

## Editorial

Welcome to the second newsletter of the Centre for Competition and Regulation. Our Summer 2001 edition focused on the establishment of the Centre and its early days. This newsletter is more substantive, including four major 'think pieces' about current issues:

- Morten Hviid discusses potential development of private actions in competition law (p.7);
- Ian Dewing and Peter Russell discuss the arguments for regulating auditors (p.2);
- Catherine Waddams asks whether the energy markets really are ready for deregulation (p.4);
- Bruce Lyons writes the first of a regular series of notes about European cases, discussing the GE Honeywell merger (p.3).

We welcome reaction to or discussion on the articles, and our emails are listed on page 8.

## New Members

Since the Centre was established at the end of 2000, as a joint initiative between the Schools of Management and Economic and Social Studies at the University of East Anglia, three new members have joined the centre. Evens Salies and Vinh Sum Chau have both joined as research associates. Evens has come from Perpignan, where his doctorate was on French table wines, to work as an econometrician on the Social Obligations and Economic Regulation project. Vinh completed a masters degree in business management at UEA in October, and is working on the performance measurement project. Vinh has been awarded a scholarship by the School of Management to undertake a PhD on strategy in regulated industries, so his association with the Centre will continue. Michael Hantke-Domas was awarded this year's CCR scholarship to complete his doctorate on property rights aspects of regulation. Michael joined us from the Law Department at the University of Essex. Evens, Vinh and Michael bring a welcome breath of fresh air to the Centre, and we are delighted to have them working with us. We are also pleased that several doctoral students now regularly join our fortnightly meetings.

## Members' News

Bruce Lyons has concluded his period as Dean of the School of Economic and Social Studies, and is on sabbatical during the current academic year. However he keeps in touch from Florence and Australia, and is working with Steve Davies on a merger project for the European Union under Centre auspices. In addition, both Bruce and Catherine Waddams have recently been appointed to the Competition Commission (see p.4).

## Visitors to CCR

We have also welcomed several visitors to the Centre. John Vickers, Director General of Fair Trading, addressed an invited audience of local trading standards officers at the Centre, when he received an honorary degree from the University in July; Professors Janet Dine and Steve Anderman from the Law Department at Essex University spoke at our first open seminar, held jointly with the School of Law at UEA, in December, using the theme 'Access to Markets' to speak about the Microsoft case and the role of international bodies in globalisation. Pepe Távara, Deputy Ombudsman for Utilities in Peru, talked to members of the Centre about deregulation and the distributional effects of eroding cross-subsidies; and Guy Holburn, from the University of Western Ontario presented his work on the role of consumer advocacy bodies in the US.

## Forthcoming Events

We are planning two major events over the next few months (see p.8). Our first annual conference, jointly with the Centre for Analysis of Risk and Regulation at LSE, will be held at Norwich on 12th April. The theme is Accountability and Regulation, and the programme will explore issues of public interest, regulation of professions and models of accountability. The autumn will see the first intake of our MA in Competition and Regulation Policy, a specialist course designed for practitioners, to balance the needs of working students with a rigorous academic treatment of the economic, accounting and legal issues involved in competition and regulation. We have already received applications from a broad group of private and public bodies, and the course promises to be a stimulating experience for both students and teachers from the Centre.

We look forward to a second stimulating and exciting year at the Centre, researching issues of Competition and Regulation as they develop, and bringing you more news of the Centre's work in six months' time. ●

# Stakeholders' Perceptions of the Audit Expectations Gap in the UK

Ian Dewing and Peter Russell

This article reports the findings of a research study sponsored by the Centre for Business Performance of the Institute of Chartered Accountants in England and Wales.<sup>1</sup> The study investigated the perceptions of various stakeholder groups as to the need, function and structure of an independent regulatory body for the audit of UK listed companies.

## Possible Models

To investigate stakeholder perceptions of the structure and function of such an agency, three models were developed: an Auditing Council; a Commission for Audit; and a UK Securities and Exchange Commission (SEC). An Auditing Council would be a private body analogous to the Financial Reporting Council responsible for oversight of setting accounting standards. A Commission for Audit would be a public sector body analogous to the Audit Commission for local and health authorities in England and Wales. A UK Securities and Exchange Commission (SEC), modelled on the US SEC, would be a public sector body having overall responsibility for City regulation including that of listed company audit.

In the study, an Auditing Council received the most support, a Commission for Audit the least, with a UK SEC provoking the strongest reactions both for and against. Arguments in favour of increased regulation of listed company audit were generally framed in terms of increased openness that would 'materially enhance the credibility of audits'; arguments against expressed fears that it would be 'cumbersome' and add a 'further tier of bureaucracy'. Overall, there was a significant degree of support to make the case for establishing an independent body to regulate listed company audit. This is consistent with findings and recommendations of previous studies.

## A Listed Companies Audit Board?

It is suggested that if such an independent regulatory body were to be created, it should be structured to match the main components of the audit expectations gap as revealed by the study: independence, monitoring and discipline. It might be called a Listed Companies Audit Board (LCAB) structured into three Panels of responsibility: an Auditor Independence Panel; an Audit Quality Panel; and a Disciplinary Panel. Whether the LCAB might be a private body, a private body with statutory recognition, or a public body is open to debate.

The role of an Auditor Independence Panel would be to set up and monitor independence standards and guidelines, for example by restricting non-audit services in whole or in part, or by setting up procedures formally to authorise provision of non-audit services.

The role of an Audit Quality Panel would be to set up and maintain a register of auditors recognised by the Panel as capable of undertaking the work of listed companies, and to monitor quality of audit work. External validation procedures might allow other firms to join the register and compete against the Big 5, especially for the audit of middle ranking or lower ranking listed companies where the importance of global reach is less significant.

Failure to observe standards and guidelines of auditor independence and audit quality would result in referral to a Disciplinary Panel. Sanctions against a firm, office of a firm or partner might include 'naming and shaming', fines, or removal from the register of listed company auditors.

## Relationship to the Accountancy Foundation

It can be argued that the new regulatory framework for the accountancy profession as a whole, based around the independent Accountancy Foundation, tackles the main components of the audit expectations gap identified in the study. Auditor independence is dealt with via the new Ethics Standards Board, monitoring of audit quality is dealt with via the profession's existing Joint Monitoring Unit, and auditor discipline is dealt with via the new Investigation and Discipline Board.

Doubts may remain whether the Accountancy Foundation, a private body without statutory backing, will have sufficient authority and independence to 'take on' powerful interests, such as the Big 5 firms, and whether, although at arm's length from the profession, it will be perceived to be independent of the profession.

However, what matters is not so much the precise function and structure of such a body, whether public or private, but effective delivery, and perceived effective delivery, of what is promised. This is the challenge facing the Accountancy Foundation. The analysis and recommendations of the research study other alternative possibilities for regulation of listed company audit if the new framework is later judged unsuccessful. ●

<sup>1</sup> Dewing, I. & Russell, P. (2001). **Stakeholder perceptions on an independent regulatory body for listed company audit in the UK**, London, ICAEW Centre for Business Performance.

## CCR RESOURCE CENTRE

We are very grateful to the Public Utilities Access Forum for the donation of their library of utility documents. We are in the process of cataloguing the material and shelving it in our resources room so that it and other material which we collect in the course of our research is available to researchers within the Centre and members of PUA, and to others on application.

# GE – Honeywell: Politics, Law or Economics?

Bruce Lyons

On 3rd July 2001, the EU competition authority (DG Comp) prohibited the merger of two large American corporations, after it had already received the go-ahead from the US authorities (DoJ). The resultant controversy has been characterised as a battle: Europe versus America.

## The Firms

GE is the world's leading aircraft engine manufacturer, with around half the installed base of large commercial jet engines and two-thirds of the new orders. Honeywell is the largest worldwide supplier of avionics (i.e. things that control the aircraft) and non-avionics (e.g. landing gear), often accounting for around half of the market for particular products. Both have a wider product range than their respective rivals. The products of both firms are incorporated into aircraft manufactured by Boeing, Airbus and other smaller airframe manufacturers. For large aircraft, airlines are typically given some choice in the engines, avionics etc, while for smaller aircraft, the manufacturer typically selects an exclusive supplier for a particular range.

GE also has a very large financing subsidiary (GE Capital contributes half GE's revenues), significant maintenance repair and overhaul services (lifetime MRO is worth twice the price of the original aircraft, and 70% of this is in spare parts), and the largest aircraft leasing company in the world (GECAS). GECAS buys around 10% of all aircraft sales each year, which is much more than any individual airline. The activities of GE and Honeywell are mostly complementary; and although there are some relatively small areas of overlap, these were not the real focus of the case.

So, why did the two competition authorities come to different conclusions?

## Was it Politics?

Was there an abuse of the rightful role of a competition authority: by the Americans to promote a globally dominant national champion; or by the Europeans to protect local rivals who feared a more efficient competitor? It may have looked a bit like this if you read the two page press release from the DoJ (the public output following a five month investigation) which focuses almost exclusively on US Department of Defense helicopter engine procurement. It did not help that EU Commissioner Monti issued a press release, before the DG Comp case had reached judgment, to 'reject politicisation of the case'.

But on closer analysis, politics was not a serious issue. The Americans accept the right for Europeans to scrutinise extra-territorial mergers when there are substantial sales in the European market (and vice versa). Most third party criticism of the merger at the

hearings came from American firms. The procedures, modes of analysis, and judgments were not inconsistent with previous decisions. Although quite different, DG Comp's first rejected merger a decade ago (Aerospatiale-Alenia De Havilland) would have created a European champion, and more recently it has stopped national mergers in France and Scandinavia. The effort put into prosecuting the Microsoft case suggests there is little reason to doubt the political independence of the DoJ.

## Was it Law?

So were the different outcomes down to different policy objectives and procedures laid down by law? It is unproductive to pore over legal wording, since it is the way these things are interpreted that matters. There is certainly a case that the EU has sometimes revealed much more of a worry about maintaining enough rivals in the market in the hope of promoting long-term competition, while the US focuses more on the current benefits to consumers of aggressive price cutting behaviour. A second difference is in the procedures of investigating, prosecuting, adjudicating and appealing. DG Comp does the first three internally, and the appeals procedure is too long winded to be much use in merger cases. The role of an independent judge is much more immediate in the US. This makes a US investigation more aware of judicial standards of proof and discourages speculation about long term effects. This further drives the focus of the DoJ on short term consumer prices, while DG Comp is more (too?) likely to listen to the worries of rivals to the merging parties.

## Was it Economics?

The main difference surrounds the technical economics of the case. Three major aspects can be identified:

- Bundling – GE-H would be able to give discounts if an airframe manufacturer or airline were to buy its engines and avionics together. GE already bundles financial and maintenance packages with its engines, with considerable sales success. This is equivalent to a price cut, and so is attractive to many buyers. Obviously, rivals are not so keen, but that should not be a concern unless they are forced to leave the market, and not be able to re-enter if prices rise later.
- Financial power of GE Capital – it is hard to defend DG Comp's worries about how strong financial backing allows GE to take technological risks with its R&D; or to provide financial support to buyers. If these are sensible strategies, then banks and financial instruments should allow rivals to achieve similar advantages, unless the latter do not have a strong reputation for objective technological assessment of project success.
- Exclusive market provided by GECAS – the parties to the merger claim that with only 10% of the buying market, this cannot exert market power. Possibly because of this, the DG Comp report spends relatively

little time on it. It has also received much less attention in the press and academic debate since July. Yet a structural remedy in relation to GECAS was the key stumbling block when it came to trying to agree remedies. GE was unwilling to lose control, which suggests it is seen as having substantial strategic advantage. Put this in the context of GE's expectation of synergies in excess of \$3b if the merger were to go ahead (i.e. a hefty 7% of the \$42b value placed on the merger), and you have an idea of how valuable this is to GE.

Of these three aspects, most of the academic debate has surrounded the bundling issue. This might seem appropriate in that the ability to bundle engines and avionics would have been a very direct result of the merger. There is also an academic literature that has been relatively well developed, such that there is reasonable understanding of when bundling is and is not likely to enhance market power. However, it would be dangerous for case analysis to focus only on where there is a well developed literature. There are still gaps in our knowledge of partial vertical integration (e.g. GECAS) in the face of technological competition (e.g. in engines or avionics). The benefits of R&D depend on the size of the expected market, and small exclusivity deals may have a large impact. Does a 10% guaranteed

## Are Energy Markets Ready for Deregulation?

**Catherine Waddams applies results from recent research to assess the regulator's proposal to remove all price constraints in the energy markets.**

The energy regulator, Ofgem, wants to abolish price regulation of energy supply when the current controls end in April 2002, believing that this move will benefit consumers. But **energywatch**, the consumer watchdog, opposes the removal of price controls for prepayment consumers, on the grounds that the market is not yet sufficiently competitive. The behaviour of suppliers and consumers each show whether the market is functioning well, and whether price controls or other competition powers are the most appropriate to control any potential abuse of monopoly power. In particular, a well functioning market would be expected to show some convergence of prices, and consumer willingness to switch suppliers in response to any remaining price differences. Evidence from recent research at CCR assesses developments.

### Background of Regulation

The current price controls are rather different in gas and electricity. In both, the regulator has already removed price control for consumers paying by direct debit. When direct debit controls were removed in electricity two years ago, the price charged to standard

## APPOINTMENTS TO THE COMPETITION COMMISSION

CCR is delighted to announce that two of its members, **Professor Catherine Waddams** and **Professor Bruce Lyons**, have recently been appointed by the Department of Trade and Industry to serve on the Competition Commission's Reporting Panel, along with 19 other new appointees. The new appointments come in the wake of the Government's White Paper "Productivity and Enterprise: a World Class Competition Regime", which proposed the creation of strong, proactive and independent competition authorities with strengthened roles. The Commission's Reporting Panel will investigate and report on matters referred to it under the Fair Trading Act 1973, the Competition Act 1980 and the Broadcasting Act 1990 relating to mergers, monopolies and anti-competitive practices.

market give a strategic advantage that can outweigh inherent technological deficiencies? Would this be harmful to consumers? We need more economic analysis before we can answer with confidence. ●

credit and prepayment consumers remained capped. However the control on these prices for gas after 2001 was in the form of a relative price cap, limiting the differential between these charges and those in the deregulated direct debit market.

### Supplier Prices

The relative price control on the gas incumbent would be expected to make it relatively less aggressive in the competitive direct debit market (and more so in the prepayment market) than if the cap were independent of direct debit prices, as it is in electricity. (Any cut in the competitive direct debit price carries a requirement to reduce prices in the prepayment market where it holds more market power.) But the analysis of mark-ups by incumbents over the median entrant in each market shows that they are very similar in the two industries, about four to five percent for prepayment and nine to ten per cent for direct debit. This means that there are higher savings available from switching for direct debit consumers in both markets; the slightly greater difference in the gas market is not statistically significant.

### Price Discrimination

The higher discounts in the direct debit market reflect a history of price discrimination in the industries. Before privatisation there was widespread cross-subsidy, much of which persists. The nationalised industries did not fully reflect the cost differences of serving different

consumers in their prices, (for example the additional costs of supplying rural areas and peak demand). In the context of the competitive market, the crucial price differential is between different payment methods, whose costs have not in the past been fully reflected in prices. In particular, the relative savings for the companies from direct debit payment were not recognised at all until about ten years ago. The competitive market inevitably erodes these historical cross-subsidies, a particularly sensitive issue because the higher cost prepayment consumers who face price increases are predominantly low income groups, particularly in gas. For example, over a third of gas prepayment meter users have a household income below £6,500 per year, while less than a tenth of direct debit customers are in this category.

### Prepayment Prices

We have seen that prepayment prices charged by incumbents have remained capped until now. For electricity the behaviour of the same company can be compared when it sets prices where it has market power as incumbent, and when it acts as an entrant elsewhere. To allow for different distribution costs in each area we have examined the ratio between charges<sup>1</sup> made to those paying by direct debit and prepayment by each company in its 'home' and 'away' markets, shown in the table below.

Analysis of similar figures from June 1999 had shown evidence that suppliers practised price discrimination in favour of prepayment meter customers in their own incumbent areas. Charges to prepayment consumers relative to direct debit prices were significantly lower when companies were acting as incumbents than in areas where they were entrants<sup>3</sup> in eleven of the thirteen companies then operating as both incumbents and entrants. The table shows that by December 2001 this was true for all the remaining seven national electricity players who were also incumbents. There are no consistent changes in the ratio differences – four have increased and three decreased, and there is no obvious tendency for these ratios to converge across companies. As entrants, it is likely that companies face sufficiently strong competition to set prices close to

Ratio of direct-debit to prepayment bills levied by each company as incumbent and entrant, December 2001				
	incumbent	entrant	difference <sup>2</sup>	diff 1999
<b>TXU energi</b>	0.918	0.877	0.041***	0.13***
<b>Powergen</b>	0.926	0.924	0.002*	0.01
<b>London-SWEB</b>	0.933	0.821	0.112***	0.145***
<b>npower</b>	0.907	0.788	0.119***	0.103***
<b>Seeboard</b>	0.931	0.844	0.087***	0.07***
<b>Southern &amp; Scottish</b>	0.924	0.801	0.123***	0.05***
<b>Scottish Power</b>	0.920	0.832	0.088***	0.1***

marginal costs. The different ratios in the home market suggest that a combination of regulation and market power has led them to discriminate against direct debit customers and in favour of prepayers where they are incumbent. This discrimination has persisted and become more consistently established since the direct debit market price controls were removed.

In gas, Ofgem had published several enquiries between 1995 and 1998 into whether the price differentials between payment methods constituted undue discrimination. The referrals were to investigate whether the price charged to prepayment consumers was too high, while the analysis above suggests that electricity incumbents undercharged prepayment consumers. In gas, in each case the regulator considered that prepayment prices should be lower than British Gas proposed. However entrants did not offer such good discounts to prepayment consumers as to others, and at times there were no savings to be made for prepayment consumers by switching suppliers. This suggests that profit margins were very low, and certainly below those in other markets where entrants made attractive offers to entice consumers<sup>4</sup>.

The role of prepayment makes identification of market power complex. Prepayment is more expensive, and inconvenient for most consumers, but very popular with most who use it, particularly households with very low incomes, because of the control over spending which it allows them<sup>5</sup>. How the market is defined in terms of payment method and geographical area will be crucial for the regulator in assessing both market power and any abuse.

### Consumer behaviour

Consumers have responded rationally to the offers available, and particularly to the much better discounts available to direct debit consumers who switch suppliers than to prepayment customers; switching rates are much higher in the direct debit than in the prepayment market. It is the relatively low rate of supplier switching in the prepayment market which arouses **energywatch's** concern, though with few opportunities for savings this is unsurprising. While Ofgem's<sup>6</sup> figures show that 37% of gas consumers have switched supplier at some time, only 29% of prepayers have done so. In electricity the discrepancy is almost as great: 38% of all consumers had switched and 31% of prepayers. The differential has narrowed somewhat over the last year, suggesting some 'catching up' by prepayment users. But this is not enough to convince **energywatch** that the market is sufficiently competitive for deregulation<sup>7</sup>. One interesting feature of the Ofgem report is the distinct levelling off in net gas switching which it reveals; about half of switching is away from the incumbent, with the remainder divided roughly equally between those returning to British Gas and switching between entrants.

One factor which may accelerate switching is the

current increase in gas prices. The gas and electricity supply markets first opened against a background of falling energy prices, but BGT has raised its prices by more than 10% in the past twelve months, allegedly increasing switching rates<sup>8</sup>. We would expect to see more active switching in markets where prices are rising, stimulating the competitive market.

### Awareness

Earlier work<sup>9</sup> on developing competition in the gas market showed the importance of including the role of consumer awareness of switching possibilities in understanding switching behaviour. The Ofgem figures show that consumer awareness is levelling off in both markets. The proportion of consumers aware of more than one supplier was almost identical for both gas and electricity in 2000 and 2001, indicating that awareness may even fall slightly as 'competition fatigue' sets in. This suggests a limit to the numbers of consumers likely to be actively involved in the market, unless Ofgem and **energywatch** are able to motivate those consumers whom the companies have failed to reach with their own marketing campaigns.

### Market Power

Even when consumers are aware of the possibility of changing, the analysis of switching behaviour in the gas market indicated that many would tolerate a considerable price differential before changing. This inertia bestows considerable market power on the incumbent. He can choose the differential between his price and that of entrants to maximise his profit. As the differential widens he loses more consumers to competitors, but makes more profit from those who stay loyal at the higher price. Information from consumers about the prices they would tolerate before switching showed that the best choice would be about 30% above that of entrants. This certainly indicates considerable market power and raises distributional questions about which consumers stay with the incumbent, and are therefore liable to pay these higher prices. Like other surveys, this research showed that prepayment meter users are most likely to stay with the incumbent, even when presented with considerable hypothetical savings available from switching (though this may partly reflect their lack of experience of any such opportunities).

There is no evidence that the 'statutory groups', whose needs both Ofgem and **energywatch** must take into account, are more likely to remain with the incumbent at these high mark-ups. In other words, those in rural areas, with disabilities, low income or of pensionable age, are as likely to change as other groups. This is surprising in the light of the lower rates of actual switching amongst pensioner households and of potential switching reported by prepayment consumers.

### Should price caps be removed?

The reluctance of some consumers to switch until price

differentials are substantial undoubtedly bestows market power on incumbents, particularly in the prepayment market. Deregulation will probably result in increases in prepayment prices. To this extent **energywatch** is right to be concerned about this market. But as long as incumbent prices remain capped, entrants are reluctant to enter the market with any enthusiasm, and the benefits of the competitive market and its innovations are denied to the very group who most needs them. Indeed there is a danger that if incumbents lose large portions of their other markets, 'fixed' costs will increasingly be recovered from the 'loyal' prepayment sector, so their costs and prices could rise further, even with regulatory controls. This is one of the costs which regulation imposes, and an argument for removing it. The Government could demonstrate its 'joined up policy' by providing short term protection through other measures for those who are most vulnerable to the removal of price caps.

The balance of the argument depends on whether Ofgem can exercise its powers under the Competition Act sufficiently robustly to curb any abuse of the considerable degree of market power that incumbents retain. The Competition Act is proving a powerful tool in other areas of competition policy, and may well be adequate to the task. But this depends on recognising the substantial market power which incumbents retain, and ensuring that this is not abused. Such vigilance will require continuing monitoring, which is likely to be most effective if Ofgem and **energywatch** co-operate in observing the markets and helping consumers make informed choices. A healthy debate between the two bodies, both of whom have new statutory duties to protect consumers, is welcome. But consumers are likely to benefit from their joint 'champions' most if they focus on identifying the symptoms of any abuse of monopoly power, and work together to maximise the considerable powers which they hold under the Competition Act. ●

1 Charges are calculated for consumers using 3,300 kWh per year, defined as medium consumers by **energywatch**

2 The tests are two-sided t-tests. They investigate the significance of the difference between the average of the direct debit to prepayment ratios of each company in other regions and in its own region. For every company the average ratio it charges in other regions is below that charged as incumbents' ratio in its own region. \*\*\* denotes significance at the 1 per cent level, and \* at the 10 per cent level.

3 Price discrimination, regulation and entry in the UK residential electricity market by Jesus Otero and Catherine Waddams Price, *Bulletin of Economic Research*, July 2001, 53, 3, pp 161-175

4 For an analysis of these enquiries see 'Incumbent and entrant response to regulated competition: signalling with accounting costs and market prices' by Jesus Otero and Catherine Waddams Price, *Journal of Economics and Business*, 53 (2001) pp 209-223

5 Affording Gas and Electricity: Self disconnection and rationing by prepayment and low income credit consumers and Company attitudes to social action by Dudley Cooke, Alessandra Ferrari, Monica Giulietti, Diane Sharratt and Catherine Waddams Price, March 2001, available from the Electricity Association website at [http://www.electricity.org.uk/srch\\_fr.html](http://www.electricity.org.uk/srch_fr.html)

6 Review of domestic gas and electricity competition and supply price regulation; evidence and initial proposals, November 2001, Ofgem

7 The group with the greatest discrepancy from average switching rates is pensioners, only about 30% of whom have switched in each market, with no signs that the discrepancy is narrowing.

8 British Gas feels the heat, *Guardian*, 9th January 2002.

9 Consumer Choice and Industrial Policy: a study of UK Energy Markets, by Monica Giulietti, Catherine Waddams Price, Michael Waterson, CCR research paper 01-05 [<http://www.ccr.uea.ac.uk/pdf/ccr01-5.pdf>]

# Private Enforcement of Competition Law

Morten Hviid

In some jurisdictions, notably the USA and Australia, private enforcement of competition law forms an important and active part of the overall enforcement of the competition laws. In the USA, about 90% of competition cases are private litigation. In other jurisdictions, such as the UK and the EU, private litigation is hardly ever used<sup>1</sup>. Private remedies are in principle possible within the EU but so far there have been very few cases where potential private plaintiffs have chosen the domestic strategy of suing misbehaving competitors in national courts rather than the EU strategy of filing a complaint with the Commission. Policymakers in the UK have expressed concern about this, for example chapter 8 of the DTI White Paper: "Productivity and Enterprise: A World Class Competition Regime" sets out proposals aimed at increasing the use of private actions in competition cases. But would this be a good idea? We should not advocate private enforcement only because the Americans do it, but need to assess its merits. This not only involves an assessment given the existing legal structure in the UK, but also thoughts about possible reforms to the legal structure.

## Who might bring a private action?

Cases could in theory be brought by final goods consumers, buyers or sellers of intermediate goods, or rival firms, all of whom could potentially be injured by anti-competitive practices. Given the costs of bringing a case, one would expect the majority of cases to come from firms rather than consumers, unless either class-actions are allowed or consumer bodies can take action on behalf of consumers, paralleling their role as supercomplainants to the Competition Commission. The following broad classes of cases might be amenable to private remedies:

1. Cartelisation. Where the cartel raises the price for inputs, as did the vitamins cartel, buyers may attempt to get compensation for losses.
2. Abuse of dominance cases such as predation, price discrimination and exclusion. Rivals, buyers or sellers may all have been harmed by the action. The proposed remedies could include injunctions as well as compensation.
3. Mergers, where one might observe suppliers and/or buyers trying to prevent a merger which would be detrimental to them through changing bargaining strengths.

## The benefits of private actions

Where the public remedies are insufficient to deter anti-competitive practices, the additional threat of costly private actions may do so. Secondly, private remedies provide restitution for those injured economically by the unlawful act, something clearly

behind the thinking of the DTI in the White Paper. Thirdly, private actions enable access to justice in cases where the relevant public regulator is either unwilling to proceed with a case, is financially constrained from doing so or does not possess the necessary information. The DTI encourages the infusion of private funds into the enforcement process, a "privatisation" of enforcement. Keeping in mind that competition law specialists do not generally agree on which actions are harmful to competition (e.g. the debate about predation), being able to "force the regulator's hand" may be valuable.

## The dangers of private actions

Private actions also have potentially harmful effects. Firms may be able to use a private action as a signalling mechanism. For example, if firms are trying to collude, initiating a private case alleging predation may be a cheaper way to punish deviations than a price war. In the latter case, consumers have at least the temporary benefit of lower prices. Note that private actions are particularly useful as signalling mechanisms because they can be dropped at any time. Secondly, private actions may enable firms to raise their rivals' costs, for example by tying key personnel up in the case. Finally, firms may engage in frivolous suits, either to extract money, or, if they are on the verge of going out of business, as a final throw of the dice.

## Factors deterring private actions

Existing work on access to justice via private litigation<sup>2</sup> highlights some of the potential difficulties in promoting private actions, such as the cost-allocation rules and the payment methods for legal representation. Other issues which have been raised are the size of awards, the chosen standard of proof, the use of class-actions and the inexperience of the court system when it comes to economics. The latter concern is expressed by the House of Lords<sup>3</sup> and the government appears to favour widening the remit of the Competition Commission Appeal Tribunals, rather than improving the level of economic literacy in the civil justice system.

## Where do we go next?

Private actions raise issues that deserve future scrutiny. Why have there been so few in the UK and EU to date? Do the benefits of private actions outweigh the costs? Is it really the case that private action is preferable to well funded public regulation? What are the distributional effects of shifting from public to private enforcement? How can access to justice in this area be ensured? Until these questions are carefully answered, the merit of pushing for more private actions in competition cases cannot be assessed. Through its ongoing research CCR will pursue some of these issues. ●

<sup>1</sup> As pointed out in C.J. Jones, 1999, Private Enforcement of Antitrust Law in the EU, UK and USA, Oxford University Press.

<sup>2</sup> E.g. G. Bevan, P. Fenn and N. Rickman, 1998, "Contracting for legal services with different cost rules", Research Paper no 3/98, The Lord Chancellor's Department.

<sup>3</sup> House of Lords, 2000, Fourth Report, Reforming EC Competition Procedures, Select Committee on European Union, HL 33

## New Research Projects

Since the last newsletter we have started three new projects:

- A European Commission funded "Post merger study: efficiency effects of a global merger in the iron ore industry"
- An ESRC sponsored "Social Obligations and Economic Regulation" project, which also involves Diane Sharratt at the University of Warwick
- A project for **energywatch** on "Issues that matter to gas and electricity consumers", undertaken jointly with Jan Anderson from the Survey Office (UEA) and Pat Barrow and Robert Vieira from the School of Information Systems (UEA).

We have published two working papers since the last Newsletter, in addition to other publications. A full list of our working papers, new 2001 publications and 2002 publications can be found on the insert with this Newsletter.

## CENTRE STAFF & CURRENT RESEARCH ACTIVITY

### Professor Catherine Waddams

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Current research interests: Effects of utility reform on efficiency and income distribution. Current projects focus on consumer choice and service quality.

### Peter Russell

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Current research interests: The regulation of accounting, audit and corporate governance, and how these are applied in the regulatory frameworks for financial services and privatised utilities.

### Ian Dewing

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Current research interests: The regulation of the auditing profession in the UK and EU; the role of auditors and reporting accountants in the UK financial services industry.

### Vinh Sum Chau

#### Research Associate

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Current research interests: Exploring the evolution and effectiveness of performance measures in the water, gas, electricity, and briefly rail and telecoms industries.

### Professor Steve Davies

#### Deputy Director

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Current research interests: Estimating the benefits to society from competition policy; multinational firms in the European Union; the growth of concentration in European food retailing; the competitiveness of European industry.

### Dr Begoña Garcia-Mariñoso

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Current research interests: Vertical mergers for technological systems markets, in particular the post merger incentives for bundling when a main essential component supplier with market power vertically integrates with a supplier of a complement part.

### Evens Salies

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Current research interests: Econometric study of consumer choices with respect to residential electricity and gas tariffs; changes in tariff structures; social schemes; and the convergence/stabilisation of energy prices.

### Professor Bruce Lyons

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Current research interests: Consumer welfare vs producer welfare in the appraisal of potentially anti-competitive activities; the effects of different remedy negotiation procedures; merger appraisal: how can synergies be measured?

### Dr Morten Hviid

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Current research interests: Regulation of international mergers; the effects of information disclosure from regulatory accounts; competition effects of price-promises; corporate governance of cooperatives.

### Dr Lynne Conrad

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Current research interests: Management control and organisational change; accounting and accountability systems in regulated industries.

### Michael Hantke-Domas

#### Research Student

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Current research interests: Property rights in regulated water industries.

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