

Regulatory Policy Institute

Annual Competition and Regulation Conference 2010

UK Competition policy structure:
challenges to the existing institutions

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Focus of Analysis

1. Institutional structure in enforcement cases: fairness and efficiency
2. Institutional structure in merger and market investigation cases: efficiency and judicial control

Enforcement cases – existing institutional structure

- OFT
 - investigates: s25; leniency; whistle blowers; prioritisation
 - prosecutes: SO; supplemental SOs
 - judges/adjudicates: infringement/non- infringement decision
 - imposes sanctions/penalties: cease/desist; directions; significant penalties
- Concurrent Regulators
- CAT
 - full merits review

OFT: Decision-Making Process

- Investigation
 - Team Leader
 - runs case day to day
 - Project Director
 - "directs the case"
 - "accountable for delivery of high quality timely output"
 - Senior Responsible Officer
 - accountable for delivery of the case
 - advises on the direction of the case
 - "typically responsible for deciding whether sufficient grounds to open formal investigation and whether evidential requirements of infringement have been met"
 - "can consult with other senior OFT officials as necessary"

OFT: Decision-Making Process/Contd...

- Analysis and review
 - Steering Committee
 - "where appropriate"
 - comprises range of senior officials and other staff
 - provides strategic advice and guidance
 - helps consistency across case portfolio
 - internal scrutiny
 - "regularly scrutinise" investigation process and assess evidence to ensure decisions/actions are "well founded, fair and robust"
 - typically involves seeking internal advice from advisers who have not been involved in day to day running of investigation
 - may seek advice from external Counsel
 - may refer questions to OCE, GCO and/or Policy
 - SRO will choose which course of action to adopt

OFT: Decision-Making Process/Contd...

- Issuing Statement of Objections
 - "provisional decision of whether the evidential standard required to establish an infringement has been met will be taken by a senior officer, typically the SRO"
 - "SRO not involved in day to day matters during an investigation. However they are kept informed of case progress. They have access to all of the evidence and analysis upon which to base their decisions"
- Reply to SO/oral hearing
 - oral hearing "will be attended by members of the case team. Typically the SRO will also attend"
 - chaired by senior OFT official who is independent of the case team
 - no hearing officer

OFT: Decision-Making Process/Contd...

- Considering representations
 - primarily assessed by the case team
 - "other areas" of OFT "may be consulted and involved" with assessment of representations
- Final Decision
 - "if we decide that the legal test for establishing an infringement is met, we will issue an infringement decision..."

OFT: Decision-Making Process: Evaluation

- Followed EC Model
 - little debate prior to adoption of CA98
 - "CBI and others attached importance to ... clear separation of responsibility for investigation and adjudication ..." (DTI, August 1996)
- Inconsistent with approach in other common law jurisdictions
 - Australia - ACCC investigates and institutes proceedings in the Federal Court
 - Canada - cartels investigated by Competition Bureau and prosecuted by DPP (criminal re individuals, fines on corporations)

OFT Decision-Making Process: Evaluation

- Ireland
 - CA investigates , initiates proceedings before High Court (civil) or District Court (criminal)
- USA: DOJ
FTC
 - prosecutes before Federal Court
 - trial before ALJ
 - appeal from ALJ to FTC Commissioners
- Hong Kong
 - Competition Bill adopted judicial enforcement model
 - enforcement actions brought by Competition Commission before Competition Tribunal
- France
 - rigorous separation between investigatory and decision-making arms

Concerns in relation to the current structure – Fairness:

- CA fines are criminal in nature
 - ECJ in *Mantecatini*
 - CAT in *Napp*
- "The fundamental principle is that a man may not be a judge in his own cause" (HL in *Re Pinochet*)
- Risk of prosecutorial bias
 - confirmation bias
 - hindsight bias/desire to justify past efforts
 - desire to show high level of enforcement activity

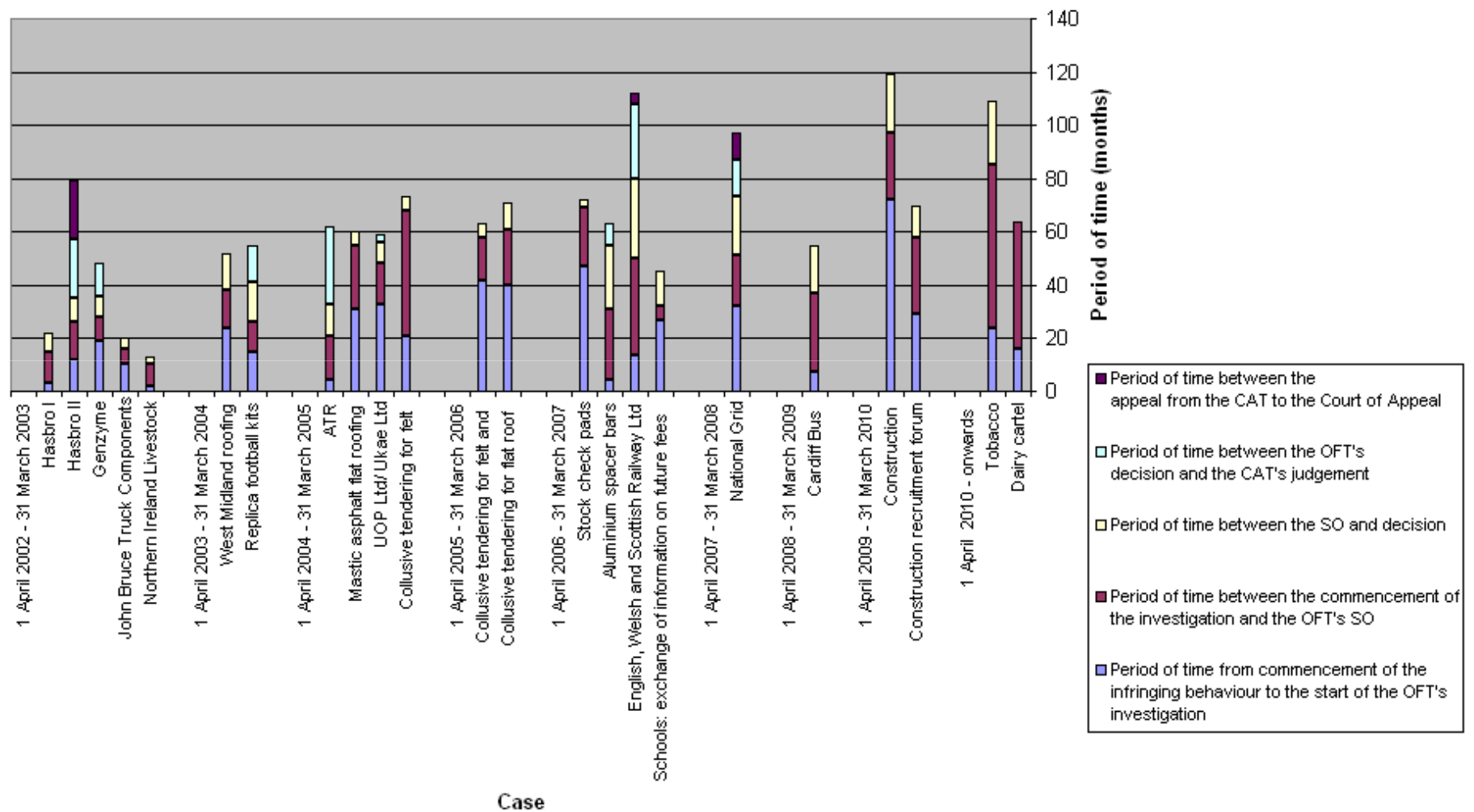
Concerns in relation to the current structure – Fairness:

- It infringes basic notions of fairness and justice:
 - transcendental institutionalisation (Sen, 2009)
 - impartial spectator (Adam Smith, 1759)
 - "justice needs to be seen to be done"
- Would not tolerate police investigating, prosecuting and adjudicating in relation to non-custodial offences

Concerns in relation to the current structure - Efficiency

- NAO, March 2010
 - Regulators made limited use of enforcement powers
 - Case law not as rich as it needs to be
 - Decision process is lengthy
 - Most decisions appealed (60% completed in less than 1 year)
 - may reduce appetite for use of enforcement powers
 - too much use of early resolution or regulatory powers
- Empirical review underlines these concerns

Infringement decisions under Competition Act 1998



A Solution: OFT prosecutes SO before the CAT

- Significant reduction in length of cases before the OFT, freeing up regulatory resources for other cases
- Material savings for the parties; e.g. tobacco 418 page SO on 24 April 2008; 583 page Decision on 15 April 2010
- Likely to avoid supplemental SOs
- Likely to avoid remittals from the CAT to OFT
- May encourage Sector Regulators to use enforcement powers
- Consistency of case law as between regulators ensured
- 2-3 year time limit to issue SO?
- Appeal to Court of Appeal on point of law; penalty

Mergers and Market Investigations

Mergers

- 82 references since June 2003
- 57 (70%) on basis of share of supply (26 turnover)
- 25 (30%) abandoned
- 31 (38%) unconditionally cleared
- 17 (21%) conditionally cleared
- 8 (10%) prohibited

Clear Benefits

- Fresh view: absence of confirmation bias
- access to senior decision-makers

Mergers and Market Investigations

But ...

- large mergers assessed under ECMR
- 70% referred on basis of share of supply
- 30% abandoned
- costs to parties high

—————> time for change?

Mergers and Market Investigations

Market Investigations

- 11 references under EA2002 (2 sector regulators – rolling stock; movies)
- Remedies required in all cases
- NAO concerns:
 - too few references
 - Sector Regulators too narrowly focused
 - threats of reference lose credibility
- Benefits of CC Model
 - fresh look by senior/experienced panel
 - access to decision-makers
 - well managed: quick cf CA98 cases
 - JR "losses" part of transition to new system
 - will costs be saved through merger/executive agency within OFT?

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