or fully achieved this in their thinking. Can we have your views on that?

Richard Moriarty: Obviously, I am not party to the detailed negotiations. I can only speak from my experience. We have been very clear about the position of aviation and in all the contact that we have had, particularly with our sponsor department, the Department for Transport, we are pretty assured that they get this. It is slightly outside the issue for today, but the big issue for discussion is obviously safety regulation and the future position of the European Aviation Safety Authority vis-à-vis the role of the UK. I am pretty comfortable that our colleagues in the department really understand these issues.

Q15 **Lord Mawson:** Post Brexit, what opportunities might greater freedom in UK antitrust policy and enforcement afford your sector, and what challenges might this present?

Dr Steve Unger: I would first echo one point that was made by David: being more clearly part of the decision-making process in some key merger transactions and some key antitrust cases. We worked very closely with the CMA to influence the outcome of some recent mergers, particularly the Telefonica-Hutchison merger, to highlight one, but not being the decision-maker or close to the decision-maker is not really where you want to be for a merger that has such a big impact on your sector. Going forward, we also have a particular interest in companies such as Google; the impact that those companies have on our sector is clearly key. The other set of opportunities are, broadly, about simplification. There are some opportunities to simplify the way we apply particularly our sectoral competition framework in the UK. That is partially about simplifying process and partially about sometimes being slightly more liberal in the way we intervene than one is when one is trying to reach a compromise amongst 28 countries.

Lord Mawson: Can I just intervene on the simplification point and whether this would affect it? You are arguing a lot for keeping the market very open around all of these things, and that is a fair point. I am just aware, as a user, for example, of telecommunications, for many people it is very complicated; even in my office at the moment, just trying to get BT and the phone line sorted out, because they have now sold the line to someone else who I do not know. I am just saying, for the user, there is massive frustration, because it has become so complicated; it has not become simpler. Are you saying that these kinds of freedoms might help

resolve some of those practical difficulties?

Dr Steve Unger: Unfortunately not. I share your concern, but I am not sure that there is a silver bullet to that one that comes from repatriation of these powers. There are bigger issues about the way some of our companies provide services to consumers in a way that is easy to use and reliable.

Lord Liddle: I see the point about simplification, but there is also a point about power, is there not? When you are dealing with Google, tough Mrs Vestager imposes on Google a £2.5 billion fine. Do you see British agencies having that kind of power? It is a question of economic power of the bloc, is it not, to be able to force its will on a huge company? Would Britain, on its own, be able to do that?

Dr Steve Unger: There is a trade-off here, which is not ultimately for me to determine. I do a lot of work internationally, talking to countries outside Europe. They are very interested in what the UK has to say; we have a lot of influence. In talking to those countries, having greater flexibility as to our position can help, in some cases, reach agreement. On the other hand, when you talk to those same countries as part of a European delegation—I have had experience representing the 28 to other countries—you clearly have more clout. You have less flexibility, more clout and, ultimately, the trade-off is not for us to decide. What that looks like post Brexit is for government.

Lord Liddle: For the Government?

Dr Steve Unger: And Parliament.

Jonathan Spence: From the energy sector side, the point about proximity to decision-makers is an equally valid one for us. We do not see there being particularly unique features in the energy sector as compared with the general market context that the CMA sketched out.

Richard Moriarty: I agree with my colleagues in relation to mergers and sharing of expertise. From an aviation perspective, there are a couple of items that, with a free pen and a free hand, we would want to reform to reflect UK-specific circumstances. That is in relation to ownership control, which I mentioned, and the allocation of slots at busy airports. All I would say is if signing up to the current system is the price we pay for our citizens to be able to fly where they want to when they want to, we would keep the present system. However, if there is scope to reform, there is a potential opportunity there.

The Chairman: My brief recollection of the allocation of slots is that this is as much a theological essay as a competition policy issue; it is more: when is a slot not a slot?

Richard Moriarty: Indeed.

Q16 **Baroness Donaghy:** My question is about antitrust enforcement and merger reviews. I am assuming your respective organisations already

have a role, but do you see a greater role in these two areas after Brexit?

Dr Steve Unger: There is a potentially slightly greater role, but not to the same extent as the CMA. First, in relation to antitrust, we already look at those cases that arise in the UK. We are certainly interested in some of the big European cases. Google, Intel, Microsoft and so on have an impact on our sector, but we would have to work with the CMA to consider how the concurrency process applies in those cases.

On mergers, we certainly are expecting that merger responsibility would go to the CMA post Brexit. We would be keen to continue to have a role in providing advice into that process, but that mirrors pretty well what we already do.

Jonathan Spence: I would echo those comments. From a practical perspective, the current framework allows us to provide advice and assistance to the CMA in the merger process; we have done so recently in a number of cases.

From the antitrust side, we have not seen the same types of cases come forward that have that pan-European dimension that have a specific impact in the UK market, particularly in the context of energy and utility suppliers. As far as I am aware, the only cases that have really come forward in the last 10 years or so have been more in the space of input to the energy sector, so we do not have that set of live cases that might be coming our way, in that sense, although obviously you never can tell what might come down the line. From our perspective, we do not see there being an immediate change in the way in which we would operate and, as has been said, if we did have one of those larger cases, if there was a cartel in some area that was related to our activities that we had concurrent jurisdiction over, we would obviously engage with the CMA to work out the most appropriate party to take it forward.

Q17 **Lord German:** Could I look at the issue of national interest criteria? Could you give me some background on what impact those national interest criteria, as they are now, have had upon mergers in the sectors for which you are responsible, perhaps with an example or so? The Government have indicated that they intend to review all the public interest regime and I wonder whether you have a view as to what things might be changed. There are two questions that come from that, which I will come back to, if I may, but basically what changes would you like to see in the national interest criteria that might reflect your sectors?

Dr Steve Unger: As Andrea said earlier, there are three considerations at the moment; one of them we are very directly engaged with, which is the media plurality consideration. I do not think now is a good time to be talking about how that might change in the future, because there is a very live case currently and I do not want to be pulled in to comment about that particular case.

The second consideration that is of interest to our sector is the national security public interest consideration, which has never been applied in practice in our sector, but where there is a long-standing debate about

the importance of foreign ownership, and there is a long-standing debate about inward investment versus national security. That plays out primarily in government and I am sure that debate will continue. The banking stability public interest consideration obviously does not affect us. In the past on occasion, there have been suggestions of additional public interest considerations. There was a particular discussion a few years ago about making it easier for local newspapers to consolidate, which did not happen. That is clearly the sort of flexibility that would be open to the Government following Brexit.

I would probably echo the CMA position, which is that we should all be cautious about moving too far away from a reasonably predictable framework based on an economic set of tests. Clearly, it is reasonable to do that in certain circumstances, but cautiously.

Jonathan Spence: I would largely agree with what has just been said. From our perspective, the criteria that might most obviously apply would be the national security criteria, which might apply, as has been described, in the context of the ownership of assets or in issues of security of supply. As a practical matter, to date that has not been applied in that specific context, which is a reflection of the types of merger cases that have taken place within the UK market in the energy sector. We have not seen these issues arising in real life, as it were. Clearly, these matters could be reviewed, and we would share and echo the comments of the CMA on that.

Richard Moriarty: We are in a fairly similar place to that of my colleagues. The one difference in aviation relates to air service agreements which the Government have signed with many countries, where there are restrictions over who can fly into various jurisdictions, with contractual clauses that mandate that it has to be a British airline that takes up that route, and then we determine Britishness in that sense.

Lord German: Judging from what you are saying collectively, these national interest criteria at present are roughly where you would like them to be and to continue to be, but there are some tweaks that you might make to them. Answer that, if you would. Also, do you think there is an opportunity to applying the criteria more frequently now than perhaps has been done in the past? In a sense, I am also asking you whether you think these criteria are aligned too broadly and could be tighter so that you could use them with more effect in the mergers that you see before you.

Dr Steve Unger: In the end, this is for government, I am afraid. I am aware of very long-standing discussions about the national security public interest consideration, for example, where there is a public policy trade-off between a set of goals for inward investment and a set of goals for national security. Ultimately, that is not a trade-off for me.

Lord German: But do you not apply them? That is the role that you currently play, so you are applying them, and therefore you do have an

interest.

Dr Steve Unger: We have a role in the process, but the overarching policy that the process is intended to deliver is ultimately for government.

Jonathan Spence: From our perspective, we have not had the circumstances to apply these provisions at all in our context since the new regime came into force under the Enterprise Act 2002, so it is a difficult hypothetical. It would depend upon the right case coming along, and clearly there have not been those cases. The cases that have come up in the energy sector over that period, even the ones that have been worked out of Brussels, have tended to be ones that the Government have taken the lead on and it has been a matter of government policy.

Richard Moriarty: In aviation, the national interest is nearly always to do with the economic domain of ownership and control. Obviously, in parallel to the work that we do, there is quite a well-developed and sophisticated system of aviation security, which we implement, but the policymaker is very clear, and that is government.

Lord German: To sum up what you have all said, you are reasonably comfortable with the national interest criteria being as broad as they are.

Jonathan Spence: Ultimately, it is a matter for government, but I would not disagree with that.

Dr Steve Unger: They have not been applied in our sector thus far. There is a very live debate as to whether they should be triggered more often. The US has just blocked an acquisition of a semiconductor company by a Chinese company. That is the debate that is ongoing, but it is ultimately for government.

Richard Moriarty: Other things being equal, does it matter to aviation consumers whether the ownership of an airline is UK or elsewhere? As I said, if you take security aside, where there are other measures to look at that I do not think that the ownership matters. However, if it is the price of accessing markets and enabling our consumers and citizens to go where they want to go to, it is a price worth paying.

Q18 **Baroness Randerson:** My question relates to the other side of the coin, really, which is state aid policy. How has the EU influenced both competition and investment in your sector through its state aid policy? I would also like to move on from that and ask whether you think the UK should take a different approach to granting state aid after Brexit, if it has the discretion to do so. There are clear voices campaigning already for a more relaxed approach to state aid in Britain, and it is an area where history shows there is strong lobbying on the issue, for very understandable reasons.

Dr Steve Unger: This has been a significant issue in the communications sector, particularly in relation to the provision of state aid for rural broadband. Essentially, three issues have arisen in the past. One has been that the BDUK process—the stage 1 process—was delayed by

roughly six months due to the need to get state aid clearance. The second point is about the number of companies that were willing to bid against the availability of public funds. Evidence was given to the NAO that the number of companies was reduced by the fact that there were quite onerous conditions attached to the state aid. Thirdly, there has been a particular challenge about the geographic areas where state aid can be provided. This has been an issue for Tech City in London, for example; can state aid be provided in those sorts of areas?

As far as the communications sector is concerned, there probably is a benefit, frankly, in the UK having more discretion as to how it spends its taxpayers' money to deliver benefits to its citizens. However, I am very aware that there is a much broader set of policy trade-offs with any state aid framework. I am sure there are sectors where the existence of a state aid framework is very beneficial to the UK and that is then a cross-sector trade-off for government.

Richard Moriarty: The European Commission has been very vigorous in aviation when it comes to state aid, particularly in terms of airports and airlines—not against the UK, I should add. There are a number of what you might describe as state aid permissions in the UK to fly public service obligations. It is a devolved matter, but there are eight or nine routes in the UK that effectively the Government fund, and that is acceptable under the state aid regime.

Just picking up the point about the policy trade-off, again, from an aviation perspective, if unrestricted access to people to fly across Europe means that we sign up to the current state aid regime in aviation, you will find that most people in aviation would agree to that.

Jonathan Spence: From an energy perspective, we are in a similar position in the sense that there have been a significant number of cases where state aid has been considered by the European Commission. The most significant ones have been around the framework for the contracts for difference, the capacity market and, obviously, the investment in Hinkley. These matters have largely been led out of government. In terms of investment, because of the nature of the state aid framework, which requires certain tech neutrality in some of these decisions, such as the capacity auctions where they sought to achieve some sort of technological neutrality between different forms of investment, that may have had an impact on investment decisions by particular companies, but the idea behind it was essentially to ensure a level playing field with different operators operating in those spaces. As such, we are not aware of core investment or strategic investment decisions having been materially adversely affected by the state aid framework. Clearly, it has an impact on timing and the process that government needs to go through to get those clearances, but in those cases the Government were able to get those clearances.

Regarding whether they should take a different approach going forward, we would probably say that is ultimately a matter for government.

The Chairman: Certainly most of your industries are fairly substantially internationalised in terms of ownership at the moment, and that affects the merger policy. As far as the state aid policy is concerned, the European intervention is to ensure a level playing field among member states. When that requirement goes, on what objective basis do we judge whether state aid is desirable or not within your sectors? That situation changes, does it not?

Dr Steve Unger: I come back to this point about rural broadband. I have never quite understood why the state aid framework has such a big impact on the decisions that individual countries make in relation to rural broadband, because I do not see how that really affects competition in markets; it does not affect competition between, say, BT and France Telecom. That it is an area where it would be good to have greater flexibility, but then there are some trade-offs as part of the wider negotiations, I suspect.

Q19 **Baroness Noakes:** Lord Chairman, I should state for the record that I am deputy chairman of Ofcom and am therefore a fellow board member of Dr Unger's, so I am extremely interested in what he has to say in relation to my question, although my question is, of course, for all of our evidence-givers today. It is about institutional mechanisms in each of your sectors for sharing both best practice and competition information, both in the EU and globally. How does that work at the moment, how is Brexit likely to affect it, and what might be the positives and negatives as a consequence of Brexit?

Dr Steve Unger: In relation to the EU, there are well-established processes in terms of antitrust and the CMA has already talked about those. In relation to our sectoral framework, there are well-established processes in the case of telecommunications via BEREC, which is not really so much about the sharing of confidential information; it is more about the sharing of best practice and promoting harmonisation where that makes sense. It is less about sharing confidential information in relation to decisions that are being made jointly.

Globally, we are in a somewhat similar position. For example, I sit on the board of BEREC, but I have also recently joined the board of the International Institute of Communications, which is the main body that informally networks communications regulators, again with the aim of promoting best practice. What we do not have at the moment are mechanisms for sharing confidential information at that level.

Baroness Noakes: Do you sit on the international board as part of the EU? Is that membership derived via the EU, and does that change after Brexit?

Dr Steve Unger: No. Currently, I am on the mini-board. BEREC has 28 full voting members and there are 11 observers: that is, EEA countries, EFTA countries and accession countries. It also has five members who are elected to a mini-board, and I am currently one of the vice-chairs on that mini-board. Post Brexit, there is clearly a question as

to whether we might continue to have some sort of observer status. We would attach some value to that because of the influence that you can wield through that mechanism. We are looking, to the extent that we can, at influencing the way in which the BEREC regulation might evolve, at least to make that possible.

The global mechanisms are more informal; they are not set out in statute. Those are essentially agreed on a multilateral basis among different regulators, particularly regulators with whom we have common ground: the US, Australia, Canada, and so on. That is the way it works at the moment.

Baroness Noakes: We are a member in our own right.

Dr Steve Unger: That is right.

The Chairman: What is the situation in aviation?

Richard Moriarty: We are very comfortable with the current institutional arrangements, particularly with the CMA, for sharing information and working together. We are a relatively small competition authority in the CAA, so we draw a lot from their strength and expertise. The thing for us is the degree to which we are able to share confidential information and expertise in the future, particularly with European jurisdictions. At any given moment, half the planes in the sky in the UK are registered by a non-UK authority, so it is very important that we can continue to exchange information and work productively with our European and non-European partners.

Baroness Noakes: Do you have any competition-type networks that you belong to, and would they be impacted?

Richard Moriarty: In the UK, it is mainly the competition networks through the CMA and UKCN. It is much less on the European scale.

Jonathan Spence: On the energy side, as has been set out, we are a party to the UKCN and we share the views of the CAA about the engagement and working relationship that we have with the CMA. It is a very constructive and good one. There is a lot of information-sharing and we have a very close working relationship on policy, information and sharing best practice, and in regard to cases and even resources within cases. As the CMA set out, we also participate in the ECN. There are special sessions in respect of the energy sector, so we will attend alongside the CMA in those sessions, and we currently have a chance to be involved in those processes, which involves sharing their thinking on cases and involves participation in those cases currently. That is on the antitrust side.

More generally, there are two forums in the EU energy space where we are involved. The first is ACER, the Agency for the Cooperation of Energy Regulators. Although we are a member of that at the moment within the current framework, once we leave the EU we will cease to be a member unless arrangements can be made for that to continue in some way,

shape or form. That is essentially a mechanism for providing co-operation between regulatory authorities in the energy space across Europe.

The other body we are involved in is the Council of European Energy Regulators, which has a broader membership; it is not limited to just EU members. There are accession countries and others that also participate in that and have some form of associate or observer status in those forums. To that extent, while our full membership might cease after Brexit, there may be some scope for us to have some sort of continued role, if that is negotiated as part of any deal.

We would say that we work very closely with and are very influential in both those forums. We have a significant voice and are very successful in them when it comes to shaping policy and thinking about the European energy framework.

The Chairman: Just to be clear, is ACER de facto an agency of the European Union itself, so there is no observer status in place for anybody?

Jonathan Spence: No.¹

Lord Mawson: I suspect that, for many people in this country, Brexit is partly about the sense that institutions are talking to institutions somewhere up here—the banking crisis illustrated this—and people worry about how much time these very large institutions actually spend engaging with the front-end user, with the real, practical experience of what is going on, or whether there is some paper-based thing going on. In some ways, it is a bit like the earlier conversation about BT; we all laugh a bit about this thing going on, but in fact it is affecting millions of people and there is an increasing body of people out there who want a simpler life and not an ever more complicated life where you cannot sort out your telephone or your rail ticket or whatever it is. I am just worrying away a bit, because we saw the dangers in the banking crisis of these kinds of disconnections. Will this new set of circumstances enable you to engage more seriously with the detail on the front edge about how this is affecting customers and real people? Will it do that, or will it be the same behaviours and basic institutional behaviours as usual? I do think there is a real danger here, and we can all see the political implications of all this, as large parts of our population increasingly want a simpler life and not ever greater complication of things that do not work.

Dr Steve Unger: For me, there are two parts to the answer to that question. First, I recognise that the consumer experience is not where we

¹ Note by witness: When the UK ceases to be an EU Member State, Ofgem may lose its membership of ACER and, as a result, its right to participate in the Board of Regulators and in the technical working groups. Ofgem could seek formal Observer status as a third country although this would depend on the extent to which the UK agreed to apply the acquis of EU energy legislation. Informal observer status at working level may be possible via a Memorandum of Understanding between Ofgem and ACER (e.g. Norway can now “informally” participate to working groups).

need it to be in many of the services that are provided. That issue is independent of a discussion about Brexit, and a large part of what we tried to do in our strategic review two or three years ago was put much more emphasis on that consumer experience. That is a work in progress, I recognise, but we have made significant progress.

There is then a question, in the context of Brexit, as to how we can protect that consumer experience. Some questions there affect the consumer directly. The fact that, for the first time in many years, people could travel this summer with their mobile phone and not worry about bill shock as they travel around Europe is a direct benefit to consumers. Clearly, we are thinking about how that type of benefit could be protected post Brexit. There are also questions on the supply side, and we are talking to companies in our sector. We are aware, for example, that one of the major equipment manufacturers holds a large stock of spares at Schiphol Airport ready to ship to wherever they need in Europe. There is obviously a question as to how those sorts of arrangements would be managed post Brexit. There is a political negotiation that is going on, but we are certainly trying to understand where we are now and the effects on consumers, as well as the legislative questions that we have been talking about.

Baroness McGregor-Smith: Just to follow on from that, how many consumers do you speak to every year?

Dr Steve Unger: We already carry out extensive consumer research and we talk to consumer bodies. We are not doing that in relation to Brexit specifically. That would be inappropriate.

Baroness McGregor-Smith: Should you? Just to follow up on this question about consumer experience, consumers would feel frustrated by many things, I am sure, so how could you be more in touch with them directly?

Dr Steve Unger: We talked about this question a bit when I last appeared before this Committee. Independently of Brexit, we can be more in touch with what consumers are concerned about by carrying out consumer research, understanding their concerns and talking to the representative bodies of consumers. I would be very open to other ideas.

There are some creative ways of carrying out consumer research. We are currently planning a trendy hackathon on the question of mobile coverage, for example. We are trying to engage with different types of groups of people to try to understand the way in which consumer issues affect people and people's ideas about how they can be addressed. Those issues need to be addressed, absolutely, but independently of Brexit. What would be inappropriate for us as a regulator would be to start putting a Brexit angle on that in our public engagement.

Lord Mawson: This is part of the cultural problem that is going on, and it is probably why part of the Brexit vote went the way it did. I remember talking to David Varney about these issues; he has run some very big

companies. It is quite interesting that when you talk to people who have run very big things, they will often also tell you, if they are very successful, that they spend quite a lot of time at the very front edge—of Shell in a petrol station or what have you. To really understand the very big things, you have to be involved practically, not in every case but in some cases, in a lot of detail. I just wonder about that culture going forward. First, is it happening now, and as it goes forward will that impact more on you? Are you going to have to think about that? I do think there are these serious disconnects going on with the customer and with the culture. They are a major problem and it feels like the world up here is unengaged with the realities down here.

Dr Steve Unger: I have sympathy for the concern. There is something about getting out more. I am going up to Inverness in two or three weeks' time. It is quite easy to sit in London and take one perspective on broadband and mobile coverage. Other people in different parts of the country and different parts of London have a different perspective. There is something about getting out more. There is something about directly engaging via different mechanisms, creatively with different groups of consumers. I am open to any new ideas in this area, because I completely agree that there is that issue. We have a contact centre where we take calls from consumers. Listening to some of those calls gives you quite an interesting perspective on the way people see the communications sector.

Richard Moriarty: In aviation, we are in a slightly different position, just because of the nature of the Civil Aviation Authority. The economic regulation and competition function is a very small part of what we do, because our airspace security, safety and consumer functions are a much larger organisation. For instance, in a lot of airports every day there will be somebody from the CAA inspecting a safety-related issue. We also have our own survey team that speaks directly to consumers in airports. We are not as trendy as my Ofcom colleagues; we have clipboards, which we are desperately looking to modernise, but that does give us some experience direct from the coalface.

The Chairman: We are straying a little from Brexit, but let us have Ofgem's position on this as well.

Jonathan Spence: I would make the same point as Ofcom. These are not necessarily Brexit issues, and we are very alive to the issue of the consumer experience. We take that very seriously. We have specific duties in respect of ensuring that consumer interest is safeguarded. The range of activities that we undertake is probably very similar to those that have been sketched out by Ofcom: we have regular surveys, we have panels of people we meet, we go out, and we have a contact centre. We do look to understand the consumer experience, which is important to us in understanding the way we regulate and, indeed, in encouraging the suppliers to provide products and services that are good for their consumers. One of our more recent initiatives has been to try to make

sure that suppliers are putting the consumer at the heart of what they do, and that is key to the way we see the market in the future.

Lord Aberdare: We had quite a lot of discussion with the CMA about resourcing and capacity issues. Are you all confident that you have the right resources and capacity in place to deal with the competition issues in your area following Brexit, or is it likely to require some additional investment?

Dr Steve Unger: It depends in particular on whether we take advantage of the opportunity for simplification. Our focus over the last few months has been to try to make sure that we see significant opportunity for simplification, particularly by not replicating the current set of arrangements that are designed to deliver harmonisation. If we can make sure that we take that opportunity to simplify, I would hope that that minimises the impact on us. There will be some other areas where we will have to do more, but a good outcome will be to start by looking at where we can do less.

Jonathan Spence: We do not envisage there being a material ramp-up of resources following on from Brexit. Clearly, to the extent that we were to take on larger cases, we would need to consider very carefully how those were resourced and whether we or the CMA were best placed to take those matters forward, but we do not envisage a significant ramping-up, as the CMA has described.

Richard Moriarty: I have a very similar position to that of my colleagues. The only additional point is that it provides another opportunity for all of us, as competition authorities, to work more closely together. Much has been achieved, but we should redouble our efforts to work in collaboration.

The Chairman: Thank you very much for all your answers. If there is anything you feel you have not covered, either speak now or write in to us. We will send you a transcript of this to ensure that we are not quoting you wrongly. Thank you very much for that perspective on our work. If you wish to make any written submissions within or without the ground we have covered today, that would be very welcome. Thank you all very much indeed.