

**Is the sword mightier than the pen?
Competition enforcement and the law**

***Peter Freeman CBE, QC*¹
Denning Lecture
1 December 2010**

Abstract

This lecture asks the question whether the ‘sword’ in the sense of casework is more important for competition enforcement than the ‘pen’ in the sense of softer measures such as guidelines, policy statements and speeches. The answer is that a proper level of casework should be the first priority for a competition authority.

The talk examines the elements of good competition enforcement—clear policy objectives, a good legal framework, a system of redress, the ability to explain decisions clearly and to show the benefits of competition and sound institutions—the latter being particularly important given the Government’s plan to merge the CC and the competition parts of the Office of Fair Trading (OFT).

The new single authority must deliver the elements of expertise, fairness, impartiality, independence and accountability—the last being provided by an appropriate level of judicial control. The new authority should also combine the best elements of the CC and OFT and retain a two-phase mode of operation with the second phase handled by commission-type panels, able to provide clear and sound decisions.

Casework (as opposed to guidance which codifies accumulated case experience) is the best way of applying theory and doctrine, providing a crucible for the focusing and teasing out of conflicting views. Casework as tested by the courts enables the law to develop.

Comparing the UK’s recent performance with some other jurisdictions, the overall level of casework activity seems low. There may be explanations for this but UK competition enforcement would benefit from a more noticeable train of landmark decisions and practice enabling business to recognize and adjust to what is or is not allowed. A crucial test for the new authority will therefore be whether it can combine OFT and CC resources to improve the breadth and depth of enforcement activity whilst still deciding its cases in a fair, transparent and accountable manner.

¹Chairman, Competition Commission (CC). All views expressed are personal to the author and do not necessarily represent the views of the CC.