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A Wise Man Proportions His Beliefs to the Evidence: Scepticism and Competition Policy

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Chairman of the UK Competition Commission

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Foreword

All of us at the David Hume Institute were absolutely delighted when Peter Freeman, the Chair of the Competition Commission, accepted our invitation to speak at a seminar in Edinburgh – on Scottish election night no less. It was also excellent that our friends at Shepherd and Wedderburn agreed to sponsor the event and that their Partner John Schmidt took on the role of chair for the evening. It was a great plus when Peter volunteered to produce this written version of his seminar paper and agreed that we could publish this document as a Hume Occasional Paper. I must also thank Peter Freeman and his colleagues for searching assiduously amongst the works of Hume to come up with the highly pertinent quotes that appear throughout the paper.

At the very outset let me declare a conflict of interest. As well as being Director of the Institute I have been a member of the Competition Commission since March 2005. Two key factors about the Commission attracted me. Both of these were well covered in the excellent talk given to the Institute by Peter Freeman and are set out with great clarity in this highly accessible paper.

The first point of attraction was the Commission's independence. It is not a matter of the Commission making recommendations to Government Ministers. As Peter Freeman states 'The 2002 reforms sought to take politics out of UK merger and market enquiries.' Within its field of competence, as defined in the relevant Act, and after cases have been referred to it by the relevant authority, the Commission makes decisions – subject only to appeal by due process of law. This state of independence also applies to the Commissioners. Each member of the Commission is appointed to an enquiry as a free-thinking individual, there to interpret the evidence as he or she sees fit, within the framework set up for the Commission's operations.

The Commission's staff is always there to provide full support and the benefit of their wealth of experience and professional expertise. But the final decisions are for the members not the staff.

The second point of attraction was the underlying belief in the efficacy and efficiency of competition that underlies the Commission's procedures – indeed its very existence. On top of this the Commission adopts, as Peter Freeman emphasises, a sceptical approach at all times; one of which David Hume himself would no doubt be proud. This sceptical approach is founded upon a belief that: 'Allowing markets to work effectively is the best system yet devised to deliver efficient business, innovation and benefits for consumers in terms of price, value for money and choice'.

It was not ever thus. As Freeman points out, very different criteria applied in 1982 when the Monopolies and Mergers Commission voted by four to two that a takeover of the Royal Bank of Scotland by either HSBC or Standard Chartered would be expected to operate against the public interest. 'What if' those take over bids had been considered under the present legislation? Freeman goes as far as to say that: 'under the present law, both might have been cleared'. What a difference that would have made to the Scottish economy and to the state of the banking sector in the UK and globally.

That example should be sufficient to demonstrate that the Competition Commission and its rules and activities matter in Scotland. This is a UK body operating across the nations of the UK; and hence covering mergers and markets whose primary effects are in Scotland as well as others where the impact in Scotland may be at least perceived to differ from the impact in the rest of the UK.

Peter Freeman's paper is liberally peppered with Scottish examples. On the mergers front he refers to the (cleared) merger between Ottaker's and Waterstones that caused great controversy north of the border. Likewise the Pan Fish and Marine Harvest case, where the business activity was in Scotland but the market – for fresh, farmed Atlantic salmon – deemed to be Europe wide. He also referred to two transport cases, First Group/Scottish Passenger Rail and Stagecoach/Scottish Citylink.

But the Commission's activity is not limited to mergers it is, to again quote Freeman: 'the only competition authority in the world not only with the power to investigate markets in detail, but also with the power to take decisions and impose remedies.'

Again competition underpins the process for sector studies. For mergers the test is whether there has been a 'significant loss of competition' (SLC). For markets the issue is whether there have been 'adverse effects on competition' (AEC).

As in the case of mergers, Freeman was able readily to pull out examples with major Scottish relevance. Let me just mention groceries, BAA Airports, Store Card Credit Services and Payment Protection Services.

So the Competition Commission matters to consumers and businesses in Scotland and this paper demonstrates that its Chairman fully appreciates the importance of understanding Scotland and taking due cognisance of Scottish factors in studies. Peter Freeman's visit to Scotland was a great opportunity for people to hear his views at first hand and press for answers on their opinions and queries. The publication of this paper should make his views and the detail of what the Commission does and why available much more widely. I very much hope that it receives the attention it deserves, not least in our major boardrooms and within the Scottish Parliament and Executive.

Despite these positive thoughts, I must end by donning firmly my DHI hat and emphasising that, while the Institute is convinced that the topics covered in this paper merit attention and discussion, as a charity it holds no collective view on either the subject matter or the policy implications.

Jeremy Peat
Director
The David Hume Institute

Introduction

Ten Years of Evolution and Reform

Ten years ago, we would not have been discussing this topic with the Chairman of the then Monopolies and Mergers Commission. Ten years ago, the MMC was a very different animal from today's Competition Commission. Ten years ago, the MMC was largely outside of the daily media spotlight, less transparent and much closer to government.

When in 1998 the MMC was renamed the "Competition Commission" it not only got rid of the old joke of *"Why is there only one Monopolies Commission?"* but it heralded a much more fundamental reform of the UK's competition law regime; institutionally, procedurally and substantively. In fact, the profile of the Competition Commission has over the past years increased to such an extent that Peter Freeman could be described as the 'visible hand' leading industry.

More than just a new name

The Competition Commission's functions evolved under new primary legislation[1] from that of a largely consultative body advising the Secretary of State to being the main decision maker in most reference cases.[2]

Even though the Secretary of State retains the power of intervention in public interest cases, this is rather residual power and was exercised for the first, and hitherto only, time this year in connection with BSkyB's acquisition of a stake in ITV.

In line with the change of its functions, the composition of the Competition Commission has also significantly changed.

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[1] The Competition Act 1998 ("CA) and the Enterprise Act 2002 ("EA").
[2] The OFT and/or sectoral regulators being the first phase (and behavioural) decision maker.

While it still reflects the wide spectrum of British business and public life, there is a significant and growing trend towards specialist competition expertise.
Past and present Chairmen, as well as Commission members, have had successful careers as specialists in competition law and economics in private practice, industry and academia.

Perestroika

Hand in hand with becoming a decision maker, the Competition Commission became a significantly more transparent and predictable organisation.

While under the previous regime very little, if anything, was published beyond the MMC's reports in individual cases, the Competition Commission is under a statutory obligation[3] to publish a set of published guidelines on how it applies the legislation and runs its cases.[4] The Competition Commission is also under a statutory duty to consult all that may be affected by a decision and to publish information about its investigations. [5]

Over and above these statutory duties, the organisation's approach has also changed significantly, so that it now publishes a significant amount of documentation during an investigation. These include a statement at a relatively early stage in the enquiry of where the Competition Commission sees the issues and, much later in the investigation, a paper on its "emerging thinking".

This provides the parties, interveners and the wider public an indication of the direction in which the Competition Commission is heading.

[3] Para 9A Sch.7 CA, as inserted by s. 187(3) EA.
[4] See its website for details: http://www.competition-commission.org.uk/rep_pub/rules_and_guide/index.htm
[5] Sections 104, 104A and 171-172 EA.

Moreover, as the inquiry unfolds the Competition Commission publishes dedicated working papers on particular issues of an investigation[6] as well as non-confidential versions of the main parties' and third parties' submissions and responses.

Outside of live cases, the Competition Commission also engages to a significant extent in advocacy and debate about competition policy, the way it decides cases and the road ahead and this evening's seminar is a very good example of the Commission's engagement with the users of the system.

A new substantive test

Finally and fundamentally, the legal test on which the Competition Commission now bases its decisions has changed from a rather loosely defined 'public interest test'[7] to a strictly competition based test. This means that the Competition Commission can no longer examine other consumer issues.[8]

It is also fair to say that the UK has led the way in forcing a more significant alignment between competition regimes in Europe and United States by shying away from a dominance based test in merger cases to a substantial lessening of competition based test.

Even looking at the way the competition test is applied, the Competition Commission has without doubt moved significantly to a more economics based approach. This, in turn, has led to a more rigorous, more coherent and more predictable regime, whether or not we agree with the approach or outcome in particular cases.

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[6] In the ongoing grocery enquiry, the CC has so far published ten working papers with topics ranging from the unlikely coordination of the major chains to analysing the substitutability of different stores and store formats.

[7] Including, for example foreign ownership, diversity environmental or other socio-economic considerations.

[8] See, for example, the current Groceries enquiry or the current enquiry into Payment Protection Insurance where the CC points out the limits of its remit, but where much of public concern seems more linked consumer issues.

Quo Vadis?

One of the natural corollaries of progress and development is the need to pause and, in the spirit of Hume, to test progress that has already been made. In a constantly evolving market it is impossible for the Commission and its fellow competition authorities to remain static.

Below, I have picked up on two points, one substantive and one procedural, upon which we touched in some of questions and discussions during and after the seminar.

Consumer Welfare Test

Even within a strictly competition or economics based approach, the test goes beyond the somewhat facile assumption that a low price always equals competition and a relatively higher price always demonstrates the opposite.

While this might be an appropriate starting point, the effect on prices is only part but not the whole story in assessing consumer welfare. As US Supreme Court Justice Scalia points out in a current case before the court:

> *"I just don't think that all the customers want is cheap. I think they want other things besides cheap. I think they want service. I think they want selection. I think they want the ability to view goods and so forth. Why do you discount all of those things?"*[9]

There might be a temptation on the part of competition authorities to short-circuit the non-pricing aspects of consumer welfare and focus too quickly on the pricing aspects. This should be resisted.

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[9] *Leegin Creative Leather Products v PKS and others,* US Sup Ct No. 06/480. Oral arguments of 26 March 2007 page 28 lines 17ff.

Is the Competition Commission getting the right cases?

The Competition Commission, unlike other competition authorities, does not choose its own cases. It has to await a referral from the Office of Fair Trading or the sectoral regulators. While this arguably ensures a more dispassionate approach by a completely fresh collection of eyes, it brings with it the risk of an imbalance of caseload, particularly in a situation where the threshold for reference has been lowered.

In the merger field, for example, caseload statistics suggest that the UK regime results in an overly high proportion of references where ultimately the competition concerns prove unfounded. More than twice as many UK mergers are referred to detailed examination compared to mergers notified in Brussels[10] and of those that are referred, almost a third more UK cases end up being cleared outright (i.e. without remedies).[11] Moreover, more than twice as many cases are abandoned in the UK following a Competition Commission reference than in Brussels.[12] Given the commitment in terms of resources and management time of a full reference there is a suspicion that a significant proportion of small mergers that are referred tend to be abandoned because of cost considerations.

In respect of market investigations, the Competition Commission itself points out that, given the relatively small size of the markets involved its cases have not so far had a significant effect on UK productivity.[13]

While this is not to say that these enquiries were not useful, it does allow us to pause and ponder on whether there is a need to fine-tune the reference mechanisms in future.

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[10] Respectively 7% vs 3% of all qualifying mergers in 2006.

[11] Respectively 47% vs 33% of all Phase II examinations/Competition Commission references in 2006.

[12] 35% in the UK vs 17% in Brussels in 2006.

[13] See Competition Commission submission to the House of Lords Select Committee on Regulators 9 February 2007 para 14. The recent enquiry into LPG domestic supply is a particularly apt example.

There are a number of other areas that could be debated, such as the approach to remedies, the issue of repeated references in particular industries[14] and absence of reference in other industries, or the question of whether the largely document and submissions based enquiry methodology is still the most appropriate and efficient method for the current type of cases. However, none of this should detract from the significant transformation of the Competition Commission over the past ten years.

Such debates on the road ahead and the sometimes heated arguments on the direction or the speed at which we are travelling should be viewed in the spirit of Hume that:

"Truth springs from argument amongst friends."

John Schmidt
Partner
Shepherd and Wedderburn LLP

[14] Groceries, airports and financial services all seem to be particularly in the authorities' limelight at present.

"'A Wise Man Proportions His Beliefs to the Evidence': Scepticism and Competition Policy"

Lecture given by

Peter Freeman
Chairman of the UK Competition Commission[1]
at a meeting of the David Hume Institute
in the Royal Society of Edinburgh
on 3 May 2007

Ladies and Gentlemen, it is a pleasure to address you tonight on election night – probably a significant election night. I doubt what I have to say will influence your vote – there is still time to vote – and if it appears that it might, then one of us has clearly misunderstood the other!

The title of my talk is: "'A Wise Man Proportions His Beliefs to the Evidence': Scepticism and Competition Policy." The first part of this title – "a wise man proportions his beliefs to the evidence" – is taken from the section "On Miracles" in the *Enquiry Concerning Human Understanding* written by this Institute's illustrious namesake. I was drawn to this quotation not because I would wish to suggest any correlation between the work of the Competition Commission (CC) and the performance of miracles. (In fact, the quotation is directed against the acceptance of miracles, which some might uncharitably say equates to some efficiency arguments put forward in merger cases.) Rather Hume's words reflect the way in which the CC endeavours to conduct itself – whether in the context of its in-depth investigations into markets, mergers or in regulatory matters.

[1] All views are personal. The invaluable help of Elizabeth Harwick of the CC's staff is gratefully acknowledged.

The CC recognises that its "beliefs", namely the views formed and decisions taken on competition-related matters during the course of an investigation and, if necessary, any "remedies" subsequently imposed, must be based on clear and justifiable analysis undertaken using any and all of the evidence available to it.

This method of reasoning not only requires robust and transparent evidence gathering processes, it also requires the CC to use its expertise to analyse that evidence and to consider the weight that should be given to each piece of evidence. In "proportioning" our "beliefs", we give serious weight to points where strong and convincing evidence exists, but will be sceptical about things for which there is no good evidence.

The second half of my title refers to "scepticism and competition policy". "Scepticism" can be construed in two distinct ways: (1) as a philosophical doctrine that casts doubts over the possibility of knowledge in itself; or (2) as a temperamental disposition which leads to an unwillingness to draw any conclusions beyond those that can be established from evidence and experience. Hume may have been a sceptic in both these senses, but it is this latter form of scepticism that, I suggest, guides the CC's approach to competition policy. In adopting such a sceptical approach, the CC acknowledges the primacy of its statutory responsibility to formulate reasoned decisions in its investigations based *solely* on that which can be established by means of sound, competition-related evidence.

As to the "evidence" that the CC will consider and the "beliefs" that the CC will form, the CC's statutory remit is to be an independent competition authority, free from political influence in any part of the United Kingdom, that focuses specifically on competition-related matters, rather than, say, one that oversees general industrial policies, such as employment, transport or environmental matters. The previous function of assessing "the public interest" was deliberately discarded (save for certain very specific instances).

This was a deliberate and explicit change brought about by the Enterprise Act 2002, with the intention of improving the quality and transparency of decision making in competition matters.

And competition policy is indeed UK wide. The Competition Commission, the Office of Fair Trading (OFT) and the Competition Appeal Tribunal (CAT) have a collective commitment to promoting competition and the interests of consumers and efficient businesses throughout the UK. Competition is a reserved, not a devolved, matter in the Scottish context. The recent establishment of the OFT's office in Scotland[2] reflects this commitment to Scotland as does the practice of the CAT to sit in the Court of Session in Edinburgh for Scottish cases.[3] Tonight I will focus on the work of the CC and illustrate this with reference to Scottish influences.

I The Overall Context: "Wise regulations in any commonwealth are the most valuable legacy"[4]

Hume observed that:

> *"wise regulations in any commonwealth are the most valuable legacy. … Good laws may beget order and moderation in the government, where the manners and customs have instilled little humanity or justice into the tempers of men."* [5]

I do not wish to pass comment on "the tempers of" any individuals in this – or any other – forum, but we should pay heed to Hume's reflections on the value of "wise regulations" and "good laws". The CC has recently given evidence to the House of Lords Select Committee on Regulators,[6] which is examining the role of the CC and other regulators and competition authorities.

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[2] OFT press release, 16 March 2007.
[3] See, e.g., *Aberdeen Journals v Office of Fair Trading* [2003] CAT 11, judgment of 23 June 2003.
[4] David Hume, "That Politics May Be Reduced to a Science," *Essays Moral, Political, and Literary*, Essay III, Part I, 1742.
[5] *Ibid*.
[6] See, for example, the oral testimony of the OFT and CC before the House of Lords Select Committee on Regulators of 27 February 2007. See http://www.parliament.uk/documents/upload/correctedEv520070227.pdf . See also the CC's written evidence to the Committee dated 9 February 2007: http://www.parliament.uk/documents/upload/Competition%20Commission.pdf.

As we said in our evidence, the UK competition and regulatory institutional architecture can look rather complicated.

It came into being over time for a variety of reasons, and I dare say, if you were starting again with a blank sheet of paper to plan the "ideal" system, you would not produce what we have. Nevertheless, we are where we are, and we must do our utmost to ensure that the system works well in practice. As Professor William Kovacic, US Federal Trade Commissioner, observed in a speech at King's College, London recently in commenting on the "optimal institutional design" of a competition (or consumer) authority, "it is less important as to where you start from; what is more important is where you go." A "willingness to make refinements" is what makes a good competition authority.[7] I will attempt to show the "wisdom" of the still relatively new legislation which governs our competition work and the way in which we are willing to make refinements. But first let me briefly explain the CC's role.

The CC's role

The CC conducts in-depth inquiries into mergers, markets and the regulation of the major regulated industries. All cases are on reference from another body – the CC cannot instigate any investigation of its own initiative. On mergers, the OFT is the sole referring body on competition issues. (Ministers may make references on specific public interest issues such as national defence and security.) In relation to the market investigation régime, the power to refer also extends to the principal sectoral regulators. The CC also conducts "second phase" regulatory reviews where we act, in effect, as an appeal body deciding price control and licence modification issues at the behest of the sectoral regulator or a regulated company. In addition, the CC acts as a fast-track appeal body for energy code modification appeals in the gas and electricity sectors. And we have a particular role in conjunction with the CAT in pricing appeals under the Communications Act 2003.

[7] Professor William Kovacic, "Using competition and consumer powers to make markets work well," Centre of European Law lecture, King's College, London, 26 April 2007.

Last month, we received our first regulatory reference since 2002 (a mandatory quinquennial airports review).[8] Two energy code modification appeals have been brought, one earlier this week and another that was abandoned at an early stage;[9] no pricing appeals under the Communications Act have yet to be brought.[10] This relative dearth of regulatory cases has caused us some concern (we query if the threat of a CC reference from a regulator can act as a "credible threat" if that reference power is very rarely – if at all – used), and it also means that my comments here will focus primarily on our merger and market investigations and the CC's role as a competition authority.

Independent decision-making competition authorities: "Preserving a proper impartiality in our judgments"

In his discussion of sceptical philosophy in *An Enquiry Concerning Human Understanding*, Hume stressed the importance of:

> *"preserving a proper impartiality in our judgments, and waning our mind from all those prejudices, which we may have imbibed from education or rash opinion. To begin with clear and self-evident principles, to advance by timorous and sure steps, to review frequently our conclusions, and examine accurately all their consequences; … [these] are the only methods, by which we can ever hope to reach truth, and attain a proper stability and certainty in our determinations."*[11]

I can't find better words than this to explain what it is we try to do. The impartiality of the UK competition régime flows from changes introduced by the Enterprise Act.

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[8] *Heathrow and Gatwick quinquennial review* referred to the CC on 30 March 2007. In 2002, the CC was asked to examine mobile phone termination charges and carried out the quinquennial reviews into the major London airports and Manchester airport.

[9] Appeal by E.ON dated 30 April 2007 on energy code modification UNC116; the *Utilita Electricty* appeal was abandoned soon after being made.

[10] One may be imminent.

[11] David Hume, "Of the Academical or Sceptical Philosophy", *An Enquiry Concerning Human Understanding*, Section XII, Part I, 1777 edition.

Whilst the CC was established (as the successor body to the MMC) by the Competition Act 1998, it was the Enterprise Act 2002 that brought about a fundamental change in our status and way of working. The 2002 reforms sought to take politics out of UK merger control and market inquiries. The objective was to produce powerful competition authorities, free from political interference, armed with a full range of powers. The government aimed to achieve this by enhancing the independence and status of the competition authorities and by giving them decision-making powers subject to more specific judicial control. At the same time the broader "public interest" tests formerly applied to merger control and to monopoly control were replaced by explicit competition-based tests, SLC in the case of mergers and AEC in the case of markets. I will explain these a little later.

The importance of judicial control

Hume also said:

> *"In all demonstrative sciences, the rules are certain and infallible; but when we apply them, our fallible and uncertain faculties are very apt to depart from them, and fall into error."*[12]

Our regulatory decisions are subject to normal judicial review by the High Court but under sections 120 and 179 of the Enterprise Act, our competition decisions are subject to a specific system of review before the CAT at the suit of "any person aggrieved". In this role, the CAT is required to apply the same principles that would apply in judicial review (sections 120(4) and 179(4) Enterprise Act) rather than to hear an appeal on the merits of the case.

[12] David Hume, "Of scepticism with regard to reason", *A Treatise of Human Nature*, Book I, Part IV, Section I, 1739.

To date, only the remedial action taken by the CC in two merger cases has been subject to review by the CAT: in *Somerfield*, the CC's remedies' methodology was found to be correct and appropriate, and in *Stericycle*, its approach to interim measures also was confirmed.[13] No doubt, in time, the findings of one of our decisions itself will be subject to appeal and we may be found to have "fall[en] into error", but we make great efforts to ensure the thoroughness of our review process and the robustness of our decisions.

Need for clear and justifiable analysis and robust and transparent processes

When asked whether he lived by his philosophy, Hume replied:

> *"Be a philosopher; but, amidst all your philosophy be still a man."*[14]

This is sound advice. It is very important that we do not get too doctrinaire or theoretical in our approach to actual cases.

Hume's advice is particularly relevant to our treatment of evidence, specifically of a technical nature, in arriving at our decisions. There is some tension between the need to look at competition effects on the basis of good economics, using proper data wherever possible, and articulating the results in language that non-specialist people can understand. A particular "philosophy" or economic (or possibly accounting) theory alone, applied to complex facts in a way that is, on its face, comprehensible only to specialists, is not likely to be sufficient as an indication of whether harm to competition is probable or not. It is not a question of weighing incomprehensible technical economic evidence against obvious facts. It is much more a question of making the incomprehensible comprehensible and then to weigh or "proportion" it against other comprehensible evidence.

[13] Respectively, *Somerfield PLC v. Commission* [2006] CAT 4, decision of 13 February 2006; and *Stericycle International LLC, Stericycle International Limited, Sterile Technologies Group Limited v. Commission* [2006] CAT 21, decision of 19 September 2006.

[14] David Hume, "Of the Different Species of Philosophy," *An Enquiry Concerning Human Understanding*, Section I, 1777 edition.

II The Process of Investigation

In *A Treatise of Human Nature*, Hume advised that we should:

> *"draw no conclusions but where [we are] authorized by experience."*[15]

The purpose of the CC's process is to apply the lessons authorised by experience to the evidential material before it. The process is constantly being examined and improved, but there is no doubt that having more than half a century's experience as an authority breeds a degree of confidence.

The importance of process

In his essay "Of Essay Writing", Hume referred to a process engaged in by the "conversible" part of mankind:

> *"Where every one displays his thoughts and observations in the best manner he is able, and mutually gives and receives information, as well as pleasure."*[16]

I am not sure that our process ever gives pleasure. But bad process can generate a sense of grievance in parties out of all proportion to the business issues at stake, or even to the outcome of the investigation. Good process ought to leave parties feeling that, regardless of their views on the decision taken by an authority, at least they have been treated fairly. So it is in many ways just as important to conduct the investigation according to a fair process as it is to adopt a "correct" decision.

The essential features of the CC's process are:

- Involvement of CC members in the investigation;
- Initial fact finding through questionnaires, meetings, "site visits" and formal hearings;

[15] David Hume, *An Abstract of* a *Treatise of Human Nature*, 1740, para. 2.
[16] David Hume, "Of Essay-Writing", *Essays, Moral and Political*, Vol. 2, 1742. This essay was published in the 1742 edition and then was withdrawn from later editions.

- Transparent administrative timetables and a large degree of publication of working papers and other materials;

- Key signposts along the way – Issues Statement, Emerging Thinking (for markets); Provisional Findings; Notice of Remedies (if needed); and the Final Decision;

- Formal hearings between the Commissioners and the parties on the substantive issues;

- Fixed overall maximum time limits for investigations.

I will now consider briefly the CC's work in mergers and market investigations, beginning with mergers.

III Mergers

The CC's function in relation to the UK merger control régime is to carry out a second-stage intensive investigation. The OFT carries out an initial investigation to assess whether the merger falls within the Enterprise Act jurisdiction.[17] If the OFT considers the issues raised require further investigation then, unless the market concerned is very small or customer benefits outweigh the likely loss of competition,[18] the OFT must refer the merger to the CC for investigation or accept undertakings in lieu of a reference.[19] The régime is applied to both proposed mergers and those completed (in some cases, a considerable time previously). There is no compulsory pre-notification of mergers but it is normal for parties to inform the OFT of what is going on, at least in major cases.

We are generally asked to look at around 15 or so mergers a year – a relatively small number given the extent of UK M&A activity. Of these, we typically allow around one half to proceed without any restriction.

[17] Section 33 (for proposed mergers) and section 22 (for completed mergers) Enterprise Act 2002 (EA 02). The jurisdictional test is whether the merger creates or enhances a 25 per cent or more share of supply or involves the takeover of an enterprise with annual turnover of £70 million or more.
[18] See OFT, "Mergers – Substantive Assessment Guidance," May 2003, paras. 7.5-7.6 on markets of insufficient importance; and paras. 7.7-7.9 on customer benefits.
[19] On undertakings in lieu of a reference, see Section 73 EA 02 as well as OFT, "Mergers – Substantive Assessment Guidance," May 2003, chapter 8, and OFT, "Mergers – Procedural Guidance," May 2003, paras. 7.1-7.9.

A reference to the CC does not necessarily mean that a merger will be prohibited. But in a significant number of cases, we do prohibit. As Hume said:

> *"Let us separate hearts which were not made to associate together. Each of them may, perhaps, find another for which it is better fitted."*[20]

Substantial lessening of competition and merger specific effects

As I said earlier, we examine mergers to see if there is a substantial lessening of competition (SLC). The test of substantial lessening of competition is well-known and similar to that applied by many other merger control authorities. Two points in particular should be noted. First, SLC is a comparative test – it requires us to examine the effect of the merger compared to what would otherwise be. If the effect is significantly to lessen competition then we may have reason to intervene – we are not required to find any particular absolute level of competitive restriction. Second, we are looking at effects brought about by the merger itself. Other influences or changes in market conditions do not justify a prohibition of the merger itself.

Merger Cases

Pre-Enterprise Act cases

What can we glean from our experience of merger cases? First of all it is worth noting how much merger control has changed in the last 25 years. In 1982 the MMC, our predecessor body, considered the proposed acquisitions of *Royal Bank of Scotland* (RBS) by *Standard Chartered* and *HSBC*.[21] Neither of the bidders was engaged in retail banking in the United Kingdom, and there would be no significant reduction in competition in UK banking arising from either merger.

[20] David Hume, "Of Polygamy and Divorce," *Essays Moral, Political, and Literary*, Essay XIX, Part I, 1742.
[21] MMC Report, *The Hongkong and Shanghai Banking Corporation/Standard Chartered Bank Limited/The Royal Bank of Scotland Group Limited*, 22 December 1981.

It was also clear that, in the absence of the merger, there was little prospect that either bidder would be able to enter the UK retail banking market directly. In wholesale banking, there was "widespread and active competition among numerous banks, both British and foreign-owned,"[22] so neither of the acquisitions would significantly restrict nor inhibit competition in that market either.

Despite this, by a majority of four to two, the MMC concluded that each of these mergers may be expected to operate against the public interest because they could be "seen as part of a process of economic centralisation" that could be "seriously damaging to Scotland". More specifically, the "removal of ultimate control from Edinburgh would lead to a deterioration in the quality and importance of decisions made in Scotland, and to loss of easy access to the most senior management of the RBS group for the rest of the Edinburgh financial community." This would "be a significant step in the long process of centralisation, reinforcing the impression of a "branch economy", diminishing confidence and morale in Scottish business, and weakening public life and leadership in Edinburgh and Scotland." The MMC majority also did not think that a merger with Standard Chartered would transform RBS into a "fifth force" that could match the "big four", despite its predominance in Scotland.[23]

This decision obviously has some resonance today[24] but the relevant point here is not its correctness or otherwise but to note that it was not a competition-based decision. As the MMC found, neither bid for RBS would lessen competition and, arguably, under the present law, both might have been cleared.

[22] *Ibid.*, para. 12.6.
[23] *Ibid.*, paras. 12.7-12.19; 12.38-12.40 and note of dissent by Mr R G Smethurst. More generally, see Chapter 10 of this MMC Report on "Evidence from Scotland".
[24] See, for example, John Kay, "Head office must be in the best place for business," *Financial Times*, 24 April 2007, which refers to the CC's 1982 RBS inquiry in light of RBS's current role as "predator" rather than "prey" in its ABN-Amro bid.

A slightly different contrast, showing that a competition-based merger control system can recognise changes in market conditions, comes from the two cases of *Bond Helicopters/British International Helicopters* (1992)[25] and *CHC Helicopter/Helicopter Services Group* (HSG) in 2000.[26] In the former decision, the MMC came to an adverse finding on the proposed merger affecting helicopter support services for the UK Continental Shelf oil and gas industry. By 2000, the CC (as it had become) considered that barriers to entry had reduced, and the buyer power of the energy companies increased, sufficiently to allow the merger of the Bristol and Bond businesses to proceed.

Post-Enterprise Act cases

Let me now turn to some more recent, post-Enterprise Act cases.

One case that aroused considerable interest here was the proposed merger between *Ottakar's* bookseller and Waterstones, owned by *HMV*.[27] This recent case received much media attention, as much because of the participants and third-party comments as for the intricacies of the competition issues. Indeed, several well-known authors provided evidence, as well as many other interested individuals and businesses.

The CC looked closely at competition at the local and regional level. In particular, we looked for any distinctive Scottish features, in light of third-party concerns about possible adverse effects of the merger on Scottish authors and publishers.[28] Our survey showed Borders as a significant constraint on Waterstone's and Ottakar's in the five locations in Scotland where their bookshops "overlapped". And generally we found that the effect of factors such as competition from Internet retailers and uniform national pricing were pretty much the same North and South of the border and we found no substantial lessening of competition.

[25] MMC Report, *Bond Helicopters/British International Helicopters*, 16 September 1992.
[26] CC Report, *CHC Helicopter Corporation/Helicopter Services Group ASA*, 19 January 2000.
[27] CC Report, *HMV/Ottakar's,* 12 May 2006.
[28] See, in particular, paras. 5.98 to 5.103 of the CC's Final Report, *HMV/Ottakar's*, 12 May 2006, on the assessment of regional competition.

A case with an even greater Scottish focus was in *Pan Fish/Marine Harvest*.[29] This was a merger of two Atlantic salmon farming companies with overlapping activities in Scotland and Norway. The inquiry team visited each of the parties' Scottish salmon fish farming operations and held hearings with several regulators, local councils and certain Scottish third parties in Edinburgh. Evidence was taken from all of the leading UK salmon retailers[30] and from many of the parties' customers and competitors, as well as from relevant regulators, local politicians and councils, and other interested parties through written and oral submissions, telephone conversations, and a customer survey.[31]

Although production was located in Scotland and in Norway, we found the relevant market for fresh, farmed Atlantic salmon was essentially the whole of Europe. In this context it was not thought likely that the merged group would try and raise prices by withholding production or that it would be able to raise prices to the relatively small number of UK customers who had a strong preference for Scottish salmon. On this basis the CC declined to intervene, although interestingly in France, where the merger also needed approval, this latter point clearly weighed more for French customers, and the authorities accepted an offer by Pan Fish to dispose of its Scottish business before allowing the merger to proceed.

I can't discuss merger control in Scotland without venturing into the field of transport. Again, two cases illustrate what we try to do.

[29] CC Report, 18 December 2006.
[30] The UK salmon retailers consulted by the CC together accounted for about 75% of all UK retail sales of salmon. See CC Report at para. 5.20.
[31] See http://www.competition-commission.org.uk/inquiries/ref2006/panfish/third_party_summaries.htm for non-confidential summaries of third-party views on the merger from a number of salmon processors and retailers as well as the summary of the hearings with Scottish Sea Farms and the Scottish Executive and Fisheries Research Services. See also http://www.competition-commission.org.uk/inquiries/ref2006/panfish/third_party_submissions.htm for non-confidential versions of written submissions from: Ms Elspeth Attwooll, MEP for Scotland; the Argyll and Bute Council; Comhairle nan Eilean Siar (Western Isles Council); the Highland Council; the Highlands and Islands Enterprise, the Argyll District Salmon Fishery Board; the Association of Salmon Fishery Boards and Rivers & Fisheries Trusts of Scotland; the Marine Conservation Society; the Salmon Farm Protest Group; as well as from customers such as the salmon smokers Ritchies of Rothesay, located on the Isle of Bute.

In *First Group/Scottish Passenger Rail*,[32] the CC had to consider the acquisition of the ScotRail franchise by FirstGroup, the leading UK bus travel provider. FirstGroup also operated five passenger train operating companies. During our inquiry, it was declared the preferred bidder for the new Scottish rail franchise.

Once again the CC took great pains to assess the likely effect of this on the ground – ie in those parts of Scotland likely to be affected. The CC found likely adverse effects not only on specific routes where bus and rail overlapped but also wider effects on public transport network markets within Scotland. The CC did not, however, go so far as to prohibit the acquisition of the franchise, partly because the routes affected were a relatively small part of the overall network, and instead accepted a package of behavioural undertakings from FirstGroup relating to fares, frequencies and other aspects of services on the affected routes.

In the current case of *Stagecoach/Scottish Citylink*,[33] the CC had to consider a completed joint venture covering certain important coach routes in Scotland, essentially Edinburgh-Glasgow and the so-called "Saltire Cross" routes (Glasgow-Aberdeen and Edinburgh-Inverness).

This case is still continuing, so I cannot comment further on the substance of it, but I will just say the following. The CC's conclusion (adverse in respect of some routes) was only reached after a very thorough review and having taken extensive evidence from many interested parties in Scotland, including from a number of MSPs and MPs, local councils and governmental bodies.[34] Our published decision (which, incidentally, was not appealed to the CAT), sets out our reasons and our chosen remedies, which are perfectly consistent with our established methodology.

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[32] CC Report, 28 June 2004.
[33] CC Report, 23 October 2006.
[34] See http://www.competition-commission.org.uk/inquiries/ref2006/citylink/third_party_summaries.htm for non-confidential summaries of third-party views on the merger and http://www.competition-commission.org.uk/inquiries/ref2006/citylink/third_party_submissions.htm for non-confidential versions of third-party submissions.

I can understand that some may find our decisions unpalatable, but we give all interested parties a fair opportunity to explain their case and they cannot say that they did not know who we are, what we do and how we operate.[35]

Merger Issues

I would not want to suggest, however, that all merger control is easy and straightforward. Indeed, there are several important points that we are addressing as the Enterprise Act régime "beds down".

The counterfactual

One point I mentioned earlier is looking at what is the alternative to the merger. The "counterfactual", as it is called, is an important part of the analysis. The starting point is the pre-merger situation. This will not always be the right alternative. In *Scottish Citylink*, the alternative to the merger on the Edinburgh-Glasgow route was withdrawal of one of the operators – so on that basis the merger itself did not lessen competition on that route.

Completed mergers and interim measures

Another issue is how to handle mergers that have already been completed by the time the CC is asked to look at them as was the case, again, for *Scottish Citylink*. Recently we have seen a number of cases like this.

The UK operates a voluntary régime, so parties do not need to receive pre-merger approval from the authorities before closing a notifiable transaction. However, the CC has to be able to do its job and, in particular, to take necessary measures, if it finds there is an SLC.

[35] The CC and before it, the MMC, has considered numerous cases concerning transport in Scotland. Examples include: MMC Report, *National Express Group (NEG)/ScotRail Railways Ltd*, 16 December 1997; MMC Report, *FirstBus/SB Holdings*, 24 January 1997; MMC Report, *SB Holdings/Kelvin Central Buses*, 27 April 1995; MMC Report, *Stagecoach/SB Holdings*, 27 April 1995; MMC Report, *NEG/Saltire Holdings*, 17 February 1994; and MMC Report, *Highland Scottish Omnibuses Ltd*, 12 July 1990.

For that reason, the CC will normally insist on imposing "hold separate" measures where appropriate, as the *Stericycle*[36] case (we subsequently did the same in *Stonegate Farmers/Deans Food*[37]) shows. One way of avoiding this problem would be to move to a system of compulsory pre-notification of mergers – but I am not sure that business would welcome that at this stage, even though it is how almost every other country operates. But a consequence of having a voluntary system is that from time to time we have to unscramble completed mergers or joint ventures.

Size and significance of mergers

Then there is the question of proportion. The cases I have described were all significant cases, but from time to time we are asked to investigate quite small mergers which, although they may raise difficult competition issues, may not justify the full weight of our intervention. This is not a straightforward thing to deal with. The incidence and scale of merger activity is not predictable, so we must to a degree take the cases that come along. But, stepping back a little, it is clear that UK merger control will be best served if it focuses its resources on the cases that matter.

Colleagues in the OFT are well aware of this issue. They have to apply a legal duty in relation to references under the watchful eye of the CAT and competitors. The OFT is actively considering some increase in the minimum size of the market that may be affected by a referred merger, assuming no special circumstances exist. This will contribute to reducing the burden on business and to reducing costs. Equally, we adapt our procedures to "smaller" mergers, although there is always the problem that the complexity of the issues to be investigated does not necessarily correlate with the size of the merger or market affected.

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[36] *Stericycle International LLC, Stericycle International Limited, Sterile Technologies Group Limited v. Commission* [2006] CAT 21, decision of 19 September 2006.

[37] CC Report, 20 April 2007. See also the parties' interim measures dated 20 November 2006 at: http://www.competition-commission.org.uk/inquiries/ref2006/stonegate/pdf/interim_undertakings.pdf.

Is UK merger control "too heavy"?

That, in turn, raises the question of how thorough and intensive should our investigations be. Unfortunately, views on this tend to vary with the interest in the outcome. In a case like *HMV/Ottakar's*, the CC was encouraged to be very thorough but in cases where our decision is unfavourable to the parties we can be met with the objection that we have applied a disproportionately heavy process (*British Salt* is an example here, although the final result was a clearance).

The truth is there is no easy way to judge the appropriate weight of process, but I would just make four brief points:

- First, the proportion of relevant mergers actually referred to the CC remains small; by far the majority of cases are dealt with at the OFT stage;
- Second, the CC now applies "lighter touch" methodology to cases where the issues involved are of limited scope;
- Third, the overall CC timetable, including the remedies stage, is not out of line with international practice; and
- Finally, those who reproach us for the weight of process are sometimes the same people who ask for more opportunities to present arguments and evidence in the course of an inquiry.

Nevertheless, I don't dispute that between us and the OFT, the system needs to be made to work as speedily and as efficaciously as possible.

So that is all I want to say about mergers and I want now to talk briefly about the other main part of our work – the investigation of markets.

IV Market Investigations

Hume contended that:

> *"we have … no choice left but betwixt a false reason and none at all".*[38]

Well, in the UK competition régime we have a choice. The market investigation régime provides the UK authorities with an additional and parallel means of competition enforcement "betwixt" and alongside the "prohibition" systems of Articles 81/82 of the EC Treaty and their national counterparts (Chapters I and II of the Competition Act 1998). As far as I am aware, the CC is the only competition authority in the world not only with the power to investigate markets in detail, but also with the power to take decisions and to impose remedies. Being directed against whole markets, rather than the conduct of individual players, market investigations can concentrate on identifying and remedying market conditions without the need to ascribe fault or to impose penalties. This can help make cases less contentious for the parties and can lead to greater acceptance of necessary remedies. These factors, coupled with the statutory two year limit, mean that, although very thorough and detailed, CC market investigations can in some instances be preferable, for the taxpayer, the consumer and for business compared with proceedings under prohibition systems.

Reference to CC: discretion not duty

As with mergers, the CC cannot initiate a market investigation. The market in question must be referred by the OFT (or one of the major sectoral regulators).[39]

[38] David Hume, "Conclusion of this book," *A Treatise of Human Nature*, Book I, Section VII, 1739.

[39] The OFT's power to make a Market Investigation reference to the CC derives from Part 4, Section 131, EA 02. In relation to the sectoral regulators, ORR's reference power derives from section 67(2A) and (2B) of the Railways Act 1993; GEMA's in relation to gas derives from section 36A(2A) and (2B) of the Gas Act 1986 and, in relation to electricity, from the Electricity Act 1989, section 43(2A) and (2B); OFWAT's derives from section 31(2A) and (4) and section 36 of the Water Industry Act 1991; Ofcom's derives from section 370(1) to (3) of the Communications Act 2003; and the CAA's derive from section 86(2) and (4) of the Transport Act 2000.

The test for reference is whether the referring body has "reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or part of the UK".[40] If it has such grounds, it may refer the market to the CC for investigation. This is in contrast to the duty to refer in relation to mergers.[41]

Adverse effect on competition

As Hume said:

> *"all knowledge resolves itself into probability".*[42]

Once a case has been referred to the CC, the CC must consider whether there are "adverse effects on competition" (AEC) assessed by reference to "features of the market" that "prevent, restrict or distort competition". In our AEC assessment, we consider any and all of the evidence or "knowledge" available to us in determining the "probability" that a feature does or is likely to prevent, distort or restrict competition. An AEC can derive from one or more of the following features:–

(1) The conduct of suppliers or acquirers of goods or services;

(2) The conduct of customers;

(3) The market structure.

Conduct includes any failure to act, whether intentional or not, and any other unintentional conduct. The legal framework requires the CC to identify an AEC from market features that restrict or distort competition. The categories of features, although broad, are not limitless, although it is open to the CC to decide that a feature may cover more than one category.

[40] Section 131, EA 02.
[41] *Association of Convenience Stores v OFT* [2005] CAT 36.
[42] David Hume, *A Treatise of Human Nature*, Book I, Part IV, Section I, 1739.

Some things, such as excess or supranormal profits as an example, cannot in themselves be "features" although they may suggest the existence of other features, such as high prices charged by suppliers.[43]

What market investigations are for

In investigating markets we are trying to assess whether conditions in a given market are enabling some providers, or acquirers, of goods or services to get, hold and exercise a degree of market power to such an extent that competition is restricted, consumers are harmed and some intervention is justified.

People sometimes say – what is the point of this? Surely Articles 81 and 82 cover all the things that should be covered? Well, the kinds of situation that market investigations can cover, and which a prohibition system might miss, include:[44]

1. *Unilateral Effects:* The need to improve the operation of a market dominated by one or more players, who are not themselves 'abusing' that position (particularly where incumbents are protected by high natural or strategic entry barriers that impede self-correcting entry);

2. *Co-ordinated Effects:* Non-collusive oligopoly behaviour falling short of illegal conspiracy, of the form economists would regard as tacit co-ordination leading to prices approaching the collusive (or monopoly) level;

3. *Vertical Effects:* Issues of market structures in vertical cases with parties operating at different levels of the supply chain where some 'unbundling' is perhaps needed to correct distortions in competition or actual or perceived discrimination;

[43] See EA 02, section 131(2) and (3). Both the OFT and CC guidelines discuss in detail what is meant by market features. See, in particular, Part 3 of CC3, "Market Investigation References: Competition Commission Guidelines", June 2003; and Part II of OFT, "Market investigation references: Guidance about the making of references under Part 4 of the Enterprise Act," March 2003.

[44] This formulation owes much to Dr Mark Williams of NERA.

4. *Inefficient Equilibria:* Where the market arrives at a 'bad' equilibrium from which no individual firm has an incentive unilaterally to deviate;

5. *Government Barriers to Entry:* Where government policy creates 'artificial' barriers to entry that may distort competition (often motivated by legitimate public policy considerations); and

6. *Informational Failure:* Where consumers lack the information to make informed choices or (perhaps more controversially) where they may not use that information to make good choices.

This is a substantial list of matters, which suggests that there is considerable utility in the market investigation régime, and indeed, the increasing volume of cases bears that out.

The market investigation régime has been in operation for nearly four years. In that time nine investigations have been started, four of which have been decided. Of the nine investigations, four are in the retail financial services sector – *Store Card Credit Services*, *Home Credit*, *Northern Irish Personal Banking* and *Payment Protection Insurance* (all essentially financial services references with strong consumer protection elements); the others are *Domestic Bulk Liquefied Petroleum Gas* (*LPG*), *Classified Directory Advertising Services* (*CDAS*), *Groceries* and, most recently, *BAA Airports* (including its airports in Edinburgh, Glasgow and Aberdeen) and *Rolling Stock for Franchised Passenger Services* (*ROSCOs*).[45] The régime appears to be operating at a level of about two to three references per year, giving a running case load of about three with an 18-month to two-year duration.

[45] CC Report, *Store Card Credit Services*, 7 March 2006; CC Report, *Home Credit*, 30 November 2006; CC Report, *Northern Irish Personal Banking*, 15 May 2007; CC Report, *Payment Protection Insurance*, 7 February 2007; CC Report, *Domestic Bulk Liquefied Petroleum Gas*, 29 June 2006; CC Report, *Classified Directory Advertising Services*, 21 December 2006; *Groceries* was referred to the CC on 9 May 2006; *BAA Airports* was referred to the CC on 29 March 2007; *Rolling Stock for Franchised Passenger Services* was referred to the CC on 26 April 2007.

The four cases (*Store Cards*, *Bulk Domestic LPG*, Home *Credit* and *CDAS*) that have been decided show a varied picture.

In ***Store Cards*** (i.e. credit cards supplied by retailers), the CC found competition problems in the downstream market (i.e. between retailer and customer) and adopted essentially informational remedies – particularly a requirement to draw customers' attention to APRs exceeding 25 per cent through a "wealth warning" (which came into effect earlier this week)[46] as well as requiring certain insurance products to be unbundled from the store card provision.

In ***LPG*** (supply of bulk LPG as a domestic fuel in tanks), the CC found that customers could not easily switch suppliers and decided on measures to make the transfer of LPG tanks between suppliers much easier.

In ***Home Credit*** (small sum credit given and collected on the doorstep), where the CC found very little competition but a rather fragile industry, it opted for market opening measures through improved data sharing; better information for borrowers on what obligations they are taking on; and an adjustment to the early settlement rebate régime to remove an existing inequity.

And in ***CDAS*** (yellow pages and other classified directories), the CC required price controls on Yell to continue, although in a modified form.

In relation to the five current cases, the CC has found, provisionally, absence of customer awareness and switching in *Northern Irish Personal Banking*; and in *PPI*, *BAA Airports* and *ROSCOs* – it is too early to say. I will come back to the *Groceries* investigation.

[46] The CC's remedies require that store card statements should have a "wealth warning" statement on store cards with APRs exceeding 25%. The minimum payment warning is the following wealth warning statement: "If you make only the minimum payment each month, it will take you longer and cost you more to clear your balance."

Market investigation issues

So much for the description of where we are – but as with mergers there are several issues that need to be considered.

The competition test

First of all, there is no easy contrast to draw between current decisions based on competition grounds and old decisions applying the broader public interest test.

The present régime followed nearly 50 years of monopoly control with the emphasis in the two decades up to 2003 on so-called complex monopoly situations, where a group of companies collectively exercised market power to the public detriment. But it is a long time since a monopoly was attacked other than on competition grounds. One has to go back to the 1980s and such cases as *Animal Waste*[47] and *White Salt*.[48] Even as controversial a case as the *Supply of Beer*,[49] which covered such matters as the terms for public house tenancy agreements, can be characterised essentially as a competition case. Other major pre-Enterprise Act monopoly investigations such as *New Cars*, *Fine Fragrances* and, more recently, *SME Banking* and *Extended Warranties*[50] came to essentially competition-based conclusions.[51]

[47] MMC Report, 3 April 1985.
[48] MMC Report, 25 June 1986.
[49] MMC Report, 21 March 1989.
[50] CC Report, *New Cars*, 10 April 2000; MMC Report, *Fine Fragrances*, 11 November 1993; CC Report, *SME Banking*, 14 March 2002; CC Report, *Extended Warranties*, 30 September 2003.
[51] Sometimes we feel that people forget that our investigations are about competition. Some of the issues we are being asked to address in the *Groceries* investigation are much more appropriate to a public interest test.

Geographical scope

Secondly, and it is only fair to address this tonight, there is the question of geography. How well does the market investigation régime cope with issues in different parts of the UK? There are two different ways of looking at this:- cases specifically directed to a particular part of the UK and cases that are UK-wide where it is important to cover all areas.

On the first, cases such as *Scottish Milk*[52] (pre-Enterprise Act) and *Northern Irish Personal Banking*[53] (current) suggest that the CC appropriately engages with the relevant area. As with mergers, the CC goes to great lengths to visit, discuss with and listen to people in the relevant country or region.

A good example of this is the 1997 inquiry into *Solicitors' estate agency services in Scotland*[54] Here the Commission concluded there was no harm to the public interest and that the supply of estate agency services by Scottish solicitors did not restrict competition from non-solicitor estate agents – on the basis of a great deal of evidence from Scottish consumers. This, it will be noted, is a case of a monopoly "clearance" – something it is sometimes (wrongly) said we never do.

In relation to UK-wide cases, I believe that we do take care to explore all relevant parts of the country. In the current *Groceries* case, the CC has held formal hearings in Wales, Northern Ireland and, of course, Scotland as well as taking detailed, local, evidence. It is in regular contact with organisations, politicians, businesses and consumers in every part of the UK. It would be hard to justify the claim that any particular region or nation was not being fully considered.

But there are more general issues raised by our experience so far.

[52] CC Report, 22 December 2000.
[53] Referred to the CC on 26 May 2005; CC Final Report, 15 May 2007.
[54] MMC Report, 29 August 1997.

Getting the right cases

One is how to get the "right" cases. The intensity of the process and the resources consumed by authorities and parties are such that market investigations must only be launched in appropriate cases. This places great importance on the OFT considering carefully, on the basis of all the information that comes available to it, which cases are appropriate for detailed investigation. This reflects the wider context in which OFT and CC operate and shows the different but complementary role each plays in the UK competition enforcement system. Whilst the CC acquires much knowledge of different areas of the economy in the course of its work, it does not replicate the OFT's systematic observation of how different market sectors are faring.

And the role of sector regulators should be noted also. They too can make market references – for example, the recent reference by ORR of Rolling Stock Leasing Companies. The sub-text here is that the market investigation régime is meant to make a difference to UK consumer interests, to the efficiency of UK business and, ultimately, to the productivity of the economy. These references are clearly significant enough potentially to have this effect and it is important that the régime continues to engage with markets of this kind.

Level of intervention

Another aspect of appropriateness is the CC's own sense of proportionality. Market investigations should be neither arbitrary nor disproportionate in their operation. Most markets could probably be said to be not "working well" in some or other respect. And assessing what a competitive market would be, when confronted with a possibly uncompetitive one, is not a precise science. But here the CC's accumulated experience comes into play. An AEC is unlikely to be found on the basis of insignificant or transitory conditions – and likely adverse effects will be considered from the point of view of durability and sustainability. Interventions will be kept to an appropriate level.

This was essentially why no formal test of "appreciability" or *de minimis* was included in the legislation and I am sure Hume would have approved of this approach.

Running a manageable process

Market investigations are genuinely difficult to do fully and fairly in a manageable time frame. The statutory maximum is two years and cannot be extended. The CC accordingly aims to conduct the substantive part of its investigations within about a year (this will not always be possible), leaving the remaining time to cover the all important aspects of remedy formulation should this be required (tasks which pre-Enterprise Act often took much longer than this).

To achieve this, the CC has to keep control of its timetable and the principal parties must play their part in the process. In particular, whilst it will always give parties a proper opportunity to comment on the CC's evidence and likely reasoning, the line has to be drawn somewhere in this dialogue, as the CC comes to its decision. The CC is digesting the lessons of its experience so far, and is well aware that the incentives for delay can be quite powerful. But making these investigations work well and to time is a key CC objective.

Appropriate remedies

As I said, the CC is unique in combining a market investigation role with extensive remedial powers. If we find an AEC we have a duty to remedy it and any damage to customers as comprehensively as possible. We must, in considering what we do, take into account customer benefits that might be threatened. And our remedy powers are extensive ranging from the making available of more information to consumers, to changing the terms of agreements or the divestment of whole businesses.

We also have a deregulatory function. We cannot override contrary legislation but we can recommend that other parts of Government should change or repeal them.

There is a commitment, as with OFT, by Government to respond publicly to such a recommendation within 90 days. In the only, rather minor, instance of a recommendation so far (to the DTI to amend regulations for home credit), the Government accepted the CC's position in full.

Generally, in applying remedies so far we have proceeded cautiously. We take great care to act proportionately and to deliver an effective solution to the problem we have found. We have not so far ordered any divestment of assets or businesses, unless you regard the LPG "tank transfer" remedy as a divestment. But in an appropriate case, we will not hesitate to do what is necessary, and I am confident that our processes are robust and fair enough for people affected to understand fully why a particular remedy is appropriate.

V Conclusion

In an autobiographical essay written shortly before his death, Hume commented that, on publication, his *Treatise of Human Nature*:

> *"fell* dead-born from the press, *without reaching such distinction, as even to excite a murmur among the zealots."*[55]

Whilst we cannot aspire to the quality of Hume's prose or the remorseless rigour of his philosophy, we do aim to produce "classics" in the sense of authoritative reports that provide useful and comprehensive conclusions that are widely respected and relied upon fairly soon after publication (instead of having to wait some time, as in the case of Hume's *Treatise*). But our reports are not aimed at, nor do they represent the views of, any particular group of "zealots".

[55] "My Own Life" in *The Life of David Hume, Esq. Written by Himself*, 1777.

Whilst we listen to the views and evidence of all interested parties during the course of our investigations, the conclusions reached in our reports are cogently and robustly argued and based on competition grounds alone.

By the end of our highly open and transparent review process, we would hope to have quelled most of the murmuring – even that of zealots – by having given all interested parties the opportunity to voice their views and by considering the merits of any views put forward.

I have covered a lot of ground tonight – probably more than is reasonable. There is much I have not said – I have not discussed our regulatory work or our residual public interest work at all, I have not gone into any detail on how market investigations fit into more general competition enforcement, our work with other competition bodies around the world and the constant efforts we make to improve our organisation and processes and to ensure that our analysis is best in class.

And you may well ask, what is it all for? What is the underlying objective we are trying to pursue as a competition authority? It is easy to lose sight of this under the pressure of events, but vital not to do so.

A French competition expert has observed that in France "competition" means job losses and foreign takeovers. The brand recognition of competition policy in the UK is also quite low and is often seen either as something rather undesirable – "cut-throat competition" or "unfair competition" – and not appropriate for sectors of the economy like transport or energy.

In the USA, The Honourable Thomas Barnett, Assistant Attorney General and Chief of the Antitrust Division of the US Department of Justice, said recently:

> *The Supreme Court has called the antitrust laws the fundamental guiding principles for the organisation of our economy. We have found that encouraging competition is the best way to build up standards of living and prosperity within our economy. Effective and efficient enforcement of those laws is a pillar of our economic policy".*[56]

That is a pretty good exposition of the importance of competition law, which resonates on this side of the Atlantic also. It is important for all of us, I would suggest, to keep competition at the centre of economic policy in the UK. The CC may be sceptical in the way it approaches the analysis of the evidence in individual cases, but it is highly optimistic about what competition policy can achieve. Allowing markets to work effectively is the best system yet devised to deliver efficient businesses, innovation and benefits for consumers in terms of price, value for money and choice. And in markets where there are no natural – or even unnatural – monopolies, regulation is normally a poor substitute for competition in this respect. The idea of an economy without a strong competition policy is very unattractive.

And here again Hume has some guidance for us. We are trying to protect and, if possible, promote competition.

Whilst Hume did not actually write a treatise on competition (a concept more developed by his friend and legatee Adam Smith), he did write the following in his essay "Of the Jealousy of Trade":

[56] As quoted in "Concurrences", № 3-2006, pp. 6-9.

> *"I will venture to assert, that the increase [sic] of riches and commerce in any one nation, instead of hurting, commonly promotes the riches and commerce of all its neighbours; and that a state can scarcely carry its trade and industry very far, where all the surrounding states are buried in ignorance, sloth and barbarism."*[57]

This points to the international benefits of competition. Whether here, tonight in Edinburgh, we are surrounded by states "buried in ignorance, sloth and barbarism" is a matter I leave to the good sense of my audience.

[57] David Hume, "Of the Jealousy of Trade", *Essays, Moral and Political*, Essay VI, Part II, 1752.

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