Japanese Fair Trade Commission seminar
'Competition Policy in the UK and its Implications for Japanese Competition Policy'

The UK Competition Regime
Recent Changes and Future Challenges

Speech by

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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.