Chapter 37

THE UK COMPETITION COMMISSION: A MODEL FOR OTHERS TO FOLLOW OR A UNIQUE EXPERIMENT?

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I. INTRODUCTION AND SUMMARY

The Competition Commission (CC) was established by statute in 1998[1] as the successor body to the Monopolies and Mergers Commission (MMC).[2] It acquired its full decision-making powers in 2003.[3] It was subsumed into the newly formed Competition and Markets Authority (CMA) in 2013.[4]

The CC inherited the basic structure of the MMC, namely a salaried Chairman and Deputy Chairmen, a body of some 40 part-time Members, drawn from academia, industry and the professions, and a professional staff of about 100, which could be varied according to the case load. It conducted cases through panels of (normally five) members, appointed by the Chairman and chaired by them or a Deputy Chairman, with a team of supporting staff. Administratively, it was a Non-Departmental Public Body (NDPB) sponsored by what was then the Department of Trade and Industry.

Its role was threefold: assessing mergers; investigating markets; and reviewing sectoral regulatory decisions. Initially there was a fourth role, hearing appeals against competition decisions, but this was, after some hesitation, hived off to an independent tribunal.

The CC had no originating jurisdiction or power to initiate. It required some other body, the Office of Fair Trading (OFT), a sectoral regulator, or a Minister, to refer matters to it.

The CC owed its existence to a particularly British habit of introducing radical reforms whilst not being willing to dispense entirely with what was there before. It is probable that the CC owed its continued existence to its inherent qualities rather than because it was needed to perform essential competition tasks, which could arguably have been re-allocated, with the possible exception of the regulatory oversight function.

This chapter suggests that, against this somewhat unpromising background, the CC performed outstandingly well over the decade in which it operated as an independent authority. It became a model for others to follow, whilst being at the same

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[1] Competition Act 1998 (CA98) s. 45.

[2] For a general account of the MMC *see* STEPHEN WILKS: IN THE PUBLIC INTEREST: COMPETITION POLICY AND THE MONOPOLIES AND MERGERS (Manchester University Press 1999).

[3] Enterprise Act 2002 (EA02). The CC's new competition powers took effect on 20th June 2003 (SI 2003/1397).

[4] Enterprise and Regulatory Reform Act 2013 (ERRA13) s. 26. The formal transfer of functions was on April 1st, 2014.

time being difficult to replicate. Nonetheless it contributed greatly to the enhancement of the UK's reputation in the competition enforcement field.

II. HOW IT ALL BEGAN

A. CA98 and EA02

Prior to 1998, the UK's competition regime was a combination of administrative investigation under Ministerial control for mergers and monopolies and a registration system for restrictive agreements overseen by a specialist court. As pressure mounted in the 1990s to adopt an EU style prohibition system covering both restrictive agreements and abuse of dominant position, there was pressure also to discard the existing system of monopoly control and deal with market power issues exclusively under a UK version of what is now the EU's Art 102. However, the newly elected government in 1997 adopted a "hybrid" solution—adopting the EU prohibition system, but retaining the old monopoly controls. In 2002, with the Enterprise Act, the reform package was completed with a new system for mergers and markets, and a new appeal system.

B. The Concept

The reforms covered both the substantive law and the institutions. The dominant theme was to entrust competition enforcement to specialist bodies operating at arm's length from government. Ministers would play little or no role in decision-making. The newly empowered authorities—the Office of Fair Trading (OFT) and CC—would make decisions on substance and be able to impose remedies (including, in the case of the OFT, financial penalties and, in the case of the CC, divestiture). Control over their activities would be exercised by a new specialist tribunal rather than by Ministers or Parliament. This package of measures was set out in an ambitious and aspirational White Paper.[5] Underlying all this was a general perception that competition assessments were matters of difficult, technical, economics which should not be left to amateurs.

C. Institutions

The OFT was entrusted with the operation of the prohibition system, Chapter 1 (equivalent to what is now the EU's Art 101) and Chapter 2 (equivalent to Art 102). Appeals (on a full merits basis) from the OFT's decisions lay initially to the CC's "appeal side,"[6] but from 2003 lay to the Competition Appeal Tribunal (CAT), newly formed as an independent body, separate from the CC.

The CC was established as a new body, in succession to the MMC, with the tasks of investigating and deciding on mergers referred to it by the OFT and conducting investigations into markets referred to it by the OFT, a sectoral regulator or, exceptionally, a Minister. It was given the power to impose remedies, including divestiture and other structural remedies. Its decisions were subject to judicial review by the CAT.

It also succeeded to the MMC's review function for sectoral regulation, with power to examine and, if necessary, redetermine price controls and other decisions reached by economic regulators.

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[5] *Productivity and Enterprise – A World Class Competition Regime,* Cm 5233 July 2001 (DTI).

[6] *See e.g., Aberdeen Journals v. DGFT* [2002] CAT 4.

D. The Law

Apart from the new prohibition system, in which the CC was not concerned, there were other, major, changes in the substantive law. Merger control assessments moved from a "public interest" test to a competition test, specifically whether the merger was likely to result in a "substantial lessening of competition" or SLC. Cases were to be examined at "Phase 1" by the OFT to see whether they merited more detailed investigation at "Phase 2" by the CC.

The monopoly controls, hitherto also assessed by a public interest test, were moved to a new concept of "adverse effect on competition" or AEC, where a given market had "features" that "prevented, restricted or distorted competition."

If this legal upheaval were not sufficiently radical, EU law went through its own convulsion of decentralised reform under Regulation 1 of 2003,[7] entrusting to "designated" national competition authorities the power directly to apply EU competition law alongside, or instead of, their national equivalents. This added a further instrument to the OFT's range of powers as it, rather than the CC, was the UK body "designated" to apply the EU's Articles 101 and 102.

III. HOW IT WORKED IN PRACTICE

It is not proposed to review in detail the CC's case work over the period to 2013 but merely to highlight some salient features.

A. Moving from the Old System

The new system took some time to bed down and was not without its teething troubles.[8]

With the formal establishment of the CAT, both the OFT and the CAT had to come to terms with a much greater degree of judicial oversight than had previously been the case. An early example was the *IBA Healthcare* case, where an OFT decision not to refer a merger in the healthcare sector to the CC for detailed investigation was appealed to the CAT by a third party[9] and the CAT's decision against the OFT was appealed by the OFT to the Court of Appeal.[10] The case was notable less for its result, (the OFT's appeal failed) but rather for what it said about the OFT's duty to refer merger cases to the CC.

The CAT took the view that the threshold for referral was low, *i.e.*, anything that looked complex should be resolved by the CC rather than the OFT. The OFT considered this would upset the balance of the regime with many more mergers having to be referred. The Court of Appeal favoured the OFT's view, ruling that the OFT's duty to refer a case only applied if it reasonably expected that the merger may result in an SLC. It did not have to second guess what the CC itself might find.[11]

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[7] Council Regulation 1/2003 OJ [2003] L1/1.

[8] Until mid-2003, the CC operated under the old merger and monopolies regime, with a significant caseload, including *SME Banking* (a monopoly investigation into banking services for small businesses), and *Bass/Interbrew* (a brewing industry merger, subsequently contested in court by the parties).

[9] *IBA v. OFT* [2003] CAT 27.

[10] *OFT v. IBA* [2004] EWCA Civ 142.

[11] The case also established that the CAT's standard of review was that of "normal" judicial review principles.

B. Merger Control

The IBA case highlighted a tension between, on the one hand, the practice under the pre-2003 regime[12] that cases requiring detailed investigation should normally be referred to the CC and the reality that, subject to the requirements of the legislation, the decision whether to refer a case to the CC now lay with the OFT, not a Minister. The OFT could validly argue that the interests of efficiency and speed of process were best served by as much as possible being done at Phase 1, and it is likely that firms subject to the merger control process agreed.

The stage was therefore set for a situation where the CC would tend to feel that not enough cases were coming its way and the OFT would feel that its own competence to assess mergers and to secure the necessary concessions to remove the risk of harm was being questioned. Indeed, there were periods when the stream of merger references to the CC seemed to be running nearly dry. Against this, however, it should be noted that mergers with a "Community Dimension," *i.e.*, most major industrial mergers, were in any case exclusively handled by the European Commission[13]—the UK "menu" was skewed towards retail and local markets. Also, some cases simply could not be dealt with at Phase 1, either because the issues were genuinely difficult or because the parties wished to fight their cause, and together these provided a sufficient throughput to allow the CC to function.

Despite this latent tension, there were some notable CC decisions. Some of these were not pure competition cases. The reforms had reserved certain specific public interest grounds for consideration by Ministers. These included media plurality and freedom of the press. The attempted acquisition in 2007 of a minority stake in ITV by BSkyB (then part of the Murdoch group), aroused sufficient interest to prompt a reference to the CC, which was asked to consider both competition and media aspects for the Minister to decide. The CC's decision finding an SLC was upheld on appeal to the CAT, but its finding that media plurality was not sufficiently harmed was overturned.[14] The Court of Appeal upheld the CC on all aspects.[15] This was, it is suggested, a landmark case demonstrating the CC's ability to handle the most complex and sensitive issues.

Ironically, the next "public interest" case that arose was Lloyds Banking Group's acquisition of TSB bank in 2008, at the height of the financial crisis. Here the OFT wanted the case to go to the CC but Ministers, at the behest of the Bank of England, hastily enacted a new public interest test of "financial stability" and exempted the merger under it. An appeal to the CAT by disaffected third parties was dismissed.[16] Had the case reached the CC no doubt it would have been dealt with swiftly and effectively.

As a contrast to these major matters, in the middle of its *Groceries* market investigation (*see* below) the CC was asked in 2007 by the OFT to examine the acquisition (in 2004) and attempted disposal (in 2007) by Tesco of a supermarket site in Slough (a small town west of London) having failed to agree a suitable purchaser for the site with the OFT. The CC found the acquisition and disposal indeed amounted to an SLC, albeit a very local one, and imposed measures to correct the situation. It was perhaps regrettable that the full weight of a Phase 2 investigation was needed for this

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[12] Even then, it was normal for the OFT to seek commitments from merging firms to avoid the need for a reference.

[13] Under the EUMR, Council Regulation 139/2004 OJ [2004] L24/1.

[14] *BSkyB v. CC* [2008] CAT 25.

[15] [2010] EWCA Civ 2.

[16] *Merger Action Group v. Secretary of State* [2009] CAT 19.

purpose, which could have been avoided had the OFT possessed the necessary powers to deal with cases of this nature.

C. Market Investigations

The CC's market investigation framework evolved from previous MMC practice but rapidly acquired new features of its own. Procedurally, and even before it had acquired its new powers, a CC investigation involved a significant process lasting for up to two years, with detailed written questionnaires, submissions, formal hearings and discussion of possible remedies.[17]

Perhaps ironically, the procedural improvements to give greater transparency of process contributed to the weight and complexity of the investigation. Parties were provided with a Statement of Issues, working papers on particular topics, an Emerging Thinking document, Provisional Findings and a Statement of Possible Remedies, all running to many pages and requiring detailed engagement and response. In addition, there could be up to three formal Hearings, and a site visit and "open meeting" at the start of the investigation. Such a process was certainly not to be embarked on lightly.

In practice, it did not prove as easy to identify markets suitable for the full weight of a Market Investigation as the framers of the legislation had thought. Several factors were at work here.

First, the OFT, as part of its own statutory function to keep the markets under review, established a unit to conduct Market Studies.[18] These had no express statutory basis but were clearly recognised as part of the OFT's general functions and could be quite lengthy. They could be used either to identify a suitable case for reference to the CC or, as was often the case, to identify issues that the OFT could address on its own without referring the market to the CC. Second, the previous power for Ministers to make references to the CC, although technically still there, fell into abeyance as it was not consistent with the withdrawal of Ministers from a front line role. Third, sectoral regulators, who might have wished the CC to investigate their particular markets, initially seemed reluctant to use this power, possibly because it would remove a market from their control for a substantial period. Of the 16 references over this period, only two were made by sectoral regulators[19] and none by a Minister. Finally, the former power to refer industry wide practices for investigation was not carried forward into the new system—there had to be a specific "market" to investigate.

Several of the market references to the CC can arguably be explained by particular factors. Thus, *Store Credit Cards* (2006) appears to have been referred, possibly with some reluctance from the OFT, after pressure from a Parliamentary Committee. The *Home Credit* investigation (2006) was referred following a "supercomplaint"[20] by the National Consumer Council. *Northern Ireland Personal Banking* (2007) followed another supercomplaint, and *BAA Airports* (2009) arose from a recent foreign acquisition and possibly also perceived difficulties with the regulatory regime. The *Groceries* reference,

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[17] *See* Derek Morris, *Dominant Behaviour under UK Competition Law*, 2003 FORDHAM COMP. L. INST. 11 (B. HAWK ED. 2004), Paul A. Geroski, *The UK Market Inquiry Regime*, 2004 FORDHAM COMP. L. INST. 1 (B. HAWK ED. 2005); and Peter Freeman, *Market Investigations and Oligopolistic Practices*, 2007 FORDHAM COMP. L. INST. 22 (B. HAWK ED. 2008).

[18] The Markets and Policy Initiatives Division (MPID) established in 1999.

[19] *Rolling Stock Leasing Companies* (Roscos) by the Office of Rail Regulation (2009) and *Pay TV Movies* by OFCOM (2012). The latter refence was unique in resulting in a clearance.

[20] A procedure requiring the OFT to investigate a consumer complaint.

(2008) which was probably the largest investigation of all, resulted from a CAT decision quashing the OFT's decision *not* to refer the supply of groceries for CC investigation. It is never possible to be certain, but finding a straightforward reference stemming from an OFT review identifying the market as a suitable case and then referring it to the CC seems to have been an unduly difficult exercise.

The OFT and CC held detailed discussions to try and resolve these "pipeline" difficulties and there was some progress, but in the end the issue was solved, or rather removed, by merging the OFT and CC and bringing all aspects of the process under the same roof. Whether the problem could have been solved otherwise remains an unanswered question. Probably some greater initiation role would have had to be given to the CC, but then that would have threatened its position as an unbiased, objective examiner, as discussed below.

Alternatively, some kind of standing regime of industry-wide or cross-industry references could have been established, ensuring a baseline of investigative activity. This might have helped to solve the system design issue, but at the possible risk of excessive and wasteful diversion of time and resources. Interestingly, in the regulatory field, discussed below, the compulsory pre-referral of airport pricing decisions by the Civil Aviation Authority (CAA) ensured a sufficient turnover of regulatory activity to prevent this part of the CC's functions becoming moribund.

D. The Airports Case

Nonetheless, the OFT did refer BAA Airports to the CC for a market investigation, and this case was probably the most significant contribution made by the markets regime to competition and public welfare in this period. The privatisation of commercial airports had involved seven major airports, including three of London's airports, coming under the single control of the former British Airports Authority, now BAA.[21] The case was notable for its length and complexity and for the litigation to which it gave rise. The CC had to judge what more competitive conditions under separate ownership would look like in circumstances which had never previously existed, and in face of strong arguments from BAA as to the efficiency of common control. The CC found that common ownership gave rise to serious competition issues and ordered BAA to divest two London airports and one in Scotland.

Despite a significant difficulty (an appeal based on the perceived bias of the CC investigating panel was initially upheld by the CAT,[22] but then over-ruled by the Court of Appeal) the CC's order was eventually confirmed in full.[23] In the meantime, the government had changed its policy on expansion at Heathrow. The CC considered whether circumstances had changed sufficiently to upset its restored decision but found that they had not. The subsequent confirmation of this decision by the CAT[24] provided a comprehensive endorsement of the CC's approach and methodology which remains applicable today. It was also noteworthy that the CC's original decision had found that one of the adverse market features was the airport regulatory system itself. If nothing else this showed the utility of having a body outside the regulatory system able to consider it dispassionately.

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[21] BAA had recently been acquired by the Spanish firm *Ferrovial.*

[22] *BAA v. CC* [2009] CAT 27.

[23] [2010] EWCA Civ 1097. BAA had already offered to dispose of one London airport.

[24] *BAA v. CC (no 2)* [2012] CAT 3, [2012] EWCA Civ 1077.

E. The CC's Regulatory Functions

The CC's function as a quasi-appeal body for price control and other decisions by sectoral regulators (principally energy, water, communications and civil aviation) was in MMC days a very important part of its activity. The particular combination of independent judgment and industrial and economic expertise made the CC, as with the MMC, uniquely suitable for this task. If the CC had not taken on this function a new and specifically tasked body would probably have been needed. It was therefore an important part of the overall CC design concept.

There was substantial synergy with the CC's mainstream competition functions. Not only was competition an important part of regulatory policy, but the analytical techniques were similar. This was borne out in practice in considering the (rather few) mergers between water companies (where a reference to the CC was obligatory) and where the test applied was one of "yardstick" competition, involving an assessment of comparative efficiencies. In the also rather few price control references, the CC assessed profitability and investment matters much as in a mainstream market investigation.

In telecommunications, the review role was divided between the CC and the CAT. The CC handled "pricing" matters, the CAT the remainder, whilst having overall control of the appeal. This somewhat awkward arrangement has survived into the CMA era, despite various attempts to simplify it. For certain energy cases, the CC had to act as a quasi-court, but actual cases were rare.

As with the mergers and markets functions, it would seem that in practice there were fewer regulatory cases going to the CC than the architects of the regime had envisaged. Apart from airport price controls, where the CAA had to refer the proposed settlement to the CC before imposing it, and pricing aspects of appeals in the telecommunications sector, straightforward price control reviews, or even licence modification appeals, were relatively few.

There were numerous explanations offered for this; Regulators might not wish to lose control of their sector for an extended period; companies might fear they would achieve a worse settlement on appeal than they already had with the regulator. These factors combined with a general consensus that industry prices and investment were better settled by negotiation with the Regulator rather than by a lengthy redetermination process. It was sometimes said that the threat of a price control reference was quite sufficient in itself, but the credibility of this threat was subject to diminishing returns over time.

Overall, the CC probably played an important role in the regulation of utility sectors just by being there. There is no reason to think that the cases it handled did not contribute to the efficacy of the regulatory regimes. But its most significant case in a regulated sector was *BAA Airports*, which was a mainstream market investigation referred to it by the OFT.

IV. THE CC'S UNIQUE CONTRIBUTION

A. The Essential Contribution

In the light of this admittedly brief and very incomplete review of the CC's activities, it is fair to ask what was the CC's unique contribution that might be said to justify its creation and continued operation as a separate competition authority?

The essence of its contribution was the following; first, the quality, experience and confidence in the discharge of its functions—parties might not like the CC's decisions,

but on the whole they respected them; second, the fairness and rigour of the CC process; again, they might not like the outcome, but parties did not feel their arguments had been ignored or swept aside; thirdly the objectivity and rigour of the CC's judgment, exercised without fear or favour. This was greeted with mystification by some parties, who seemed to operate in a world where everything could be bought if the price was right. Finally, and vitally, there was the CC's operational independence from government. This fiercely defended position became harder to maintain as the heady atmosphere of the early 2000s gave way to a more realistic appreciation that even high-class competition analysis could not answer all problems.

Let us look briefly at each of these before drawing an overall conclusion.

B. Quality, Experience and Confidence

There is little doubt that the CC had expert staff balanced by a wealth of experience and wisdom in its panel members. Its reports are comprehensive and well-reasoned and are cogent even at this distance of time. Above all, the CC was confident in its function, carried over from the MMC, which was much more circumscribed than that of a general competition authority, and fully backed by government when this was needed. In short, it knew what it had to do, knew how to do it and did it well.

C. Fair and Rigorous Process

Having clearly defined functions made it easier to set and operate a fair process. With overall timetables set by statute and freedom to set out its own procedure, it was not difficult in principle to run a fair process. This created its own problems of increased expectations. The CC provided summaries of third party evidence—parties wanted full access to the file. The CC offered working papers and comments on parties' submissions—parties asked for the chance to comment on the CC's comments. But overall, and certainly compared with experience in other, neighbouring, jurisdictions, parties were pleasantly surprised by the openness of the CC's approach.

D. Objectivity of Judgment

It was fundamental to the CC's way of operation that it approached each referred case with an open mind and with no pre-conceived theory or view of the evidence. There was even a serious debate as to whether the CC could subscribe to the increasingly fashionable approach of setting out "theories of harm" as it was conscious of the danger of looking only for evidence that supported the theory. It is not clear whether parties always believed the CC's claim to have an open mind. But it goes some way to explaining one of the complaints sometimes levelled at the CC which was why is did not make more adverse findings, particularly in merger cases.

It was, apparently, assumed by some that the purpose of referring a merger to the CC for Phase 2 investigation was to prohibit it, as the OFT could only clear a merger or impose conditions. In fact, the CC cleared about half the mergers referred to it. This may not have satisfied everyone involved, but it did demonstrate a high degree of objectivity of judgment.

E. Independence

Independence is always easy to claim but hard to demonstrate. The CC was not answerable operationally to any other part of government and its decisions were reviewed by the CAT on appeal. Of course, its personnel were appointed by government and its budget set similarly. It was also, as with all such bodies, a creature of statute and could be abolished, as it eventually was, by a very short statutory provision. But provided it stayed within its statutory remit and could be shown to be discharging its functions effectively, it was free to act.

A particular feature was the nature of the CC Members' appointment. This had in MMC days been for four- or five-year renewable terms, but the CC members were, from 2002, appointed for a single term of eight years. The daily rate for what would now be termed a "zero hours" contract was sufficiently low for it not to be an inducement to follow any governmental directive. Once appointed to a particular inquiry, the panel's decisions could not be interfered with or overridden even by the CC Chairman and certainly not by anyone else. So far as possible, independence was 'baked in' to the structure and operations of the CC.

V. CONCLUSION

A. A Model for All, but Hard to Replicate

What overall conclusion should we draw as to the CC's unique contribution to the institutional architecture of the 21st century UK competition system? The reader may think from the above discussion that the CC was without blemish or fault and that other authorities merely had to be and behave as the CC did to achieve consistent 5-star ratings in the GCR World Competition Authority league tables. This would, however, clearly be an incorrect conclusion to draw.

First, the CC was a very particular body. It had limited, clearly defined, functions and its activities did not span the whole range of competition enforcement. It did not find infringements, or impose punishment for past conduct. Its remedies were directed towards changing market structure or future conduct. Second, its time frames were set by statute, and offered sufficient time to conduct the great majority of cases fairly and efficiently. It had the luxury of enough time and resource to examine things thoroughly. Third, it did not have to initiate or set priorities. That was for others, principally the OFT. Finally, as it acted only on referred cases, it did not have to justify its choice of cases in the way a more generally empowered authority might have to do. This was always the argument against giving the CC any automatic or regular review function, although it carried the risk that its workload would fluctuate.

Instead, the considered view must be that the CC's retention as part of the major reforms in 1998–2002 was the result of a very fortunate and beneficial combination of circumstances that allowed a new regime the luxury of inheriting and relaunching a long established and well-functioning body and giving it high profile tasks at the core of the regime. Competition authorities outside the UK looked at its powers and decision-making record with a degree of institutional appreciation. Viewed in that way, the CC was certainly a model for others to follow, even though, because of its derivation from the former MMC, it was also very hard to replicate.

And the final irony is that, for all its excellence in terms of structure and operation, the CC did not play any role in what rapidly became the principal aspect of competition

enforcement, namely the prohibition system of EU law and its UK equivalents. Despite a desultory attempt to have the CC "designated" to apply EU competition law, the exclusion was complete and, although it made the CC's life easier, as already explained, represented a fundamental flaw and fault line in the UK regime for the whole period up to the CMA's arrival in 2013. Whether or not the "spirit" of the CC lives on in that no doubt excellent merged authority is for discussion elsewhere, but what can be said is that one of the merger's main objectives was to harness the synergies and benefits of putting the CC and OFT together. That in itself would seem more than enough to justify the significant institutional step that it involved.

So perhaps, with the benefit of hindsight, the CC may be seen as something of an institutional luxury. But, whilst it may not have been essential, it was nonetheless surely very nice to have.