



## REPORT ON THE TRANS-ATLANTIC ANTITRUST DIALOGUE 2007

### *GENERAL:*

The Seventh Annual Trans-Atlantic Antitrust Dialogue was held by the British Institute of International and Comparative Law on 1 to 2 May 2007 at the Brunei Gallery in London. The annual event is convened by Dr Philip Marsden, of BIICL. Following in the tradition established over the last number of years this conference brought together top antitrust officials, practitioners and consultants to debate the pressing competition law issues of the day. Sessions on mergers, consumer welfare, consumer redress, markets working poorly, and consistency (or chaos?) of decision-making were offered over the course of the two days. Keynote speeches were presented by Philip Collins, Chairman of the Office of Fair Trading, and Philip Lowe, Director General of DG-Competition, European Commission. As expected the conference included the annual 'Roundtable with the Authorities' with senior officials from the US, UK, and European Commission debating issues ranging from consumer harm to market investigations and sector inquiries. Another highlight was the Jeremy Paxman style debate, with Michael Hutchings putting questions to a panel of experts on the issue of the consistency of decisions across jurisdiction. The Trans-Atlantic Antitrust Dialogue also provided the opportunity for all delegates and speakers, and indeed their partners, to enjoy themselves at a gala dinner at the impressive venue of Drapers' Hall in the City of London, where Sir Jeremy Lever of Monckton Chambers provided an engaging after-dinner speech commenting on the more interesting aspects of his more than fifty years of legal experience.

***SPECIFIC:***

The following sessions made up the 2007 Trans-Atlantic Antitrust Dialogue:

**Session 1:** ‘Substantive Merger Analysis in Recent Cases: Old Theories, New Theories, Empirical Evidence and Efficiency Defences’

Chair: Cristina Caffarra, *CRA*

Speakers: Bill Kovacic, *Commissioner, US Federal Trade Commission*; Miguel de la Mano, *Chief Economist’s Office, DG Competition, European Commission*; Peter Davis, *Deputy Chairman, Competition Commission*

**Session 2:** ‘Fix-it First and Phase I Merger Remedies’

Chair: Alex Nourry, *Clifford Chance LLP*

Speakers: Simon Priddis, *Freshfields Bruckhaus Deringer*; David Meyer, *Deputy Assistant Attorney General for Civil Enforcement, US Department of Justice*; Simon Pritchard, *Director of Mergers, Office of Fair Trading*

**Keynote 1:** ‘The Benefits of Dialogue for the Evolution of Competition Law and Practice’

Speaker: Philip Collins, *Chairman, Office of Fair Trading*

**Session 3:** ‘Consumer Welfare: What is Your Theory of Harm?’

Chair: Philip Marsden, *Competition Law Forum, British Institute*

Speakers: Frank Maier-Rigaud, *DG Competition, European Commission*; Adrian Majumdar, *RBB Economics*; Alena Kozakova, *Which?*

**Session 4:** ‘Private Enforcement and Consumer Redress’

Chair: Aidan Robertson, *Brick Court Chambers*

Speakers: Rob Murray, *Cohen Milstein Hausfeld & Toll*; Ali Nikpay, *Office of Fair Trading*; Ingrid Gubbay, *Which?*

**Keynote 2:** ‘Tour D’Horizon of His Time at the Commission’

Speaker: Philip Lowe, *Director General, DG Competition, European Commission*

**Session 5:** ‘Agencies Roundtable’

Chair: Professor Margaret Bloom, *King’s College London*

Speakers: Philip Lowe, *Director General, DG Competition, European Commission*; John Fingleton, *Chief Executive, Office of Fair Trading*; Jerry Masoudi, *Deputy Assistant Attorney General, USDOJ*; Bill Kovacic, *Commissioner, US Federal Trade Commission*; Peter Freeman, *Chairman, Competition Commission*

**Session 6:** ‘Failing Markets/Markets Not Working Well’

Chair: Mark Friend, *Allen & Overy LLP*

Speakers: Frank Maier-Rigaud, *European Commission*; Bill Kovacic, *Commissioner, US Federal Trade Commission*; Daniel Gordon, *Office of Fair Trading*; Peter Freeman, *Chairman, Competition Commission*

**Session 7:** ‘Consistency of Decisions Across Jurisdictions ... or Chaos?’

Chair: Michael Hutchings OBE, *Competition Law Forum*

Speakers: Matthew Levitt, *Lovells*; Rod Carlton, *Freshfields Bruckhaus Deringer*; Gabriel McGann, *Coca-Cola*

***SUMMARY OF SOME IMPORTANT POINTS:***

The following are some of the most important points submitted at the conference:

**Mergers**

- It was suggested that the ‘checklist’ approach is better at ruling coordinated effects out than ruling them in and that coordinated effects are very important even if difficult to assess.
- As with unilateral effects simulation, formal empirical analysis requires that we settle on a particular model of competition and also a particular model of collusion for analysis.

- The best way to approach vertical merger enforcement is through case-by-case analysis; but fact-gathering must be informed by theory.
- With vertical guidelines in place practitioners and economists will focus on developing empirical techniques.
- It is necessary to beware of misplaced faith in behavioural remedies and of contingencies and scarcity of suitable purchasers in divestiture cases.
- First-phase remedies are key to a sound two-phase merger regime, and to reducing frictional costs of the UK system.
- The cases of *Cinemark/Century* and *American Steamship/Oglebay Norton* illustrate an apparent flexibility of the US DOJ when it comes to implementing fix-it-first remedies.
- In contrast, the EU system is still relatively inflexible, especially in Phase I cases, although the suggestion was made that the EU could look at giving partial derogations and that the impact of the CFI's *Lagardere* judgment on warehousing solutions would also need to be considered.
- The OFT's announcement of a consultation on a second-bite option for 'near miss cases' and the appointment of a new head of remedies were welcome developments.

### **Consumer Welfare**

- Consumer harm includes increases in prices and reductions in quantity. Other areas, e.g. dynamic competition, innovation, choice, are also covered in theory. But we must exercise caution in practice with these other areas. For example, what triggers innovation is hotly debated.
- Choice does not have value in itself. Too much choice can be detrimental to consumers, e.g. in the financial sector.
- The consumer has the right to make wrong choices. The issue is whether companies make it deliberately more difficult for them to understand.
- Consideration of environmental and political concerns requires a legitimacy that agencies do not have.
- The existence of business practices that harm consumers does not necessarily imply the existence of a competition problem.

- The Commission is attempting to implement a consumer welfare standard.
- Consumer benefits cannot be static benefits; a long term perspective needs to be taken into account.
- A consumer welfare standard does not imply that consumers realise they have benefited from a given conduct.
- Two components are required in order to measure harm: (i) a coherent theory of harm; and (ii) support for this theory with the facts. The coherent theory is pretty much agreed upon by economists when it comes to exploitative abuses; this is not the case with exclusionary ones.
- One may need to set the standard of proof at ‘very likely to harm consumers’, especially if one is asking for a certain sacrifice of efficiencies or low-pricing now.

### **Private Enforcement**

- OFT has an evident understanding of the role and the challenges of private enforcement.
- Public enforcement cannot by itself bring about optimal levels of compliance; need combination of public enforcement and private actions.
- Need more private actions than currently, but this does not mean less public enforcement. In fact we are likely to see more enforcement as resources become better focused.
- There is a need to: avoid US style litigation culture; strike the right balance *between* public and private for optimal regime; and ensure consistency of policy/certainty.
- OFT’s main focus must remain public enforcement but greater intervention is likely.
- Much can be done at UK domestic level and, based on the outcome of its consultation, the OFT will make recommendations to the Government and take action itself, within the limits of the legal framework in which it operates, to address barriers to private actions and facilitate well-founded competition claims.
- Which?’s tactical nous in pursuing Section 47B cases was noted.

- Cohen Milstein's commitment to claimant litigation in Europe is obvious.

### **Failing Markets/Market Not Working Well**

- The limits of law enforcement was acknowledged and the employment of a fuller range of instruments was encouraged (e.g. reports and studies; advocacy; and education).
- The OFT's strategy consists of: a presumption against intervening in markets; a strong focus on government activity; a flexible, evidence-based, approach subject to principles of good project management; with an active stakeholder strategy for each market study.
- The Competition Commission attempts to: investigate features of markets where competition is not effective; identify any (significant) adverse effects and any resulting customer detriment; work out appropriate remedies to be applied directly by it, or by recommendations to others; and conduct a thorough and fair investigation and to produce a decision that is clear and understandable, with the conclusions clearly based on the evidence.
- A sector inquiry is useful in priority sectors: if not enough evidence is available to open individual cases but investigative powers are needed; in complex sectors where competition problems of different levels interact; if collusion is not suspected; if political momentum is needed; if a regulatory failure exists; or if there is a link between antitrust and other Commission policies.
- It is a very resource and communication intensive tool.
- Political sensibilities have to be considered with sector inquiries.
- Sector inquiries can be very effective catalysts for complex cases, for initiating or supporting other Commission initiatives, and for inducing regulatory measures by Member States or national regulatory agencies.

### **Consistency of Jurisdictions**

- The panel disagreed as to whether the Modernisation architecture laid out in Regulation 1/2003 was leading inevitably to chaos, with inconsistent decisions between national competition authorities and the Commission.

- While there is clearly evidence of inconsistencies in cases like *Visa/MasterCard* and *Ice Cream*, the Commission appears to be achieving the aim of coherence and consistency in the majority of cases.
- EU-wide settlements negotiated by the Commission are one way sure way of ensuring consistency.
- The panel recognised the greatly increased burden on practitioners to give clients clear and useful advice now that the notification system is no longer available.
- When it comes to national courts, the panel were unanimous in thinking that considerable efforts will be needed to ensure consistency, and the Commission's role in this respect is not yet clear.

### **Agencies Roundtable and Keynotes**

- Guidelines on Article 82 will not be forthcoming from the Commission until current Article 82 litigation (i.e. the *Microsoft* case) is completed.
- The Commission is rethinking its current commitment to the Consumer Liaison Office. Stronger links with consumer bodies need to be created. These links must go beyond the exchange of info to develop an exchange of views.
- The OFT is trying to focus on those areas where consumer harm is the greatest (i.e. where price increase to middle income earners may not be a problem but the same increase for low income earners may exclude them from the market).
- The Competition Commission generally assumes that harm to customers will lead to harm to consumers.
- Ex post assessments of intervention by agencies allow them to see if they have chosen the correct proxies for consumer harm in the first place.
- There was broad agreement that the standard for intervention by an agency should be to prevent likely harm to consumers.
- US agencies are more comfortable with a 40-50% market share safe harbour for single firm conduct than European ones.

- The ECN has achieved remarkable increases in consistency of national decisions, although this falls short of full consistency. The ECN might need some further reform in order to achieve full consistency.
- For international mergers, the scope for one agency to take the lead in designing remedies to resolve the adverse affects for all the jurisdictions concerned was generally downplayed.
- There was strong support for investigations of markets that are not working well from Europeans and US FTC, but not from the US DOJ.