COMPETITION COMMISSION

The Bar Association for Commerce, Finance & Industry

2010 Denning Lecture

Is the sword mightier than the pen? Competition enforcement and the law

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Introduction

Ladies and Gentlemen

It is an honour to be asked to give a lecture named after Lord Denning. When I first studied law at the end of the 1960s Lord Denning was the dominant judicial influence of the time. His judgments were always being quoted—and they were interesting and easy to read for students. It was the same when I started to practise nearly 40 years ago—as a solicitor, I am afraid, as I left the Bar rather early. It was Lord Denning who in *Application des Gaz v Falk Veritas*,[2] one of the first 'Eurodefence' cases, which later became the first direct action for damages under what was then Article 86, and which concerned camping gas cartridges, memorably began his judgment thus:

> This is the first case in which in this Court we have had to consider the Treaty of Rome. It comes about because of a tin-can.

Such pith and clarity are only to be admired. Shortly afterwards he pronounced in *Bulmer v Bolllinger*, which concerned the permitted use of the designation 'champagne',

> … (W)hen we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.[3]

All very true, although unlike most tides, this one had no ebb. I wonder what Lord Denning would have thought of what I am going to say tonight, which concerns in part at least one consequence of 'the Treaty'—the proper enforcement of competition law.

More specifically, my title is 'Is the sword mightier than the pen?'

Lord Denning, one of the finest wordsmiths ever, would probably give this question a robust and short answer. But I would hope to persuade him, and you, that there is more to the question than might appear, at least in the particular context of competition law enforcement.

The phrase itself comes from a play by Edward Bulwer-Lytton about Cardinal Richelieu:

> Beneath the rule of men entirely great,
> The pen is mightier than the sword ….[4]

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[1]Chairman, Competition Commission (CC). All views expressed are personal to the author and do not necessarily represent the views of the CC. The assistance of Ms Trudy Feaster-Gee in the preparation of this paper is gratefully acknowledged.
[2][1974] 2 C.M.L.R. 75.
[3]*H.P. Bulmer Limited v J. Bollinger SA* [1974] 2 C.M.L.R. 91 at p111, paragraph 16.
[4]*Richelieu; Or the Conspiracy*, 1839.

As one critic said, not an original thought, but originally expressed. Shakespeare had said in Hamlet that 'many wearing rapiers are afraid of goosequills'.[5] And Thomas Jefferson told Tom Paine to 'Go on then in doing with your pen what in other times was done with the sword'.[6]

It is an obvious and powerful phrase—so why turn it round?

I am not suggesting that enforcing competition law should involve physical violence. Instead I argue that we should see as 'the sword' the cases brought by the authorities that lead to enforceable decisions; and that 'the pen' represents the softer and non-casework activity, guidelines, policy statements, research papers, studies, reports—even speeches—all sometimes put under the generic heading of 'competition advocacy'.

Nor am I saying these different instruments are mutually exclusive or that neither is important. They all have their place in the spectrum of activity. But my theme tonight is that neglect of the 'sword' puts effective enforcement at risk and that far from being the activity of last resort, conducting cases should be the first call on an authority's resources and attention.

I will outline the elements of good enforcement, explain the importance of coherent policy and doctrine and discuss what is needed by way of institutional framework. I will then explain why we need cases, what they comprise and how they should best be conducted. I will then assess our experience over the past decade or so. By then I hope I will have convinced you that actions may speak louder than words and the sword may indeed sometimes be mightier than the pen.

Good competition enforcement

So what makes for good competition enforcement? Clear policy objectives, a sound legal framework with clear rules and proper processes together with a system for redress. There then must be sound doctrine, clarity and coherence, an ability to measure the benefits and a proper institutional framework, including an appeal system. Let us look briefly at each of these in turn.

Clear policy objectives

The idea that businesses should compete with one another in the interest of themselves, their customers and the economy as a whole is not so obvious to all that it needs no further explanation. It is the task of government to set out its policy on competition[7] and the task of commentators and academics to develop and test the theories on which such policies are based. It is then the task of the authorities to apply and enforce them in real situations.

Legal framework—prohibitions and processes

For this they need, above all, a sound legal framework. Most competition systems rest on prohibitions of anti-competitive agreements, practices and, in part, mergers. The prohibitions are normally backed by penalties—which can be severe; they may even go so far as sending individuals to prison. The purpose is to make clear what is and what is not permitted, to punish offenders and thereby to deter others. The legal framework must provide for all of this and for proper processes of prosecution, judgment and, importantly, appeal. Competition

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[5] *Hamlet*, Act II, Sc 2.
[6] Letter, 19 June 1792.
[7] A useful statement of the coalition government's policy on competition is the Secretary of State's speech to the CBI Conference on 25 October 2010: www.cbi.org.uk/pdf/20101025-cbi-vince-cable.pdf.

policy without, in this sense, 'the rule of law' would risk being oppressive, authoritarian and arbitrary.

Improving competition

But it is not all about prohibitions. Merger control, for example, is not really part of the 'prohibition' system. Often the decision is about what part of the merger can be permitted to go forward and there is rarely any question of punishment.

In the UK we have an additional way of encouraging competition—by examining industrial sectors and markets through the market investigation regime—the MIR. The MIR does not operate by punishment and prohibition; instead it seeks to make changes to improve competition.

You may say that when the result of a market investigation is an order for divestment, the difference is academic. And indeed each process may be more or less confrontational. But to my mind there is a significant difference between a divestment remedy ordered after a detailed market investigation and one that is based on a finding of illegality with a large fine and consequent exposure to private damages suits.

Redress

As well as prohibition, with its associated ideas of punishment and deterrence and the possibility of improving competition, there is the need for adequate redress. The system must also provide a way of compensating those harmed by breaches of the law. This is not easy. In the USA with its court-based approach to competition enforcement, private damages—often trebled—by classes of claimant represented by an incentivized 'Plaintiffs' Bar' provide a powerful means of redress. The experience in the UK and elsewhere is more patchy.

This is, in part, because of technical legal issues as to causation and passing on of damage incurred; partly because of issues over costs, representation and incentives. But the principle should not be in doubt. Breach of competition law may give rise to private as well as public consequences. And one justification for a finding of infringement by an authority is that it makes it easier to bring private damages actions for redress. Private parties who have to establish the infringement as well as the damages face a high hurdle indeed.

Doctrine

All this must be based on a sound theoretical basis derived principally from the discipline of economics. Even the prohibition on cartel agreements is justified by the conclusion from economic study that cartels generally have detrimental economic effects.[8] The articulation of that theory into a legal prohibition is a matter of doctrine. That doctrine must be maintained and developed, by the authorities making decisions and explaining them, by courts making judgments on them and by academic and practitioner commentary.

Clarity and coherence

But whether we are talking about prohibiting bad practices or improving market conditions, it is still important that people understand why these things are being done. In the pursuit of clarity there is always a danger of over-simplification. Economic analysis is complex and it

[8]In the Regulatory Impact Assessment for competition reforms to be introduced by the Enterprise Act 2002, the government estimated that cartels gave rise to consumer detriment in the UK of over £1 billion.

may not always be obvious or easy to explain in simple terms why a particular agreement or transaction may be harmful—or why an apparently harmful one should be allowed. But the challenge is there. Business will not comply with, and the consumer will not use or appreciate, a system of competition enforcement that is incoherent. So it is up to all of us, authorities, courts, commentators and advisers to describe competition issues in terms that people can understand.

Establishing the benefits

Coherence helps to provide the necessary underpinning in terms of political commitment, consistency with regimes in other comparable countries and showing that competition, and competition enforcement, are worth having. The demonstration of the benefits of competition is a continuing and important aspect of enforcement. Direct or static benefits can be shown from the effect of stopping obviously bad practices like a price cartel or an anti-competitive merger; dynamic benefits may come from showing the effect of competition on better economic performance (though this is usually rather harder to demonstrate). With all its difficulties, the need to measure the benefits from competition must constantly be kept in mind.

Institutions

One question at present exercising the Government and the competition law community is the design of the institutions which enforce the regime and how this affects the performance and achievement of its objectives. I will dwell on this topic in a little more detail, in view of its currency.

I have so far talked rather loosely about 'authorities or courts'. There are important differences between them, and between different sorts of authority. What sort of institutional structure will provide the best enforcement?[9]

Essential elements

There is, I suggest, no single best institutional model; but there are essential elements that any model needs to provide. These are expertise, fairness, impartiality, independence and accountability.

Expertise: The institutions must know what they are doing. Like it or not, competition analysis is a technical subject and expertise is required. That is not to say everyone has to be expert in everything, just that expertise must be prevalent in the institutions, enabling markets and their issues to be understood and the evidence to be properly gathered and assessed.

Fairness: Competition enforcement is not an academic pursuit but a practical discipline. To work, it has to have general acceptance from those to whom it is applied—not always in the individual case necessarily—but for the system as a whole. One way of obtaining this is by making sure that the institutions act fairly.[10] This is partly a question of what is loosely called 'due process', ie a proper set of procedures by which different interests can be heard. But it is also an attitude of mind of those in authority. High-handed, secretive, manipulative or even dishonest administration will fail to meet this requirement.

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[9]For a recent commentary, see 'What is a good competition authority', speech by CC Deputy Chairman Laura Carstensen, November 2010 at www.competition-commission.org.uk/our_role/speeches/pdf/lc_speech_what_is_a_good_competition_authority.pdf.

[10]Fairness is also, obviously, a good idea in itself and lies at the base of good administration and good government.

Impartiality: An objective and impartial approach is related to fairness but it adds a little more. There should be no preconceived ideas, agendas or axes to grind. Even-handed assessment of the evidence is essential for the task. I should add, I hope not controversially, that perceived impartiality is every bit as important as actual impartiality, although as we have always known, there can be tensions between having the necessary expertise (eg having some relevant experience in the field) and the need for impartiality.

Independence: No competition authority is completely independent of government; it performs, after all, an activity of public benefit. What concerns us is operational independence, and freedom to set the enforcement agenda within the limits of policy set by government. Of all the elements, independence is the most important. Institutions that can be bought, bent or bullied into taking a certain line will not deliver what is needed.

Accountability: Authorities must be accountable in a general sense to Ministers, who set the overall direction of policy, to the public in whose interest policy is set, and to their Parliamentary representatives in the form of Select Committees, etc, who oversee the operation of policy; and through the fourth estate—the media—although the media can be very fickle in holding authorities to account. For an administrative authority, however, the principal operational accountability must be to the courts. Here the relationship between authorities and courts comes into play.

Authorities and courts

Enforcement can, and around the world does, take many different forms, but the essential distinction is between systems where the main process takes place before the courts and systems where the authorities make decisions, which may be reviewed by courts. Each system has its merits from the point of view of guaranteeing the essential elements.

With a *court-based system*, fairness and impartiality are easier to provide (provided the judges have the necessary qualities), as is, to a degree, independence. Having to convince a judge (or even a jury) that the authority's case and the economic evidence underlying it are sound can be a powerful discipline. Where high penalties or personal liberty are at stake, this may be the only way to proceed. It is significant that in this country, although the OFT can itself impose high fines on companies, it has to proceed against individuals suspected of cartel offences through the criminal courts.

But there are snags. Courts may lack expertise. How best to present complex evidence in court may be an issue; the court may have to decide, as a non-expert, between the views of conflicting experts. Rules and procedures can help—but the obvious paradox of having to hire additional experts to decide between the views of opposing experts lurks dangerously behind every difficult case. And court proceedings take time—particularly with several layers of appeal. The maxim 'justice delayed is justice denied' applies in competition enforcement just as it does elsewhere.

In the UK we have an *administrative system*—in which the OFT and CC[11] jointly operate the competition system by means of their own decision making, subject to review by or appeal to the courts. In the OFT's case this was simply the adoption of the EU model, following the adoption of EU-style competition law in 1998. In the CC's case, what was formerly an advisory commission (albeit one whose advice was to some extent binding on Ministers) was given decision making powers in 2002.

[11]Various sector regulators also have concurrent power to enforce competition law.

The CC and the OFT

These two bodies provide an interesting contrast in delivering our five elements—particularly as they operate—in principle at least— 'in series' rather than 'in parallel'.

Each will claim to be expert, fair, impartial and independent, but there are differences of emphasis, reflecting their culture and origins. Both would fiercely defend their independence. Ministers cannot tell them what to do, although the OFT, as the 'front end' authority, is more likely to be exposed to pressure of that kind. The OFT is a non-ministerial department; the CC is a non-departmental public body. Both probably qualify, for political purposes, as 'Quangos'. Both are expert in competition matters but it is very hard to deny that the OFT has a more 'executive' tinge to it whilst the CC is more 'deliberative'. This partly reflects the different functions. When they genuinely act in series—in merger and market investigations, it is the CC's job to have a fresh look—so objectivity and impartiality are paramount. Where they essentially try to do the same job (for example, where the OFT conducts a large market study) these differences of approach will tend to show themselves.

A basic difference lies in the way in which each body reaches its decisions. In prohibition cases, the OFT assembles the evidence, puts it to the parties, considers the response—including an oral response—and then makes a decision. It is not always clear as a matter of institutional design where within the OFT the decision is taken—it varies according to the significance or type of case—but the responsibility is the OFT's as a whole.

The CC's decisions are taken—obviously and explicitly—by the group of commissioners appointed to the case.[12] The commissioners currently comprise several eminent former competition partners of leading law firms, a cadre of financial experts (with backgrounds at senior level in banking and accountancy), a 'faculty' of well-known economists (from both academia and consulting) and senior business people from across industry. They bring a wide range of experience and expertise in a most cost-effective way. They are appointed by the Secretary of State for fixed, eight-year, terms. They are in no sense 'a rubber stamp'. The commissioners are fully engaged and visible participants throughout the proceedings, deciding the issues to be examined, attending site visits, reading the case papers, participating at meetings with the parties etc. The decision of the Group is reached following rigorous debate and argument among the commissioners and between them and the expert staff.[13]

Reform—the key elements

Now the Government's intention is to merge these two bodies into a single competition and markets authority, able to do everything that the OFT and CC currently do separately but to do it even better together. It will clearly be a matter of careful deliberation how to make sure that the 'two pints make a quart'—or even more. The new body will be awash with expertise—one can imagine, for example, the CC's economists being eager to do abuse of dominant position cases—but fairness and impartiality will be harder to achieve. Somehow, the benefits of the present two-phase review for merger and markets provided by the OFT and CC 'in series' will have to be built in to the workings of a single authority, as well as clear and appropriate decision making. For me, and I can speak more freely as my term as CC Chairman is coming to an end, this means the maintenance of a commission-type structure within the authority as the principal decision making organ, preferably operating through panels of commissioners, as now. Different types of case may require different types of

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[12]A CC Group normally comprises four or five commissioners headed by the Chairman or one of the Deputy Chairmen. The total number of commissioners is currently 38.

[13]The CC's Group system is sometimes criticized for being liable, in theory, to produce inconsistent decisions. But in fact the deliberative decision making that it embodies is one of the best ways of ensuring consistency—provided there are enough cases to decide.

panel; some cases, perhaps the smaller ones, may not need the full panoply of decisions made by panels of commissioners; but I suspect that most will, and the credibility of the new single authority will depend on making decisions in the right way. And the internal operation and system of governance must be clear and transparent from the start.

The role of the courts

Getting the authority structure right is only the half of it. There is also the question of accountability. Here we need to provide a proper role for the courts. One can debate the merits of specialist or general courts for this purpose. In the UK we have a specialist court—the Competition Appeal Tribunal (CAT)—but the general courts also handle competition cases either on appeal from the CAT or in private litigation.

In my view what matters is not the label attached to the court or indeed to the type of process it applies, but what it does. Like it or not, Parliament enacted an administrative system, where the main work is done by the competition authorities. That is why we need to get their structure and way of operating right. The courts' task is to oversee that process and to provide redress if the authorities for one reason or another 'get it wrong'. That is not the same as usurping the authorities' function, although telling the difference can sometimes be difficult. No system of competition enforcement can sustain a multi-phase approach where the same case is put through a heavy and close examination at three or four levels. In this context, limiting the courts' role to 'judicial review' rather than 'appeal on the merits' is not the point, in my respectful view. What matters is the degree of intensity of scrutiny rather than the label attached to the type of review. Paradoxically, some judicial review can be heavier and slower in practice than a full merits appeal, particularly as its main remedy, the remittal of the case back to the authority, can add months if not years to any process.

A sense of context

I have no easy solution to the issue of how to set the right level of judicial control. I am not for one moment denying the need for proper accountability and I am the staunchest defender of appropriate judicial control of competition authorities. Perhaps the key is that the courts, particularly the specialist courts, should remain at all times aware that they are playing a part in the system of competition enforcement; that they should be conscious not only of the merits of the case before them, but also of the consequences of their decisions on the operation of the system as a whole. To give a trite example. A court that consistently reduced OFT fines by 25 per cent would effectively guarantee that every fining decision by the OFT would be appealed. I believe this point is well understood. But I believe I am stepping dangerously into territory that is more Lord Denning's than mine.

We can all get very excited by institutional design. It is, after all, fundamental. But we should remember that the purpose of having good institutions is to enable competition enforcement to operate properly—in other words to *do cases well*—and it is to that we should now turn.

The need for casework

Having considered what is good enforcement, why do we need cases? It is sometimes said that the best enforcement system is one where there are no cases at all. Deterrence and compliance operate with no expenditure of official effort. Like all dangerous notions this one contains an element of truth. Of course not every agreement, transaction or practice will be the subject of a case. Competition enforcement does operate by precept and example. But this should not be reduced to the absurd. A proper level of enforcement activity is necessary to breathe life into an otherwise inert body.

Cases are the way in which the theory and doctrine are applied. It is like the difference between armchair swimming and plunging into the pool.

Casework is the crucible of the law. It concentrates the collected minds on the issue at hand; it is also the embodiment of enforcement as theatre, with an opening, much action on stage and the final curtain. The cast, whether they be officials or parties, are required to perform; some are better at it than others; like all plays there may always be another performance but on the night you have to get it right or the audience will not applaud and the reviews will be critical.

Besides this aspect of display, casework forces the players to focus their ideas on the evidence. Often this provides inconvenient corrections. The process of testing and arguing back and forth between protagonist and antagonist teases out error and refines the result. And the result, in the form of a decision, has to work—it has to make sense. On these foundations rest the quality, reputation and credibility of the authorities and hence of the enforcement system.

Casework is also the best way to develop the law. This process of testing and teasing out—in a real sense trial and error—not only clarifies but also develops the law. A new approach can be tried, a new doctrine applied. If it works it will become accepted. But it will be severely tested by the casework process—including if necessary through the courts on appeal, leading to the many important court judgments by which the law evolves.

So, in short, casework both requires and produces clarity, transparency, rationality, logic and coherence; and it enables the law to evolve in a properly controlled way. But we should also acknowledge the importance of less formal measures, particularly guidance issued by authorities.

The role of guidance

Guidance, by which I mean statements of interpretation or practice issued by competition authorities,[14] is an important way of explaining the approach the authorities will take to particular points or situations. The European Commission has issued numerous notices or communications on a wide variety of topics since 1962.[15] The US Department of Justice stated its policy on mergers in guidelines first issued in 1968. The most recent version, issued jointly with the FTC, appeared earlier this year.[16] In the UK, the Competition Act 1998 and the Enterprise Act 2002 included specific statutory requirements to publish 'advice and information' about how the OFT and CC would apply the statutory provisions in practice.[17] The recent OFT/CC Joint Substantive Merger guidance[18] is the latest example. There is no doubt that all this material, which is very considerable, provides copious, useful, practical, assistance to understanding how the authorities think, on the basis of the experience they have gained from casework.

But there is one crucial distinction between guidance and cases. Guidance is intended to be an explanation of how the authorities will act on the basis of their accumulated experience or how they intend to apply new legislation in the absence of actual experience. Casework, by

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[14]Guidance, Guidelines, Notices, Communications, Notes of Best Practice are just some of the various forms of nomenclature used.
[15]The earliest date from 1962, on commercial agents and patent licensing respectively. The most significant recent examples from DG Comp are *Guidance on its enforcement priorities in applying Article 102 to abusive exclusionary practices by dominant undertakings*, 3 December 2008 and its *Guidelines on vertical restraints*, 10 May 2010.
[16]Horizontal Merger Guidelines, 19 August 2010 at http://ftc.gov/os/2010/08/100819hmg.pdf.
[17]See, for example, CA 98 section 52 and for Guidance on Commitments section 31D; and EA 02 ss 106 and 106A for mergers and 171 for market investigations.
[18]*Merger Assessment Guidelines: A joint publication of the Competition Commission and the Office of Fair Trading*, CC2 (Revised), OFT1254, September 2010.

contrast, is the experience itself. As is well established, guidance does not bind the courts—although it can bind the authorities themselves. Guidance is also not a good substitute for legislation—indeed it is often published in conjunction with legislation better to explain its meaning.

My point is not to diminish the need for or importance of guidance; merely to emphasize that it complements rather than removes the need for casework.

The sources of casework

If casework contributes the experience on which guidance can be written, how then do cases arise?

Cases involve the authorities investigating and proscribing agreements, transactions and practices and, in the CC's case, investigating markets. They arise from public or private complaints, from tip-offs or references from other bodies, from merger activity, disputes, agreements, other arrangements, sales and purchases and from the whole array of business activity. At some point, however, an authority has to decide to move and that initial decision has a big effect on the nature and scale of casework activity.

Prioritization

Authorities jealously guard their right, if they have it, to 'prioritize' activity, so as to retain some control over expenditure and balance of work.

For the CC of course, prioritization in the sense of choice of cases is not an issue. It simply has to do everything that comes its way. For others—and for the new merged authority—it is a real issue. The basic principles are, in my view these. First, an authority must have some discretion not to follow up every matter or complaint that comes its way. Otherwise resources and effort are simply squandered. But, equally, an over-theoretical approach risks neglecting the authority's duty to the public. It is scant help to the householder who reports a break-in to be told that the police have decided instead to prioritize white-collar crime.

The elements of casework

Although there is wide variation in ways of approaching casework, there are some common elements that every case must have.

On the substantive side, there has to be an issue; a set of facts to consider, a dispute, a situation or a transaction, and a reason why competition may be harmed (the 'theory of harm'). These things must be put into some coherent analytical framework and the necessary evidence gathered and examined. The views of the main parties and other affected parties—suppliers, competitors, customers—must also be collected and considered—they will not all point the same way. The arguments and evidence of the main parties involved must be assessed and a decision reached, with a strong awareness of the connection between evidence, reasoning and conclusion.

On the procedural side there must be effective ways of gathering and sifting evidence, formulating the issues and interacting with main and third parties. The facts and evidence relied on by the authority must be disclosed to the affected parties—including evidence that may not support the proposition being advanced—and their responses carefully assessed. The weighing of the evidence must be done as transparently as possible and the reasons, when decided, clearly stated.

The object of all this is twofold. First the decision in the case must be 'right'; secondly it must be fairly arrived at and the reasons clearly explained. This second point has two purposes—first, for the parties and the public to understand what has gone on; second, for the courts to be able to follow the authority's thinking if the parties bring an appeal.

So that is what casework is, and why we need it. Let us now see how it works.

Cases as landmarks

One purpose of casework that we identified was to test and establish key principles and new developments. So one would expect to see, over time, a series of historically important 'landmark' cases in which the system has been consolidated, publicized and developed. In the case of European competition law, which has now enjoyed some 50 or 60 years' continuous development, this is indeed apparent.

The three great cases of 1966–1967—*Consten and Grundig*,[19] *STM v Maschinenbau Ulm*[20] and *Italy v Council*[21] set the scene for most future developments in the control of restrictive agreements. The first because it neutralized the requirement for effect on trade between member states (the effect did not have to be adverse); the second because it established the need for agreements to be considered in their economic context; and the third because it confirmed the block exemption as a permitted, valid instrument.

It may be said that only one of these, *Consten and Grundig*, arose from a decision of an enforcement authority. But there is little doubt that on the basis of these cases the European Commission for many years pursued an active enforcement policy, particularly against agreements that threatened to divide the Common Market, at least until the policy started to falter under the weight of notifications and had to be rejuvenated in 2003.

In relation to abuse of dominant position, the European Commission's early activity was shown in the cases of *Commercial Solvents*,[22] *Continental Can*,[23] *United Brands*[24] and *Hoffman la Roche*[25] establishing Article 86 (now 102) as a significant enforcement measure. The European Commission also spent much time pursuing *IBM*[26] and the 1984 settlement[27] was a slightly ironic forerunner of the later proceedings against *Microsoft*.[28]

In merger control, the European Commission pressed for direct powers, having tried to use other means. The landmark cases here point the other way—*Airtours*,[29] *Tetra Laval*[30] and *Schneider*,[31] where the European Commission's possibly overzealous application of the law was reined back by the courts, with a lasting effect on methodology and organization within DG Competition.

I make no particular point about any one of these cases; but they demonstrate that, over many years of development of European competition law, at key stages, particular points of

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[19]Cases 56 and 58/64 *Consten and Grundig v EC* [1966] ECR 299.
[20]Case 56/65 *Societe Technique Miniere v Societe Maschinenbau Ulm* [1966] ECR 235.
[21]Case 32/65 *Italy v Council and Commission* [1966] ECR 389.
[22]Cases 6 and 7/73 *Commercial Solvents v EC* [1974] ECR 223.
[23]Case 6/72 *Europemballage and Continental Can v EC* [1973] ECR 215.
[24]Case 27/76 *United Brands v EC* [1978] ECR 207.
[25]Case 85/76 *Hoffmann-La Roche v EC* [1979] ECR 461.
[26]See, for example, Case 60/81 *IBM v EC* [1981] ECR 2639.
[27]*IBM* [1984] 3 CMLR 147.
[28]In the first *Microsoft* case, the EC's investigation was settled by undertakings given after joint negotiations between Microsoft and the EC and US authorities: XXIVth Report on Competition Policy (1994) p364; see also Case T-201/04 *Microsoft Corporation v EC* [2007] ECR II 3601.
[29]Case T-342/99 *Airtours v EC* [2002] ECR II-2585.
[30]Case T-5/02 *Tetra Laval v EC* [2002] ECR II-4381.
[31]Case T-310/01 *Schneider Electric v EC* [2002] ECR II-4071.

principle have been tried, tested and, for the most part, confirmed in a series of important decisions.

Not all of the landmarks have been casework, it is true. *Regulation 17 of 1962* established the European Commission as the enforcement agency, able in particular to process notifications and issue prohibition and exemption decisions. *Regulation 19/65* allowed the European Commission to issue block exemptions. *Regulation 4064/89* introduced EU merger control and *Regulation 1/2003* changed the enforcement system again, abolishing notifications and making exemptions self-executing.

But the fact that not all landmarks are cases does not alter the importance of casework—indeed most of these regulatory developments either enabled casework to take place (Regulations 17/62 and 4064/89) or attempted to deal with the absence of casework as the backlog of unprocessed notifications increased (Regulation 1/2003).

And if anything we are suffering a little currently from an absence of landmark cases. For example, although the *Microsoft*[32] case in the General Court attracted a lot of attention, it can hardly be said to have resolved the doctrinal debate on how to assess abuse of dominant position. DG Comp has sought to complement its casework with 'guidance on enforcement priorities'.[33] As we have noted, striking the right balance between guidance and casework can be difficult and it is not necessarily effective to develop new doctrine through guidance alone.

In the UK, it is harder to see any pattern of landmark cases similar to that of the EU. This is in one way not surprising given the severe hiatus around 1995–2000, when the old RTPA/FTA legal framework was effectively abolished and replaced by new law closely modelled on EU law in the case of the prohibitions, and with a new *sui generis* regime for mergers and markets culled from the best of international practice. So one would expect interruption, but nevertheless the casework record is harder to interpret. Let us look first at some statistics.

Some statistics

Let us begin with a very superficial comparison of the level of competition casework activity in the EU, Germany and the UK over the past five years.[34]

In the EU, DG Comp took, during this period,[35] 41 Article 81/101 decisions concerning anti-competitive agreements and cartels and 22 Article 82/102 decisions on abuse of dominant position; it also took 40 Phase II merger decisions[36] in total over the five-year period and around 300 Phase I merger decisions annually.

In Germany, the Bundeskartellamt (BKA) took[37] 32 decisions concerning anti-competitive agreements and 26 decisions on abuse of dominance. On mergers,[38] the BKA reached 124

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[32]Case T-201/04 *Microsoft Corp v EC* [2007] ECR II 3601.
[33]3 December 2008, see footnote 15.
[34]Statistics for the EU and UK cover 2006 to 2010. Statistics for the BKA cover 2005-9. Germany is taken simply as another major member state rather than from any similarity to or difference from the UK.
[35]For the search facility on EU case statistics, go to http://ec.europa.eu/competition/elojade/isef/index.cfm. These figures include commitment decisions as well as prohibition decisions and there is some overlap in the figures as 12 cases involved both infringements of Article 101 and Article 102. At the time of researching, there were some five Article 101 prohibition decisions not listed for 2010, which are included in the figures given in this speech.
[36]See http://ec.europa.eu/competition/mergers/statistics.pdf. We have included the recent Phase II decisions on Unilever's acquisition of Sara Lee's Household and Body Care business and Syngenta's acquisition of Monsanto's sunflower seed business, both cleared subject to conditions on 17 November 2010.
[37]2005–2009. See www.bundeskartellamt.de/wEnglisch/News/Archiv/EntschKartell_e.php.
[38]See www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivFusion_e.php.

Phase II decisions out of a total of around 1,500 to 2,000 mergers assessed annually at Phase I.[39]

In the UK, the OFT's public register lists over this period 19 cases in total on antitrust matters,[40] including eight decisions taken by the sector regulators.[41] The OFT took seven formal anti-cartel decisions and four decisions on abuse of dominance. This somewhat understates the OFT's activities, as it excludes settlements and early resolution cases[42] and it lists as one case the multiple cover pricing cases in the construction sector, involving more than 100 individual companies.

On mergers, the OFT lists some 475 merger cases on its website[43] for the period in question, though these figures include cases not yet decided, those referred to Phase II or referred to the EU, cases involving review of undertakings and numerous cases found not to qualify under the jurisdictional test.

The CC over the period 2006–2010 took 35 Phase II merger decisions and concluded nine market investigations. It also dealt with ten regulatory appeals.

I stress that these are just numbers of decisions. They do not show the length of time taken to reach the decision and they include no measure of the scale or importance of the decision taken. Moreover, comparisons with European Commission activity must recognize that the scale and territorial reach of DG Comp's operations far exceed those of a single member state. It is useful to look in a little more detail.

Cartels and other restrictive agreements

One obvious feature is the continued anti-cartel casework of DG Comp. This has produced a large number of decisions over the past five years, including 11 prohibition decisions in 2007 alone. That such a scale of interventions is needed at the EU level reflects well on DG Comp's activity but rather poorly on the acceptance of EU rules against cartels in the wider EU economy.

Since the passing of Regulation 1/2003 there have been many fewer exemption or clearance decisions. Most cases coming from the competition authorities are findings of infringement.[44]

Abuse of dominant position

Article 102 enforcement has been more problematic, reflecting perhaps the difficulty in moving to an 'effects-based' approach. Even so, DG Comp has maintained a relatively high level of activity taking some 22 decisions over the last five years. In the same period Germany took 26 decisions on abuse of dominant position. The UK took 12 decisions under Chapter II of which five were prohibitions.[45] Of these, three were taken by the OFT and two

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[39]Antitrust Enforcement by the Bundeskartellamt, Areas of Focus 2007/2008, at p9.
[40]2006–2010. See www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/?Order=Date.
[41]Save for two cases, the cited decisions of the sector regulators were non-infringement decisions.
[42]Such as: the BA/Virgin cartel, where BA admitted liability and agreed a fine; the settlement reached with RBS for breach of the Chapter I prohibition; and the settlement reached with Reckitt Benkiser for breach of the Chapter II prohibition.
[43]See www.oft.gov.uk/OFTwork/mergers/Mergers_Cases/.
[44]The OFT has recognized this unintended consequence of the abolition of notifications by publishing short-form opinions in some individual cases.
[45]Interestingly in the early years of the CA98 regime, the OFT conducted a number of Chapter II cases, for example *Aberdeen Journals*, *Napp Pharmaceutials*, *Genzyme* and *Bacardi*.

by sectoral regulators.[46] All the rest were either confirmations of non-infringement or decisions not to proceed. Within the five-year period, no fines were imposed by the OFT under Chapter II although a recent settlement[47] included an agreed fine of £10.2 million.

Merger control

For merger control, comparison with 'antitrust' is misleading because, in general, the volume of merger casework is affected by the level of merger activity and the jurisdictional threshold applied. Nevertheless, there are some lessons.

In the EU, where the overall number of decisions is linked to the Community Dimension jurisdictional turnover thresholds, the number of Phase I decisions is large, with around 300 decisions taken annually (nearly 400 in 2007). Phase II decisions, by contrast, are far fewer: 14 in 2008 but very few recently. Prohibition decisions (as opposed to conditional clearances) are fewer still.

In Germany, the well-established mandatory system has resulted in Phase I review of around 1,500 to 2,000 mergers a year, a comparatively large number,[48] generating an average of 24 Phase II decisions a year.[49]

In the UK, which operates a voluntary notification regime, Phase I decisions by the OFT nevertheless ran at well over 100 a year in 2005–2006 but in recent years have reduced to an annual total of just over 50, reflecting a more focused approach by the OFT as well as lower merger activity. Phase II decisions, taken by the CC, totalled 35 over the period 2006–2010 with the highest annual figure being 12 in 2007, falling more recently to three in 2010. The CC cleared about half the mergers referred to it.

Markets

Turning to market investigations, the CC has made nine decisions over this period, well below the number expected at the time of enacting the Enterprise Act of some four to six cases per year.

There is no equivalent decision making framework in the EU or Germany, so there is no relevant comparison. It is possible, but by no means clear, that some UK market investigation cases could have been dealt with under Article 102/Chapter II.

Lessons for UK enforcement

In the light of these statistics on casework activity, it is reasonable to ask whether there are any lessons to learn for UK enforcement.

One should take care not to jump to facile conclusions and one should also take care not to cherry-pick the statistics to support a view that is not necessarily objective.

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[46] *London Metal Exchange* was an interim measures direction, 28 February 2006; *Associated Newspapers Ltd* gave commitments to the OFT, 2 March 2006; in *Cardiff Bus* the case was too small to warrant a fine, 18 November 2008. English Welsh and Scottish Railway was fined £4.1 million by the Office of Rail Regulation (ORR) in 2006 and National Grid was fined £41.6 million by Ofgem in 2008 (reduced on successive appeals to £15 million: *National Grid v Gas and Electricity Markets Authority* [2010] EWCA Civ 114).

[47] *Reckitt Benkiser* 15 October 2010.

[48] This large number reflects the particular threshold applied in Germany for mandatory pre-notification of mergers.

[49] Over the period 2005–2009.

The level of activity

In a comprehensive and informative review of OFT and sector regulators' enforcement,[50] Professor Margaret Bloom recently concluded as follows:

- Infringement decisions have been fewer than was expected.
- Sector regulators have preferred to use regulation rather than competition.
- The use of complaints to find cases has declined.
- OFT resources devoted to competition enforcement are relatively small and could be increased.
- Risk of appeal to the CAT has discouraged enforcement activity.
- Business awareness of the law particularly for SMEs is low and needs to increase.

Margaret Bloom was in part concerned to assess the use of competition powers by sectoral regulators but her conclusions are of general application also and are supported by a recent National Audit Office Review.[51] If one adds to these conclusions the lower than expected number of market investigation references, there would appear to be some questions to consider, at least.

It is not for me, or anyone else, to prescribe an optimal number of enforcement cases. Whether cases arise depends on many factors, as we have seen, including the resources devoted to 'antitrust' enforcement within the competition authority or the sectoral regulators, the ascertainment of suitable breaches of the law to pursue and the approach adopted to prioritization of competition cases. But even making allowance for all that, it is hard to describe as excessive the number of enforcement actions by UK competition authorities of all kinds in recent years.[52] In particular, prohibitions under Chapter II (abuse of dominant position) have been very few, and use of the devolved Article 101/102 powers almost non-existent.[53]

Changing priorities

Margaret Bloom makes the further point that numbers in the last five years are also lower than 2000–2005, possibly reflecting a different approach within the OFT to the use of complaints, a greater sense of prioritization and a particular concern to concentrate on smaller numbers of high impact cases.

That last policy in itself does not diminish the importance of casework but it carries risks. The fewer the cases, and the greater their importance, the better and surer must be the performance as more hangs on each result.

The OFT has taken action recently to increase the number and speed of competition enforcement cases. This is an important recognition of the value of casework. But a key test

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[50]Margaret Bloom 'The Competition Act at 10 Years Old: Enforcement by the OFT and the Sector Regulators' [2010] *Competition Law Journal*, p141.
[51]The National Audit Office Review of the Competition Landscape, 22 March 2010.
[52]The National Audit Office's Review observed '…(T)he competition system relies on case law and precedent. However, to date most sector regulators have used their powers sparingly'.
[53]The level of fines imposed in the UK is also a small fraction of the amounts imposed by DG Comp, which for example imposed a fine of over one billion Euros on Intel in 2009. There are, of course, several explanations for this difference, reflecting the size of the companies involved, the benchmarks used for calculation and the significance of the markets in question.

of the government's merger proposals will be whether the new, single, authority can bring the combined experience and resources of the formerly separate authorities to bear on 'antitrust' enforcement in a way that improves both the breadth and depth of activity.

There are two other related issues raised in Margaret Bloom's article and the National Audit Office Review. One is the low use of competition powers by sector regulators. The other is the fear of appeal.

Regulators' use of competition powers

Regarding the regulators, it was perhaps naïve to assume, as many did, that regulators would respond to 'concurrency' by preferring competition interventions to licensing powers. This is often explained in terms of interventions after things have gone wrong being less desirable than intervention in advance—the *ex post*/*ex ante* distinction. But the difficulty may go deeper. Competition interventions are significant and serious processes, which stigmatize behaviour and perpetrators in equal measure. This sits rather uncomfortably in the regulatory environment. Use of licensing powers is more flexible, lighter in touch and does not involve stigma and punishment. One wonders whether the few instances where competition powers have been used (eg Ofgem's decision against *National Grid* when the initial £41.6 million fine was reduced successively on appeal to £15 million) provide sufficient justification for the continuing concurrency regime. Ofcom has found this issue particularly intractable, with frequent CAT proceedings, and in pursuing issues of market power in relation to the wholesaling of television channels, has preferred so far as possible to rely on its licensing powers.[54] Unlike the position with the OFT, the sectoral issue is not so much a question of how much activity, but more one of what form should this take—regulation or competition?[55] But one cannot help feeling that the present concurrency settlement is unlikely to survive the institutional reform process unscathed.

Fear of appeal

On fear of appeal, this is not an obvious argument to make. The CAT has in many cases upheld OFT decisions, so it is not clear where this fear comes from. The appeal system ought to operate in a neutral way on the level of enforcement activity—neither encouraging nor discouraging but ensuring that all casework is done well. The evidence that the appeal process inhibits activity seems very subjective. Indeed one has the strong impression that the CAT, at least, would like to see more, not less, enforcement activity, at least in the sense of justiciable decisions, although as discussed earlier, doing justice in the individual case can have a distorting effect on the enforcement system as a whole.

The Competition Commission

So much for the OFT and regulators, but what of the CC? As its work is entirely derived from that of others it can have no independent activity level. But the question can be asked whether the MIR, operated jointly with the OFT and the sectoral regulators, has performed well since its relaunch in 2003. As we have said, there is no easy benchmark. Comparisons with overseas authorities do not work as the regime is unique and the pre-2003 regime was markedly different as final decisions, and remedies, lay with Ministers.

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[54]See: summary of Ofcom's Pay TV statement, 31 March 2010 (with link to full decision) at http://stakeholders.ofcom.org.uk/consultations/third_paytv/statement/; and BSkyB's subsequent appeal to the CAT (Case No 1158/8/3/10) at www.catribunal.org.uk/237-6549/1158-8-3-10-British-Sky-Broadcasting-Limited.html.
[55]See also the NAO Review already referred to in footnote 51.

Market investigations

Here again, though, one has to conclude that the regime has operated less well, or at least less frequently, than expected. The number of markets investigated has been small and the overall result lacking in coherence. For example, there is no sense that a large sector like financial services has been examined systematically under the MIR and with any sense of overall purpose; instead the investigations into *Store Cards*,[56] *PPI*,[57] *Home Credit*[58] and *Personal Banking in Northern Ireland*[59] whilst comprehensive and excellent in themselves, when taken together seem to represent a series of uncoordinated individual interventions.

There have, nonetheless, been some Herculean efforts. Indeed the publication within a space of some 12 months of reports in *Groceries*,[60] *PPI*,[61] *ROSCOs* [62] and *BAA Airports*[63] was in itself Herculean. 2008–2010 has been a time of high CC activity with a series of hard-hitting, authoritative decisions. But this activity, and the flurry of litigation that has accompanied it, may flatter to deceive. It is a little surprising that the MIR has not been applied to markets such as retail energy, banking, telecommunications, broadcasting, newspapers and newspaper distribution, the professions, liberal or otherwise, and transport. True there have been investigations into particular aspects of some of these markets. It may also be that for utility sectors, regulators have these matters already under control; it may also be that all these markets are working well. I am not so sure.

Market studies

It may be said that although market investigations have been few and relatively spasmodic, market studies have made up for this. It is true that the OFT has completed more than 30 of these,[64] and regulators study or 'probe' their respective markets with some frequency.[65] Many of these studies are justified either as precursors to a full market investigation, or as reflecting a range of issues not all of which lend themselves to pure competition solution. But some at least seem to cover the ground of a CC investigation without the full investigation process, with its elaborate but necessary procedures being applied, in the hope of finding an easier or more flexible solution.

So getting the right balance between full market investigations and lighter market studies, and in a broader sense getting the MIR right as a whole, will also be central issues for the new merged competition authority.

The Independent Commission on Banking

One recent relevant event is the establishment in June 2010 of the Independent Commission on Banking (ICB). Faced with an urgent and weighty set of issues on the performance and structure of the banking industry, the new coalition government preferred to set up an ad hoc commission rather than refer the matter to the CC.

Please do not misunderstand me: the ICB is a most welcome development which provides a chance for precisely the kind of comprehensive, systematic review that some have said has

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[56]CC report, 7 March 2006 *Store cards market investigation*.
[57]CC report, 29 January 2009 *Market investigation into payment protection insurance*.
[58]CC report, 30 November 2006 *Home credit market investigation*.
[59]CC report, 15 May 2007 *Personal current account banking services in Northern Ireland market investigation*.
[60]CC report, 30 April 2008 *The supply of groceries in the UK market investigation*.
[61]See above, footnote 57.
[62]CC report, 7 April 2009 *Rolling Stock Leasing market investigation*.
[63]CC report, 19 March 2009 *BAA airports market investigation.*
[64]OFT, *Completed Market Studies*, at www.oft.gov.uk/advice_and_resources/resource_base/market-studies/completed.
[65]See, for example, Ofgem's recently announced examination of profit margins in retail energy, *Financial Times*, 27 November 2010.

been needed for some time. And, being non-statutory, it can address issues of prudential regulation as well as competition (which the CC could not) and need only make recommendations, not itself having to take specific measures (as would the CC). But in establishing a commission scarcely different from the pre-Enterprise Act MMC/CC model—able to examine general issues in the public interest and make recommendations to Ministers—the ICB is a silent but telling comment on the ability of the MIR in its current form to confront the most important issues of the day.

Again, this is something for the new competition regime to take on board. Perhaps the current MIR, far from being too broad, is too narrow in its scope.[66]

Merger control

I gave the bare statistics for merger control activity. I do not propose to discuss it at length as, although the nature and operation of the merger control regime whether in the UK or elsewhere, are of the highest importance, the question is not so much one of casework and its sufficiency, given that the authorities do not control the level of merger activity, but rather how the cases themselves are handled.

There are, going forward, important issues. There was a long struggle to make competition the main aspect of the substantive test, both at the EU and UK level. This has recently been subject to anxious re-examination both in relation to the financial crisis (where the *Lloyds/ HBoS*[67] merger was allowed on specific financial stability grounds) and in relation to hostile takeovers of UK-based companies in situations where competition-based merger control had little or nothing to say (when *Kraft Foods* acquired *Cadbury*).[68]

Within the EU system there remain issues of jurisdiction and case allocation. The recent report by Professor Mario Monti[69] suggested harmonized EU-wide merger control for cross-border mergers. And within the UK there is the need to consider placing the notification system on a mandatory basis. These will be important matters to address in the context of institutional reform.

But none of this, important though it is, really bears on my central thesis which is that in those fields where the decision whether or how to act lies with the authorities themselves, it is the degree of vigour and alacrity with which they engage and the means they adopt that determines the success or failure of enforcement activity as a whole.

So it is time to draw some conclusions from what I have been saying.

Conclusions

I have described what casework is and why the authorities need to do cases; I have explained how they can be done to best advantage; what processes and substantive analysis they involve; how they enable an issue to be tested and decided, doctrine to be developed and expanded and how they enable the appropriate level of judicial control to be exercised. I have examined levels of casework activity in different jurisdictions and I have considered the UK's performance in this respect as we go forward to a new competition enforcement regime.

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[66]In contrast to the merger regime, the Secretary of State cannot ask the CC to consider specific public interest considerations other than competition in market investigations, although he can himself take such considerations into account in considering the CC's report on competition aspects, see EA 02 ss 139–153.
[67]OFT Report to the Secretary of State, 24 October 2008; Secretary of State Decision under EA 02 section 45, 28 October 2008; *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 36.
[68]Comp/M.5644 *Kraft Foods/Cadbury*, 6 January 2010.
[69]*A New Strategy for the Single Market: Report to the President of the European Commission*, 9 May 2010 at p86.

So what does this all boil down to? Some very simple propositions:

Successful competition enforcement requires a regular stream of well-resourced, clearly understandable, decisions applying the main legal instruments available in the main areas of economic activity.

Other activities by way of policy, guidance, presentations and communications and interaction with government, industry and consumers are important; but they cannot and should not be allowed to crowd out casework.

Cases provide the real life situations in which abstract theory is applied to the facts. They are the stage upon which the competition enforcement play is performed. They require authorities and parties to make their arguments precise and allow these arguments to be tested and debated. They compel all involved to address the evidence. The infringements that they find may open the door to the possibility of redress and compensation.

Cases provide the best way of testing new propositions, developing theory and practice and moving doctrine forward, under the proper control of the courts.

Cases, if properly conducted within a fair and open institutional framework, allow for equality of arms between authorities and parties and enable proper judicial oversight to be applied. Requiring the authorities to apply and develop the law through cases is the best guarantee against arbitrary activity and unfair or oppressive conduct.

A critical test of the new single competition authority will be the way it decides cases and the level and scope of its casework activity.

So, is the sword mightier than the pen? In the sense that I posed the question—are cases more important than softer enforcement? More relevantly, would I have persuaded Lord Denning that my thesis is correct? I doubt he would be temperamentally sympathetic to the unrestrained activities of competition authorities; he would probably prefer to subject them to stringent control by the courts. So be it; my point can equally well be that such control is best applied if the authorities are active in making full use of the legal powers conferred on them, in the public interest, by bringing cases openly, transparently and fairly, across a broad range of significant issues.

Thank you.