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Peter Freeman, Chair of the Competition Commission

Chair: John Schmidt, Shepherd and Wedderburn

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“A wise man proportions his belief to the evidence- Scepticism and Competition Policy”

Peter Freeman, Chairman of the Competition Commission (the body which (now independently of Ministers) investigates merger and market situations referred to it by the similarly independent offices of Fair Trading as requiring in depth scrutiny) spoke to the David Hume Institute on 3 May 2007 on the general subject of how the Commission considers the evidence given to it in its enquiries.

Jon Schmidt, of the law firm Shepherd & Wedderburn who were the Seminar Sponsors and hosts at a discussion dinner after the event, commented that the Commission had become increasingly transparent in revealing its internal mode of operation.

Freeman posed five questions

1. What was the Competition Commission’s remit in performing its task?
2. How did the task of a merger investigation differ from that of a market investigation?
3. What mentality did the Commission bring to the finding of evidence and the assessment of evidence?
4. How did the Commission deal with regional differences in the UK economy?
5. What claims could be made for the operation of the UK Competition Regime as a whole?

On remit Freeman said that while the Competition Commission, like the Bank of England, had become independent of Government it was, like the Monetary Policy Committee, bound by a remit and that remit was, in its case, a statutory one. The statute obliged the Commission to have regard solely to the effect of a merger or market situation on the competitiveness of the relevant market. There had been a time when its task had been to consider the public interest generally but it could not do so now, and the entrenching by the 2002 Enterprise Act of a competition test meant that the kind of outcome seen in the enquiries into the bids for The Royal Bank of Scotland in 1982 (when bids were blocked because of concerns about the loss of a corporate headquarter in Scotland) would not be repeated today (since the sole question would be the effect on competition in banking services). The Commission did however publish guidance on what it regarded as the effects of loss of competition.

On the nature of Investigations. Freeman drew a distinction between merger enquiries and market enquiries. In mergers the Commission was concerned with the actions of individuals - the merger parties - in a market and with a double prediction viz “What might be expected if the merger took place and, separately, what might be expected if the status quo remained unchanged?” A merger, moreover, had a specific focus - the issue was not whether the relevant market as such was defective but whether the outcome of the merger would lessen competition in it. In a market investigation, by contrast, the Commission had to look at the market as a whole and at whether it could be made to work more competitively. So one might be as concerned with what did not happen (eg consumers not being prepared to switch custom) as with what did happen.

Market investigation were also more difficult to manage, even within their much longer time tables, because the players did not have any incentive (as they obviously did in a merger plan) to see the investigation completed.

What was the Commission's mentality? Freeman said that although the Commission had a remit imposed upon it "*that did not mean it was a doctrinaire body*". It applied its own experience of the evidence it heard in coming to its determinations of whether a competition ethical could be expected. This was fundamental to its manner of dealing with the parties and explained why the members of a Commission Enquiry Group examined the parties in oral exchanges and did not merely rely on the Commission's expert staff. The process was, moreover, an open one which could be tracked. The determinations might not be palatable to a party but there could be no grievance, Freeman thought, "*on the grounds of parties not knowing who we are or how we operate*" and he added "*The parties may be zealous but the Commission are not zealots*". The need for open discussion explained why it was that the Commission could not be cajoled (as business parties sometimes hoped) into "informal" behind the scenes discussions.

On the question of coping with the diversity of the UK Freeman said that the references made to the Commission might be local as well as national and no region in the UK - if its market was the one referred - would fail to be considered. It was necessary, again, to bear in mind that the statutory test was the effect on market competition not the effect on a regional economy although the Commission would of course look at any particular competition impacts and for that reason had considered the evidence given to it in the HMV/Waterstone merger as to the particularities of the book publishing market in Scotland. It had come to Scotland for that purpose.

On the claims which the UK Competition Region could make for itself, Freeman noted that one of the UK's strengths was that competition enquiries did not depend (as in the E.U.) on the breaching of prohibition or (as in the U.S.) on the need to demonstrate that a market practice was illegal. That was why, in the UK, the competition authorities had means of adjusting "*wrong equilibriums*" in markets which might not be available in more prescriptive systems. Freeman thought it was right that "*Competition should be at the centre of economic policy and should be so in all parts of the UK*". The basis for saying so was, in his view, that "*efficient markets are the best instruments yet found to deliver benefits in an economy, and Regulation is usually a poor substitute for them*". A protectionist would argue from a different perspective but Adam Smith's answer was still valid "The increase of commerce in one nation, instead of hurting other nations, usually benefits them".

Robert Bertram
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