

# LEFT IN LIMBO

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a period of uncertainty

# 2020

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## UK COMPETITION POLICY ENTERS A PERIOD OF UNCERTAINTY

When Lord Tyrie took up the chair of the CMA in June 2018, the direction of UK competition policy was far from clear. For decades the UK had aligned its antitrust regime closely with that of the EU, deferring to Brussels on many issues. But now the UK was in the throes of negotiating Brexit. The government had yet to publish its white paper on its vision for the future EU-UK relationship, let alone set out detailed plans for the newly ‘independent’ UK’s competition policy.

Against such an uncertain backdrop, few would have begrudged the CMA for battening down the hatches and waiting for the basics of Britain’s future ties with Europe to be thrashed out before setting out detailed proposals for the future of UK competition policy. But the new chair thought differently, as soon became clear in a letter he sent to Britain’s business secretary in February 2019. Citing “rapidly emerging forms of consumer detriment” resulting from the digitalisation of the global economy and “increasing signs that the public doubt whether competition works for their benefit”, Lord Tyrie laid out bold plans for reforming Britain’s competition and consumer policy regime. Among the most eye-catching of these – and top of Lord Tyrie’s list – was a proposal to introduce an overriding “consumer interest” duty on both the CMA and any courts scrutinising its decisions. This would replace the CMA’s existing statutory duty to “promote competition both within and outside the United Kingdom, for the benefit of consumers”. This distinction mattered, Lord Tyrie contended, because CMA interventions designed to promote competition alone were not always those that would best serve the interests of consumers.

Fast forward to 2020 and Lord Tyrie’s abrupt resignation – effective in September – has thrown the proposed reforms into doubt. Some elements of the package look likely to survive his departure. The CMA is, for example, now leading a Digital Markets Taskforce with the objective of “unlocking competition” in digital platform markets. But talk of reorienting the CMA’s core focus from competition to consumers appears to have died down. Lord Tyrie’s resignation statement contained more than a hint of frustration, indicating that the role of CMA chair prevented him from leading a “more forceful” campaign for change. So what went wrong?

## EXEC SUMMARY

In June 2020, the chairman of the UK Competition and Markets Authority (CMA) unexpectedly announced his resignation, barely two years into the job. In his brief tenure, Andrew Tyrie turned heads by setting out ambitious proposals for a “decisive shift” in the CMA’s focus in favour of the consumer. At a time when questions are already being raised about the impact of Brexit on Britain’s antitrust regime, Lord Tyrie’s departure leaves both the role of the CMA and the future path of UK competition policy in limbo. Will his far-reaching ideas now be quietly shelved? Or could – and should – they survive his departure?

## LORD TYRIE'S PROPOSALS

In calling for a shift in the CMA's focus, Lord Tyrie was challenging the traditional view that – as he put it – “if we sort out competition, consumer interest will take care of itself”. Seen through that prism, in a well-functioning market competing firms are locked in a live-or-die battle to attract consumers, meaning that what consumers want is what they get. Of course, in reality few markets are perfectly competitive in this sense: for example, barriers to entry may prevent new firms from being able to challenge incumbent providers; firms may seek to bypass competition by colluding; or customers may not have all the information at their disposal to allow them to make an informed choice about the product that is in their best interests. The job of competition authorities, according to this world view, is to remove these blockages and thereby unleash the full force of competition.

In challenging this approach, Lord Tyrie drew particular attention to the case of loyalty penalties, citing the CMA's response to a super-complaint brought by Citizens Advice that longstanding customers were paying much more than new clients for the same service across a range of telecoms and financial services markets. Many of these markets had characteristics that one might expect to facilitate effective competition: a wide range of providers to choose from, little or no evidence of collusion, readily available information on the services offered by different competitors and a relatively straightforward process for switching (the latter two in many cases aided by price comparison websites). And yet, according to the CMA, many customers were opting to stick with their existing provider, even when they could save a lot of money by switching. Across the five markets it looked at, the CMA estimated that loyal customers were collectively paying some £4bn a year more than customers who did switch.

These concerns about sticky customers are not new: the CMA and UK sector regulators have been thinking about the issue for several years. Initial ideas for solutions came from the traditional playbook: if users were not swapping suppliers even when it would be in their interests to do so, then some barrier – for example, a complex switching process or a lack of information on competing firms – must be getting in the way. The solution, on this view, was to identify and remove these barriers and thereby allow competition to flourish.

However, a number of factors appear to have undermined the CMA's faith in this approach:

- First, initiatives led by sector regulators to encourage more consumers to engage in such markets have met with mixed success. Regulators have taken a number of steps to reduce the cost and complexity of switching; to ensure that users have the requisite information at their disposal to make an informed choice of provider; and to nudge people to consider switching (e.g. by requiring providers to include reminders on customer bills about the potential benefits). However, despite these efforts, switching rates remain relatively low in some markets.
- Second, there is growing recognition that these demand-side issues cannot be fully addressed simply by ensuring that there is vigorous competition on the supply side. On the contrary, even if suppliers compete aggressively, paring industry profits to the bone, loyalty penalties can remain a feature. The only difference is that competition drives providers to hand back the profits they would have made from customers who do not switch to customers who do, in the form of an introductory discount. (For more detail, see our previous article on loyalty penalties here.)
- Third, loyalty penalties have become a hot political issue in the UK in recent years, turning up the heat on both the government and regulators to act. The political pressure has increased further as a result of evidence that those customers who are least likely to engage in these markets – and thus are most likely to pay the loyalty penalty premium – are disproportionately likely to be from vulnerable backgrounds. The CMA emphasised this correlation in its response to the Citizens

Advice super-complaint, noting that those who are most likely to pay the loyalty penalty may also be those who can least afford to do so.

If loyalty penalties are an inevitable outcome of competition in many markets, then the only way of eliminating them would be for regulators to intervene directly in the competitive process. Indeed, in responding to the Citizens Advice super-complaint, the CMA recommended that sector regulators should consider price controls in the markets covered by the complaint, targeted to protect those who are worse off. The CMA acknowledged that such price controls could distort competition. But it argued that the case for intervention was stronger when those most badly affected were vulnerable customers who found it difficult to switch and ended up paying significantly higher prices. Promoting competition, it seemed, was no longer the CMA's favoured way to safeguard consumer interests in these circumstances.

## RADIO SILENCE...

The CMA published its response to the super-complaint in December 2018, shortly before Lord Tyrie set out his proposals to replace the CMA's duty to promote competition with an overriding consumer interest duty. But there has been little to no visible progress on this proposal in the intervening 18 months. In June 2019 the government announced a forthcoming consumer white paper on reforms that would give the CMA enhanced powers to "tackle bad practices" in consumer markets, but more than a year on there is still no sign of this paper emerging. And with a change of prime minister and two changes of business secretary in the last 12 months (in addition to Lord Tyrie's resignation), it is now unclear whether his proposals will ever come to fruition.

Why the radio silence? One simple explanation is that events have blown the government's legislative programme off course (the twin dramas of Brexit and COVID-19 would have been a major distraction to even the most determined of governments). However, it is also notable that the government never openly voiced its support for Lord Tyrie's call for an overriding consumer interest duty. When unveiling its plans for the consumer white paper, the government signalled its intention to give the CMA more teeth in deciding whether consumer law had been broken, but made no mention of changing the CMA's fundamental duty to promote competition.

Why might the government have been lukewarm about Lord Tyrie's idea? Part of the challenge for policymakers lies in the difficulty of identifying what constitutes 'consumer interest' in practice. In a world where the CMA's job is to promote effective competition, the underlying assumption is that consumer preferences are both revealed and served by the market mechanism: Adam Smith's invisible hand. Consumers are left to make their own decisions about what goods and services to buy and who to buy them from, on the assumption that they will – by and large – know how best to define and pursue their own interests. But in a world where the CMA had a consumer interest duty that could trump the market mechanism, policymakers and regulators would be left with the tough task of defining what these consumer interests are.

One challenge here is that different consumers' interests are not always aligned. For example, as noted above, in a competitive market context one consumer's 'loyalty penalty' could be paying for another consumer's 'introductory discount'. Banning loyalty penalties in such circumstances would involve consciously redistributing money from one group of users to another.

Distributional decisions that involve difficult value judgments about winners and losers are traditionally the purview of elected representatives. In order to turn these distributional questions into a set of guidelines for 'technocratic' regulators to follow, policymakers would need to provide clarity on the weight to place on the interests of different groups of consumers. In the context of loyalty penalties, the CMA might have felt more compelled to call for intervention on the basis that – in addition to concerns that it was unfair to punish loyal customers with higher prices – the service users least likely to switch provider were disproportionately likely to come from vulnerable backgrounds.

However, fairness and vulnerability are slippery concepts that evade simple definition. As we have explored in a previous article, fairness is a natural theme for politicians, but regulators have struggled to flesh out what fairness in pricing means in practice. And while there are a number of characteristics that might correlate with vulnerability (age, income, educational level and so on), Lord Tyrie himself appeared to favour a much broader definition that included anyone who was “time poor” in an age where the digitalisation of the economy had, in his view, “rendered previously confident and capable consumers vulnerable to getting bad deals and poor service”. His conclusion: “We are all vulnerable now.” While the observation that anyone can be vulnerable at certain times and in certain circumstances may well be true, it illustrates the difficulty that policymakers would face in providing a simple, mechanistic set of guidelines for the CMA to follow when weighing up the interests of different groups as part of an overriding consumer interest duty. After all, if everyone is vulnerable the concept cannot serve as a clear-cut guide to identifying which customers should get priority treatment.

## WHERE TO NEXT?

In stepping down from the CMA after just two years at the helm, Lord Tyrie is leaving the future direction of UK competition policy in an even greater state of uncertainty than he found it. He leaves the CMA in a difficult position, having publicly called for new powers and responsibilities only for those calls to fall on deaf (or at least distracted) ears. Businesses find themselves operating in an information void, with no clarity on whether regulators or policymakers tolerate pricing practices that are commonplace across a wide range of consumer markets. And, most fundamentally, his departure leaves consumers in limbo, with a confusing mix of messages about whether they should be fending for their own interests by actively engaging in markets or sitting back and letting regulators intervene on their behalf with price controls.

In challenging the traditional view that the competition authorities need only worry about promoting effective competition, Lord Tyrie was drawing attention to an important issue that is not going away – and that may be becoming more complex as digitalisation changes the way that consumers engage with markets. But in the absence of a simple way of defining what constitutes consumer interests or of weighing up the interests of different groups, interventions that override market competition to protect certain users at the expense of others may need to be led directly by government, rather than being devolved to regulators. In this sense, it will be interesting to see where Lord Tyrie heads next in his quest to lead a “more forceful” campaign for change.

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