

Peter Freeman, Deputy Chairman Competition Commission gives Lord Fletcher Lecture

On 15 March 2005 Peter Freeman, CC Deputy Chairman, gave the Law Society European Group's Lord Fletcher Lecture at the Law Society's Hall, London.

Peter Freeman spoke on the subject of UK competition law after EC Modernization. He explained how the new system of decentralized enforcement of EC competition law has affected national authorities like the Competition Commission and, in particular, how the UK's régime for market investigations has come through 'alive and well'.

Full text attached.

**LORD FLETCHER LECTURE
TUESDAY 15 MARCH 2005**

UK Competition Law after Modernization

Peter Freeman¹

Introduction

The purpose of this series of lectures in memory of Lord Fletcher, Eric Fletcher MP as he was, is to explore subjects of comparative law of relevance to the UK. I think that the subject of UK Competition Law after Modernization fits this description very well.

When in April 1999 the European Commission published its White Paper on the modernization of the enforcement of EC competition law,² the reaction was generally one of surprise at its radical nature and from some, at least, suspicion.³ The initial impression that the proposals were indeed radical has been proved entirely justified. The White Paper envisaged a wholesale recasting of the way in which EC competition law is applied. And it is the effect of this on the position of national competition authorities, particularly those like my own, the Competition Commission, whose remit is essentially to apply national competition law, that I wish to examine.

My theme will be that whatever the detail of the implementation of the European Commission's proposals, and there are many points of interest there, their principal effect is to require national competition authorities to operate within the overall context of EC competition law and to act in harmony to apply a cohesive competition policy. That is not only a legal requirement but a pragmatic recognition of the international economic environment. And in the UK, there is plenty left for national authorities like the Competition Commission to do and plenty of scope for national competition law, properly applied.

Scope of talk

I am not going to discuss two aspects of competition law enforcement which raise detailed issues deserving of fuller consideration than I can give here.

Private actions

The first of these aspects is the private enforcement of competition law by action in national courts. This is an important feature of the modernization measures,⁴ and is given impetus by the abandonment of the European Commission's exclusive power to make exemption decisions, indeed by the abolition of exemption decisions as such altogether. But although private actions have been given this extra impetus, and are increasingly seen as playing a key role in competition law enforcement, they are a major subject deserving of full treatment in their own right and are only peripherally relevant to the effect of modernization on national authorities.

¹Deputy Chairman, Competition Commission; Chairman, Regulatory Policy Institute, Oxford. The views expressed in this lecture are personal and should not be attributed to the Competition Commission or the RPI.

²White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty OJ [1999] C132/1.

³See for example Ernst-Joachim Mestmäcker, *European Business Organisation Law Review* 1 (2000) 401-444, who referred to the term modernization 'as a dialectic concept and not very enlightening as a policy guideline.' For the argument that modernization means greater centralization, see Alan Riley *EC Antitrust Modernisation* [2003] ECLR 604 and 657.

⁴The issues have been comprehensively reviewed by Judge Koen Lenaerts and Damien Gerard in *Decentralisation of EC Competition Law Enforcement: Judges in the Frontline* *World Competition, Law and Economics Review* Vol 27 No 3 (September 2004).

Merger control

The second aspect is merger control. The reform of EC merger control has proceeded separately from, but to some extent in parallel with, modernization of competition law enforcement.¹ It is also, in part, a response to enlargement of the EU, but the different legal basis of merger control, and in particular the reliance on a jurisdictional test based on turnover, make drawing parallels between the two streams of reform rather uninformative. In any case merger control is also a large subject deserving of fuller treatment than I can give it tonight.

However, it should not be forgotten, when considering public enforcement of competition policy, that there are the parallel universes, as it were, of private enforcement and merger control, and that all three universes can interact.² It is on public enforcement that I wish to concentrate, and to look at how 'modernized' public enforcement affects the work of national competition authorities such as the Competition Commission. I will briefly review the background to modernization, describe the way it affects the application of national law, and then say something about market investigations, which are a feature of the UK scene. And to provide a framework, I propose to ask four questions—'Where are we now?' 'How did we get here?' 'Was it all necessary?' and 'What does it mean for us?'

Where are we now?

We are just under a year into the enforcement system enacted by Regulation 1 of 2003. The key features of this (and I am sure you are already familiar with the detail) are:

The legal exception principle and the abolition of notifications

Regulation 1 removes the need for decisions applying Article 81(3).³ Conditions for exemption are either satisfied or they are not and no previous decision is required either way. This self-executing version of Article 81 removes, at a stroke, the whole edifice of notification, Forms A/B etc, built up over 40 years and, in particular, outflanks any argument over whether exemption decisions should be the preserve of the European Commission or devolved to national competition authorities (NCAs). Instead the problem is eliminated altogether. The other main effect—or claimed effect at any rate—is that undertakings can no longer 'play safe' by notifying agreements to the authorities and instead must work out for themselves what is their exposure to the prohibitions.

Empowerment of NCAs

All member states are required to designate at least one national competition authority to apply Articles 81 and 82.⁴ Hitherto this position had been rather patchy. National courts were already, of course, able to apply the Articles but they were not allowed to grant exemption decisions—a difficulty removed by the abolition of such decisions.

¹See EC Commission *Green Paper on the Review of Council Regulation (EEC) No 4064/89* 11/12/2001 COM (2001) 745/6 final and the new Council Regulation (EC) No 139/2004 OJ [2004] L24/1/

²The recent decision of 15 February 2005 (ECJ) Cases 12 and 13/03 (P) *Commission v Tetra Laval* (ECJ Press Release 11/05) reminds us that the impact of general competition law needs to be borne in mind when applying merger control; and the *Courage v Crehan* litigation in the UK demonstrates that private and public enforcement of general competition law are closely interlinked. (See, most recently, [2004] EWCA Civ 637).

³Reg 1/2003 Article 1.

⁴Reg 1/2003 Article 35.

Parallel application of EC and national law

If NCAs apply national law to agreements or abuses of dominant positions that affect trade between member states they are obliged also to apply Articles 81 or 82, as the case may be. Under the terms of Article 3 (to which we shall return), as explained by Recitals 8 and 9, NCAs may not prohibit under national law agreements which are 'allowed' under Article 81 (I will come back to what this means) although they may apply stricter national laws to unilateral conduct prohibited by Article 82. There is a further exception for national laws with predominantly different objectives. The Recitals also indicate that the imposition of criminal sanctions on individuals is a further exception.

Uniform application of EC law

The uniform application of EC law is a general principle which, it might be said, needs no restating. But to reinforce the point Article 16 of the Regulation provides that NCAs cannot take decisions under Articles 81 and 82 that would run counter to any existing EC Commission decision.¹ The obligations of national courts are expressed more elaborately, reflecting the ECJ ruling in *Masterfoods*,² and accordingly cover also the case where the EC Commission has started proceedings and is contemplating a decision.

The European Competition Network (ECN)

Recital 15 of the Regulation envisages a network of public authorities working in close co-operation. To this end the Regulation provides for cooperation and consultation. The ECN is up and running, operating with the intention of ensuring that cases under Articles 81 and 82 are handled by the most appropriate authority and that parallel application leads to a parallel result. Articles 11 to 14 cover the ECN and the enhanced Advisory Committee. Interesting points to note are:

- (a) the obligation on NCAs to inform the European Commission when starting a formal investigation;³ and
- (b) the right of the European Commission, after due consultation, to remove an NCA's competence by starting its own proceedings.⁴

Block exemptions

Finally, but not unimportantly, there is the continued existence of block exemptions.⁵ The effect of block exemptions is not absolute as NCAs can, under certain conditions, withdraw their benefit in distinct markets within their own territory. Block exemption is not really the right term any more—'Inapplicability by Category' might be better—but the intention is fairly clear—to provide a measure of codification which NCAs (and national courts) must observe.

So, we are now operating in a Brave New (modernized) World, where the authorities intervene when they need to intervene and apply a single system of law in a broadly similar manner from Limerick to Lithuania and from Sweden to Sicily.

¹Reg 1/2003 Article 16(2).

²Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2001] 4 CMLR 14.

³Reg 1/2003 Article 11(3).

⁴Reg 1/2003 Article 11(6). See generally the *Commission Notice on co-operation within the Network of Competition Authorities* OJ [2004] C101/43. On 10 March 2005 Commissioner Neelie Kroes stated that NCAs had taken 5 out of the 11 cartel decisions and 8 out of the 9 Article 82 decisions taken since 1 May 2004 SPEECH/05/157.

⁵Reg 1/2003 Recital 10 and Article 29.

How did we get here?

The context

Regulation 1 has to be seen in the context of the other important developments taking place around it. The enlargement of the Community has already been mentioned. Equally important were the developments in the law itself, away from a formalistic and prescriptive approach towards a more realistic, economics based approach. These developments bore fruit in the new block exemption and guidelines for vertical agreements, introduced in 1999,¹ which provided for a substantial change from the previous approach, and the equally significant guidelines on horizontal agreements, together with modifications to the existing research and development and specialisation block exemptions, introduced in 2000.²

These developments have not necessarily run their course. Article 82 has not yet been the subject of any systematic clarification or codification but, on the other hand, Regulation 1/2003 does not perhaps have quite the same effect on the way in which Article 82 is enforced as it does with Article 81.

Cartels

Another important background factor is the increased emphasis placed by the European Commission on anti-cartel activity. This emphasis reflects similar moves by other authorities, particularly in the USA. Cartel cases are high profile, involve much investigative activity and frequently involve several competition authorities. The need to allocate greater resources to this kind of activity was a further factor in moving to the legal exception approach, and the escalation in the number and seriousness of recent cartel decisions may be, at least in part, a result.³

Two aspects of the European Commission's original proposals were not enacted. These were the so-called 'exclusivity' provision and an autonomous power for the European Commission to make block exemptions.

Exclusivity

The original version of Article 3 provided that only EC Competition law could be applied to agreements or abuses falling within the scope of Articles 81 and 82.⁴ As the European Commission said in its Proposal to the Council of 27 September 2000—'This rule ensures in a simple and effective way that all transactions with a cross border effect are subject to a single body of law'.⁵ Exclusivity was an attempt to 'short-circuit' any doubts on how to resolve conflict between EC and national competition laws, in an area of competence hitherto (and still) shared between the Community and member states.⁶ But not all member states were prepared to go this far and a compromise proposed by the Belgian Presidency was eventually adopted.

¹Regulation 2790/99 OJ [1999] L336/21; *Guidelines on Vertical Restraints* OJ [2000] C291/1.

²Regulations 2658/2000 (*Specialisation*) OJ [2000] L304/3 and 2659/2000 (*R&D*) OJ [2000] L304/7 *Guidelines on Horizontal Co-operation Agreements* OJ [2001] C3/2.

³See for example the *Graphite Electrodes* case (2001) (fines totalling €219M), the *Vitamins* case (2001) (fines totalling €855 million) and the *Plasterboard* case (2002) (fines totalling €478 million) and more recently the *Copper Plumbing Tubes* case (2004) fines totalling €223 million) and the *MCAA Chemicals* case (2005) (fines totalling €217 million).

⁴The original terms of Article 3 included the provision that: 'When an agreement ... within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws'.

⁵Proposal 2000/0243 of 27 September 2000, COM (2000) 582 final, page 8.

⁶Under the proposed new *Constitutional Treaty for the European Union*, agreed but not yet ratified, one of the areas of exclusive Union competence is 'the establishing of the competition rules necessary for the functioning of the internal market' (see Article I-12). This appears to represent a change to the existing position and may affect the future interpretation of Regulation 1/2003. I am indebted to Sir Jeremy Lever for this point.

Block exemptions

The European Commission had proposed a generalized delegation of power from the Council to enact block exemptions. Given their effect both on NCAs and on national courts, this would have been a very powerful measure, providing for a rather centralized approach, albeit in the name of clarity and uniformity and subject to obligations to consult and a national opt-out right. Objections were raised, *inter alia*, on the ground that this power effectively bypassed judicial control, and in the result the present block exemption régime of specific empowerment was left in place.

Was it all necessary?

It is only fair to ask whether the upheaval that modernization entailed was necessary. Two reasons are normally given for the reforms, and it is fair to say these were extensively canvassed and debated in the periods following the publication of the European Commission's White Paper in April 1999 and the proposal for a new Council Regulation in September 2000. These reasons were (1) administrative overload; and (2) imminent enlargement of the EU. The overload lay, it was said, in the need to deal with notifications for authorization and, towards the end of the process, the two factors were linked in the European Commission's Press Release of November 2002¹ which declared that a system of notifications was no longer workable as the EU prepared to take in ten new members.

The justification originally put forward by the European Commission to the Council² had a subtly different emphasis, referring to the obstacles to effective protection of competition presented by the Commission's monopoly over Article 85(3) (as it then was) as well as the inability of the Commission to enforce the competition rules throughout the enlarged Community. The notification system required resources to be allocated that would be better devoted to anti-cartel enforcement and placed increased compliance costs and uncertainties on industry, particularly on SMEs wishing to enforce their contracts.

Looked at from the perspective of a national competition authority, the reasons for modernization appeared to be based almost entirely on the need to enforce EC competition law. References to national competition law were few and for the most part limited to noting the lack of harmonization.³ NCAs were seen as partners, or future partners, in the shared task of applying the EC rules rather than as enforcers of national competition law. Significant benefits were claimed for this sharing of responsibilities, including greater resources⁴ and the fostering of a 'common competition culture throughout the Community.'⁵ For countries where competition law was not prominent or even non-existent, the empowerment under EC rules was a powerful instrument. For countries such as Germany and the UK, with a stronger tradition of competition law, the effect of this Community-centric approach might have appeared to be more problematic. And it is to one such country, namely the UK, that I now turn.

¹'Landmark reform simplifies and strengthens antitrust enforcement'. Press Release of 26 November 2002 IP/02/1739.

²Proposal 2000/0243, page 2.

³Proposal 2000/0243. See for example page 8 'Several national systems of competition law have been modelled on Articles 81 and 82. However, no formal harmonization is in place, and differences remain both in law and practice'.

⁴*Ibid.*, page 6.

⁵*Ibid.*, page 9.

What does it mean for us?

Parallel laws

The European Commission said in its September 2000 Proposal to the Council that: 'Parallel application of national and Community competition law should be avoided, because it leads to unnecessary parallel proceedings'.¹ However, particularly with the enactment of the 1998 Competition Act, that is what we have in the UK, and, as we shall see, the version of Article 3 that was finally agreed expressly allows for this, although at the same time seeking to impose some discipline on the situation. The Competition Act is a fine statute, and the interpretation section 60 is particularly elegant. But it seems fairly clear that in the preparations for the Act, no-one, on this side of the Channel at least, had any clear idea that the European Commission was going to discard the system of notification and exemption and require the empowerment of NCAs to apply EC competition law. Had this been appreciated, it is unlikely that the UK reform would have taken precisely the form that it did and in particular it is unlikely that a system of national notification and exemption would have been put in place.

The chosen method of reform in the UK was to replicate EC competition law in national law. The Competition Act in effect does this, save for the absence of any requirement to show an effect on trade between member states. Other 'relevant differences', to use the language of s60,² are few and relate more to process than to substance. So we have, in effect, parallel prohibition systems for agreements and abuse of dominant position, and the way that this parallel application is controlled by Article 3 of Regulation 1/2003 needs to be considered.

Article 3 of Regulation 1/2003

The Article has four main elements:

- (1) the parallel application of national and EC competition law by NCAs to agreements and abuses of dominant position which may affect trade between member states;
- (2) NCAs may not, on the basis of national law, prohibit 'non infringing' agreements;
- (3) stricter national measures against unilateral conduct are permitted; and
- (4) exceptions are provided for merger control, for laws with a predominantly different purpose and for criminal sanctions against individuals.

Parallel application

Article 3(1) requires NCAs also to apply EC competition law 'where they apply national competition law to agreements ... which may affect trade between Member States...' There is copious law on when agreements may affect trade between member states, and the European Commission pulled this together in its 2004 Notice.³ This sets out the so-called NAAT rule (non-appreciable affectation of trade), by reference to an aggregate market share threshold (5 per cent) and an aggregate EC turnover threshold of €40 million of all the undertakings concerned in relevant products.⁴ These rather tricky mathematical calculations

¹Proposal 2000/0243, page 8.

²The exclusion of vertical agreements from the scope of CA98, arguably a 'relevant difference' under s60, is being removed.

³*Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* OJ [2004] C101/81, in particular paragraph 52.

⁴For vertical agreements, the turnover is in relevant products of the supplier only; for licence agreements, the turnover is that of the licensor and licensees in relevant products; and for multiple supplier agreements, the turnover is that of the buyers' combined purchases.

are to be applied as a negative assumption. Assessing effect on trade is as much an art as a science. Nearly half the 2004 Notice (50 paragraphs out of 108) is devoted to discussion of the types of situation that may arise. This shows not only the willingness of the European Commission to explain its thinking but also the inherent difficulty of the subject. Obviously there will be cases falling clearly either side of the line; but equally obviously for many other cases it will be a matter of appreciation. A prudent course in such cases might be to assume that trade was affected and that EC law did apply.

No prohibition under national law of 'non-infringing' agreements

Here the Article treads on the delicate ground of the relationship between national and EC competition law and the effect of the principle of supremacy. Much has been written on this since the seminal case of *Walt Wilhelm*,¹ and most of it may well now be obsolete.

The law prior to modernization

To summarize the position prior to the enactment of Regulation 1/2003 would be brave, if not foolhardy, but let me try the following:

- (i) Parallel application of national and EC competition rules was allowed.
- (ii) Any conflicts had to be resolved on the basis that EC law prevailed.²
- (iii) Consequently, when EC law prohibited, national law could not permit; conversely, when EC law permitted, national law should not prohibit, but the exact scope of this proposition was never established.
- (iv) Much depended on what was meant by 'permit'. Under *Walt Wilhelm* some element of positive Community purpose seemed to be required.³ Where EC law did not 'apply' (particularly where trade was not affected), such a finding⁴ did not preclude the application of national law to prohibit; but where a block exemption regulation applied, contrary national law was almost certainly precluded; as was the case also with an individual exemption decision.
- (v) The European Court of Justice never pronounced on the effect of either individual or block exemptions on contrary national law. The nearest it reached was the Opinion of Advocate General Tesouro in the *Volkswagen* and *BMW* cases;⁵ Commentators were by no means unanimous either as to the effect of exemptions generally, or as to whether block exemptions had greater impact than individual. For example, the *Motor Vehicle Block Exemption Regulation* 123/85 envisaged derogation under national law;⁶ and the now repealed *Beer Orders* in the UK were arguably inconsistent with

¹Case 14/68 *Wilhelm v Bundeskartellamt* [1969] ECR 1.

²Under Article 10 EC member states must 'abstain from any measure that could jeopardise the attainment of the objectives of this Treaty'.

³Case 14/68 [1969] ECR 1 refers to the Community authorities being permitted 'to carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activity within the whole Community'.

⁴A 'negative clearance' in old parlance.

⁵Case C-266/93 *BKA v Volkswagen and VAG Leasing* [1995] ECR I-3477 and Case C-70/93 *BMW v ALD Auto-Leasing* [1995] ECR -3439. The Advocate General stated at paragraph 46 in the first case and at paragraph 33 in the second case that: 'To reconcile the primacy of Community law with the possibility of prohibiting an agreement which has been exempted by and under Community law seems to me a desperate undertaking, even a diabolical one.' The ECJ declined to rule on the point as it was not necessary for judgment in the case.

⁶See Regulation 123/85 Recital 29 and Article 5(2)(2)(b). AG Tesouro criticised these provisions as 'infelicitous' and 'contradictory' in his Opinion in *Volkswagen* and *ALD* (see above).

Regulation 1984/83 in prohibiting some exclusive purchasing agreements that were permitted by the Regulation.¹

The effect of modernization

Now, apparently, all that is resolved. Or is it? This rather depends on what it is that national law cannot prohibit. Article 3(2) refers to three situations in which the application of national competition law is restricted:

- (i) Agreements that affect trade but do not restrict competition within the meaning of Article 81(1).
- (ii) Agreements which fulfil the conditions of Article 81(3).
- (iii) Agreements covered by a block exemption regulation.

In these situations, national competition law may not prohibit the agreement in question.² This appears to resolve the previous doubts as to the possible application of national competition law in the situation where there is a finding of non-applicability under EC competition law. In particular, Article 3(2) makes no reference to the need for any positive Community purpose and it makes no exceptions. The only situation in which national law can be applied in this way is where it is held that the agreements in question do not affect trade between member states. In this the Regulation is consistent with previous jurisprudence,³ but formal findings to this effect by the European Commission, at least, are likely to be rare.

Of course, with the empowerment of NCAs to apply EC competition law in addition to national competition law and the European Commission's giving up of its exclusive power to apply Article 81(3), possible conflicts between national and EC competition law may arise within, and have to be resolved by, NCAs themselves rather than being a matter as between an NCA and the European Commission. I deal with the question of possible conflict between authorities below.

Stricter national measures permitted in case of article 82

Article 82 is in some senses the 'Cinderella' of Regulation 1. Lip service is paid to it, but the fun is all with Article 81. Or is it? Article 3(2) allows member states to adopt and apply stricter national laws which prohibit or sanction unilateral conduct. Recital 8 explains this in terms of 'provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings'. How will this apply in practice? As with Article 81, Article 3(1) of the Regulation requires that Article 82 be applied by NCAs in parallel with their national law to any abuse that is prohibited by Article 82. Arguably the 'stricter national laws' would cover (a) conduct engaged in by dominant firms that went beyond what is prohibited by Article 82; or (b) abusive conduct practised by non-dominant firms. However, the latter category would

¹For a summary of the differences, together with references to the literature, see *Butterworths Competition Law* Division I Chapter 4. See also the Opinion of Advocate General Jacobs in Case C-7/97 *Oscar Bronner* [1999] 4 CMLR 112 at p121 (paragraphs 21–22).

²This discussion of possible conflicts assumes that each authority is considering the same case. Whether this is so will not always be clear and the European Commission's *Notice on co-operation within the Network of Competition Authorities* (OJ [2004] C101/43) provides some guidance on this, particularly in Part 3.

³See Case 253/78 *Procureur de la Republique v Giry and Guerlain* [1980] ECR 2327 in which the European Commission had notified the parties by comfort letter that their agreements fell outside Article 85(1) (as it then was) because trade between member states was not affected and the ECJ held that the French authorities were entitled to apply national law to those agreements.

appear to fall outside the scope of Article 3 altogether, as it is not 'abuse prohibited by Article 82'. Recital 8 of Regulation 1 gives an example of the former category, abusive conduct towards economically dependent undertakings but it is not immediately apparent how wide the scope of this exception will be. It is important to note that it does not remove the obligation to apply Article 82 where the conduct in question falls within the scope of this provision.

Merger control and other exceptions

The other exceptions need not detain us very long. I have already mentioned *merger control*. The boundary between Articles 81 and 82 and merger control can be blurred and the Regulation does not require NCAs to apply EC competition law as part of their national merger control.

The exclusion for *provisions pursuing predominantly a different objective from competition* is explained a little in Recital 9 in terms of legislation that is intended to prohibit unfair trading practices, unilateral or contractual; and, in particular, prohibitions on undertakings from imposing or attempting to impose unfair terms and conditions on their trading partners, even if such laws actually affect competition in the market. These measures would in the UK, at least, fall under the general heading of consumer protection law. Utility regulatory régimes are not specifically mentioned, but would surely fall within this exception.

The final exclusion appears not in Article 3, but in Recital 8—*measures to impose criminal sanctions on individuals*. However, if such measures are intended to enforce the rules against undertakings, the exclusion falls away. One assumes that Part 6 of the Enterprise Act 2002 (the cartel offence) benefits from this exclusion, but provisions holding company officers criminally responsible for the default of their company do not.

Conflict of authorities

I considered earlier the way in which Article 3 resolves possible conflicts between national and EC competition law. With the empowerment of NCAs to apply EC competition law and the abandonment of the European Commission's exclusive power to exempt under Article 81(3) the possibility arises that an NCA may take a different view from the European Commission on the application of Article 81 or Article 82. The risk of this occurring is considerably reduced by the Network arrangements, but the possibility cannot be completely excluded. Two aspects of this may be noted.

First, under the heading 'Co-operation between the Commission and the competition authorities of the Member States,' Article 11(6) provides that:

The initiation by the Commission of proceedings for the adoption of a decision under Chapter III [ie to find infringement or non-applicability] shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82.

There is an obligation to consult if the NCA is already acting on the case. This provision accordingly establishes a certain hierarchy of activity between the national and European authorities and, according to Recital 35 its effects 'should apply to all competition authorities.'¹

The second relevant provision is Article 10 of Regulation 1/2003 which provides that:

¹The operation of this provision is explained in the European Commission's *Notice on co-operation within the Network of Competition Authorities*, OJ [2004] C101/43, paragraphs 50 to 57.

Where the Community public interest relating to the application of Articles 81 and 82 ... so requires, the Commission ... may by decision find that Article 81 ... is not applicable to an agreement ... either because the conditions of Article 81(1) ... are not fulfilled, or because the conditions of Article 81(3) ... are satisfied.

There is corresponding power in relation to Article 82.

Read in conjunction with the requirement of uniform application set out in Article 16, this means that NCAs when applying EC competition law are required to follow non-infringement decisions of the European Commission. In relation to agreements, Article 10 (unlike Article 3(2)) does not specifically mention the case where Article 81(1) is held inapplicable because trade between member states is not affected. However, if in a particular case the European Commission were to decide that Article 81 was not infringed because trade was not affected, the NCA would remain free, under Article 3(2), to apply national competition law to that agreement, provided this did not endanger the wider duty under Article 10 of the Treaty.

Application in the UK

Competition Act 1998

So I come back to my question—what does it mean for us? We have already looked at the Competition Act 1998 and seen how the position is regulated by Article 3 of Regulation 1/2003. The designated NCAs (the OFT and sectoral regulators with concurrent competition powers)¹ apply EC law and national law in parallel where the agreement or conduct affects trade between member states. The NCAs can also apply EC law without applying national law. All is subject to close cooperation through the ECN and, so we understand, all has worked well so far.

Enterprise Act 2002

But what of the other part of UK competition law—the Enterprise Act 2002? We have mentioned the criminal provisions contained in Part 6 of this statute, but what about the market investigation régime contained in Part 4?

Market Inquiries—background

A new régime to investigate particular markets was envisaged in the Government's 2001 White Paper² and was enacted in the Enterprise Act. It replaced and 'modernized' the monopoly provisions of the Fair Trading Act 1973. Apart from transferring the decision-making from Ministers to the OFT and to the Competition Commission, the new régime broke free from the formalistic structure of the old (with its requirement first to find the existence of a monopoly situation followed by the need to consider its effects on the public interest). Significantly, the market investigation régime allows any possible adverse effect on competition to be assessed by reference to market structure, and to the behaviour of customers, as well as to that of the alleged 'monopolists'. The result is an inquiry régime which although similar in many ways to the old complex monopoly inquiries lacks some of the legal complications that divert attention and resources away from the central issue of whether restrictions on competition are present in a given market.

¹See the implementing legislation SI 2004 No 1261 Competition Act 1998 and Other Enactments (Amendment) Regulations 2004.

²*Productivity and Enterprise—A World Class Competition Régime* Cm 5233 (2001).

The new régime is operated jointly by the OFT the sectoral regulators and the Competition Commission. There was not much in the Fair Trading Act about the OFT's investigation of markets prior to making a reference to the Competition Commission.¹ In response to the 2001 White Paper the OFT established a new Markets and Policy Initiatives Division and began to look more systematically at markets where competition was not working effectively.² In addition, the so-called 'Supercomplaints' procedure (envisaged in the White Paper and enacted in the Enterprise Act³) has enabled consumer organizations to present the OFT with prima facie cases for investigation.

Although the OFT has conducted a considerable number of market studies, only three cases have so far been referred to the Competition Commission for investigation, and all are still in progress.⁴ So it is much too early to say whether the new régime produces better results than the old, at least at Commission level. But the régime is a notable feature of the UK competition system and high expectations go with it. In particular, the White Paper praised its potential scope and flexibility compared with EC competition law and noted (with implied approval) that its remedies applied to the future and did not involve retrospective penalties or exposure to private action for past abuses.⁵

The market investigation régime is not without its complexities; and in one respect it appears to come close to the very EC law from which it was said to differ. This is in the definition of 'adverse effect on competition', which is derived from any feature of the market that 'prevents, restricts or distorts competition ...'.⁶ This, of course, is similar wording to Article 81(1) (and Chapter I), but the wording in this context can also be traced back to the old definition of complex monopoly⁷ which applied when two or more persons acted 'as in any way to prevent, restrict or distort competition.' An intriguing question is whether EC law on Article 81 can be of use in interpreting what is meant by this term, or indeed whether there is an obligation of consistent interpretation.

Relationship with EC law

The question of principle is how the market investigation régime and EC competition law relate to each other. The White Paper trod rather warily around this issue, referring to the development of a concept of collective dominance and the then modernization proposals (described as 'contentious among some Member States').⁸ The OFT's Guidance covers the potential overlap between the two systems in a straightforward manner, anticipating that most issues would be avoided by selecting out those potential market investigation references raising Article 81/82 issues and stating that, in relation to the Competition Commission, the obligation to apply Article 81 and 82 would only arise at the stage the Competition Commission imposed remedies.⁹ Similar statements are contained in the Commission's own Guidelines.¹⁰

These Guidelines pre-date the enactment and implementation of modernization, and it is fairly early days to assess whether these developments have made a significant difference. The following propositions may assist:

¹The Director General of Fair Trading (as he then was) had a general duty under s2 FTA 1973 to keep under review commercial activities relevant to monopoly situations. A function somewhat similar to this is given to the OFT under s5 of the Enterprise Act.

²See OFT Guidance 'Market Studies' (2004).

³See s11 EA 02.

⁴*Storecards, Bulk Domestic LPG and Home Credit.*

⁵See Cm 5233, paragraphs 6.7-6.8, although the correctness of the last proposition is open to doubt.

⁶See s134(2) EA 02.

⁷See Fair Trading Act s6(2).

⁸Cm 5233 paragraph 6.10.

⁹See *OFT Guidance: Market Investigation References* (2003) paragraphs 2.9-2.18.

¹⁰See *Competition Commission Guidelines: Market Investigation References* (CC3) (2003) paragraphs 1.10-1.14.

- (1) Market investigations are an important aspect of the UK competition régime. The distinctive point about market investigations compared with the régime they replaced is that they address 'features of markets', including structure and customers, besides the conduct of players on the market.
- (2) Market investigations are jointly carried out by the OFT (and sectoral regulators)¹ and the Competition Commission. The OFT's first stage inquiry process has been enhanced with the emphasis on an initial wide-ranging study to see what further action is appropriate.
- (3) It is hard to deny that Part 4 of the Enterprise Act is 'national competition law' within the meaning of Article 3 of Regulation 1/2003.
- (4) Although not a designated NCA under Article 35 of Regulation 1/2003, the Competition Commission is a national competition authority within the scope of the Regulation, and, as a UK public authority, cannot ignore the requirements of the Regulation without putting the UK at risk of breaching its obligations under Article 10 of the EC Treaty.
- (5) A market being studied by the OFT or under investigation by the Competition Commission may well be characterized by agreements and abuses of dominant position that are subject to EC competition law.
- (6) The OFT has made it clear that if that situation is apparent at the preliminary study stage, it will not normally make a reference to the Competition Commission.
- (7) Nevertheless, the Competition Commission, in conducting a market investigation following a reference, may suspect, or learn that, such a situation exists. Its current practice is to seek information on such matters with a view to making its investigation as comprehensive as possible.
- (8) If any matters so identified relate to unilateral conduct by a firm, then the Competition Commission will, under Article 3 of Regulation 1/2003, regard itself as able to make a decision under Part 4 of the Enterprise Act and impose whatever remedies it considers appropriate to such conduct, even if it is also prohibited under Article 82. The application of Article 82 itself would be considered by the OFT.
- (9) If any matters so identified relate to restrictive agreements, the Competition Commission will, in making its decision under the Enterprise Act, not decide against, or apply remedies that would prohibit, any agreement covered by the requirements of Article 3 of Regulation 1/2003. Any decision on the application of Article 81 would again be for the OFT.
- (10) Every effort will be made to identify any likely issues in advance, and avoid them.

Market investigations in other competition law systems

It is a mistake to discuss market investigations as if they were unique to the UK. Many other competition authorities will seek to ascertain whether issues arise in relation to a particular sector as a precursor to any action against particular undertakings. Of particular interest is a proposed change to German competition law empowering the BKA to conduct sector

¹See, for example, recent press reports suggesting that Ofcom might institute a market investigation reference in relation to the structure and operations of BT *Sunday Times* 16 January 2005 Business Section page 2; *Financial Times* 4 February 2005 page 3).

specific inquiries.¹ But most important is to note that EC competition law itself provides for them.

Under Article 17 of Regulation 1/2003, the European Commission is given express power to investigate a particular sector of the economy, or particular agreements spanning several sectors, if particular factors suggest that competition may be restricted or distorted.² It may publish a report on its findings. The use of these powers has hitherto not been very extensive. An inquiry into the brewing sector in the 1960s was inconclusive. More recently inquiries have been made in various parts of the telecoms and music sectors, and more use of these inquiries is envisaged. In January 2004 the European Commission began an inquiry into the sale of sports rights to Internet companies and 3rd generation mobile operating service providers.³

In recent speeches, Commissioner Neelie Kroes has signalled an intention to 'conduct investigations in a limited number of key sectors where competition does not appear to be functioning as well as it might.' Transport, energy and financial services were mentioned specifically.⁴ The Commissioner makes it clear that the European Commission will propose solutions to any problems found, working closely with national administrations, regulatory bodies and NCAs. The significance of this development is twofold. First, it is only natural that without a regular diet of notifications to consume, the European Commission would wish to look at the market or sectors of the market, as opposed simply to responding to complaints, 'whistleblowers' or information provided by other competition authorities. Second, the revival of EC sector inquiries is seen as the precursor of, if not the stimulant to, more focused measures, including measures at national level. So far from disempowering NCAs, these inquiries may lead to more activity at member state level if that is thought appropriate.

Conclusion

Let me now pull these threads together. I have tried to show how the Brave New World of modernization came about and how it may affect the position of national competition authorities such as the Competition Commission. I have concentrated on the UK mainly because it is closest to home, but the points are of general application. And I have tried to show that modernization is not a threat to the position of national competition authorities but rather an opportunity. In particular, I do not see decentralized enforcement of EC competition law as in any way a threat to the utility of that part of UK competition law which is distinctive and different from Article 81 and Article 82: far less to the rôle of the Competition Commission itself in investigating markets.

Public enforcement of competition policy in the UK has to be seen as the combined task of all authorities with relevant jurisdiction, that is the OFT, the Competition Commission, the sectoral regulators about whom I have said little but whose importance should not be underestimated, and of course, the European Commission itself. Each has a part to play and each contributes to the whole.

In particular, the market inquiry regime in the UK is a powerful instrument which enables competition issues to be examined in a way that does not require the focus to be exclusively on the conduct of the market players. It needs to be applied with a proper sense of the

¹A new s32e to the GWB. See 'Sector Inquiries' David Wood and Nicolas Bavarez, *Competition Law Insight*, Vol 4 Issue 2 8 February 2005 at paragraph 5.

²This carries over a similar power previously conferred by Article 12 of Regulation 17/62.

³Press Release of 30 January 2004 IP/04/134. See 'Using the instrument of sector wide inquiries: inquiry into content for 3G services.' Alain Crawford and Panayotis Adamopoulos *Competition Policy Newsletter* (EC) No 2, Summer 2004, p63.

⁴'Effective Competition policy—a key tool for delivering the Lisbon Strategy' 3 February 2005 SPEECH/05/73 and 'Building a competitive Europe competition policy and the relaunch of the Lisbon Strategy' 7 February 2005 SPEECH/05/78. The sector inquiry into gas and electricity markets was announced on 22 February 2005 (see *Financial Times* 23/02/05 page 9), and that into financial services on 10 March 2005, SPEECH/05/157.

general application of Articles 81 and 82 by authorities throughout the EU and the need to pursue a common competition objective. But far from being shunned by other authorities it is being flattered by imitation. I expect it to remain alive and well for the foreseeable future.

Thank you.

© Peter Freeman 2005