

Handling Competition Cases in a Single Authority

Outline of a presentation by Graham Mather, President of the European Policy Forum (Member of the Monopolies and Mergers Commission 1987 to 1992 and of the Competition Appeal Tribunal 2000 to 2011)

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1. I was in my second term on the MMC when elected to the European Parliament; since then have served on the CAT since 2000. My experience in both organisations is as a lay member. In these remarks I would like to focus on what I consider to be the value of lay members and how things might work in a single competition and markets authority.
2. I think it is not contentious that Britain's competition regime is seen as world class and, coming in at a cost of certainly well under £100 million looks like good value. In a shopping list for reform, personally I would certainly place the Town and Country Planning system or certain elements of the MOD Procurement regime as of more urgent priority.
3. What looks fine to insiders may look less perfect to others. Certainly the 'end to end' protraction of timetables may merit attention. For businesses the whole process, perhaps beginning in a sector regulator and ending years later after appeals, remedies or new legislation, may seem too much of a good thing and certainly too long. Broadly speaking, my view is that there could well be considerable advantages from a fused authority in shorter timetables and even lower costs, but not if it is at the expense of the role given to lay members in the existing system, or if it risks confirmation bias or a substantial lessening of regulatory competition.
4. Of course when we see the consultation we may also feel that in these exercises it is difficult to stop the kitchen sink being added; there is always the risk of churning the system; and much to be said for a relatively minimalist and incremental approach to change. My overall motto would be that the OFT needs to be still better at effective enforcement, the CC at designing remedies that stick, and the CAT at avoiding excessive legalism and deterring tactical litigation.

5. In my experience on the MMC, I was struck by elements of the way members worked together in their groups. We probably don't talk about it much in the outside world but this ethos is worth capturing.
6. A carefully selected set of people with the experience, education and approach of the typical CC member is likely to get good results. But the ethos is more than that. It's more than collegiality. The role requires enormous reading and preparation. The expectation that every member has read every page of the documents under discussion is a fine thing. It takes self-discipline and application. It requires a questioning and inquisitive approach with plenty of applied judgement.
7. Breadth of expertise is essential to set balanced judgements. A group which includes people with legal skills, with business experience, with accounting or financial expertise, with an academic approach and perhaps including someone with a former role elsewhere in the public service is a pretty formidable force. If these skills can be applied in a focused way they can yield excellent results and build up over the years public esteem and credibility: which I think the CC has in full measure today.
8. One of the strengths of the CC, in my view, is that it has achieved that delicate balance between lawyers and economists that facilitates decision taking in an environment where law and economics is the underlying discipline. Too many lawyers can lead to a legalistic and procedural preoccupation; too few and cases can go off the rails and are judicially reviewed too frequently. Too many economists – well we all know the consequences of that. Too few and we fail to get to the heart of the issues.
9. When I joined the MMC, we were in the middle of the takeover of the UK water businesses by their French counterparts. This was generating political debate and I remember the then Secretary of State addressed the annual meeting of the Commission and made it very clear that he thought it was our duty to prohibit takeovers which came to us. As the newest member I was interested in this and

pricked up my ears as the existing members chatted together as they left the meeting. What they were saying was – “this is all very well but we have to decide these cases under the statute”. In fact I think all the mergers went through. I was impressed then, and remain impressed today, with the sturdy independence of CC groups. It seems to me that it is essential to preserve this in the new system if it is to work to its full potential.

10. Someone else put it to me this way recently. However skilful and expert a leading sector regulator might be, they always have to look over their shoulder at something. What the Minister or the Department is doing and/or thinking. They may hold the key to their reappointment. Or to a far reaching review of their organisation, with all the unpredictable consequences of such reviews. Full time officials also have to keep a beady eye on the army of lawyers, lobbyists, media commentators and others who cluster around big cases. All of these may have an influence on that individual’s future career. There is nothing profoundly wrong in this, and I am not in the slightest questioning the independence and skill of public officials or sector regulators. Yet the environment is very different from a group of five CC members whose career prospects, future employment and so on can in no way be affected by the Minister, the Department, the press, the lobbyists or the others.
11. In the consultation on mergers it has been suggested we should think about giving the decision taking-role to full time officials of the new authority – official A at the first stage of the investigation and official B at the decision taking stage. I don’t think this is a good idea, because they cannot have the level of independence of a group, because they don’t bring together that same mix of expertise and because in my view in these cases five heads reaching a consensus are better than one.
12. How do the choices pan out in other areas – in market inquiries or in anti-trust?
13. In market inquiries I can’t see benefit from losing the group approach. In the initial fact finding stage, of course, much of the work of information generating is done by the staff. But it seems to me to do no harm, and frequently helps, to

have a broadly constituted group of different skillsets to guide, to steer and against which to test out approaches.

14. In recommending action, just as in dealing with remedies in merger cases, there may be scope for more specialist staff members or indeed more recourse to outside consulting expertise. The challenge of thinking through, war-gaming and fire proofing market solutions or merger remedies is a formidable one. We should always be on the lookout to harness more skills and expertise to the task.
15. Anyone who has chaired a CC group – and I had that privilege just before I left the Commission in 1992 – knows what a complex and responsible role it is. But the responsibility really is shared by the group. One quickly discovers that attempting to nudge, steer or corral a group to the Chairman's preferred position doesn't work. Often a member chosen almost at random can start the conclusion process running. Every member feels equal, and equally responsible.
16. Thus the group approach fosters independence, insight and collegiality. It also has very real checks and balances in it, which cannot be present in the same way in a purely administrative order. I don't think in a line-managed organisation, however independent minded officials may be, that same measure of autonomy can be achieved. I certainly don't think you can add it back in at a later stage by having a board, or other officials, subsequently review the decisions. Decision-making bites at the moment an informed decision is taken. In cases of the complexity handled by the authorities it is very difficult to retro-fit.
17. Some people say this approach can lead to disparate decisions. Certainly in the 70's and early 80's there was press comment that it was difficult to predict MMC decisions. Doctrines of precedent did not seem to have much purchase. I think it is many years now since such complaints were heard. The Commission's procedures and the discussion in the Chairmen's group have helped to make precedent inform decisions effectively.

18. The consultation is, one understands, going to look at the possibility of two approaches towards a prosecutorial model – one with an internal tribunal of some sort within the merged authority, to which staff bring cases; the second bringing anti-trust cases before the CAT as fully fledged legal cases, prosecuted by the authority and developed by the organisation concerned. I have explained why I think a group approach from the outset is better than an internal tribunal.
19. In the second area I think the many merits of the CAT are accompanied by one potential demerit, the risk of excessive legalism. The relative scarcity of leading counsel representing parties in the CC seems appropriate. The judicial style of the Tribunal makes it a challenge to keep the balance between law and economics; a proper appreciation of regulatory imperatives and margins of discretion in proper balance; to avoid an excess of legal pleadings and procedures and find a way of getting to avoid being used as a vehicle for tactical litigation.
20. Personally I have found the tribunal much more legalistic than I expected. This is not least because it has to hold its own against its supervisory body, the Court of Appeal. It is noteworthy that parties are almost invariably represented by distinguished QCs from the Competition Bar.
21. In a case last week seven counsel including 3 QCs were before us. Even a regulatory appeal will usually be heard by the equivalent of a Chancery judge. It may be wishful thinking but I sometimes feel that it would be a smoother process, less costly and less encouraging to tactical litigation if such cases were heard by, for example, a panel of retired regulators. Would the world come to an end if a recent chair of a sector regulator, rather than a judge, chaired the Tribunal?
22. I think it would also help if the tribunal had a stronger staff contingent trained in economics to accompany the legal secretaries, so that there was more of a balance of expertise on the staff side.

23. There may well be real merit in prosecutorial approach for anti-trust cases. It would shorten proceedings and give the protections of a court-like approach to the parties concerned. I would simply suggest that in considering it, one is aware of the downsides of the judicial style as well as the upsides.

24. This is also relevant to the looming debate as to whether the CAT should have authority to review regulatory decisions on the merits or on principles of judicial review. The Tribunal has tended to refer decisions back to the regulators with an indication of its view, rather as if they were being handled under judicial review. In fact the Tribunal's powers to retake the decision are useful and symmetrical, subject to my comments about the balance of legal and economic expertise. I would rather beef up the Tribunal's economic staff resources and hire in experts where necessary than lose the economic dimension.

25. In any event there may not be a huge difference in practice between the two approaches. In the old days the doctrine of Wednesbury unreasonableness meant that judicial review applied on the whole only where an authority had taken a decision which no reasonable authority could have reached. Alas for those of us who trained under that regime it doesn't seem to apply now Her Majesty's Judges overturn decisions on judicial review for what seem relatively small quirks of policy or procedure. Judicial review will not necessarily provide a safe haven for regulators who may be understandably concerned that there is an incentive to second guess almost every decision they take.

26. So we have to see the picture in the round: we have a good system. If it can be streamlined, timetables shortened, legalism reduced, and independence strengthened it can be better still.