

Agenda

Advancing economics in business

New decade, new government: evolution of the competition and consumer regimes

Philip Collins, Chairman of the UK Office of Fair Trading, considers the challenges that the competition and consumer regimes face given the fundamental changes that have taken place over the past decade—particularly to the legislative landscape—and the economic constraints currently affecting both private and public spheres

In light of current economic conditions, the next few years will be a critical and testing time for the competition and consumer regimes in the UK. It is therefore useful to reflect on how the regimes have functioned, as well as how suited they are to the latest business models and practices.

It is also important that we look forward at how the competition and consumer regimes might develop in response to the new challenges we will face over the coming decade. A new government agenda that has to address significant economic challenges including the deficit, and inevitable public spending constraints will, no doubt, play a part. All the more so when the demands on the regimes are likely to exceed the resources available. This means that careful choices will have to be made, underpinned by a clear focus on both the efficiency and the effectiveness of the regimes.

This article focuses primarily on the competition regime. However, it is important to remember that the competition and consumer regimes in the UK are closely connected. Historically, competition and consumer law and policy have each been attributed distinct objectives and features, and generally treated as separate disciplines, each with their own specialisms. The Office of Fair Trading (OFT) believes that this historical separation is damaging to both sets of objectives. Competition and consumer policy are interdependent. Good consumer outcomes rely on competitive markets to provide choice and value, while vibrant competition relies on consumers being able to shop around with confidence. Competition and consumer policy together provide a framework for markets to deliver maximum benefits for consumer welfare and productivity growth.

I will first make some remarks taking stock of the competition regime, and then I will look forward and ask some questions about the future.

Taking stock

It is perhaps salutary to remind ourselves just how far we have travelled over the past ten years since the Competition Act 1998 came into force.

The Act fundamentally changed the competition law landscape in the UK. It introduced prohibitions modelled on Articles 81 and 82 of the EC Treaty (now Articles 101 and 102 of the TFEU)—far removed from the previous rules under the Restrictive Trade Practices Act and the Competition Act 1980. At the same time, decisions under the new rules became subject to full merits appeal before a specialist tribunal.

Fundamental though it was, this was only the beginning of a broader legislative programme aimed at establishing a 'world-class' competition regime.

The Enterprise Act 2002 reformed the UK's system for dealing with mergers and markets. Ministers were largely removed from the process, and decision-making powers were given to politically independent authorities—the OFT, the sectoral regulators and the Competition Commission. The Enterprise Act also established the criminal cartel offence.

The same decade has seen the introduction of leniency programmes in relation to cartels, the power to disqualify directors in competition cases, and a significant expansion of the OFT's powers of investigation (including, in some cases, the power to use intrusive surveillance techniques).

This article is based on a speech given by Philip Collins to the Law Society Competition Section Annual Conference, London, May 20th 2010.

In 2004, the European modernisation programme abolished the system of notification, which had been created in 1962 but had become unnecessarily bureaucratic. The UK (like most Member States) followed suit. UK competition law is to a large extent shaped by EU law—which itself has changed significantly over the last decade. And indeed we are obliged to apply EU competition law in the UK in parallel with our national rules where there is an effect on trade between Member States.

Coupled with this is the role that the UK, and the OFT in particular, is rightly expected to play internationally, beyond domestic and European jurisdiction. With many businesses becoming regional or global in their reach, cartels and mergers are increasingly cross-border, and it is increasingly common to find several, and in some cases many, legal regimes in play.

The OFT has played, and will continue to play, a key role in fostering and furthering international legal and economic thinking, exchanging learning, ideas and experience, and promoting coordination and convergence where practicable with our international counterparts, large and small, old and new.

The scale and impact of these changes over a relatively short period of time should not be underestimated, and it has taken time for the regime to 'bed down'. For the OFT, adapting to so many, and such fundamental, changes to the legislative landscape has been a challenge. It is probably fair to say that, in practice, identifying and taking forward the priorities for competition enforcement, in terms of both cases and tools, has proved more challenging than the OFT, and perhaps also the legislators and many practitioners, anticipated.

But the record suggests that we are now seeing the benefits of a more settled regime. Many of the legal and procedural uncertainties have been resolved—although some remain, as recent events demonstrate. Nevertheless, I believe that we are now seeing the efforts of the past ten years bear substantial fruit in terms of benefits to the economy and to consumers, as well as in terms of changes in the behaviour of business.

Examples of recent benefits include our decisions in the construction sector, recruitment (Construction Recruitment Forum), retail (tobacco) and against Cardiff Bus.¹ There have been setbacks too—and I refer to the airline fuel surcharges criminal case below.²

The enforcement of competition law of course tells only part of the story. The OFT's objective—making markets work well for consumers—is in our view best achieved

through a mixture of enforcement action, market tools (market studies and market investigation references), advocacy and working with business (whether through formal guidance or informal engagement). I will come back to this mix later.

Measuring impact

There are many potential measures or indicators of impact, none of which is definitive. Ideally we might like to measure the correlation between the effectiveness of the regimes and innovation and productivity, but this is difficult in practice. It is clear that the number of cases is not a good measure of success: not only does this ignore the amount of detriment but it also creates the wrong incentives for agencies to pursue absolute numbers of cases.

In terms of direct financial benefit for consumers, the latest public estimates show that the direct benefit of the OFT's competition enforcement activity has been £78m per year. The annual estimates for market studies and mergers work are £132m and £131m respectively.

Our consumer protection work is estimated to generate £68m of positive impact. Taken together, the average consumer savings generated from the OFT's work in all these areas are estimated at more than £400m per year. When compared with the relevant budget, this results in an 8:1 benefit to cost ratio.

On top of this, there is the indirect or deferred benefit of the deterrent effect of the OFT's competition enforcement. For instance, for every cartel we investigate, five others (according to conservative estimates) are deterred or abandoned.

Looking back, the picture is positive in most regards. The regime has taken time to bed down, but it is clearly delivering the kind of benefits expected.

I said 'positive in most regards' deliberately. You may expect me to say, and it is right that I say, something about the recent withdrawal of the criminal charges against the four individuals in the airline fuel surcharges case. Of course I cannot go into detail, but I will make four points.

First, the OFT is confident that the decision to bring these prosecutions satisfied the tests set out in the Code for Crown Prosecutors. The decision not to proceed once the trial had started was made in light of the discovery of additional electronic material—which neither the OFT nor the defendants had been able to review—and of the judge's rulings about disclosure and the timing of witness hearings.

Second, as we have said publicly, lessons have already been learnt and will continue to be. This may result in changes to practices and procedures.

Third, the OFT does not regret bringing these proceedings. They have sent an important signal to business of the risks of engaging in cartel activity and hopefully have helped practitioners to convince their clients that the risks of criminal charges in hardcore cartel cases are real, not imaginary. Research indicates the very significant deterrent effect of the prospect of criminal sanctions. The OFT has other cases which are being assessed as potential criminal cases, and our commitment to investigating and prosecuting criminal cases is undiminished.

Finally, the rather lurid allegations and abusive comments made in court (now withdrawn), and the criticisms in some parts of the press, are in my view unjustified.

Looking forward

It is clear that we cannot afford to stand still. The competition and consumer regimes are, and will continue to be, under pressure to deliver 'more with less', while facing an increasing and expanding variety of challenges and choices.

The need for effective competition and consumer protection in markets has never been greater. The UK economy is only just starting to show signs of recovery from the banking crisis and recession. Business has been under intense pressure and consumer confidence has been severely damaged. Effective regimes that promote innovation and sustainable growth are critical to this recovery.

At the same time, we know also that there will be significant constraints on public spending for the foreseeable future. The OFT is no different from most other public bodies when it comes to funding: it will be expected to continue to deliver benefits to the economy and for consumers with fewer resources. For instance, over the last three years the OFT has already taken a 15% reduction in its budget without, I would argue, significant impact on its delivery; indeed, I would argue, while improving its delivery.

I believe that both business and practitioners consider that the UK competition regime has benefited enormously from the political independence given to competition authorities. Decisions on enforcement and the analysis of mergers are based on evidence and economic assessment of the impact on competition alone. These decisions provide a clearer business environment and a basis for better business and investment decisions, and so the benefits flow well beyond savings to the firms directly involved.

Similarly, political independence is important to our dealings with European colleagues through the European Competition Network. This independence allows questions of the application of law and policy to be discussed and agreed at a technical level without the influence of government pressure or national interests.

While we might conclude that the competition and consumer regimes are developing and maturing well, with some impressive results, when looking to the future we should be realistic. Any responsible competition and consumer agency should always be engaged in a critical evaluation of its own effectiveness and the framework within which it operates. We should not be, and we are not, afraid to ask fundamental questions. For instance:

- Are the regimes working as well as they could? Are they delivering effective outcomes across the economy as efficiently as possible, at reasonable cost to the public purse, and in a timely manner?
- How well equipped are they to address new challenges—for example, greater e-commerce, changes in business models and increased globalisation?
- At a time of constrained public expenditure, how can we ensure that the aim to have the 'world's best competition regime' is affordable and deliverable? To achieve this, are changes necessary?

The balance of tools

Enforcement will always remain a cornerstone of the OFT's work. Enforcement is critical to achieving deterrence and ensuring that legitimate players are not disadvantaged by competing fairly. (This applies equally to firms and individuals and to both the competition and consumer regimes.) In the competition field, it is also important for detection of the most serious cartel offences. Without the threat of enforcement action, there is no incentive for a cartel member to blow the whistle on its fellow cartellists.

But the OFT will never be in a position to investigate every possible case. What it can do is maximise the impact of its enforcement activities by investigating fewer, higher impact cases in the most efficient way possible. The OFT's recent competition decisions have all been 'high impact', because of the size and prominence of the parties and the potential detriment, the nature of the infringement, or because of scope across the economy. (The 2009 construction decision covered around 200 separate infringements by 103 firms. It followed a number of much smaller individual cases from which it was clear that the deterrence message had not been heard.) This does not mean we

will not investigate smaller infringements—it is important that businesses do not feel that they are exempt from enforcement action on the basis of factors such as their size, or the scale of the market they are operating in. Furthermore, relatively small individual infringements may provide a route by which to start addressing problems that occur much more widely. For example, our decision in the Cardiff Bus case was strategically significant even though the case concerned a small market.

The same is true of our consumer enforcement action, where the OFT (through its internal Consumer Market Group) has focused on market-wide issues with a view to changing practices across markets or sector. The OFT's work on retail banking and retirement homes exemplifies this approach. Similarly, the landmark ruling against letting agents Foxtons has brought legal clarity across this sector and potentially other areas where similar issues could arise.³

However, enforcement is not the only tool available. There are other, less investigative and less resource-intensive, ways of furthering the same objectives.

Advocacy is one other way. By engaging with government and other rule-making bodies, we can help to ensure that competition principles are recognised and observed. For example, the OFT's 'Competition in the Professions' report (March 2001) made several recommendations for the reform of the legal services market which were ultimately reflected in the Legal Services Act 2007. This Act introduced fundamental changes to the structure of supply in that market—for example, allowing lawyers to work in so-called 'Alternative Business Structures'.

Our 'Drivers of Compliance' work considers initiatives to encourage a greater culture of compliance in UK businesses. The OFT will be publishing guidance for directors on their responsibilities under competition law. Other important examples include our reports on 'Government in Markets' (September 2009) and on 'Choice and Competition in Public Services' (March 2010), where the importance of competition policy is emphasised in terms of the key impact it has on productivity and growth in the short, medium and long run.

It is worth emphasising here the crucial role played by market studies. They allow for a holistic analysis of markets—from both a competition and consumer angle. They are an informal and efficient instrument for diagnosis, cure or both. Increasingly, the mere exposure of market practices through the conduct of a study is sufficient to motivate change and move the market away from a bad equilibrium. Where the study does not reveal a problem, there is real value in a clean

bill of health; this is not and should not be portrayed as a bad use of public resource.

Market studies also have value as a means of informed technical advice, including making recommendations to government for regulatory or policy change to reduce unnecessary state restrictions on competition. The OFT will continue to develop its use of the market studies tool in the kind of issues examined. The studies we have recently launched into the Advertising of Prices and Consumer Contracts, as well as our stock take of Infrastructure Ownership and Control, represent important new ways of looking horizontally across the economy. Developments will also be seen in terms of the efficiency of our project management, the transparency of dealings with stakeholders (for example, by consulting on the scope of a study in advance of its formal launch as well as throughout, and publishing research during the course of a study so that those interested can better understand the conclusions of our work), and our approach to securing outcomes which effectively address any consumer detriment identified.

Innovation has an important role to play in other areas of our work too. The OFT has introduced and modified a number of non-statutory initiatives aimed at improving the efficiency of the competition regime, such as early resolution and, most recently, short-form opinions. Innovation is also important in terms of our engagement. The OFT has dedicated significant time and effort organising and hosting events to debate key issues publicly, such as our Trust in Markets events, Brand Protection and Competition Conference, and recent round tables on horizontal agreements and the application of Article 101(3).

Bigger changes?

Linked to the fundamental questions outlined above, might there be bigger, more radical changes facing us in the new decade?

One issue which comes up increasingly in conversation with business and practitioners is the advantages and disadvantages of a multiple competition agency system and, especially in light of recent experience of other countries that have made such a move, whether the UK might move to a single agency system.

Institutional change of course is not a matter for the institutions themselves, but for government and Parliament. Whether there is one agency, or two—or more—agencies, needs to be judged by what is required to deliver effective and timely outcomes from the regimes concerned using the tools at their disposal, not from the point of view of institutional interests.

Moreover, whatever the institutional structure, the objective has to be to continue to develop and deliver a 'world-class' regime for the UK.

Now and for the foreseeable future, I expect effective competition and consumer regimes to play an absolutely vital part in promoting growth through innovation and productivity. Furthermore, competition policy has an increasingly important role to play in informing and supporting the use of competition to promote the efficient delivery of public services.

In the very difficult economic circumstances that we now face, there is (rightly) an ever greater emphasis on the need for speed of delivery and the effectiveness and the consistency of outcomes, combined with certainty and predictability for business. This emphasis has also to be considered against the background of the rapid pace of change and innovation in business and in markets, nationally and globally.

The current system works hard to achieve that consistency and predictability for business across different markets, across different tools and over time. Where it succeeds, as it generally does, it can be a considerable public and private benefit. Where it does not, it can impose substantial chilling effects on business and the wider economy, perhaps without the clear accountability that society expects and government and Parliament require. Either way, protracted uncertainty and delay for business can have an impact on the economy as well as raising issues of both better regulation and value for money.

If—and I stress the word if—the UK were to consider moving to a single agency model, one can see that it could potentially offer benefits in terms of timely, efficient, clear and consistent delivery of better outcomes for consumers and the UK economy at present and into the future. Those directly or indirectly harmed benefit if cases are investigated and remedies implemented more quickly, and business benefits from streamlined processes and from less duplication at different stages in the process.

A single agency could potentially offer better use of resources with greater flexibility to manage peaks and troughs across the different areas of work, more agility to drive through outcomes, and an enhanced ability to

develop and retain expertise, give intellectual leadership and attract, develop and retain the best talent in a highly specialist and competitive employment market (especially for lawyers and economists). Finally, there could be efficiencies from physical resource savings and reduced duplication in staffing and governance, as well as longer-term 'learning-by-doing' and scale efficiencies that are more easily achieved and retained by doing more cases within a single body. This could contribute in principle to a stronger, more robust institution and regimes which deliver better and quicker outcomes for consumers, lower burdens on business, and fewer costs to the taxpayer.

Against potential benefits have to be set potential disadvantages, and all changes of course come with potential costs, direct and indirect, as well as risks. These have to be assessed, managed and minimised, especially at the present time when an effective competition and consumer regime is so vital and public finances are strained.

It would be essential to ensure, for example, that the benefits of an integrated approach to competition and consumer issues, as well as the individual strengths and experience of the constituent parts in the tasks that they currently undertake, are retained, and also that independent decision-making and appropriate checks and balances within the system are preserved. Managing any change effectively in terms of avoiding protracted uncertainty and delay in implementation would be essential in order to avoid unnecessary costs and risks and, crucially, negative impact on delivery at such a critical time. Change can be daunting to those involved who may be concerned about the complexities and difficulties, although these can be overemphasised as recent international experience suggests.

I do not know whether the new decade and the new government will bring about such a change. It may be something that we will, and indeed should, face, given the economic conditions and the pivotal role of an effective competition and consumer regime. If we are asked to face it, we will do so positively and creatively. However, unless and until any change is proposed, our overriding objective is to make the present regime structure work.

Philip Collins

¹ Office of Fair Trading cases: 'Investigation into Bid-rigging in the Construction Industry in England', September 21st 2009, case reference number: CE/4327-04, http://www.offt.gov.uk/about-the-offt/legal-powers/enforcement_regulation/Cartels/construction/; 'Construction Recruitment Forum', September 29th 2009, case reference number CE/7510-06, <http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/Construction-recruitment-forum/>; 'Tobacco', April 16th 2010, case reference number CE/2596-03, <http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/tobacco/>; and 'Cardiff Bus', November 18th 2008, case reference number CA98/01/2008, <http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/cardiffbus/>.

² Office of Fair Trading (2010), 'OFT Withdraws Criminal Proceedings Against Current and Former BA Executives', press release 47/10, May 10th, <http://www.offt.gov.uk/news-and-updates/press/2010/47-10>.

³ Office of Fair Trading (2010), 'OFT Secures Final High Court Order Against Foxtons', press release 19/10, February 22nd, <http://www.offt.gov.uk/news-and-updates/press/2010/19-10>.

If you have any questions regarding the issues raised in this article, please contact the editor, Dr Gunnar Niels: tel +44 (0) 1865 253 000 or email g_niels@oxera.com

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