



Experience of Complex Monopoly and Market Investigations in UK and Europe

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South African Developments in Light of Recent
European Experience**

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Outline

- UK: evolution from "complex monopolies" to "market investigations"
- Comparison between UK and S African regimes
- UK OFT market studies - a model for S Africa?
- Comparison between UK CC market investigations and EC sector inquiries
- Case studies: UK CC market investigations
- Case study: EC pharmaceutical inquiry

UK: evolution from “complex monopolies” to “market investigations”

- S African proposals modelled to significant extent on old UK regime of complex monopolies
- Complex monopoly provisions are typically designed to complement standard enforcement tools in concentrated markets where companies without market power adopt parallel behaviour (in either a coordinated [S Africa] or uncoordinated [UK] manner) to the detriment of competition
- Authorities have far-reaching powers to impose industry-wide structural /behavioural remedies beyond those available in traditional enforcement tool-box

UK: evolution from “complex monopolies” to “market investigations”

- UK complex monopolies - two-stage test:
 - Launch: Two or more companies with a combined UK market share of 25% engage in conduct likely to have the effect of restricting, distorting, or preventing competition
 - Substantive test: is the public interest harmed by the complex monopoly?
- In practice legal test for launch caught *any* parallel conduct on market
 - Covered situations of uncoordinated parallel conduct (where firms act unilaterally and rationally in response to market conditions) as well as coordinated parallel conduct (i.e. where firms consciously and deliberately adopt parallel behaviour to restrict/prevent competition) as authorities focussed on industry-wide features of a market
 - Akin to modern CC market investigations
- Decisions to launch/impose remedies were essentially political
 - Secretary of State had power (with OFT) to refer complex monopoly to MMC and had discretion whether to impose remedies on the basis of MMC’s recommendations
 - “Public interest” substantive test broader than competition assessment

UK: evolution from “complex monopolies” to “market investigations”

- Cf S African conduct-based test but no public interest test
 - Test designed to address coordinated conduct by firms in concentrated industries that authorities cannot attack using traditional enforcement tools
 - Not intended to address industry-wide features of a market
- S African “hybrid” market share test limited to “conscious, coordinated” conduct suggests narrower scope than old UK complex monopoly rules
 - Although under S African market share test the companies engaged in a complex monopoly could theoretically have lower market share than under the old UK rules it is more likely that the implicated firms will have over 25% combined share for there to be an anti-competitive effect
 - S African conduct test appears to specifically exclude uncoordinated parallel conduct (requires at least two firms to engage in “*conscious parallel conduct*” or behave in a “*coordinated manner*”) whereas UK complex monopolies covered both coordinated and uncoordinated conduct
 - Dividing line between coordinated conduct and uncoordinated conduct is unclear and precise scope of S African regime will ultimately depend on interpretation by S African Competition Commission and appeal courts
- Query whether structural remedies will be available

UK: evolution from “complex monopolies” to “market investigations”

- EA 2003 introduced new regime of market investigations
- Looks at functioning of the market as a whole rather than conduct of a group of undertakings
 - Legal test: Feature/combination of features of a market prevents, restricts or distorts competition in UK causing an “adverse effect on competition” (“AEC”)
 - “Features of a market” include structural features (i.e. government policy / customer behaviour / information failure / vertical foreclosure issues) and single-firm conduct (BAA)
- AEC test based on competition principles rather than policy considerations
- Market-focussed test designed to deal with market inefficiencies where either no evidence of wrongdoing under traditional enforcement tools or where traditional remedies insufficient
 - OFT will only make a MIR where either no breach of CA98 or where remedies under CA98 would be ineffective to counter the AEC (Guideline 511)
- Procedural changes de-politicised decision-making process and strengthened CC’s investigatory powers
- CC decisions subject to judicial review by CAT

Comparison between UK and S African regimes

UK: Complex Monopolies	UK: Market Investigations	S Africa: Complex Monopolies
<i>Launch of market investigation / definition of complex monopoly conduct</i>		
Two or more companies together accounting for 25% of market engage in conduct likely to have the effect of restricting, distorting or preventing competition (OFT / Secretary of State were decision-makers)	Reasonable grounds for suspecting that a feature or combination of features of a market prevents, restricts or distorts competition (OFT is decision-maker)	In a market where at least 75% of goods or services are supplied by five or fewer firms, any two of those firms conduct their business in a parallel conscious manner or co-ordinated manner, and this conduct has the effect of substantially preventing or lessening competition in the market (unless a firm can prove a pro-competitive gain from the conduct outweighing the effect) (Competition Commission will be decision-maker)
<i>Substantive test</i>		
Is the public interest harmed by the complex monopoly? (MMC / Competition Commission were decision-makers)	If any feature or combination of features of the market prevents, restricts or distorts UK competition leading to an adverse effect on UK competition (Competition Commission is decision-maker)	If firms are engaged in "complex monopoly conduct" as described above and two or more firms have at least 25% of the market and the conduct has resulted in high entry barriers, exclusion of other firms from the market, excessive pricing or refusal to supply, or other market characteristics that indicate co-ordinated conduct (Competition Commission will be decision-maker)
<i>Remedies</i>		
Secretary of State had discretion to order wide range of remedies based on MMC/CC's recommendations (included structural remedies)	CC can order any remedies for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any (anticipated) detrimental effect on customers from the adverse effect on competition (includes structural remedies)	Competition Commission can apply to the Competition Tribunal for an order reasonably requiring, prohibiting or setting conditions upon any particular conduct by the firm, to the extent justifiable to mitigate or ameliorate the effect of the complex monopoly conduct on the market (limited to behavioural remedies?)

UK OFT market studies - a model for S Africa?

- S Africa proposals introduce market studies in addition to complex monopoly provisions
- UK market studies are a flexible and valuable tool for competition authorities to gain a better understanding of markets
 - *“Market studies enable the agency to examine markets more broadly, to focus on the social costs of public restrictions on competition, to engage in advocacy, public education and to promote a competition culture” John Fingleton, June 2008*
- UK market studies have wide variety of subject-matter and outcomes
 - Often results in recommendations for regulatory action (UK medicines report recommended changes to UK pricing model (PPRS) and distribution schemes)
 - Fewer than 10 studies out of over 33 since 2002 have resulted in MIRs to the CC
- S African proposals similar to UK market study regime with elements of CC market investigations
 - Trigger for launch of S Africa market studies mirrors test for CC market investigations: *“any feature or combination of features of a market for any goods or services prevents, distorts or restricts competition within that market”*
 - Under UK and S African market studies, authority has wide discretion to launch market studies and no power to compel businesses to provide information, however may be in businesses' interest to participate if study likely to result in industry-wide measures or competition complaint

Comparison between UK CC market investigations and EC sector inquiries

- CC market investigations are an *alternative* to traditional enforcement action designed to address market-wide restrictions of competition whereas EC sector inquiries are information-gathering exercises that often *precede* enforcement action - perhaps more akin to UK market studies?
 - EC Commission cannot impose remedies but often follows up with individual competition investigations / recommendations for regulatory changes at EU level
- EC sector inquiries have focussed on areas that are subject to EU regulation and/or liberalisation
- Lower threshold for launch of EC sector inquiry than CC market reference
 - “where the trend of trade between Member States, the rigidity of prices or other circumstances *suggest* a restriction or distortion of competition” Article 17 Regulation 1/2003
 - OFT must have “*reasonable grounds*” for suspecting that a “feature” or “combination of features” of UK market restricts UK competition
- Both authorities have wide powers of investigation

Practical lessons from UK CC market investigations

- 9 market investigations completed under Enterprise Act (none ongoing)

Sector	Timing	Summary of remedies
Rolling Stock	Concluded April 2009 (24 months)	Recommendations to Dept of Transport for changes to franchise system; undertakings removing non-discrimination provisions from rolling stock contracts; transparency and information requirements
BAA airports	Concluded March 2009 (24 months)	Divestment of 3 major UK airports; recommendations to Dept of Transport re: airport regulation and policy; strengthening public consultation/transparency procedures
Payment Protection Insurance	Concluded January 2009 (23 months)	Information requirements; behavioural measures to improve consumer switching; changes to way PPI is sold and unbundling products; prohibition of selling single-premium PPI products
Supply of groceries	Concluded April 2008 (23 months)	Inclusion of a "competition test" in planning decisions (under appeal); recommendations to introduce new code of practice and to establish an ombudsman to arbitrate; requirement for retailers to amend certain restrictive agreements
N. Ireland personal banking	Concluded May 2007 (24 months)	Transparency and information requirements
Classified directory advertising services	Concluded December 2006 (18 months)	Price cap on Yell's advertisement prices
Home credit	Concluded November 2006 (23 months)	Transparency and information requirements
Domestic bulk Liquid Petroleum Gas (LPG)	Concluded June 2006 (23 months)	Behavioural measures to improve customer switching and information requirements
Store cards	Concluded March 2006 (24 months)	Transparency and information requirements; requirements to unbundle products and allow consumers to pay by direct debit

Practical lessons from UK CC market investigations

- CC's market investigations are long and thorough
 - Resource-intensive for businesses and can have negative reputational consequences
 - Reports often published just before statutory 2 year deadline, although CC has said it is aiming to complete future investigations within 18 months or less
- Implications of market investigation can be significant as wide-ranging remedies affect entire industry
 - First structural remedies under EA imposed recently in BAA investigation (BAA ordered to divest 3 major airports) - single market conduct
 - Consumer law (PPI / store cards / extended warranties - complex monopoly regime)
 - Other regulatory changes (Groceries - proposed "competition test" remedy has implications for the planning regime; CC proposed new Grocery Supplier Code of Conduct (GSCOP) and currently seeking voluntary undertakings to establish ombudsman to police GSCOP disputes)
- Often there are parallel regulatory investigations in the same sector
 - BAA: key element of CC inquiry (economic regulation of airports) also investigated by the Civil Aviation Authority and the Department of Transport

Practical lessons from UK CC market investigations

- Scope for judicial review of CC decisions currently being tested
 - S179(4) Enterprise Act: *"The CAT shall apply the same principles as would be applied by a court on an application for judicial review"*
 - CAT cannot rule on merits of CC decision but can decide whether CC acted properly (i.e. judicial review test) in taking its decision
- CAT demonstrated willingness to challenge basis of CC's remedies' findings leading to further appeals by affected companies
 - First challenge to CC market investigation was successful: appeal by Tesco against CC's recommendation that a "competition test" be introduced to the planning system (Groceries)
 - CAT considered that CC hadn't properly considered the welfare/economic tests of the remedy or fully explained its proportionality assessment (March 09) - CC currently reconsidering approach to test
 - May 09: BAA announced appeal of CC decision requiring it to divest three major UK airports on following grounds:
 - CC *"failed to take into account the adverse financial impact of introducing competition, in particular by requiring BAA to sell three airports within two years in the current financial and economic circumstances"*
 - Allegations of bias (one CC member is on a panel bidding for one of airports up for sale)

Case studies: UK CC market investigations

- Extended warranties: the last complex monopoly investigation
 - Investigation into industry-wide anti-competitive practices for sale of extended warranties for domestic electric goods
 - Good example of complex monopoly provisions used to address market-wide conduct where traditional competition tools insufficient
 - All industry players engaged in complex monopoly selling products under similar potentially anti-competitive terms but no evidence of collusion
 - Dixons identified as having “scale monopoly” (abuse of dominance equivalent) but not acting against public interest by itself - others’ market shares too low
 - Restrictions on choice/information about alternative products at point of sale, requirements to contract in advance, high prices, unfair terms and uninsured cover
 - Resulted in package of consumer remedies unrelated to competition law
 - Designed to improve consumer information and consumers’ ability to assess their options

Case studies: UK CC market investigations

- BAA airports: the most significant market investigation
 - First CC market investigation where structural remedy imposed
 - Divestment of 3 major UK airports will have a huge impact on the structure of the UK airport industry
 - Investigation essentially covers conduct by single undertaking (albeit one that is essentially a monopoly)
 - Query whether such wide-ranging structural divestment breaches fundamental Community principle of proportionality
 - No evidence of anti-competitive conduct by BAA
 - Consequences for companies' rights of defence (judicial review cannot call into question merits of a CC decision)
 - Could alternative less radical measures adequately have addressed the issues (changes to regulatory regime and/or behavioural remedies?):
 - *"We recognize that in using our powers in this way, we will have a significant impact on BAA's business. However, given the nature and scale of the competition problems we have found, we do not consider that alternative measures, such as the sale of only one of the London airports or greater regulation, will suffice."* CC press release

Case study: EC pharmaceutical inquiry

- First use of Commission's powers to use dawn raids to launch sector inquiry (Jan 2008)
- Preliminary report (November 2008) confirmed focus of inquiry into decline of innovation and delayed generic entry caused by potentially anti-competitive practices of pharmaceutical companies
- Extensive questionnaires sent to over 100 originators and generics; separate questionnaires then issued to associations of doctors, pharmacists and price regulators
- Commission has dedicated team of 25-40 staff
- Likely that final report (due Summer 09) will be followed by individual competition investigations and recommendations for changes to regulatory system
- Proactive / oppressive approach to enforcement?

Conclusion

- S Africa's complex monopoly regime - is it focusing on market structures and behaviour or multi-firm conduct? Dividing line between coordinated and uncoordinated parallel conduct?
- UK example - competition authority interpreted powers widely
 - focus on market-wide issues rather than limiting enforcement to parallel conduct of individual undertakings
 - imposed divestments affecting structure of industry even in absence of anti-competitive conduct
- The focus appears to be enforcement rather than preparatory to enforcement: *cf* EC example - wide investigative powers of authority can be burdensome for business and result in follow-up enforcement action even where no powers to impose remedies
- Market studies are a useful tool for competition authorities to develop better understanding of markets