

Key challenges at the Competition Commission

Peter Freeman

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1. Introduction

I should like to start this lecture by giving my thanks to Margaret Bloom for inviting me to speak. I am a great admirer of the work done by Margaret, Richard Whish and others at King's College London to integrate the academic and practitioner communities working in competition law and policy. I hope that my short talk today will contribute to that worthy cause.

My topic today is the key challenges at the Competition Commission (CC). I will start with a few words about the history of the CC and where we stand now. I will then discuss some particular challenges in the areas of merger control, market investigations and the CC's work in the regulated sectors. If I stopped there, I doubt I should be saying much that has not already been said on many occasions. So I will try to draw some general conclusions about how the CC sees itself as a Phase II authority.

I will not, I regret, have time today to examine what I think is an increasingly important question, which is how competition should relate to other policies and how its message becomes dimmed when other policy imperatives come to the fore. That will have to await another occasion. Let me instead turn to more mundane, but still very real, issues facing the CC.

Where we have come from and where we are now

The Competition Commission will be 60 years old this year. Its history is one of continuity and change.

The Commission dates back to a statute of 1948¹ which established the Monopolies and Restrictive Practices Commission (MRPC). Some of the basic characteristics of the CC have been in place since its formation. The Commission has always been an expert body composed of members and supporting staff, independent of the executive arm of Government, to which significant issues have been referred for a thorough and fair investigation.

However, the Commission has also changed a lot. First there is the name. This has changed from the MRPC, the Monopolies Commission, the Monopolies and Mergers Commission and now the CC. Over the years, the Commission has acquired new responsibilities—for example, we acquired responsibility for merger control in 1965—and also passed responsibilities on to other bodies. For example, in 1956, responsibility for the newly-established system of control for anti-competitive agreements was vested in the Registrar of Restrictive Trading Agreements, from whom the

¹Monopolies and Restrictive Practices (Inquiry and Control) Act, in force 30 July 1948.

Office of Fair Trading (OFT) can trace its origin. Significantly, under the more recent reforms of 1998–2002, responsibility for applying the newly-established prohibition system for agreements and abuses of dominant positions lies with the OFT, subject to the scrutiny of the Competition Appeal Tribunal (CAT), with the CC given the main task of investigating markets.

So one of our key characteristics is longevity and one of our 'key challenges' is how to deal with being so old and well established. One could almost call it 'first mover disadvantage'. The CC must always guard against being set in its ways. But one of the keys to our longevity is our ability to evolve and to embrace change.

Speaking of longevity, my arrival at the CC, in May 2003, coincided with the culmination of a series of rapid changes for the UK competition regime and for the CC in particular. June 2003 saw the entry into force of the Enterprise Act 2002. This completed the work begun by the Competition Act 1998, and set up a new UK system of merger control and a new regime for investigating markets (replacing the 'complex monopoly' provisions of the Fair Trading Act). All this had profound implications for the CC and its work.

First, in general terms, our focus is now on competition. We no longer report on the 'public interest'. Instead, we examine whether mergers lead to a substantial lessening of competition ('SLC test') and whether there are market features which lead to an adverse effect on competition ('AEC test'). Now, one can always argue that this was already largely the case, but making it explicit was a significant step.

Second, our findings are now determinative in relation to these competition matters. Ministers have been 'taken out of the loop' of nearly all decisions in relation to our reports.

Third, we are now responsible for remedying the problems that we have found in mergers and markets, rather than merely making recommendations to the relevant Secretary of State, although there still remains a role for recommendations.

Fourth, to balance the diminution in Ministers' role and given this increase in our powers, our decisions are subject to review by a specialist tribunal, the CAT, and we publish guidelines to help ensure transparency and procedural fairness.

One important, and topical, exception is the control of media mergers. Here we have a hybrid regime, with elements of the old and new systems, whereby the CC is used as a specialist body, whose competition findings are binding, but whose analysis of other public interest issues (such as media plurality) is advisory. One issue that has come up in the BSkyB/ITV merger²—now before the CAT—is the extent and nature of the qualitative investigation that the CC is required to carry out in order to advise on the public interest aspects of media mergers.

The reforms contained in the Enterprise Act, the accompanying increase in the public profile of competition policy, together with strong political backing for competition authorities, combine to increase expectations. We have been given the tools; we are now expected to finish the job—to a very high standard.

So, we are expected:

- to conduct our investigations under a fair and transparent process;

²*Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc*, final report published by the Secretary of State for Business, Enterprise and Regulatory Reform on 20 December 2007.

- to conduct high-quality analysis, looking at all of the relevant evidence; and
- not to impose unnecessary burdens on business and to deliver our investigations to prompt timetables.

These are all, in their way, 'key challenges'. As you can see, there are potentially some tensions between these desirable objectives—in particular, between rigour and timeliness.

In addition, as in many other areas of public policy, there is an increased focus on the impact of the competition authorities' work and measuring the benefits to consumers of our actions. This is perhaps best exemplified by the OFT's PSA target to generate benefits of five times its costs. Such a target is more appropriate to a body such as the OFT, which initiates investigations, than for a second-stage authority such as the CC, whose first duty is to evaluate whether there is a competition problem. However, we also monitor and report on the consumer detriment identified in our investigations, and with somewhat less precision, of our activities as a whole. We put considerable effort into ensuring that our interventions are effective in remedying the problems that we find. Together with the OFT we also carry out *ex post* evaluations of our decisions and the effectiveness of our remedies.³

These remarks set out the background to where we are today. I will now talk about the particular challenges that we face in our three main areas of activity:

- operating an effective system of merger control;
- developing the market investigation regime; and
- integrating our competition and regulatory functions.

2. Operating an effective system of merger control

It is five years on from the Enterprise Act. The CC now has considerable experience of applying the new, improved mergers regime. We have reported on 45 cases, made adverse findings in 21. Another 21 cases were withdrawn and cancelled at an early stage.

In the light of this experience, we are currently reviewing and revising the guidance that we publish on how we conduct our merger investigations. There are two major exercises currently under way.

We are reviewing our *substantive guidance on merger assessment*. We are conducting this review jointly with the OFT, with the intention of producing a combined guidance document applicable to the competitive assessment at both the first and second stages. This will cover the core analytical topics in merger assessment, including what is a merger situation, market definition, the counterfactual, unilateral and coordinated effects and the assessment of non-horizontal mergers.

We are also updating our guidance on *merger remedies*.

This exercise is rather more advanced (indeed we held a consultative seminar only yesterday) and we have recently issued draft guidelines for consultation. The draft guidelines provide a single source of guidance on merger remedies including divesti-

³Extensive information is available on www.competition-commission.org.uk/our_role/analysis/evaluation_reports.htm.

ture, prohibition and behavioural measures. The emphasis of the guidelines is on implementing remedies that are effective and yet minimize burdens on customers, suppliers and merger parties. The document takes account of the CC's experience of implementing remedies in recent years under the Enterprise Act and research into the outcome of remedies.

These are important reviews and I would encourage you to engage with the consultation processes.

I would also like to talk briefly about two current issues in relation to merger scrutiny. These are:

- conducting proper analysis within merger timescales; and
- dealing with completed mergers.

Conducting proper analysis within merger timescales

I talked earlier about the tension between rigour and timeliness. This tension is probably most apparent in merger investigations, for which we have a statutory timescale of 24 weeks (extendable by up to 8 weeks).

Meeting our statutory deadline—which is broadly in line with the timescales for detailed merger scrutiny in the EU and USA—requires us to publish our provisional findings within 13 to 16 weeks. This does not allow a great deal of time for us to complete the necessary, in-depth, fact-based analysis.

We seek to meet this challenge through effective project management and focusing on the key issues and evidence. Recently there has been a trend towards taking the extension for cases with adverse findings. This does not reflect any deliberate policy on our part and we are seeking to pull this practice back and wherever possible stick to the 24 weeks period—or improve on it.

One technique for making best use of the time available is to base the analytical framework for an inquiry upon identified '*theories of harm*'. The phrase 'theory of harm' seems to have become fashionable among anti-trust practitioners in the USA in the mid-1990s following publication of the 1992 US Horizontal Merger Guidelines. While the terminology may be new, the basic concept of theories of harm is not new to the CC or to competition analysis. They are simply the hypotheses that we wish to test during an inquiry: the ways in which a merger (or indeed the features of a market) could give rise to consumer detriment, for example by unilateral, coordinated and/or vertical effects, along with the necessary conditions for each. The use of the term 'theories of harm' does not in any way mean that we already believe that harm *will* arise at the outset of an inquiry or are seeking to pursue and track it down to the exclusion of all else. It only means that we are clear as to the mechanisms by which harm could arise. Testing these theories then becomes the basis of the analysis.

A second technique for bringing greater focus is the use of what may be called '*primary*' evidence, in other words documents and data generated in the normal course of a party's business, outside the context of and probably prior to our—or any other competition regulator's—inquiries. In addition to collecting primary evidence, we normally receive a great volume of evidence from the parties that is deliberately prepared for the inquiry. From our point of view, such prepared evidence, whilst often extremely helpful, can sometimes be less persuasive. Primary evidence gives us insight into how the parties manage their businesses, how they assess the state of competition outside the context of our inquiry and the nature of their corporate

strategy. Obtaining entire datasets or analysing entire documents rather than carefully selected extracts is invaluable in giving us a full explanation of the parties' actions and intentions. For example, in the *Bucher/Johnston* merger⁴ investigation, about road sweeper vehicles, seeing the company's actual strategy documents enabled us to form a much clearer view of the relevant plans than we were able to obtain from the company's submissions.

Both these approaches can bring benefits to the parties to our inquiries as well as to us. Both techniques should reduce the initial size of market and financial questionnaires and also in the case of numerical data the amount of work required to be undertaken in-house to adapt data series to our requirements. We are, of course, aware of the need to protect legitimate business secrets to an appropriate degree, and we take confidentiality extremely seriously.

Dealing with completed mergers

My second live issue is ensuring that we have the ability to deal adequately with completed mergers. The UK merger control system is unusual by international standards, in that firms are not required to pre-notify the competition authorities of qualifying mergers. A high proportion of the mergers considered by the CC are completed mergers: of the 66 merger references since the Enterprise Act came into force, 26 (just under 40 per cent) related to completed mergers and completed mergers make up more than half of all cases in which the CC has made a final decision.

We apply the same criteria to all mergers. However, completed mergers raise practical challenges which make the investigation more burdensome both for merger parties and the CC.

One aspect of this burden is interim measures. The CC has taken an increasingly firm line on interim measures, to ensure that we retain the ability to achieve effective divestment remedies. To this end, we generally obtain interim undertakings for all completed mergers. We may also require the appointment of a hold separate manager and will often also direct the parties to appoint a monitoring trustee or technical monitor, to ensure that any interim measures are effective. The CC's approach in this area has been upheld by the CAT in the *Stericycle* case.⁵

Another problem with completed mergers is that firms which have already completed a merger may not feel the need to achieve an efficient and timely divestment in the event of an SLC finding. This has been very clear in a number of cases and is in addition to all the difficulties arising from 'hold separate' issues in this instance. We have required the appointment of a divestiture trustee in three cases (*Somerfield*,⁶ *Tesco Slough*⁷ and *Stonegate/Deans*⁸). All of these were completed mergers.

The UK regime of no compulsory pre-notification allows the flexibility for firms to complete mergers, even if they raise competition concerns. But whatever may be said about the advantages that the prevalence of 'voluntary' pre-notification confers

⁴*Bucher Industries AG/Johnston Sweepers Limited: a report on the acquisition by Bucher Industries AG of Johnston Sweepers Limited*, 15 September 2005.

⁵*Stericycle/CC*, CAT judgment of 19 September 2006.

⁶CC report, *Somerfield plc/Wm Morrison Supermarkets plc: a report on the acquisition by Somerfield plc of 115 stores from Wm Morrison Supermarkets plc*, 2 September 2005.

⁷CC report, *Tesco plc and the Co-operative Group (CWS) Limited: a report on the acquisition of the Co-operative Group (CWS) Limited's store at Uxbridge Road, Slough, by Tesco plc*, 28 November 2007.

⁸CC report, *Clifford Kent Holdings Limited and Deans Food Group Limited: A report on the completed merger of Clifford Kent Holdings Limited, parent company of Stonegate Farmers Limited, and Deans Food Group Limited*, 20 April 2007.

on businesses, the fact is that parties are in practice completing, or seeking to complete, a significant number of problematic mergers without, or before, obtaining the approval of the OFT and/or ourselves. The CC will continue to take the necessary steps within the system as it stands to ensure that the flexibility of a voluntary system does not hinder effective merger control. But the experience of the system since 2002 strongly suggests that another look needs to be taken at moving to compulsory pre-notification so that we are not constantly having to 'unscramble the eggs'.

Conclusion on mergers

I have highlighted two current challenges in merger control that specifically face the CC, as a Phase II authority. However, the operation of the UK merger regime is the joint responsibility of the CC and the OFT and the most important challenge is making the system as a whole work well. Our joint work on merger guidance is a good example of how the two organizations can work together, while respecting our distinct roles, a point to which I shall return.

3. Developing the market investigation regime

Our second major area of work is market investigations. These take between 18 months and two years to complete, and are in-depth, determinative investigations into sectors of the economy. We have completed six market investigations to date with a further three investigations ongoing.

Scope of market investigation regime

Market investigations have a broad scope in terms of subject matter. They enable the CC to look in the round at markets and where it may be thought that competition is not working well. It is clear from the White Paper that preceded the Enterprise Act and the discussions around its implementation that market investigations were seen as an important addition and alternative to the prohibition system established by the Competition Act and later extended to include Articles 81 and 82. This is in part because the AEC test is cast in terms that, whilst recognizable in general competition law, are broader than the normal prohibition concepts of agreement, concerted practice, dominant position and abuse. The AEC encompasses all these matters, but goes much wider, extending, for example, to vertical effects, structural issues, tacit coordination or non-collusive oligopolies.⁹ And the emphasis is very much on diagnosis and cure rather than prohibition, punishment and deterrence.

The scope of the market investigation regime can be shown by looking at three of the cases that we have completed to date.

Liquid petroleum gas

The first case is *Liquid Petroleum Gas (LPG)*.¹⁰ This concerned a small oligopolistic market, with four suppliers accounting for around 90 per cent of domestic bulk LPG in Great Britain.

⁹The situations that market investigations can capture include: unilateral effects; coordinated effects; vertical effects; inefficient equilibria; Government barriers to entry; and informational failure. This is based 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.

¹⁰CC report, *Market investigation into the supply of bulk liquefied petroleum gas for domestic use*, 29 June 2006.

The basic competition problem here 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. There was no finding of dominance or abuse; and no tacit coordination or explicit collusion. It was simply that it was too hard to change suppliers, and suppliers took advantage of that situation. The remedy, therefore, was to allow the transfer of the incumbent supplier's tank to the new supplier.

Home credit

The second case is *Home Credit*.¹¹ Home credit loans are cash loans for small sums.¹² Loans are repaid, generally over a period of around a year or less, in weekly instalments collected by agents from the customer's home.

The CC investigation found an almost total lack of price competition. The CC found no evidence of collusion, but price competition was so weak that even tacit coordination would have been unnecessary. In part, this lack of price competition arose from the difficulties faced by customers when seeking to compare price and the relative importance placed by customers on credit availability rather than price. 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 adopted were a requirement to share customer credit histories with the main credit reference agencies, and a website to enable price comparisons, as well as changes in early settlement rebates.

Classified directories

The third case is *Classified directories*,¹³ where the main competition issues were structural. Of all the market investigations concluded to date, this was closest to a monopoly inquiry and to the kind of situation that can lead to Article 82 proceedings. 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.¹⁴ While this investigation centred

¹¹CC report, *Home Credit*, 30 November 2006.

¹²The CC found that 70 per cent of home credit loans were for less than £500.

¹³CC report, *Classified Directory Advertising Services*, 21 December 2006.

¹⁴MMC report, *Classified directory advertising services*, HMSO, Cm 3171, March 1996.

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, which had originally sold Yell’s business). Price controls were therefore retained, although on a diminishing basis.

As you can see just from these three examples, the market investigation regime can address a broad range of competition issues. The differences between the markets currently being investigated by the CC—*Rolling stock leasing*, *Airports* and *Payment protection insurance*—emphasize this point still further. The three examples show how the markets regime can address situations such as switching costs, entry barriers, information failures and network effects that are much harder to handle under prohibition systems. It also has the merit of looking ‘in the round’ at all of the competition issues in the markets we investigate.

Remedies in market investigations

Remedies represent a key test of the market investigation regime. Experience to date suggests that the framing and implementation of remedies is at least as important as coming to the right substantive finding. 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—for example, how should one remedy tacit coordination? Competition requires willing and able competitors and (preferably—but not necessarily) active and informed customers.

Of course the CC cannot force people to compete. Nor, by the way, can any other competition authority and the problem of the horse, taken to the water, that will not drink is common to all systems. Look, for example, at the continuing issues over the enforcement of the European Commission’s remedies in the *Microsoft* case. But we can seek to put in place measures that create a more competitive market structure, which 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.

It is sometimes said that the markets regime is only there to deliver *structural solutions* and that if it does not do so it has in some way failed. It is certainly the case that remedies might involve a structural solution (eg a divestment of assets or the break-up of a dominant player). And it is true that structural remedies attract attention and are seen as a more intensive and decisive intervention. One has only to see the media reaction to the CC’s Emerging Thinking in the Airports market investigation,¹⁵ which suggested that BAA’s ownership of its airports might be giving rise to an AEC. But this is to mistake the way the regime operates. When divestment is appropriate to remedy the AEC found, it will be required. When it is not, we will look to other measures. There is no automatic bias towards divestment.

¹⁵BAA Airports, Emerging Thinking, 22 April 2008.

Remedies that *reduce barriers to entry or expansion* can create a more competitive market structure indirectly. For example, in the *Home Credit* case, we required lenders to share customer data through credit reference agencies. This gives 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.

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 and able to switch to rivals' products.

Our investigation into *Northern Ireland Personal Current Accounts*¹⁶ shows how information remedies can work. Our finding here 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.

So, the CC 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. The remedies that we put in place in Northern Ireland were largely accepted by the independent reviewer of the UK Banking Code and are contributing to changes in personal current accounts to the benefit of banking customers across the UK as a whole. I read a criticism recently that this case would better have been dealt with under 'normal competition law'—ie Articles 81 or 82. But I cannot see how those articles would have delivered remedies of the kind we are able to require.

We can also make recommendations to the Government, as to how the *regulatory environment* could change to bring about more competitive outcomes. We cannot bind the Government to accept our recommendations, though there is a standing commitment from the time of the Enterprise Act to respond to our recommendations within 90 days. The most significant recommendations that we have made to date are in our *Groceries* report, where we recommended among other things the inclusion of a 'competition test' in planning decisions on larger groceries stores, and an Ombudsman to enforce the Grocery Supply Code of Practice.

All the above measures are aimed at introducing greater competition where this is feasible and desirable. We can also impose *measures to control outcomes*, for example price caps, to address the harm to customers in situations where there are no competition-enhancing measures that would be effective. For example, in the *Classified directories* case, the CC opted to continue with 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.

¹⁶CC report, *Personal Current Account Banking Services in Northern Ireland*, 15 May 2007.

So, we have the powers to put in place a wide variety of remedial measures, to match the broad scope of the problems that we may find.

Conclusion on market investigations

I should like to make a few more general comments about market investigations.

My first point is that this is still a relatively young regime. Lessons from the previous Fair Trading Act cases are of limited relevance and even five years in, it is much too early to judge whether the system works effectively. This is partly because not enough time has passed to assess the impact of the remedies so far implemented, and partly because there is no obvious coherent pattern to the cases so far referred, although a trend towards greater size and importance is apparent.

My second point is that market investigations are necessarily heavy. Criticism that they take up time and resources misses the point. But remember that their duration is not over-long by international standards, the maximum of two years is fixed by statute and they always involve a tension between the three requirements of speed, thoroughness and fairness.

My third point is that the effectiveness of the market investigation regime relies in large part on the selection of appropriate cases for in-depth investigation. This is a key challenge for others, rather than the CC, and whilst I fully recognize that this is easy to say but hard to implement, it is essential that this challenge is met and I shall return to this point.

Finally, there is a contrast between the 'market-improving' remedies that a market investigation may give rise to and the operation of prohibition systems, with the capacity to punish. Obviously, punishment and deterrence play an essential role when there is a clear breach of a clear rule. But prohibitions and fines can be a blunt instrument and will not be able to address all competition failures effectively. Not only are there limits on the amounts that can reasonably be imposed but prohibition and deterrence focus on behaviour rather than on market structures and on barriers to entry problems which may still need to be addressed even after the fines have been paid.

It is a key challenge for UK competition authorities to maximize the effectiveness of the competition regime as a whole, by choosing the right tool for the job.

4. Integrating our competition and regulatory functions

I would now like to turn to our work in relation to the regulated industries. This is a very important part of the CC's role.

Each of the regulated sectors has its own regime and the CC's role varies from sector to sector.

For each of the main regulated sectors (water, energy, communications, rail, postal services and airports) the CC has the task of deciding issues of price controls or changes to other licence terms. In the case of airports only, the regulator is required to obtain a report from the CC before deciding (in principle every five years) on prices for designated airports. In all other cases, the CC is involved only where there is disagreement. For Ofcom decisions on telecommunications matters, exceptionally, the Communications Act provides that an appeal lies direct to the CAT, but the CAT has in turn to ask the CC to decide on price control aspects of such appeals. The CC

has a new and specific adjudicatory role on appeals against Ofgem's decisions on modifications to energy codes for gas and electricity. Operating under so many different legal frameworks calls for some flexibility in our procedures—for example, in Energy code modification appeals, we operate essentially a court procedure, rather than conducting private hearings.

Investigations in sectors subject to economic regulation—whether under general competition law or specific regulatory powers – are making a significant contribution to our current caseload. On the regulatory side, we are carrying out a price determination review for *Stansted Airport* (having just finished one for *Heathrow* and *Gatwick*) and are at the CAT's request deciding pricing aspects of the current appeal on mobile phone termination charges. We conducted our first appeal on an energy code modification last year.

Of course, sectoral regulators have concurrent competition powers and we are also conducting two market investigations in regulated sectors under the Enterprise Act (into *Airports* and *Rolling stock leasing*).¹⁷ There appears to be an increased awareness among economic regulators of their powers under the market investigation regime in addition to their other competition powers. For example, Ofcom accepted the 'Openreach' undertakings from BT in lieu of a market investigation reference; Ofgem is investigating domestic energy markets; and Ofcom is looking at PayTV; in each case under the EA02 market investigation framework.

In addition, and simply as a happy (or unhappy) coincidence, three of our most significant merger investigations (*BSkyB/ITV*,¹⁸ *Mid-Kent Water/South-East Water*¹⁹ and *Macquarie/National Grid Wireless*²⁰) over the past 12 months have also considered mergers in regulated sectors.

I see our work in the regulated sectors as absolutely central to the CC's activities. I would highlight two challenges.

Fulfilling the role of a second-stage authority

The first challenge is for the CC to ensure that we continue live up to the reason for our involvement in the regulated sectors. We bring two fundamental qualities to the UK system of economic regulation. First, we bring the focus and discipline of a competition authority to regulatory issues, which means that we are always alive to the potential tensions between competition and regulation. Second, we provide a fresh pair of eyes from a knowledgeable outsider and, in our market investigations, can stand back and look at the regulatory system itself. The key challenge for us is to conduct thorough, authoritative and expert investigations, while maintaining that sense of perspective, which is—in my view—our fundamental contribution to the UK regulatory regime.

The occasional nature of CC involvement

The second challenge concerns the occasional nature of our involvement in regulated sectors. Until the recent flurry of cases, no regulatory references were made to the CC since 2002, when we were asked to examine mobile phone termin-

¹⁷The *Airports* investigation is on reference from the OFT, although relating to a regulated sector, as the CAA, exceptionally, does not have the necessary concurrent competition jurisdiction.

¹⁸CC report, published by the Secretary of State for Business, Enterprise and Regulatory Reform, 20 December 2007.

¹⁹CC report, 1 May 2007.

²⁰CC report, 11 March 2008.

ation charges and carried out the previous quinquennial reviews into the major London airports and Manchester Airport. This creates a practical challenge for the CC in maintaining the capacity within the organization to conduct expert investigations, given that we may have little or no involvement in a sector for a decade and then be called upon to produce a report of strategic importance to the industry.

A more fundamental issue is whether the regulatory system, taken as a whole, has a built-in tendency to avoid references. It is worth noting that our current regulatory references are either mandatory (*Airports*) or are under very specific regimes (*Mobile Phones, Code Modifications*). I can see that from the perspective of an economic regulator, there are some good reasons not to have cases referred to us. CC investigations take time, cost money and risk reputational damage if a regulator is perceived to have 'lost', in the sense of not having achieved their desired outcome. These considerations apply as much to regulated companies as to the regulators. But all the regulators need to be able credibly to threaten a CC reference if they are to achieve any sort of settlement which is worth having. The longer a sector goes without a reference, the less credible that threat becomes, and the more the regulatory system as a whole comes under scrutiny and pressure. I can do no better than cite the recent recommendation of the House of Lords Select Committee on Regulators '... where possible, utility regulators should work to bring more cases to the competition authorities and that the regulators should work to ensure that the case most likely to establish useful precedents are brought to the CC' (paragraph 6.26)²¹ and the Government's response '... the Government agrees with the Committee that regulators should be encouraged to think about whether they can be more pro-active in using competition law, including market investigation references to the Competition Commission' (paragraph 1.22).²²

5. Conclusions

So let us try and pull this together. I have described where the CC 'came from' and what it is meant to be doing under the new merger and markets regimes set up in 2002 and in relation to regulatory matters. I have pointed to the conflicting pressures of thorough and focused analysis in a fair and open procedure subject to strict time limits; and to the need to apply remedies that offer the prospect of restoring or maintaining (or, in the case of market investigations, even increasing) competition where significant problems have been identified. These are all very significant challenges and indeed we confront these every day. But they are not very different from those faced by all authorities applying competition law. In the UK we have a particular challenge, which is to make the present institutional structure deliver the best results for consumers, businesses and the economy generally. The two specific issues are the effective use of resources and the appropriate level of intervention.

Effective use of resources means making sure that we avoid unnecessary duplication of effort as cases work their way through the system and deploying people and activity where they are most needed. In the case of *mergers* this means more clarity about the respective roles of the OFT and ourselves, more transparency as to evidence relied on and analysis deployed, and more harmonized activity. This is precisely why we are pressing on with joint CC/OFT merger guidelines. For *markets*, although the read-across is not exact, similar considerations apply. A CC market

²¹House of Lords Select Committee on Regulators, 1st Report of Session 2006-07 *UK Economic Regulators* HL Paper 189—I, 13 November 2007.

²²Her Majesty's Government's Response to the House of Lords Select Committee on Regulators Inquiry 'UK Economic Regulators', 31 January 2008.

investigation should follow from a clear and transparent Phase I process (whether by OFT or a sectoral regulator) as the Enterprise Act itself envisages.

Appropriate level of intervention follows from this. The effectiveness of the CC's two-stage process depends on the right cases being selected for the inevitably heavier scrutiny that a CC investigation can bring to bear. So the characterization and selection of cases is key, both in mergers and in markets. In *mergers*, cases that involve complex assessment of evidence or where the issues need careful examination and debate will tend to be those referred to the CC.²³ In *markets*, the scale, and complexity of the sector, the intractability of the issues and the importance for the economy as a whole are key influencing factors.

Now it may be said, what does the CC bring to all of this, and why is a two-stage, two-authority approach needed at all? After all, would a single competition authority not eliminate the risk of duplication and waste, save time and lead to better deployment of the limited resources available to combat those who wish to damage competition? And, rather than markets, should the emphasis not be on cartel enforcement, where the CC has no role to play?

My response is this.

First, a two-stage examination, with an assessment of the *prima facie* case followed by a more detailed consideration, is a good way to deal with competition cases in any event, and is followed by authorities all over the world.

Second, if you are to have a two-stage process, the existence of a separate, established, Phase II authority is a huge advantage. Separation of powers overcomes many of the common criticisms that the administrative procedure, normal in Europe, combines the role of investigator, prosecutor, judge and jury. The value of a fresh look at the issue, albeit fully conscious of what has gone before, by a decision-making group to which the parties have direct access, is very great. This is not to say that the two authority model should be universal. Far from it. But the fact is that in the UK we have such a model and it would seem odd not to take full advantage of it.

Third, it is obviously true that investigating and punishing cartels is a central plank of competition enforcement. But it is not the only plank. As I said earlier, you still have to address the question of how to make competition effective after the fines have been paid. Being tough with cartels does not remove the need to investigate markets that do not work well for consumers, and the UK system explicitly recognizes that.²⁴

Finally though, I do accept that the UK two-stage system cannot honestly be defended if it cannot be made to work properly. And here indeed the CC does face a challenge as its contribution to actual casework is entirely in the hands of others. The CC is a major contributor to the UK's competition enforcement system, but it depends entirely on others to send cases to it. The CC was not created to write guidelines or make significant contributions to competition policy development at national or international level, fascinating though these tasks are. No, the CC was created to do cases—to conduct significant and useful investigations. I am concerned that if full use is not made of the CC's expertise and experience, competition enforcement in the UK may not be as effective as it could be. So whilst it is true that this is a

²³Small problematic cases where there is no obvious solution at Phase I will also tend to be referred—but are frequently cancelled if so.

²⁴This is not to belittle the importance of Article 82. But similar questions arise as with Article 81 as to the effectiveness of the prohibition of abuse of dominant position on the development of competition conditions in the market.

challenge for the CC, it is also a challenge for those on whom the system relies to select and refer appropriate cases to us for examination.

I fully appreciate and have referred to the strong pressures on all authorities to deal with issues within their own organization. But I would also point to the risks involved in this approach. The CC is there to be used, for the public good, and we should all strive to make the best possible use of the immensely strong competition enforcement system that we have in the UK.

Thank you for your attention.