

**SPEECH AT THE COMPETITION FORUM—2 DECEMBER 2008  
PETER FREEMAN, CHAIRMAN, COMPETITION COMMISSION**

**Competition policy and interesting times—the role of the CC**

The rather hackneyed title I have chosen for my speech today refers to ‘Interesting Times’ and we could, without difficulty agree that we are, indeed, living in interesting times. The origin of the phrase ‘May you live in interesting times’ is often ascribed to an unnamed (and apparently unknown) Chinese philosopher, but it appears more likely to be traceable back only to a British diplomat in pre-war Shanghai. In fact, of course, this very plastic title was chosen to give me some flexibility to deal with whatever issues were current at the start of December—which we have now reached.

So let me now turn to more serious issues. From our perspective at the Competition Commission (CC), what are the key challenges at the moment?—Challenges to competition, to competition policy and to the position of the CC.

First, let me ask the question, after ten years of the current competition law regime since the Competition Act 1998 (and later the Enterprise Act 2002) came into force, can we be satisfied with where we are? Or are we witnessing a turning of the tide? Is the honeymoon over, and are we entering a phase where the merits of competition law and policy are no longer part of the political consensus and may be at risk of being swept away by a tidal wave of financial and economic distress?

Second, if we look at the competition system in the UK in particular, based on the Enterprise Act 2002 and the Competition Act 1998, how well is it coping with the current pressures? Does it (still) deliver what we expect from it?

And finally, I will examine the current pressure points for the CC, what lessons we can learn and what changes will allow us to withstand these pressures and to move forward.

Let me first deal with the broad question—is the honeymoon over?

It is helpful to weigh up the plus and minus factors here. In the UK, we have been in the lucky position of having had a broad consensus that competition policy is beneficial for economic efficiency and for enhancing welfare. There has been general agreement that competition benefits the economy and consumers. This has become clear over the last decade and was re-emphasized by the Secretary of State at the CC’s Anniversary Dinner last week. There are some obvious examples to illustrate this.

Internationally, the UK took the lead in privatizing utilities and the approach was very much a bi-partisan one. Competition and consumer choice in telecommunication services and other public utilities are things that we now take for granted. The days when you waited 6 months to obtain a telephone are long gone.

The 1998 Competition Act introduced competition prohibitions modelled on Articles 81 and 82 of the EC Treaty. It made it clear that these practices were, save in specific and closely-defined circumstances, illegal, and a change of this magnitude was only possible because of the policy consensus.

The Enterprise Act 2002 was no less than a complete relaunch of the UK's system for controlling mergers and markets. Ministers were largely taken out of the process and, instead, independent competition authorities, that is the Office of Fair Trading (OFT) and the CC, were given the power to take decisions.

That all sounds very positive and if this were the whole picture, one could assume that the competition authorities' job was all plain sailing. I am not sure that this is the case. There are other, possibly adverse, influences which may lead us to conclude that the overall picture is slightly less rosy. For example, in the utility sectors, are we entirely happy with the outcomes achieved so far? Some have argued that deregulation and increased competition have led not only to price reductions, but also to a degree of underinvestment in capacity.

And, in some sectors at least, even those price reductions look illusory and the messages to consumers in relation to competition and prices can appear contradictory. There is an expectation that competition will lead to low prices for consumers—surely, that is one of its main benefits? It can be very difficult to communicate to the public that, in the short run, competition might actually lead to high prices.

Within the EU, it seems that protectionist tendencies and the issue of 'national champions' remain topical. How should states deal with and react to 'asymmetric' competition (where other markets do not match the EU's freedom)? Is it beneficial to open up EU markets, even if other states do not reciprocate?

How is competition law and policy interacting with other policy imperatives? Recent CC inquiries have made it clear that not everyone views competition as the answer to all questions. A good example is our *Groceries* investigation,<sup>1</sup> where many pressure groups and some members of the public voiced their concerns that competitive markets may result in unfavourable 'externalities', such as binge-drinking, the extinction of the 'small corner shop' and fundamental change in the 'high street'. Viewed in this way, competition policy can be seen by some as irrelevant to the major policy issues that we face. Other policies, such as those tackling climate change, and more recently, financial stability, can appear much more important, and competition policy faces particular challenges in an economic downturn.

It has become clear from the recent Lloyds TSB/HBOS<sup>2</sup> case that, when faced with the danger of systemic collapse, many will say that safeguarding financial stability should override concerns about restrictions on competition. There is now a new public interest criterion for 'financial stability' and the Secretary of State can issue an intervention notice pursuant to the Enterprise Act 2002 enabling him to retrieve the power to decide whether a banking merger should be prohibited and to balance competition issues against those of financial stability. This case is, however, currently before the Competition Appeal Tribunal<sup>3</sup> so I will not comment further.

What does all this mean for the competition authorities? We clearly have a big challenge. Do we retreat? Or do we advance? I suggest two things. First of all, there is no point in pretending the challenge does not exist. Just carrying on as if nothing was happening is not a sensible course. We must therefore be pragmatic in our activities, recognizing that economic circumstances and the difficulties that are currently being experienced will affect what is the right thing to do in particular cases. I will say a little more on that later.

---

<sup>1</sup>CC report, *Market investigation into the supply of groceries in the UK*, 30 April 2008.

<sup>2</sup>*Anticipated acquisition by Lloyds TSB plc of HBOS plc*, OFT report to the Secretary of State for BERR, 24 October 2008; *Decision by Lord Mandelson, the Secretary of State for Business, not to refer to the Competition Commission the merger between Lloyds Group TSB plc and HBOS plc under Section 45 of the Enterprise Act dated 31 October 2008*.

<sup>3</sup>*Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform*, Case No: 1107/4/10/08.

But what we must not do is retreat on the principles of competition. Those who support competition must speak up for it, and this includes not just agencies such as ourselves, but also competition practitioners. There is a real danger that we will otherwise lose the benefits of a free and competitive market economy, with all the damage that will follow. We should take care not to 'kill the goose that lays the golden egg'. The state has taken on important new economic functions recently. It will probably want to step back from these as it decently can.

Let us now turn to the second question—how is the UK system faring?

As you know, the system of competition law in the UK covers the prohibition of cartels, private enforcement, merger control and the control of market power, either through control of abuse of dominance or investigation of markets.

First, **cartels and private enforcement** are not my field of responsibility. From the CC's point of view, effective anti-cartel policy and redress through private enforcement are important elements of effective competition policy and we support the OFT's efforts in this regard. They are not the whole story though.

Second, **mergers**. I am not going to speak at length about this today—I have talked about this at some length recently and the speech is now published on the CC's website. Essentially, the system is well-perceived, not least internationally, and the basis of analysis is not in doubt. There are usually no complaints that we get the answer 'wrong' but there are sometimes complaints that it all takes too long and is too burdensome. We are currently drafting new joint OFT/CC Substantive Merger Guidelines<sup>4</sup> and this also gives us (and the OFT) an opportunity to implement some process improvements. Wherever possible our focus is on reducing the overall 'burden on business' without losing sight, however, of the fact that we are here to protect consumers. From our perspective, one problem with the current system is that we are receiving too many completed mergers, which raises all sorts of problems of implementation both during the investigation and in the case of an adverse finding.

Our focus is very much on 'delivery'. We aim to make robust decisions, which are predictable and which are reached in good time.

Of course, there are two 'stages' to merger control.

At the CC stage, it is always going to be a challenge to deliver provisional findings in much less than 3 months. Of course, this could be done in less time, but it would come at a cost. The CC would have to sacrifice either a significant part of its analysis or a key procedural stage, and both aspects are usually commended. Also, finding the most appropriate remedy can be difficult and, in many cases, this is further compounded by having to apply remedies to completed mergers, to which I have referred. We have just issued revised merger remedies guidance.<sup>5</sup>

Just a few words on the OFT stage.

The main points to note here are (a) the recent development of a more predictable *de minimis* regime; (b) greater use of undertakings in lieu of a reference; (c) the danger of dissipation of resources from operating a voluntary system and (d) the difficulty of striking the appropriate balance between Phase I and Phase II. Following the *IBA Health* case,<sup>6</sup> the OFT is now effectively doing 'Phase 1½'. In the interest of overall Phase I/Phase II balance,

---

<sup>4</sup>More information is available on [www.competition-commission.org.uk/about\\_us/our\\_organisation/workstreams/analysis/cc2\\_review.htm](http://www.competition-commission.org.uk/about_us/our_organisation/workstreams/analysis/cc2_review.htm).

<sup>5</sup>CC8, Merger Remedies: Competition Commission Guidelines, November 2008.

<sup>6</sup>*IBA Health Limited v Office of Fair Trading*, Court of Appeal judgement of 19 February 2004.

it may be desirable to distinguish obvious Phase II candidates and refer them to the CC as quickly as possible. The possibility of statutory time limits at Phase I level could also be considered. We continue to work with the OFT on these points.

Let me now turn to **markets**.

A key element of the Enterprise Act 2002 policy was the relaunch of Market Investigations as an instrument. There were high expectations but the experience of the nine cases so far suggests that all may not be well. From the CC's perspective, it has become clear that correct case selection is the key to the success of the system. It cannot be right, for example, for the CC only to receive cases where the referring body can already foresee the outcome. That would negate the whole purpose of an empirical in-depth investigation by the CC. Then there is the issue of scale. Some markets are very large. Is it really necessary to investigate all aspects, or is there room for some more focus? Then there is the question of length. The two-year time limit is a useful discipline, but there is also a tendency for the CC to expand its assessment to fill the time available. As with mergers, in the interest of overall efficiency of the regime, there is a need for greater time and scope discipline. The CC and the OFT are currently working together to achieve better case selection and characterization and to keep investigations within a reasonable scope and acceptable time limits.

The relationship between Market Investigations and the Market Studies regime is also ambiguous. Some Market Studies are effectively Phase I of a CC Market Investigation, but some are not.

So that is the UK system in summary. But it may be helpful to look back to the wider issue—how does competition 'fit' with other policies—and to consider how the CC itself should approach the position.

The CC's 60<sup>th</sup> birthday reminds us that it began as a body charged with assessing 'the public interest'. This implies that competition is just one issue to consider alongside others. How to balance competition against other policies came to the fore in the CC's *Groceries* investigation, but it has always been present to some degree. *HBOS/Lloyds* is only the latest example of cases where striking this balance has been at issue. We are not taking the CC back to being a public interest authority. Those days are gone. But I go back to what I said earlier:

- We should not deliberately compress our competition analysis into a narrow straitjacket. Instead, we should stretch the boundaries as far as possible to take into account the realities of the market, particularly when it comes to applying remedies.
- Where there is a conflict between competition and other policies, I believe that, so far, the UK regime is holding up fairly well. We have seen how, in relation to merger control, the system provides a mechanism to enable any balancing of issues to occur within a clear statutory framework.
- When the conflict between competition and other policy imperatives cannot be internalized (as in *Groceries* where the other issues were not 'relevant' public interest considerations in the sense of the Enterprise Act), then it is for the competition authorities to explain clearly the case for competition-based measures and not to abandon the cause just because 'times are hard'. Ultimately the trade-off will be for Government to make. In a democracy this is clearly the best solution, which ensures that there is transparency of how the balance has been achieved, as well as accountability to Parliament.

Let me conclude.

Credibility of competition enforcement must be maintained in the face of economic downturn. This is best achieved by a combination of soundly-reasoned, evidence-based decisions and fair process. We must resist the temptation to react to any squeeze on resources by retreating into a 'Star Chamber' approach, however soundly based it may be intellectually.

Nevertheless, in 'Interesting Times' we may also need to show flexibility and common sense. It is necessary to recognize the limits of a purely competition-based approach and, within the statutory framework, be willing to work pragmatically for improvements to markets.

It is essential to ensure that the institutions are securely based and able to carry out their functions. For their part, the institutions should be open, transparent and willing to discuss their roles and how they mean to fulfil them. Competition 'enforcement' requires support and participation of the professional and advisers' community. Deterrence and casework alone cannot achieve across-the-board compliance—this must ultimately be attained through understanding and consent. So, while benefiting consumers and their interests will remain the object of the system, it cannot work without the active participation of business and its advisers. That task is for you, as much as for us.

In my view, the future of successful competition enforcement lies in ensuring that this participation occurs more through dialogue and trust between the authorities and the business and advisers' community than through confrontation and fear—although from time to time some confrontation will be inevitable!

Thank you for your attention.