

**'The Quest for the Holy Grail'
The Search for Good Competition Decisions**

Peter Freeman¹

III Lisbon Conference on Competition Law and Economics

14 January 2010

The Quest for the Holy Grail is the mythical story, popular in Great Britain at least, in which King Arthur's Knights of the Round Table, who flourished in the Age of Chivalry, set off in search of a symbolic and sacred plate, bowl, cup or chalice (according to which version of the legend you support). Finding this prize represented the perfect fulfilment of the Code of Chivalry that they all followed and conferred complete salvation on the lucky Knight. As every English school boy or girl knows, the main concern of the King Arthur's Knights was to 'do good', and they spent a lot of time on one kind of quest or another, sometimes with a happy ending. But the Holy Grail was different. This quest consumed much of the strength and resources of the Arthurian system but the pursuit of symbolic perfection was ultimately futile. Only three Knights (Sir Galahad, Sir Perceval and Sir Bors) proved sufficiently noble to attain the Grail and only one of them (Sir Bors) survived.

Possible parallels

I would not want to draw too close a parallel between the travails of King Arthur's Knights and competition authorities' efforts consistently to improve their decision making. But there are features in common. Overall, we are trying to 'do good'; and we go off on quests, often with good outcomes, although the dragons and other beasts that get slain would probably disagree. But there is a risk that we might, as with the Knights, become so obsessed with the pursuit of perfection that we are diverted from more modest but essential tasks, and dissipate our resources on a romantic, but ultimately futile, quest. The theme of this talk is that we should seek only that degree of perfection that is sufficient to enable us to do our job. I will now leave the world of Medieval romance for the harsh reality of the present day world of competition, where I believe the need to reach well founded and robust decisions is facing a large number of challenges.

The challenges we face

Let me first make it clear that I am not talking about any particular regime or system. The problem I am concerned with is a general one which I hope will strike a chord with all who are involved in the framing of competition decisions. But I will relate my concerns to my own Authority's position as our experiences may offer some lessons for others.

Essentially the UK Competition Commission is required to investigate mergers and markets on reference, mainly, from the Office of Fair Trading (OFT), within statutory time limits (that are either excessively generous or miserably short, according to your point of view,) obtain and assess relevant evidence, hear the parties, come to a reasoned decision and decide on and apply necessary remedial measures. Our work is subject to review by a specialist tribunal, the Competition Appeal Tribunal (CAT), and beyond that by the general court system.

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

Our challenge is to reconcile the three potentially conflicting requirements of fairness, thoroughness and timeliness. In other words, our decisions have to be based on proper analysis of all the relevant evidence, arrived at using a fair procedure and reached within reasonable time limits. To this should be added a fourth requirement, although probably already inherent in the other three, that our remedies must be effective and proportionate. Let us look more closely at each of these.

Thoroughness

Under this requirement I put all work on the substance of a case. This covers the obtaining, sorting and assessment of information and data; the formulation of useful theories of harm to provide a framework for analysis; the use of appropriate economic theory and the application of economic and econometric techniques to make sense of the information and data; the use of legal techniques to assess and judge the relevance and weight of evidence; the weighing of evidence and deliberation as to the right outcome; the formulation of a decision, each aspect of which is based on a chain of logic, supported by evidence, giving rise to a conclusion; the careful assessment of the effectiveness and impact of remedial measures and the overall evaluation of our casework over time.

This may all sound easy, and obvious. But things are not so simple. Let us consider some of the problems.

Scale

The first is the growing volume of information and data that we are required to consider. Many business sectors now generate vast quantities of basic transactional information which, if we are interested in how buyers and sellers interact, and how prices and other variables actually behave, or may behave, under different conditions, we have to consider. It is true that there are sophisticated techniques and much technological kit to help us do it, but the task is often daunting. On the other hand it cannot be ducked, not least because well-resourced parties expect us to do it. Nor is the problem confined to numerical data; the growth of email and data storage means there is a host of raw 'written' material to consider also.²

Risk of data bias

This data issue carries its own risk in that sectors which are data rich get more attention than those that are not. And techniques that depend on extensive data, such as diversion ratio analysis in defining markets will tend to be applied to sectors where there is good data. This is undesirable in principle, as the authorities need to make decisions across a range of sectors.

Risk in analysis

The growing availability of data and the importance of economic analysis in competition cases, and the development of ever more sophisticated techniques help us to adopt a systematic and logical approach to the myriad of pieces of evidence. But, as one analyst rather unkindly said: 'It is one thing to buy a new car, you also have to learn to drive it'. Decision-making authorities have to understand how to use these techniques, what they can and cannot show, what are their strengths and limitations. Authorities may either be too

²See CC report, *The supply of groceries in the UK market investigation*, 30 April 2008, where the CC considered some 100,000 emails between suppliers and certain retailers covering a six-week period of dealing.

uncritical, in accepting results they may not fully understand, or they may be too critical and dismiss a piece of analysis too readily on the basis of a superficial defect or criticism which does not really invalidate the general conclusion. There are dangers either way.

Risk to proof

A competition decision rests on a careful and logical assessment of all the relevant evidence, including economic evidence, properly analysed. In making reasoned predictions (as in merger cases) or justified observations (as in market cases) of how a market will behave or is behaving in particular circumstances, the evidence has to support the conclusion. In our case, which I think is fairly typical, we have to show that a particular effect is 'likely'. That involves an important element of judgement, but it is often not difficult to cast doubt on aspects of economic analysis that help to make up the evidence on which that judgement is based. The search for 'proof' in this economic sense risks becoming harder and authorities may become more cautious in coming to conclusions. Competition decisions outside the cartel field rarely rely on direct 'smoking gun' type documentary evidence, and the task of proving a finding to the appropriate standard by reference to economic analysis is always under challenge.

Summary

I will deal separately with the need to be similarly thorough when assessing the effectiveness and proportionality of remedial measures. Let me sum up on thoroughness generally by saying that the scale and weight of the task is increasing rather than diminishing, and the ability to establish the 'likelihood' of a particular finding is both helped and hindered by the availability of voluminous data and sophisticated analytical techniques.

Fairness

It is clearly not enough to come to a good substantive finding. The decision has to be reached according to a fair process that properly recognizes the interests of parties whom the decision affects, and meets generally accepted principles of openness and natural justice. This again sounds straightforward, but it is not. However attractive the proposition may sound, it is never easy to satisfy the procedural aspirations of an aggrieved party where the decision arrived at is not the one they want. The due process line, as they say, has to be drawn somewhere.

Nevertheless we are absolutely committed to fair process. We have recently been given a sharp reminder in the BAA judgment³ just before Christmas that even when there is no suggestion of actual bias in the composition or actions of our decision-making panels, a perception of apparent bias can be enough to taint a decision. Whatever happens on the BAA case itself, we are determined that our procedures should not only be fair but should also be seen to be fair and we shall shortly be announcing a thorough external review of our conflict of interest rules and procedures.

There are two aspects to fairness—fairness as regards the public—in the sense of running an open and transparent procedure, and fairness to the parties—giving aggrieved parties and other interested parties appropriate information and opportunity to present their case. These aspects of fairness overlap, but they can give rise to conflict in relation to the disclosure of sensitive information.

³*BAA Limited v Competition Commission*, judgment of 21 December 2009 [2009] CAT 35.

Let me say also that I believe the CC operates very open and transparent procedures, but even we experience considerable difficulty in this respect.

Public

We think it is beneficial generally to publish as much as possible of the evidence we receive and the material we are considering. This means that all who are interested in our cases can follow their progress and it also acts as an encouragement to good dialogue and discourages people from offering extreme or far-fetched arguments.

For this we mainly use our website,⁴ which is exceptionally informative as to the development of our cases. As well as the documents that we publish at key stages of an inquiry, setting out the issues we are considering and our thinking at the time, we put on the website summaries of evidence received, submissions made, the timetable, our emerging and provisional views and the final report. This laudable practice is subject to two constraints—the need to respect confidentiality of information and other public interest concerns, and the time and resources required to handle this amount of publication.

Paradoxically, our overriding statutory duty is not to publish information arising from an investigation but to withhold it from publication.⁵ We can publish if we think it appropriate for the performance of our functions but we have to have regard to a number of factors, including the commercial interests of the party concerned and the public interest. We take these requirements very seriously and this means that our ‘public’ website will normally contain only non-sensitive material. Unlawful disclosure by the CC exposes individuals at the CC to criminal prosecution. As for resources, we ask the parties concerned to help as much as possible, but the preparation and checking of publishable material is a big burden for the staff teams, albeit a necessary one. It remains to be seen how far we can keep this up.

Parties

The issue of fairness vis-à-vis the parties overlaps with this public transparency need. Essentially we try to tell parties what evidence we are obtaining, how we are assessing it and give them appropriate opportunity during the investigation to understand, assess and respond. Again the issues of confidentiality and public interest can intrude. It may not be possible, for example, to give one party the opportunity to comment on its competitors’ strategic plans. And more general market information may be similarly circumscribed, for example in relation to the individual responses to a customer or supplier survey. And some information may have to be withheld because of some overriding public interest concern. So while we strive, as do all authorities, to give parties a proper chance to comment on the evidence we are using, it is not always possible or appropriate to give complete disclosure.

This is particularly so in relation to our assessments. The CC provides—and publishes—‘provisional findings’ in all its merger and market cases. There is a formal, statutory, right to respond to them and to be ‘heard’. But parties will sometimes argue that provisional findings are in practice near-final and that they must be entitled to comment at an earlier stage.

The first response to this is that in fact the CC is quite prepared to alter provisional findings in response to fresh evidence and has done so in a number of cases.⁶ But we also seek to give the parties not only as much access to evidence as is reasonable and practicable but

⁴www.competition-commission.org.uk.

⁵Enterprise Act 2002, section 237.

⁶See, for example, the recent *Ticketmaster/Live Nation merger inquiry* decision, 22 December 2009 (www.competition-commission.org.uk/press_rel/2009/dec/pdf/56-09.pdf), also *Stagecoach Group PLC/Eastbourne Buses Limited/Cavendish Motor Services Limited Merger Inquiry*, 22 October 2009 (www.competition-commission.org.uk/rep_pub/reports/2009/550stagecoach.htm).

also insight into the thinking of the CC prior to the provisional decision stage.⁷ Parties often want multiple chances to comment throughout our inquiries and indeed we maintain a considerable dialogue by the provision of papers setting out working assessments and by holding oral hearings. The question arises, how intensive and extensive should this dialogue be? It is clearly necessary, and the statute provides for this expressly, for parties to be able to comment on any proposed, or provisional, adverse findings and the evidence on which they are based. But it is less clear they are entitled to comment at earlier stages (as opposed to it being desirable that they should). Indeed, as I have already said, this has to be balanced against the legal requirement to withhold information on the grounds that it is commercially sensitive or on other, public interest grounds.

In the recent *Sports Direct* case⁸ a party appealed the excisions, ie non-disclosure, of some material from a background working paper. The CAT ruled that such a withholding of material could be subject to judicial review. The case is unusual because it is the first under the Enterprise Act where information was withheld on public interest grounds, in this case the need to protect the process of a parallel cartel investigation being carried on by the OFT. If there were to be, as a result of this judgment, a greater number of challenges to decisions to excise information from papers prepared prior to the provisional findings stage, our ability to maintain our present procedures and to conduct a meaningful dialogue with the parties through the exchanges of such material would be at risk. The CAT interestingly said that '[t]he fact that the CC has taken a [reviewable] decision in this case does not mean that judicial review will lie in all cases where, for one reason or another, a decision is disputed'. I hope that that view is maintained. In my view, care must be taken to strike the right balance between the right to have access to relevant material at appropriate stages of an inquiry and the risk that authorities will be more reticent in showing how their thinking is progressing.

Then, once the right to comment on provisional findings has been exercised, how many further opportunities should be granted? Should there be a right to comment on the authority's assessment of the parties' responses—and on its reaction to these comments—and so on? Again the procedural line has to be drawn somewhere.

Possible consequences

These developments, particularly the constant demand to increase the degree of dialogue beyond what is reasonable and practicable do make us wonder sometimes whether our current very transparent and informal practice of sharing much information and thinking with the parties is sustainable. Present practice goes well beyond the minimum standard of fairness and if undue advantage is taken of it the danger is that we will be under pressure to move to a more formal and less generous—although doubtless still fair—way of working. I would very much regret this.

So this is another area where the pursuit of 'perfection' in the form of a generous degree of procedural transparency and discussion might risk preventing us from operating a manageable process.

Timeliness

Both factors I have reviewed so far put pressure on the timetable. Pushing the boundaries of thoroughness takes more and more time; repeated exchanges with the parties take time also. Yet the strong cry from the business and professional community is for speedier

⁷In particular, by sharing edited versions of papers prepared for internal purposes (working papers). Often these papers cover aspects that are significantly refined, or even discounted by the time of provisional findings.

⁸*Sports Direct International v Competition Commission*, judgment of 14 December 2009, [2009] CAT 32.

decisions. We are obviously sympathetic to this, whilst also being a little wary of it as, for some, calls for a speedy decision mean calls for a speedy clearance.

But these are nonetheless real concerns. In merger cases, we are subject to a 24-week time limit at Phase II, with the possibility of an eight-week extension. The OFT at Phase I has a four-month statutory time limit to decide on completed mergers and no time limit for proposed mergers. It strives to apply an administrative timetable of 40 days in all its cases but some cases inevitably take longer. It is possible for the UK merger control process to take up to a year—more if the appeal process is included.

Similarly in market investigations, the combination of assessment and procedural interaction puts continual pressure on the timing of the investigation. Almost all of the CC's nine market investigations concluded over the past six years have run to their full two-year period. And the business community rightly points out that in some of these cases (the *Payment Protection Insurance*⁹ (PPI) case, for example), this period was preceded by lengthy consideration and investigation at Phase I. The question arises whether that duration of official scrutiny is appropriate or sustainable. For our part we have in our most recent annual report¹⁰ announced that we are seeking a reduction of the duration of our market investigations from two years to 18 months, with an optional six-month extension, and will strive even harder to achieve shorter timescales in appropriate cases.

Implications

But consideration needs to be given to strengthening the time discipline at the Phase I stage, both in mergers and markets. It is surely rather anomalous to have a strict timetable at Phase II and a much less strict one at Phase I—and none at all, of course, in any subsequent process of judicial review. So we have a situation where the *BSkyB/ITV* merger¹¹ case has so far taken over three years, the *Groceries* market investigation has taken nearly five years, whilst *PPI*, from the first complaint, has taken 13 years.

The effectiveness and proportionality of remedies

The search for the appropriate balance between thoroughness, fairness and speed has been given extra focus by recent litigation in which our approach to remedies has been attacked by the parties to market investigations and reviewed by our specialist tribunal, the CAT. The implications of these judgments (in *Tesco*,¹² *PPI*¹³ and, most recently, *BAA*¹⁴), are important and we have taken them very seriously.

Now is not the place to go into these cases in detail but the essence of the findings in each of them for today's discussion is that the CAT has confirmed what we already know, which is that when recommending (in the *Tesco* case) or requiring (in *PPI* and *BAA*) a remedy we must not only explain how it will work and why it will be effective, but assess its proportionality, through appropriate cost and benefit analysis, particularly to see that it does not have undue adverse effects.

⁹CC report, *Market investigation into payment protection insurance*, 29 January 2009.

¹⁰See CC Annual Report and Accounts 2008/09, available at www.competition-commission.org.uk/rep_pub/annual_rev_archive/pdf/annual_report_2009.pdf, p6.

¹¹The OFT reported to the Secretary of State (BERR) on 27 April 2007 on the competition issues raised by the case. The CC sent its final report on the *Acquisition by British Sky Broadcasting Group plc of the shares in ITV plc* to the Secretary of State (BERR) on 14 December 2007. The CAT delivered its judgment dismissing the various challenges by the parties on 29 September 2008. The case is currently pending before the Court of Appeal.

¹²[2009] CAT 6.

¹³*Barclays Bank PLC v Competition Commission*, judgment of 16 October 2009, [2009] CAT 27.

¹⁴*BAA Limited v Competition Commission*, judgment of 21 December 2009, [2009] CAT 35.

Again this seems self-evident and we regularly do this, which is why I do not see this as a new requirement. My only concern is that the more time we are required to devote to this, the less time will be available for the other aspects of our assessment, and the greater the overall pressure on our timetable.

We have examined how we might deal with this and conducted a comprehensive review by three CC members who have made recommendations. The results of this exercise have still to be fully assessed internally but it is my intention to publish the recommendations and our response to them as soon as possible. It is already clear that our practice is likely to change significantly with a much sharper—and earlier—emphasis on assessment of remedies and a more equal allocation of the timetable between substantive findings and the assessment of the likely effectiveness and proportionality of any intervention.

This will, of course, come at a procedural price. It will be said that the CC's objectivity is lessened—how can we even contemplate a remedy if we have made no substantive, albeit provisional finding? And won't we have even less time to conduct proper, rigorous economic analysis and discuss the results with the parties?

In the end this is all part of striking the right balance. And these cases serve to remind us that even the finest substantive finding is of little use if no sensible and proportionate remedy can flow from it.

Conclusion

I have tried to describe the challenges strewn in our way as we pursue our quest for a sufficient degree of perfection in competition decisions. There is the 'dragon' of excessive data, evidence and analysis breathing fire over our ability to prove our findings to a sufficient degree of reliability; there is the 'marshy quagmire' of an overly convoluted procedure, with growing pressure to increase disclosure to and engage in dialogue with the parties threatening to drag us down with repeated iterations of assessments and proposed findings. Finally there are the 'siren voices' of delay, enticing us to tarry among their seductive pleasures, and tempting us with the prospect of another survey, another regression, or a further bundle of expert opinions, making it impossible to complete our work in the allotted time. These are dangerous things indeed, much worse than anything King Arthur's Knights ever faced.

We must somehow resist these difficulties and stick to our task. This, I suggest, involves putting some limits on any pursuit of perfection and instead having more pragmatic ambitions. A robust decision based on a reasonable assessment of the appropriate evidence—arrived at by a fair process which provides sufficient opportunity for the parties to engage, and all done within a reasonable time so that the correct and proportionate remedies can be seen to have a reasonable chance of dealing with the problem that has been identified. The adoption of a pragmatic and practical approach, striking the right balance between the various conflicting demands and producing a result that has real utility, should represent a sufficiently perfect solution for all practical purposes, and it is that we should seek to attain.

So a perfect competition decision remains, like the Holy Grail, a somewhat mythical concept. Had King Arthur, and his Knights, in their time, adopted a more pragmatic approach, they might have continued to 'do good', without perishing in the attempt. And had they done so, perhaps Sir Galahad and Sir Perceval, if they ever were alive, would still be alive today.

Thank you.