UK COMPETITION LAW
TEN YEARS ON

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Some milestones

- 1 March 2000: Competition Act 1998 came into force
- 1 April 2003: OFT board structure
- 20 June 2003: Other Enterprise Act 2002 provisions:
  - UK merger law reform
  - Market investigation references
  - Criminal cartel offence
- 1 May 2004: EC reforms:
  - Modernisation Regulation
  - ECMR reform

How well is it working? What next?

- Two successes
- Two disappointments
- Two questions for the future
- Competition policy and the financial crisis

Success 1: Merger policy

- De-ministerialization (but BSkyB/ITV & Lloyds/HBOS)
- Transparency – casework and guidelines
- Economics-grounded policy
- The C of A on the duty to refer – *IBA Health* (2003)

- Lessons learned by DG Comp after *Airtours* etc
- ECMR reform
- International harmony?

Success 2: Cartel policy

- Carrot (leniency) and stick (fines, jail) policy

- *Hasbro toys* (2003) and *Replica football kit* (2003)
- *Bid rigging in construction* (2009): 100+ firms

- *Dairy* (2007) and *Tobacco* (2008) cases: early resolutions
- *British Airways* (2007) and criminal charges
- *Marine hose* (2008): criminal convictions

Disappointment 1: Prohibition on abuse

- Not many UK cases – especially since 2004 (see Bloom *CLJ* 2010)
- Regulators' incentives – question concurrency?

- EC jurisprudence stalled (though DG Comp guidance)
- US courts' retreat

- Lack of clear basic principles

Disappointment 2: Agenda distortion

- Complaints bring valuable information and ideas
- But capture by complainants risks competition policy being 'at war with itself'
- Appeals against non-infringement decisions are fair enough
- Resource drain in defending file closures – unsuccessfully in *BetterCare*, *Freeserve*, *Claymore* and *Bacardi* – seriously hampered CA98 enforcement
- ... and may have deterred file opening (and transparency)
- Does *Cityhook* (2007) signal a different approach?

Court of Appeal in *Floe* (2006)

"The Tribunal cannot know what are the competing demands on the resources of the particular regulator at the given time. It may well be that it cannot properly be told of this by the regulator because of issues of confidentiality as to current investigations. It cannot, therefore, form any proper view as to the relative priority of one case as compared with others".

– Lloyd LJ at para 37

Q1: Is the market reference regime worth it?

- Very unusual by international standards
- Only 13 references in past ten years
- Only one by a regulator (rolling stock leasing)
- Only one (local bus services) since April 2007
- Inquiry length
- Plus aftermath, including challenges to remedies

- OFT market studies are another matter

Supermarkets

- 18-month inquiry in 1999-2000
- Safeway bids in 2003
- OFT dairy and tobacco investigations
- OFT set aside its 2005 decision not to refer supermarkets (again) following appeal to the CAT by the Association of Convenience Stores ...
- then refers Grocery market in 2006 for 2-year inquiry ...
- plus 2009 remittal proceedings following appeal to the CAT by Tesco

Q2: Should OFT and CC be merged?

- Besides direct cost savings, advantages of CC/OFT merger include
  - better allocation of competition policy resources
  - more streamlined merger review
  - greater consistency
- Implication: increased role of the Courts (including CAT)
- Swing issue may be view on value of CC market investigation regime

Competition policy and the financial crisis

- The crisis is a failure of *laissez-faire* – or rather misdirected regulation – not of competition
- But it presents opportunities for vested interests to seek anti-competitive favours from politicians – including shielding from competition policy itself
- Such pressures must be resisted
- And in due course bank privatization must be conducted more pro-competitively than was utility privatization in the 1980s

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