

Competition Policy—A Process of Constant Renewal

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Introductory remarks¹

Mr Chairman, Ladies and Gentlemen

It is a great honour and privilege to be invited to address you today. It is also a pleasure to contribute to this series of lectures established by the Competition Commission of Singapore (CCS). This helps to show the support of the UK Competition authorities for all that the CCS is doing. Indeed, we watch with admiration the developments in Singapore and I congratulate Mr Lam and his colleagues for what they have achieved so far.

Today I want to talk about change and renewal.

Sir Winston Churchill said, 'To improve is to change; to be perfect is to change often.' My theme today is the importance of appropriate change in the context of a competition regime. Change in this sense means recognizing and retaining clear strengths whilst not being afraid to make changes to eliminate weaknesses and improve performance. The aim is to ensure that the regime remains effective and efficient against a background of continuing economic and social change.

I will begin by considering the evolution of the UK's competition regime. The two UK competition authorities, the Office of Fair Trading (OFT) and the Competition Commission (CC) have a long history. But there have been significant changes within the last decade. This means that we are still gaining experience of a new framework that places competition tests, rather than broader public interest tests, at the heart of what we do. The historical experience of the OFT and the CC is very valuable. But the present UK competition regime is actually less than ten years old.

Whilst on the surface there may appear to be some significant differences between the UK authorities and the CCS, not least in terms of their ages and histories, they have much in common. Each operates a new competition policy regime and they have much to gain from sharing their experiences.

In addition to the benefits we can gain from learning from each other's experiences, I will explain why I believe strongly that all competition regimes should be subject (or subject themselves) to a constant process of self-criticism, review, updating and improvement—the constant renewal of my speech's title. It is not something we should do occasionally when our workload permits, it is something we should expect to do as a matter of course as an essential part of our functions.

Having outlined these general points, I will then try to draw some specific lessons from the experience of the CC. I will concentrate on the CC, rather than the OFT, for obvious reasons of familiarity. This is not because there are not other, equally important lessons to be learned

¹I am most grateful to Caroline Wallace and Carole Begent of the CC's staff for their contributions to the preparation of this talk.

from the UK's application of the Competition Act prohibitions and of Articles 81 and 82 of the EC Treaty. But they are for others to present.

The CC has recently undertaken a review of its people and processes, and I will explain the results. One of the outcomes of this review which I would like to share with you is a set of proposals for sharpening our focus on the relevant evidence during our inquiries. Another issue has been the need for effective timetabling and how to impart a sense of urgency to the businesses we are investigating. Their incentives to cooperate with us may at best be described as mixed. This is particularly so where parties may benefit significantly from delays in applying our remedies.

I shall also discuss some issues that arise with merger control; particularly with mergers that have been completed before our investigation begins. Our merger regime (in common with Singapore) does not require compulsory pre-notification of mergers to the competition authorities. This has created some challenges for us in terms of the number of completed (as opposed to anticipated) mergers that are referred to us for investigation, with the consequential need for interim 'hold separate' undertakings and the increased risk of the main parties facing the sometimes significant costs of implementing structural remedies in the event of an adverse finding.

I will then say a few words about the UK's market investigation regime. This regime works in parallel with the prohibitions against anti-competitive agreements and abuse of a dominant position in the UK and allows the competition authorities to consider whole markets when looking at individual agreements or practices may not be sufficient. But I will also emphasize that this mechanism for investigating markets needs to be used cautiously, with cases carefully prioritized in order to avoid placing additional and unnecessary burdens on business.

The fundamental objectives of any competition regime are clear in terms of the relationships between effective competition, a healthy economy and consumer benefits. However, as I hope to demonstrate today, all competition authorities need to remain flexible and adaptable, and willing to learn both from their own growing body of experience and from each other.

Some historical context

The origins of the CC and the OFT

The CC dates back to a statute of 1948² which established the Monopolies and Restrictive Practices Commission (MRPC). In something of a contrast, I note that the CCS was established at the beginning of 2005.

The 1948 Act gave the MRPC the power to investigate and publish reports on industries where a single firm or a group of firms acting in collusion could restrict competition. Following publication of the MRPC's report, the relevant government department would be responsible for taking action to protect the public interest. The MRPC examined a number of sectors³ and found plenty to give it concern. So the MRPC set about a more general investigation and, in 1955, issued a report entitled *Collective Discrimination*. This report recommended that a range of restrictive practices described in the report should be prohibited by law, with provision for certain exemptions set out in legislation.⁴ A minority of

²Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948.

³See eg *Supply of Dental Goods* (1950), the MRPC's first report.

⁴Although this pre-dated the Treaty of Rome, a similar approach was contained in the 1951 Treaty of Paris which created the European Coal and Steel Community. There were parallel developments in the mid 1950s in Germany, where anti-cartel legislation was introduced and, obviously, in the USA, where there was continued enforcement of antitrust law based on prohibitions and limited exceptions.

the MRPC members involved in preparing the report recommended a slightly different approach, based on registering and examining restrictive practices rather than prohibiting them outright, and this was the approach adopted by the Government in the subsequent legislation,⁵ which created a Registrar of Restrictive Trading Agreements and a Restrictive Practices Court. Over the next decade a large number of restrictive agreements were duly registered and referred to the court. The new system was meant to provide a mechanism carefully to balance competition against wider public interest issues but in practice, almost all were condemned by the Restrictive Practices Court as anti-competitive.

Under the 1956 Act, the MRPC was reconstituted as the Monopolies Commission (MC) and its remit was limited to so-called 'monopolies'. This was a somewhat fallow period for the MC and there were few referrals—and only six reports—between 1957 and 1965. In 1965, however, the MC's remit was extended⁶ to include merger control, subjecting mergers to the same investigatory process and the same public interest test as monopolies.

In 1968⁷ the control of restrictive agreements was strengthened in two ways. First, it allowed the Secretary of State to direct the exemption of restrictive agreements with little economic significance from the regime set up by the 1956 Act. Second, it provided the sanction of voidness for restrictions that ought to have been registered but were not.

In 1973 there was another major reform.⁸ First of all there was the establishment of the OFT. The OFT took over the competition responsibilities of the Registrar of Restrictive Trading Agreements and gained new responsibilities for consumer protection. The 1973 Act also provided for the extension of the restrictive trade practices regime to services (done in 1976)⁹ and lowered the thresholds for monopoly and merger references to the MC (from then on renamed the Monopolies and Mergers Commission (MMC) from a one-third to a one-quarter share of supply. Although competition was given prominence in the 1973 Act, the MMC was still required to take into account 'all matters' within a broad public interest test when making recommendations in relation to market or merger references.

From public interest to competition

During the 25 years from 1973 to 1998, there was widespread and lengthy debate both at the UK and the European level about the role and proper extent of competition policy. The European Common market and accompanying European competition rules were developed through the case law of the European Court of Justice and the practice of the European Commission.¹⁰

The UK's 1980 Competition Act targeted anti-competitive practices of individual non-dominant firms, and provided for efficiency inquiries into nationalized industries, many of which were privatized in the following decade.

In 1984, Norman Tebbit, then Secretary of State for Trade and Industry, stated in what subsequently became known as 'the Tebbit doctrine' that his policy would be to make merger references primarily on competition grounds. In other areas of enforcement also, the public interest tests in relation to restrictive agreements (under the Restrictive Trade Practices Acts (RTPA)) and in relation to the control of market power (under the MMC's monopoly controls) moved inexorably towards becoming, in practice, competition tests.

⁵Restrictive Trade Practices Act 1956 (commonly called 'the RTPA') and the Restrictive Practices Court Act 1956.

⁶By the Monopolies and Mergers Act 1965. A special regime for newspaper mergers was introduced at the same time.

⁷1968 Restrictive Trade Practices Act.

⁸1973 Fair Trading Act.

⁹Restrictive Trade Practices (Services) Order 1976.

¹⁰Britain entered the EEC on 1 January 1973.

Eventually in 1998,¹¹ after considerable debate, a further, major reform abolished the RTPA system and introduced new prohibitions modelled on Articles 81 and 82 of the EC Treaty, called Chapter I (for agreements) and Chapter II (for abuse of dominant position). In addition, and significantly, these provisions were to be interpreted in accordance with the principles of EC law, enforced by the OFT and supervised by newly formed specialist tribunals.¹²

The 1998 Act left in place the control of mergers and monopolies jointly operated by the OFT and the MMC and reconstituted the latter as the Competition Commission.

Over the fifty years since 1949, however, competition policy in the UK had evolved from a standing start to becoming one of the cornerstones of the modern UK economy.

In 2002, with the passage of the Enterprise Act, further, important changes were made to the assessment of mergers and a wholly new regime for market investigations was established. The status of the OFT and CC as independent decision-making authorities was confirmed. The broader public interest test for both mergers and markets was finally abandoned in favour of new competition tests, namely substantial lessening of competition (SLC) in the case of mergers and adverse effects on competition (AEC) test in the case of markets.¹³ Finally, the specialist appeal tribunal function was hived off from the CC as a separate body under the name of the Competition Appeal Tribunal, commonly known as the 'CAT'.

The situation now

As a result of the 1998 Competition Act and the 2002 Enterprise Act, the competition regime in the UK is now essentially as follows:

- For *anti-competitive agreements and abuse of dominance* the OFT and the sectoral regulators with concurrent powers (see later) are responsible for enforcing the prohibitions—known as the Chapter I and Chapter II prohibitions—contained in the 1998 Competition Act and in Articles 81 and 82 of the EU Treaty.¹⁴ Appeals against the OFT's (or the sectoral regulators') decisions may be made on matters of law or fact to the CAT.¹⁵ I note that the CCS is responsible for enforcing the analogous prohibitions contained in sections 34 and 47 of the Singapore Competition Act 2004, and it should be remembered that the CC is not involved in this type of work.
- For *mergers*, the OFT undertakes Phase 1 investigations, referring on to the CC those that raise SLC concerns for a Phase 2 investigation.¹⁶ I note that the CCS undertakes both Phase 1 and Phase 2 merger investigations to enforce the prohibition on mergers that result, or may be expected to result, in an SLC as set out in section 54 of the Singapore Competition Act.
- For *markets*, the OFT and various sectoral regulators¹⁷ undertake market studies and are able to refer a market to the CC where there are reasonable grounds for suspecting that features of the market give rise to an AEC. I note that the CCS is able to undertake

¹¹1998 Competition Act.

¹²The Competition Commission Appeal Tribunals—originally conceived as part of the CC.

¹³The CC retained a broader public interest function in special limited situations (see page 7). The Enterprise Act also introduced individual criminal liability for cartel offences.

¹⁴Under European Council Regulation 1/2003, which established the system of decentralized enforcement of EC competition law, the OFT and the UK sectoral regulators (but not the CC) were designated to apply Articles 81 and 82.

¹⁵See sections 46 to 49 and Schedule 8 of the 1998 Competition Act as amended by the 2002 Enterprise Act.

¹⁶Ministers may also make merger references to the CC on specific public interest issues such as national defence and security and media plurality.

¹⁷The full list of sectoral regulators with concurrent Competition Act powers and the ability to make market investigation references is GEMA (energy), Ofreg (Northern Ireland energy), Ofwat (water), ORR (rail), Ofcom (communications) and the CAA (airport traffic control).

market studies to gain a better understanding of the dynamics and structure of markets of interest, not necessarily with a view to conducting enforcement action; however, should competition concerns be uncovered in any market, the CCS may at its discretion undertake formal investigations into features, conduct or practices in the market.

The CC's role

One point to note is that the CC is only able to undertake inquiries into mergers and markets on reference from other bodies, and does not launch inquiries on its own initiative, unlike the CCS. Also, the CC's competition decisions in relation to both mergers and markets are subject to a specific system of review before the CAT. In contrast to appeals against the OFT's Competition Act decisions, the CAT is required, when considering the CC's decisions, to apply the same principles that would apply in a judicial review rather than to hear an appeal on the merits of a case.

The Enterprise Act considerably enhanced the status and independence of the UK competition authorities. It gave the CC decision-making powers and responsibility for remedies, whereas in the previous regime the role of the CC (and, in the past, the MMC) was simply to make recommendations to Government. These recommendations could sometimes be quite bold. One such recommendation that the MMC made to government in the context of its 1992 report into the New Car market in the UK¹⁸ was that, because the UK's tradition of driving on the left—and the consequential need for right-hand drive cars—was an obstacle to the effective working of the market, the UK should reassess the costs and benefits of changing to driving on the right. It may come as no surprise that this recommendation was not acted on.

As I explained earlier, the monopoly investigation regime was retained by the 1998 Competition Act and was substantially recast as a market investigation regime by the Enterprise Act. It is an interesting question whether the UK would have created a monopoly/market regime *de novo* in 1998. But the 50 year experience of the regime under the MMC gave the UK the opportunity to continue and strengthen the regime, rather than to abandon it. Indeed, the MMC and its predecessors had presided over 50 years of policy development in which competition had moved from the edge to the centre of public policy objectives.

Why all this matters

The point of this history lesson is a simple one. At first glance, it may appear that the CCS is a much younger organization than the CC or OFT with less history to bind it—or less precedent to guide it, depending on your point of view. However, as I pointed out earlier, the UK was itself confronted with a new competition regime from 1998 to 2002 with the passage of the Competition Act and then the Enterprise Act: a competition regime which represented a considerable departure from the past. We at the CC are still discovering the strengths and weaknesses of our part of this new regime. Whilst we have completed nearly 50¹⁹ Phase 2 merger inquiries, we have completed only a small number of market investigations under the new regime, and we have been subject to review by the CAT on only a small number of occasions.²⁰ Our ability to draw broader conclusions in these two critical areas is therefore limited. Part of my purpose today is to share the lessons we have learnt thus far with you. However, my purpose is also to emphasize that we do not, by any means, have all the

¹⁸MMC Report, *New motor cars: a report on the supply of new motor cars within the United Kingdom*, 1992.

http://www.competition-commission.org.uk/rep_pub/reports/1992/313newmotorv1.htm.

¹⁹As at the end of 2007, 66 mergers had been referred to the CC for a Phase 2 merger inquiry, of which 20 had been laid aside or cancelled.

²⁰The OFT has more experience of dealing with appeals to the CAT.

answers. We have found it essential to strive to improve our ways of working on a continuous basis, as our operational experience of the new UK competition regime grows.

Some key principles

I will now, if I may, narrow my focus from the UK competition regime as a whole to the more specific experience of the CC with which I am familiar.

When considering improvements (and, as I said, that is something we are always keen to do) it seems to me essential to begin by understanding one's strengths in order to ensure that these are not inadvertently discarded but rather may serve as the foundations on which more can be built. Whilst I do not have time today to go into great detail, I would like to mention some of the key principles that have served the CC well to date.

1. *The decision-making process: members and staff*

One clear area of strength for the CC is our decision-making process itself. The CC is the decision taker both in respect of the competition analysis and the choice of remedy, if appropriate, for those mergers and markets referred to it by the OFT. We aim for—and believe we achieve—evidence-based decision making.

The CC comprises some 50 Commissioners all of whom, with the exception of the Chairman and the three Deputy Chairmen,²¹ are part-time. For each inquiry the Chairman appoints a Group of between three and six Members led by the Chairman or one of his Deputies²² who are responsible for the inquiry and who take on the CC's powers for that purpose. They are involved throughout the inquiry process and take the final decision. This process of decision-taking by an inquiry Group supported by full-time staff has proved successful in achieving the delicate balance between decision makers getting involved in the detail of a case whilst maintaining enough detachment and distance to ensure objectivity throughout.

2. *Transparency*

The CC aims to be as open and transparent in its work as possible while maintaining confidentiality of information that it obtains during its inquiries. It is gratifying to note that the CC is recognized as being outstandingly transparent in how it conducts its inquiries, but achieving a suitable balance between disclosure and confidentiality can on occasion be very demanding. We usually find that most of the evidence we receive and the working papers and reports we generate can be published in some form on our website, even if this entails excision of some of the more detailed and commercially sensitive information. I will not pretend that this is straightforward; in fact it can sometimes be very time-consuming indeed. But the benefits in terms of achieving due process and fairness, providing an opportunity for factual inaccuracies to be corrected, helping third parties make a meaningful input to our inquiries and helping main parties understand the evidence we are receiving from others make the investment highly worthwhile. We also publish an inquiry timetable to enable all parties to understand the overall inquiry process and the next key stages.

3. *Consideration of evidence*

The CC considers evidence from a wide variety of sources during its inquiries, including (in no particular order):

²¹Two Deputy Chairmen work four days a week.

²²Exceptionally, a Member may chair an inquiry Group.

- published documents and reports;
- the parties' submissions;
- the CC's data and analysis;
- the CC's or others' surveys;
- the parties' files and raw correspondence, for example emails; and
- oral evidence obtained during hearings.

For us there is no set 'hierarchy of evidence'.²³ In particular, we keep a careful balance between what economic analysis tells us about the parties' incentives and likely behaviour and what can be proved from documents, correspondence and emails. Our approach is always to consider all the evidence 'in the round' in forming our expectations rather than to favour some evidence in preference to any other.

4. Political influence

As I explained earlier, the 2002 Enterprise Act changed the CC from a body that provided reports and recommendations to Government, for Ministers to act on, into an authority making decisions in its own right. This change was pursuant to the policy of creating independent competition authorities subject to specialist judicial, rather than Ministerial, control. However, hand-in-hand with this enhanced independence came a narrowing of the scope of the CC from more general public interest matters to competition issues more specifically—a necessary corollary perhaps, given that the CC is a non-elected body.

The effect of these measures is to provide a substantial distance between the CC and Ministers during competition investigations and to remove any serious risk of politically motivated interference in the CC's decisions.

For certain specified and limited areas of public interest, a mechanism is retained allowing Ministers to intervene in merger inquiries to require them to cover issues other than competition matters (for example, national security and certain media issues), although Ministers retain the final decision-making power with respect to any adverse effect on the public interest. There are somewhat similar mechanisms in relation to market investigations.

Constant renewal

I have touched on what I regard as some of the key strengths of the CC, including our decision-making structures and our transparency policy. We are proud of our record as a world-class competition authority. However, there is no room for complacency in our field, with its continuously evolving economic and commercial context.

All organizations have to keep pace with the rapid rate of change in the modern world. But, in my view, competition authorities are confronted with an additional challenge that makes critical self-appraisal absolutely vital. Our role is to ensure that markets work effectively, delivering efficient businesses that produce benefits for consumers. Therefore we must be particularly vigilant that we do not introduce such friction into the economic machinery through the burdens that our activities inevitably place on business that we defeat the very objectives we were set up to achieve.

²³A view which has been supported by the CAT: *Aberdeen Journals v OFT*, CAT judgment of 23 June 2003 [2003] CAT 1.

There are several ways in which the CC has sought to address this challenge and to renew itself and its approach to the UK competition regime.

International cooperation

We take as many opportunities as possible to share our experiences with other competition authorities and to learn from their experiences. My lecture here today is part of that process. We also participate actively in the International Competition Network (ICN), a network which brings as many benefits to established competition authorities as it does to new ones. One very specific way in which we have examined our performance is by launching a formal review programme in late 2006, in which we compared international structures and best practice, undertook a survey of our Members, conducted a series of staff focus groups and held a number of round-table meetings on key issues with external experts. Our objective was to identify those changes that would be required to deliver the CC's strategic vision and enable the CC successfully to overcome any challenges it would be likely to encounter in the next five years. Whilst I do not intend to dwell on the detail of this internal review process today, I would like to touch on several of the key recommendations that may be of particular interest to other competition authorities. I will come to these shortly.

Learning by doing

Another way in which the need for change can be identified may best be described as 'learning on the job.' What broader lessons can we learn about our competition regime from the knowledge base we have built up by completing increasing numbers of market and merger inquiries? This is a huge subject and I will only have time today to discuss our experiences of a small number of key issues with our merger and market regimes. I trust however that I have chosen these issues carefully enough to be of some interest and relevance to my audience here today.

Ex post evaluation

We also operate a programme of systematic evaluations of the effectiveness of past inquiries that we have undertaken, once a suitable period of time has elapsed following publication of our final reports, and in light of subsequent market developments. These evaluations are available on the CC website.²⁴

Review outcomes

One of the key challenges identified during the CC's formal review of its processes was how to maintain high standards in the face of increased demands and workload. Our conclusion was that we needed to carefully retain what we do well—I have outlined some of these strengths already today—whilst renewing our focus on relevant evidence, on timeliness, on presenting our decisions concisely and on minimizing the additional burden our work inevitably places on industry.

Increased focus on relevant evidence

We have identified two main areas of possible change to our approach to evidence during our inquiries.

²⁴See for instance www.competition-commission.org.uk/our_role/evaluation/ex_post_evaluation_of_mergers.pdf. This is only one example of the types of evaluation we undertake—a topic which could be the subject of another entire lecture.

First, we intend to base the central analytical framework for an inquiry upon identified ‘theories of harm’. Theories of harm are not new to the CC or to competition analysis. They are the hypotheses that we wish to test during an inquiry: the ways in which a merger (or 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. It only means that we are clear as to the mechanisms by which harm could arise. Testing these theories then becomes the basis of our analysis. The ideal would be to share the theories of harm with the parties at the outset of an inquiry, to log all significant evidence received against the theory or theories of harm to which it relates, and to use the theories of harm, where appropriate and without unduly limiting ourselves, to drive subsequent information requests and guide our documentation reviews. The practice will probably be somewhat less perfect than this.

The second change we are considering is the increased 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 our—or any other competition regulator’s—inquiries. We do of course collect primary evidence already, but we often receive a greater 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, may not be as persuasive as primary evidence. 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.

We anticipate that both these proposed changes should bring benefits to the parties to our inquiries as well as to us. We envisage that these changes will reduce the initial size of market and financial questionnaires and also the amount of work required to be undertaken in-house by main parties. We are, of course, aware of the need to protect legitimate business secrets to an appropriate degree.

Timeliness

I was interested to note that the CCS states in its guidance that it expects to complete a Phase 1 review within 30 working days and that it ‘will endeavour to complete’ a Phase 2 review within 120 working days.²⁵ The CC is *required* by the Enterprise Act 2002 to investigate and publish its Phase 2 merger report within 24 weeks from the date of the reference being made (which amounts to 120 working days if there are no public holidays during those 24 weeks). This reporting period can be extended by a further eight weeks if the CC considers there are special reasons why the report cannot be published within the statutory period.²⁶ For market inquiries, the CC is subject to an absolute time limit of two years, with no opportunity for an extension.

As you may imagine, delays in the submission of evidence seriously jeopardize our timescales for production of working papers and the final report. As I suggested earlier, there can be incentives on parties to offer less than full cooperation. In market investigations, parties may fear the commercial impact of any remedies we may seek to implement, and may believe that it is in their interests to stretch out our inquiry for as long as possible. In both merger and market inquiries, parties may seek to play a tactical game of delaying the

²⁵CCS Guidelines on Merger Procedures paragraph 2.6.

²⁶For example, the *Stagecoach/Scottish Citylink* merger inquiry (2006) was extended due to delays in the submission of evidence, delays in the scheduling of the second main party hearing and the emergence of new or substantially revised arguments late in the inquiry process. The *Stonegate Farmers/Deans Food Group* merger inquiry (2007) was extended to allow proper consideration of complex remedy options, as well as due to delays at the outset of the inquiry.

provision of information for as long as possible in order that we have insufficient time to analyse the information in full and to fulfil our pledges concerning consultation and transparency. The parties' objective in such cases appears to be either to force us into a clearance or to lay the foundations for an appeal on procedural grounds in the event of an adverse finding.

To date, we have only rarely used our formal information gathering powers under the Enterprise Act. We have never imposed a penalty for failure to comply with our information requests (known as section 109 Notices) nor have we exercised our power to suspend the timetable when a merging party does not comply with such an information request. We are exploring a more extensive but flexible approach using section 109 Notices. We are considering using section 109 Notices whenever we need to request evidence that is on the critical path in our inquiry process such that delay would immediately jeopardize our inquiry timetable, and where there has *already been* a dialogue with the party concerned as to what data and time frames are realistic. In such circumstances, the section 109 Notice would provide us with comfort that the information we have discussed with the party concerned will actually show up within the agreed timescale. Section 109 Notices would, of course, also continue to have a role where parties refused or failed to provide information.

More concise decisions

From a legal point of view, a CC report has to contain the CC's decisions on the statutory questions posed in the OFT reference, the reasons for them and such information as the CC considers appropriate to enable an understanding of both. Yet there is no doubt that the CC's reports have tended to become more complex and less accessible to a general audience as the analysis has become more sophisticated and detailed.

We are therefore considering ways in which we could change our reports to ease the burden of the inquiry process for both the CC and the parties. We are actively debating report clarity, accessibility to a non-specialist audience and length. We certainly do not envisage that the analysis underpinning reports would be dropped altogether, rather that there may be opportunities to clarify its presentation. However, whether we do actually make these changes will depend greatly on the extent to which the CAT requires us to set out our full reasoning and analysis in the decision document, as opposed to merely referring to those matters covered during the inquiry.

Focus on teamwork

We aim to enhance the cohesion of inquiry teams by:

- confirming the pre-eminent role of the Inquiry Director as project manager and overall manager of the work of the various specialist contributors;
- avoiding so far as possible the disruption of inquiry teams during lengthy investigations;
- resisting the excessive multiplication of specialists; and
- encouraging the acceptance by the whole team of joint responsibility for the outcome—rather than for their own contribution only.

These moves, coupled with the retention of the overseeing role of the panel or groups of Commissioners will, it is hoped, produce more efficient and focused methods of working.

I would now like to take a step back from the specific changes we are proposing to make as a result of our recent internal review to examine some of the issues we have encountered with our competition regime as a whole.

The merger regime

Voluntary pre-notification

Turning first to the merger regime, I note that Singapore, in common with the UK, does not require mandatory pre-notification of mergers. I understand that this decision was taken in Singapore to minimize business compliance costs, acknowledging that in a relatively small economy there was a need not to deter merger activity and that the companies involved will tend to be well-known to the authorities. In the UK, the voluntary regime was carried over into the Enterprise Act to minimize regulatory and business compliance costs, and thereby to avoid deterring UK merger activity.

It is interesting to note that many of the merger investigations that the CCS has concluded to date have been of anticipated mergers that have been notified to the CCS on a voluntary basis. It is also interesting that, under section 69 of the Singapore Competition Act, the CCS may impose a financial penalty if a merger has infringed the section 54 prohibition and the infringement was committed intentionally or negligently. Proving intent or negligence in such cases will, of course, be the key. But it may be that this power, which is not available to us in the UK, to impose financial penalties in certain circumstances for completed mergers that are subsequently found to have resulted in an SLC has driven the volume of voluntary notifications of anticipated—as opposed to completed—mergers in Singapore thus far.

Completed mergers

The dynamics of the voluntary pre-notification regime in the UK have proved to be quite different. The CC has concluded 66 merger investigations under the Enterprise Act, of which 26 (nearly 40 per cent) were completed mergers. There is some evidence of a year-on-year upward trend in the proportion of mergers we investigate that are completed, with 55 per cent of the mergers referred to us in the 2007/08 financial year so far being completed mergers.

We have found investigating completed mergers to be considerably more resource-intensive and risky than investigating anticipated mergers. There are two main issues for us:

- (a) obtaining interim undertakings from the merging parties²⁷ (or, in the absence of voluntary undertakings, imposing an interim order²⁸) to prevent the parties taking any action that might prejudice the outcome of our investigation. Examples of prejudicial action may include dismissal of employees and sharing of information about customers and sales; and
- (b) the increased difficulties of implementing structural remedies in the event of an adverse finding in the event that the merger is already completed rather than simply anticipated.

²⁷Section 80 of the Enterprise Act 2002.

²⁸Section 81 of the Enterprise Act 2002. The CCS has similar powers under section 58A of the Singapore Competition Act 2004.

Interim measures

In relation to interim undertakings or orders, there is a clear need to hold the merged parties as separate as possible during the course of both the Phase 1 and Phase 2 merger investigations. As already explained, this prevents further and possibly irreversible damage to the merged businesses that will pre-empt or otherwise constrain the CC's ability to impose remedies in the event of an adverse finding. Further, it helps prevent our analysis of the merger situation becoming impossible—for example, if sales databases are merged in such a way that disaggregated analysis of the sales of the pre-merger entities cannot be undertaken.

Jurisdiction

In the UK merger regime, it is intended that the OFT obtain interim undertakings²⁹ or impose an interim order³⁰ prior to any reference to the CC for a Phase 2 investigation. However, there can be delays as the OFT must first determine whether it has jurisdiction in any particular merger case.³¹ Some completed mergers are therefore referred to the CC without interim undertakings in place. Even if such undertakings are in place, we may wish to expand upon them as our understanding of the precise details of the merger situation grows.

It is our experience that securing suitable interim undertakings (or making suitable interim orders) in the case of completed mergers absorbs considerable time and effort at the beginning of a merger inquiry, very much to the detriment of our statutory timetable.

The Stericycle case

One perhaps rather extreme example of the substantial resources required to secure adequate interim measures in the case of a completed merger was in the CC's Stericycle Phase 2 merger investigation.³² Without going into too much detail here, the investigation concerned the completed merger of two businesses involved in disposing of clinical waste. The CC sought initially to expand on the interim undertakings already obtained by the OFT. When the merged parties would not agree to these undertakings, the CC made an interim order. The merged parties applied to the CAT for interim relief from this order, and also appealed the directions we made subsequently under the order. As you might imagine, all this activity soaked up enormous quantities of time and effort in the CC's inquiry, legal and remedy teams, all before the competitive analysis that lies at the heart of a merger investigation had even commenced. On the positive side, in its judgment, the CAT upheld the CC's approach, and confirmed that the CC has wide powers to prevent pre-emptive action under section 81 of the Enterprise Act. We also hope that the CAT's judgment has sent a deterrent message to other parties considering completing potentially problematic mergers prior to investigation by the UK competition authorities, although it is too early to tell whether this has, in fact, been the case.

²⁹Section 71 of the Enterprise Act 2002.

³⁰Section 72 of the Enterprise Act 2002.

³¹Under section 23 of the Enterprise Act, a 'relevant merger situation' is created where two or more enterprises have ceased to be distinct and either (i) the UK turnover of the enterprise being acquired exceeds £70 million; or (ii) as a result of the transaction, in relation to the supply or purchase of goods or services of any description, a 25 per cent share of supply in the UK (or a substantial part thereof) is created or enhanced. It may often be necessary for the OFT to obtain information from the merging parties to establish whether either of these tests are met, particularly in the case of the share of supply test. Many completed mergers—and 60 per cent of all mergers referred—have been referred to the CC on the basis of the share of supply test.

³²*Stericycle International LLC and Sterile Technologies Group Ltd*, 2006. See:

http://www.competition-commission.org.uk/rep_pub/reports/2006/519stericycle.htm.

Structural remedies

Turning to the second issue I identified in relation to completed mergers, this was the difficulties that arise when the CC decides to require a structural remedy in the event of an adverse finding.

The CC has a stated preference for structural remedies such as divestment or prohibition over behavioural remedies which seek to control the behaviour of firms, as we consider that structural remedies address the effects of a merger more directly and will usually require less monitoring or enforcement of compliance.³³ I note in passing that we share this preference with the CCS.³⁴ The CC must also act in a proportionate manner, and have regard to the costs of implementing the remedy.³⁵ Parties often argue that, in the case of a completed merger, the costs to them of de-merging to restore the status quo antea are prohibitive, and therefore a structural remedy would be disproportionate.

Our published guidance specifically addresses this argument and states that:

...for completed mergers the Commission will not normally consider the costs of divestment to the parties as it is open to the parties to make merger proposals conditional on competition authorities' approval. ... Since the cost of divestment was, in essence, avoidable, the Commission will not, in the absence of exceptional circumstances, accept that the cost of divestment should be considered in the setting of remedies.³⁶

However, despite the clarity of our guidance on this point, we find that parties continue to make the argument that the costs of structural remedies make them disproportionate in the case of completed mergers. This argument appears to have a certain intuitive appeal to the media, to politicians and to the wider public. Whilst we have no intention of changing our policy of not normally placing weight on the costs to the parties of structural remedies in the case of completed mergers, there is no doubt that completed mergers cause additional complications during our remedies process.

Summary

Drawing this together, there is no question that it generates some problems for the CC as outlined above. On the other hand, it is perhaps too early to decide that the UK's voluntary regime should be replaced with a mandatory pre-merger notification regime. There would be other, consequential, changes that would need careful consideration. For example, this regime would need to include the compulsory suspension of merger activities while the merger was under investigation (subject to appropriate exceptions) and some short-term increase in the regulatory burden on business might follow, although businesses would no doubt adjust rapidly to this new regime. A clearer jurisdictional basis would be required, probably based exclusively on turnover, so that businesses could readily identify mergers that needed to be notified. An efficient system would be needed to filter out unproblematic mergers to identify the ones which genuinely raise competition concerns.

In short, a mandatory regime has advantages and disadvantages. Despite the UK having over 40 years' experience of merger control, we have as yet no clear-cut answer to what would work best for us, let alone for other jurisdictions. But the issue is firmly on the table, and is part of our ongoing commitment critically to appraise the work we do and how we do it, in order to determine if improvements are possible.

³³CC Merger Guidelines paragraph 4.15.

³⁴CCS Guidelines on Merger Procedures paragraphs 5.4 and 5.21.

³⁵CC Merger Guidelines paragraphs 4.9 and 4.10.

³⁶*Ibid* paragraph 4.10.

The market investigation regime

I would now like to discuss the other main source of the CC's work: market investigation references from the OFT (or the major UK sectoral regulators).

Broad scope and flexible operation

The OFT is able to refer a market to the CC under section 131 of the Enterprise Act where there are reasonable grounds for suspecting that features of that market give rise to an adverse effect on competition (AEC). The sectoral regulators (for example, Ofwat, Ofcom and the Civil Aviation Authority) have similar powers to refer markets in their fields of expertise under the relevant sectoral legislation.

An AEC arises where 'any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply of goods or services in the United Kingdom'.³⁷ Features of the market include the conduct of suppliers or acquirers of goods or services, the conduct of customers or the market structure. Conduct includes any failure to act, whether intentional or not, and any other unintentional conduct.

The purpose of market investigations is to allow the CC to analyse a market in detail where competition does not appear to be working well but the problems do not immediately appear to be associated with obvious anti-competitive agreements or a single firm abusing a dominant position. The CC has the powers not only to investigate such markets, but also to decide whether there is an AEC and, if so, to remedy it—a combination of powers I believe to be unique to the CC among competition authorities worldwide. As I hope to show, whilst the current regime is not perfect, there are distinct benefits in the approach it allows us to take to markets that are not functioning correctly.

Operation in parallel with prohibitions

The market investigation regime works in parallel with the prohibitions on anti-competitive agreements and abuse of a dominant position contained in Articles 81 and 82 of the EC Treaty and in Chapters I and II of the UK Competition Act 1998 but has certain advantages in terms of flexibility. For example, no party active in a market may be to blame for certain features of markets, such as customer behaviour, that nevertheless result in reduced rivalry and higher prices than might otherwise be the case. The market investigation regime allows such features to be identified and, if appropriate, remedied, without the need to ascribe fault. We aim for a process that is inquisitorial rather than adversarial. The parties active in the market in question do not face large administrative penalties as would be the case with an investigation into a potential breach of the Competition Act, although, of course, our remedies may not always be to their liking.

The types of market situation that the UK market investigation regime can deal with include:

- (a) *unilateral and coordinated effects* that fall short of the abuse of dominance or the illegal agreements that are prohibited under the UK Competition Act. For example, tacit collusion amongst oligopolists may lead to prices approaching the collusive (or monopoly) level;
- (b) *vertical effects*, covering market structure issues where parties operate at different levels of the supply chain;

³⁷Section 134(1) Enterprise Act 2002.

- (c) *informational failure*, whereby consumers lack information—or do not act on the available information—to make rational economic choices;
- (d) *Barriers to entry* created by government policy, which, although often motivated by legitimate public policy considerations, may distort competition;
- (e) *inefficient equilibria*, in which a market arrives at a ‘bad’ equilibrium from which no individual firm has an incentive unilaterally to deviate.

In particular it will be seen that the market investigation regime can address issues of non-collusive oligopoly where outcomes are bad for consumers.

At the time of writing, the CC has issued five market investigation reports:

- Store Card Credit Services;
- Domestic Bulk Liquid Petroleum Gas (LPG);
- Home Credit;
- Classified Directories Advertising Services; and
- Northern Irish Personal Banking.³⁸

In each of these investigations, we concluded that there were market features that created an AEC, but there is no reason why a clearance decision should not be made in a market investigation, where appropriate (indeed both Store Cards and NI Banking contain partial clearances). We also have four other Market Investigations in progress: Groceries; BAA Airports; Payment Protection Insurance (PPI); and Rolling Stock for Franchised Passenger Services.³⁹

Our experience to date of the UK’s formal market investigation regime has been encouraging, but with some caveats.

Use with care

A market investigation system must be balanced with safeguards as to how and when it should be used. In the CC’s experience, a market investigation is a resource-intensive and time-consuming process for both the authorities and the parties. This implies that market investigations should be used sparingly and that attention must be paid to the burdens placed on business, particularly if an industry is subjected to multiple investigations either concurrently or over a relatively short period of time.

³⁸CC Report, *Store Card Credit Services* (March 7, 2006) http://www.competition-commission.org.uk/rep_pub/reports/2006/509storecards.htm;
 CC Report, *Domestic Bulk Liquefied Petroleum Gas* (June 29, 2006) http://www.competition-commission.org.uk/rep_pub/reports/2006/514lpg.htm;
 CC Report, *Home Credit* (November 30, 2006) http://www.competition-commission.org.uk/rep_pub/reports/2006/517homecredit.htm;
 CC Report, *Classified Directory Advertising Services* (December 21, 2006) http://www.competition-commission.org.uk/rep_pub/reports/2006/521cdas.htm; and
 CC Report, *Northern Irish Personal Banking* (May 15, 2007) <http://www.competition-commission.org.uk/inquiries/ref2005/banking/index.htm>.

³⁹*Groceries* was referred to the CC on May 9, 2006; *BAA Airports* was referred to the CC on March 29, 2007; *Payment Protection Insurance* was referred to the CC on February 7, 2007; and *Rolling Stock for Franchised Passenger Services* was referred to the CC on April 26, 2007.

References, studies and priorities

The effectiveness of a market investigation regime also depends on careful selection of markets for investigation and the correct allocation of cases between Competition Act prohibitions and Enterprise Act market investigations. As explained previously, the CC does not initiate or select its market investigation cases, but undertakes such investigations solely on the basis of references from the OFT and the sectoral regulators with concurrent powers. Those authorities will select cases based on their statutory remit and their priorities.

The OFT proactively studies markets that appear not to be working well for consumers. The OFT has set out in detail in its published guidance the circumstances in which it is likely to refer a market to the CC rather than launch an investigation into an infringement of the Competition Act.⁴⁰ This guidance reflects the list of market situations I set out earlier in which competition problems may exist yet not be susceptible to an analysis based on possible breaches of the Competition Act prohibitions. The OFT has stated⁴¹ that it will, as a matter of policy, always consider first when dealing with a suspected competition problem whether it may involve infringement of the Competition Act before then going on to consider a reference.⁴² All these case selection measures help in building the credibility and usefulness of market investigations.

Sectoral regulators can also refer markets for investigation as is the case with the current Rolling Stock for Franchised Passenger Services Market investigation, referred to us by the Office of Rail Regulation. Again there is a continuing need for clear guidance on the sorts of cases that are liable to be referred and careful consideration before a reference is made.

Private actions

Choice of possible enforcement means is affected to some extent by the availability of a mechanism for private enforcement of competition law by litigation. Our experience in the UK is that it has not been easy for us to encourage private actions to develop. However, if there were to be more activity in this area, this could help the prioritization of markets for market and Competition Act investigations. For example, if there were enough successful private actions in a particular market that the firms active in that market changed their business practices, there might not be any pressing need for the OFT to launch its own study of that market.

Remedies

An increasing issue for us in our market investigations is determining what kind of remedies will be effective in dealing with any lack of competition we may find. As I explained earlier, markets are referred to us when there appear to be problems not associated with obvious anti-competitive agreements or a single firm abusing a dominant position. The ills that we diagnose in such markets are not always amenable to a straightforward structural remedy and opening up a market to new entry and promoting competition within it is easier to say than to accomplish.

⁴⁰OFT Guidance: Market Investigation References.

⁴¹*Ibid* paragraph 2.3.

⁴²The OFT has also recently published a consultation document on the prioritization principles it will use in deciding which projects and programmes of work it should undertake across all the areas of its work: see *OFT Prioritisation Principles Consultation*, September 2007.

Summary

Overall, our early experience of the UK market investigation regime is positive, allowing failing markets to be picked up and examined in detail by the UK competition authorities in a less confrontational but nevertheless effective manner. So far, despite the potential for overlap, we have been able to ensure that our market investigation regime has worked relatively harmoniously with the parallel prohibitions on anti-competitive agreements and abuse of a dominant position contained in our Competition Act. However, as I have pointed out, care must be taken with the selection of markets for investigation and the burden on business such an investigation inevitably creates.

Conclusions

I note that the CCS's mission statement is 'To promote healthy competitive markets that will benefit the Singapore economy'. The CC describes itself as 'one of the independent public bodies which help ensure healthy competition between companies in the UK for the benefit of companies, customers and the economy'. These are only slightly different ways of saying the same thing. Effective competition is the best way to create efficient and innovative businesses to the advantage of consumers. And effective competition has international, not just national, benefits.

I hope my lecture today has gone some small way towards fostering those international benefits by emphasizing the importance of critically reviewing the performance of competition authorities and competition regimes to ensure that they continue to be appropriate, relevant and effective. Whilst the UK and the Singaporean regimes may appear to be at opposite ends of the historical spectrum, I have shown that, in reality, both regimes are young and quite similar in many ways, and the issues they face are still emerging as the collective experience grows. In particular, I have discussed the lessons we have learnt in the UK about focusing on relevant evidence, about the importance of timeliness and about the desirability of concise but legally robust documentation of our decisions. I have set out our experiences of the resource implications of a voluntary pre-notification merger regime. Finally, I have described the advantages of the UK market investigation regime whilst also sounding several notes of caution about how the regime works in practice.

In conclusion, it is worth remembering that both the UK CC and CCS—as with all competition authorities—act as gatekeeper on behalf of the consumer to balance the commercial imperatives of industry and the economic and public policy objectives of government. Against that background, whilst we would all no doubt acknowledge that we can learn much from past experience, we should also work with open minds, prepared to change, adapt and renew our approach to competition policy as circumstances and society demand. For the CC, with all its long history, experience and antecedents we are always keen to learn and to improve. For us, as with any authority, there can be no 'resting on our laurels'.

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