THE REFORM OF THE UK COMPETITION REGIME: WHAT CAN BE LEARNT FROM FRANCE?

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INTRODUCTION

The roundtables organised in 2010 by the Competition Committee of the Organisation for Economic Co-operation and Development (OECD) showed that national competition authorities share a common goal of ensuring the fairness of their procedures, but also that the legal and practical means of achieving this procedural fairness may legitimately differ from one jurisdiction to another.²

On 15 March 2012, the Department for Business, Innovation & Skills (BIS) published the government’s response to its March 2011 consultation regarding reforming the UK competition regime. The UK government proposed to establish a single Competition and Markets Authority (CMA) which will perform the functions of both the Competition Commission (CC) and the Office of Fair Trading (OFT).

At the dawn of the UK’s reform of its competition law regime, it is useful to review France’s competition authority which has recently undergone similar changes to the ones proposed by the UK government. In 2008, France decided to create one single competition law agency known as the ‘Autorité de la concurrence’ (FCA). By comparing the current two-tier UK regime and the one-tier French regime, the UK may be able to learn some lessons from the French experience that can be taken on board at this time of transition.

There are many different ways of comparing and evaluating two jurisdictions. This article will focus on European and national statistics, examining the concrete structural differences between the current UK and French competition regimes and discussing the different approaches adopted by those jurisdictions and finally, some conclusions will be drawn.

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Both the UK and French competition authorities are members of the European Competition Network and as such, regularly report to the European Commission (the Commission) with respect to procedures involving the application of Arts 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). From reviewing the number of investigations reported to the Commission by the two authorities it is evident that there is a significant difference between the figures. According to the Commission’s statistics, between May 2004 and February 2012 there were 208 new case investigations in France and 79 envisaged case decisions. In contrast, however, in the UK there have only been 57 new case investigations and 16 envisaged case decisions. At a European level, France is also ranked at the top, and is only outnumbered by the Commission, whereas the UK is ranked at the lower end of the spectrum. This vast difference also exists at a national level. In 2010, the FCA issued 198 merger decisions of which two required in-depth examination whereas the OFT only examined 77 merger cases and referred eight to the CC. This clearly shows that the FCA has conducted significantly more investigations than the UK authorities. However, the reasoning behind why this situation exists is not clear.

On the basis of these statistics it would be easy to conclude that there are simply more cartel offences and abuse of dominance cases in France than in the UK. However, this may be too simplistic. Alternatively one could perhaps conclude that companies in the UK are more disciplined when it comes to competition law compliance. Does the difference stem from the standard of proof applied in each jurisdiction? Or the approach to investigations adopted by each authority? Can the gap be explained by the different structures and powers of these authorities? This article will attempt to provide some possible explanations for the disparity between the numbers of investigations carried out by these two authorities.

STRUCTURE AND POWERS

The structure of the OFT is significantly more complex than that of the FCA. This may be a significant factor contributing to the vast difference between the numbers of cases dealt with by the OFT.

In the UK, the OFT shares its responsibility for enforcing competition law with other regulatory authorities. These sectoral regulators include the Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem), the Water Services Regulation Authority (Ofwat), the Northern Ireland Authority for Energy Regulation (Ofreg NI), the Office of Rail Regulation (ORR), and the Civil Aviation Authority (CAA). The OFT and the designated sectoral regulators have the power to make market investigation references to the CC.

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Under the current regime, the OFT (or the relevant sector regulator) conducts the initial investigation. If an investigation is referred to the CC, it is the CC which makes the final enforcement decision. The UK therefore has a two-tier competition law regime for merger control and market investigations, the responsibility for which is shared between the OFT and the CC. Institutional separation is therefore a key feature of the current regime. The OFT’s competition functions include investigating mergers at Phase 1 as well as conducting market and antitrust investigations and carrying out market studies. The CC, on the other hand, cannot initiate cases but conducts Phase 2 merger enquiries in cases referred to it by the OFT. The CC also conducts market investigations and can remedy market-structure problems where it finds that competition is not working in a particular sector. One of the most valued elements of the UK regime is the CC’s so-called ‘fresh pair of eyes’. Each case that the CC has referred to it from the OFT is started afresh, thus avoiding the risk of the CC being seen as prosecutor, judge and jury. A fear expressed by some critics of the proposed one-tier UK regime was that it would remove the opportunity for cases to be reviewed by a ‘fresh pair of eyes’ through the current OFT/CC split. Although the UK government’s proposal seeks to address such concerns by having separate decision makers in Phase 1 and 2, it remains to be seen whether the checks and balances of a two-tier system regime can be maintained within one body, as much of the discretion in implementation will be left to the discretion of the CMA.

This fear can, in part, be alleviated by reference to the success of the Paris Court of Appeal in challenging the decisions and the decision-making process of the FCA. Despite the fact that France has a one-tier competition regime, the Paris Court of Appeal acts as a de facto second tier with respect to competition law. For example, a recent decision by the FCA regarding interbank cheque processing fees was quashed by the Paris Court of Appeal and the investigative process undertaken by the FCA was heavily criticised.

Similarly, the OFT recently suffered a setback with respect to a case involving tobacco manufacturers, whereby the Competition Appeal Tribunal (CAT) held that the restraints that the OFT wished to prove were not part of the infringing agreements as identified and condemned in the OFT’s decision. This was particularly difficult for the OFT because it had originally imposed a record fine on the various tobacco manufacturers which had generated significant publicity. The ability of an independent judicial body to overturn the rulings of the national competition authorities on the grounds of incorrect procedure or insufficient evidence is fundamental to a fair and effective competition regime. For the advocates of the one-tier

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4 Under the UK government’s new proposal, the CMA will have a board, established by statute, which will have responsibility for strategy, performance rules and guidance. Initial decisions will be taken by the board, with groups of independent panellists responsible for the outcome of in-depth investigations.

5 Décision n°10-D-28, 20 September 2010.

6 Imperial Tobacco Group plc, Imperial Tobacco Ltd v Office of Fair Trading (Case Nos 1160/1/1/10, 1161/1/1/10, 1162/1/1/10, 1163/1/1/10, 1164/1/1/10 and 1165/1/1/10) [2011] CAT 41, [2012] CompAR 61.
regime, the role of the judiciary in reviewing competition authorities’ decisions supports their argument that the necessary checks and balances remain in place. Nevertheless, there have been few examples of such judgments so far and in the Tobacco case, the CAT held that it did not have jurisdiction to continue to hear the appeals. It remains to be seen whether the CAT would become more assertive with its decisions under the proposed one-tier regime.

The OFT’s powers are derived from a range of consumer and competition legislation. It has the power to review voluntary merger notifications, conduct market investigations and open investigations into anti-competitive agreements or abuse of dominance cases. The CC has the power to take remedial action if it determines that there is an adverse effect on competition in the market concerned. Such remedial action includes accepting undertakings to take specified action or making enforcement orders, that can, inter alia, require the divestment of business or assets, regulate prices, and impose behavioural measures aimed at improving the way in which goods or services are supplied. Once these remedies are put in place through undertakings or orders, the OFT will monitor them and the remedies can be enforced in civil proceedings by both the OFT and the CC or in private law actions for breach of statutory duty.

In France, the Law on the Modernisation of the Economy was passed on 4 August 2008 and transformed the Conseil de la concurrence into the new FCA. As a result, the FCA stands as the only competent body in France for the examination of a notifiable transaction. However, the French Minister of the Economy (the Minister) has retained a role with respect to the application of competition law meaning that the reforms have not ended the French institutional dualism with respect to competition law. Indeed, the Minister retains the power to request an in-depth investigation of a merger. However, the FCA may reject this request. The Minister also retains the power to enforce settlements in response to anti-competitive practices affecting ‘a market of a local dimension’ in France.

In theory, the Minister may intervene at two stages. First, following a Phase 1 clearance where he can ask the FCA to reconsider the need to carry out an extensive examination (Phase 2) provided that the request is made within 5 days of the receipt of the FCA’s decision. Secondly, at the end of Phase 2 where he can decide to overrule the FCA’s decision on the grounds of public interest considerations provided that the request is made within 25 days. This 25-day period is combined with other strict deadlines to which the FCA is subject. Despite these rights afforded to the Minister, no intervention has been made as yet.

The FCA also has the power to review merger notifications where the relevant entities’ turnovers reach the thresholds. The relevant thresholds are €150 million of the total turnover achieved by all the parties to the merger transaction and €50 million of the turnover achieved in France by at least two of the parties in the transaction. Lower thresholds have also been introduced with respect to the retail distribution market of €75 million and €15 million. However, most of the merger cases involving retail distribution were cleared within short timeframes, which meant that the FCA’s resources were not engulfed in this administrative burden.
When dealing with cartels and other extremely damaging forms of competition infringement, enforcement is considered by the FCA as the most effective response. Indeed, the reforms have given the FCA the power to influence not only the way companies behave, but also the structure of the market itself. In the retail industry, for example, the FCA might be approached by the mayors of local municipalities, who feel that a company or group of companies running retail stores have abused their dominant position. If the commitments are not being respected, the FCA may impose ‘structural’ measures, which may go as far as ordering the sale of retail space in order to restore competition.

The FCA conducts its own market investigations and has its own investigators, issues opinions, conducts cartel investigations and organises leniency programmes. The FCA’s most interesting regulatory power, though, is the use of self-referral under which the FCA can give an opinion on ‘any question concerning competition’. This means that the FCA can act as an ‘advocate of competition’, and thus may, whenever it deems it appropriate, express the point of view of a competition expert. It may, for example, contribute to the drawing up of legal texts or, furthermore, recommend measures or actions in order to improve the competitive functioning of markets. This is highly important, as it allows the FCA to educate the public and economic players about the importance of competition. Hence, the FCA will be in a position to advise and to warn, in addition to its regulatory functions.

Despite the different structures of the French and UK competition authorities, both agencies have similar powers to ensure competition law compliance functions effectively. The significantly lower number of investigations and decisions of the OFT can therefore not be attributed to weaker enforcement powers.

SAME GOALS BUT DIFFERENT APPROACHES: PREVENTION VERSUS SANCTIONS

A possible explanation could lie in the fact that the UK competition law authorities seem to prefer preventive measures over sanctions, whereas sanctions are considered by the FCA as a more persuasive enforcement tool. Despite showing a firm political determination to contribute to the economic development through their respective roles in enabling competitive markets to function well, while protecting consumers and business from anti-competitive behaviour, unfair practices and public restrictions on competition, both authorities have elected different approaches. Consequently, it could be said that they have different approaches but the same goals.

The UK competition authorities have taken the approach of educating and guiding stakeholders in relation to competition law enforcement. These measures notably include producing a vast number of publications aimed at companies and the general public in relation to competition law enforcement and compliance, and industry recommendations and best practice guidelines. One of the OFT’s goals is to detect competition anomalies by way of
market studies, and companies are able to negotiate fines and settle cases prior to any infringement decision. This differs greatly from the French system which does not give companies the opportunity to offer remedies in the context of market investigations.

The UK was one of the first jurisdictions in Europe to introduce merger control legislation and it has always rested on the notion that merger activity is positive for the economy. Therefore, intervention should only take place where it is clear that a particular merger can be expected to have significant adverse effects. This supposition underlies the voluntary nature of the UK regime, with no obligation to notify, and no obligation to wait for clearance before completing the merger. This approach was retained through subsequent legislative overhauls in 1973 and 2002 and remains a fundamental and distinguishing characteristic of UK merger control to the present day. Furthermore, it results in a regime where no notification costs or transactional delays are imposed.

There is clearly a concern within the UK government that under the current voluntary regime, problematic mergers can escape scrutiny or complete before being investigated by the CC, making it more difficult for the effects of such deals to be prevented or remedied. It is interesting to note that the OFT expressed reservations in relation to the introduction of a small business exemption (target turnover of under £5 million) in the current consultation to reform, on the basis that the exemption could allow, for example, creeping acquisitions of stores by large national retailers (an issue which the French merger control rules were specifically amended to capture).

The FCA’s view is different; it considers sanctions to be a powerful educational tool. Indeed, there is little guidance for companies with respect to competition law enforcement in general and ongoing investigations in particular. In fact only two procedural guidelines have ever been published by the FCA. The FCA seems to be adapting its approach by putting more emphasis on prevention and education of the public. This is evidenced through the recent reform introducing the possibility for the FCA to conduct market studies comparable to those undertaken by the OFT aimed at detecting the malfunctioning of competition in certain markets.

A major change in this respect has been the introduction of a leniency programme in 2007 and the possibility for companies to offer commitments with respect to certain infringements. This has forced the FCA to enter into early (often informal) discussions with companies that have been involved in antitrust infringements and provide them with procedural guidance. However, there seem to be no plans for the FCA to introduce early resolutions or negotiate settlements for companies subject to cartel investigations (outside the scope of the FCA’s leniency programme), such as those offered by the OFT.

Another powerful sanction used by the FCA, and rarely used either by the Commission and/or other Member States including the UK, is the application of interim measures. These are efficient tools and the FCA has not hesitated to use them in order to enforce competition law
and protect consumer interests. The FCA uses interim measures to intervene where there is a serious and immediate threat to the market with the goal of avoiding permanent damage. Urgent interim measures are an effective and immediate remedy for dealing with the problems identified, pending a review of the case on the merits. Typical cases are restrictions by effect and/or abuse of dominance in order to avoid serious and irreparable damage to consumers’ interests, sectors, markets and competition.

An interesting example of the FCA utilising such interim measures to protect consumers is the case regarding Apple’s distribution agreement with Orange for the sale of Apple’s iPhones. In late 2008, the FCA suspended Apple’s 5-year exclusive deal with France Telecom’s Orange pending an ‘in-depth’ investigation into the merits of the case. The Paris Court of Appeal upheld the FCA’s decision granting interim measures. The suspension has allowed Orange’s competitors to purchase iPhone devices from Apple and to sell them. Interim measures have also been used in other French sectors including telecom, media, energy, medical/pharmaceutical and transport.

On the other hand, the UK has only once adopted similar interim measures when, in 2006, the OFT issued a direction to the London Metal Exchange to prevent it from extending its trading hours on its electronic trading platform. The interim measures direction was appealed to the CAT, but, before the appeal was heard, the OFT withdrew its direction following receipt of substantial and material new evidence. Although the ruling of the CAT was one on costs, the CAT nonetheless criticised the OFT’s ‘superficial and flawed’ procedure, and described the decision as ‘ill-founded’. Furthermore, the CAT considered that the quality of the evidence on which the OFT relied ‘fell below the standard which should normally be required by an authority such as the OFT when carrying out its functions under section 35 of the Act’.

In light of the success of the FCA in adopting multiple effective interim measures and the fact that the UK has only once had recourse to such measures, one could easily condemn the OFT for not adopting such measures more often. However, the wording of the interim measures test means that the threshold for OFT intervention is very high. In its reform proposal, the UK government is trying to address such problem by amending the wording of s 35(2) of the Competition Act 1998. The proposed change to the interim measures test would mean that the threshold is triggered where there is a ‘perceived need to act for the purposes of preventing significant damage to a particular person or category of person’. Such a test would then become very similar to the French test.

Interestingly, despite the above similarities in tests, the BIS response indicates that the UK government understands that the authorities in other EU Member States make greater use of

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7 Décision n°08-MC-01, 17 December 2008.
9 Serious and irreparable damage are cumulative criteria and the test has been interpreted as a requirement that, absent interim measures, the relevant business will exit the market or go out of business.
their powers to impose interim measures. European Competition Network briefs indicate that the FCA addressed interim measures to La Poste in May 2011, Google in June 2010 and SFR in September 2009. It appears that many other jurisdictions including the UK, are now seriously considering the adoption of such measures in light of France’s experience and successful results.

**PRIORITISATION VERSUS GENERALISATION**

The OFT seems to be taking more liberty in prioritising and choosing its enforcement work with a clear focus on cartel and dominance cases that involve a potentially high impact on consumer welfare, which reflects the OFT’s mission ‘to make markets work well for UK consumers’. In *Cityhook Ltd v Office of Fair Trading and Others*, the CAT issued its judgment in the appeal by Cityhook Limited (Cityhook) against the OFT’s decision to close an investigation into alleged anti-competitive activity in the submarine telecommunications cables sector. The CAT held that even cases which had reached an advanced stage could be closed if the OFT considered that other work was more deserving of its scarce resources. Cityhook sought to challenge the case closure on judicial review grounds before the Administrative Court, but the court ruled that the OFT had acted reasonably in closing the investigation. In 2008, the OFT published a detailed paper setting out its enforcement priority considerations. The paper clearly demonstrated the OFT’s relatively vast discretion in pursuing potential competition law infringements.

However, one could argue that the *Cityhook* decision gives rise to potential problems in safeguarding the effectiveness of UK competition law enforcement. The more the OFT makes use of its apparently ever-widening, CAT-approved remit to close existing cases and to refuse to open new investigations, the more situations will arise when competition infringements are left unchecked and the more private enforcement may suffer. It strikes the author as odd that this should be the OFT’s policy at a time when the encouragement of private enforcement is high on the agenda of practically every competition authority in Europe.

In contrast to the OFT, the French authority’s focus is limited to certain sectors. Even though the French authority describes its mission equally as one to ensure consumer welfare, there are no clear priority principles according to which the French regulator would act (or not act). Even though the FCA has given informal indications as to its enforcement strategy, one would hope for the authority to define its enforcement policy more clearly and transparently. However, it has to be noted that the FCA is subject to a rather strict procedural framework that

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10 (Case No 1071/2/1/06) [2007] CAT 18, [2007] CompAR 813.
requires it to act and take on certain cases (and thus take decisions), which, in comparison to the OFT, limits its scope to prioritise/reject cases.

In exercising its discretion to pursue a case the OFT considers the potential legal risks associated with an investigation at an early stage and thus applies a relatively high standard of proof. This could partly explain the lower number of cases when compared to the French authority, which is often criticised and challenged for its low standard of proof in finding competition law infringements. The OFT’s more cautious approach to taking on cases and sanctioning companies, can be contrasted with the FCA’s willingness to take on cases even if they seem weak and are likely to be challenged by the courts.

**CRIMINAL SANCTIONS: WIDESPREAD VERSUS LIMITED USE**

The OFT’s powers in relation to criminal prosecution, and its ability to issue disqualification orders for directors, constitute efficient deterrence methods to discourage cartel infringements. While it is very difficult to quantify the effectiveness of such tools, it cannot be denied that the threat of imprisonment, and of being permanently dismissed as a director, represents a strong incentive for the company’s management to comply with competition law.

From a purely legal perspective, the two jurisdictions provide similar sanctions for individuals: up to 4 years of imprisonment in France and up to 5 years in the UK. The FCA has no power to prosecute a case before a criminal judge, but can transmit a file to the prosecution for consideration. Prosecution of individuals for cartel involvement has been extremely rare in France and has obtained very little public attention. This is contrary to the UK, where the recent criminal prosecution of (former) British Airways executives as well as the conviction and imprisonment of three former executives for their role in the Marine Hose cartel has received wide media attention, both, in the UK and internationally.\(^\text{13}\)

Encouraging criminal enforcement could arguably be an effective tool for the FCA to create incentives for competition law compliance. Although, unlike the UK’s leniency programme, the current French leniency programme does not provide specific immunity for individuals with respect to criminal charges. In his recent speech, Bruno Lasserre (President of the FCA) addressed the issue saying that:

‘something should be done to avoid firms wrestling with their staff because they want to obtain fine immunity via corporate leniency, while their employees do their utmost not to

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cooperate to avoid the finding of a corporate infringement that would trigger individual criminal proceedings. Thought should be given to aligning individual incentives with corporate incentives.\textsuperscript{14}

It remains to be seen if the FCA and/or the French legislator will take any initiatives to boost criminal enforcement in relation to antitrust infringements in France.

Given that the FCA has elected to adopt an approach based on sanctions rather than prevention, it is rather surprising that the one sanction perceived to be an effective deterrence tool in the UK and other jurisdictions has no real ‘power’ in France given the absence of individual immunity.

\section*{CONCLUSION: LESSONS TO BE LEARNT}

In conclusion, it can be seen that the UK has adopted a more holistic approach through its use of market investigations and remedies and is regarded as a competition law agency focused more on education and compliance. France in contrast has a stricter and more case focused approach, and acts as more of an enforcement agency. The UK has a voluntary regime with no deadlines, very rarely uses interim measures and is cautious in taking decisions. In comparison France has a compulsory regime with strict timetables, often uses interim measures and takes risk with its enforcement. It therefore seems likely that the differing approaches will be one of the key contributing factors to the difference between the numbers of investigations carried out by the authorities.

The FCA is certainly among the most active or arguably even the most active European competition authority when it comes to enforcing antitrust rules and imposing fines on companies, which could at least in part, explain the number of new investigations reported by France in 2011. However, one could argue that the French lack transparency when it comes to defining enforcement priorities and informing and educating the public on practical and procedural aspects. In this regard, the OFT has guided the way for the FCA, and many other European authorities. According to recent declarations made by Bruno Lasserre, France would appear to be adapting its approach to adopt a more transparent and preventive strategy, particularly with respect to its guidance for companies on internal antitrust compliance work as well as the possible extension of the French leniency programme to individuals. This could be done through the FCA’s role as the ‘advocate of competition’.

Each authority has its strengths and weaknesses. To say that one authority is better than the other would be wrong. The FCA has taken a more pro-active approach to its remit, whereas the UK authorities have taken a more cautious approach and prioritised certain areas. The fact that

\footnotesize{\textsuperscript{14} See Bruno Lasserre’s speech, ‘The New French Competition Authority: mission, priorities and strategies for the coming five years’ (2009).}
the FCA has conducted more investigations than the OFT does not necessarily mean that it is doing a better job than the OFT. The figures can neither show how successful the UK’s more cautious and preventative approach has been, as prevention is not able to be recorded in this way, nor whether there are simply, in actual fact, more offences in France. However, both authorities can evolve by learning from the best practices of the other in order to improve procedural fairness and protect consumers. It is hoped that this convergence of the two systems will continue. Indeed, improvements from convergence of best practices can be seen all over the world in developing competition law regimes.

Senior figures from within both authorities acknowledge that there are key ways in which they should improve in light of the other’s success. As noted above, Bruno Lasserre is keen to adapt the FCA’s approach and, equally, John Fingleton (former CEO of the OFT) has acknowledged that interim measures should be used more often in the UK as they are a good tool in protecting consumers.15

One cannot ignore the success of the FCA as a single agency, its approach to merger control which has proved to be efficient despite the lower thresholds and the timescales. It is true that the FCA has to increase its transparency and could learn from the OFT with respect to educating the public, notably through market investigations. However, it seems that some lessons could be learnt from France in terms of merger control efficiencies, more aggressive use of interim measures and from simplification of the structures of the regime.