

**INVESTIGATING MARKETS AND PROMOTING COMPETITION:
THE COMPETITION COMMISSION'S ROLE IN UK COMPETITION
ENFORCEMENT**

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Peter Freeman¹***

1. Introduction

It is a great privilege to be invited to speak in the lecture series named in honour of Professor Michael Beesley, an eminent and well remembered member of the Monopolies and Mergers Commission (MMC). I am sure he would agree that tonight's topic is highly appropriate for discussion.

When trying to fix on a topic for a talk, there is always a tension between being too bold and being too pedestrian. Tonight, I must confess, I am not quite sure where I have ended up on that spectrum. My title might well strike most people outside the rather specialized world of competition as being nothing more than a statement of the obvious. Investigating markets and promoting competition is surely what competition authorities do and, indeed, what they should be doing. Why else would the UK's competition law include a Market Investigation regime?

Yet I know that the two words 'promoting competition' will raise hackles in some quarters. We are, they would say, allowed to 'promote competition' at least in general terms in our regulatory role, working to liberalize sectors with some residual state ownership. Most would allow us to investigate markets that are outside that regulated world. But many would say—and have said—that promoting competition cannot be a realistic, or even proper, objective of such investigations.

Looking at it another way, one distinguished commentator, pointing to what he saw as the improper use of competition law as a means of regulation, said recently:

Competition is only about stopping illegal interference with the market. Regulation gives power to alter an existing, *legal*, situation. [...] Competition law may *not* be used to make an existing market more competitive, unless some element of the market is illegal²

What I wish to show is that competition policy, at least in the UK, is not merely a set of prohibitions aimed at stopping illegal behaviour. Nor is it only a question of making a choice between competition and regulation. Within 'competition' there is the choice between prohibitions on illegal conduct and measures to make markets work better. Both can be appropriate, even in the same market, and it is not necessary or appropriate to seek to categorize all market measures as 'regulatory'.

I am not saying that competition authorities should not take action against anti-competitive practices by dominant firms and anti-competitive agreements. Far from it. Apart from anything else there is the need for punishment and deterrence. But there is a big difference between being 'anti-anti-competitive' and being pro-competitive. The first is concerned solely

¹Chairman, UK Competition Commission. Any views are personal and do not necessarily represent CC policy. The assistance of Elizabeth Harwick of the CC and John Davies, the CC's chief economist, in preparing this talk is gratefully acknowledged.

²Dr John Temple Lang, *The Use of Competition Law Powers for Regulatory Purposes*, Regulatory Policy Institute Annual Competition Policy Conference, July 2007 at pp2 and 3.

with preventing specific conduct and, if necessary, punishing people for that conduct. The second is much wider, less well-defined and less widely agreed as a proper role for competition authorities.

I will argue that the Market Investigation regime under the Enterprise Act 2002 (EA 02) is particularly well suited to this more positive promotion of competition. It gives a remit that is broader than that of Articles 81 and 82 EC in competition law, or their UK equivalents, Chapters I and II of the Competition Act 1998. Yet it is narrowly focused on competition, rather than on the broader public interest, or indeed any political interest, and it operates to no regulatory agenda.

I will also seek to demonstrate that not only can Market Investigations be used to promote competition; but, in practice, that is how they are being used. I will argue that key here is the focus of Market Investigations on creating or increasing what Adam Smith called 'rivalship'. But first let me briefly describe the Competition Commission's (CC) roles and provide some background on the UK's Market Investigation regime and the thinking behind this regime.

2. The overall context—the CC's role

As is well known to this audience, the CC conducts in-depth inquiries into mergers, markets and the major regulated industries. It draws its jurisdiction from a large number of statutes.

The CC cannot start an investigation on its own initiative; all cases that come before the CC are on reference from another body. On mergers, the Office of Fair Trading (OFT) is the sole referring body (on competition issues).³ In Market Investigations, the power to refer extends also to the sector regulators with concurrent powers. The CC has an additional, specifically regulatory, role, in conducting 'second phase' regulatory reviews where it acts, in effect, as an appeal body deciding price control and licence modification issues at the behest of the sector regulator or regulated company.⁴ The CC recently completed its first regulatory reference since 2002, the mandatory quinquennial London airports review.⁵

The CC also acts as an appeal body from decisions of GEMA in energy code modification appeals. Two of these have been brought, one in April this year and one that was abandoned at an early stage.⁶ And the CC has a particular role, on reference from the Competition Appeal Tribunal (CAT), in appeals under the Communications Act 2003 that raise price control matters. Such an appeal has recently been made.⁷

This wider jurisdiction might suggest that we are a super-regulator, extending the wide-ranging powers that quite properly are applied to natural monopolies, potentially across the entire economy? I think not. Our three tasks are quite specific, clearly defined in the various statutes and do not need to be confused. And I would go further. It is precisely because we have separate competition and regulatory tasks that we are well practised in distinguishing between them.

³The Secretary of State may refer public interest cases.

⁴See Paul Geroski, 'Appealing to the Competition Commission', *Utilities Policy*, Vol 12, Issue 2, 2004, pp 77-81, as republished in *CC Essays in Competition Policy*, August 2006, pp 17-22.

⁵CC Report, *Heathrow and Gatwick quinquennial review*, 3 October 2007, which was referred to the CC on 30 March 2007. This is, of course, strictly speaking 'first phase'. In 2002, the CC was asked to examine mobile phone termination charges and carried out the quinquennial reviews into the major London airports and Manchester airport.

⁶CC Decision and Order, *E.ON UK Plc and GEMA and British Gas Trading Limited, UNC 116, An appeal under section 173 of the Energy Act 2004*, 10 July 2007. The appeal by E.ON was made on 30 April 2007; the Utilita Electricity appeal was abandoned soon after being made.

⁷If an appeal to the CAT under Section 192 of the Communications Act 2003 raises a price control matter, the CAT must, before reaching its decision, refer the matter to the CC for determination and the CC must determine the price control matter within four months. In its final decision, the CAT must follow the CC's determination concerning the price control unless that determination would fall to be set aside applying the principles applicable on a claim for judicial review. On this, see the *Rules and Guidance, Competition Appeal Tribunal Guide to Proceedings*, October 2005, paragraph 2.38.

Let me elaborate on the Market Investigation role, which is the focus of my talk tonight.

3. The market investigation regime

The CC's market investigations to date

The CC now has some experience of completed Market Investigations, although it should be emphasized that these are still comparatively few in number. The OFT itself has undertaken more than 25 market studies since the Market Investigation regime came into force in June 2003, and nine Market Investigation references have been made to the CC (eight referred by the OFT and one, *Rolling Stock*, referred by the ORR).

Of these nine Market Investigations, five have been completed to date:

- Store Card Credit Services;
- Domestic Bulk Liquid Petroleum Gas (LPG);
- Home Credit;
- Classified Directories Advertising Services; and
- Northern Irish Personal Banking.⁸

In each of these completed cases, the CC concluded that there were market features which had an adverse effect on competition. The four other Market Investigations in progress are: Groceries; BAA Airports; Payment Protection Insurance (PPI); and Rolling Stock for Franchised Passenger Services (ROSCOs).⁹

TABLE 1: CC market investigations—current and completed

Completed inquiries	Market size (annual revenue)
	£m
Store Cards	670
Bulk Domestic LPG	~120
Home Credit	>700
Classified Directories	~825
NI Personal Banking	167
<i>Inquiries in progress</i>	
Groceries	123,500
PPI	~5,350
BAA Airports	~2,500
Rolling Stock	~1,000

Source: Market size estimates from CC reports or parties.

The turnover estimates in the table suggest that the size of markets referred is mixed but generally increasing. Market size may be a poor proxy for identifying whether or not the CC is focusing on the 'right' markets. Given the scale of these investigations and the relative

⁸CC Report, *Store Card Credit Services*, 7 March 2006; CC Report, *Domestic Bulk Liquefied Petroleum Gas*, 29 June 2006; CC Report, *Home Credit*, 30 November 2006; CC Report, *Classified Directory Advertising Services*, 21 December 2006; and CC Report, *Northern Irish Personal Banking*, 15 May 2007.

⁹*Groceries* was referred to the CC on 9 May 2006; *Payment Protection Insurance* was referred to the CC on 7 February 2007; *BAA Airports* was referred to the CC on 29 March 2007; and *Rolling Stock for Franchised Passenger Services* was referred to the CC on 26 April 2007.

heaviness of the review process, it is important from the taxpayer, consumer and business perspective that the focus is on those markets that are 'worthy of investigation'.

I will talk more on the five completed Market Investigations later, but let me look here at the framework for the regime.

Legal framework

(i) Overview

UK Market Investigations in one form or another have a long history and have always operated within a detailed and arguably robust legal framework. For those who are interested, this history can be traced on the CC's website, which provides every report back to the first case (in 1950 on the supply of dental goods)¹⁰ in a searchable format.

The current Market Investigation regime derives from the system of scale and complex monopoly investigations that found its final form in the Fair Trading Act 1973. This system was effectively 'born again' in the Enterprise Act 2002.¹¹ The essence of the new regime is:

- a new legal test of 'adverse effect on competition' (or AEC);
- decision-making power vested in the CC and the Phase I authorities;
- a fixed maximum duration of two years for the CC's investigation;
- an obligation to determine and apply remedies where an AEC is identified; and
- specialist judicial review by the Competition Appeal Tribunal (CAT).¹²

(ii) Selection of markets for investigation

As I said, the CC does not initiate or select its cases. That choice lies exclusively with the OFT and sectoral regulators with concurrent powers.¹³ The correct selection by these referring authorities of appropriate markets for investigation by the CC plays a crucial part in the effectiveness of the Market Investigation regime.

Obviously, the referring authorities select cases in accordance with their statutory remit and their priorities. The OFT generally conducts a market study before deciding whether a Market Investigation is appropriate, as part of its general function of studying the operation of the UK economy. Of the references to date, one has resulted from internal work by the OFT falling short of a market study (LPG); three arose from 'super-complaints'

¹⁰The Monopolies and Restrictive Practices Commission, *Report on the Supply of Dental Goods*, 1 December 1950.

¹¹The Enterprise Act 2002 entered into force on 20 June 2003. Under the Fair Trading Act regime, the OFT (or, more precisely, the Director General of Fair Trading) had the power to refer possible monopoly situations to the CC for investigation (as did Ministers themselves), but the CC's role was to make recommendations to be acted on by Government Ministers. The main difference for the CC is that it now comes to binding decisions and decides on and implements remedies, instead of that task being left to Government.

¹²Section 179 EA 02. The review is not a full appeal on the merits, but under section 179(4) EA 02, the CAT is required to apply the same principles as would apply in judicial review.

¹³Section 131 EA 02. A residual power also lies with the Secretary of State, but it is not the policy of the Government to exercise this. See sections 132 and 139 EA 02 on this residual power. The sector regulators with concurrent powers and the ability to make Market Investigation references are GEMA (energy), Ofreg (Northern Ireland energy), Ofwat (water), ORR (rail), Ofcom (communications) and the CAA (airport traffic control).

made by designated consumer bodies¹⁴ (Home Credit, Northern Irish Personal Banking, PPI¹⁵); and five have resulted, in formal terms at least, from market studies (Store Cards, Classified Directories, Groceries, BAA Airports, Rolling Stock).¹⁶

(iii) Reference test

The test for reference by the referring body is that there should be 'reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or part of the UK'.¹⁷ Whether the OFT or sector regulator makes such a Market Investigation reference to the CC is, unlike the case with mergers, a matter of discretion rather than a duty. In *Association of Convenience Stores v OFT*, the CAT confirmed that the hurdle is not high for exercising this discretion. That case, which involved an appeal against the OFT's decision not to refer the grocery retailing market to the CC, resulted in the OFT withdrawing its defence and non-referral decision. The OFT subsequently conducted a fresh review before referring Groceries to the CC. With the greatest respect to the CAT, this approach, if applied too strictly, could prove something of a challenge to the Market Investigation regime. The OFT cannot be expected to refer every market to the CC that might not be working well. That could give rise to the possibility that any market that does not approach the perfectly competitive ideal is referred. The better view must, therefore, be that, whilst the hurdle for referrals may indeed be low, the referring body must have a proper discretion as to whether to refer. The way that discretion is exercised is the key entry point for the work of the CC.

(iv) Undertakings in lieu

Having decided in principle that a reference to the CC is appropriate, the OFT or regulator will consult on its proposals. At that stage, it is open to the referring body to accept assurances or formal undertakings from the parties in lieu of such a reference.¹⁸ This power has not been used much so far. The most significant example to date is the undertakings accepted by Ofcom in September 2005 in relation to BT's local loop.¹⁹ This resulted in the formation of BT Openreach. The only other case in which the undertakings in lieu were accepted (in this case by the OFT) was in relation to postal franking machines.²⁰

The BT case suggests that the threat of a CC reference can be a powerful inducement for parties to offer undertakings in lieu. And in so far as they offer a remedy to a perceived problem in a way that minimizes the investigative burden, undertakings in lieu are appropriately deregulatory. But they cannot cure all ills, particularly if such reference threats

¹⁴For the super-complaint procedure to the OFT, see section 11 EA 02. Section 205 EA 02 provides that section 11 also applies to the sector regulators. A 'super-complaint', as defined in section 11(1) EA 02, is a complaint submitted to the OFT or relevant sector regulator by a designated consumer body concerning any market features that appear to harm the interests of consumers significantly. The super-complaint process is intended to be a 'fast-track' system for designated consumer bodies to bring such market features to the attention of the OFT or sector regulators.

¹⁵The Citizens Advice made a super-complaint about the PPI sector in December 2005, some 22 months before the reference to the CC was made in 2007. As with the other current cases, this Market Investigation was preceded by considerable examination and discussion prior to its reference to the CC.

¹⁶See OFT, *Market Studies Guidance on the OFT Approach*, November 2004. Market studies by the OFT or regulators can alternatively result in the following outcomes: (i) the market is given a clean bill of health' (ii) information is published to help consumers; (iii) firms are encouraged to take voluntary action; (iv) a consumer code of practice is recommended; or (v) recommendations are made to regulators or to the Government. The intensity and duration of market studies can vary considerably.

¹⁷The OFT's referral powers derive from section 131(1) EA 02. As the CAT clarified in *Association of Convenience Stores v OFT* [2005] CAT 36, 'There is, if we may say so, some risk that one may mistake the height of the [Market Investigation reference test] hurdle. ... It is a 'reasonable ground to suspect' test. The scheme of the [Enterprise] Act is that a full investigation is carried out at the stage of the Competition Commission, not at the stage of the OFT.'

¹⁸Section 154 EA 02.

¹⁹Undertakings given by British Telecommunications Group plc to Ofcom on 22 September 2005.

²⁰Undertakings given by Royal Mail Group Plc, Pitney Bowes Limited and Neopost Limited on 17 June 2005.

cease to be credible, and if they are behavioural in nature they will require monitoring and checking to see whether they are operating effectively.²¹

(v) *The AEC legal test*

Once a Market Investigation reference is made, the CC is required to investigate and decide on whether any adverse effect on competition (AEC) exists. An AEC derives from one or more 'features of the market' that 'prevent, restrict or distort competition', wording that reflects Article 81 EC as well as the definition of a so-called 'complex monopoly situation' in the 1973 Fair Trading Act. Features comprise:

- the structure of the market;
- conduct of suppliers or acquirers of goods; or
- conduct of customers.

Conduct includes any failure to act (whether or not intentional) and any other unintentional conduct.²²

(vi) *Features of the market*

The CC tries to assess the nature and extent of rivalry between firms operating in the market by considering whether the features of the market structure itself, the conduct of players in the market, or the conduct of their customers, restrict or distort competition. Both the CC's and OFT's guidelines discuss, in detail, what is meant by a 'feature of the market'.²³ The assessment process is not a checklist approach. The categories of features, although broad, are not limitless, but indicate the wide ranging nature of features. And it is open to the CC to decide that a feature may cover more than one category.

Relevant factors in this assessment include traditional indicators of rivalry such as price and non-price competition, choice, quality and innovation. The assessment also includes consideration of how open the market is to entry, expansion and exit; the countervailing power of buyers and suppliers; and the effect of any vertical integration of certain players on the structure of the market. 'Features' go well beyond behavioural aspects of competition and can include the structure of the market (as in Classified Directories). The fact that the definition extends to customer behaviour is significant and means that it can encompass such factors as customer inertia and failure to switch suppliers (as in LPG, Home Credit, Northern Irish Personal Banking) as well as low customer price sensitivity (as in Store Cards and Home Credit). International comparisons are made where applicable and relevant. High prices, as well as supernormal (or 'excess') profits, although not themselves 'features', can help to indicate the state of competition.

(vii) *Counterfactual*

The assessment of such 'features' of the market naturally raises the question: prevent, restrict or distort in comparison with what? Consideration of the counterfactual in Market

²¹See, for example, the reports and correspondence relating to the BT undertakings. The fifth quarterly, and latest, Report on the Implementation of BT's Undertakings was published by OFCOM on 7 February 2007. For correspondence relating to BT's requests for exemptions and variations to these undertakings, see, for example, the OFCOM statement dated 3 October 2007.

²²Section 131(2) and (3) EA 02.

²³See, in particular, Part 3 of CC3, *Market Investigation References: Competition Commission Guidelines*, June 2003; and Part II of OFT, *Market investigation references: Guidance about the making of references under Part 4 of the Enterprise Act*, March 2003.

Investigation is generally not straightforward, but there are some obvious extremes to avoid. If the CC were to adopt the economists' ideal of perfect competition, then clearly it would find an adverse effect on competition in every market it examined. Conversely, if the CC accepted the existing state of competition in a market as given, then it would never identify any problems at all. This latter case could be characterized as a finding that the market is working 'as well as might be expected'. This proposition has been put to the CC in some markets where consumers' absolute levels of expenditure were low (such as in Store Cards), and consumers were generally only losing a few pounds per month compared with what they would have paid were the market competitive. While many markets might be said to work as well as might be expected, the point of the Market Investigation is to challenge this situation.

The question 'compared with what' also can be quite tricky when there is existing regulation. Classified Directories, for example, where Yell was already subject to price regulation, had no easy counterfactual, but the CC compared what it found—including the effects of existing price regulation—with what it would expect in a well-functioning market.

And if, for example, a network business were referred to the CC for a Market Investigation, then it is by no means clear against what standard it should be assessed. To state, for example, that the existence of a network is a feature seems to call upon the CC to imagine a world in which the business operated without its network, which seems odd. Similarly, if the CC were to identify as a 'feature' of a railway market, the limited degree to which rail can compete with road transport, does this imply that it is considering this a distortion compared with a counterfactual in which trains run other than over the railway network?

I do not mean to pre-judge any cases by these examples. Rather, my point is to emphasize that the identification of a particular 'feature' does not necessarily imply a counterfactual in which that feature is not present, and what looks like the compelling logic of counterfactual analysis can sometimes lead to a nonsensical result.

(viii) Remedial powers

If the CC finds an adverse effect on competition, it has a duty to remedy it, and any damage to customers, as comprehensively as is reasonable and practicable, although it has some discretion to protect specific customer benefits.²⁴ The CC's remedy powers are extensive, ranging from the making available of more information to consumers to changing the terms of agreements or the divestment of whole businesses. In developing these remedies, the CC must have regard to the principle of proportionality. This requires the CC to consider their likely effectiveness in relation to their associated costs.²⁵ The CC cannot impose financial penalties for past behaviour but measures looking forward may not necessarily be free of cost for the companies concerned.

The CC cannot override contrary legislation, but it can recommend that Government should change or repeal it, so to that extent the CC has a specific deregulatory function. There is a commitment, as with the OFT, by Government to respond publicly to such a recommendation within 90 days. In the only, rather minor, instance of a recommendation so far (to the then Department of Trade and Industry to amend regulations for home credit), the Government accepted the CC's position in full.

²⁴See section 134 EA 02 and, in particular, sub-sections (6) to (8).

²⁵See paragraphs 4.9-4.12 of CC3, *Market Investigation References: Competition Commission Guidelines*, June 2003.

(ix) *Time limit*

The CC has a statutory limit of two years to complete a Market Investigation from the date of the reference to its final decision. This period cannot be extended.²⁶ By imposing a two-year maximum time limit on such investigations, major cases, even in complex markets, have a finite and predictable duration, which is no longer, and usually shorter, than the length of other major antitrust investigations.

The CC has, so far, not often completed an investigation significantly under the two-year statutory deadline. That it has taken nearly two years for investigations is not a matter for pride, but there can be some justifications. It will not, of course, always be the case that the issues under consideration in a smaller market are any less complex than those in a larger market. However, having said that, several of the earlier cases clearly involved smaller markets with less complex issues than are raised in a number of the current cases. The fact that these generally ran close to the two-year period may have reflected the inevitable teething process with a new regime.

The CC tries to learn from its experiences, and the intention remains to carry out more straightforward market investigations in less than the two-year deadline. However, good intentions only get you so far, particularly in a regime which operates under a highly transparent process. To achieve this, the CC has to keep control of its timetable and the principal parties must play their part. In particular, whilst the CC will always give parties a proper opportunity to comment on the CC's evidence and likely reasoning, the line has to be drawn somewhere in this dialogue, as the CC comes to its decision. Parties can sometimes approach this dialogue (including the CC's 'put-back' procedure) as a war of attrition, which will only end when the CC accepts their arguments. But while the CC can promise to listen to and to comprehend their arguments, the CC needs to reach its own decisions. The CC is digesting the lessons of its experience so far, and is well aware that the incentives for delay can be quite powerful. But making these investigations work well and to time is a key objective.

(x) *Process*

In terms of process, Market Investigations offer an alternative, more inquisitorial, means of investigating the operation of particular markets in-depth and may, in some circumstances, offer a better chance of reaching the necessary level of objective understanding than more adversarial systems, where the stakes for the parties under investigation may include very large administrative penalties and possible third-party liability.

'Adversarial' can mean two things—first, as between the authority and the parties; and second, as between different parties. Opinion seems generally divided as to whether an inquisitorial or adversarial process in the *inter partes* sense is better. Obviously, it depends upon the case. Recently the CC operated a form of adversarial process, in hearing the first full appeal against changes to an energy industry code. It was an interesting experience, and it was surely the right way to conduct an adjudication of a narrowly defined issue in a short time frame. Nonetheless, some aspects of the procedure were very strange to the CC, such as relying principally on parties' argumentation and being required merely to interpret that evidence rather than to conduct its own, independent analysis, as it does in all of its other types of investigations, including Market Investigations.

²⁶Section 137 EA 02. This period can be shortened (but not lengthened) by the Secretary of State (and even then not for an investigation already under way) and it is open to the CC to complete any individual investigation in less than two years. The statutory period does not include the time frequently needed after the CC's decision to develop and implement the remedies that have been decided upon.

Conducting an independent investigation from scratch means that the CC can find reasons for clearance that have not been put forward by the parties or the referring body. For example, in Store Cards, the OFT reference highlighted the limitations on retailers' ability freely to choose competing finance companies to provide their store card programmes. The CC cleared this part of the market, but reached an AEC finding on the consumer end of the business.

An inquisitorial process also seems far preferable for the first sense of 'adversarial' in which the authority confronts the parties. And it seems particularly well suited to Market Investigations, where the CC is required to assess evidence from a very large number of main and third parties. Adversarial procedures of either kind might be preferable in dealing with accusations of specified conduct but they seem less well suited to addressing the (qualitative) question: could this market function better?

Scope of application

(i) Subject matter

As I have said, Market Investigations have a broad scope in terms of subject matter. In particular, they enable the CC to deal with issues that might fall into 'gaps' between the control of restrictive agreements and control of dominant undertakings. In terms of subject matter, the scope of the AEC legal test encompasses all matters covered under a prohibition system as well as market 'failures', which a prohibition system might miss or deal with less well. In particular, the kind of situations that Market Investigations can capture include:²⁷

- *unilateral effects*: where a market is dominated by one or more players, who are not themselves 'abusing' that position (particularly where incumbents are protected by high natural or strategic entry barriers that impede self-correcting entry);
- *coordinated effects*: oligopoly behaviour falling short of illegal conspiracy, that is tacit collusion leading to prices approaching the collusive (or monopoly) level;
- *vertical effects*: issues of market structure in vertical cases with parties operating at different levels of the supply chain where some 'unbundling' is perhaps needed to correct distortions in competition or actual or perceived discrimination;
- *inefficient equilibria*: where the market arrives at a 'bad' equilibrium from which no individual firm has an incentive unilaterally to deviate. Various economic models of non-collusive oligopoly are consistent with inefficient equilibria;
- *government barriers to entry*: where government policy creates 'artificial' barriers to entry that may distort competition (often motivated by legitimate public policy considerations); and
- *informational failure*: where consumers lack the information to make informed choices or (perhaps more controversially) where they may not use that information to make good choices.

²⁷Based on a formulation by Dr Mark Williams of NERA. See also Philip Marsden and Peter Whelan, 'When markets are failing', *Competition Law Insight*, 16 January 2007, pp 6-8.

(ii) *Rivalry*

What is the common factor here? Any one of these situations can produce adverse effects on existing UK consumers. But more significantly, in the longer run, many also involve the prevention, restriction or distortion of the process of competition. The process of competition is the means by which good ideas succeed while bad ones fail, well-run firms thrive while bad ones reform or perish, and a constant pressure for innovation is maintained. As Adam Smith rather more elegantly put it,

... [W]here the competition is free, the rivalry of competitors, who are all endeavouring to jostle one another out of employment, obliges every man to endeavour to execute his work with a certain degree of exactness. ... Rivalship and emulation render excellency ... an object of ambition. ...²⁸

This concept of 'rivalship' (now modernized to 'rivalry') is critical to the operation of the Market Investigation regime. Let me illustrate by some examples:

(iii) *Examples from cases*

Very broadly, in several of the completed Market Investigations, it could be said that the industry was sleepy; there was little 'rivalship' and not much opportunity or enthusiasm among the providers to 'jostle' one another out of employment. For example:

- Some store card interest rates had not changed for ten years, despite variations in costs and a large decrease in credit card rates over that period;
- In the home credit sector, the same companies had provided much the same products for decades, with very little change in the cost of credit;
- Providers of LPG to domestic users generally saw themselves as having captive customers for life once they had installed a tank; and
- Personal current account holders in Northern Ireland did not know how they could switch banks and the banks did little to encourage any switching.

In each case, there was a sense that the providers felt that consumers were getting a 'good enough' deal and always had. But from the consumer welfare perspective, competition in each of these markets was perceived not to be working well. And the alternative tools available to the referring body (here, the OFT) were not deemed able to address these competition concerns. Let me illustrate this from two of the cases, LPG and Home Credit.

*The LPG case*²⁹

LPG was a case where the providers were not obviously in rivalry with each other. To quote one customer complaint from the LPG inquiry:

I am dissatisfied with the monopolistic and expensive service my provider, [], gives me, but I am unable to do anything about it. I would like to appoint an alternative supplier but find it impossible because [my provider] will not allow other suppliers to fill my tank. They own the storage tank and no other firm is

²⁸Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Book V, Part III, Article II (London: 1776) as republished in an edition edited by RH Campbell and AS Skinner (Liberty Press: Indianapolis, IN, USA: 1976) at p759. The quotation is part of a discussion about the effect of endowing academic institutions on the incentives of their members.

²⁹CC Report, *Domestic Bulk Liquefied Petroleum Gas*, 29 June 2006.

allowed to fill it. I am locked into a five year contract of the tank and it seems they can charge any price they like for LPG. ... This practice is spiteful and a ploy to discourage customers considering a change and hence is a restrictive practice.³⁰

The market structure here was a classic oligopoly, with four suppliers accounting for around 90 per cent of domestic bulk LPG in Great Britain.

The basic competition problem was the low level of switching, even among customers who could obtain significant net savings by switching, and the barriers faced by the few customers who sought to switch suppliers. Suppliers normally retained ownership of tanks on domestic customer premises, and it was standard practice, when a customer switched, for the outgoing supplier to remove its tank, which was then replaced by a similar tank owned by the incoming supplier.

Given these and other barriers to switching, along with the limited extent to which suppliers approached one another's customers, the CC found competition to be constrained. It also concluded that the large majority of customers were paying higher prices than would be the case if these features did not exist. In this case the CC estimated that the annual consumer detriment from these market features was comparatively modest, from £4 million to £13 million, and the CC's remedies were correspondingly modest. They were partly informational (better information for customers on competing offers) but included a 'tank transfer' remedy, that is a right for a new supplier to buy, at the customer's request and subject to a price formula, the existing supplier's tank on change of supply. The CC found, after some argument, that this could be done without compromising safety.³¹

*The Home Credit case*³²

Another market characterized by little or no rivalry was home (collected) credit. Home credit loans are cash loans for small sums (the CC found 70 per cent of home credit loans were for less than £500). Loans are repaid, generally over a period of around a year or less, in weekly instalments collected by agents from the customer's home. In 2005, home credit lenders lent about £1.3 billion to around 2.3 million customers in the UK, and collected around £1.8 billion in repayments.

The market structure in this investigation was an unbalanced or highly asymmetric oligopoly. There was one very large player with over half the market, four to five other large players and a long tail of between 400 and 500 small and medium-sized suppliers, including a number of sole traders. While numerous, these smaller providers accounted for less than 10 per cent of the overall market in value terms and operated on a highly local basis.

The CC investigation found a lack of price competition, which arose in part from a lack of rivalry on the part of the lenders to seek to compete on price. The CC found no evidence of collusion, and price competition was so weak that even tacit co-ordination would have been unnecessary. The other adverse features identified were the difficulties faced by customers when seeking to compare price and the relative importance placed by customers on credit availability rather than price.

³⁰CC Report, *Domestic Bulk Liquefied Petroleum Gas*, 29 June 2006. This quotation can be found on the section of the CC website on this case under 'Further views of domestic bulk LPG customers', 'Evidence from Individual No 2', 7 January 2005.

³¹CC Report, *Supply of Bulk Liquefied Petroleum Gas for Domestic Use*, 29 June 2006. Paragraphs 7.159-7.161 provide details of the CC's package of remedies. On the discussion of the tank transfer remedy not, in itself, having an adverse effect on safety, see paragraphs 7.47-7.59 and Appendix L, paragraphs 185-209. All four principal suppliers argued that safety required complete integration of supply, but the CC did not find evidence to support this view.

³²CC Report, *Home Credit*, 30 November 2006.

The CC also found that established lenders enjoyed considerable incumbency advantages in that they had much better information about the creditworthiness of their customers than any potential lenders, either within or outside the home credit sector. This made it harder for customers to switch suppliers and for new suppliers to enter the market.

The CC concluded, after some debate, that profits in excess of the cost of capital of at least £75 million each year had been earned by the industry over the period 2000 to 2005. This equated to around an additional £20 on the price of an average loan (or approximately £7 per £100 of loans issued). The remedies involved greater provision of price information to customers and, significantly, also required lenders to share customer data through credit reference agencies. This would give other lenders greater access to relevant information about these customers, thereby reducing barriers to entry and expansion as well as increasing competitive pressure from outside the sector.³³

(iv) *Market structure*

So much for rivalry. But market features include structure. If a market has an uncompetitive structure then it will not deliver good outcomes for consumers, or for society more generally, in the long run. I do not mean by this that all markets with high market shares for individual firms, or with high HHI measures, need to be reformed. As we know, high concentrations can arise from the process of intense competition and are not necessarily indicative of a lack of competition. We need, in short, to distinguish between cause and effect. Again it may be helpful to illustrate this from the cases.

*The Store Cards case*³⁴

Store Cards was referred to the CC after adverse publicity surrounding high charges for credit cards offered in retail stores and in response to questions raised about the supply of store cards by the House of Common's Treasury Select Committee. At the end of 2005, there were 11.4 million active store card accounts in the UK, with outstanding balances of about £2,300 million.

The CC found two relevant economic markets: an upstream market, comprising the supply of store card services to retailers; and a downstream market to supply consumer credit and other related services to customers. The upstream market was highly concentrated, with one provider accounting for over half of the market, but there was no single large player at the retail level, with the four largest store card programs accounting for about 50 per cent of all active store card accounts and balances.

But the CC concluded that the competition problems in this sector arose from features of the downstream customer-facing market, rather than as a consequence of the upstream market structure, which, although concentrated, was subject to effective competitive pressure. The CC considered that in the downstream market there was little or no competitive pressure on the setting of annual percentage rates (APRs) and that APRs were above competitive rates. This resulted from a number of market features which had an adverse effect on competition, including:

- customers having a poor understanding of price;

³³CC Report, *Home Credit*, 30 November 2006. The CC remedies provided that this data would be shared not only with other home credit lenders but also more widely with other lenders, including credit card companies. A summary of the CC's decision on remedies is set out in paragraphs 9.151-9.162 of the report. See now the Home Credit Market Investigation Order dated 13 September 2007, which came into force on 4 October 2007.

³⁴CC Report, *Store Card Credit Services*, 7 March 2006.

- providers not including sufficient information on statements leading to an increased lack of transparency;
- retailers and customers not exerting competitive pressure on APRs, insurance or late payment fees; and
- low price sensitivity (from both retailers and customers).

The essential competition problem stemmed from information asymmetry. There was a lack of downward pressure on prices from customers and retailers. This resulted partly from a lack of understanding about competing products and price sensitivity on behalf of customers, but also from the way in which store card products were structured and sold. Given the high profits that were being earned, suppliers had little incentive to change their behaviour or to increase customers' price sensitivity (eg by competing aggressively on price and marketing this fact heavily to customers). The market had settled into a stable equilibrium that was producing poor outcomes for consumers.

The CC estimated that the detriment to customers, in terms of the excessive prices paid, was substantial—at least £55 million a year and possibly significantly more. The remedies applied were essentially informational and included, in particular, a requirement to draw customers' attention to interest rates exceeding 25 per cent as well as a provision for the sale of payment protection insurance to be 'unbundled' from the store card offer.³⁵

It was put to the CC that its measures to increase competition might—if successful—lead to higher market shares for the larger providers, who could spread the costs of operating common IT systems across a larger customer base. It was hard to know at the time whether this was a likely outcome or not, but the attitude was, 'if so, so be it.' Sometimes an uncompetitive market can shield smaller niche players from the force of competition, and the CC's remedies, if effective, may result in increased concentration.

So it is important not to confuse concentration measures with an uncompetitive market structure. This refers to a market which is uncompetitive for reasons that are structural rather than immediately behavioural, that simply will not act in a highly competitive manner unless something jolts it out of its current state. Such markets will generally be producing bad outcomes for consumers.

*Classified Directories*³⁶

It is also worth mentioning Classified Directories, where the main competition issues were also structural. Of all of the market investigations to date, this was closest to a monopoly inquiry. Yell accounted for around 75 per cent of advertising revenues, with nearly all of the remaining revenues accounted for by BT and Thomson. Yell was already subject to price regulation, following an earlier investigation. While this investigation centred on the advertising price controls on Yell, it also involved consideration of 'themed' directories supplied by smaller competitors.

The CC found that the high and sustained level of market concentration and the high entry barriers, including network effects, gave Yell market power, which meant that, in the absence of the existing price regulation, Yell's prices would exceed competitive levels even though the market was beginning to open up in the face of new entrants (including BT, who had originally sold Yell's business). To address this situation, the CC opted to continue with

³⁵CC Report, *Store Cards*, 7 March 2006. Paragraphs 10.77-10.87 summarize the CC's decision on remedies. On the APR warning on store card statements see, in particular, paragraphs 10.80-10.82.

³⁶CC Report, *Classified Directory Advertising Services*, 21 December 2006.

a price control regime for a limited period, which included aspects of the pre-existing regime, recognizing that market conditions were continuing to change, although not sufficiently enough to remove the need for price control altogether.

(v) *Vertical issues*

As well as rivalry and structures, it is important not to overlook the issue of vertical relationships and restraints. We have already mentioned the BT Undertakings in lieu. The current discussion of 'ownership unbundling' in EU energy industries serves to remind us of the UK's track record here. The 1992 market and regulatory British Gas inquiries, which involved four references to the MMC (two under the Gas Act and two under the Fair Trading Act 1973) led to the separation of its trading and transportation functions. The two reference decisions under the FTA proposed the separation of British Gas' trading and transportation businesses. The Secretary of State (whose final decision it was) chose not to implement this recommendation, but British Gas decided to do it anyway (partly because of the onerous licence amendments put in place following the Gas Act Reports).³⁷ 'Transco' was established as a separate unit in 1994 and the formal demerger that led to the creation of Centrica took place in 1997.

It can be argued that these parallel investigations helped to create a competitive gas market where previously there was none, by ensuring open and non-discriminatory access to pipeline system owned by the vertically-integrated British Gas. That situation had arisen as a result of the way the industry was privatized, but the barriers to competition had nothing much to do with regulation, and everything to do with vertical integration and the large market share of British Gas. Without the intervention prompted by the MMC reports, the market would arguably have remained uncompetitive.

4. Competition and regulation

Perhaps this is the moment to return to one of the questions asked at the start of this lecture. Is any intervention outside the scope of prohibiting and punishing illegality to be seen as regulatory in nature?

The first response is to accept there is some understandable ambiguity here. This stems in part from the CC's (or the MMC's) role as a 'mixed' (ie competition and regulatory) authority. This is often seen as an advantage, in the sense that it is probably a good thing for regulatory issues to be considered by an authority with a competition mentality. But what about the other way round? Cross-infection can go both ways, we may assume, so is it wise for competition investigations to be in the hands of an authority with a regulatory remit also?

Many of the markets referred to the CC have been investigated before by other authorities or by the CC itself under different legislation. There is nothing new in this. Look at the MMC's

³⁷The two references under the Gas Act were reported under *British Gas plc: Volume 1 of reports under the Gas Act 1986 on the conveyance and storage of gas and the fixing of tariffs for the supply of gas by British Gas plc*, August 1993. At the same time, the MMC also reported on two references under the Fair Trading Act 1973 published as *Gas: Volume 1 of reports under the Fair Trading Act 1973 on the supply within Great Britain of gas through pipes to tariff and non-tariff customers, and the supply within Great Britain of the conveyance or storage of gas by public gas suppliers*, August 1993. Two further volumes providing supporting documents were published as *Gas and British Gas plc, Volume 2 and Volume 3*, September 1993.

work on beer, gas, consumer electrical goods, ice cream and milk.³⁸ All these were cases where not only were many of the same issues re-presenting themselves but where competition issues and regulatory issues, whether the liquor licensing laws in the case of beer or de-regulation of milk production, played a big part in the analysis. All this tends to feed the ambiguity.

Two cases currently before the CC (Groceries and BAA Airports) exemplify the different ways in which regulatory regimes and competition powers overlap. The groceries sector and the airports sector have both been the subject of previous investigations. Both are frequent visitors to the CC. If the CC had a loyalty card programme, supermarkets and airports would all have a large stock of points. Unfortunately, it does not work like that, and the repeat customers do not always savour the experience.

But there is a big difference between the two cases. The groceries market has been investigated repeatedly for some of the same issues both in markets and merger cases. The airports sector, on the other hand, has elements of natural monopoly and has therefore (naturally) been through price control reviews. There has also been scrutiny of mergers in the sector (albeit only at the OFT stage). But it has never been the subject of a fundamental review, in the form of a Market Investigation, to assess the state of competition in the sector generally, with the possibility of significant change not only to the sector but to the regulatory regime, as now. Whether that will prove useful is not to be pre-judged. But the fact that this review is being conducted by the same authority that has conducted the most recent price control review, will probably help, rather than hinder, the CC in getting the right balance between competition and regulatory solutions, should these be needed.

One might conclude from this that the Market Investigation regime can be used to identify and, if possible, resolve long-standing controversies in competition and regulatory policy. But it is one thing to identify; quite another to resolve, and this leads us to the question of remedies.

5. Can we do anything about it?—the question of remedies

As I noted above, what the Market Investigation regime does, when it works best, is to eliminate the protections that firms enjoy in markets that are not working well in some of the ways I have described. Remedies represent a key test of the Market Investigation regime. The CC's success in implementing appropriate remedies determines the output of the regime and ultimately its effectiveness.

Put simply, the challenge for the CC is to promote a competitive environment in markets where the CC has concluded that there is presently little competitive pressure. This is never going to be easy. Competition requires, after all, willing and able competitors and (preferably—but not necessarily) active and informed customers. However, the CC can seek to put in place measures that give firms stronger incentives to compete, which break down barriers to entry and which empower customers to put greater pressure on firms to improve their offering. It is upon these things that CC remedies tend to focus.

³⁸See, for example, Monopolies Commission (MC) Report, *Beer: A Report on the Supply of Beer*, 24 April 1969; MMC Report, *The Supply of Beer: a report on the supply of beer for retail sale in the United Kingdom*, 21 March 1989; MC Report, *Electric Lamps: Second report on the supply of electric lamps*, 2 December 1968; CC Reports, *Domestic Electrical Goods I and II*, 30 July 1997; CC Report, *Extended Warranties for Domestic Electrical Goods*, 30 September 2003; MMC Report, *Ice Cream and Water Ices: A report on the supply in the United Kingdom of ice cream and water ices*, 2 August 1979; MMC Report, *Ice Cream: A report on the supply in the UK of ice cream for immediate consumption*, 29 March 1994; CC Report, *Milk: a report on the supply in Great Britain of raw cows' milk*, 6 July 1999; CC Report, *Supply of Milk in Scotland*, 22 December 2000; MMC Report, *Gas: A report on the matter of the existence or possible existence of a monopoly situation in relation to the supply in Great Britain of gas through pipes to persons other than tariff customers*, 19 October 1988. On CC Reports on the gas sector, see footnote 37 above, and CC Report, *BG: A report under the Gas Act 1986 on the restriction of prices for gas transportation and storage services*, 18 June 1997. Note that these examples do not include any merger investigations conducted by the CC or its predecessor bodies in these sectors, although there were a number of these as well.

Sometimes the measures might involve a structural solution, although such a remedy has not been appropriate in the cases concluded to date (unless you include the tank transfer remedy in LPG). Behavioural remedies that reduce barriers to entry or expansion might create a more competitive market structure indirectly. Informational and other remedies aimed at assisting consumers to make informed choices work—when they work—by increasing competitive pressures as consumers become more price sensitive and willing to switch to rivals’ products.

Considered thematically, the objectives of the remedies put in place to address competition problems found in the cases so far have been to:

- **Lower switching costs and reduce incumbency advantages.** In LPG, the CC established a protocol to enable the transfer of ownership of tanks from one supplier to another when a customer switches supplier. In Home Credit, the CC required lenders to share creditworthiness information through Credit Reference Agencies, as is standard practice in most other consumer credit markets. In Northern Irish Personal Banking, the CC proposed improvements to the switching process, to reduce customers’ switching costs.
- **Improve customer information.** In Store Cards, the CC required full information to be included on customer statements, including a warning for products with high APRs, that cheaper credit may be available elsewhere. In Home Credit and NI Banks, improved information to customers were central themes.
- **Directly constrain prices, where other measures are insufficient.** In Classified Directories, the CC retained a cap on Yell’s prices, though in modified form relative to the previous limit. A price constraint was considered but rejected in Home Credit as being disproportionate and liable to reduce supply of credit to borrowers.

All of these could be characterized as behavioural remedies, although measures aimed at facilitating entry have a structural dimension (as does the ‘tank transfer’ remedy in LPG). The CC has not yet made a major recommendation to Government about anti-competitive laws or regulations, but these have not so far seemed to be the problem.³⁹

TABLE 2: **Customer detriment**

<i>Completed inquiries</i>	<i>Market size (annual revenue) £m</i>	<i>Annual customer detriment £m</i>
<i>Store Cards</i>	<i>670</i>	<i>At least 55</i>
<i>Bulk Domestic LPG</i>	<i>~120</i>	<i>4–13</i>
<i>Home Credit</i>	<i>>700</i>	<i>At least 75</i>
<i>Classified Directories</i>	<i>~825</i>	<i>20</i>
<i>NI Personal Banking</i>	<i>167</i>	<i>12–24</i>

Source: Market size estimates from CC reports or parties; CC estimates of consumer detriment figures.

Here are the cases with the CC’s own estimates of customer detriment, and which it has used to inform remedies. In each case, the CC has been concerned not to act in any way punitively, to take measures which will open up markets to competition and, above all, to act proportionately to the scale of the harm to consumers identified.

³⁹In *Home Credit*, the CC made a recommendation to Government about the implementation of the periodic statement provisions of the Consumer Credit Act 2006. This recommendation was accepted in full.

Northern Irish Personal Banking⁴⁰

The Northern Irish Personal Banking case provides an example of the dilemma faced by the CC in this kind of situation. In this case there was a market structure that was clearly oligopolistic with the four large clearing banks accounting for about three-quarters of the market.

The CC's AEC finding was essentially that:

- banks had unduly complex charging structures and practices;
- banks did not fully or sufficiently explain their charging structures and practices; and
- customers generally did not actively search for alternative personal current accounts or switch banks.

The first two of these features led to difficulties in customers making properly informed choices. This applied both to new-to-banking customers in searching for an appropriate personal current account and to existing customers who might otherwise switch to a bank that could provide an account to meet their needs at lower cost. This was exacerbated by the third feature: the perception and, to some extent, experience of difficulties in switching, as well as by customer indifference.

To address these concerns, the CC's remedies required banks to make better and clearer information available to customers to help them understand banks' personal current account services, and to improve their knowledge about their ability to switch banks. All that was to correct 'information asymmetry'. Further measures improved the switching process itself, to ensure that customers who switched banks did not incur costs in doing so.

It may be said that these were intensive and rather detailed interventions in the business of banking in Northern Ireland; and, surely, a structural solution would have been 'neater'. I would answer that in two ways. Although the market was concentrated, there were clear signs of change in respect of the major banks' overall share of supply and in new entry suggesting structural intervention would be inappropriate. Second, whilst there is a deregulatory preference for structural rather than behavioural remedies, the principle of proportionality requires the remedy to be moderated to the nature of the problem. Is it seriously to be argued that a more drastic structural remedy should be preferred just to avoid the appearance of regulation? The same could be said in relation to Home Credit. Dismembering the major provider was urged on the CC by some, but the CC did not see such a solution as addressing the competition problem identified, which was not overall scale but localized incumbency advantage.

And it is important not to regard 'behavioural' as synonymous with 'regulatory'. The purpose of behavioural remedies is to open up the market and to alter the incentives, not to control behaviour on a continuing basis. It is still early days, and I leave it to you to decide whether the CC should be judged by its remedies on the cases so far. The intention has generally been to restore and promote competition by breaking down barriers to entry and by altering the incentives for non-colluding oligopolists.

So far I have dealt with the nature of the Market Investigation regime, what it can cover, what it can remedy, and how it can be applied to markets with regulatory regimes and issues; how its remedies can appear to be regulatory even though in reality they are not; and how they are seeking to restore or promote competition in situations where there is no illegal conduct.

⁴⁰CC Report, *Northern Irish Personal Banking*, 15 May 2007.

It now remains to look at the more fundamental objection to Market Investigations—that they give the authorities too much discretion to intervene in the market place and to regulate conduct that should be left alone, ie in one commentator's words, that they allow the authorities to 'run amok in business'.⁴¹

6. Running amok?

Safeguards

When the Enterprise Act was enacted, there was some concern that the OFT's brief to shine a searchlight into dark corners of the economy, and the CC's extensive new decision-making and remedies powers could open the door to wide-ranging regulation, whether politically motivated or simply through the meddling of well-intentioned but misguided officials. Well it is a fair concern, even if sometimes overstated. There are several general safeguards against using the regime to trawl for intervention opportunities across the economy. These safeguards result from a structure for investigation that is firmly based within the law and particularly within competition law, rather than in a regime of regulatory oversight.

The first safeguard is that the CC does *not choose its cases*. The CC, the decision-maker in Market Investigation cases, does not decide which cases should be examined. Rather, the CC works within clearly-defined references made by other bodies. Also the CC cannot simply decide that, as a result of investigating one market, something it comes across merits another Market Investigation. That is not only reassuring for business but occasionally a relief for the CC itself.

Second, the CC is *institutionally, and practically, independent*. The CC is independent of the executive branch of government and from the bodies that make references to it. Politics play no role in its decisions or in the remedies that it imposes. The only connection is through appointments and, ultimately, through funding, but these would both, if deployed as weapons to influence the CC, be very blunt instruments. The system under which each investigating panel takes on all CC powers for a particular case is a further buttress to its independence.

Third, the CC is a *'fresh pair of eyes'*. Any market referred to the CC receives a full investigation, afresh, on the merits. It is this feature of the system that distinguishes it most strongly from a regulatory system. This can be easily demonstrated. Those who come before the CC and make representations as to the fierce state of competition in the market can sometimes be surprised by their success. Similarly, referring authorities will find their long held views on what needs to be done subject to intense scrutiny and questioning. No-one would view the CC as a kind of 'rubber stamp' and in that sense the CC is not to be seen as an enforcement arm of the OFT, or of any other authority. Those who argue for a closer link between Phase I and Phase II in the interests of efficiency and brevity need to keep this safeguard in mind.

To give an example, the CC has found adverse effects on competition in all five of the completed Market Investigation cases. So there has been no full clearance decision. But the AEC in each case is clearly described and defined, and in several cases is narrower than the matters identified by the referring body. In the Store Cards investigation, the CC identified two markets: an upstream market for the supply of store card programmes to retailers and the more visible downstream retail supply of store card services to customers. The OFT's report had considerable detail on the former, upstream, market and it was a significant element of the investigation. However, the CC 'cleared' the upstream market, announcing at

⁴¹See T Arthur, *Authority: A Monopoly Running Amok in Business*, *Institute of Economic Affairs*, 25:4, December 2005, pp 74-76.

the provisional findings stage that it found no AEC there. The CC's eventual findings—and remedies—related to only a part of the businesses referred. Similarly, in Northern Irish Personal Banking, one of the key accusations against the clearing banks—tacit collusion—was found not to be supported by the most recent evidence. The adverse features that were found were tightly defined and more limited than the scope of the original reference.

The fourth safeguard is the *robust legal framework* within which market investigations take place. This comprises a clear legal test, fair and transparent procedures, reasoned decisions, proportionality in remedies, and appropriate judicial review. Some have commented that 'features that restrict, distort or prevent' competition' is too ill-defined a criterion to facilitate challenge. This does not seem to apply in practice, judging by the numerous well-argued points that parties put to the CC where they believe it might be straying from the straight and narrow path of the Enterprise Act. But more substantively the same criticism could be made of Article 81 EC (which uses the same words) and is met by the development of case law and practice over time with a judicious leavening of Guidelines to interpretation.

7. Conclusion

In his 2004 lecture in this series, on 'Trying to make sense of abuse of a dominant position', happily not our topic tonight, Tom Sharpe quoted a phrase from John Kay's book, *The Truth About Markets*:

The economic approach to competition policy has invited economic engineering—a belief that the courts can make cost-benefit analyses of alternative industrial structures.⁴²

I do not believe that Market Investigations fall into this trap. I have tried to show that in examining markets that do not appear to be working well and in applying measures to improve the information available, to remove or weaken barriers to entry and alter the incentives of those operating on the market, the CC may indeed succeed in promoting competition to the benefit of consumers and suppliers alike; and that Market Investigations are an instrument of competition rather than regulatory policy offering a powerful adjunct to the more widespread approach of prohibiting and punishing illegal conduct. And may 'rivalship and emulation continue to render excellency an object of ambition'.

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⁴²John Kay, *The Truth About Markets*, (London: Penguin) 2003, p365 as quoted in Thomas Sharpe, QC, 'Trying to make sense of abuse of a dominant position', 2004 Beesley Lecture in Colin Robinson, ed, *Regulation Utilities and Promoting Competition: Lessons for the Future*, (Cheltenham: Edward Elgar) 2006 at p139.