

THE SECOND ANNUAL CHATHAM HOUSE COMPETITION CONFERENCE

Modernisation and Decentralisation Session

'Market Investigations'

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Introduction

Paul Geroski's paper, which you have in the Conference Papers gives an optimistic overall view of the UK market investigation régime (MIR) with a strong endorsement of its various features. In Paul's absence I have agreed to come and say a few words on the same theme, but as this session is headed "Modernisation and Decentralisation" I thought I would try and place market investigations in their proper context in the EU competition régime and to try and rebut the proposition (if indeed such a proposition could be put forward) that market investigations are in some way anomalous or fundamentally out of line with the overall thrust of EU competition policy.

With this in mind, I shall give a basic appraisal of the MIR and note some of the reasons for its continued existence; I shall then discuss the relationship between the MIR and the EU Modernisation Regulation (Regulation 1/2003). I propose then to touch on what appears to be a trend towards market or sector studies at both Member State and EU level. Finally, I shall try and draw together these different strings and make some general comments.

The 2001 White Paper

A new regime to investigate particular markets was envisaged in the Government's 2001 White Paper.² The basic aims set out in this part of the White Paper were:

- Reform of the monopoly provisions of the Fair Trading Act 1973.
- Review of the market by the Office of Fair Trading (OFT) (and/or sectoral regulators) with full investigation by the Competition Commission (CC).
- The Competition Commission's decisions to be determinative on substance and remedies.

The Enterprise Act 2002

Statutory Framework and competition test

The reforms were enacted in the Enterprise Act 2002 which broadly reflects the White Paper proposals. Apart from transferring decision-making from Ministers to the OFT and the CC, the new MIR discarded the formalistic structure of the old monopoly control (with its requirement first to find the existence of a monopoly situation followed by a need to consider the public interest). The aim behind the MIR was to provide a mechanism to investigate whole sectors against a substantive test of "Adverse Effect on Competition" (AEC) and to address the problem of uncompetitive markets where market players may not necessarily behave anti-competitively (or more specifically may not breach the EC/UK prohibitions). Both the

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²*Productivity and Enterprise- A World Class Competition regime* Cm 5233 (2001).

OFT and the CC published detailed Guidance on what situations fell within the MIR and what the methodology for assessing AEC would be³.

Implementation

In practice the system has been implemented as follows. Even before the coming into force of the Enterprise Act OFT set up its Markets and Policy Initiatives Division (MPID) to conduct “Market Studies”. As its Guidance infers the outcome of a Market Study may not be a Market Investigation⁴. It could be anything from a clean bill of health to a recommendation to alter regulations or legislation in some related field. So far the OFT has conducted at least 19 studies⁵.

Supercomplaints

Linked to this is the Supercomplaint procedure, under which recognised consumer bodies can send dossiers to OFT with a 90-day deadline for rejection or further action.⁶ Some 6 of these have been made so far, one of which (Home Credit) led to a reference to the CC.

Current Commission Investigations

A market can be referred, after a review by the OFT or a sectoral regulator, for full investigation by the CC⁷. Five cases have been referred so far; all are still in progress.⁸ The statutory timetable gives the CC a maximum of two years in which to report—although the CC has set and will hopefully meet stricter time targets. If the CC discovers anti-competitive features within the market under investigation it has a duty, so far as is practicable, to remedy them.

Summary

There are several significant features of the MIR:

- (a) Although it is a two-stage procedure, the second stage does not automatically follow from the first. Many OFT Market Studies do not lead to a Market Investigation by the CC.
- (b) It allows possible adverse effects on competition to be assessed by reference to market structure, and to behaviour of customers, as well as to that of producers or suppliers.
- (c) It has a wide ranging provision for remedies.
- (d) If carried through both of its stages, it is very thorough.

³See OFT Guidance: Market Investigation References (2003) and the Competition Commission Guidelines: Market Investigation References (CC3) (2003).

⁴ See OFT Guidance: Market Studies (2004).

⁵ Examples of Market Studies carried out by the OFT are: Extended Warranties on Domestic Electrical Goods; Consumer IT; Pharmacy Entry Regulations; Private Dentistry; Payment Systems; Liability Insurance; Taxi Services; Estate Agency ; Doorstep Selling; Debt Consolidation; Storecards. More details can be found on the OFT website www.of.gov.uk .

⁶EA02 s11.

⁷Part 7, section 205 EA 2002.

⁸ [Domestic Bulk Liquefied Petroleum Gas](#) ; [Store Card Credit Services](#); [Northern Irish Personal Banking](#); [Classified Directory Advertising Services](#); [Home Credit](#).

The latter point is important as the MIR was designed in part to take advantage of the CC's 50-year experience in investigating markets and market investigations are an important part of the CC's work.⁹

The relationship between Market Investigations and EC Modernisation

Separation or overlap?

It is often said that a clear distinction should be drawn between the MIR and the so-called "prohibition system," ie the prohibitions on anti-competitive agreements and behaviour in the EC Treaty Articles 81/82, the Competition Act 1998¹⁰. The usual remedy under these provisions is prohibition often accompanied by a fine on the undertakings involved.¹¹

UK competition law

Before considering the significance of this distinction (if indeed it is correct to draw it) in the context of EC competition law, it should be noted that it also arises in relation to UK Competition Law—ie Chapters I and II of the Competition Act 1998. But that is not normally thought to be an issue because the initial investigating authority (the OFT) has a choice of means available and can select the most appropriate with no obligation to use one in preference to the other.¹²

EC Modernisation

But let us focus on Articles 81/82 and their relationship with the MIR. The application of EC competition law has recently been "modernised". This package of measures consists of a White paper in 1999,¹³ a new Regulation (No 1 of 2003)¹⁴ and a host of supporting notices and guidelines,¹⁵ mainly from the EC Commission. The essence of Modernisation is the decentralised, but co-ordinated, application of Articles 81 and 82 throughout the EU territory. This involves the designation of national competition authorities to apply EC law and, for Article 81, the abolition of formal exemptions and hence of the EC Commission's monopoly on their grant.

In general terms, Modernisation has changed the context for all national competition law by placing alongside it a general EC system of control applying to all cases where there is an effect on trade between member states.

But there is also a particular effect. This arises from the provisions of Article 3 of Regulation 1/2003 which settles the relationship between national and EC competition law. The Article sets out what a national authority can and must do when applying its national law to a situation to which EC law is also applicable.¹⁶

In such a situation:

⁹As was noted in the recent GCR 2005 Enforcement Review.

¹⁰The Chapter I and II prohibitions which are modelled on, but not identical to, Articles 81 and 82.

¹¹There is also the specific cartel offence contained in Part 6 of the Enterprise Act 2002.

¹²Particularly with the abolition of notifications for exemption.

¹³White Paper on modernisation of the rules implementing Articles 81 and 82 of the EC Treaty (formerly Articles 85 and 86 of the EC Treaty) OJ [1999] C132.

¹⁴O.J. L1/1 4/1/2003.

¹⁵See eg Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty; Commission Notice on cooperation within the Network of Competition Authorities OJ C 101, 27.04.2004; Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC OJ C 101, 27.04.2004; Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty OJ C 101, 27.04.2004; Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty OJ C 101, 27.04.2004.

¹⁶Article 3 applies equally to national courts but this is outside the scope of this paper.

- (1) the national authority must also apply EC competition law (in addition to national law);
- (2) national law cannot be used to prohibit agreements that are compatible with Article 81;
- (3) but stricter national measures can be applied to unilateral conduct to which Article 82 is also applicable ("stricter" means stricter than Article 82);
- (4) the national authorities are free to apply national law that predominantly pursues a different objective from Articles 81 and 82.

Does it matter?

How does this affect the MIR? The problem, if there is one, stems from the potential for overlap. As we have seen, the MIR is not a system of prohibition and is intended to be directed to whole sectors rather than individual operators, but a market sector can have within it agreements or networks of agreements between undertakings covered by Article 81 and conduct of suppliers or customers that may involve abuses covered by Article 82. The OFT, which has the full set of national and EC prohibition powers, can seek to filter out cases of overlap, but may not always be in a position to identify the problems, and there may also be cases where filtering out may be inappropriate—because the sector as a whole ought to be investigated. So we are left with a situation where the two systems (prohibition and MIR) could cover some or all of the same ground and where in the course of a Market Investigation the CC might find aspects to which Articles 81 and 82 could be applicable.

Before looking at how to deal with that situation, let us divert a little to see how other jurisdictions look at market sectors.

Market Inquiry equivalents within the EC

The UK MIR may not be as unique as we think—there are provisions both at EU level and in some other member states for examining sectors of the market.

EU Sector Inquiries

The EU power to undertake sector inquiries was little used under the old regime.¹⁷ Under Article 17 of the Modernisation Regulation¹⁸ the EC Commission may conduct inquiries into particular sectors of the economy, or particular types of agreement across various sectors. When conducting a sector inquiry the EC Commission has the power to request information, to take statements and to conduct inspections. The Commission can request the help of national competition authorities and it can impose sanctions if a party does not comply.¹⁹

However, in essence an EU sector inquiry is a precursor to further action. It looks to see what further steps need to be taken, which may not necessarily be competition measures. In this respect it is more akin to an OFT Market Study in the UK system. The inquiry itself confers no power on the EC Commission to adopt specific measures—it has to do this under a further procedure. Thus, if during the course of the inquiry the EC Commission discovers breaches of Article 81 or 82, then it (or the appropriate national authority) may take enforcement measures under those Articles.

¹⁷Regulation 17/62.

¹⁸Regulation 1/2003.

¹⁹Ibid Articles 18-24.

EU sector inquiries can be seen as part of the more pro-active rôle being adopted by the EC Commission and if they involve also action at national level, then they reflect also the decentralisation policy underlying Modernisation.

The EC Commission has recently announced sectoral studies into the gas and electricity sectors and the financial services market (with a focus on retail banking and business insurance).²⁰ The size of the EU makes such sector inquiries difficult to conduct with speed, and it will be particularly interesting to see how the recently announced inquiries proceed and what they lead to.

Other Member States

Several other Member States also have market investigation powers. The Italian Competition Authority recently opened an investigation into the grocery sector.²¹ Germany recently adopted an amendment to the law empowering the BKA to conduct sector specific inquiries. The BKA has recently begun an investigation in the liquefied petroleum gas sector.²² The Irish Competition Authority also investigates market sectors as do several other Member States.

However, it remains the case that the UK seems to be the jurisdiction where the most emphasis is placed on the desirability and benefits of sector inquiries.

Making the UK System Work

Danger of over-theorising

Returning now to look at the UK system, we should beware, first of all, of over-theorising. The MIR is useful and appears to work, as the large number of OFT studies and the five current Competition Commission references indicate. The fact that it is constructed on slightly different foundations from prohibition-based systems such as Articles 81 and 82 may not matter in practice. The issue is whether the co-existence of two differently framed systems covering potentially similar subject matter is a source of potential weakness, (in the sense of sending a confused enforcement message, or adding unjustifiably to the burden of controls) or strength (providing more comprehensive and perhaps more flexible control).

No Fundamental Difference in Objectives

As regards the objectives, there is no significant difference. Both Articles 81 and 82 and the MIR are intended to remove restrictions on competition. Differences in the means by which this is to be done are not of great significance here.

No fundamental inconsistency of scope or content

And even those differences can be exaggerated. The language used in each legal formulation ("prevent, restrict or distort competition") is identical. It is true that the MIR is broader in scope. For example, every restrictive agreement or abuse of dominant position is capable of comprising an Adverse Effect on Competition, but the converse is not true, as AEC can pick up matters not covered by either Articles 81 or 82. An example comes in the CC's Report in *SME Banking*²³ where part, at least, of

²⁰Financial Times, 14th June 2005.

²¹Global Competition News June 13th 2005.

²²PLC Competition Law 31st May 2005. Note that the same sector is subject to a market investigation in the UK.

²³Cm 5319 (2002). The investigation itself was conducted under the old régime, but the point remains a valid one.

the adverse ruling in relation to switching behaviour was based on a finding of inertia by small business customers of the banks involved.

The Competition Commission's place in the EU picture

But this is difference in scope, not inconsistency. The economic tests and analysis underlying the two systems are essentially the same and there is little difficulty in placing the MIR into the overall EU context as an important part of the UK's competition enforcement system acting to buttress and supplement Modernisation rather than to undermine it.

How to obtain the best result

To make this system work best, the tasks have to be allocated to suit the requirements. Thus the MIR is best suited to those cases that do not centre on the activities of one particular supplier or group of suppliers and where the problem relates more to problems of market structure, ease of entry and customer behaviour. For instances of illegality, hard core cartel behaviour or individual abuse of market power, the prohibition system is there to act and enforce. Neither system is necessarily better or more effective than the other.

Their complementary nature and ability to cross-fertilize is hard to deny and an obvious example would be the possibility of illicit agreements between competitors coming to light in the context of a Market Investigation.

Conclusion

Let us now pull the threads together. I have tried to show that MIR is a key part of UK competition enforcement. The growing popularity of market inquiry-type procedures at EC and Member State level provides further evidence of their utility. The MIR is complementary to prohibition based systems and the present UK system can sit happily alongside the EC/UK prohibition régime. The MIR emphasises prospective promotion of competition rather than punishment of past conduct but can perfectly well embrace situations where the imperfections in the market go hand and hand with a breach of the prohibitions. Accurate allocation of tasks between the two systems makes the MIR a powerful weapon. I do not foresee its early demise.