Good government for free markets

Remarks to the Competition Policy conference of the Regulatory Policy Institute, Oxford

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Beyond competition law

The point discussed in these remarks is that good competition policy extends well beyond competition law – i.e. beyond the law dealing with anti-competitive agreements, abuse of dominance, and mergers.

It is well known that competition law in the UK has changed fundamentally in the past few years thanks to the Competition Act 1998 and the Enterprise Act 2002. The law is now clearly focused on competition. It has teeth where it should, for example against cartels. And it is applied transparently by independent bodies – principally the OFT, the Competition Commission, and the Competition Appeal Tribunal – with Ministers out of the process.

That is all well and good. But there is much more to good competition policy than good competition law, well applied. So what are the key elements of competition

[1] I am grateful to Gary Roebuck and other OFT colleagues for their help preparing this paper. The views expressed here are personal and not necessarily those of the OFT.

policy beyond competition law? Who is responsible for them? How is UK policy in this area developing? And what are the challenges ahead?

Regulatory reform and competition

Perhaps the most important element of competition policy beyond competition law is competition scrutiny of regulation. Competition policy is a potentially important ally for all those who think that there is too much regulation. Sometimes it points simply to deregulation – the removal of restrictions so that existing and would-be market participants have more freedom to compete for the business of customers. Sometimes it points to smarter regulation – so that the aims of policy are achieved more effectively, and at lower cost, when there is more freedom to compete.

Regulatory reform is the responsibility of Government and Parliament – and the European Commission and Council – not the competition authorities. It has not traditionally been a role of the competition authorities even to carry out competition scrutiny of regulation. But this is changing.

A striking example is the *Fiammiferi* case. The Italian competition authority challenged a national regulatory framework governing the production, distribution and sales of matches, which included an anti-competitive quota system. The matter was referred by the Italian court to the European Court of Justice, which ruled a year ago that national legislation must be disapplied if it requires or facilitates conduct contrary to EC law against anti-competitive agreements, legitimising or reinforcing the effects of the conduct, specifically with regard to price-fixing or market-sharing.[2] While legal proceedings by competition authorities against anti-competitive laws might be rare, this case is an interesting one to take note of.

[2] Judgment of 9 September 2003, *Consorzio Industrie Fiammiferi (CIF) v. Autorita Garante della Concuurenza e del Mercato*, case C-198/01.

More commonly, competition scrutiny by competition authorities of laws and regulations results in advice to Government.[3] This advice, and the analysis on which it is based, are carried out with the same independence as the authorities' competition law enforcement work, though whether or not to accept the advice is of course for others to decide.

Deregulatory initiatives

There are two main kinds of competition scrutiny of regulation – that of existing regulation and that of proposals for new or different regulation. Here are some examples of both.

Professions: The OFT's 2001 report *Competition in professions*[4] challenged a number of anti-competitive restrictions in the regulation – including self-regulation – of professional services including law. Some deregulatory steps have since been taken and more are in prospect. Following the report, the exclusion of professional rules from the scope of competition law was removed. The OFT's 2003 market study of the private dentistry,[5] as well as addressing lack of market transparency, recommended removal of certain regulatory restrictions on how dentistry services can be supplied.

Pharmacies: Since 1987 regulatory restrictions on entry have impeded the development of new pharmacy businesses in the UK. On the basis of a detailed

[3] Though not primarily competition scrutiny, the CC's role in relation to the regulated industries (e.g. energy and water) should also be noted here.
[4] The report, and updates, on competition in professional services is at www.oft.gov.uk/News/Publications (in 'Reports/Professional bodies').
[5] The report on private dentistry is at www.oft.gov.uk/Business/Market+studies/dentistry.htm. The Government's response of June 2004 is at www.dti.gov.uk/ccp/topics2/dentists.htm.

study,[6] the OFT recommended liberalisation to enhance competition and consumer choice, and to open new ways of getting medicines to the public. The Government has however decided, for the time being, only to relax the rules for new pharmacies open more than 100 hours a week, located in large out-of-town shopping centres, or based on the internet or mail order.[7]

Taxis: The OFT's 2003 report on taxi services[8] found that restrictions on taxi numbers, which apply across about half the UK, block competition and mean fewer taxis on the roads, longer waiting times, less choice for the public, and risks to public safety. The OFT recommended that the legislation allowing local authorities to limit taxi numbers should be repealed. Rather than securing de-restriction for all, the Government is encouraging it locally.

Financial services: The OFT advised in 1999 (and again in 2002)[9] that the 'polarisation' regulation on those who advise on and sell packaged investment products was restrictive of competition and not beneficial for consumers. Supported further by its own extensive analysis the FSA is proceeding with de-polarisation.[10]

Betting: The OFT advised Government on the transfer of the Tote to the private sector. The Tote has an exclusive licence to supply pool betting. The OFT advised against maintaining this exclusive right in order to allow business freedom and

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[6] The report on pharmacy entry controls is at www.oft.gov.uk/Business/Market+studies/pharmacies.htm. The Government's response of August 2004 is at www.dti.gov.uk/ccp/topics2/pharmacy.htm

[7] Further, the system for approving new pharmacies will be modernised so that NHS Primary Care Trusts can take account of the benefits of competition and choice in its assessments of applications for new pharmacies.

[8] The OFT's 2003 report on taxi services is at www.oft.gov.uk/Business/Market+studies/taxis.htm.

[9] The OFT's 1999 report on polarisation and its 2002 paper are at www.oft.gov.uk/News/Publications (in 'Reports/Financial products and services').

[10] See, for example, the FSA's 2004 consultation document at www.fsa.gov.uk/pubs/cp/04_03/.

promote competition to the benefit of consumers. The Government decided to lift the exclusive right after seven years.

In all these cases, the OFT recommendation was to remove regulatory restrictions on business freedom to serve customers. This brought vocal protests from vested interests for the retention of restrictions on the freedom of other, potentially competing businesses. That is natural. Perhaps the best restrictions on competition from the point of view of incumbent businesses are those imposed by public regulation. Which underlines the importance of independent competition scrutiny on behalf of the wider public.

The removal of restrictions on business freedom to serve customers has also been a feature of steps taken by the OFT, under competition law, against privately-imposed restrictions on competition. Examples include the ending of resale price maintenance – and hence the creation of retailer pricing freedom – on books and over-the-counter medicines; and the greater freedom and choice being established in horse-racing. Similarly, some privately-imposed restrictions on the supply of professional services have been eased – e.g. the scope for direct access to barristers has been widened – and after the Clementi review further liberalisation of legal services might well be on the cards.[11]

Competition and the public interest

Defenders of anti-competitive restrictions often say that liberalisation of regulation, though it would lead to more competition, would be detrimental to the 'wider public interest'. Since competition is but a means to ends, defences on these lines cannot and should not be dismissed out of hand. But they should not hold sway unless certain conditions are shown to hold.

[11] The OFT's response in June 2004 to the consultation of the Clementi review is at www.oft.gov.uk/news/press+releases/2004/91-04.htm

An important point to keep in mind is that competition – through its incentive properties and otherwise – is a valuable means towards a great *range* of ends, public as well as private. It simply isn't a question of competition on the one hand, and the public interest on the other. Competition and the public interest generally go hand in hand.

That is not to say that 'more competition' is *always* for the good. How, then, to distinguish justified regulatory restrictions on competition from the rest? A natural test is suggested by the competition law treatment of anti-competitive agreements.[12] For an agreement – or part of an agreement – that appreciably prevents, restricts or distorts competition, the questions are:

- does it bring benefits
- of which consumers get a fair share
- and for which the anti-competitive agreement is indispensable
- and without eliminating competition?

Likewise, a good test for a regulation shown to be anti-competitive is whether it achieves, and is indispensable to the achievement of, identified public interest benefits that outweigh the detriment from restricted competition.

Embedding competition scrutiny

Important steps have recently been taken to make competition scrutiny of regulation in the UK more systematic.

First, the Enterprise Act has strengthened the powers of the OFT and the CC to examine and make recommendations to Government on regulatory restrictions and

[12] Article 81 of the EC Treaty, which is mirrored by Chapter I of the UK Competition Act 1998.

distortions of competition.[13] The OFT proposes to amend its guidance on market investigation references in order to enhance further the potential role of the CC in this regard.[14]

Second, since 2002 competition scrutiny has been built into the regulatory impact assessment of legislative proposals. The assessment is primarily done by Government departments. The OFT provided guidance[15] to Government departments on when and how to carry out competition assessment, and assists on cases as necessary.

Third, this summer the Competition Forum was established. This is a cross-government forum for discussion of relationships between market competition and government bodies. The work of the Forum will include helping to identify markets where competition appears not to be working well.

Conclusion

The comments above have mainly concerned pro-competitive regulatory reform. Of course Government interacts with markets not only as regulator but also as producer, subsidiser and purchaser. Publicly-owned producers engaged in economic activity are subject to competition law just as private firms.[16]

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[13] Section 7 of the Act gives the OFT a function of making proposals to Ministers or public authorities, such as the recommendations we make following a market study. Section 131 enables the OFT to refer markets to the Competition Commission for investigation when it has reasonable grounds to suspect that a feature of a market – which can include regulation – prevents, restricts or distorts competition. If the CC finds an adverse effect on competition, it has a range of remedial powers, as well as the power to recommend changes to regulations.

[14] The OFT proposes to amend paragraph 2.31 of the Market Investigation Reference Guidance to remove the statement that 'where the OFT is satisfied that adverse effects on competition arise primarily from laws, regulations, or government policies it will not normally make a reference when it considers that the CC will not be able directly to remedy such adverse effects.'

[15] Available at www.oft.gov.uk/Business/regulations.

[16] Publicly-owned producers that have been subject to inquiry under the Competition Act 1998 include the North & West Belfast Health & Social Services Trust and Companies House.

Government subsidies and procurement are currently the subjects of preliminary OFT studies that will be published in the autumn.[17]

In all these respects Government activities can help or hinder competition, and markets can work more or less well – not only for consumers but also for Government policy objectives. Good competition policy therefore extends well beyond competition law. Where regulation or other state intervention unduly restricts competition, good government frees markets.

[17] See www.oft.gov.uk/Business/Market+studies/subsidies.htm and www.oft.gov.uk/Business/Market+studies/procurement.htm. Some subsidies fall for competition scrutiny under the EC Treaty rules on state aids.