

Regulatory Policy Institute Annual Competition and Regulation Conference

Merton College, Oxford

2pm Monday 24 September to 4.30pm Tuesday 25 September 2018

**The discovery, assessment and use of evidence in regulatory and competition law
decision making**

This year's conference will have a single theme: the processes by which regulators and competition authorities go about the tasks of discovering, assessing/interpreting and using evidence that is of potential relevance to their decisions. It is motivated by an oft heard view that, though we arguably have (a) greater data collection and processing capacity and (b) greater insight into the cognitive processes at work in decision making than ever before, political decisions, at least, are less and less influenced by carefully considered evidence.

The question is: how well are regulatory and competition authorities coping with the assessment of evidence tasks? Is evidence becoming less influential in decision making, either directly from internal pressures within organisations (e.g. toward bureaucratic inertia), or indirectly via less 'evidence sensitive' external pressures from politicians, the media (including social media), campaign groups, and so on.

In structuring the conversations over the two days, the aim will to ensure coverage of each of the stages of the evidence-chain: (i) acquisition of information ('discovery'), (ii) interpretation and assessment of what is acquired, and (iii) the use made of the information, including not only to inform the decisions, but also to explain and/or 'justify' them. The programme will take in general issues concerning the structures of information processing systems as well as exploring the experiences of the relevant authorities. How, for example, can the familiar benefits of competition be achieved in what are, in the end, monopolistic processes? Can there be induced rivalry in the discovery of relevant information, for example, or in the interpretation of evidence? Or do organisations tend to default to 'single channel information processing' and to conventional wisdoms/beliefs, leading to increased risks an exclusion of some types of information/evidence that come to be ignored, possibly because inconvenient?

The event

After our sojourn at Lady Margaret Hall last year, we will be back home in Merton College in September, based in the T.S. Eliot Lecture Theatre. Those who have attended in earlier years will know that it is a relatively intimate setting conducive to lively group discussion.

The provisional schedule for the two days is set out below. At this stage we are seeking nominations or suggestions of people who might speak from the platform on one of the identified themes, topics or questions. We are also inviting first reservations of places via seminars@rpieurope.org A good indication of the speaker list should be available in early July.

Confirmed speakers (to date)

Prof Sir John Vickers, All Souls College, Oxford (Zeeman Lecture)

David Gray, GEMA

Rachel Fletcher, Ofwat

Peter Freeman, CAT

Stefan Hunt, CMA

Tony Ballance, Severn Trent

John Davies, Compass Lexecon

Cathryn Ross, BT

Steve Smith, Lloyds Banking Group

Dr Chris Decker, Wolfson College, Oxford

John Temple Lang, Trinity College, Dublin

Prof Catherine Waddams, University of East Anglia

Outline programme

Monday 24 September

14.00 – 17.20 The two afternoon sessions will be dedicated to the discovery/assessment/use (DAU) process as it pertains to information about, or information provided by, consumers.

A number of issues are open to consideration, including:

Whether there are material differences in the ways in which (a) authorities and (b) supply businesses go about developing an understanding of ‘consumer interests’.

Whether there are material differences between suppliers operating in monopolistic markets and in more competitive market environments.

The methods used in the DAU process and the weightings given to them, e.g. surveys, behavioural studies, consultations. Are there differences here between household and business consumers/customers?

The breadth of the conception of the ‘consumer interest’ (which necessarily affects the breadth of the DAU process). Are consumers assumed to be only interested in outcomes (products, prices, quality of product (including security of supply), quality of service), or are they also interested in other things, e.g. *how* the outcomes are determined, including an interest in market rules themselves? Is the last part of this question ever addressed?

The extent to which authority views of the consumer interest are influenced by information emanating from the media, including social media, and whether any

explicit effort is made to disentangle views about consumers interests that are mixed in with points about regulators and supply businesses.

Whether consumers themselves are given significant roles in the DAU process other than as passive respondents to the questions of public authorities or their commissioned agents (market research firms and the like). E.g. are ‘consumer juries’ on any organisational agenda? Or consumer participation in ‘social compacts’ or ‘licences to operate’? (These being approaches being tested out in other jurisdictions.)

17.30 – 18.30 The Annual Zeeman Lecture, in the T.S. Eliot Lecture Theatre

19.30 - The Annual Distinguished Fellows’ Dinner, in Merton Hall

Tuesday 25 September

09.00 - 13.00 The two morning sessions will be devoted to comparative reflections on DAU processes in different decision-making contexts (competition law decisions, price-control determinations, rule-making decisions), encompassing perspectives from different stages of the processes.

End stage perspectives. All major competition law and regulatory decisions face potential adjudication by a Court or Tribunal at the end stage, where the DAU process encounters a competitive/adversarial structure. This in itself demonstrates the feasibility of competition in such processes. Questions to be asked are:

How well to these ‘competitive’ elements work in practice in competition law and regulatory cases?

To what extent are adversarial approaches effective only where questions to be settled are narrow in scope, e.g. a yes/no infringement decision?

Are investigative/inquisitorial approaches more appropriate when the information evidence that might be required is much wider in scope and/or is of a more open-ended nature, e.g. anything that might be relevant to a price control?

Earlier stage perspectives. In relation to prospective judicial/merits review of administrative decisions, do authorities rely on any explicit methods to ensure that they can answer the questions: (a) Was all relevant evidence taken into account? (b) Has a decision been swayed by irrelevant evidence?

To what extent do the boards of authorities, who formally take the decisions, engage with detailed evidential issues at all?

Are those who work in the ‘engine rooms’ where the bulk of the DAU activity takes place, given guidance on how their work fits in to the process as a whole, including how it will be used and for what purposes?

14.00 – 16.30

Tuesday afternoon will be dedicated to commentaries and thoughts from regulatory and competition agencies about the ‘holistic’ challenges they face in establishing effective systems for discovering, assessing and making good use of evidence in the face of all the various challenges discussed in the earlier sessions.

Depending on participants and on what might be covered in the ‘Boards and Engine Rooms’ slot in the morning, the final afternoon will see platform contributions from a subset of: the CMA and the regulators in the financial services, energy, communications, water, and transport sectors, along with general discussion.