CPRC Second Open Seminar

‘Competition Policy in the UK and its Implications for Japanese Competition Policy’

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Co-organisers: JFTC Competition Policy Research Center
British Embassy
Support: Fair Trade Institute

Lecturers: Sir Robin Young

Permanent Secretary, Department of Trade and Industry, UK

'The Context for UK Competition Policy'

Mr. Christopher Clarke

Deputy Chairman, Competition Commission, UK

'The UK Competition Regime Recent Changes and Future Challenges'

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*This document was compiled by the CPRC secretariat based on the recording of the Seminar. The CPRC secretariat is responsible for possible mistakes in this document.

Introduction

Chairman [translated]: Thank you. Now we'd like to start today's seminar. First of all I'd like to express our heartfelt appreciation to all of you for turning out in such large numbers for our second seminar of the CPRC. Later on I'd like to have you be very active in the Q&A session. I'll be serving as MC today. My name is Suzumura, the President of CPRC.

Although you have all been informed, we have decided to hold this seminar with the objective of having people understand our activities and to therefore enhance our function to send out information by our center since we were established. So today this is the second seminar of the series. Fortunately we were able to make this second seminar a special one. We have with us Permanent Secretary Sir Robin Young, DTI, and also we have Deputy Chairman Mr. Christopher Clarke from the Competition Commission.

The title of today's seminar is "Competition Policy in the UK and Its Implications for Japanese Competition Policy." I'd like to say that regarding competition policy it's an issue here in Japan as well. Work is underway to revise the law and the policies, as well. When this revision was planned for we thought that by this seminar we would have a framework for a new competition policy and law in Japan. There were such expectations and hopes, and that's why we have given this title to this seminar. But for our part, we've not yet been able to revise and amend the law.

The lecture of today's seminar will not cover in detail the aspects of Japanese law. But both speakers may cover this in their Q&A session if there are any questions coming from the audience. So things may be covered as one of the discussion topics later on and during the Q&A panel discussion.

First of all, Sir Robin will be giving his presentation under the title of "The Trend for British Economic Policy." Actually, that was the title that we asked for from him but he will be covering more specifically the context for UK competition policy. So he will be delivering his speech under this title. And then Deputy Chairman Christopher Clarke will be talking about a very interesting topic, the impact of the 2002 Enterprise Act and its lessons.

So without further ado we'd like to actually start the seminar. And first of all we will

have a presentation by Sir Robin and also by Mr. Clarke, and I'd like to briefly introduce these two gentlemen to you.

Sir Robin Young, the Permanent Secretary, was educated at Oxford and he first joined the Department of the Environment in 1973. After a very glamorous career he was at the Department of Culture, Media and Sports. He served as a Permanent Secretary from 1998 until 2001. And in June of 2002 he became a Permanent Secretary at the Department of Trade and Industry. So first of all I'd like to call upon Sir Robin Young for his speech. Thank you.

Sir Robin Young's Speech:

Sir Young: Thank you very much, Chairman, for that introduction. I'm very grateful to you and your colleagues for inviting me to this seminar, and it's a great pleasure to speak to everybody about this very important subject. Please excuse me if I look a little tired. I arrived from the United Kingdom last night. We had dinner at the embassy yesterday evening, breakfast with British businessmen who work in Tokyo this morning, followed by a meeting with the JST, the Science and Technology Agency, followed by a meeting and speech with METI. So I have not been lazy since I arrived in your country, but it's been really, really interesting and it's already clear to me that we have a huge number of agendas in common. Our economies are in a very similar position as we face global challenges, and one of the most important things we have in common, I think, is what should be the key place that effective competition policy can play.

I'm going to focus today on the importance of competition policy, by which I mean effective competition policy which works, not just competition policy which is a rhetoric. I want to talk about the benefits of competition and the links to the wider world of my department, which is the Department of Trade and Industry. The UK has recently made major changes to our legislation, and my colleague Christopher Clark will talk to you about that after me.

It's always important for visiting people to avoid seeming to understand all the details of the politics or the administration of the country they're visiting, and I know that competition issues seem particularly important and relevant for you here in Japan at the moment. All I can say, whatever the difficulties and sensitivities you have here, is that we in the United Kingdom are absolutely clear that successful economies in the 21st century definitely need strong pro-competition and anti-monopoly laws with strong penalties for those who violate them. That's where I'm starting from, and I suspect that's where I will finish, and I hope that that's relevant to the subject of today's seminar.

As with Japan, the United Kingdom knows that it cannot compete with the emerging economies in this world based on low prices, cheap labor and poor economic regimes. Quite the opposite—we need more innovation, stronger and more soundly based economic frameworks and regimes, by which I include strong company law and a strong competitive framework, and only then will we persuade our businesses to

innovate and to succeed. We are clear that competition is the spur that makes good companies become the best companies and makes the best companies continue to adapt and improve. That's why I think setting competition in the context of economic policy is really important and I hope helps the general debate we're about to have.

Our ambition in my department is prosperity for all, prosperity for everyone in the United Kingdom. We work to achieve this by helping people and companies become more productive by promoting enterprise, promoting innovation and promoting creativity. We champion business at home and abroad. We invest heavily in world class science and technologies. And we protect the rights of working people and consumers. Above all, we stand up for fair and open markets first in the UK, then in the rest of the European Union, and finally in the world through the World Trade Organization and other such mechanisms.

Nothing is more important, therefore, to us than effective regulation. We need effective regulation to improve our productivity, and productivity is the crucial factor in securing long-term growth in our living standards. Of course we need investments, of course we need skills, and certainly we need science and innovation and enterprise. But also we need competition, a firm, robust competitive legislative regime which works and which persuades everybody to obey it. I am here, obviously, in Japan to see what we in the UK can learn from what the Japanese government is doing to meet the economic challenges which I have expressed, and I think we both really welcome the opportunity to discuss with you whether you agree that the cornerstone of economic success has to be an emphasis on strong competition policy with strong and effective enforcement of that policy.

We think we have evidence that competition is vital in reducing costs for businesses and for consumers. Only competitive pressures—nothing else that the government can do, foreign governments or native governments—are the ones which most effectively bear down on firms and companies, demanding that they find more efficient ways of producing and delivering goods and services and making their products cheaper and more desirable. We know because we've tried other methods. We've tried state intervention. We've tried state subsidies. We've tried capping prices. I promise you, we've tried them all. None of these things work in making companies more efficient and more competitive. Only a legal framework of competition can produce the same sort of pressures on firms to bear down on their prices and produce better goods which

consumers want.

Competition is vital in rooting out the old practices which protect inefficient companies and prevent newer, nimbler and more innovative businesses entering the market. Why should we want to stop new, innovative businesses from entering the market? Just as much as the United Kingdom, Japan needs more, not fewer, innovative new businesses and there is absolutely no evidence that old, monopolistic businesses will produce the innovation which consumers demand and which Japan needs to have a successful economic policy in this century.

Ultimately, in our view and according to every piece of evidence I've seen, it is continually competitive markets, which can only be brought about by sustained and effective competition legislation, continually competitive markets are the only route to ensuring that business remains on its toes, keeps innovating, and maintains pressures to keep producing efficiently.

Competition is good for business, good for the economy and above all good for consumers. As we all know, within markets we can see the success of one business, or at least a small number of businesses, at being at the expense of all the others. What's wrong with that, if it has been achieved through fair competition? In many cases nothing. But in some cases it can lead to businesses abusing dominant positions. This is where the need for competition law comes in.

Yes, business is the wealth creator. Yes, business is the generator of quality products. But that's businesses in competition with each other. When businesses become dominant the pressures to improve, to innovate and to maintain cost and quality can fall away. Market power can be abused. Monopolies lead to companies restricting their output to drive up prices and increase their profits. All academic research that I have seen suggests that if we did not have our competition regime in the UK and if we did not make sure that it is not abused, this would cost the UK economy around one full percent of gross domestic product (GDP). That's just one measure of the importance of successful and successfully enforced competition policy.

Of course, we can also find anti-competitive policy and anti-competitive activity without single dominant firms. As is well known, cartels may form other anti-competitive practices. Cartels may form themselves and other anti-competitive

practices may prevail. And here again the consumer and then the economy are the first to suffer. Recent research by the OECD suggests that cartels in an economy can raise prices by an average of ten percent.

In 2001 the European Commission concluded that eight companies were guilty of operating a cartel around vitamins. They fixed prices for different vitamin products. They allocated quotas for sales and they agreed on and then implemented price increases. This activity by these eight companies and this one cartel kept prices for 12 different vitamins artificially high, by between 17% and 49%. So consumers in Europe overpaid for these vitamins by $72 million US for every year of the cartel, which in fact lasted from 1989 to 1999. The companies did well, the consumers suffered and what do we think about the quality of the economy in the European Commission area, in the EU area?

As you're about to hear in more detail, we in the UK introduced competition legislation, legislation through Parliament, which addressed this issue by making cartels a criminal offence. Cartels guilty of offending our legislation, if they were found guilty of dishonestly operating in hardcore cartels these people can face up to five years in jail. I ask you to think about that. The alternative, of course, was to make it not a criminal offense, which was the previous regime. And this resulted normally in financial penalties.

We are fairly clear, and it was clear from the response of some in our business sector, that the proposition of jail was more likely to discourage than the proposition of fines. Somehow financial penalties didn't seem quite as strong and persuasive as the prospect of five years in prison. We have a very progressive prison regime in the United Kingdom, but even so the prospect of five years enjoying its comforts seemed to be more likely to deter cartels than financial penalties.

Investigations by our competition authorities have revealed significant detriment to our consumers from a range of anti-competitive activities. Last year for example the Competition Commission, Christopher's outfit, estimated that excess pricing in something called the extended warranties market (warranties for when you buy goods) amounted to a detriment to consumers of nearly £150 million per year.

Take another example. Also last year mobile phone operators—a subject close to the

heart of many here I should think, judging by the number of people I have seen in the street using mobiles—were found to be overcharging us by up to 40%. Correcting this would benefit UK consumers by up to £700 million over four years.

Effective competition legislation ensures that competitive pressures are maintained, ensures that there is a level playing field for companies, that the small players can challenge the big players if they have the right products and skills. It ensures that the detriment to consumers is minimized. It won't achieve this by itself. Competition policy by itself cannot achieve all of these good results. It needs to be seen alongside the rest of our economic and consumer facing policies.

We asked Professor Stephen Davies, a leading UK academic on these issues, to look at some case studies of how enhanced competition can benefit consumers. Because it is very important for Parliament and our politicians to support legislation on these issues it's very important that we don't have a dry economic argument. I know our Chairman is an economics professor, but economic arguments by themselves don't always win political support. It is the support of consumers—we are all consumers; voters are consumers—that we need to win support, in addition to the necessary economic argument. I'm going to talk about two case studies of the sort which persuade UK consumers and UK voters and UK political parties that it's important to support competition legislation.

The first example is European passenger flights, by which I mean airplane flights within Europe. The European Commission, which is of course the EU competition authority for these purposes, liberalized air routes within the EU during the 1990s. Previously the market was dominated by the big "flag carrier" national airlines, among which is British Airways. And these were not subject to significant competition from other airlines. They had lower incentives to be efficient or to innovate than in a competitive market and they were usually subsidized explicitly or secretly by their governments, whose flags they were carrying.

As a result of this liberalization a number of new low cost carriers emerged, for example Easyjet and Ryanair. These new entrants operated a very different business model from that of the traditional scheduled carriers. Prices of all fares, and in particular of economy class fares, have fallen considerably since this liberalization. Most of these lower fares come from new low cost airlines. And interestingly the existing firms,

including British Airways, have now significantly reduced their prices. This was not a result of charity or of goodwill on behalf of British Airways. This was the result of a competition policy properly intimated by the competition regime.

Without liberalization low cost airlines would not have been able to grow to their current size, and equally it's of great importance that the new entrants brought with them a new business model. So we got not just lower fares, but also innovation in the business model which these new airlines adopted. As a result, traditional carriers have not only reduced their prices, they also have now decided to adopt a number of the new business practices associated with the new entrants to the market. So it's a win-win situation. The consumer benefits from lower prices and the existing virtual monopolies or subsidized, single, one country/one airline companies were forced and encouraged by the marketplace rather than by the government to introduce new and better practices.

The second example is perhaps of more interest to my children, replica football kits. I know the Japanese don't follow football, or I understand they do follow football rather, though not as much as my family.

Secondly, the pricing and availability of replica football kits in the UK this is a huge market. This market of football kits, which you can buy with your favorite club and give to your son, earns around £250 million every year. Football supporters are keen to have their team's latest kit, and as a result the clubs make sure that they change their kit frequently so that fans are encouraged to buy kits more often.

Under new legislation the Office of Fair Trading, another one of our competition bodies, was able to investigate complaints, and complaints came in this area. We found clear evidence of price fixing. All football clubs were charging a similar amount. They agreed on how frequently clubs would be able to change their kit and the price was fixed. Heavy fines were imposed on the companies concerned and after the investigation prices of replica football kits fell, in some cases by up to one-third. So parents looking for Christmas presents for their son could spend one-third less money on these expensive and unnecessary items.

This is the responsibility of my department and of Parliament. We have responsibility for competition legislation and we have just modernised our competition framework, as Christopher is about to explain. I make the point because although it's very important,

in fact extremely important, to have strong independent regulators it's also important that we have a government department and then Parliament, and a government, which understands the importance of competition effectiveness for overall economic policy. The two go hand in hand. We need independent regulators but we need legislation put through by government which supports effective regulation. Independent regulators by themselves are not sufficient. We need legislation which gives those regulators the backing and support that they need.

How effective are we? One difficulty in this area is that it's difficult to tell what proportion of your economic success is due to the competition legislation and what proportion is due to other things (for example, taxation, the amount of regulation not to do with competition, the level of wages, all of these other things which effect economic efficiency). But what we do in the UK is have a system of regular peer reviews where independent people compare the UK competition regime with regimes in a range of other countries. The most recent one of these surveys, which summarized the views of businesses, lawyers, economists and competition authorities in other countries, has just reported. It found that the UK competition regime was amongst the best in the world and that our recent changes, amongst which was the change which criminalized the cartel activity, have made our legislation viewed more favourably than before. So although it's too early to evaluate all of the effects of our legislation thoroughly the early signs are good and the peer reviews are very favourable.

This is not a dry academic issue. Competition is important for the whole of DTI's wider work in creating prosperity for all in the United Kingdom. A major part of this is raising productivity and closing the gap with our competitors. We see four key drivers of productivity: investment, innovation, skills and enterprise. There are of course many links between these drivers. We need enterprise or entrepreneurship to drive competition and innovation in markets. Competition drives innovation. Skills and investment drive innovation. Competition drives investment. So it's a virtual circle, and I think all productive economies in this century need to hit that circle and to learn from each other in how to improve all aspects of it.

Our recent academic study said, "To achieve higher prosperity, UK companies will need to update their productivity by competing on more unique and more innovative products and services". Innovation is one of the main engines of long-term economic growth for us, just as it is in Japan, just as we discussed this morning at the Science and

Technology Agency. We share that agenda precisely. I repeat: we cannot compete on low costs. We have to compete with the rest of the world on high value jobs and high value products, which can only be created by more innovation and more creativity.

There are two conflicting views on the potential impact of competition on innovation. One is that increasing competition means that firms' incentives to invest are reduced as they have less to gain from any innovation they make. The likes of Bill Gates, for example, have often been quoted as saying "anti-trust law discourages innovation." So we must keep off our companies. They will innovate by themselves, and if we allow them to compete or we allow too many players in the market companies are less likely to innovate. So argue some.

The other view, which I share, is that faced with increasing competition firms are under greater pressure to operate efficiently and attract consumers through lower prices, higher quality and unique new products. Competition is necessary to give firms that strong incentive to conduct research and development and to be innovative. That second view is the one I adopt, and I hope very much that this is a view that has some sympathizers here.

If you look at the evidence, recent academic work shows that where competition is initially at a low level and then increases we do see a significant increase in innovation. Only at very high levels of competition does an increase in competition appear to reduce innovation. In any assessment of the link between competition and innovation causality is very important. We would argue that increasing competition drives innovation as firms have a greater incentive to innovate to attract new consumers and improve efficiency. It is also possible that the reverse is true, but we are not persuaded.

In the UK under innovation we have a number of sectors that lead the world, including aerospace, pharmaceuticals, biotechnology and financial services. We are very good at generating ideas. Our mission is to turn these ideas into successful products, services and processes (wealth from knowledge).

Innovation depends on a range of factors apart from competition (for example, a firm's ability to turn knowledge into profitable goods and services, access to finance, sources of new technological knowledge, and the existence of demanding customers and suppliers). So I repeat: competition alone is not enough. To have an innovative economy

we need other factors, and it's that combination of factors which drives a true competitiveness.

We in the DTI, my department, work to achieve this in the United Kingdom in three main ways. First, as I hope you have heard, we are the champions of strong and effective competition and we legislate in our country to deliver just that. We work jointly with competition authorities in the UK to promote the competition message not only across government but also across the European Union. We work to ensure that regulation promotes rather than restricts competition. We work to ensure that the UK's competition regime is effective. And we empower consumers to help them make the markets work better.

We promote innovation by ensuring that intellectual property rights are clear and effective, by ensuring that regulation promotes and does not restrict innovation and we ensure that our own DTI business support should increase the impact of our interventions. And finally, we want to get business engaged and we want a business community which supports strong regulation and a strong regulatory framework and sees it as an ally of effective and competitive businesses rather than a threat. It'll be interesting to see whether you have that position here in this country as well.

I hope I have explained how we see a competition and legislation on competition as key to the United Kingdom's future economic performance. We have a world-class framework in place, but of course we leave it to the independent regulators to make it work. Thank you, Chairman.

Chairman [translated]: Thank you very much. Are there any questions from the floor regarding the presentation by Sir Young? Please identify yourself before you ask a question. Give your name and affiliation. Also time is limited so I hope that you'll be very succinct in asking questions. If you have any questions please raise your hand. Do you have any questions for Sir Robin? Yes? Please wait for the microphone.

Questioner A: Your presentation on criminalization of cartels is quite interesting. In the administration of the European Commission's competition law charging fines has been prevalent, but as you said the UK Enterprise Act introduced criminal sanctions in addition to administering a fine. My question is was there any opposition in introducing such criminal sanctions to the Enterprise Act? Thank you.

Sir Young: The answer is "yes." There was quite strong opposition. It came in two ways. The first argument was we don't have cartels in this country. There is no need for it. The system of fines we have is already effective in virtually abolishing cartels and anti-competitive activity of that sort. That was the first argument. You can guess our response. If there is none of it why would you mind having the offense criminalized? So the argument that the system of fines works so effectively works so well to drive out this undesirable activity is not, in my view, an overwhelming argument against the creation of a new criminal offense. Indeed, the more people kept on saying that the fines were working the more suspicious we became.

Secondly, it was argued that the complexity of the law in this area might mean that people disobeyed the law by mistake, and it was excessively harsh to put them in jail. Various examples were produced for us for people where there was genuine doubt about whether anti-competitive activity was taking place. To be fair, this was a more serious objection because we have to be very careful not to penalize entrepreneurial activity or to deter people from entrepreneurial activity which fell just on the wrong side of a line which was being drawn for the first time. But we took that to be a challenge to just put in place the right legislative framework and to put in place the right regulators with all the discretion and flexibility that our regulators have. So this second argument was, in our view, not a killing argument against the proposition to introduce a new criminal offense, but rather it was a warning that our regulators and our courts would have to be careful in distinguishing between deliberate and accidental breaking of the law.

The opposition eventually fell quiet, partly because in the end the government put the critics in the position of seeming to be supporting cartel activity and most of these critics (which came from the business community) did not want to be seen as supporters of cartel activity. So in the political debate in the United Kingdom that happened. The government rather carefully positioned itself as being in favor of the consumer and in favor of legitimate business and the critics found themselves in a position as if they were seeming to be soft on cartels. That was how the debate went in our country, and I shall be interested to see how it goes in other countries looking at these matters.

Chairman [translated]: I would like to thank Sir Robin very much.

Now, let us go on to the second presentation for today. Just like before, I'd like to briefly introduce to you Mr. Clarke. Mr. Clarke graduated from Cambridge University in 1967 and at London Business School obtained an MBA in 1972. From 2004 he has been serving as the Deputy Chairman of the Competition Commission. He has been with this Commission since 2001 as a member. He has wide-ranging international experience, and so he will be giving his presentation based on the background of his experience. Mr. Clarke, the Deputy Chairman of the Commission, will give a speech. Mr. Clarke, please.

Mr. Clarke's speech

A. Introduction

Sir Robin Young has explained that competition policy is key to the UK Government's objective of promoting a strong, competitive economy. Competitive firms provide the consumer with lower prices and a greater choice of goods and services. In turn, an internationally competitive economy leads to economic growth and prosperity.

Competition policy is enshrined in a comprehensive legal framework both in the UK and in the wider European Union. This is where I will begin this afternoon. I will then explain the institutional structure through which policies are implemented, focusing, in particular, on the Competition Commission and how changes in legislation have affected us in practice. I will finish with some remarks about the future.

I hope that some of what I have to say may be relevant to the competition issues now being debated here in Japan.

B. Legal framework in UK and European Community

UK

In the recent past, the UK Government has overhauled competition law which is now contained, for the most part, in two statutes:

(i) The Competition Act 1998; and
(ii) The Enterprise Act 2002

The Competition Act

The Competition Act prohibits agreements, business practices and behaviour that have, or are intended to have, a damaging effect on competition in the UK. Businesses that breach the Act can be fined. There are two different prohibitions. The first is the Chapter I prohibition covering anti-competitive agreements which have an appreciable effect on competition. This includes collusion by competitors on customers, markets, prices or output. The second is the Chapter II prohibition which prevents businesses

that are dominant in a market from abusing that position through activities such as predatory or discriminatory pricing. In essence, these mirror the provisions of Articles 81 and 82 in the EU legislation.

Enforcement of the Competition Act employs, in English parlance, both a carrot and a stick. The stick is substantial fines for anti-competitive behaviour as well as exposure to possible claims for damages from those who have been harmed by the behaviour. The level of fines is designed to persuade potential offenders that the expected cost of engaging in such behaviour makes it uneconomic. Fines of up to 10 per cent of a company's UK turnover for three years can be imposed. The carrot, in contrast, is a leniency policy which provides for whistleblowers who co-operate with the competition authorities to have their fines reduced by as much as 100 per cent. To date, the largest fine has been £17.3 million levied on Argos in a toy and games price fixing case in which Littlewoods was fined £5.3 million and Hasbro £15.6 million. However, in consideration for providing crucial evidence, Hasbro's fine was reduced to nothing. In another case, fines of £18.6 million were levied on ten companies for fixing the price of Manchester United and other replica football shirts. Three parties received leniency, one in full and the others in part. Overall, the use of the carrot and the stick seems to be working well, as it is in the EU more broadly. The same approach is similarly favoured in the US.

The Enterprise Act

After only four years, the UK government decided a bigger stick and still tougher powers of investigation were needed and these came into force in 2003 with the implementation of the Enterprise Act.

The additional measures to combat anti-competitive behaviour set out in the Enterprise Act include:

(i) first, a criminal cartel offence carrying a sentence of up to five years imprisonment and/or an unlimited fine; it is directed at individuals and operates alongside the Competition Act's civil law procedures against companies involved in cartel agreements;

(ii) second, disqualification of company directors for breach of UK or EU competition law; and

(iii) third, increased powers to investigate anti-competitive behaviour, such as the power to compel persons to provide evidence, and to enter private premises to seek evidence; again, these are in addition to existing powers under the Competition Act.

I have so far looked only at ***anti***-competitive behaviour which is an important topic for this seminar. I now want to turn to the equally important area of ***un***-competitive behaviour which, as I explain later, is the principal domain of the Competition Commission. (I recognise that the distinction between anti-competitive and un-competitive behaviour may be too simplistic but I hope it may be helpful for our purposes this afternoon.) By the term 'un-competitive behaviour', I am referring to conduct of firms which, although not illegal, still results in the market not being competitive and, therefore, being detrimental to consumers. This may occur as a result of single firms merging. Alternatively, it may result from the features, or a combination of features, of a market in the UK preventing, restricting or distorting competition in connection with the supply of goods or services.

The Enterprise Act introduced important changes to the powers and procedures for investigating potentially uncompetitive situations. It also established a mechanism for appeals to a specialist competition court for parties affected by merger and market investigations. I will return later to the respective roles and responsibilities of the different competition authorities. First, however, I want to place UK competition law in the wider context of European Union law.

European Union (EU)

The UK competition authorities operate within the confines of the European Union where, as in the UK, there have been important changes to competition law and policy. The most recent changes were introduced in May of this year and coincided with the enlargement of the number of member states from 15 to 25. The changes include:

(i) the Modernisation Regulation which decentralised the application of European competition law; and
(ii) reform of the EC Merger Regulation.

Article 81 and Article 82 which, as I mentioned earlier, prohibit respectively

anti-competitive agreements and abuse of market dominance, will now be enforced in an entirely different framework. National competition authorities and national courts are expected to become much more involved in enforcement of these rules. Also, individual companies have to assume much greater self discipline to ensure that they do not breach EU competition law as they will no longer be able to notify agreements to the European Commission for exemption.

A particular aim of these changes is to enable the European Commission to concentrate resources on the most serious breaches of competition law, such as pan-European cartels, and other serious damaging abuses of market power.

Reform of the EC Merger Regulation has included a change to the substantive test; this is now one of whether a merger ***'significantly impedes effective competition'*** and falls somewhere between the EU dominance standard and the substantial lessening of competition (SLC) test used in the UK, US and certain other jurisdictions.

C. Institutional Framework

Overall policy for competition and consumer issues in the UK is the responsibility of the DTI which works closely with HM Treasury. The DTI is also responsible for European Union and other international relationships.

Implementation of competition policy is entrusted to three principal organisations:

(i) the Office of Fair Trading;
(ii) the Competition Commission; and
(iii) the Competition Appeals Tribunal.

In addition, the regulators responsible for specific sectors such as electricity, gas, water and railways, have a role to play in promoting competition within their sectors. These regulators also have competition powers concurrent with those of the OFT to apply the provisions of the Competition Act and to make market references to the Commission.

Office of Fair Trading (OFT)

The OFT is an independent competition and consumer authority with a broad range of responsibilities to make markets work well for consumers. These include enforcing

the legislation against anti-competitive behaviour as well as implementing the first phase of the UK mergers and markets regime. If the OFT's initial investigation finds a potential competition problem in its initial merger investigation, it must refer it to the Commission for a phase II investigation. If the OFT identifies competition concerns in its assessment of a market, it may refer the market to the CC for in depth investigation.

The OFT also has important responsibilities for protecting consumer interests which I will not cover this afternoon.

Competition Commission (CC)

The Competition Commission is a statutory body, independent of Government. It is responsible for in-depth phase II inquiries into mergers and markets referred to us by other competition authorities, usually the OFT. Market investigations focus on the function of a market as a whole rather than the conduct of a single firm in the market. The question that the Commission must answer is whether any feature, or combination of features, of a relevant market, prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or some part of it.

A particular aspect of the UK market regime is that the Commission can impose remedies to mitigate or prevent the adverse effect on competition concerned or any detrimental effect on customers. The Commission is also the appeal body for certain regulated industries, such as utilities and transport, against some decisions by their sectoral regulators.

I shall cover our activities in more detail in a moment.

Competition Appeals Tribunal (CAT)

The Competition Appeals Tribunal (CAT) is a specialist competition court which was established under the Competition Act in 1998. The CAT can review, on application from main and third parties with sufficient interest, the decisions of the Competition Commission, the Secretary of State or the OFT in merger and market investigations. It is also able to hear actions for damages and other monetary claims under the Competition Act and appeals against certain economic regulatory issues. The Enterprise Act requires that on an application for judicial review, the CAT should follow the same

principles as a court. This means that the CAT cannot substitute its own decisions on the merits of the case, but can review the reasonableness, lawfulness and fairness of the relevant decisions and if necessary, require them to be reconsidered by the OFT, Competition Commission or Secretary of State. Decisions of the CAT can be appealed on points of law to the Court of Appeal.

To date, the CAT's principal function has been appeals on Chapter I and Chapter II cases. There has been one appeal on a merger against a referral decision by the OFT.

For the remainder of this paper, I will concentrate on my own organisation, the Competition Commission.

D. Impact of legislative changes on Competition Commission

The recent legislative changes have had a significant impact on our work at the Competition Commission. Let me outline the impact of these changes under three main headings: our powers, our procedures, and our people.

Our Powers

Government wished to take politics out of merger control and Ministers are no longer responsible, or even involved, in the vast majority of merger and market cases. Previously, the Secretary of State was involved in referrals, in ultimate decisions, and in remedies, where these were imposed. Now, Ministers are only involved in very limited so-called 'public interest gateways', currently limited to national security and media mergers. Consequently, the Commission is now determinative in deciding the outcome of almost all merger and market investigations; we also determine and implement appropriate remedies.

The test against which both merger and markets cases are evaluated by the Commission is now strictly one of competition; a ***substantial lessening of competition*** in the case of mergers and an ***adverse effect on competition*** in the case of market inquiries. Previously, the test was one of the 'public interest' and while, over the years, this had come to be interpreted very largely in terms of the effects on competition, it was broader and less clear-cut than the new tests. The more precise terms of these new tests will help to provide greater clarity on the outcome of an inquiry and greater consistency in

the way in which decisions are made.

The Commission's power to collect evidence has been enhanced by the authority to impose penalties on parties if they fail to provide it.

Our Procedures

The new legislation requires us to consult parties on proposed decisions and to give our reasons behind these decisions, before a final decision is taken. Together with other factors, this led the Commission to undertake a thorough review and revision of our procedures to make them more open and transparent.

The first outputs of this process were a set of published Rules of Procedure and Guidelines. The Rules of Procedure, which are binding on the Commission, supplement the statutory provisions, and require, for example, the publication of an administrative timetable for each inquiry and of 'provisional findings'. The Guidelines describe the process and time scales of an investigation, identifying the critical stages and the Commission's planned output at each stage. These ***procedural* guidelines** are accompanied by a set of ***economic* guidelines** which describe how we address the various economic issues that might arise in an investigation – how we define markets, identify co-ordinated effects, assess competitiveness, interpret profitability data and so on. The overall objective of both sets of guideline is to ensure that everyone affected by any inquiry understands the process they are involved in; what the Commission is doing; why and how we are doing it; and what is expected of each of them. In addition, our timetables for each stage of the inquiry are clearly enunciated at the outset.

The Guidelines also set out the basis on which a Group of Members is appointed to conduct an inquiry. Groups typically comprise four Members and a Chair. Significantly, once established, it is the Group rather than the Commission itself which takes responsibility for decisions throughout an inquiry.

Evidence is gathered through written submissions and questionnaires, independent market surveys, economic and other reports and through oral hearings. We make public much of the evidence that we receive by posting it on our website, with suitable excisions to protect confidentiality.

We now also produce what we call "working papers" which pull together the facts of the case as the Group conducting the inquiry understands them. These working papers also identify and explore the various issues of potential concern. Wherever possible, we provide them to the parties, partly to check on factual accuracy but more importantly, to expose the Commission's thinking and to give the parties time and scope to engage in constructive debate. We use some of our oral hearings in the same way.

At around six weeks into a merger inquiry, we publish a statement of the key issues we have identified and invite views. More important is that at around week 14 or 15, which is about two-thirds of the way through an investigation, we publish the conclusions we have reached at that stage in what are known as "provisional findings". We follow an almost identical process in market investigations though the timescales are rather longer. The publication of provisional findings also marks the switch of the emphasis of the inquiry from reaching a decision on whether there is a substantial lessening of competition to how best to remedy the situation. Once again, the Commission consults the parties on a draft remedies statement before reaching final decisions.

Our new procedures have brought a number of significant advantages in terms of remedies. First, parties are more likely to discuss remedies constructively if they understand the concerns of the Commission; these are now clearly set out in our provisional findings. Second, by encouraging the active participation of the parties, the Commission benefits from their practical experience of the market in which they operate and thereby understand what might, or might not, be workable. Third, having responsibility for determining remedies has brought greater focus to our analysis of adverse effects earlier in the inquiry. Finally, the time taken to determine remedies is now much shorter; previously we had to pass our findings back to the OFT and inevitably, it took time for them to become familiar with the circumstances of the case.

The legislation also introduced changes to our timetables. The statutory deadline for merger inquiries is now 24 weeks although, in most cases, at the outset we aim to complete the reference in a shorter time. An extension of up to eight weeks is available in special circumstances but we try to avoid taking this extra time. In market investigations, the statute grants a maximum of two years but once again, we aim to complete an inquiry well within this limit. The timing for regulatory inquiries varies

according to the particular case in hand and can vary from 12 weeks on certain appeals to as much as 12 months.

Many of these procedural changes have been designed to increase the Commission's transparency of decision making. Although transparency helps ensure that the parties have a fair opportunity to address our specific concerns, and this in turn allows them to deploy their resources more efficiently, it is not without some element of additional cost as well as additional pressures on an already tight timetable. On balance, however, there is certainly a net benefit over previous arrangements.

Our People

The marked increase in our independence and our responsibilities has inevitably had a significant impact on the Commission's people and our culture. The exercise of our new powers and implementation of our more transparent procedures has led to a need for more people and an enhanced skills base. We have recruited more professional staff, many of whom have come from the private sector. Our new responsibility to design and implement remedies has led to the establishment of a specialised staff team dedicated to work in that area. We are also placing greater emphasis on staff and Member training and development. The Commission is also currently looking to appoint new Members with skills and experience which match the Commission's increased responsibilities.

All of this has had a subtle but pervasive impact on the culture of the organization, and on how well it works. We have ceased seeing the Commission as an extension of the civil service and instead, have begun to benchmark ourselves against leading competition authorities around the world. We have become more active in liaising with those authorities and with other organisations in the UK and internationally. We are sharing our expertise at the international level by participating in organisations such as the International Competition Network (ICN), with which we are currently working, alongside others, on a study of remedies on mergers.

E. Future challenges

It will be clear, I hope, that the Commission has undergone significant change over a short period of time. Events, however, do not stand still, and we face a number of new

challenges. Before I finish, let me identify some of them.

The changes to European competition law that were introduced with the Modernisation Regulation have placed a significant onus on national competition authorities to apply European competition law in a consistent manner. It is still too early to see the full extent of the impact on national authorities, such as ourselves. Over time, however, they will certainly have a marked impact on our procedures and our people.

It is a little easier to surmise that inevitably, we will be affected by the rights of parties to appeal to the Competition Appeals Tribunal. The OFT has so far experienced only one appeal to the CAT from a third party that challenged its decision not to refer a case to the Commission for further investigation. As yet, none of the nine decisions taken to date by the Commission under the Enterprise Act has been reviewed by the CAT, but this state of affairs is unlikely to persist for long and we must expect that in due course our decisions will be challenged. When this happens, whatever the outcome of a particular appeal, we are confident that our commitment to transparency and to due process will stand us in good stead.

Another expectation is that over the next 12 months, following the introduction of new legislation in the energy and telecommunications sectors, we will receive a number of appeals which will differ in substance and process from our normal investigative work and will have to be completed in much shorter timescales.

So let me conclude. The UK competition regime has been substantially reformed and strengthened. The competition authorities have been granted considerable powers to enforce and promote competition. For those of us at the Competition Commission, our increased independence and responsibilities have come hand in hand with the need for greater transparency in our decision making and for constant development of our skills and expertise. There will be no shortage of challenges to come but I am confident that we will continue to play our part in evolving a competition system which deters anti- and un-competitive practices; protects the reasonable rights of companies and consumers; and overall, contributes to a stronger economy.
Thank you.

Chairman [translated]: Thank you very much, Mr. Clarke. Without any ado, I'd like to open the floor for questions.

Questioner B [translated]: In the UK you have a competition law, and there is a competition law in the EU as well, and both of them have become much more compatible and consistent. The first question is particularly talking about third countries like Japan who are not EU members, and if those country's businesses operate in the UK depending on the conduct maybe the conduct will be covered by both the UK competition law and the EU competition law at the same. We are talking about cases of violation of the law. Would that be the case?

Also, there is an article 81, paragraph 3 for the Rome Treaty, which is going to be determined by the ECJ (European Court of Justice). How would the decision be coordinated with the decision to be made by the European Commission, if the ECJ comes up with a ruling on this?

And also the third point, with regard to the violation of competition law in the case of the UK the penalty will be imposed upon the individuals as well. In that case, there is the Treaty of Rome. If the violation is made then the same penalty will be imposed as well, like in the case of UK domestic law?

And my fourth point, has there been any case for the actual application of the penalty yet or not?

Going on further I have a fifth question, departing from the main line of the topic. Previously, with regard to the extraterritorial application of the law I think the UK government has been rather negative on that. But what do you think about the extraterritorial application of UK law? Right now what is the position of the British administration? Thank you.

Mr. Clarke: First of all, I'm not a lawyer and my first advice to anybody who gets a question like this is, "Seek good legal advice." I can't really answer those questions in terms of the specifics, but there is very close liaison between London and Brussels in terms of who handles what particular cases. It will never be a situation where the two authorities are looking at the same case. One purpose of the modernization regulations is to bring the jurisdictions closer together, and as I said in my talk that will almost certainly result in certain things which would have happened in Brussels now being conducted in London.

Getting closer to I think it was your first if not the second question, I think the pointers will depend entirely on first of all the size of the transaction—you haven't described exactly what it is, but of the situation, let me call it that—and secondly where in geographical terms the activities are alleged to be taking place. I'm not sure I can be much more specific about that. I think I would just finish by saying that I don't think there are the same concerns now over split jurisdiction as there were even three or four years ago. There is a much greater unity of thought. I'm not saying there can't be kind of turf struggles on particular cases from time to time, but there is enormous cooperation between the different authorities and that has increased substantially since May of this year. Sir Robin may want to add to that.

Chairman: Thank you. Would you like to add something?

Sir Young: Only very briefly. We in the DTI and in the rest of the UK government have been very keen indeed on behalf of, really, business to ensure that we reduce as far as possible the risk of repetition, duplication and overlap. So unless the questioner has a particular example in mind, we think that by administrative agreement, just as Christopher has explained, we have avoided those risks. The competition authorities in individual member states and those in Brussels are working very, very closely on behalf of businesses. We have undertaken to do this to business, business both EU and international, to avoid the risks of duplication. Of course they exist in principle but in practice by working together we can avoid duplication and insure a consistent, fair and transparent application of competition law to all businesses operating in Europe, be they from abroad or within the EU. The same issues arise whether it's a Japanese company working in the UK as for any other multinational or, indeed, a UK company operating elsewhere in Europe. There's no distinction there.

Mr. Clarke: There was the other question, has there been a case?

Sir Young: There have been no cases up until now using our new powers. So our jails are still empty.

Questioner C [translated]: We are businessmen, so when we conduct operations and activities of companies—I can name one example, Microsoft. In the United States there was a decision rendered, and also another decision was rendered in the EU and another

one rendered in Japan. It was judged by illegality. However, the reasoning behind the rending of the same decision might be slightly different, and many people have pointed out that fact. And also in May this year the EU has been enlarged to cover 25 member countries. Looking at the activities of each member country I see that under the EU law the smooth start has been marked. However, there is an anti-trust act in the United States which provides for a leniency program, and in Japan a similar leniency program is likely to be introduced as well so that maybe EU registration would also incorporate more US anti-trust related provisions and clauses.

Yet, I think you have a slightly different standing in terms of the competition law between the EU and the United States. But each business is operating in different parts of the world at the same time, and we are always making sure that we will not violate any of the local competition laws. So we are being very careful. But on the other hand the cost associated with it can run pretty high. That's what we are afraid of. You talked about the international competition network. It may be that something like a global competition law will come up in the future. Do you think that will be the case or not? What about the possibility of having a global competition law? That would make the life of international companies easier, perhaps. That's my view. Do you have any reaction to or observation on this, please?

Sir Young: I'll go first and we'll see if Christopher wants to add anything. I don't think I can properly comment on the Microsoft judgments and I don't really want to be tempted into commenting on the USA legislation. I have every sympathy with multinational companies, who have to struggle with differing competition regimes in different continents. Being more positive, however, I think we can promise you (and you have heard us both do so) consistent and transparent and non-duplicatory response from the EU competition regulatory authorities, and I think we all deliver that. I know it's hard for multinational firms but I think at least within Europe we will deliver that.

Now as to whether we should expand a little and take in the world, let's say you believe us and say we have won in Europe (though I sense some skepticism in your question about some or all of the new member states in Europe). But let's say you believe us and say we have an open, fair, transparent and effective system in Europe. Should we go just one little step further and take in the rest of the world? In part we did start discussing some aspects of that question within the World Trade Organization as we tried to implement the DOHA development round, most recently in Cancun and after that in

Geneva. But as you and others will have spotted it's not straightforward to get agreement at a global level about virtually any aspect of trade, including in particular, I should think, if we tried to put on a global basis this aspect of competition.

What I do think will happen (and this is a prediction rather than a promise) is that the main competition regulators will more and more talk to each other and try and help multinational companies through these legislative hoops. Certainly in our case the British competition regulators have been very active in talking with the United States as well as talking to the EU, and I know they'd be very happy (as Christopher's presence here demonstrates) to talk with the Japanese regulators. So I think what we need is rather than a global regulation is an encouragement of the separate regulators to talk to each other on behalf of multinational business to reduce the costs and to get the fairness and the outcome for the consumers that we all need without excessive costs and confusion on the multinational businesses.

Mr. Clarke: I think I'll just add two things, neither of which is going to help you a great deal but I'm still going to make the points, if I may. I hope the very fact that Sir Robin and I are here today is evidence of our wish to share views and experience, and we genuinely believe that's very important. The second thing is, you know better than I do how much debate is taking place here in Japan on what the right rate should be in terms of the surcharges. I've been asked I think five or six times today for my views on that point, to which my answer is I'm not sure I can give a view on that nor should I. All I can do is to share our experiences and put it in the wider context. I don't believe it's practical to think in terms of a single system, one size fits all. Indeed, I suspect there's a certain strength in diversity, but only so long as we go on listening to each other and sharing the experiences. I'm quite sure that, given the amount of change that we've been through in the last 3, 4, 5 years, we're bound to go through a lot more in the next 3, 4, 5 years, and I hope that between us we'll share and benefit from some of those experiences. That doesn't help you in terms of the specifics.

Chairman [translated]: Well, thank you very much. I know there are so many questions that people wanted to ask you, but at the very end, after the panel, we can come back to you once again for having you ask some more questions. But let us thank wholeheartedly the two speakers for their wonderful contribution.

Professor Suzumura's comments and Q&A session

Chairman [translated]: Ladies and gentlemen, we ought to go into the second act. We would like to have a panel discussion now. That's a continuing discussion based on the presentations just received. Maybe just to kick of the panel I can serve a further function than just being a mere timekeeper. Let me try to take a few minutes to try give some food for thought for the discussion.

I have found the two keynote speeches to be very interesting. The first speech touched upon many things, and I think several impressionistic expressions have been used. I think it was a very stimulating speech over a short period of time. The points of emphasis were that in order to promote industries and businesses many alternatives have been tried, like regulations and subsidies and so forth, but he came to the conclusion that a competition policy would be the only way. A great deal of trust is placed upon the competition, and in order to have a well-function competition rules have been established. There was a firm determination behind the UK's work toward formulating an appropriate regime for competition. I was able to perceive a great determination for bringing about the most appropriate competition regime in the UK, which had impressed me a great deal, and at the same time I felt sympathy for the directions taken by the UK.

Secondly, there was a basic notion concerning the policy of the DTI. The prosperity for all is what is being aimed at. I have sympathy for this viewpoint, too. Also, at the same time we need to think about the competition and its mechanism. Where can we find the interface between the two? Maybe we could have used further elaboration on this point. There is a competition mechanism on one hand. Within a given competitive arena there are winners and losers created as a result of that process. In a round of competition it's inevitable that some losers will be produced. If you look at each individual competition round it doesn't mean that prosperity for all can be accomplished because there is an inevitable direction that there are losers and winners, and sometimes the losers are taken over by winners and so forth. But of course we have to look into the future. The competition game is not a single round game. It is repeated. In every round of the competition, depending on their efforts losers can turn into winners during the next round of the competition. And for that we have to provide good rules for the game. Maybe that is the intention. There is a fairness distributed throughout the time frame, and to do that rules will be needed and also we have to give another opportunity for the

losers to become winners during the next round of the competition. That is the larger framework of the economic mechanism.

So when we talk about competition, in a sense it is a very severe and harsh mechanism. But competition is repeated so that the probability of success will be distributed fairly amongst the participants, and that is a job to be undertaken by competition policy. That's how I interpreted Sir Robin's presentation.

Now let us go on to my third point. There are certain things which impressed me immensely. You talked about the UK competition regime, which was judged as amongst the best in the world. Very proud remarks have been made for the UK situation because it's highly rated in the world. Looking at the Japanese competition regime, we are in the process of revision. Presently we are not proud enough to be able to claim the same thing for the Japanese regime. For myself, I hope that in the near future we will also be as proud as our UK counterparts in saying that our competition regime is as good as any in the world, but the time has not come yet for us to be able to declare that.

In the UK it is often said that the proof of the pudding is in the eating, so that competition regime per se is not the only issue. We have to look into how it is actually being executed and implemented; otherwise no proof can be produced. That leads me to make a comment about the second presentation, which was given by Mr. Clarke. I'd like to cite expressions given in a speech, and you used the words "carrot and stick". The carrot is the leniency program and the stick is the administrative fine on the one hand, and on the other the criminalization of the cartel. The Japanese regime has been a stick without a carrot. In order to have a well-functioning regime we need a balanced approach inclusive of the introduction of a leniency program, and preparation is underway now in Japan. That is one of the pillars for revising our competition regime at this time in Japan.

I have one more point which is relevant to Japan, talking about the stick side. As was mentioned before, Mr. Clarke said in his talk that administrative fines and criminalization are included in the stick. In the case of Japan, in a sense we have both of them in Japan already, but the problem is the balancing of the two. Particularly in terms of the administrative fines, maybe you have already repeated this six times today, we are talking about the percentage of the surcharge to be imposed and so forth. But we need to

look at the overall situation of the regime per se rather than looking at the specific percentages involved for the surcharge here in Japan.

We have a surcharge system in Japan, but we have to think about its origin. The Japanese surcharge system is something like "things which are changeable according to who beholds it." Maybe you can look at a creature which looks like a dog to you, but at the same time it can look like baby bird to you and so forth. It's just a type of mystery. It has been said that the system was to take the unfair profit from an anticompetitive conduct away. So this is the administrative sanction. But along with its strengthening, its penal character increased. The positioning of the surcharge is being looked at in such a way that the people do not know how they need to position this within the normal framework. Double jeopardy is ruled out in the Japanese constitution, but I have a question about the carrot and stick, which needs to be balanced. I know that a balanced approach is a must in the expert's eye. Within the sticks there are two different measures here. How could one positively evaluate having two sticks available at the same time, administrative fine and criminalization? How can the compatibility between the two be assured?

I would welcome any reaction or observation on this. This is the problem that we need to solve for ourselves, and we hope that by the time that we finish this work we will be able to claim for ourselves that our regime is one of the best in the world. So I hope I'm not imposing anything on you, but I look forward to receiving your observations and reactions and any additional comments, as well. So I would like to Sir Robin and Mr. Clarke, both of you, to make a comment as well as additional remarks. Sir Robin first, please.

Sir Young: Thank you, Chairman. You've raised some very interesting points there. First, I'm grateful for your general sympathy with the policy stance that we are adopting in the UK. I repeat: I think it really is important that we are agreed on that first point, because once we agree that well-formulated and well-implemented competition regimes are necessary then that's a very important first step for us to take. Once we have that step the rest becomes, in a way, simpler. It's only when we have discussions, which we often have both within the UK and among other trading partners, which disagree really about the fundamental importance of transparent economic competition regulation that the argument becomes complicated. Once we agree that competition is a better way than

subsidy or all the other things that the UK has tried and failed on I think we have the beginnings of a consensus.

I think I should clarify a bit about winners and losers. We argue that effective regulation is necessary to achieve prosperity for all because we say that our economic policy is fundamentally based on open competition. This doesn't mean that there aren't loosing businesses, in particular competition disagreements. For example, in the one that I quoted on European passenger flights, it is obvious that all the flag carriers, the individual national airlines, were in one sense losers when the European Commission rightly said that the market had to be liberalized. But Europe was the winner. The European consumer was the winner. And I would argue that for example British Airways (just to be clear that I'm not being blind and pro-British) needed to loose that battle in order to be forced to modernize and innovate, because as a result of loosing that battle they immediately had to cut their prices by one-third for UK passengers and they had to adopt new business practices. I would argue they are both losers and then eventually winners, from the point of view of British Airways, but the consumer (namely the person who buys the tickets) is an immediate winner. Of course there can be casualties along the way, but the achievement of fairer and lower prices is worth the fight.

A final point from me, on this issue of best in the world, I assure you we think there's plenty of room for more countries joining us with that title as long as you are happy with equal best in the world and don't insist on overtaking us into first place. I would say that there are three very important factors which made the peer reviewers assess the UK so favorably. I'm not sure, since I don't know enough, whether you think your regime here equals this. The first is independence from government. We do have a clear split. The legislative framework is put through Parliament by the government and by my department, but after that there is no role for government at all. It is all carried out by the independent regulators, of whom this is one. I'm not clear (and it's my own ignorance, really) whether your regulators here are involved in the policy-making in the first place and/or whether the government is indeed completely separate from the decisions of your regulators after that. I have no idea whether those tests are passed in this country, but they were certainly important. Independence is a very important reason for the high assessment of us by the international body.

Secondly, the transparency of the operation. You heard Christopher set out how at all cases now when the Competition Commission carries out its work first it says what the case is about. It explains early on what the issues are and it consults the applicants and the objectors about its emerging conclusions. That is a new piece of process for us. It was very favorably assessed by the international bodies and it's not easy to do. Not many regulators achieve that. And the third, which I don't need to dwell on, is effective delivery, which does take us into the sticks and carrot—which was your term, Christopher, so perhaps you ought to pick up the questions about that.

Mr. Clarke: Thank you. In no particular order, first of all I'm very struck in the few days I've been here by how much emphasis in the whole discussion there is on anti-competitive behavior and on cartels. As I hope that I showed in my presentation that is only one part of the way we look at competition policy and implementation of that policy. I'll come back to that.

If I turn to discussion of winners and losers I think it's very important to consider what is the baseline. We're not talking about two teams that go on the pitch, where you've got a level playing field. We're talking about situations where the playing field is not level. Our whole emphasis when we look at an uncompetitive situation in either a merger inquiry or in a market as a whole is to look at the position against the position. We compare the actual as we see it based on the evidence that we receive and that we seek out. We compare that against what we assess as being the situation which would prevail in a fully competitive market.

In the two cases that Sir Robin cited of excess profits, first of all in the extended warranties case on domestic electrical goods (and I was one of the five members on that case) the excess profits of £150 million were excess over the base that we concluded would have been able to be earned by the companies in a market where there was full competition. We didn't then add something to penalize them below that baseline. In fact, rather the reverse. In coming to our number of £150 we gave significant leeway to allow for, if you like, additional uncertainties and risks. That was similarly the case in the mobile phone inquiry. The £700 million was over and above the baseline of the estimate in a fully competitive market. The remedies were trying to get the playing felid level again, not to kind of tip it the other way. I think it's very important to see, certainly, the uncompetitive market situations and merger situations in that light.

The next point I want to refer to is double jeopardy. I think it's very important to appreciate that in the UK there is not double jeopardy. The Competition Act is concerned with companies and levying fines against companies. The Enterprise Act extended it into the position of individuals and it's only in respect to individuals (as I understand it) that the criminal element comes into the equation. Obviously, to the extent that the individuals work for the company there is a link, but I think there's also a clear distinction.

Two other things: inciting the numbers, up to 10%, up to three years of turnover, the fines in the UK, those are the maximum. And in deciding what the actual penalty should be the authorities are required to take into account the facts of the particular case. We have a very important principle in the UK (which goes much wider than the UK, but is certainly in the UK) of proportionality. No authority is able to impose a penalty which is disproportionate.

I talked about remedies. In the case of the Competition Commission it is specifically written into our guidelines that if we concluded that there is an adverse effect on competition or a substantial lessening of competition the remedies which we then design and implement, hopefully willingly but sometimes we may have to impose them, have to be proportionate to the competition problem that we've identified. They also have to be the least cost and least intrusive remedies, because usually there is a kind of choice of remedies. There's a spectrum. And if either we or another authority is thought to be acting disproportionately then that's when the appeals procedure comes into play. I can't stress too strongly how important that appeals procedure is. That is the safeguard. That was brought in, having given the OFT and the Competition Commission a great deal more independence. To make sure that those two parties acted reasonably and fairly the appeals process was introduced.

Finally, really to reiterate something that Sir Robin has already said, we do not see our system in any sense, whether it's to do with cartels or mergers or markets, as something which is negative. It is not a tax on the system. We see it quite the other way. We see a system which is pro-enterprise, pro-development, pro-growth, pro-change and I think seen that way it looks rather different.

Chairman: Well, thank you very much. I quite liked the last observation, which emphasized the positive side of competition policy, and here again we share quite a lot. Thank you very much.

Chairman [translated]: Well, ladies and gentlemen, we just had our first round. Let's have a second round of discussion with the floor. Anything can be raised about anything which has been brought up already today.

Questioner D [translated]: Mr. Clarke, can I ask you two questions? The first question is in your Competition Committee you have said that econometric analysis has been given, but to what extent are those analytical results used in making a decision? Can you give me a recent case example? One more has to do with the role of CAT, the Competition Appeals Tribunal. I'm sort of asking you a fundamental question, but is the CAT a judicial court or part of an administrative agency? What is the standing of the CAT? And also the judges working for the CAT, a judge who makes decisions at the CAT, what is the qualification standard for that judge? Does that person have to be a qualified judge for a court or anything like that? Thank you.

Mr. Clarke: Let me take the second one first. The CAT has the status of a court and it's on the same level as the High Court. Technically I think it's actually a tribunal. But as I said, it has the status of the High Court, and that's exemplified by the appeal against decisions by the CAT go not to the first level in the High Court but to the Court of Appeal. The president, let's say the head of the CAT, is Sir Christopher Bellamy, who is was a very distinguished judge in the Court of First Instance in Brussels, very highly regarded, and came back from Brussels to take on this important new role. It's the first time we've had a specialized court for competition. Actually over lunch I was asked whether it is unique, and I don't know whether it's unique but I think it's rather unusual. I know a lot of people are watching carefully to see how it operates. Sir Christopher Bellamy himself is highly qualified and highly experienced. Well, it's not for me to say but I suspect if he was not there he would be in the High Court per se.

The other appointments are two-fold. First of all I think (Sir Robin will correct me if I'm wrong) they're made by the Secretary of State. One group is known as Chairmen, and I think the Chairmen who have been appointed so far are all High Court judges. Then in addition the second group is people who are more similar, perhaps, in terms of mix of background to the Competition Commission. So they're not all lawyers. They

either have an accountancy background, a business background, et cetera. They are there to help the court to understand the non-legal aspects or those which are not purely legal. I hope that covers the CAT.

In terms of economic analysis, economic analysis is very important to the Competition Commission. The former Chairman, who retired at the end of last year, of the Commission was Sir Derek Morris, who started life as an academic economist and became a very distinguished academic economist before he became a member of the Competition Commission and eventually became our Chairman. He retired and the new Chairman is Professor Paul Geroski, who is also a Professor of Economics. And it's not for nothing that we've had two professors in that role. It hasn't always been a professor of economics. We've had very distinguished lawyers in the past. Economics is right at the core of our approach, but it's not the only part of our approach.

In terms of conducting our analysis, I'll rummage through one or two points now but I strongly recommend you have a look at our website. Indeed, I encourage anybody here today who is interested in what we've been saying about the Competition Commission in particular to do that. We rely very strongly on our website in all sorts of ways. My speech today in about a week's time will appear on the website because we believe that all such speeches should be made public, for better or worse. We publish all of our procedures and our guidance on our website. Everything that referred to you can look at. You can download it. We publish significant parts of our evidence on the website, subject to maintaining commercial confidentiality. But even there we have considerable discussion, if I can put it that way, with the parties to allow us to publish more rather than less. You can also access our reports. You can get pages and pages where you can actually see how we've conducted our analysis.

To give you an overview, in all of our inquiries we will start with market definition. We ask the question, "What market are these companies in?" For the non-economists here that may seem a rather trite question. I assure you, it can take many months sometimes to determine what market people are in. It's always a question of where the boundaries are because what one's trying to determine is what the substitutes are for a particular product or service, because not until you've determined that can you see what the competitive elements are and the competitive constraints in a particular market.

So we look at market definition. We need to look at the products. We need to look at the geography. We look at the competitive effects in the market. We look at the coordinated effects. We look at unilateral effects. We look very carefully in all of that at pricing. Quite often we're told it's a bidding market and it turns out not to be a bidding market, that prices are individually negotiated and that price lists may exist but they have nothing to do with what is actually happening in terms of how prices are set. It's a very important part of our analysis. Almost always the main parties in a merger or a market investigation who sit in front of us will have sitting next to them on one side their lawyers, on the other side their economic consultants. So we engage in economic debate on an almost daily basis. It's very important to us.

Chairman: Thank you very much.

Questioner E [translated]: I am studying economics and I am a post-doctorate. Regarding the leniency system, the kind of penalty is what I'm looking at and experimenting on. From the perspective of economics, I understand that competition policy analysis has been discussed. The leniency system that exists today is 100% is given to one company and I think you mentioned that partial leniency is given to several other companies. Regarding this leniency schedule, what kind of economic theory and what data is used to come up with the design of this leniency system? Since the introduction of this leniency system has it changed based on experience? Has this changed to a more ideal leniency system based on your experience? That's my question.

Mr. Clarke: The straight answer is I don't know. If you look at the website of the OFT you will be able to see all of the decisions that have been taken in terms of what fines have been levied and what leniency has been granted. You'll also see how many cases have gone to appeal, which is a number of cases. You'll certainly be able to find information on, for instance, the Hasbro case that I mentioned where there were three parties and they were all dealt with quite differently.

I don't know. I would be very surprised if there was a great deal of economic analysis. I suspect that the leniency was very much based on the principles, which are set out in a document that is published by the OFT, on leniency policy, which again is available on their website. From memory, the 100% offset or leniency is available to the first party which tells the authorities of the alleged cartel. But they have to do it in advance of the authorities commencing a detailed investigation. That is well set out in the policy

guidelines. There are also other thresholds for, I think, the second party, which I think can gain up to 50%, but why they ended up with the figures they did I don't know.

Has it changed over time? I suspect not very much because there really hasn't been enough experience. I'm quite sure that if you complete your thesis it may well be read quite widely.

European Speaker: I work for the European Commission here in Tokyo. To the last question on leniency policy, I could add a little detail of information at the European example on how we do it. We introduced leniency in 1996 and we revised it, if my memory doesn't fail me, in 2002. The major change we did at the EC level was to change from a partial leniency to full leniency. That had a major impact. I cannot give you the figures because I don't have them in my head, but in the first years of our practice not that many companies came forward and provided information because a leniency of just 50% was still too much stick and not enough carrot. I think since 2002, since we changed it so that the first whistle blower would get a full leniency, there has been an avalanche. There has been a real massive increase in the number of cartels where companies have come forward and provided information. So that was a crucial change that we introduced.

Chairman: Thank you for your comment.

Questioner F : You talked about independence, that the competition policy needs to be independent, particularly for the investigation into merger cases. Except for the special case of national security and so forth, you mentioned that ministers are not involved, that it's very rare for the ministers to intervene. But I have a question. You talked about the perspective of national security, those technologies which are important for security. That means that defense-related things need to be protected for the sake of national security. Is that what you meant? Or are you meaning this to be broader in context when you say, "national security interests?" How broad or limited is the area when you said "broad national security interests?"

Sir Young: Not at all broad is the answer. Let me just go a step further back. People usually ask whenever I travel around, "Now tell me really, when is it that ministers can really make the decisions? We don't believe you that the regulator is independent. In which clause of the act have you hidden ministers' powers to make these decisions

really?" And the truth is there is no such hidden clause in the act. Ministers not only don't get involved they cannot get involved. This was much discussed in Parliament, of course, because several politicians would support the idea of independent regulators except and unless they are interested in protecting jobs in their constituency or in supporting businesses who have contributed to their party funds. So there were lots of cases where politicians in principle wanted to allow independence to the regulators, but in practice wanted exemptions. It was that which was most discussed during the passage of the recent legislation.

We ended up with the act that exists now. Ministers cannot get involved in any case at all, with a single exception, leaving aside the special area of the media to do with the BBC and things of that nature. Initially the plan was to put "defense-related," and that was withdrawn by us (the government side) and we put "in areas of national security" to tighten, not loosen, the exception. So most defense-related cases are outside of ministers' intervention powers. If, however, very exceptionally some says, "This case goes to the heart of national security," (not just any old defense case) then subject to the court's jurisdiction being tested ministers can intervene. They can't pick and choose when to intervene. The case has to be matters affecting the security of the nation.

This was the most limited exception which we allowed, and it's no great secret that in the UK government, as in many other governments, it is our Ministries of Defense which least favor open and transparent competition and which usually favor separate deals with a defense machine. We don't allow that in our country. Only when the security of the nation is at stake can ministers get involved in these cases. Otherwise, cases involving the defense industries get dealt with in the usual way, by the independent regulators.

Chairman [translated]: Are there any other questions at this time? Well then, I thank everyone for taking part in the active discussion period. Let us thank wholeheartedly once again the two outstanding speakers we had today. Thank you.

[End]