
Current issues and future challenges

Keynote address to the British Institute of International and Comparative Law at the Eighth Annual Trans-Atlantic Antitrust Dialogue

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Introduction

It is a pleasure once again to give the keynote address to BIICL's Annual Trans-Atlantic Antitrust Dialogue and I thank Philip Marsden and BIICL for this opportunity to talk to you. BIICL continues to play an important role in promoting debate on international and comparative law over a broad range of topics including competition law, and I congratulate it on reaching its fiftieth anniversary since the merger in 1958 of the Society of Comparative Legislation and the Grotius Society.

Hugo Grotius, or Huig de Groot as he should properly be called, was a Dutch jurist in the first half of the seventeenth century who, with Francisco de Vitoria and others, laid the many foundations for international law. In *Mare Liberum* (The Free Seas) he formulated the new principle that the sea was international territory and that all nations were free to use it for seafaring trade. He thus provided the ideological justification for Holland to use its naval power to break up various trade monopolies. Grotius can therefore be seen as a sort of early protagonist of the use of the law to open up competition – even if afterwards the Dutch then went on to establish their own monopolies in essential goods of the time such as spices!

This year's conference covers a wide variety of significant and topical issues, with the discussions being led by eminent speakers. I would like to use this address as an opportunity to touch on some of these and on

developments at the OFT over the past year, as well as the area of private actions, which are of particular relevance to the OFT's work. Cases over the last year including airline passenger fuel surcharges, dairy products, construction, tobacco and the bank current account charges test case have raised the profile of competition and consumer enforcement in general and the OFT's commitment to rooting out anti-competitive behaviour and addressing issues in markets that are not working well for consumers.

After reviewing a number of developments over the last year relevant to this conference, I will comment on some of the challenges ahead including some issues that legal advisers need to address with their clients in order to ensure that clients and business generally understand what we do, why we do it and how we do it.

Some key developments at the OFT

Last year I spoke about some of the changes that had taken place at the OFT over the previous 12 months and our work on the integration of competition and consumer policy. Today I would like to start with a short update on these domestic matters, in particular on some of the steps we have taken to help us in the way we work, both in how we deliver and how we measure our delivery.

The interface between competition and consumer enforcement

The OFT is a competition and consumer authority. We have enforcement powers in both areas designed to achieve our mission of making markets work well for consumers. Competition and consumer policy are complementary in achieving this goal.

Abuse of dominance or collusion between suppliers are issues one could comfortably consider as within the domain of competition policy. However, there are other reasons why competition may not work well which would sit more comfortably within the domain of consumer policy. These may include lack of transparency about prices or terms of supply, difficulties in making informed choices between rival offers from competing suppliers and lack of responsiveness of the supply side to the demand side in terms of, for instance, availability, price, choice or quality issues.

The OFT has been working hard to develop and exploit the synergies between competition and consumer policy and to use the tools available to us to promote and protect consumer welfare and drive productivity. Last month we published an economic discussion paper on the interactions between competition and consumer policy by Professor Mark Armstrong of the ESRC Centre for Economic Learning and Social Evolution (ELSE). I do not propose to discuss it here but commend it to you. A copy of the paper can be downloaded from the OFT website.

A good example of the interface between competition and consumer policy is our work on personal current accounts and bank charges. In April 2006 we published a statement of our position on calculating fair default charges in credit card contracts. We subsequently conducted an initial review of unauthorised overdraft charges, at the end of which we shared the public concern about the level and incidence of bank current account charges. We concluded however that applying the general principles on credit card charges contained in our 2006 statement here was not straightforward.

Clearly the market was not working well and the demand side (i.e. consumers) did not feel empowered to tackle the problem themselves. One possible solution for us could have been a competition-based solution such as making a market investigation reference to the Competition Commission. However, it was clear that central issues were, first, the application of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs), which we contended applied but the banks disputed, and second, if the regulations did apply, the proper assessment of fairness under them. We decided that we would seek to tackle the problem in another way, making the best use of the tools (both competition and consumer-based) available to us.

We therefore commenced a formal investigation (including the test case) into the fairness of unauthorised overdraft charges. You will be aware that last month the High Court confirmed our view that personal current account unarranged overdraft charges can be assessed for fairness under the UTCCRs. This is an important early milestone for the OFT and our investigation into this area of high consumer interest. It is important to note, however, that this judgment does not determine whether the relevant charges are actually unfair. We are continuing our investigation

into the fairness of these terms and will consider our position after reviewing the detail of the judgment.

We are, however, taking a holistic look at whether the personal current account market is working well for consumers and the test case complements our ongoing market study into personal current accounts. The market study addresses wider questions about competition and price transparency in the provision of personal current accounts and will assess the extent to which consumers help drive competition. We expect to publish a report in the near future.

Prioritisation, evaluation and effective delivery

Another important factor in maximising our impact and achieving effective and timely deterrence is the continued use and refinement of case prioritisation to help ensure that we target our finite resources on investigating the issues that are most serious in relation to markets that are not working well for consumers. We feel that such an approach is not only good for the development of the UK's competition and consumer regime as a whole but also for businesses under investigation, who I hope will continue to see an improvement in the length of time taken by the OFT to reach a view as to whether formal or informal intervention in the market is appropriate.

As I mentioned last year, we have been working to develop our **prioritisation principles**, which we routinely apply to all our Competition Act (CA98) casework, so that they can be used to prioritise our work across the board. In September last year we published for consultation eight proposed prioritisation principles. These were under four headings of Impact, Strategic Significance, Risks and Resources. At the same time we have been piloting the application of the draft principles. The responses to the consultation have generally been sensitive to the rationale behind the new draft principles and welcome their publication and the consultation.

We are considering the points raised in the responses and will shortly publish a summary of these and our views on the pilot along with a final version of the prioritisation principles. I should mention that one concern commonly expressed by law firms who responded to the consultation was that private actions, which were referred to in the principles as one

possible alternative to OFT action, were not really a viable alternative. I will touch on this point briefly later on.

Some commentators appear to believe that our prioritisation principles preclude us from taking so-called 'small cases'. However, achieving a high impact is only one of a number of factors in our prioritisation principles (albeit a very important one). For example, the strategic significance of work is also very important. These factors are also balanced against the risks involved and available resources. In addition, where appropriate, the OFT may also take account of other relevant factors.

Of course, it is not enough that our work is perceived to be high impact; as well as taking the right sorts of cases we need to know that our work is 'high impact' and can quantify that this is the case. To this end our evaluation team has conducted work to quantify the impact of our interventions and identifying the kind of work we should be doing.

We have just finalised our **estimates of the impact** of our merger, CA98 enforcement, market studies and scams prevention work over the three financial years 2005 to 2008. We estimated that we have saved consumers on average £340m per year in those three years, i.e. over £1 billion in the three year period, consisting of £115m attributed to our merger work, £82m per year from market interventions following CA98 infringement decisions, £132m from our market studies work and £12m from OFT actions to stop illegal scams. Such savings are important, especially when taking into consideration our performance commitment to HM Treasury to deliver measured benefits to consumers and the economy of five times our annual budget over the 2008-11 period.

Another particularly significant piece of work in the evaluation programme looked into the **deterrent effect** of our competition enforcement. In an independent study, Deloitte was tasked with finding evidence of the deterrent effect of our competition law decisions and the merger control activities of the UK competition authorities. Deloitte's survey covered, separately, UK businesses and senior competition lawyers. This was supplemented with interviews with competition lawyers, economists and managers with compliance responsibility. The survey responses were then used to measure the scale of deterrence by estimating ratios of potentially anti-competitive activities deterred in relation to our CA98 interventions.

In November we reported that in the lawyers survey, the ratios of agreements and initiatives abandoned or significantly modified because of a risk of OFT investigation to those which actually resulted in a CA98 decision for the period 2000-06 were calculated as five to one for cartels, seven to one for commercial agreements and four to one for abusive conduct. Significantly, the scale of deterrence calculated from the business survey was considerably higher than in the legal survey: 16:1 for cartels, 29:1 for commercial agreements and 10:1 for abusive conduct. One explanation for this is that activity is deterred by our actions within business without external legal advice being taken.

The research also shows that sanctions which directly affect individuals (criminal penalties and director disqualification) are believed by companies to be more important in deterring infringements than sanctions, in particular fines, which are imposed on businesses. Perhaps more surprisingly, companies also considered the risk of adverse publicity to be more important for creating deterrence than fines.

The research suggested the following five changes would have the greatest impact in increasing the deterrent effect of our work:

- increasing publicity and education
- encouraging private damages actions
- faster decision making
- more criminal prosecutions for cartels, and
- more decisions/greater enforcement activity.

We will look to develop both our further research in evaluating the deterrent effect of our work as well as our thinking on how the results of this research informs our selection of cases.

One further point for comment, however, is that I believe that the survey unequivocally demonstrates that any question about whether the level of OFT fines is 'too high' is very much open. Fines were attributed as only the fourth most important factor in relation to the average ranking of perceived importance of sanctions by the companies surveyed.

In addition to the use of prioritisation principles, we have also implemented an **Effective Project Delivery** (EPD) framework and training. A significant number of projects may be ongoing at any one time, many of which

involve resources drawn from across the OFT. Applying like procedures across our work helps to ensure a consistent approach and understanding to each project, while at the same time helping to reduce and manage project risk and giving greater certainty both to ourselves and to business on timescales, resource demands and key milestones.

Criminal enforcement

I now turn to some of the substantive topics that will be discussed today and tomorrow. There can be little doubt that one of the areas that has seen the most significant developments for the OFT over the last twelve months is in the area of criminal cartel enforcement.

You will of course be aware of our investigation, coordinated with those of the US Department of Justice (DoJ) and the European Commission, into suspected cartel conduct in relation to the market for marine hoses used to transfer oil. We announced our investigation last May and this was followed in December with our bringing charges against three UK businessmen for bid rigging, price fixing and market allocation: these are, of course, the first ever criminal charges for cartel offences under the Enterprise Act (EA02).

Simon and Mark will be speaking about the substance of this further this morning, and I do not want to pre-empt what they are going to say, but I do wish to make a few comments.

The first is to note that this investigation and these charges, which are the first visible outputs arising from the statutory criminal cartel regime, are the culmination of less publicly visible efforts to embed within the OFT the criminal enforcement regime over the last few years.

Second, the deterrence study carried out by Deloitte which I have already mentioned underlined the deterrence value of criminal enforcement. Not surprisingly, both the lawyers and businesses surveyed regarded criminal penalties as being the most important of the various factors in deterring competition law infringements. The key significance of the criminal regime from an enforcement perspective thus lies in its deterrence value. However, criminal enforcement will not be appropriate in every case and it is important that a combination of criminal and civil enforcement is deployed across the range of cases that we choose to pursue.

Third, as a result of the potential for cartel conduct in a global economy to have an international dimension, both the need for, and the benefits of, international cooperation have been particularly apparent. In the marine hose case we conducted a criminal investigation in parallel with a European Commission investigation under Article 81.

Both the OFT and the European Commission visited the same home address, as well as a business address. We cooperated to create procedures to ensure that these inspections took place successfully and with the least intrusion possible, both in relation to the individuals and the undertakings involved, whilst being careful to avoid a situation whereby either authority could have gained an improper advantage through the other authority using a different set of investigatory powers.

Furthermore, the case represented an unprecedented development in the level of cooperation between the UK and other national authorities, most notably the DoJ. The DoJ arrested a number of individuals, including UK nationals, at the same time as searches were taking place in the UK and elsewhere. In that instance the UK businessmen were allowed to return to the UK and face charges under EA02. It should be made clear, however, that the US plea agreement applies only to the proceedings in the US and does not affect the rights of the defendants under UK law. It should also be stressed that no one has yet been convicted of the EA02 cartel offence and that the businessmen charged are, of course, entitled to a presumption of innocence.

Early resolution of cases

There is increasing consensus within the international competition community that an ability to resolve cases without conducting a full administrative procedure, but still leading to an infringement decision, can bring significant benefits both to competition authorities and to undertakings under investigation.

Early resolution, or 'settlements', offers the prospect of saving resources for both parties during both the administrative and appeal stages of investigations. One key component of such a procedure is that parties agree to proceed under a 'streamlined' administrative process. The substantial savings which can be achieved through the early resolution of

appropriate cases assists the OFT in ensuring greater impact for our work across the board, in particular, through freeing up resources that could be used to pursue other investigations and/or advocacy work. It also enables the parties to avoid the cost and distraction of protracted proceedings, achieves certainty and frees them to get on with their business.

To date the OFT has used a form of early resolution in a few select cases. In 2006 we agreed a resolution of our investigation into an agreement between independent schools to exchange information about intended fee levels. The Independent Schools case had a number of exceptional features which facilitated the approach outlined above. However, its success encouraged us to consider whether such an approach might usefully be used in some other cases.

In August last year as part of an early resolution procedure, British Airways admitted collusion over the price of long-haul passenger fuel surcharges and agreed to pay a penalty of £121.5m, thus enabling us to close our civil investigation; an infringement decision is to be published in due course.

At the end of last year and the beginning of this year we also concluded early resolution agreements with Asda, Dairy Crest, Safeway (in relation to conduct prior to its acquisition by Morrisons), Sainsbury's, The Cheese Company, Wiseman and Lactalis McLelland based upon the provisional findings set out in a statement of objections issued in relation to the retail prices of certain dairy products. These parties have all admitted involvement in certain of the anti-competitive practices identified in the statement of objections.

Our experience in this area is growing and we are also learning from the practice and experience in this area of other enforcers in the global competition enforcement community. We have identified a number of key principles that will inform our approach to settling CA98 cases: these seek to achieve the benefits of settling in appropriate circumstances while not undermining either deterrence or our leniency programme. However, these will need to be worked through in practice in a variety of situations and cases before best practice for the UK competition regime can be articulated fully.

Ali will speak further to this during this afternoon's session.

Cartels

I am told that there was a perception in the legal community around a year ago when we began discussing private actions that the OFT had 'gone soft' – to put it at its politest – on enforcement. To those in the legal community who might have been promoting this view, I suggest that events have proved this to be misinformed or even misguided.

In recent months we have underlined our commitment to take firm action where we believed that there was evidence of anti-competitive conduct in markets affecting consumers in their everyday lives. We have issued statements of objections in cases where we have had reason to believe there has been market behaviour which harms the functioning of markets and the economic welfare of consumers.

For example, on 17 April 2008, in one of the largest ever CA98 investigations we issued a statement of objections against 112 firms in the construction sector in England. In it we formally alleged that the named construction companies had engaged in bid rigging activities, and in particular cover pricing, a practice where one or more bidders collude with a competitor during a tender process to obtain a price or prices which are intended to be too high to win the contract.

Shortly afterwards, on 25 April 2008, we issued another statement of objections alleging that certain tobacco manufacturers and retailers had engaged in unlawful practices in relation to retail prices for tobacco products in the UK. These consisted of arrangements between manufacturers and retailers that restricted the ability of the retailer to determine its selling prices independently, by linking the retail price of a manufacturer's brand to the retail price of a competing brand of another manufacturer. The alleged infringements span different periods for different parties between 2000 and 2003. We also allege that some competitors engaged in the indirect exchange of proposed future retail prices between 2001 and 2003.

These two recent cases follow Airline Passenger Fuel Surcharges and Dairy Products cases to which I have already referred.

These investigations, together with our previous decisions and the creation of the position of Senior Director of Cartels and Criminal Enforcement, and the appointment of Simon Williams to that role, will hopefully send out a

strong message to undertakings about the seriousness with which we view suspected anti-competitive behaviour and our determination to take robust action against infringing undertakings.

We continue to innovate in the way we unearth cartel behaviour. We substantially revamped our leniency policy in 2005 to address concerns that had been identified to make the handling of leniency applications more transparent and to increase the attractiveness of making such applications. As a result, there has been a clear rise in the quality and quantity of leniency applications. There has been a significant increase in quantity of Type A immunity applications (i.e. first in, where OFT had no pre-existing knowledge of the cartel) since 2005 which on average nearly doubled. Significantly, over the same period there has been a qualitative improvement in these applications, providing increased potential for the commencement of high impact work. In the construction investigation alone, 37 companies applied for leniency. We continue to refine the policy and Simon hopes to be in a position to issue further revised guidance this summer. That guidance will not affect the fundamentals of the policy, but will add further detail in areas where our experiences in more recent leniency cases can usefully be shared to increase still further the transparency of the policy and its up-front predictability.

We have taken innovation a stage further, as many of you will know, by introducing a reward programme for individuals who give us credible, verifiable and useable information about cartel conduct. The programme was launched as a pilot only in late February. No doubt at least in part as a result of this, the OFT's cartels hotline is now considerably 'hotter', with a few interesting leads already. But it is too early to evaluate the success of the programme which in our view is complimentary to the leniency programme and we see some evidence that it may even have boosted leniency. A well informed company that has discovered cartel conduct, especially with criminal enforcement now a reality, must have even more incentive to seek leniency, given that sweeping the problem under the carpet may now incur the additional risk of its prompt discovery through a company employee blowing the whistle under the reward programme.

Private actions

Although it is not on the programme as one of the topics for discussion at this conference, I would like to say a few words on private actions.

The lack of an effective private actions regime in the European Union has been a concern for some time. The last year has seen continued momentum in support of an effective private actions system and some very important progress has been made towards ensuring that this problem is dealt with in a thorough and effective manner.

In November of last year we published our recommendations to HM Government on private actions.¹ We recommended strengthening the private actions regime by:

- changing procedures to allow representative bodies to bring actions on behalf of consumers and businesses, irrespective of whether a competition authority has previously taken public enforcement action
- requiring the courts to pay close attention to competition authorities' decisions and guidance, and
- safeguarding the effectiveness of the leniency regime for cartel investigations by excluding the use in private actions of certain documents provided by whistleblowers and limiting their liability in certain cases.

We also made certain recommendations on the funding and costs of private actions, namely:

- modifying restrictions which limit the funding of actions
- encouraging the courts to consider limiting risks of claimants having to pay the other side's costs in appropriate cases, and
- ensuring that funding is available for meritorious cases which would not otherwise be brought.

Of course the European Commission has also been looking at the scope for developing private actions. In 2005 they published their Green Paper which stimulated debate and elicited feedback on a number of possible options which could facilitate private damages actions. Last month they

¹ 'Private actions in competition law: effective redress for consumers and business' Recommendations from the Office of Fair Trading November 2007 OFT916resp. See also the Discussion paper Private actions in competition law: effective redress for consumers and business, April 2007 OFT916.

then published their White Paper.² The White Paper proposals are consistent with the OFT recommendations to Government. This reflects the productive working relationship between the Commission and the OFT within the context of formal and information cooperation via the ECN. The UK here has an important role to play in Europe: we can both lead by example and benefit from a mature and sophisticated civil justice system, with strong case management powers and an experienced judiciary.

The benefits of an effective private actions system are clear: increasing the incentives for businesses to comply with competition law will stimulate interest in good corporate governance and encourage the development of a competition culture, in which responsible business leaders and boards recognise the benefits of competition in properly functioning and open markets. This will have positive effects on the productivity and competitiveness of the UK economy to the benefit of consumers. It is equally important to ensure that consumers who have been harmed by competition infringements get the full compensation to which they are entitled. Consumers currently face significant barriers to access to effective redress. Many small businesses are in the same position. It is therefore necessary to take action to remove or alleviate those barriers.

Of course a system in which there are more private actions and stand alone actions brings with it a new set of challenges. It is necessary to ensure that competition policy continues to develop in a coherent and robust fashion. With an increased number of private actions, there is a strong argument that courts should be required to pay closer attention to competition authorities' decisions and guidance to avoid inconsistency and reduce uncertainty for the parties. Furthermore, the OFT may have to intervene in private litigation more frequently. If it does not intervene in these cases, there is a risk of more judgments, and thus precedents created, without the input of the agency responsible for public competition

² White Paper on damages actions for breach of the EC antitrust rules.

enforcement and where policy issues may not be evident from the arguments raised by the parties in their dispute. Clearly there will be a stronger case for the OFT's intervention in some cases in which it is not a party to in order to ensure that policy issues are not ignored.³

Another challenge in relation to private actions is that the claimant may incur significant costs (even if the case is struck out). Strong case management is needed to dispose of unmeritorious cases as early as possible. In standard actions the courts already have such a power under the Civil Procedure Rules and with the use of costs orders. However, in relation to representative actions, it may be arguable that there is merit in an additional filter when asking for permission to commence an opt out/ representative action on behalf of consumers at large - the need to prove 'an arguable case' – although obviously the bar cannot be set too high at a preliminary stage.

Mergers

The UK merger regime has continued to deal effectively with potentially anti-competitive mergers.

The forthcoming positive impact 2007/8 study I touched on earlier estimates that consumers on average directly saved £115m per year due to OFT merger work, of which £55m is a result of undertakings taken by the OFT in lieu of a reference to the Competition Commission (CC) and mergers referred and subsequently abandoned, and £60m is allocated to the OFT for its part in consumer savings arising from mergers blocked or amended by the CC following a reference.

Alongside our examination of mergers we have published or consulted in several areas over the last year:

³ At present, the OFT may submit written observations to courts on issues relating to the application of Article 81 or Article 82 pursuant to Article 15(3) of Regulation 1/2003. With the permission of the court in question, the OFT may also submit oral observations to the national courts. Where the coherent application of Article 81 or Article 82 so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations. The OFT has already used this power to intervene before the House of Lords in *Inntrepreneur Pub Company (CPC) & Ors v. Crehan* [2006] UKHL 38; [2006] 3 WLR 148.

- In November, we published revised *de minimis* guidance for merger cases affecting small markets. This has already been applied in several cases. We have used our discretion to avoid detailed investigations where the costs could be disproportionate to any potential consumer harm. Interestingly, despite its recent implementation, we have already faced some substantive questions on the interaction between the *de minimis* guidance and other aspects of the merger regime, such as undertakings in lieu. We hope that the increase in transparency by explaining in detail our thinking on important issues can assist the UK business and competition community when planning deals. Our recent decisions on rail franchises and local newspapers in Slough can also provide some guidance to the business and legal communities on how we apply the *de minimis* guidance
- our draft mergers procedural guidance is now out for consultation and we hope that our stakeholders will continue to contribute actively to the review process. Our aim is that the new guidance will provide the best possible procedural framework for the benefit of all those involved in UK merger control. I would encourage you to provide your views by 20 June; we will then aim for the new guidelines to be implemented later in the Autumn
- in April we announced that we would work with the CC to produce joint guidelines for substantive merger analysis and assessment (these will replace our respective existing guidance). This provides a good example of the cooperation between the two UK authorities within the UK merger control regime and we hope that this will provide a single valuable source of reference both within the UK and abroad.

We resolved competition concerns in four cases last year and two more cases since the beginning of this year by way of divestment remedies. Cases such as the merger between the Co-operative Group and United Co-operatives Limited (that involved the analysis of multiple markets and required numerous divestments) show that we have not been reluctant to protect the benefits of competition for consumers, without the need for a second phase investigation, despite significant substantive and procedural complexities

We have also strengthened our capability for own-initiative merger inquiries. We are determined to pursue those unnotified harmful mergers with the appointment of our new Chief Intelligence Officer and the launch on 31 March of the new dedicated email address to inform us on a confidential basis of potentially harmful mergers which might have passed below our radar.

Future challenges

It will be apparent that in relation to many of the areas I touched on today, and on which there will be presentations and discussions during the conference, a number of challenges remain, for the OFT as well as for the business and legal communities. I will mention just a few.

Evolution of policy and practice in areas such as **private actions** and **criminal enforcement** are still in the early stages. As these continue to develop, making them work effectively will be the key challenge. However, it is worth noting in relation to private actions that at the time I spoke last year there may have been a misconception held by some that the OFT had given up on public enforcement and was working towards 'contracting out' such enforcement to the private sector or reducing our own emphasis on enforcement activity. Our work over the last 12 months to which I have referred above and our recommendations to HM Government last November demonstrate that this is not the case and indeed how much progress has been made on this issue.

I firmly believe that **private actions** have a vital role to play in contributing to effective enforcement of the law. In doing so, however, a number of challenges exist, not least the need for the courts to make sure that they dispose of unmeritorious cases quickly while ensuring that, for meritorious cases, their assessment of the case is properly informed by the policy and precedent input of the agency responsible for public enforcement. It is important that lawyers advise their clients appropriately about the merits and conduct of their cases and that strong case management directions are given by the courts and complied with by the parties.

With regard to **early resolution of cases**, as I mentioned earlier, any policy needs to consider carefully issues such as the extent to which the settlement of cases could have an impact on both deterrence and

undertakings' incentives to apply to the OFT for leniency. In using early resolution, the aim of optimising benefits whilst minimising costs is a delicate exercise of balancing competing aspects.

Early resolution and leniency may mitigate penalties for businesses but they do not remove the underlying problem of compliance. Businesses need to take **competition compliance** far more seriously, and need to do so at the most senior levels. Therefore chairmen, chief executives and boards, including non-executive directors, need to understand the risks to their businesses of non-compliance and ensure that appropriate preventative steps – which may include the support of senior management, appropriate policy and procedures, training and evaluation – are in place and that a compliance culture exists throughout their organisation.

I believe that competition compliance remains an on-going challenge for the business and legal communities. As I have mentioned in the deterrence study, both the lawyers and businesses' average ranking of the factors which motivate compliance identified criminal penalties as the most important factor.⁴ As we begin to see criminal cartel cases coming through the pipeline we can take comfort in the fact that criminal enforcement, used in appropriate circumstances, has the potential to offer an effective means of OFT action increasing deterrence and thus encouraging compliance.

In relation to cartels, striking the correct balance between civil and criminal enforcement will be an important challenge for the OFT, with a great many factors to consider such as the sufficiency of evidence to prove the commission of an offence and/or the appropriateness of prosecution in the particular circumstances.

A challenge for legal advisers in relation to cartels is to properly inform their clients in relation to the **leniency programme**. For cartel members the benefits of making an application for leniency are clear: whereas we can impose penalties of up to ten per cent of a business' worldwide turnover for infringements of the law, under the leniency programme they may have

⁴The complete Companies' average ranking of the factors which motivate compliance was: (1) criminal penalties (2) disqualification of directors (3) adverse publicity (4) fines and (5) private damages actions.

their financial penalty reduced substantially or avoid a penalty altogether. Therefore, it is very important that lawyers understand how the leniency system works, the OFT's procedures for handling applications, the circumstances in which it will be granted and on what terms.

There remains, of course, the issue of **the future direction of Article 82 and thus Chapter II** which is the subject of a later panel and on which I did not speak earlier. At the OFT we have a few cases and of course there have been a number of private actions before the UK courts. In Brussels there is a small but very interesting portfolio. The OFT has played an active, and I believe very positive, part in shaping the debate about future evolution of Article 82 and we will engage actively on this subject. The important thing is that abuse cases are founded on clearly articulated theories of harm which are set within the particular market circumstances. Developing guidance that is neither too prescriptive nor too vague is a challenge but one that we should all aspire to meet.

Finally, there is a challenge for all of us in dealing with some of the some of the myths or misconceptions about our work and why we take on particular cases or investigations.

One is that we start investigations with so-called 'fishing expeditions'. This is an inappropriate term these days even in relation to fishing because professional fishermen usually know where to fish – and modern technology, such as sonar devices, gives them precise targets.

But it is particularly inappropriate to use the term in our world where investigations are based on information that has come to our attention. This may come from a variety of sources, such as leniency applicants and individuals under our informant reward scheme, complaints, other competition authorities, arise from another matter such as a review of a merger or another competition investigation, or other sources (such as industry reports and conferences, government departments or other parts of the public sector, the media or MPs etc).

We do not embark on such investigations or issue statements of objections without having met certain statutory thresholds and having had a rigorous internal review. (In passing I also would like to take this opportunity to remind businesses and their legal advisers that any

information which is provided by the OFT during the course of an investigation, including for example the contents of a statement of objections, should not be disclosed either to the press or others. Disclosure of specified information which relates to the affairs of an individual or the business of an undertaking is a criminal offence. Moreover, any such disclosure can hinder or damage our investigations. The OFT will look to take appropriate action if this happens.)

The conclusion I draw from this is that business do not understand from their lawyers what we do and why we do it. Our publications on issues such as cartels, our powers of investigation and enforcement provide clear guidance including the manner in which we conduct an investigation and why we do it. Business needs to understand them.

Businesses have also expressed surprise over what they perceive to be the increasingly vigorous enforcement activity and the use of powers to obtain or request information, including how costly this is for them to respond and how the use of statutory powers to conduct so-called 'dawn raids' changes the atmosphere of investigations. We have certainly made greater use of the full range of information gathering powers over recent years. Parliament gave us these powers and it is proper to use them in appropriate cases, which is what we do. When we use our powers we do so reasonably and proportionately. Some businesses choose to react to our use of our powers in a more contentious and adversarial manner than others. Where we investigate, we need to gather all the relevant information for our investigations and in doing so ensure that it is correct, complete and sufficient for an informed conduct of our work.

There is also a perception that our fines have got much higher, and represent a tougher approach to enforcement. It is true that our fines have increased, but this is because, in focusing on high impact work, the markets in question have been bigger. Fines are set in accordance with our penalties guidance and statutory limits and, expressed as a percentage of relevant turnover of the companies involved, these have not changed noticeably. Comparing the level of fine from one year to another may make sensationalist headlines but all the figures show is that we are enforcing the law, that we are taking on the cases we said we would take on and that a range of parties with an interest in our work said we should take on. And, as I said earlier, the deterrence survey suggests that in any event the question whether fine as 'too high' is very much open.

Finally there is a perception that OFT is in some way 'anti-business'. Nothing could be further from the truth. There are many areas where the OFT and business have similar interests, such as in removing unnecessary regulatory burdens which stifle markets, in assessing the competitive effects of legislative proposals and in the areas of introducing the private sector into the supply of public services. Our enforcement actions often arise because a business approaches us with evidence about a market problem. Our actions are focused on specific arrangements, behaviour and models that are problematic in terms of the proper functioning of markets, including unlawful conduct, and demonstrate our commitment to tackle competition and consumer issues rigorously and effectively.

This is not just good for consumers; it is also good for business generally which benefit from vibrant markets and, ultimately, it is of course good for the productivity of the UK economy.