

Shared market power and consumer detriment: the United Kingdom solution through Market Inquiries and Comprehensive Remedies

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After many years of debate and dithering the United Kingdom took the bold decision after the election of the Labour Government in 1997, that it was time to align its competition laws, at least in substantive terms, with those of the EC.

The old apparatus of the Restrictive Trade Practices legislation went to the scrap heap, little mourned, for it had ceased to be of any serious relevance to the business community and consumers for many years. Its companion statute, The Fair Trading Act of 1973 had provided for a rather slow and orderly process for the examination by what is now the Competition Commission of 'monopoly situations', following which any adverse public interest findings could be addressed through a cluster of remedies, including such radical steps as break up or long term price controls. But there were no systematic controls over anticompetitive agreements or abuse of monopoly power. All that changed in 1998 with the new Competition Act, modelled on Articles 81 and 82 of the EC treaty and based on the principle of 'prohibited activity': anti-competitive agreements (Chapter I) and abuse of a dominant position (Chapter II).

Radical change through the Enterprise Act 2002

The Act came into force in 2000. Within two years the Government introduced the Enterprise Act, which is probably best known for four major changes. The first was to change the status of the Competition Commission ('the Commission') into that of a determinative body rather than a reporting body. The second was to introduce a new system of merger control, the only relevant test being whether a merger causes a substantial lessening of competition in any relevant market. The former public interest test was abandoned. The third was to make certain types of anti-competitive agreements (price fixing and market sharing) criminal offences. The fourth was to extend the appellate responsibilities of the Competition Appeal Tribunal. All are intended to have a significant impact on the operation of markets within the United Kingdom (and on the enforcement of the rules).

A new system of Market Inquiries

A less well known major change was made by the Enterprise Act, potentially of even greater

significance for the impact of competition law on the operation of the United Kingdom economy. It is the new system for Market Inquiries. The Fair Trading Act provided for the investigation of scale and complex monopoly situations, from which the new system of Market Inquiries has evolved, but the new system is distinct from the old. It also bears the signs of a Government impatient with aspects of markets which should be but may not be working effectively and in the interests of consumers. Indeed, if the Government is not satisfied with a decision of a competition authority, such as the Office of Fair Trading or a Sector Regulator, not to make a Market Inquiry reference to the Commission it may do so itself under the Enterprise Act.

Focus on Adverse Effect on Competition

In every Market Inquiry the Commission has to decide whether any feature, or combination of features, of a relevant market in the United Kingdom prevents, restricts or distorts competition. If it does so, it is known as an Adverse Effect on Competition or 'AEC'. A feature of the market may be its structure or conduct. The Commission, having no rights to commence an Inquiry itself, has complete control over all subsequent stages once a reference is made to it, from publication of its Emerging Thinking to the Provisional Findings then the Final report and imposition of remedies if required. Its decisions are amenable to judicial review by the Competition Appeal Tribunal.

AEC's arising out of inertia and absence of rivalry

Competition authorities and Government generally, have a keen interest in making markets work effectively in the interests of consumers, not least in seeking to ensure the highest degree of economic efficiency. Competition is seen as the best means of securing that outcome – but some markets exhibit many signs of inertia or an avoidance of competitive rivalry without those supplying the goods and

services (or their customers) overstepping the mark of lawful activity through cartel activity or acting, if they are dominant, in some blatantly anti-competitive manner qualifying as a prohibited abuse.

Concept of the effectively functioning market

In carrying out its Market Inquiries the Commission has adopted the concept of the 'efficiently functioning' market as the paradigm by which to measure how well real markets are doing. In many markets, as a result of some scale economies or as the legacy of old wars in which weaker companies have left, few companies may remain, which have become interdependent and where the rational behaviour of the firm, exercised unilaterally, is likely to be conditioned by predictions as to the reaction of a small number of rivals to a particular strategic or tactical move. In the paradigm of an 'effectively functioning' market there is rivalry, there are customers won and lost, there is innovation in the form of new products and processes, there is scope for different business models to operate successfully, there is usually proof of entry and expansion as well as exit – and all these features or at least some of these,

which may cause pain to the losers, contribute to consumer welfare. Moreover, in effectively functioning markets no firm makes supra normal profits.

New system is innovative

The 'innovation' in this aspect of United Kingdom competition law is that the question of what is an anti competitive feature of a relevant market is not necessarily answered by saying that the conduct must of itself consist of something which restricts the ability of another person to act in a particular way. It may also consist in 'refraining' from acting in the kind of way that would be expected in effectively functioning markets – for instance in the avoidance of price competition, or innovation or product range or other aspects of benefit to consumers. If the greatest monopoly profit is a quiet life (especially if combined with profits well in excess of the cost of capital) then that monopoly has been earned at the expense of the customer and should not be tolerated.

Simple and effective analytical structure

Moreover, the new system has a very simple



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structure. Everything turns on a finding of an AEC. If the Commission find an AEC they have a duty to decide whether they, or others, should take action to remedy the AEC or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the AEC and in either case what action should be taken. Customer detriment is defined as including higher prices, lower quality or less choice of goods or services in any market or less innovation in relation to such goods or services. The new determinative status of the Commission means that in deciding what action to take to remedy the AEC or customer detriments the Commission must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the AEC and any resulting customer detriments. And in doing so they may have regard to any relevant customer benefits of the features that have given rise to the AEC. This is extremely important, because it puts customer welfare as the principal concern of the Inquiry. So far as customers are concerned, they want lower prices, higher quality, more innovation and so forth. And any obstacles to their getting what they want should be removed, whether it is some feature of the market or some conduct, which need not be conduct prohibited by competition law.

Market Inquiries as complementary to and more productive of future market benefit than enforcement of the prohibitions alone

The former Chairman of the Commission (the late Professor Paul Geroski) identified three reasons why market inquiries are an important complement to the Article 81/82 prohibition system. They are often a more sensible way to investigate and attack the underlying causes of particular agreements or abuses of dominance; they focus on industry wide features (including laws and regulations) rather than on particular forms of behaviour; they have as their aim the improvement of the working of markets.

In using the concept of an effectively functioning market the Commission can test whether prices are 'higher' or choice or innovation is 'less' than that which would be expected were the market operating effectively. There is no exact science in such a measurement, indeed there can be a substantial measure of disagreement as to what the conduct in question should be in such a market. But at least the starting point is the collection of a substantial body of evidence as to how a particular market works, including an analysis of profitability and efficiency, as well as the views of those who participate in the market, as buyers or sellers.

Comprehensive solutions through imaginative remedies

Except in the extreme case where the only appropriate remedy is some form of price control, the comprehensive solution would ordinarily be expected to address the root causes of why the market is not functioning effectively. It could be through a recommendation to the Government that laws or regulations controlling entry should be changed; or measures to eliminate information asymmetries, through mandatory exchange of information into a pool so as to be more transparent and increase the exercise of choice; or a Code of Conduct designed to protect weak or fragmented buyers or sellers from the exercise of superior and possibly unfair selling or buying power; or restraints on the ability of firms with market power to discriminate as between buyers or sellers without cost justification. Or it could be a combination so as to provide different routes to market improvement.

However, structural remedies, including divestments, are only likely to be made where there are no other proportionate means of remedying customer detriment. And there is always a risk to the efficient functioning of markets in any attempt to use remedies to turn the clock back, because change in markets is usually the inevitable consequence of innovation and rivalry.

New system here to stay

What is certain is that the remedies fashioned by the Commission will inevitably and rightly influence the actions taken by the Office of Fair Trading and the sectoral regulators in their consideration of ways in which, possibly through the use of undertakings, more transparency can be won in many more markets to the benefit of customers. The new system is innovative and here to stay. The Commission is now undertaking the biggest and most challenging of all its Market Inquiries – into grocery retailing. And it will be the ultimate decision maker for the future of that vital sector of the economy.

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