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## The benefits of dialogue for the evolution of competition law and practice

A speech to the British Institute of International and Comparative Law at the seventh Annual Trans-Atlantic Antitrust Dialogue

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### **Introduction**

The title of this conference is 'the seventh Transatlantic antitrust dialogue'. In keeping with that theme, I will in the first part of these remarks explore what the concept of 'dialogue' means in the context of the evolution of competition law and practice, looking in particular at how various forms of interaction with a wide range of interested parties can enhance the effectiveness and functioning of competition regimes, and how they drive change. I will then go on to discuss some of the particular changes that have taken place at the OFT over the last twelve months, which have been informed at least in part by the benefits of such dialogue, and the impact they are likely to have on the evolution of competition law and practice in the UK. In doing so, I will offer some suggestions as to the implications for the business and legal communities in the UK, hopefully in the process dispelling some possible misconceptions about what we are taking at the OFT.

I should say at the outset that BIICL itself deserves significant credit for playing its part in the international debate through this conference and its other work, such as in the Competition Law Forum. The international competition landscape has altered fundamentally in the seven years since the first of these conferences took place even if the agenda has not changed so much. Early conference subjects five, six and seven years ago looked at areas that are still with us today: the implications of e-

commerce, the role of private enforcement and the treatment of unilateral conduct, to name but three.

At the same time, in the UK alone, two major pieces of competition legislation (the Competition Act 1998 and the Enterprise Act 2002) have been implemented; in Europe there has been a major package of modernisation-related reforms, a set of revised Block Exemptions and guidelines, and the recast Merger Regulation – not to mention the important ongoing work on unilateral conduct and private enforcement.

It is clear that the impetus behind many of these changes has been a gradual policy shift: a process of substantive convergence that has been taking place internationally on the principles underlying competition policy. There has ('slowly but surely', as Philip Lowe put it in a recent speech<sup>1</sup>) come to be a consensus that consumer welfare lies at the heart of what we do. The ongoing work on the reform of Article 82, in particular the development of an effects-based approach, is one obvious example of this process. This policy shift has, in my view, been driven to a large extent by increased dialogue between agencies, and between agencies and business, advisers and representative groups. There has been an increasing recognition amongst enforcement agencies over the past few years of the benefits that increased dialogue can bring, in terms of sharing experience and best practice, and helping to shape the international competition policy agenda. At the same time, increased engagement by agencies with business, advisers and representative groups can increase certainty and predictability and lower compliance costs.

In our work on competition issues, the OFT is engaged in dialogue on many fronts, ranging from other competition authorities, internationally and domestically, to government departments, the business and legal communities, and representative bodies including consumer groups. These dialogues take place through a variety of fora and methods, including international and domestic networks, bilateral and multilateral

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<sup>1</sup> 'Consumer Welfare and Efficiency – New Guiding Principles of Competition Policy?' 13<sup>th</sup> International Conference on Competition and 14<sup>th</sup> European Competition Day, 27 March 2007.

communications (formal and ad hoc), visits, conferences and public consultations.

I now want to look in more detail at how and why some of these various dialogues have developed, and how they operate in practice from the OFT's perspective.

## **Part 1: How dialogue works**

### International networks

The OFT is an active participant in a number of international competition networks.

The obvious place to start is with the European Competition Network (ECN). This is a forum for discussion and co-operation between European competition authorities in cases where Articles 81 and 82 are applied, and is the network with which we are most frequently engaged. It was established in 2004 as part of the modernisation process, and its remit includes both policy and case-focused work. Broadly speaking, it aims to ensure the efficient distribution of work and the effective, consistent application of EC competition rules. From our perspective, the ECN is operating very effectively – perhaps far more effectively, and in a different way - than was originally envisaged. This is because dialogue between the various member authorities and the Commission has developed well, on an informal as well as formal basis. In many cases, by the time that the formal allocation process takes place under Regulation 1, the authority 'best placed' to take action will already have been identified through informal discussion.

The iTunes case is a recent example of institutional dialogue working well within the ECN. The OFT received a complaint concerning iTunes. Given the pan-European issues involved, we took the view that the Commission was likely to be better placed to deal with it. Following both informal and formal discussions, we referred the complaint to the Commission, who subsequently issued a statement of objections on 4 April 2007. This is precisely how the allocation system is intended to operate, with the Commission devoting its resources to major pan-European cases, and the

national authorities concentrating on those with a national focus.

One major success arising from the ECN's policy work has been the development of the Model Leniency Programme. If you think back seven years, it seemed highly unlikely when the debate about leniency really started that the major differences of policy and in national legal systems would be overcome and enable the leniency concept to be widely, let alone consistently, adopted. An ECN Working Group was established in the summer of 2004 to address issues arising from the fact that as sanctions have not been harmonised across the EU, a single unified leniency regime or a 'one-stop shop' for the common market is not a realistic short-term objective. 23 member states currently have leniency programmes, and both Spain and Denmark have well-advanced proposals – only Slovenia and Malta have yet to propose programmes. The OFT co-chaired with the French Conseil de la Concurrence the Working Group which developed an ECN Model Leniency Programme.

As part of this project, the Working Group needed to identify problems arising out of the discrepancies which exist between parallel leniency programmes across the EU. In order to do this, the Group organised a workshop with representatives from the business and legal communities in Brussels to hear from those representatives directly what they perceived to be the principal problems and disincentives for reporting cross-border cartel conduct in the EU. In addition, representatives from around 20 EU competition authorities actively participated in the deliberations of the Group.

The ECN Model Leniency Programme was adopted by the EU DGs at their annual meeting in Brussels at the end of September 2006. It is intended to function as a focal point for soft harmonisation of leniency regimes across the Community. Indeed, it has already had a positive effect. The BKA had regard to the Group's work when revising its leniency policy early last year and the Conseil de la Concurrence issued a revised programme in line with the Model in mid-April of this year. Likewise, the Commission has also publicly stated that its revised Leniency Notice brings its leniency programme in line with the Model Programme provisions (for example, by introducing a marker system). There is a clear expectation that other European competition authorities will now also have due regard to the Model Programme provisions when revising their respective programmes in the future.

This provides an excellent example of how dialogue between competition authorities, and between competition authorities and business and representative groups, can have clear and direct benefits for the effective operation of the regime, not just in the UK but across the European Community as a whole. Some may say that developments have not moved fast enough or gone far enough. To them I would say that you have to act within the bounds of the possible, recognising that you are operating with 28 different regimes and legal systems.

What I have described above is part of the formal work of the ECN. What is equally impressive is the level of informal bilateral dialogue that now takes place between agencies in which problems are shared, issues are discussed and possible positions and solutions are formulated. I will come back to this later.

At the wider international level, the OFT is an active member of the OECD Competition Committee and International Competition Network (ICN).

The OECD's Competition Committee provides an unrivalled source of policy analysis and exchange of experience through discussions amongst like-minded authorities and Governments from its 30 member countries, the EU, nine non-member countries and business and consumer representatives. The work of the Committee facilitates greater understanding of policy issues alongside the cooperative and consistent application of competition law enforcement. It produces papers on a diverse range of subjects and issues of great quality and depth and attracts high-level participation from agencies and others.

I will speak later about the OFT's work on the integration of competition and consumer policy, but it may be worth noting here that we are actively involved in encouraging dialogue between competition enforcers and policy makers and their consumer counterparts through the joint meetings of the OECD's Competition Committee and the Committee on Consumer Policy. There have been two meetings to date with a further one planned for early 2008.

The ICN is a 'virtual' organisation established by competition authorities in 2001 to discuss a range of practical competition enforcement and policy issues, with the objective of sharing experiences, exchanging views and

improving international co-operation on competition issues. The ICN's membership has grown to over 90 competition authorities from over 80 jurisdictions from both developed and developing countries, which is testimony to its already significant contribution in its relatively short life. Collaborative working between practitioners and agencies within the ICN's various Working Groups has contributed substantially to enhancing convergence through dialogue. Merger notification rules have been dramatically affected by the ICN's merger notification and procedures recommended practices, with many countries amending their merger notification rules in line with the network's guiding principles. The Mergers Guidelines Workbook, which the OFT led on jointly with the Irish Competition Authority, has been a key component in encouraging a common approach to substantive assessment in merger control worldwide. The ICN Cartel Working Group has also produced excellent materials (for example, an enforcement technique manual) designed to facilitate convergence.

These various international networks have different (and in some cases overlapping) membership, and differing emphases. However, they all aim to develop international best practice and to encourage substantive convergence in core areas. From our perspective, participation allows us to learn from our peers, and to inform our own thinking on approaches to enforcement and advocacy tools. It also presents us with an opportunity to influence and engage with other agencies within formal structures and assist in shaping the international policy agenda.

#### International bilaterals

Contacts made through networks frequently lead to bilateral dialogue on specific cases, on sectoral issues, and techniques and best practice.

In the mergers field, for example, we liaised closely with our counterparts at the BKA in considering the recent Deutsche Börse bid for the London Stock Exchange. There have also been examples of OFT dialogue with the US Department of Justice: for instance, in the merger between SBC and AT&T, close co-operation with the DoJ case team – facilitated by confidentiality waivers on behalf of the merging parties – enabled us to rely on information obtained in the US, and so to reach a robust first phase clearance decision in a very short period of time. Such dialogue is

both instrumental to the quality of our own decision-making, as well as beneficial to the parties involved in terms of speed and efficiency of process.

You may also be aware of our ongoing work on the 'fast-tracking' of cases as a means of effective and resource efficient enforcement. The OFT has had a number of discussions with the Netherlands Competition Authority, the NMa, in order to explore the issues it faced in a large construction bid-rigging case in the Netherlands. A 'deep discount' fast-track offer was a feature of that case. Over the last two years we have been carrying out our largest cartel investigation which concerns bid-rigging by construction companies in England. As a result of the investigation, the OFT has uncovered evidence of bid-rigging in thousands of tenders with a combined estimated value approaching £3 billion. On 22 March this year we announced our own fast-track offer: an example of how we have learnt from the Dutch experience and have been able to model the UK fast-track procedure accordingly.

These bilateral dialogues are enhanced through staff secondments. In recent years we have hosted officials from numerous EU and EEA Member States, including Norway, Sweden, and France, as well exchanging staff with Australia and Germany. We have also benefited from the European Commission's Seconded National Expert programme, with OFT staff seconded to DG COMP and DG MRKT.

As a relatively mature competition agency, we recognise the importance of developing the capacity and expertise of newer agencies. To that end, we provide technical assistance to overseas agencies and governments through the organisation of inward study visits. We receive over 30 delegations from other agencies every year. But equally we recognise that youth can sometimes have the edge over maturity and we are keen to learn from newer agencies on the processes, techniques and solutions that they have found to be useful in developing their competition regimes.

#### Domestic networks

Cross-agency dialogue is not only important in the international community: it can also be extremely beneficial in a domestic context; and indeed, essential to the optimal functioning of the domestic regime. Here, I am thinking particularly of two unique aspects of the UK framework:

concurrency, and the respective roles of the OFT and the Competition Commission.

As you know, certain UK regulators, have, in addition to their sectoral powers, concurrent competition powers with the OFT to enforce the prohibitions on anti-competitive agreements and to make market investigation references.

The main forum for this inter-agency dialogue is the Concurrency Working Party (CWP). CWP is chaired by OFT and brings together working-level representatives of the sectoral regulators 6-8 times per year. The main objectives of this dialogue are to ensure that there is clarity on who should take action, to share best practice, and to work jointly on matters such as publishing guidance.

Concurrency is a system that continues to develop, and we are working with the sector regulators to improve it further. We propose, for example, to report to the Joint Regulators Group (JRG), which comprises senior representatives of the UK's economic regulators (including some who do not have concurrent powers, such as Postcomm), on an annual basis, providing an overall view about whether competition law is being applied consistently and pro-actively across all sectors. This will be valuable in promoting consistency and an effective way of enhancing the relationship between CWP and JRG. As you may be aware, a House of Lords Select Committee was established earlier this year to consider the role of economic regulators, including the operation of concurrency. We submitted evidence to them, and await their further deliberations and their report with interest.

OFT's work interlinks closely with that of the Competition Commission in some key areas - in particular in merger control and market investigations. We are two separate, independent organisations working, so far as competition is concerned, within a single system. We have both increased our efforts to interact effectively with each other at all levels, mindful of the great benefits of such dialogue. Regular meetings have, for example, been established between the OFT Board and the CC Council and between senior officials in addition to the working level contacts that take place on particular issues and cases. Much of the recent dialogue has centred on ensuring that the overall regime works efficiently in terms of delivery of effective outcomes and the control of administrative burdens

and costs placed upon the parties. From my days in private practice, I observed the OFT and the CC – or the MMC as it then was – apparently moving almost entirely independently of each other within parallel universes. The changes brought about by the Enterprise Act 2002 have changed this and I believe that the two organisations are now working closer together, and with better relations at all levels, than at any time in the past and with the common aim of ensuring that the still relatively new regime established in 2002 works as effectively and efficiently as possible.

#### Dialogue with others

Moving away from inter-agency dialogue, I would like to touch upon other parties with whom we communicate on a frequent, and increasing, basis, and explain why these exchanges are so important.

First, there is Government. Government can have an effect on markets in various ways given the public sector's role as regulator, subsidiser, buyer and provider of services. The OFT seeks to influence government policy in order to ensure markets work well for consumers. In order to do this effectively we have established a dedicated advocacy team to work with other government departments to provide advice on how best to design policies to protect and promote competition.

Last year we provided advice on the potential competition effects of new regulations ranging from gambling fees to home information packs; we have published advocacy work on subjects ranging from schools' uniform policies to the public procurement of construction services. We also used training sessions and helped run an interdepartmental Competition Forum to improve government understanding of how its actions can affect the evolution of markets and the development of competition in markets.

There is also ever-increasing dialogue between the OFT and what we might call our 'user communities': businesses, advisers and representative groups. Whilst at first sight it might appear that the interactions we have in this context are very different in nature from those we are engaged in with other competition authorities or government (particularly in relation to alignment of interests), they in fact have a great deal in common. Through these particular contacts we seek to provide guidance and education to businesses, advisers and consumers, and to raise the level of

understanding across society about properly functioning markets and about the benefits of competition to consumers and to the economy. At the same time we are looking to increase our understanding of bodies that have a direct or indirect interest in our work and to ensure that we are engaging with them at the appropriate levels. Again, this is a listening and learning, two-way process. There is still further work to do to ensure that common interests are aligned (e.g. business interests) and that the same firms do not seek to wear multiple hats with possibly several different interests ( e.g. business and professional groups). This is not to suggest that we are seeking single, monopoly, representative groups; there is always benefit in diversity, as there is in competition. It is rather that there are occasions where it is not clear whose interests are being represented and in what guise.

The progress that has been made on leniency is a key example of this sort of dialogue in practice. Much work has been done over the past few years in the UK to ensure that the OFT's leniency programme is highly predictable and transparent, and works as effectively as possible. I have already referred above to the work done within the ECN on the Model Leniency Programme; here I am concerned with the development of our own domestic policy.

Since the inception of our programme, we have made 111 grants of leniency from around 130 applications. We organised a conference in June 2005 attended by leading competition and criminal law practitioners in order to understand how our leniency programme could be improved and made more attractive for prospective leniency applicants. The dialogue was of very high quality as was the feedback that we received on the event. Following this conference we published on the OFT's website an Interim Note on the handling of leniency and no-action applications. It set out the OFT's interim policy by way of supplement to and elaboration of the OFT's existing guidance on leniency and no-action letters.

After operating the interim policy for just over a year, we published for consultation a draft final version of our current Interim Note on the handling of leniency and no-action applications at the end of last year. This contains additional clarification on issues that have been raised and new guidance on the interaction between the OFT's and the Commission's leniency policies. The consultation period for this ended on

31 January 2007 and following consideration of the responses to that consultation from practitioners (both competition and criminal) we hope to issue the final version shortly.

We have also actively participated in many public speaking engagements to explain the practical operation of our leniency programme and to address any concerns which potential applicants may have. All of this work is an excellent example of how dialogue with experienced practitioners has enhanced the effectiveness and functioning of the OFT's leniency policy and therefore the regime as a whole.

We have taken a similarly pro-active approach in seeking to involve stakeholders in our work on private actions in competition law, an area where we are also heavily engaged with the European Commission. In October of last year, we hosted a seminar on this subject. Discussions centred around whether additional measures should be introduced in the UK to facilitate private actions in competition law and if so, what lessons can be learnt from other jurisdictions. Feedback about the seminar was very positive.

The seminar brought together a number of leading figures in the competition field including agency heads, judges, lawyers, economists, academics, representatives of business/consumer organisations, and officials from other government departments. It was very helpful in contributing to the OFT's thinking in this area. Participants expressed their views candidly. We took the contributions at the seminar into account when drafting a discussion paper on private actions in competition law, which we published on 18 April of this year. The paper makes a number of suggestions as to how to make private actions in the UK more effective, and we would very much welcome views. The consultation is open until 13 June, and will be followed by full discussion at a hearing to be held in September.

Ali will be speaking this afternoon about the substance of the discussion paper and the ongoing work on private actions, and I do not want to pre-empt what he is going to say. I do want to stress, however, that our work in this area is not aimed at, in any sense, 'contracting out' public enforcement to the private sector, or at reducing our own emphasis on enforcement activity. We see private actions as an essential complement to public enforcement in the overall scheme of the competition rules, and

we aim to help develop a system where public enforcement and private actions work alongside, and in harmony with, each other to the best effect for consumers and for the economy. Similarly, fears that a greater number of private actions will inevitably lead to tensions between competition authorities and courts seem to us to be largely unfounded – or, at the very least, surmountable. One suggestion that the discussion paper puts forward to address this issue and ensure the consistent application and development of UK competition law is to introduce a 'section 60 equivalent' into the Competition Act to require the courts to 'have regard' to UK national competition authorities decisions and guidelines when determining relevant issues before them.

Any changes to the system must be aimed at providing access to redress for those harmed by anti-competitive behaviour, and promoting a culture of compliance with competition law. That culture of compliance must be promoted from the very top of businesses, that is by Chairmen and Chief Executives, by executive and operating committees and by Boards of Directors, including non-executive directors. At the same time, we must guard against the development of a 'litigation culture', where threatened or actual ill-founded litigation increases business costs and diverts valuable management time.

We very much encourage respondents to engage fully with the detail of the proposals, so as to help shape and develop the mechanics of how the proposals should work in practice.

We also communicate with businesses and our user communities in other, more structured ways. The Competition Act requires us to prepare and publish general advice and information for businesses and others about both the application of UK competition law and, importantly, the approach which the OFT will take with respect to its enforcement. Since the entry into force of the Competition Act in March 2000, the OFT has produced guidelines for businesses, advisers and others on a wide range of issues, and continues to do so as and when we consider further guidance necessary. In all cases we take care to consult fully with interested parties in advance, a process which invariably enhances the value which our published guidance offers.

Perhaps it is worth me mentioning here just one example, given its pertinence to the theme of this conference. In 2006 the OFT published

guidance setting out when and how we will provide third parties with an opportunity to comment at key stages in investigations conducted under the UK's Competition Act. We now, for example, provide interested parties who are not directly implicated in an investigation with an opportunity to see and comment on our arguments in a statement of objections – a development which we anticipate will significantly enhance the robustness of our decision-making. The published guideline is a clear demonstration of the importance and value which the OFT attaches to establishing an effective dialogue with business, advisers and others in our day to day work.

Does dialogue encourage convergence?

In one sense, it seems inevitable that all of these various strands of dialogue on competition issues will together lead to a greater degree of convergence. At the same time, as I noted at the outset, the substantive convergence on core principles that we have seen in recent years has itself been a key factor in facilitating productive dialogue: the two elements are interlinked.

Some question whether this all means that the tide is turning inexorably towards a 'one stop shop' approach to competition law. Certainly, there has been increasing convergence over the past several years, and this has brought with it benefits to enforcers, business, advisers and consumers alike, in terms of transparency, predictability and the lowering of compliance costs. There are, however, many reasons why a 'one stop shop' for all is not a realistic aim in the short – or, indeed, the longer – term. One obvious point is that it always takes time for theory to feed through into practice. In particular, the judiciary (certainly at European level) has not tended to undertake significant analysis of economic issues in the cases that come before the courts; it will therefore take time for the impact of, for instance, effects-based thinking to filter through into the case law.

At the same time, we should recognise that there are, and will always be, legal and cultural differences between jurisdictions: what is important is that we understand why these differences exist and what impact they will have within particular regimes, cases and issues. There will always be genuine differences between markets in different countries and regions – in their structure, their state of evolution, and so on. In the same way,

there will always be scope for genuine differences of judgement in cases where the arguments for and against intervention are finely balanced. For instance, economies that are dominated by previously state-owned enterprises will need a greater degree of intervention using abuse of dominance rules than jurisdictions such as the US that have a long history of liberalisation. In terms of our own approach to policy development, we aim to learn from others' experience; in essence, this means 'taking the best aspects' and adapting them for our own system – it does not mean that what works in one regime can, or should, be imported wholesale into another. You will see, for example, that our discussion paper on private actions does not propose that US-style class actions should be introduced in the UK - we suggest various forms of representative action - nor that triple damages should be made available.

## **Part 2: Key developments at the OFT**

Having considered some of the various dialogues in which we are engaged and the benefits they bring, particularly at an international level, I would now like to move on to more 'parochial' matters, and in particular to consider one area of competition policy where – informed by international debate in many of the fora I have touched on above – the OFT is playing a leading role. This is in advancing the case for an integrated approach to market intervention. To help achieve that aim, we have gone through substantial change in the last twelve months.

The OFT's mission is to make markets work well for consumers. To achieve our objectives, we have a broad remit and a diverse set of tools available. In the last year, we have made radical changes to our internal structure to ensure that we are more strategic, focused and coherent as an organisation. Unlike many national competition authorities, we have always combined our consumer and competition functions in one body, but until now have not operated on a fully integrated basis.

A key aspect of our new structure is that it puts together project and enforcement work into three sector-focused market groupings covering goods, services and infrastructure and knowledge economies. This structure is intended to allow us to take a fully market-informed, joined-up approach to our work, choosing from, and utilising our 'toolkit' of powers effectively across the spectrum. In particular, it will enhance our ability to employ our unique market studies power to examine the functioning of

markets and to consider what possible forms of action or intervention, if any, are appropriate. Increasingly, we intend proactively to seek out markets where competition is not working effectively, rather than responding to complaints on a reactive basis. Complaints can be, and will remain, an important source of information, but they are only one source.

This approach is built on an increasing recognition of the significance of the consumer/competition interface. The 'informed consumer' stands on the common ground between the goal of competition policy – the maintenance of an efficient, innovative, competitive economy – and consumer law – confident consumers making purchasing decisions on the basis of good information. This process of integration is underway on a number of fronts: I have already touched on the increasing international consensus on the consumer welfare objective of competition policy. DGCOMP has recently appointed a Consumer Liaison Officer for the first time. The recently appointed Consumer Commissioner, Meglena Kuneva is in the process of developing and implementing a new consumer strategy - Making the Market Deliver for Consumers - in which EU consumer policy is regarded as an essential tool for increasing competitiveness, by giving consumers the confidence to shop around in the single market. The changes we have made put the OFT in the vanguard of this process.

This re-consideration of how best to achieve our mission has resulted in some bold and ground-breaking steps. Recognising the importance of focusing our resources on addressing the key competition issues affecting consumers' interests, we published prioritisation criteria last year which we now routinely apply to all our Competition Act casework. We are in the process of developing these criteria so that they can be used to prioritise our work across the board. We have also established a new unit at the OFT - the Enquiries and Preliminary Investigations Centre (EPIC) - which is now the interface of the OFT with the public. It will sift incoming complaints and other information and carry out the initial prioritisation assessment as early as possible, to ensure the most efficient use of our resources. In time, these changes will allow us to focus our efforts on 'high impact' cases, from which enforcement by the OFT will bring about real benefits for consumers. Businesses will also benefit in many cases, not least through being provided with welcome and timely clarity as regards their compliance obligations and, just as important, the penalties which they risk incurring for breaching them.

A necessary corollary to this process is that we need to be able to ascertain where our work is indeed 'high impact'. To that end, our evaluation programme has made a good start on quantifying interventions. This is a cutting edge, internationally innovative programme covering the full range of OFT work, and includes in-depth evaluation of discrete projects and wider research on the impact we have. Projects completed to date show that that impact is not inconsiderable: evaluation of the OFT market study into new car warranties, for instance, showed that we saved consumers around £150m, compared to the £300k cost of the study itself. This evaluation work will continue, and will indeed be expanded, not least as we have committed ourselves to delivering over the coming years measurable benefits to UK consumers of five times our budget for all activities (excluding Consumer Direct, where the cost/benefit ratio is 3.5 times).

Our restructuring allows us to take a much more holistic view of the full range of our work. The result is a consumer and competition agency which places the proper functioning of markets and the interests of consumers at the heart of all its work and has the necessary structures and processes in place to deploy its resources accordingly.

OFT's dialogue with the business and legal communities: an integrated approach

To close, with a particular eye to my audience today, I want to consider whether, and if so how, the dialogues that we are engaged in with the business and legal communities are changing, and may change in future.

The process of change was already underway before the OFT's restructuring - for example, with our work on prioritisation of competition cases - but we envisage that it will continue as our market-informed rather than tool-based approach develops further. This approach, together with the increased international dialogue that I have already touched upon, will make different (and perhaps greater) demands upon businesses and their advisers in their dealings with us. A greater degree of international co-operation and communication between agencies will cut down on the opportunities for 'forum shopping'; it may also require legal advisers to take a broader perspective beyond, for instance, the speciality of competition law and to be in a position to advise (or have access to advice) across several jurisdictions on competition and consumer as well

as other areas of law. Similarly, our market-based analysis will demand a more 'holistic', integrated approach from businesses and advisers – we will be pro-active in identifying instances of market failure, and will look across the whole range of our available tools when we consider appropriate action. In some cases that will mean that a consumer law remedy may be appropriate for what may have looked like a 'competition' problem, or vice versa – a competition law remedy for what may have looked primarily like a 'consumer' problem: a boundary-free approach designed to maximise the impact of our work.

Our market study into ticket agencies is a good example of this in practice. We went into that study believing there would be a serious competition problem in the market for ticket sales among ticket agencies. We concluded however that there was no competition issue that needed addressing, but that there were major consumer detriments deriving from problems which could be addressed by consumer enforcement tools, including consumer information, advertising codes, and the use of our powers against unfair contract terms. Something that we originally thought was a competition problem was ultimately dealt with using consumer tools.

What all of this emphatically does not mean is that we will suddenly favour market studies over Competition Act enforcement, or indeed that we will cut back on our enforcement activities generally, or 'sub-contract' them to the private sector by encouraging more private actions. At any one time, we may be handling fewer ongoing cases, but we will only be opening cases that meet our prioritisation criteria and we will be progressing them faster and with greater certainty as to processes and outcomes. That is what the prioritisation process and our evaluation work are all about: namely, focussing our finite resources on cases which bring high impact and quantifiable benefits to consumers and the economy.

The use of market studies is not intended as a substitute for taking Competition Act cases. Rather, market studies enable us to consider issues in context rather than looking at complaints about specific problems in isolation or under particular legislation, so that we can use our resources most efficiently and take the most effective action. This wider perspective may be particularly valuable in fast-moving or developing markets. Consider, for example, our recently announced study into the distribution of medicines. This originally arose out of a number of

Competition Act complaints about one particular supplier's changes to its distribution system. At the same time, a number of other suppliers indicated that they are considering making significant changes to their own distribution methods. The market study mechanism will allow us to consider the impact of those changes in the round, rather than focusing purely on the subject of the original complaints. In our experience, the broader-based nature of such studies also tends to facilitate broader and better dialogue with market players and other interested parties, including Government. Together, these aspects provide us with high quality intelligence, and a solid basis upon which to consider appropriate forms of intervention - which may, of course, ultimately include taking action under the Competition Act.

This brings me back to what I said earlier about complaints. There may be a perception in some quarters that there is now no point in bringing a complaint to the OFT. That view is misconceived. We still need, and expect, complaints. What is important, however, is that they are well-formulated and set out clearly the case for OFT action, bearing in mind our prioritisation criteria. It may be particularly important, for instance, to go beyond the specific of the facts, circumstances and issues that are the subject of the complaint and explain why taking up the complaint is important in terms of, for instance, precedent value or potential impact in other markets. We will be looking to take action only where it is 'in the public interest'. The days of intervention into what were essentially commercial disputes between private parties are long gone. Businesses and their advisers must recognise that sea change, and must be willing to work with us accordingly.

This is joined-up thinking on two fronts: on learning how to make the most effective use of our powers and on how we can most effectively drive national and international policy development. We expect both of these processes to continue, and we hope to continue to take the lead.

## **Conclusion**

The benefits of dialogue for the evolution of competition law and practice have been real and substantial, especially over the past seven or so years. I appreciate the contribution that BIICL in general, and this annual conference in particular, have made and I am sure that the presentations

and discussions today and tomorrow will make a further significant contribution on a number of important issues.

I also hope that the brief insight into recent developments at the OFT has been helpful and will have dispelled some misconceptions. Many of you will already have read about the changes at the OFT from our Annual Plan and from other publications. You will have the opportunity to read our Annual Report when it is submitted to Parliament later this month.