

Regulatory Policy Institute 25th Anniversary Conference

Merton College Oxford 12th /13th September 2016

ZEEMAN LECTURE

“Better to travel hopefully than to arrive?”

The Reform of UK Competition Law 1991-2016.

Peter Freeman CBE, QC¹

Introduction

Ladies and gentlemen, good evening and thank you to the RPI for inviting me to give this Zeeman lecture. The late Sir Christopher Zeeman, who died earlier this year², was famous for many things, particularly in the field of mathematics. Amongst his many distinctions, he was the Principal of Hertford College when the Institute was founded 25 years ago, and lent great support and encouragement to the efforts of the founding members. We owe him a great debt.

I have been asked to talk about UK competition policy reform over the past quarter century and have taken my title from the closing lines of an Essay by Robert Louis Stevenson called “El Dorado”. In this piece, Stevenson discusses the position of an explorer in the South American jungle, seeking the fabled city of El Dorado. His point is that although the explorer thinks he will soon come upon the fabled spires, spied from some conspicuous hilltop against the setting sun (this could almost be Oxford), in fact he will never get there and the “true success is labour”, that is to say the journey and the struggle.

Competition policy reform has much in common with this experience.

I will outline the main events of our 25 year journey, and identify some themes. This is essentially an exercise in history, and history can be dry. I will try and provide some lubrication. History is seldom objective and I have been quite closely involved with some of the matters I shall describe. I shall try and avoid an overly partisan approach.

Two caveats: the starting point of 1991, although a very significant date for the RPI, is entirely arbitrary from the point of view of substance. Competition law reform was well under way by that date. Second, much as I would like to, I do not have time to deal with economic regulation of privatised utilities and other former state activities, save to note that this process and that of competition reform undoubtedly had strong interactive effects,

¹ Competition Appeal Tribunal Chairman. The views expressed here are entirely personal and do not in any way represent the views of the Tribunal.

² Sir Christopher Zeeman FRS died on 13th February 2016 at the age of 91.

particularly given the growth of “concurrency”, as sectoral regulators were also empowered to apply competition law.

So, let us cast our minds back to 1991 and attempt a brief chronology of the main events.

Brief Chronology

The situation in 1991

UK competition policy in 1991 was already in the throes of a reform process. The seminal reviews chaired by Hans Liesner from 1977 to 1979³ - together with a succession of consultative documents issued over the next decade⁴ meant that by 1991 proposals to adopt a prohibition system **for restrictive agreements and practices** were either lying ready on the table, or were nearly so.

On **mergers**, there had been modest procedural changes adopted in 1989⁵, but the recent adoption of the European Merger Control Regulation (ECMR)⁶ in 1989 had just started to operate to cream off the larger cross border mergers from UK jurisdiction. An early example of what this meant in practice was the *HSBC* take-over of *Midland Bank*, cleared by the European Commission under the ECMR⁷, with *Lloyds Bank's* counterbid examined under the UK system.

On **monopolies**, the Monopolies and Mergers Commission (MMC) had completed its perhaps rather controversial work on the *Supply of Beer*,⁸ and a political settlement between the industry and a rather unsympathetic Conservative government had led to the adoption of the Beer Orders and the divestment of some 10,000 on-licensed retail outlets. By contrast, the MMC had given the *Petrol* supply industry⁹ a clean bill of health.

At the same time, serious consideration was being given to reforming the system of administrative control of scale (ie single firm) and complex (multiple firms) monopolies.

In relation to **institutions**, the rather *ad hoc* structure of the Director General of Fair Trading (DGFT), the MMC and the Department of Trade and Industry (DTI), all with different roles and responsibilities, produced a system where checks and balances tended to prevail over coherence.

The DGFT, with his office, the Office of Fair Trading (OFT), dealt with restrictive trade practices and resale price cases. He also carried out preliminary merger and monopoly

³ Department of Trade and Industry, *A Review of Monopolies and Mergers Policy* Cm 7198 (London HMSO 1978) and *A Review of Restrictive Trade Practices Policy* Cm 7512 (London HMSO 1979).

⁴ Department of Trade and Industry, *Review of Restrictive Trade Practices Policy*. Cm. 311 (London: HMSO, 1988); Department of Trade and Industry, *Opening Markets*. Cm 727. (London HMSO July 1989).

⁵ DTI, *Mergers policy: a Department of Trade and Industry paper on the policy and procedures of merger control*, HMSO, 1988.

⁶ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L395 of 30 December 1989.

⁷ Case IV/M.213 OJ C157/18, 21 May 1992.

⁸ Cm 651, March 1989.

⁹ Cm 972, 1990.

assessments. He had virtually no decision making power. For restrictive trade practices (RTP) matters he referred agreements to the Restrictive Practices Court (RPC) or advised ministers that they did not merit further action. For mergers he advised ministers whether or not to refer cases to the MMC; for monopolies he could himself make a reference. He was broadly responsible for overseeing the operation of the law and was closely involved in advising on and implementing such measures as ministers decided to impose.

The MMC received merger and monopoly references, considered whether they operated against the public interest and reported to ministers, with recommended remedies if appropriate. Ministers were obliged to accept the MMC's findings of no public interest detriment, but were not obliged to act on the MMC's adverse findings. There were special provisions for newspaper mergers, breach of which was a criminal offence.

Ministers and the DTI played a central role, deciding on merger and monopoly cases, and whether to accept the DGFT's RTP recommendations. They also handled and largely dominated the development of competition policy.

Finally, the RPC decided on restrictive agreement cases referred to it by the DGFT. It did so by reference to a public interest test, which was meant to be an exercise in balance, but few agreements passed this test. It also considered resale price exemptions. It was an important court, but in no sense was it an appeal court against the DGFT's decisions, as there were none. Review of ministerial decisions and MMC reports was by way of judicial review in the High Court.

This then was the scene in 1991. What followed can usefully be divided into four periods, the first being from 1991-1998.¹⁰

Period 1: 1991-98

The first major development was the 1992 Green Paper on **market power**¹¹. Building on the prohibition approach to restrictive agreements, the government proposed three options: first to retain the existing administrative system with investigations by the MMC and remedies decided by the Secretary of State, but strengthened and enhanced. Second to adopt the EC Article 86 (as it was) prohibition, extended to cover joint dominance and with enhanced remedies; third, a hybrid system with both Article 86 and a simplified version of the current administrative system. This was of course the option eventually adopted, although for most of the period it was assumed that option 1 would prevail.

On **merger control**, a 1991 parliamentary report¹² examined the issues around co-existing national and EC merger control, without offering any solution. Things would just have to work themselves out.

¹⁰ Stephen Wilks, *In the public interest: Competition Policy and the Monopolies and Mergers Commission*, MUP 1999 gives a full account of reform processes up to 1998.

¹¹ Cm 2100, November 1992.

¹² HC TIC Report on *Takeovers and Mergers*, First Report, session 1991-2 (HC90); see Wilks loc cit p303.

On the substance of merger control, the public interest test remained in law, even though the Tebbit Guidelines¹³ provided that references to the MMC would normally be made on competition grounds alone. As the 1997 general election approached, the Labour party, with the assistance of various distinguished advisers, toyed with the idea of a presumption against mergers, with the parties having to demonstrate beneficial effects.

Somewhere in all this was a dim awareness that reform of the law had to be comprehensive. One could not introduce prohibition of restrictive agreements without risking the creation of anomalies if the law on dominant positions, joint dominance and oligopolies was not similarly dealt with. There was a similar awareness that somehow the Europeans had already got there, with a senior OFT official describing consistency with EC law as an “extra benefit”, albeit a minor one, of adopting a prohibition system.

On **institutions**, a powerful debate developed and serious attempts were made to sort out the existing muddle. In particular, the House of Commons Select Committee on Trade and Industry produced a report on monopoly policy in 1995¹⁴ that proposed the formation of a single competition authority, combining the roles and structures of DGFT and MMC, with the power to make decisions on competition cases, but with decisions on divestment remedies only reserved to Ministers.

This was of course the age of the “Lilley doctrine”, where the government sought to prevent take-over of UK companies by state-owned foreign enterprises. This approach did not find much support at the MMC and perhaps this disagreement contributed to the substantial and public falling out between the DGFT and the MMC in 1995, with the DGFT, who had just announced his retirement, appearing before the Select Committee responsible for the 1995 report and calling for the merger of the two authorities in the interests of cohesion and clear enforcement. The MMC was not of the same view¹⁵.

In the last days of the long Conservative administration, the DTI issued a further consultation paper¹⁶. This recommended the adoption of a prohibition system for restrictive agreements, following the Liesner proposals, but retaining the administrative control of monopolies, ie option 1 from 1992.

The new Labour government in 1997 therefore inherited even further advanced proposals to enact a prohibition system for restrictive agreements, with rather less developed ideas on changes to the existing monopoly controls. There was some inherited antipathy to mergers, and a possibly uncertain attitude to competition and market-based solutions but a clear wish to move forward and end the 15 year debate that had been going on, particularly with regard to institutions.

¹³ DTI Press Release 5 July 1984.

¹⁴ HC TIC Report *UK Policy on Monopolies*, May 1995. The 1991 TIC Report on *Takeovers and Mergers*, see above, had similarly recommended a unitary body.

¹⁵ See Wilks loc cit pp 312-313 for a full discussion.

¹⁶ *Tackling Cartels and the Abuse of Dominant Position* DTI March 1996 and the subsequent draft bill

The first decision of the new Secretary of State, Margaret Beckett, was to prohibit the *Bass/Carlsberg Tetley* merger¹⁷, overruling a majority of the MMC.

However, the main product of the new government in this field was the 1998 Competition Act (CA98), which was by any measure a very significant reform, and one which opened up a new stage in the reform process.

Period 2: 1998-2003

The CA98 did many things. It enacted into UK law, with hardly any substantive change, the EC prohibitions of Articles 85 and 86¹⁸, and gave the DGFT and sectoral regulators competition decision making power, including the power to impose penalties.¹⁹ It abolished the Resale Prices Act and the Restrictive Practices Court. It retained the existing monopoly controls, including the controversial complex monopoly provisions, but recast the MMC as one part of a new authority, named the Competition Commission (CC). The CC's other part was a new tribunal, the Competition Commission Appeal Tribunals (CCAT), whose main task was to hear appeals on a full merits basis against decisions of the DGFT under the new prohibition system. The two sides of the new CC (called the Reporting Panel and the Tribunals) were to be supported by more modern management with the office of Registrar imperceptibly changing into that of a chief executive.

For **agreements and dominant positions**, this was clearly a complete change. Interestingly, the OFT appears to have under-estimated the scale of the task. It was keen to encourage complaints, but less keen to receive notifications (individual notifications for exemption were still entrenched in EC practice at that time). It proceeded cautiously, taking dominant position rather than cartel cases; it played down the need for elaborate procedures or “rights of defence”.

This was partly because it was thought that such matters would be overseen by the new CCAT, in the exercise of its appeal functions. This coincided with the increased emphasis on human rights in competition case procedures²⁰, in which the CCAT would clearly play a central role. Several significant appeals went to the new Tribunal, and the DGFT's duties and obligations were carefully scrutinised.²¹

CA98 took effect in March 2000. Before the new cartel regime had had time to operate, the government became increasingly attracted by the idea of criminalisation of serious cartel infringements, and was considering how best to bring such a law into effect alongside and complementary to the new Chapter I prohibition.

¹⁷ Cm 3662, 27 June 1997.

¹⁸ Section 60 of the CA98 provided that the new provisions should be interpreted so far as possible in accordance with EC law.

¹⁹ The giving of enforcement powers to sectoral regulators led to the need for working arrangements to ensure some measure of coherence in the system of “concurrency” ie the application of the same law by several authorities.

²⁰ The European Human Rights Act was passed in 1998 and like CA98 took effect in March 2000. Article 6 of the ECHR emphasised the importance of a hearing before an independent tribunal.

²¹ See eg *Aberdeen Journals limited v DGFT* [2002] CAT 4 and [2003] CAT 11, *Napp Pharmaceutical Holdings v DGFT* [2002] CAT 1.

The regime for **monopolies and mergers** continued, under a new institution, which in many ways strongly resembled the old. The single firm scale monopoly provisions were kept, but were eclipsed by the new law on abuse of dominant position. The complex monopoly provisions were thought to have an important continuing role in controlling situations of joint dominance or oligopoly.²²

In terms of the new CC's working arrangements, major procedural changes were under way, with the former MMC reforming itself to provide greater co-ordination and consistency between inquiry groups, more transparency of process (including public hearings), clearer stages of the inquiry process, and clarity over possible remedies. Emerging Thinking and Provisional Findings had their genesis at this time.

Both the DGFT and the CC took the production of Guidelines seriously and much work was done to ensure these were of high quality. Particularly important were the guides to merger and market investigations, produced respectively by the two authorities who operated different phases of the same system.²³

However, more change was coming, and there was a strong sense that the CA98 had not completed the job and in 2001 the government published a lengthy White Paper setting out its aim to establish a world class competition regime.²⁴

On **mergers**, the policy aim was to move away from the public interest test towards the US "substantial lessening of competition" (SLC) test. The ECMR was itself being reassessed following some successful appeals against Commission decisions, and there were moves to adopt a comparative test at the European level also.²⁵ At the same time, partly as a result of experience in the *BSkyB/MUFC* case²⁶ the then Secretary of State Peter (now Lord) Mandelson wanted to "take Ministers out of" merger cases, at least for competition-based decisions.

The result of these two developments was the proposal to give the CC itself the power to decide merger cases applying an SLC test, with specific, and rather limited, additional public interest issues reserved for Ministers. References were to be made by the OFT rather than by ministers.

In the meantime the CC had to deal with some major domestic mergers under the existing regime, including the four competing bids for the failing *Safeway* supermarket chain²⁷.

On **monopolies**, the public interest test continued to apply, albeit with competition aspects predominating. The experience of the *SME Banking* case²⁸ showed the weakness of the

²² The government told parliament, however, that these powers would be used sparingly (see *HL Deb* Vol 586 no 116 cols 1333 and 1337).

²³ These guidelines were later issued jointly by the CC and OFT.

²⁴ DTI White Paper "A World Class Competition Regime" CM 5233 30th July 2001.

²⁵ Internal changes included a new chief economist office and re-organisation of the Merger Task Force. Substantive changes were embodied in Council Regulation 139/2004/EC OJ L24 29.1.2004.

²⁶ Cm 4305, 9 April 1999.

²⁷ CC Report *Safeway and others* 26th September 2003 Cm 5952.

regime. Not only was this reference made by Ministers against the DGFT's wishes, but many of the competition issues stemmed from so called customer inertia, which was difficult to address under the framework of the Fair Trading Act controls.

So it was decided completely to recast the approach to monopolies also. A new analytical framework was proposed, involving a wide and flexible Adverse Effect on Competition (AEC) test, and the power to apply it was given to the CC itself, on references made by the newly empowered OFT (and the sectoral regulators). A Brave New World indeed, and with all kinds of unintended consequences lurking behind the new regime and its powerful supporting rhetoric.

All that found its enactment in the 2002 Enterprise Act (EA02), to which we now turn.

Period 3: 2003-2011

Outline of the new regime

The EA02 took effect in the following year, 2003, and set the stage for a new competition regime which lasted for about a decade.

Its main features were:-

- newly empowered, independent competition authorities;
- clear, economics-based competition tests;
- criminal sanctions for individual cartel infringements;
- strong, cross-party political support;
- strong, specialised judicial control, with a newly independent tribunal, the Competition Appeal Tribunal (CAT);
- substantial alignment, if not actual integration, with EC/EU competition law;
- encouragement of private competition enforcement, alongside the public law; and
- significant international involvement, through active roles in the OECD and ICN.

Regulation 1/2003²⁹

There was little if any further domestic legislation during this period. Improvements and changes were brought about within the existing system, mainly by the authorities themselves. The one major change was at EU level, the passage of Regulation 1/2003, which abolished notifications for exemption and empowered designated national authorities to apply EU competition law alongside the EU Commission, co-ordinated through a new body, the European Competition Network or ECN.³⁰

²⁸ CC (2002), *A report on the supply of banking services by clearing banks to small and medium-sized enterprises within the UK*, Cm 5319.

²⁹ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, p.1-25.

³⁰ The commitments procedure was introduced for CA98 cases by the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004.

Designation

The OFT³¹ was designated as the UK national authority for the application of EU competition law. The CC was not, initially on the ground that it did not apply the equivalent powers under CA98. In the years that followed this gave rise to some debate, as the CC concluded that, as its market investigations were liable to unearth possible breaches of EC competition law, which it was itself unable to deal with, it would make sense if it too were designated to apply EU competition law, at least for some purposes. The OFT was officially neutral but in practice less than enthusiastic. The DTI were inclined to favour the idea, but in the end did not proceed in view of the OFT's reluctance. The CC's participation in EU competition matters therefore remained on an informal basis³².

Economic objectives

It is interesting to look at what had been claimed in the 2001 White Paper. This had set out a clear vision for improving competition, including a statement of the government's objectives and a summary of the economic literature on competition and economic performance. It also set clear goals for the newly empowered and independent competition authorities.

The White Paper seems to have assumed that, with these changes in place, competition would increase with consequential improvements in consumer welfare and possibly also in productivity. Such improvements are of course hard to measure reliably, and even if measurable can be hard to attribute to any one aspect of economic policy. But the policy aim at least was clear, to improve consumer welfare by vigorous competition enforcement, applied by agencies at arm's length from the executive government.

Assessing the new regime

The new regime brought in by the EA02 was by any standards a major step forward. Indeed much of it is still with us. It is very hard to assess reliably the extent to which this new regime actually improved the UK's overall economic performance. But one can look at what happened against the government's stated aims and the regime's attributes.

On **independence of the agencies**, this was largely achieved, although the OFT, with a strong executive function, was always going to be closer to government than was the CC. However, this handing over of powers and responsibilities to arm's length agencies had the effect of disempowering Whitehall departments and ministers, with unforeseen consequences in terms of the understanding of how competition law worked, and what was or was not achievable³³.

³¹ As also were the sectoral regulators with concurrent competition powers.

³² The CC nonetheless played some part in the ECN, for example co-chairing the ECN's Mergers Working Group.

³³ A related issue was the perception that the arrangements for concurrent competition enforcement by sectoral regulators and OFT had not worked well, with regulators generally reluctant to rely on CA98 over their licensing powers and OFT discouraged from taking enforcement action in regulated sectors.

On **substance**, the new authorities embraced competition economics with great enthusiasm, and earned respect from colleagues both here and overseas for the thoroughness of their analysis and the diligence with which they amassed quantitative evidence and data. A consequence of this new approach was a noticeable expansion in the scope and complexity of individual cases.

Criminal sanctions had been added to the EA02 in response to the widely held view that only if business executives were faced with the threat of jail or other personal sanction would they stop forming cartels. Whether or not that was correct, and it is notable that the EU's anti-cartel policy operated without the benefit of such measures, the legal means chosen to implement this proposal in the UK were rather formalistic and cumbersome. A separate, self-standing individual offence was created, requiring individuals to have agreed to fix prices, or whatever, with dishonest intention, with prosecution and jury trial in the criminal courts. Integration of this offence with civil enforcement by the OFT³⁴ against the companies in question was difficult.

The regime indeed proved difficult to operate, successful prosecutions were few, and it was found necessary to abandon the dishonesty test in favour of one of secrecy in the 2013 legislation. The actual deterrent effect of the criminal regime over the period since 2003 must therefore remain unclear.

Political support for the new regime stayed strong, at least until the financial crisis of 2007 and the economic downturn that followed. This was partly because, with a few notable exceptions, understanding amongst politicians of the new competition economics was limited, and most were content to "leave things to the experts". However, after 2007, it became increasingly untenable to put forward purely market-based solutions to obvious economic difficulties, and the competition authorities were obliged to take more account of political realities. How far this influenced operational activity, or the outcome of individual cases, is for others to judge. What one can say is that the political reality was there, as was shown by the *Lloyds/HBoS* banking merger in 2008, and the *News Corporation/BSkyB* merger a few years later..

Judicial control developed significantly over the period. The new CAT had not featured very prominently in the "World Class Competition Regime" plans. Instead it was originally thought that the CCAT could continue to operate from within the CC itself. It became increasingly apparent that this was untenable and in November 2001 the government decided that a separate tribunal was needed, able to hear appeals from the OFT's and regulators' competition decisions, and to judicially review the CC's decisions³⁵.

With this new role, as well as a new power to assess damages in follow-on private actions, the CAT became increasingly confident and expert, with its influence confirmed by some

³⁴ Or the European Commission, which was a more factor, important given the higher level of EU cartel enforcement activity.

³⁵ The Competition Service, envisaged at one stage as supporting both sides of the CC, emerged as the administrative service of the new CAT.

important decisions³⁶. By the end of this period, the CAT had gained an enviable reputation as a competition appeal court, not least amongst other EU countries.³⁷ There were only the faintest murmurs of discontent, mainly from authorities whose decisions had been examined with what they saw as excessive critical attention. The CAT also helped to ensure that interventions in markets and punishments applied to infringers became increasingly subject to the EU doctrine of proportionality.

Integration with EU competition law became a given; the OFT participated with alacrity in the ECN and enjoyed its new found designated status as an EU partner. The CAT, in its role overseeing the operation of the law, did as much as it could to ensure that UK competition law was applied so far as possible similarly to the law in the EU.

The CC, by contrast found this aspect more difficult. In both mergers and markets it was not applying EU law, or anything similar, it was not designated as a National Competition Authority and did not participate formally in the ECN.

The disparity between the substance of EU and UK merger law had been reduced by the 2004 reforms to the ECMR mentioned earlier, which introduced a Substantial Impediment to Effective Competition (SIEC) test, although the suspicion lingered on that DG Comp was more interested in absolute dominant positions than in significant relative lessening of competition.

The UK market investigation regime remained an outlier. No other EU country had a system where an authority could investigate, condemn and act against those subject to the investigation. The standard EU model was a sector inquiry, on the basis of which further action under the ordinary law could in due course be taken. Early on, there were mutterings about the regime's compliance with Regulation 1/2003, and whether the CC's decisions could be open to challenge as a result.

In the result, the market investigation regime emerged intact and respected. As the CC grew in confidence and the cases flowed, other EU authorities began to wish they had similar powers, and the CC was in much demand to explain how such a regime could work.

Internationally, the UK regime was much admired, and the UK contributed greatly to the emerging international co-operation in competition, providing sound case experience, doctrine and hands-on advice and assistance. With this went much peer group appreciation. For most of the period, the CC achieved the top 5 star rating in the GCR peer review rankings, alongside the US authorities and DG Comp., with the OFT not too far behind. This did indeed look like a "world class regime".

³⁶ See eg *Genzyme limited v OFT* [2004] CAT 4, *Claymore Dairies and Arla Foods v OFT* [2005] CAT 30, *Albion Water v WSRA* [2006] CAT 36 and *National Grid v GEMA* [2009] CAT 14.

³⁷ The CAT provided the initiative in establishing the Association of European Competition Law Judges (AECLJ) for education and co-ordination of the EU-wide judiciary.

The new regime found wanting

So what went wrong? By 2011, the new Coalition government, albeit partly in the context of a “Bonfire of the Quangos”, was proposing a merger of the OFT and CC.³⁸ The government said that whilst the substance of the competition regime remained excellent, the institutional structure could be improved by merging the two principal authorities. These moves led to the Enterprise and Regulatory Reform Act 2013 (ERRA13) which enacted yet another major reform of the system, albeit one essentially limited to institutional changes only. So let us now consider the final period in this chronology.

Period 4: 2011- present

The new Competition and Markets Authority

The ERRA13 provided for a merged authority, the Competition and Markets Authority (CMA), combining the antitrust and phase 1 mergers and markets roles of the OFT with the phase 2 role of the CC. Cases and inquiries, together with the substantive law, continued unchanged.³⁹ The CC inquiry groups were retained within the new structure, their status and independence protected, with a chairman of panels to represent their interests⁴⁰. The resulting merged CMA would, it was claimed, be better able to manage and deploy resources, would express a single more powerful voice internationally and would benefit in its antitrust enforcement work from the application of processes and techniques perfected within the CC, but hitherto only used there.

All in all, it would be hard to imagine a more perfect situation. The golden spires of El Dorado were now surely in view. However, it was neither necessary nor inevitable that this reform occurred and it may be interesting to examine how it came about.

The justifications put forward for the reform

Even after half a decade, it is hard to be sure precisely which of many factors brought it about. The idea of merging the two authorities was not new; it had been around at least since the 1990s and examined again in some detail for the purposes of the Comprehensive Spending Review of 2006-7. The arguments for merger were perfectly respectable, but the risks of implementation were substantial, and the transition costs high. It happened, I believe for the following reasons.

³⁸ *A Competition Regime for Growth: A Consultation on Options for Reform*, URN 11/657 BIS March 2011; *Growth, Competition and the Competition Regime: Government Response to Consultation*, URN 12/512 BIS March 2012.

³⁹ Market investigations were, however, reduced in duration from two years to 18 months, with the possibility of a six month extension, and provision was made to widen the scope of investigations to include cross-sector and public interest issues. Measures were also included to improve the working of the concurrency arrangements.

⁴⁰ The Chairman of Panels was not specifically envisaged by the statute but was a result of a delegation of powers by the CMA Chair.

The fragility of the Enterprise Act regime

In the first place, the 2003 regime was not as coherent as it appeared; in one sense it was a compromise and in another sense quite a risky experiment. All this conferred on it an element of fragility.

The reforms of 1998, introducing a UK prohibition system modelled on EU law, sat somewhat uncomfortably beside the old monopolies legislation, which was retained. One was a system in which an authority found infringements of the law and imposed fines, answerable only to an appeal tribunal. The other was an administrative system where the conduct of market players could be found undesirable, with the last word resting with the government itself.

The reforms of 2002-3 could have ended this rather anomalous situation, by aligning the law controlling market power fully with EU law. Instead they re-launched the control of monopolies in an entirely new legal framework, the Market Investigation Regime (MIR) with the CC as its guardian. Markets were to be investigated and competition improved as a result of the CC's efforts, which were in addition to any action by the OFT under Chapters I and II.

Somehow these two approaches had to work alongside each other. The connecting factor was the OFT, with power to take decisions under one system and to initiate market investigations under the other.

How the system worked in practice

The authors of the legislation appear to have had a clear vision of how this system should work. There would be a lot of "antitrust" cases handled by the OFT and a steady stream of significant market investigations conducted by the CC. Unfortunately, the reality proved rather different. Antitrust enforcement was on the whole lower than envisaged and full market investigations were rather few in number and rather random in their coverage.

In relation to antitrust, it is fair to say that OFT were to some extent pursuing a moving target. Cartel cases could be difficult and complicated. Parties did not like, on the whole to be subject to high fines, and they tended to appeal. Under the watchful eye of the CAT, authorities had to conduct accurate assessments and consider carefully what was said by the parties accused of wrongdoing. The growth of economics-based assessment empowered the defendant companies as much as the authorities; strong judicial control meant that the authority did not always have the last word, and the full appeal process could be an uncomfortable experience.

Whatever was the reason, by 2010 it was being said that the OFT's antitrust enforcement was not "effective" enough and that change was needed. In the proposals tabled, the government considered turning the OFT into a prosecutor authority before the CAT, but in the end limited the changes to improvements in decision making and case handling, although this idea has not wholly gone away.

Uncertainties in markets and mergers

In relation to markets, and to some extent also to mergers, the OFT had only a limited incentive to make full use of the new regime. Already in 2003, it had set up its own markets and policy division (the MPD) and was starting to conduct its own market studies. These had no specific statutory basis⁴¹ but could be used either as a precursor to a full market reference to the CC under the MIR, or as investigations in their own right, which was in many cases the outcome. There was nothing in the law to require any specific number of references, so the CC's workload, and contribution it made to the competition system, was effectively controlled by the OFT.

In the same way, it was for the OFT to decide whether a merger merited reference to the CC and a "phase 2" examination in depth. The OFT conducted an ever-increasing degree of scrutiny at phase 1, often seeking undertakings in lieu of a reference, and had every interest in settling issues in this way. The business community was by no means opposed to this development, as it offered a speedier, if somewhat cruder, route to merger clearance.

It is undeniable that faced with this kind of institutional pressure, the OFT/CC relationship could occasionally become strained. Although the regime's benefits were properly calculated on a joint basis, there was in practice some jostling for relative share. The CC's very situation, detached from the front-line work of investigation and complaint handling, seemed to give it an unfair advantage. In relative terms it was well resourced, was able to focus its energies on a limited number of cases, was required to work within strict timetables, and was wedded to transparent and open procedures that it had perfected over time. How could it fail to do well?

A second pair of eyes?

One of the traditional arguments in favour of retaining two separate authorities was that a reference to the CC provided parties with "a second pair of eyes", that is the chance to argue their case before a fresh and unprejudiced body, free from so-called "confirmation bias". For markets and merger cases, this could be said to be true, but the CC had no role in "antitrust", so for what might be seen as the OFT's main task of enforcing this aspect of competition law, the "second pair of eyes" benefit of having two authorities did not apply. The necessary control of the OFT's actions was supplied by the CAT on appeal.

From the OFT's viewpoint, it must therefore have seemed the system would be much better if the resources available to the CC could be pooled with those of the OFT⁴². Arguments about independence and avoidance of bias could be seen as secondary, and could be dealt with by internal procedures.

⁴¹ They were justified under the OFT's general statutory duty to monitor competition.

⁴² It should be noted that by 2005-6 the OFT's budget had increased by some 70% compared with 2000-1 (see NAO Report 2005). The Report noted that this increase in powers and expenditure had raised the expectations of both government and stakeholders.

Differing perceptions

The OFT's control of the reference pipeline was clearly a factor. Both in mergers and in markets, some noticeable periods went by without any cases being referred. In part this arose from market conditions, but there may also have been a measure of official reluctance. It was suggested at the RPI annual conference two years ago that the lack of market references arose from the OFT's belief that the CC would not apply effective remedies such as divestiture⁴³. This was not said at the time and a more plausible explanation is that the OFT did not like the unpredictability of a fresh phase 2 investigation of a market they had already studied. Similarly, a noticeable number of merger cases were cleared by the CC in circumstances where it was likely that the OFT would have preferred a different outcome.

The Group of Four

Be all that as it may, in March 2008, the OFT and CC jointly appointed a group of four senior people, two from each authority, to examine the markets regime, why it was not working, and to recommend changes.

The Group reported in August 2008, making a number of recommendations. The CC was asked to make its investigations less "monolithic" ie shorter and more flexible, and to work more closely with OFT, particularly in relation to remedies. The OFT for its part was urged to reduce the many filters that it placed in the way of making references to the CC⁴⁴ and to cease regarding them as a measure of last resort.

Initially both authorities agreed to work on the basis of these recommendations. However it was not long before the OFT came to the view that only a merger of the two authorities would put the system right. It articulated this view formally in the summer of 2008. The CC disagreed with this proposal as it was presented, and some quite tense discussions ensued. However, the government rejected the OFT's proposal. Instead the idea remained on the table as one option for improving the regime and it was left to the new Coalition in 2010 to act on the recommendation of officials in the Department for Business to take the merger forward.

The new proposals

What transpired in 2010 was rather different from what had first been put forward. It was now proposed to place the two authorities under a single chairman and board, whilst preserving as much as possible of the substance of the existing system. In particular the two phase investigation of mergers and markets was retained, with something resembling the former CC given an independent phase 2 role within the new body.

⁴³ By the OFT's former chief economist. Presumably the CC's decision in *BAA Airports* (2009) would have allayed any such fears.

⁴⁴ These included avoiding any possible overlap with Chapters I and II, seeing a likely remedy at the time of reference, and applying a high proportionality threshold. Reference decisions were made by the full OFT Board.

Taking the merger forward

Once the principle of the merger was decided, however, any previous disagreements had to be put aside, and both authorities put considerable effort into achieving the best possible outcome in terms of a merged authority.

Whilst it is still early days, the CMA has already achieved a lot. It has instituted better processes and decision-making in antitrust cases, given greater emphasis to antitrust cases, conducted two very large market investigations, and improved the process of merger control, all with the vital phase 2 assessments still carried out by panels able to reach their own conclusions, independent of any other part of the CMA.

The CMA has worked hard to complete the integration of two very different authorities, as well as introducing new blood from elsewhere in the competition regime. It has during this time been subject to close examination by the National Audit Office⁴⁵, which although making some trenchant comments on particular aspects, has in the main been content to give the CMA the necessary time to sort itself out, whilst noting that it is handling some very large and important cases. The CMA was set a difficult task. It has expended much effort and made considerable progress. But it is unlikely that the task of transition is yet completed.

Further measures

For much of the rest of the Coalition's term, aided by continuity in the office of Secretary of State (Sir Vince Cable serving for the entire five years), the government left the new system to bed down. An exception to this official tranquillity was the Regulatory Appeals Review⁴⁶ in 2013, which although largely directed at appeals from sectoral regulators' decisions, at one stage, and without any obvious justification, proposed to lower the full merits appeal standard for competition cases. This was quietly dropped⁴⁷.

The Consumer Rights Act 2015

Another exception, and a major development, was a big boost to private enforcement. The Consumer Rights Act 2015 added significantly to the CAT's powers and jurisdiction, introducing opt-out class actions together with injunctions and fast track procedures for simpler cases. This coincided with, and in some ways exceeded, the similar moves across the EU. These measures are potentially of great significance, particularly for smaller businesses and for groups of consumers, but how they will work and what their effects will be will take some time to appreciate.

⁴⁵ C&AG Report HC 737 Session 2015-16 5th February 2016 *The UK Competition regime*.

⁴⁶ *Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform* (BIS19th June 2013).

⁴⁷ Although the proposal to do the same in relation to Communications Act appeals has been quietly resurrected in the new Digital Economy Bill.

Further Reforms

There have also been plans for further reforms. Earlier this year the new Conservative government consulted on further improvements to the competition regime⁴⁸ but it may be that in the light of recent upheavals, these do not proceed. In any case, it is probably too soon for further substantial changes. The framers of the ERRA13 set a period of five years for the first review of the new regime, and that still looks about right.

Some part of the pressure for earlier change may have lain in the CMA's experience of market investigations. It is significant that the first two major market investigations begun by the CMA, banking and energy, were cases that had "hung around" for many years, well before the OFT/CC merger, and were of course both politically very sensitive. Neither case is yet fully concluded. The CMA was unable to complete either case within the newly shortened timetable of 18 months, but it would be very unwise to assess their substantive outcome or to draw too many lessons from how they were conducted until some more time has passed.

Assessment

So that brief chronology brings us up to date. Those are the main events, at least as I see them. But what has actually been going on in this journey towards the perfect regime? There are several principal themes that can be seen, and several major issues that are still outstanding.

Let us start with the themes.

Underlying Themes of the Reform Journey

The reform process aimed to put competition policy onto a sound analytical basis that makes sense in terms of accepted economic theory. Only in relation to mergers has there remained any serious issue about the wider public interest⁴⁹.

At the same time the reform process has tried to give authorities sufficient powers and expertise to operate effectively. Expert judicial control has been developed, whilst the overt control exercised by ministers has weakened. Private enforcement has been developed alongside public enforcement. The government has largely left the development of competition doctrine and policy to the authorities.

Let us examine each of these in turn.

⁴⁸ *Options to Refine the UK Competition Regime – A consultation* BIS/16/253, May 2016.

⁴⁹ Admittedly ERRA13 expanded the public interest competences in relation to market investigations, but it is not yet clear how important a move this will prove to be. One reason advanced for the appointment of the *ad hoc* Independent Banking Commission in 2010 was that a CC inquiry would only have been able to consider issues of competition, not prudential regulation or other wider issues.

Dealing first with **sound analytical basis**, the arguments for this were well rehearsed in the 1980s and 90s and the point may seem obvious. The old RTPA was rightly criticised for excessive formalism, and the control of monopolies was haphazard and often unclear in its approach. But the process is by no means complete. Only in relation to the law against cartels is it generally accepted that these almost always have harmful effects and in general should be prohibited. This acceptance has contributed to the move by authorities towards a “restriction by object” approach to cases, but this consensus is not reflected in dominance cases, where the issues are more in dispute.

In relation to abuse of market power, the argument continues, with advantage moving back and forth. Despite all that has been written and said it is still not clear how much market power a business should be allowed to acquire and how far it may take advantage of it. Individual cases fall either side of whatever line is sought to be drawn. Agreement on the merits of static or dynamic factors, efficiency gains, the time scale for assessment and protection of competition as opposed to competitors is still some way off.

This uncertainty affects both merger control and abuse of dominant position cases. Merger control is less problematic as the test applied is a relative one, against a recognised counterfactual situation, (how far will the merger lessen competition compared with what might otherwise reasonably occur), with less emphasis on an absolute assessment of the resulting market position.

On **wider public interest issues**, the debate on how far these should count in merger control continues. The most controversial merger cases in recent times have been those that generate issues other than competition. Only yesterday, it seems, it was questioned whether Kraft should be allowed to take over Cadburys or Pfizer take over Astra Zeneca. More recently similar questions were raised when ARM Holdings was taken over by the Japanese firm Softbank. More significantly, the specific public interest grounds that were preserved in the EA02 regime have been applied with some effect. Admittedly the *Lloyds/HBoS* merger required a new ground to be hastily enacted, but the *BSkyB/ITV* and *NewsCorp/BSkyB* cases raised distinct media issues, that were assessed separately from the competition issues. These and other cases suggest that try as one may, merger control can never be entirely removed from the political process.

On the **powers given to the authorities**, the theme clearly has been one of massive increase over the period. Indeed the process seems without an end in sight. The CMA has, by any international standard, an extraordinarily large array of powers. The recent consultation found some possible additions, for example a power to fine for breach of antitrust commitments. It would in the present circumstances be hard to base any criticism of the present regime on the authorities lacking the necessary powers, but no doubt more gaps will emerge. Whether this has enabled the authorities to operate more effectively overall is another question.

The development of **judicial control** by an expert, dedicated tribunal has been a significant theme. By and large this has worked well. The challenge in an appeal system that allows the tribunal to examine the merits of a case is to avoid a time consuming and expensive retrial of

all the issues, whilst still getting to the substance of the case. Most courts, however expert, are not in a position to repeat an authority's investigation⁵⁰. An appeal can, however, allow those areas where the authority's analysis, its use of evidence or its judgement are disputed to be thoroughly examined. Whilst the appeal process is largely in writing, the oral hearing of argument and examination of witnesses provides a vital safety valve for the prohibition system, and a counterbalance to the concentration of power in the authorities. In the case of the CAT, its growing role in private enforcement will enable it to develop even more experience and expertise, so that it can assess more effectively whether, and to what extent, the authority has "got it right or wrong".

Indeed, the growth of **private enforcement** has been another major theme. It may well attract the most attention in the years to come. Of course the changes recently enacted will need time to bed down, and the CAT will gain more experience as it grapples with more of the issues. It is by no means easy or straightforward to organise and manage a large scale action for damages, whether or not a class of litigants is involved. Nor is it always easy to dispense justice quickly in an urgent injunction case, however small. Private enforcement grew slowly in the early years, but now looks to be increasing, assisted in no small measure by a growing number of bodies willing to fund such actions, particularly "follow-on" cases.

One obvious consequence is that this will have effects on the scale and character of the CAT. Whilst its capacity to adapt to new circumstances should not be under-rated, it is important that in increasing its scale and competences its essential expert character is not lost.

Taking **ministers out of decision making**, and **entrusting policy and advocacy to the authorities** are different sides of the same coin.

We have already mentioned that the former aim is probably impossible to realise. Ministers will often want and sometimes have to become involved in particular issues or cases. Yet it may be questioned whether it was such a good idea to remove ministers from considering competition issues altogether.

The effect over more than a decade of competition policy having been "left to the experts" is that ministers may lack a sufficient body of informed officials within their own departments. This means that doctrinal issues may simply not be understood, or particular reforms proposed without a full understanding of their effects or implications. The successive, often inconsistent, proposals to change the standard of review in competition and regulatory appeals are perhaps an example of this. Responsible departments have "hollowed out" their cadre of competition experts so that it is sometimes hard to discern in the relevant departmental organisation chart where competition policy is dealt with at all. This is undesirable for all kinds of reasons.

One obvious area of risk is that the value of the "strategic steer" given by ministers to the CMA may be diminished if it is based on an insufficient appreciation of what the authority is already engaged in and why.

⁵⁰ The Upper Tribunal does so in some cases.

I am not advocating going back to the pre-1998 system, with ministers taking all the important decisions. I merely point out that there are significant drawbacks to the present situation, and that we have not completed our journey here, by any means.

The UK and the European Union

As if all that was not enough, we now have the uncertainties added by the result of the Referendum on June 23rd and the subsequent moves towards the UK's possible departure from the EU. This is not the place to discuss the legal consequences of "BREXIT" as it is crudely referred to, and in any case it is too early to say what these will be. We may just note, for present purposes, that one could take either of two views. On the one hand this could be seen as a chance for the UK to re-assert the distinctive character of its competition regime and develop it separately from that of the EU. Or one could see BREXIT as putting at risk the entire intellectual basis for the reform process of the past 25 years, leaving UK competition law as an untimely reject from the EU legal family, with the uncomfortable choice between steady divergence from EU law and declining influence or adherence to it but with no role in its development. I leave it to you to decide which view is the better.

Have we arrived?

Those are what I see as the main themes of the reform process over the past quarter century. It remains to consider whether we have arrived at our destination or whether, as with Stevenson's El Dorado, it remains an unreachable objective.

Clearly, much *has* been achieved. The competition landscape has been transformed since 1991. The whole basis on which mergers, restrictive agreements and situations of market power are considered has been radically changed, and pretty clearly for the better. For the most part, the UK has integrated its competition law into the EU system and both contribute to, and benefit from, participation in a supra-national system. New authorities have emerged, dedicated to effective competition enforcement. Processes are much more open and transparent. Authorities genuinely attempt to obtain the appropriate evidence and to assess it correctly. Judicial control is by and large strong and effective, and the political consensus in favour of competition policy has more or less survived the shock of severe economic and financial downturns.

So are we there? I fear not. I see three main issues still to address.

In the first place we have still not resolved the issue of striking **the right balance between rules and individual case analysis**. I referred earlier to the increasing complexity of case-analysis. It is a classic example of conflicting virtuous pressures. On the one hand, examining a particular case in the light of all relevant evidence is the only fair way to arrive at a correct solution. On the other hand, given the resource implications, it is impossible to do that exercise in every case, so without recognisable rules the system becomes impossible either for business to follow or for authorities to administer. When heavy fines and other drastic consequences follow from a finding of infringement, such a tension becomes intolerable. So,

the elaboration of workable rules on abuse of market power, and to a lesser extent on merger control, remains an essential task to fulfil.

Second, although the government has asked for more antitrust enforcement, we have still not reached consensus on **the balance between “soft” enforcement** (policy statements, notices, guidance and guidelines) **and “hard” enforcement** (decisions applying the law). This is particularly important in the context of a system that rests on prohibition, punishment and deterrence. Of course there should ideally be no tension between these two approaches. Soft enforcement is extremely important in explaining how an authority approaches its tasks and in informing and persuading businesses and individuals to change their behaviour. But such things only carry credibility if it is clear that the authority will also act firmly and swiftly against those who break the law.

One of the charges laid against the OFT in the years up to 2010 was that it did not conduct enough cases, particularly in the central antitrust territory of horizontal cartels. The CMA has accepted the challenge of doing more of these cases, and restoring the appropriate soft/hard balance, and is to be commended for this. It must be careful, as I am sure it will be, not to settle too many of its infringement cases or to accept too many commitments that do not lead to findings of infringement.

The third area of concern, which arises from the challenge set by the 2001 White Paper, is in **the overall acceptance by the public and by the business community of the purpose and value of competition law**. Here again, it is not clear what we have to show for 25 years’ work. Business awareness surveys continue to show a surprising level of *unawareness* of competition law requirements. It is however absolutely fundamental to the effectiveness of any competition law regime that its aims and purposes, if not its methods and results, are understood and accepted by the businesses on whom its weight falls.

The public’s view is no less important. Although competition cases are zealously prosecuted in the interests of consumer welfare, individual consumers often seem blissfully unaware of this process, or what it means for them. In this sense, the very development of sound, economics based, competition analysis has undermined its acceptance by the public, as they find it hard to understand what is going on⁵¹ I see this as a real challenge for all those engaged in competition enforcement. It is no use reaching an analytically perfect solution in a given case. It must also be necessary to explain in simple terms what the issue is, what has been infringed and why it is wrong. This might be called the “Today Programme” test and it is by no means clear that it is being passed often enough.

This matters not only for the credibility and self-respect of the authorities. It also has an important political implication. One clear lesson of the past few years is that the handing over of competition enforcement to “the experts” was not a permanent or irreversible process. Ministers will always retain the power to abolish, recast or fundamentally change any regime they have established, and any individuals they have appointed to operate it. Such is the

⁵¹ The acquittal of some defendants in criminal cartel cases may be a further reflection of this sense of puzzlement.

nature of power, and it is probably necessary and even desirable. But ministers are only human, and if the operation of even such an important policy as competition becomes too rarefied, technical, incomprehensible or detached from the mainstream of government, then it too can be at risk.

Conclusion

So, in conclusion, we have certainly not “arrived”. We have, however, travelled very hopefully, and will no doubt continue to do so. Our success must indeed lie in our labour, which has been strenuous although not always well-directed. I doubt we will ever establish the perfect competition regime, or that we should even think that desirable. All we can do is to strive to achieve the best possible outcomes to the challenges placed before us, in the fairest possible way and in the most reasonable time possible; and to explain clearly what we are doing along the way.

Thank you for your attention.