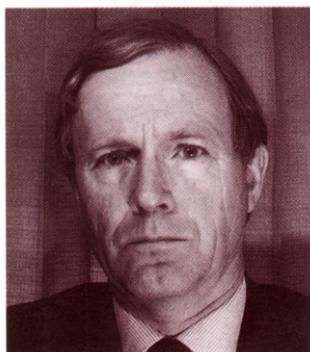


The lives and death of the MMC

by Dan Goyder



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Dan Goyder reviews the history of the Monopolies and Mergers Commission from its beginnings in 1948 until its replacement on 1 April 1999 by the new, European-law inspired, Competition Commission.

Just over 50 years ago the Monopolies Commission first came into existence under the terms of the *Monopolies and Restrictive Practices (Inquiry and Control) Act 1948*. On 1 April this year the same Commission (though now under a different name) ceased to exist as a result of the terms of the 1998 *Competition Act* and is replaced by the Competition Commission. In one sense that date, 1 April 1999, marks the death of the present MMC, although in reality it will continue under its new name into a future in some ways different as a result of the 1998 Act. The end of the MMC, therefore, is not really a 'death' at all, although it represents the start of a new stage in its existence.

IMPLEMENTATION OF COMPETITION LAW

Competition law is different from many other areas of commercial law in that it is implemented mainly by governmental bodies such as Directorate General IV ('DG4') of the European Commission in Brussels and the OFT and MMC in London, together with the national competition authorities in other member states. It is only enforced to a limited extent by actions between persons or undertakings in national or Community courts. The fact that implementation therefore so much depends on governmental institutions emphasises the importance of understanding how these institutions actually operate. Often these authorities operate through a requirement (or option) of notification or registration of agreements or proposed transactions, and clearance or exemption has to be obtained with or without conditions. These contacts often represent the routine aspects of the work of such authorities. Alternatively, contact with such agencies results from unilateral action on their part, as they respond to complaints or press reports about alleged price-fixing or market-sharing agreements between competitors. Investigations may then start to ascertain if there is evidence of such activities, often involving the well-known 'dawn raids', at present only available to the European Commission and shortly to be available, to the Office of Fair Trading, under the 1998 *Competition Act*, in respect of domestic UK cases.

The legal powers, traditions and resources of the institution will have an important part to play in the nature and effectiveness of the intervention which it makes in particular cases. Institutions that are effectively administered and well-led can sometimes achieve with limited resources results that agencies better endowed, but suffering from bureaucratic rigidity, fail to match. The quality of leadership and imagination provided by experience amongst senior officials and their professional advisers is of real importance in determining both the outcome of individual cases and in the longer term the development over time of policy and policy implementation. Moreover, as George Yarrow pointed out in his 1998 IEA/LBS lecture 'MMC – retrospect and prospect':

'Institutions also have a life of their own. Once established they become both interest groups in their own right and a factor that influences later developments by changing legislative trade-offs. For example, when new problems arise, established institutions may gather powers by accretion, whether under existing legislation or as a result of new legislation, because their prior existence renders such accretion expedient in the circumstances of the time.'

This quotation has particular relevance for our present topic. Familiarity with the history of such governmental institutions is important for lawyers who are specialists in competition law and who need to be aware not only of the current substantive and procedural rules but also of the institutional characteristics of the bodies responsible for policy and enforcement. It is also part of this knowledge to be aware of the way in which the institution has developed over time and the various stages through which it has arrived at its present jurisdiction. For example, in order to deal effectively with officials of DG4, it is useful to realise the extent to which the history of the implementation by the European Commission of art. 85(1) and 85(3) and also of the Merger Regulation 4064/89 has developed over the last 40 years within the framework of the relevant regulations. Likewise in the UK, those who deal with the MMC find it helpful through experience to become aware of its institutional traditions, characteristics and methods of working, few of which by their very nature can be found recorded in current text books.

SEVEN PHASES OF THE MMC

To understand the operations of the MMC now it has been redesignated as part of the new Competition Commission, it is necessary to realise that it has already, in its 50 years of life, passed through a number of stages, in nearly all of which it had to react to new legislation conferring fresh jurisdiction and imposing different responsibilities upon it. There are seven separate periods that can be identified as follows.

- (1) The 1948 Act up to the adoption of the *Monopolies and Restrictive Practices (Commission) Act 1953*.
- (2) From 1953 until the *Restrictive Trade Practices Act 1956* ('RTPA').
- (3) From 1956 until the *Monopolies and Mergers Act 1965*.
- (4) From 1965 until the *Fair Trading Act 1973* (perhaps the most important of the various statutory interventions affecting the Commission's role).
- (5) From 1973 to the enactment of the *Competition Act 1980*.
- (6) From 1980 until the end of that decade (implementation of the *European Community Merger Regulation 4064/89* and the first regulatory cases in which the MMC began to act to resolve licence disputes between regulators and the newly privatised utilities).
- (7) The final period covers the '90s, ending on 1 April 1999 (conversion into the Competition Commission under the *Competition Act 1998*).

From this brief outline it will be apparent that, six times out of seven, the beginning and end of a stage has been the result of a new statute which has either extended, or occasionally reduced, the jurisdiction and resources allowed to the Commission. The first three periods, covering 16 or 17 years between 1948 and 1965, were not marked by expansion but rather by the loss of much of its original jurisdiction over restrictive practices as the result of the 1956 Act, even if that change could itself be traced directly to the Commission's own Collective Discrimination Report of 1955. By contrast, the last four periods, covering 34 years, have represented periods of steady expansion with one exception, the loss of jurisdiction over some major mergers because of the advent of the EC Merger Regulation from September 1990.

Early years: up to 1953

It is interesting to compare the focus of the workload and jurisdiction of the Commission as it has fluctuated and developed over the years. Taking the first period we find the Commission established as a plenary body, unable to sit in groups or chambers, so that in the first five years of its existence it completed only eight reports into restrictive practices and agreements in particular industries. There had been a number of sectoral reports of the same kind during the years immediately before the Commission was created, arising from concerns that wartime practices creating multiparty cartels covering prices, quality, terms and conditions, collective discrimination, etc., required examination. The idea behind the creation of the Commission was to place such examination on a more permanent footing and to educate both industry and public on the problems that might be found to exist and need consequent intervention by government. Lack of resources, however, meant

that the preparation of reports at this time, even the relatively slim or light ones of those days, took two, three or even four years. Nevertheless the production of even a small number of such reports had the important result of exposing many of the anti-competitive agreements that had grown up during the war in a wide range of industries and provided a foundation for later development of the Commission.

1953–56: procedural concerns about restrictive practices

The first stage of the Commission's life came to an end, however, in 1953 when the Conservative Government responded to the criticism, which had been widely expressed, over the inadequacy of the resources allocated to the Commission by strengthening it to some degree. It was allowed for the first time to work in groups comprising not less than five members and over the next three years its budget was almost doubled so that the annual number of reports had by 1955 markedly increased; in 1956 we find that as many as seven were published. Of these the most significant was that on collective discrimination in 1955 which, after a broad review of a range of horizontal restrictive practices, put forward two alternative views for their future handling. However, the minority view (comprising three members of the Commission) proved more influential with the government of the day than the majority Report.

Interestingly, the solution that the majority wanted was a 'prohibition' system with exemptions which, in practice, would have been similar to the terms of the newly implemented *Treaty of Paris 1951* establishing the European Coal and Steel Community. The minority who prevailed, however, wanted a more 'legal' system, under which particular agreements falling within the scope of the legislation would first be registered and then, if of sufficient consequence, be examined by a newly created division of the High Court. The state of business and economic opinion in this country was not yet ready for a 'prohibition' system and in the event we have had to wait more than forty years for it! The arguments of the successful minority led to the creation of the Restrictive Practices Court, and of the Office of the Registrar of Restrictive Trade Practice (responsible for keeping a list of registered agreements and sending them on a regular basis to the Court for examination in the context of the complex system of 'gateways'). It is clear from contemporary documents, however, that the Lord Chancellor and the judges were extremely concerned about the possibility that they might have to make complex economic policy judgements in such cases and insisted that the criteria upon which such agreements would be assessed be laid down in great detail to prevent the Restrictive Practices Court from having too wide a discretion.

SEVEN 'LIVES'

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1956–65: downs ... and ups

The third period begins with the enactment of the RTPA in 1956. The first ten years of the Act were a success story,

primarily because of the proactive steps taken by judges such as Devlin J in the Restrictive Practices Court, which found against many of the agreements taken before them and changed the original expectation that only a minority of such agreements would be struck down. Within fifteen years the Court had completely changed the landscape and nearly all horizontal agreements restraining competition within the UK had either 'gone to ground' or been eliminated. By contrast, however, the success of this new judicial process was damaging for the continuing work of the Commission. The 1953 Act had been repealed, the size of the Commission reduced and its ability to work in chambers or groups again removed. Very few referrals were made and indeed during the whole period from 1957 to 1965 only six Commission reports were published. In some four of those nine years it signed no reports at all. Its jurisdiction was now limited to investigations into major monopolies. Such a limited jurisdiction is inadequate in practice to sustain the existence of a competition authority dependent for its continuing vitality on a sufficient workload to ensure that it attracts members of the required ability and sufficient experience to invigorate its inquiries. If ever the Commission came near to premature death, this was the time.

CHANGING ROLES IN THE '90s

... the 1989 EC Merger Regulation (4064/89) ... for the first time took away to Brussels mergers reaching the substantial turnover threshold required for 'concentrations with a Community dimension' ... The loss of workload in this area was to be more than compensated, however, by the increase in numbers of the new 'regulatory' sector licence-dispute cases coming before the Commission, as well as the number of mergers involving utility sectors ...

1965–73: new jurisdiction over mergers

However 'the darkest hour comes before the dawn' and in 1965 the Conservative Government, fresh from a successful battle to outlaw resale price maintenance, responded to the public outcry over the proposed takeover by ICI for Courtaulds, without any possibility of public review of its impact on competition, by the introduction of a Monopolies and Mergers Bill. Ultimately the Act was passed in 1965 by the new Labour Government but in a form largely framed by the previous Conservative administration. In giving this new jurisdiction to the Commission, its size, budget and flexibility of working within groups was also restored and for the first time services were brought within its scope in addition to goods. The criteria for the assessment of mergers were at this time to be the same as those laid down in 1948 for assessment of monopoly, namely a rather narrow public interest test. However, if a public interest finding was made in respect of any merger, the Secretary of State retained discretion to decide on the final outcome of the case without necessarily being required to accept the recommendations of the MMC. On the other hand if the Commission made a finding that there was no public interest detriment from the proposed merger, the Secretary of State could not intervene and the merger would go through.

During the period between 1965 and 1973 it is noticeable that the Commission becomes significantly more active, and that the Board of Trade is willing to make more significant references to it. We find sectors referred in which MMC findings will in due

course have an important effect on both their structure and development. These include the first supply of beer reference and other references in petrol and film processing as well as general reports on particular practices, such as refusal to supply. The MMC issued its first merger reports at the end of the '60s and, by chance, the two principal initial cases both involved conglomerate mergers (Unilever/Allied Breweries and Rank/De la Rue), which enabled general comments on the public interest aspect of such transactions to be spelled out in its reports.

1973–80: the Fair Trading Act

1973 and the beginning of the fifth period marks a real watershed in the history of the Commission. It is, of course, also the year in which the UK joined the European Community, a decision which itself would in time have a major influence on our competition law and institutions, not excluding the MMC. The *Fair Trading Act* 1973, introducing a new regime both for competition and consumer law, is still with us in spite of some minor subsequent amendments. The Act consolidated the law in respect of both monopoly and merger inquiries to be made by the MMC, conferred the current title of 'Monopolies and Mergers Commission' upon it for the first time and created the Office of the Director General of Fair Trading, responsible both for administering the existing restrictive trade practice legislation and also for all aspects of competition policy as well as consumer protection.

The Commission now began to operate within the tripartite system familiar to us (Secretary of State – OFT – MMC) and, because of the existence of more adequate machinery for examining complaints and analysing the need for inquiries, began to receive a more consistently important stream of references made on solid competition grounds rather than on the more opportunistic basis of earlier years. The threshold for investigation of both monopoly and merger cases was lowered in the 1973 Act from the original one-third of the relevant UK market to one quarter; the expanded 'public interest criteria' set out in the new s. 84 (replacing that in the 1948 Act) gave a wider measure of discretion in both the initial choice of references and the detailed assessment of them to the OFT and thereafter the MMC. The relevant criteria included not only the maintenance of competition but also the protection of consumers, the maintenance of a balanced distribution of industry in the UK and also the promotion of new products and technology. The influence of a powerful Director General of Fair Trading, Gordon Borrie, also began to be felt soon after his appointment in 1976. Major inquiries in this fifth period include important retail and consumer sectors as well as many professional services reports. Among the sectors examined were frozen foods, cat and dog foods and ice cream, contraceptive sheaths and ceramic sanitary ware.

1980–89: Competition Act gives new powers

Towards the end of the 1970s, the Liesner Committee was established by the Board of Trade to report on the best method of investigating and controlling both monopoly practices and merger cases as well as the working of the restrictive trade practices system. The main need identified by the Liesner Committee was the absence of any measure dealing with single, firm, anti-competitive practices; to meet this need, the *Competition Act* 1980 was one of the first measures adopted by the

new Conservative Government under Margaret Thatcher, and the sixth stage in the Commission's life began. The anti-competitive practice jurisdiction of the Commission was dependent, however, on a prior examination of the particular practice by the Office of Fair Trading resulting in an adverse finding against the company; the apparent difficulty of identifying significant anti-competitive practices by a single company meant this jurisdiction never really took off and dealt mainly with only minor cases.

The 1980 Act, however, had its main impact in another area, under s. 11, which provided that the Commission could carry out so-called 'efficiency studies' into public authorities and bodies not subject to normal competitive pressures, for example the Central Electricity Generating Board, water and sewerage authorities, British Rail, the nationalised coal and steel industries, etc. The Conservative Government had thus given to the MMC some of the jurisdiction previously held by the Prices and Incomes Commission, which it had abolished upon coming to power. The section unexpectedly produced a large number of cases and laid the foundation for MMC's subsequent involvement in utility licence disputes. Such public sector inquiries were regarded generally as successful, in that they substantially increased knowledge of the working of these industries, the majority of which were to pass over the next few years into private ownership, and established the ability of the MMC to handle this kind of inquiry alongside its traditional role in assessing competition and monopoly in the private sector. Throughout the 1980s, therefore, with these multiple forms of inquiry, the MMC was kept extremely busy and the number of reports published annually grew considerably.

1989-99: changing roles

This period, however, came to an end with the 1989 EC Merger Regulation (4064/89), which for the first time took away to Brussels mergers reaching the substantial turnover threshold required for 'concentrations with a Community dimension' and thereby reduced the number of merger cases dealt with by the MMC. The loss of workload in this area was to be more than compensated, however, by the increase in numbers of the new 'regulatory' sector licence-dispute cases coming before the Commission, as well as the number of mergers involving utility sectors, in particular water and electricity, which raised new and difficult issues. The original model of legislation authorising intervention by the MMC if the privatised utility was unable to agree the terms of licence amendments with its regulator is contained in the *Telecommunications Act 1984*, but this has served as a model for other later privatisation statutes and the number of cases in this area has grown steadily up to the present. They have ranged from cases involving major structural issues such as the British Gas inquiry in 1993 to relatively minor inquiries such as the 'Chat lines (BT)' case at the end of the '80s.

This, therefore, is the position that prevailed prior to the enactment of the 1998 *Competition Act*. As of 1 April 1999, the MMC was technically 'dissolved' under s. 45(3) and its functions were transferred to the new Competition Commission. The immediate effect of its dissolution however is that it becomes the reporting side of the new Competition Commission, cohabiting with the new Appeal Tribunal, which will be responsible under s. 46 of the Act for hearing any appeals against decisions of the DGFT in respect of Chap. 1 and 2 of the Act. The small print

governing the constitution of the new Commission is found in Sch. 7. It is interesting to note that it will have a Management Board known as the 'Competition Commission Council' upon which the Chairman of the reporting side (Derek Morris) and the President of the Appeal Tribunal (Judge Christopher Bellamy) will both sit with other members of the Council to ensure coordination of all its activities. Both the tribunal and the 'reporting side' will be bound by the provisions of the Competition Act and in particular by s. 60, which contains the well known 'guiding principles' clause requiring that decisions are made under UK domestic competition law in a manner consistent with equivalent decisions under EC competition law.

This is a major change of approach for UK Competition law, though one welcomed by the great majority of politicians, professionals and commentators. It will mean changes in due course in the approach of the Competition Commission's reporting side but I think it will prove able to take this in its stride. One of the features of the MMC in the past has been its ability to adapt to new circumstances and to take on new responsibilities in a flexible and constructive way. This has been true both of its merger jurisdiction and of its efficiency studies into public utilities under s. 11 of the 1980 Act as indeed also of its willingness to tackle the complex and burdensome utility licence appeals which it has taken on from the beginning of the present decade.

CONCLUSION

Over its lifetime, therefore, the MMC has suffered various vicissitudes and changes. I am clearly not an unbiased commentator, but I think it has shown over this time certain particularly British qualities which have been of real value in the investigation of a wide variety of references, even within a system which leaves it unable to make policy initiatives of its own but is rather required to make the best use of the opportunities which successive Director Generals of Fair Trading and other regulators have enabled it to receive. Within this framework the MMC has contributed much to our understanding of how business and industry operates in both the public and private sectors. It has also contributed much to the control of monopoly power and encouragement of competition. In particular, it has demonstrated certain features and characteristics that are central to such control, among which I would mention especially:

- independence both from authorities and government itself;
- a thoroughness in analysis and approach aided by the use of proper professional skills and techniques;
- transparency through production of full reports available for publication with deletion only of business secrets; and
- a general consistency in its approach over time especially in its regulatory cases.

I am certain that it will continue to show the same adaptability in the future as it has in the past. 🇬🇧

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