



Select Committee on Communications

Corrected oral evidence: The internet: to regulate or not to regulate?

Tuesday 9 October 2018

4.30 pm

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Members present: Lord Gilbert of Panteg (The Chairman); Baroness Benjamin; Baroness Bertin; Baroness Chisholm of Owlpen; Viscount Colville of Culross; Lord Goodlad; Baroness Kidron; Baroness McIntosh of Hudnall; Baroness Quin.

Evidence Session No. 16

Heard in Public

Questions 135 - 142

Witnesses

I: Dr Andrea Coscelli, Chief Executive Officer, Competition and Markets Authority; Simon Constantine, Director, Policy and International, Competition and Markets Authority.

USE OF THE TRANSCRIPT

This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Dr Andrea Coscelli and Simon Constantine.

Q135 **The Chairman:** Welcome to our second session this afternoon of the House of Lords Communications Committee inquiry into internet regulation. Our second set of witnesses is from the Competition and Markets Authority. Mr Constantine and Dr Coscelli, you are both very welcome. Thank you for giving up your time to be with us. Today's session will be recorded, and a transcript will be made available.

Could you briefly introduce yourselves and tell us a little about the role of the CMA, your respective roles within it, and the current role of the authority, particularly in relation to the online regulatory framework? Do you have the resources and powers that you need to fulfil that role? Perhaps you would address those points in your introductory remarks.

Dr Andrea Coscelli: I am the chief executive of the Competition and Markets Authority.

Simon Constantine: I am the director of policy and international at the CMA.

Dr Andrea Coscelli: The CMA is the competition authority for the general economy of the UK, so we are different from Ofcom or other regulators. We have a wide remit. We have four main clusters of activity, all of which are relevant to the discussion today. The first is merger control. Jointly with the European Commission, we review mergers and acquisitions that affect UK consumers. There is a division of labour. Some of the large global European transactions are currently reviewed by the European Commission and we tend to look at national transactions. That will change after Brexit, and on current assumptions all those cases will come to us.

The second cluster of activity is competition enforcement, which is essentially the prohibition in competition law from engaging in abusive behaviour or illegal agreements. Today, again, this is done jointly with the European Commission. For instance, the recent cases in Brussels involving Google Shopping and Google Android protect UK consumers in many ways. As you know, the UK digital market is very large in Europe, so quite a lot of the commerce affected by such cases is in the UK. Again, there is a division of labour. At present, we focus mainly on national cases and cases involving Google or Amazon are dealt with in Brussels. That is again likely to change post Brexit. It might change in the next few months or a bit later.

The third area is consumer enforcement, which is done more at national level, so it is an area that is less likely to change. It has been a fairly active area for us, in particular in digital markets. For instance, we have an ongoing investigation into a secondary ticketing website. We are currently in court with a company called viagogo to try to get it to comply with UK consumer protection legislation; we are active in online gambling, working with the Gambling Commission; we are doing some

work on hotel booking sites; and a few months ago we concluded some work on online dating. So quite a lot of our work is in digital markets.

The final area is market work, which is essentially a cross-cutting market-wide initiative. This is a fairly flexible tool, because it allows us either to look at the way competition works in certain markets and issue recommendations to government to introduce legislation or regulation, or potentially to launch a second phase where we can try to impose change by our direct order-making powers. For instance, in the context of retail banking, some work that is now taking place on open banking, linked to some of the discussions about platforms, arose through our own direct order-making power. Those are the four key areas.

On the final part of your question about resources and powers, we are a well-funded agency. We had detailed discussions with the Treasury, and our sponsor department the Department for Business, Energy and Industrial Strategy in the context of Brexit. We have had a significant increase in our resources this year to prepare for Brexit, and there is certainly an indication that we will be properly funded going forward. Obviously, there will be a spending review next year, so we will have to see exactly where we land on that.

Like our colleagues at Ofcom, the main challenge is to try to translate funds into expertise and skills in the agency. We are doing quite well on some of our more traditional skills. On the legal and economic sides we are recruiting quite well. We are convincing a number of colleagues potentially to come to us from private practice and take a pay cut; we try to explain the benefits to them and the general public of spending some time in an agency.

Digital is a different level of challenge. We have recently recruited a head of data and digital. We have been very happy about that. We are now trying to support him in expanding that area. We are trying to be creative through secondments, apprenticeships and universities. We are trying to be pretty flexible in the way we do it, but we will have to see in the next year or so where we land.

The Chairman: Mr Constantine, do you wish to add anything?

Simon Constantine: Not to that point, no.

The Chairman: Let us stick with your remit and your relationship with other regulators.

Q136 **Baroness Quin:** This is a similar question to the one I asked Ofcom. It is about whether there are areas of remit overlap between yourselves and other agencies; whether you have identified gaps as regards the issues we are looking at; and in either case whether you see the need for some kind of overarching co-ordinating body.

Simon Constantine: As you say, some of it was covered by Ofcom, but there are probably three main strands. Within the CMA itself, as Andrea has already noted, we have a number of different powers. Certainly, in the digital space there is a lot of overlap between them. A company that is in breach of consumer protection requirements might equally be

violating competition law. Similarly, with our markets powers we are able to look at both competition and consumer issues. Within the CMA, it is about working out what is the right tool for the job.

As I think your question was getting at more directly, we then have the relationship with others. Splitting that between competition and the consumer: on the competition side you heard from Ofcom about the concurrency system we have with the sector regulators, the discussion that goes on with them about how cases are allocated and the co-ordinating mechanisms, such as the UK Regulators Network and the UK Concurrency Network that the regulators and the CMA are involved in, to work better together not only on specific cases but on research projects and things such as that.

On the consumer side, the other main enforcement body, along with some of the sector regulators, is Trading Standards. Again, there is an attempt to co-ordinate that through what is known as the Consumer Protection Partnership at national level to ensure coverage of all the issues. The CMA's focus is on the market-wide systemic issues, particularly those that affect consumer choice; some of the more local issues are taken forward by Trading Standards.

Baroness Quin: Do you think the current system is working? In your contacts with government are you pressing for changes to the way the system works, in particular co-ordination?

Simon Constantine: On competition and consumer issues, there are areas where we are constantly looking to improve. In their Green Paper earlier this year, the Government identified that on the consumer side there may be better ways to enhance co-ordination. Those efforts are ongoing. Whether there are gaps that need to be filled by a new regulator is probably a separate question. Equally, Ofcom talked a lot about people such as the ICO. There is a degree of interaction between its remit and ours, and that is an area where we need to deepen relationships. We do some good work with the ICO already on specific cases, but more regular dialogue would be beneficial.

Dr Andrea Coscelli: There is a lot of ongoing co-ordination on matters. What worries me more now are potential gaps in the regulation as opposed to a lack of co-ordinating bodies.

Baroness Quin: Are you doing work on identifying gaps, or should government lead that work? I am trying to think where the responsibility lies for looking at gaps in the system.

Dr Andrea Coscelli: Strictly speaking, it probably sits more with government, but we interpret our remit in some areas as potentially trying to add value and thinking about those questions as well. For instance, in 2017, we spent a year looking at care homes as part of a market study. One of our key recommendations went across the regulatory set-up framework and the various responsibilities.

A month ago, this Committee asked us to look at digital advertising. That is something we are actively considering, subject to Brexit in the next few weeks, because it has a big resource implication for us. It is certainly

something where we are interested in getting involved. If we did, we would work closely with Ofcom and give serious thought to the regulatory framework in that context.

Baroness Quin: Is there a regular mechanism whereby you can express your views on these issues to government?

Dr Andrea Coscelli: Yes. We have extensive discussions. On a matter such as this, we have discussions with the Department for Business, Energy and Industrial Strategy, DCMS and obviously Ofcom. For us, the extent to which this becomes public is usually linked more to a specific piece of work where we explicitly talk to stakeholders and publish something, so launching a market study would be the outcome. To give you an analogy, this morning we launched a market study on statutory audit. That piece of work is closely linked to initiatives brought by the sector regulator and the Government in a specific case linked to the Kingman review of the regulatory framework. Quite a lot of the work we do is linked to other initiatives because we find that is the best way for us to add value to the overall system.

Baroness Quin: If you make recommendations, on the whole do the Government follow them up? I ask this with some feeling, because committees make lots of recommendations to government and they are not always followed up. Sometimes they are.

Dr Andrea Coscelli: There is a mixed track record. As you know, recently there has been less domestic legislation going through Parliament. We think that some recommendations have essentially been accepted by government, but they are not part of a draft Bill yet, and hopefully they will become so. In other cases, we think we need to be involved post report to make sure that, as part of the implementation, the Government take it forward. In a sense we do not see our role as ending with the delivery of our report; it remains part of an ongoing discussion.

The Chairman: Dr Coscelli, thank you for telling us what you did about your consideration of the digital advertising market. Can we ask that you keep the Committee informed as your considerations progress?

Dr Andrea Coscelli: Yes, certainly.

The Chairman: As you know, it is an issue of interest to the Committee. Dr Coscelli, you are head of a powerful organisation. We have been talking about your relationship with the other regulators. Can you characterise the leadership relationship between you and your co-regulators? Do you meet on a regular basis? Is there a formal leadership forum where you discuss not just the immediate issues or the agenda of your organisations but perhaps the broader context in which you operate?

Dr Andrea Coscelli: Yes. We lead a UK competition network that meets two or three times a year. One of the sessions is explicitly a strategy session, a bit of a horizon-scanning session. All the economic regulators are part of it. We have quarterly senior-level meetings with the chairs and chief executives of the key economic regulators we work with. The

vast majority of CMA projects in the past few years have involved at least a regulator of some sort.

As I was saying earlier, we have found that one of the best ways for us to add value and to diminish duplication is to work with other public sector agencies. In many ways, we do not have deep sectoral expertise, so it is very important for us to acquire that. There are often secondments of case teams and very frequent meetings. This happens at all levels of the organisation. Obviously, the leadership level is important to ensure that, culturally, there is the right environment for the teams to have those conversations. It is in a very good place, as has been recognised by others as well.

The Chairman: At leadership level you see yourselves as convenors, not just participants.

Dr Andrea Coscelli: Absolutely. It depends on the issues. There are some issues where naturally sector regulators feel they are in the lead. The way I think about it is that, if you are the leader of Ofcom or the FCA, you feel you are accountable for the outcomes in that particular sector. We feel that we are accountable for the outcomes across the piece, and for making sure that our competition and consumer powers are used when useful to achieve the outcomes. In that sense, it is a slightly different sense of accountability, but we work very closely to ensure we are all happy with the role we play.

Q137 Viscount Colville of Culross: I would like to ask you about the tools you can use to look at the abuse of market dominance. In paragraph 42 of your submission you say that questions are being increasingly asked about companies with strong competitive advantages being toppled by new, innovative entrants. You say that "certain businesses have acquired a commercial power which makes them immune to the competitive pressures which competition laws are designed to foster". Should you be looking to use tools in a different way, moving your focus from prices and consumers and switching to the behaviour of companies with investment and innovation?

Dr Andrea Coscelli: There is a very active debate, which to some extent resonates with some of the earlier discussions with Ofcom. In many ways, when I go to events in the United States and Germany, there are very similar discussions. The discussion is whether competition law can be interpreted in such a way that some of these new business realities can fit it and allow us to achieve the right outcomes, or whether there is a gap. I think the jury is out at the moment. Different people have different views on it.

Our current view is that the framework is quite flexible. We think that a lot of the business reality and changes can fit the framework and we can achieve the results we need. For me, the main risk, as we tried to put in the submission, is that business and economic reality can come into the assessment of cases quite easily and naturally, but, to the extent that you end up in litigation in a court-type process, the natural tendency in case law is to look at the evidence you have and to have a fairly high bar

for evidence for competition authorities potentially to interfere with commercial operators. In markets where things change very quickly and there is a significant element of uncertainty, there might be a gap, and people are saying that maybe we need to change some of the frameworks. That is where the discussion is currently.

Baroness Kidron: It seems that in various areas, not just this one, there is a debate about harmonising laws. You make small moves to say that they apply, so that where you do not have case law you at least have the assertion that they now apply in these new environments, versus whole new laws that somehow seem to create a problem with different standards for online and offline. Is that part of the same discussion you are finding everywhere? Are there slightly smaller things one can do to tip the hat so that the courts can see it?

Simon Constantine: Going back to what Andrea was saying about our flexible framework, I think it is founded on the idea that it should be technology-neutral and should apply to both equally. Our principal message is that, on both the competition and consumer protection sides, online businesses are subject to the same laws as offline businesses. A number of the practices we see are very similar to the ones we have traditionally seen. Some of the challenges are, first, for us as regulators to understand those markets better—the expertise issues that have been discussed a lot today—and, secondly, the question of pace: the risk that by undertaking long and detailed evidence-based investigations, as we rightly do, with very fast-changing markets you end up remedying something that has already moved on.

Baroness Kidron: On case law, if that is a point of failure, that is something that government can speak to specifically.

Simon Constantine: Putting in ex ante rules to address it is one option. There are areas. With any kind of regulation, evidently the trick is to ensure that it is sufficiently well targeted and adaptable so that you do not end up inadvertently locking in the incumbent system.

Viscount Colville of Culross: You said in paragraph 47 that in a full competition enforcement investigation you can “impose time-limited interim measures to avoid significant harm”, but you think that currently the powers are “subject to a number of legislative procedural requirements” which you would like to see changed. Can you go into that in further detail? What sort of changes would you like, and how would that benefit your ability to operate more effectively?

Dr Andrea Coscelli: It is interesting that the European Commission has similar issues. The issue is the balance between the rights of the parties under investigation versus third parties. If we receive a complaint from a business that feels it is being excluded by a larger rival, at the moment the process we have to follow under our interim measures process, which is the fast track to try to get a result more quickly, gives very significant rights to the business under investigation in terms of access to file and confidentiality. In practice, for us that means it is almost like running a standard case; the first track feels very close to the standard case.

When we are deciding what to do, we think that trying to run, essentially, two cases—a fast-track case, which feels very similar to the standard case, and then progressing the standard case—is not a very efficient way of doing it, so we end up just running the standard case, and the fast track becomes a tool that we very rarely use. That is what we would like to see changed, but it is for Parliament to decide the right balance. It is always difficult to take rights away from businesses. The reality is that, by not doing that, at times you take rights away from other businesses which are the complainants.

Viscount Colville of Culross: What are the changes you would like to see?

Dr Andrea Coscelli: It is very much about ‘access to file’ and the rights of defence for the business under investigation before we can achieve tangible results through interim measures.

Simon Constantine: A lot of balancing has to be done in considering the rights of both sides, and the decision we take at the end to impose interim measures is subject to appeal. Therefore, there is a risk that that is appealed, and it runs very much counter to the very intention. We are looking at how we might use interim measures and the level of proof you might need, and whether through the design of the interim measures you can reduce the risk of harm to the company on which you are imposing things, and the duration and extent of that, but the underlying requirement of the steps we have to go through makes it very difficult to ensure that—

Dr Andrea Coscelli: We talk about it because the French competition authority has successfully used interim measures in the digital space over the past few years. As regards the European debate, a number of agencies are in the same position we are in, where we find it difficult to use the measures. Looking at the French situation, we think they have achieved some results that we would have liked to achieve ourselves, so that is a prompt for ongoing discussions with government on this.

Q138 **Baroness Chisholm of Owlpen:** How do you ensure that the competition law assessments strike the right balance between short-term efficiencies and long-term innovation?

Dr Andrea Coscelli: That is something we do in every case. A consumer welfare test is very much focused on the future; it is about innovation and the way the market will be in the next few years. The difficulty, which is linked to my previous answer, is that it is easier to measure and to be precise about short-term effects than it is about long-term effects, particularly with these types of technologies and businesses. At times, a potential risk for us in defending our cases in court is that a lot of the focus is on measurement of the short-term effects, and less weight is put on some of the longer-term effects. We are aware of that and we are working on it, but it creates an element of risk.

Two years ago, we prohibited a merger that was the acquisition by the Intercontinental Exchange, a large US-based exchange company, of a competing European trading business. That had significant elements of

long-term effects. The decision was challenged by the Intercontinental Exchange. We successfully defended it in court, so it is possible to do it in a way that allows us to get the right outcome.

Baroness Chisholm of Owlpen: Presumably, innovation is moving so quickly that no sooner are you working on one thing than it has already moved on to something new. It must be very difficult to keep up with the pace.

Dr Andrea Coscelli: Absolutely. To my mind, and I think a number of colleagues are in the same place, the international discussion of these issues up to a few years ago was almost that, given the pace of change and the complexity and uncertainty, it was very difficult to intervene in a successful way, so there was very limited intervention, as you know.

The debate has moved on. Current debate is very much about smart intervention, which could be a combination of ours and potentially the sort of targeted regulation Ofcom was talking about. Potentially, you can go all the way to a situation where very heavy regulation, such as public utility-type regulation, is needed, but I do not think that is where the majority of people are.

It is difficult, but it is not beyond us to think about the right forms of intervention. It is important to bear in mind that the mistakes need to be on both sides. Sometimes we make mistakes because we do not intervene when we should, but once in a while we might intervene when we should not. We have spent too many years working and thinking exclusively about mistakes on one side, and we need to rebalance that.

The Chairman: For clarity, the mistakes you have been focusing on are those of over-intervention.

Dr Andrea Coscelli: Yes. Generally, we have been in the same place as other leading agencies internationally in that we have been very worried about over-intervention, and now the debate needs to be more balanced.

Q139 **Baroness Kidron:** In a way, my question is a subsection of Viscount Colville's. Traditionally, you have looked at price and so on; now we have huge data monopolies and it is not about price. In our inquiry into advertising we started talking about data as currency, so it has a value and a price. Do you feel you have the tools to look at the big data monopolies to see whether they are fit for purpose? Is there an opportunity, is it a disaster, or is it something in between? Mainly, I am interested in whether you have the tools even to look properly.

Dr Andrea Coscelli: The short answer is that we believe we have the tools. Two cases of interest are the acquisition of LinkedIn by Microsoft and the acquisition of WhatsApp by Facebook. Both cases were looked at by the European Commission, not by us directly, but obviously we followed them closely. The view of the senior officials of the Commission was that the traditional framework allowed them to look at those concerns. If they feel that the acquisition of LinkedIn by Microsoft had created a degree of control over data that would have made it difficult for

competitors to compete in the relevant markets, they felt they could have intervened.

The answer is yes, but it is something that needs to be monitored very closely, because there is a risk that a gap is created whereby, in a sense, we are forced into a test that is a bit too narrow for what could potentially happen in future in terms of acquiring data from different markets. Antitrust works very much on overlaps. When you are buying a competitor, the concern is that you may buy someone that is not a competitor today but could become one in the future, it is quite difficult to block that under antitrust law, unless there is clear evidence that there are plans to compete.

The question is whether there is a gap. For instance, recently we launched a research programme to look ex post at some of the merger decisions in the digital space. We looked directly at the acquisition of Instagram by Facebook, and the acquisition of Waze by Google. We are going to go back and look at them. The Federal Trade Commission in the United States is doing a similar programme, and we are working with it to do that in a joined-up way.

Baroness Kidron: When that piece of work is complete, I would be very interested in seeing it and the thinking behind it.

Dr Andrea Coscelli: Absolutely. A number of people have expressed an interest, so we will try to make it available.

Baroness Kidron: It is a core question for us all at this point. My other question is about portability. A lot of people feel quite disappointed about how that is going at the moment. If portability was going slightly better, the question of data monopoly would be somewhat less intense for those of us who take a slightly critical view. Do you see those two things as part of the same puzzle?

Simon Constantine: Yes; interoperability and standardisation certainly have a role to play. You have the broad right under the General Data Protection Regulation, but evidently it is a very broad right, and the implementation is important, as you say. We are in the very early stages of that. There is also a significant trust aspect, to ensure that data, if people are sharing it, is adequately protected. That provides the context.

Andrea mentioned the Open Banking remedies, after our banking market investigation, in which, effectively, we required all the banks to use standardised APIs—application programming interfaces—to ensure that new entrants can come in and create new products based on that data and that, with people's explicit consent, consumers could share their data among different providers. So you as a financial consumer could share your financial data and, based on that, have particular products recommended to you or tailored for you. In principle, therefore, consumers should be able to drive competition, which should reduce the costs of switching, because they can take their data from one place to another. As I said, it also reduces barriers to entry for new competitors, because you do not have the 'data moats', as they are known, that other people cannot get at.

We are thinking a lot about this at the moment, as are the Government as a whole. They have launched a smart data review. We are thinking about other sectors where portability might be used. In Australia, they have done some work on this, looking at the energy and mobile telephony markets. The focus is currently very much on the regulated sectors, but also on whether effective ways can be found to enable consumers safely to move their data around in a way they can trust and which protects the incentives of businesses to innovate. Obviously, if there is no incentive for somebody to gather data because they immediately have to share it with everybody else, you need to be careful about that. Equally, consumers should have control over who they give their data to and how it is used when they give it; they should be able to give that data to different people and use that to drive competition.

Baroness Kidron: I cannot work out whether that is a bit like rearranging the deckchairs while the ship—the data monopoly—is driving ahead. One thing we know and love about this environment is that it is all very convenient; it is always very convenient to do what the bigger players would like you to do rather than what you are, potentially, allowed to do. Do you feel that in our inquiry we should look more at the question of portability, or should we look a bit more to the data monoliths for answers?

Dr Andrea Coscelli: We are at a stage where portability is a good candidate for a lot of the heavy lifting in this area. We are certainly putting our time and effort into it, working closely with a number of other partners.

Q140 **Baroness McIntosh of Hudnall:** These questions are all roughly in the same territory. A moment ago, you mentioned public utility in respect of other kinds of consumer product. Do you think we are close to having to regard the internet and all its many iterations and uses as a public utility and, therefore, to be regulated in a similar way? I shall leave that one to stick to the wall, because you might want to respond or to think about it.

In particular, I wanted to ask about the existing tools you have in respect of offline activities and, in particular, the notion of a public interest test. The question of market dominance, which you have talked about at various points today, is clearly germane in respect of the big platforms, and invites questions about what is or is not in the public interest and whether you can apply tests.

What would be the risks and benefits of trying to apply public interest tests in this field, particularly given what you just said in response to Lady Kidron about the thinking you have already done about the mergers and acquisitions that have already happened? What conclusions did you come to? You said that you had looked at that, but you did not say what you had seen. Can you put that together and tell us where your thinking is going?

Dr Andrea Coscelli: Yes, we are doing it at the moment, but we have not reached a conclusion. That is why I did not mention conclusions. On mergers, there are three public interest categories. One is media

plurality, which was used in the context of the Fox-Sky review; the second is national security; and the third is financial stability. Parliament could add a fourth category, say, the creation of data monopolies. There have been discussions in separate contexts about adding R&D as a further category. Whether to expand public interest in the review of mergers is an active debate, here and in a number of other countries.

There are pros and cons. The main counterargument is that you create a degree of uncertainty around foreign direct investment and the acquisition of companies. For the sake of argument, let us suppose that we end up with a public interest test on data monopolies. If you are a large platform and want to buy a small start-up, potentially you could worry that we might go against it on the basis of public interest. That is the downside.

The upside is that you give us greater flexibility to make a judgement.

At the moment, when we intervene on mergers, we have case law and the law on consumer welfare, so there is a fairly tried and tested methodology to look at it, which is reasonably flexible but has some limits. We could make a judgment that, right now, we are very worried about the accumulation of data for some of those platforms, so, ideally, we would like to block a particular acquisition, but our legal assessment might be that we cannot do so in the context of the law as it is. Adding public interest would allow us to do that, which could be the advantage of doing it.

Baroness McIntosh of Hudnall: Where other kinds of utility are concerned—water, electricity and all that sort of stuff—there is an anxiety, which is built into the way you regulate, that certain types of people are likely to be excluded from access because of the particular way they conduct themselves economically. Do you see any danger in future, as data becomes more and more the commodity that is traded, that classes or types of people will be excluded from areas of public discourse by the fact that they cannot participate as fully in the online world as other people? I do not mean that just in terms of conversation; I mean it more widely than that.

I ask that because, in a review of a book I have been reading, I have just read about a scheme already under way in China that gives citizens a trust score based on their communication and purchasing behaviour. If you have a low score, says the reviewer, you might not be able to book a train ticket. Obviously, that is not where we are; it is thinking a bit ahead. Do you foresee any danger of that kind of exclusion growing out of these datasets?

Dr Andrea Coscelli: That is something to think about and, potentially, to worry about. It is firmly in the remit of potential regulation. There are a number of sectors, such as energy, water and telecoms, where regulation has been firmly established for a number of years, and the regulators have specific duties on exclusion, vulnerable consumers and various other considerations. There is a scenario whereby we could end up with a portion of the internet that is regarded in a similar way, and regulated in

a similar way. A few weeks ago, there was a report by the IPPR that was regulatory in the nature of its recommendations for the internet.

At the moment, we and a number of our sister agencies internationally are in a more intermediate space, where we think that it is probably better to focus on some aspects of regulation and still hope that innovation, competition and the potential leapfrogging from one model to another will generate a lot of benefits for consumers. From regulating networks, we know that it is a bit of a plan B; it is not ideal. It is the best we can do, but there is a lot of time and effort on generating the outcomes. Before we develop a heavy regulatory framework for the internet, we would probably want to see more evidence that there are more enduring and entrenched problems.

Simon Constantine: We have been looking a lot at the remedies we impose: things such as data portability, competition-focused remedies, and efforts to make people switch their bank or energy accounts more. Those are very much competition-driven remedies, and for some people they will work. People who are unable to engage in a market, or do not engage, may not benefit. We are looking at our remedies and asking whether the balance is right for the active consumers we want to encourage to switch, because ultimately that is what drives competition and innovation, and the people who might not be able to benefit from that. Within those, you want to select the generally vulnerable, who are unable for whatever reason to engage in markets, and think about how to address that. Some of it may come in the way we design our remedies, but, as Andrea says, you may find that that is where you need a degree of more direct intervention.

Baroness McIntosh of Hudnall: The world is moving to a situation where more and more of people's life is conducted online—for example, access to healthcare—which is generally seen to be a positive in some respects; but there is no question that for some people, if that becomes the dominant method of delivery, it is not a positive. It is particularly not a positive if the delivery mechanisms are dominated by two or three major platforms as the means by which things are made available. I do not want to put words into your mouth, but, given that that is how things are going, I sense that you are saying, "Yes, it's sort of a problem, but we're not really sure that it is much of a problem yet".

Dr Andrea Coscelli: We are absolutely focused on the experience and outcomes for consumers. The question is about the best way to get there. With healthcare, for instance, there is a sector regulator, NHS Improvement, which might have a role in regulating some of the digital providers in the healthcare space. We have consumer protection, which is essentially regulation, so there are a number of things they have to do anyway. There is always a degree of regulation; the question is whether you need extra layers to achieve what you think you need to achieve.

We completely share your view that what is needed is that the outcome for consumers in a particular situation is the right one. I do not know about the specifics in that particular case, or whether we might think that other providers might provide a similar product, and that giving them

access to the data through our data portability remedy might be the best way. To have four platforms innovating and competing is better than having a heavily regulated single platform. It would be a case-specific assessment. In theory, I completely agree with you. It is just about the specific application and what's the best way of getting there.

Q141 Baroness Bertin: I shall keep this brief and make it quite simple in the interests of time. If you were to change one thing about the current law to make your job more effective, particularly with regard to the online economy, what would it be?

Dr Andrea Coscelli: That is a good question. The point about interim measures is important. The second area is consumer protection law. We have asked for better powers from government in the last couple of years. For us, one key area for consumer protection is fining powers; for instance, when we intervene against a number of providers in the online gambling or dating space, we cannot penalise the operators who are materially in the wrong place as regards their compliance. As one of their lawyers said to me, at the moment there is no business case for compliance. Essentially, they drag their feet and resist us, and, eventually, they end up doing the right thing, which they should have done 18 months before.

The Government have agreed and have said that, when there is room for legislation, they will give us fining powers. Linked to that, the current model is one whereby we have to go to court, as in the case of viagogo, a ticket reselling website. We would like the same powers as we have on the competition side, so that we can take decisions ourselves and potentially fine a company and get remedies. That is what a number of other agencies in Europe and internationally do, and they are quite effective in doing it. If we brought consumer power into a similar sphere to competition power, particularly for digital, the two sets of powers would be complementary and would allow us to achieve a lot.

Baroness Bertin: Do you think that existing legislation could be tweaked to get you that, or would a wider Bill have to go through?

Dr Andrea Coscelli: We think that for consumer power it would have to be primary legislation, so it would have to be part of another Bill.

Q142 Baroness Kidron: My question is about consumer protection, specifically on terms and conditions. Is it not a regulatory failure that we rely on terms and conditions, and that 99.8% of people tick them and never read them, period? That is my first question. When you have answered that in short form, I also want to ask whether you would extend it to other things, such as using consumers' emotional states to create a decision, or persuasive design. It might be connected with your report, where you raised the question of whether terms and conditions should inform consumers if there was personalised pricing. It could be like drug companies having to tell consumers about side-effects. Can we rely on terms and conditions, or is there regulatory failure? What should be in them, and should we be more demanding about what is in them?

Simon Constantine: On your first question, it is one of the incredibly intractable challenges. We have all experienced it personally. How do you get all the key information in front of consumers that they need, get them to read and understand it and enable them to have some kind of meaningful choice at the end? If you get a breakdown in any of those points, you have an issue, because you end up with a situation where either it is not read or it is not understood, or it is read and understood, but people feel that they have to click through anyway as a result. That again is something we are looking at, whether it is a combination of specific rules or principles, or certain nudges that you can make to get the right information in front of the consumer. Certain things have been tried, such as cookie notices, although I think we can all say that they may not necessarily have worked as they might.

A lot of experimentation is going on in government and internationally about how we can get terms and conditions to be more effective in doing what they are supposed to do, which is to make consumers aware of what will happen to their data—what has been gathered and whether it will be sold—and to give them a choice. If they have a choice, we hope that will create incentives for other people to offer better terms and conditions, creating a degree of competition, which we do not really have at the moment. People do not go from one product to the next, reading through all the terms and conditions and comparing them. You cannot have that perfectly, but there must be elements where people can promote themselves on the various terms they offer.

More generally, consumer protection law has an important role. As Andrea said, one reason why we are keen to bolster our powers is that the underlying laws are potentially very effective in this area. It is about looking at unfair terms in and of themselves, which applies equally to online platforms. If people are insufficiently transparent about data they are gathering or how it is used, that can potentially be unfair and unenforceable.

There are also certain misleading commercial practices. Some of the practices intended to exploit biases and to rush people into making decisions may be unlawful. One of our concerns with some of the sites that we have looked at recently is the ticker across a site that turns out to be meaningless but is designed to create a sense of time pressure or scarcity. And with our hotel investigation, we are looking at whether some of the scarcity messages might be misleading by inducing customers in that sense. The laws are there, and we are looking to see how best we can use them, and we feel that additional enforcement powers will create a strong sense of deterrence at the outset.

Baroness Kidron: Can I press you on this point? I know that you are doing very good work in this area, looking at comparison sites and other things. If we all roll our eyes and say that we do not read them, or that they do not offer a choice, do you have the right laws? I am very sympathetic to the enforcement bit, and I understand exactly the point—noted—but the system is not fit for purpose. It is not just the end bit or the enforcement bit; there must be something wrong up front.

Dr Andrea Coscelli: That is where the ex ante regulation will come in, in my view. Ex post enforcement works well with enough ex ante regulation. When there are gaps in ex ante regulation, somehow we feel we have to do much more to compensate for it, and sometimes the tools are not exactly what you would use. For instance, with terms and conditions it would be much more efficient to have a degree of ex ante regulation, rather than us looking individually at specific companies or specific sectors without fining powers, just one by one trying to get people to the right place, which is possible but not the best use of our resources.

Simon Constantine: The ex ante thing has been done fairly well in certain regulated sectors. There are key facts documents, and other things, for various financial products, which work quite effectively. As Andrea said at the outset, we are looking economy-wide, and it becomes somewhat more difficult to work out how to create a standard that works for all those things, or to set a framework within which there is flexibility for each industry to create a series of mechanisms to get the right information to consumers, and then for consumers to engage with it.

The Chairman: It is a very interesting area.

Baroness Kidron: It really is.

The Chairman: What might it look like if you created a framework for terms and conditions to be agreed sector by sector? Would there be protection for businesses, if you identified the issues that in your view were most important to consumers and must be covered in the terms and conditions and on which there must be clarity—hence, keeping them short—while other things need not be terms and conditions and might just be a statement elsewhere on the company website? As well as an enforcement role, would you see it as having protection for businesses to enable them to keep their terms and conditions short and to the point?

Simon Constantine: Trying to work out which are the key terms is clearly important. Experiments have been done about whether you can create some kind of 'trust score', a fairness rating or something like that, for terms and conditions, or whether to have a kind of cascade system where certain terms are prominent, with click-throughs and so on. A lot of that behavioural research is being done in other countries, from what I have heard, and similar research has been done here. Shifting consumer behaviour is very difficult, but that should not stop us trying.

If we are looking at a particular market and asking how we can make competition work well in that market, these sorts of issues arise: how to get the right sort of information in a motor insurance or banking market and what sort of information consumers need. We have league tables in banking, for which you will have seen the adverts; some banks are making quite a lot about the fact that they have come top of our tables for that. There are all those different ways, and it is just about designing the right one. As we keep testing those sorts of remedies, I hope we can become better and better at it.

The Chairman: Thank you both very much. I am very interested in the evidence you have given, and I know that the Committee is, particularly

the perception that public opinion is changing internationally and nationally, and consequently the remedies you are putting forward will change accordingly. The points about gaps in the regulatory powers and the co-ordination with other regulators are very interesting, too. I appreciate that you have a very broad remit and that you have clearly kept abreast of the work of the Committee in this important area.

Dr Coscelli, is there anything we might have asked that we have not asked, or any other points that might be useful for us in coming to our conclusions?

Dr Andrea Coscelli: No, we have covered the main issues that we wanted to talk about.

The Chairman: In that case, thank you very much. As we develop our report, we may come back to you with technical questions and ask whether you can direct us deeper into your organisation to someone who can help us. Thank you very much for your time.