

A Strengthened Competition Regime– the OFT experience

**Danish Competition Law Society, 29 October
2009**

**Philip Collins
Chairman**

Office of Fair Trading, London

Outline

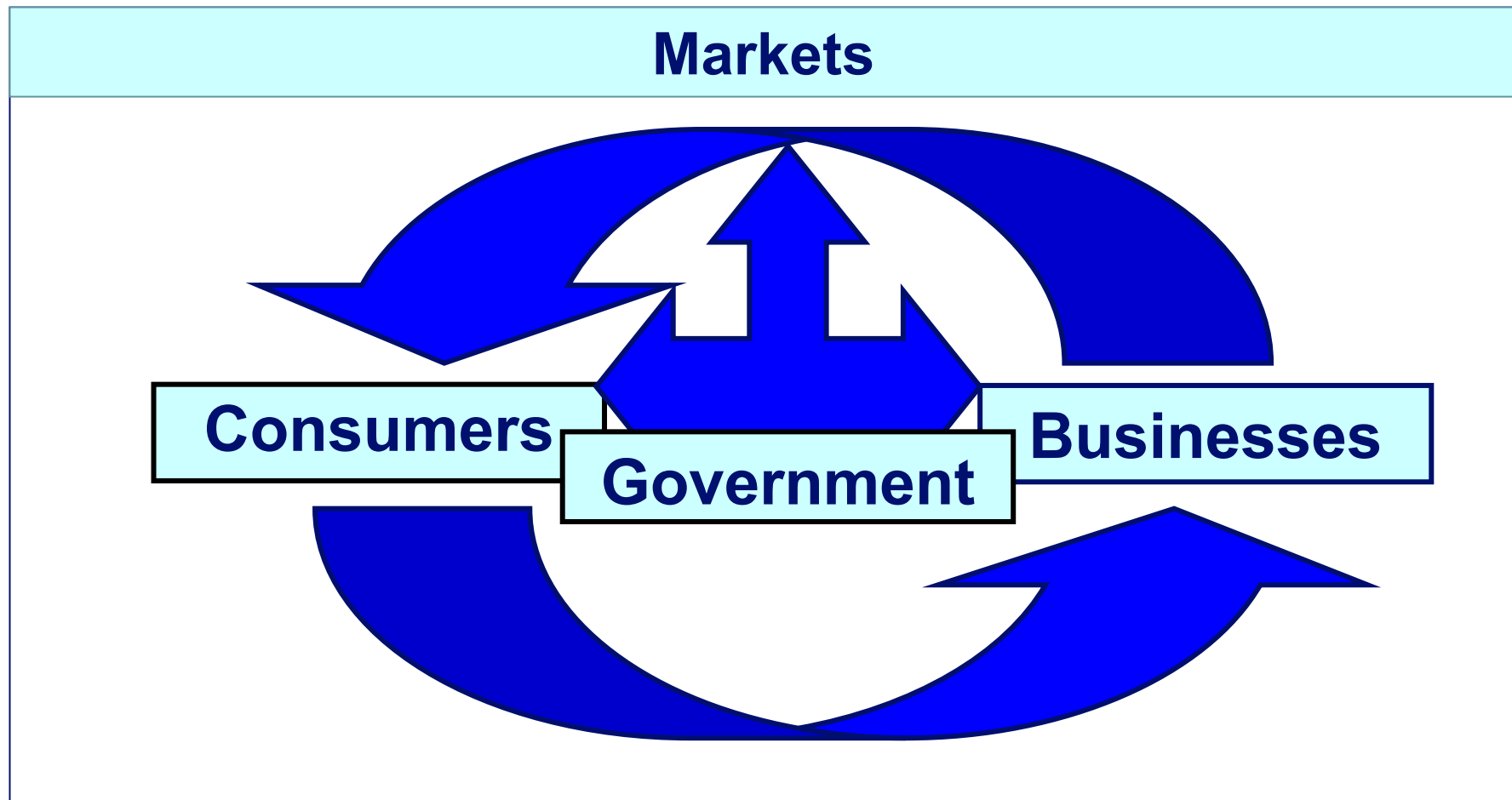
- **Role of the OFT- consumer and competition authority**
- **Motivations for strengthening the competition regime**
- **UK criminal and civil competition regimes**
- **Sanctions**
- **Leniency and immunity**
- **Deterrence study**
- **Optimising competition toolkit**
- **Recent highlights**
- **Conclusions**

Role of the OFT

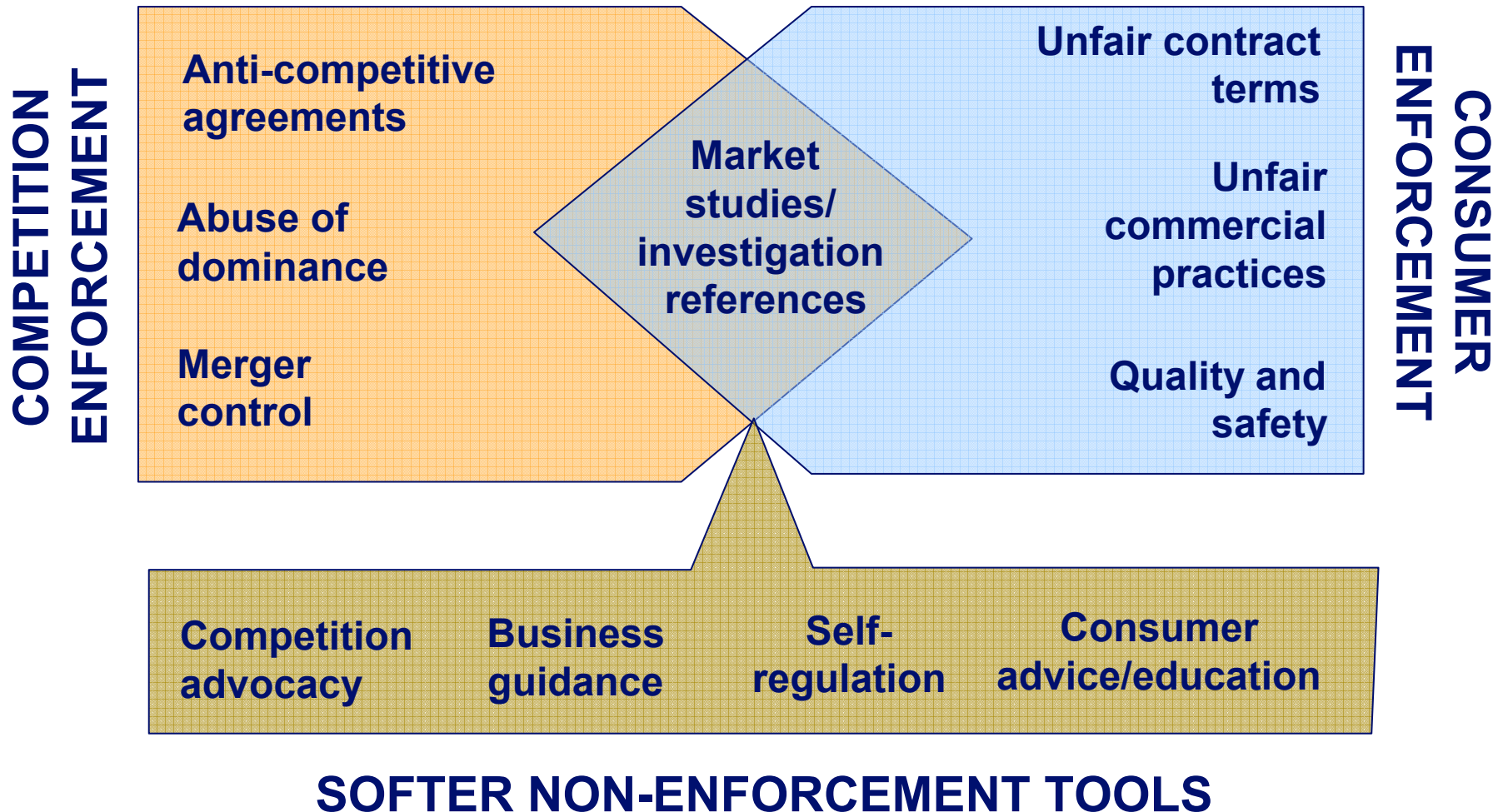
Making markets work well for consumers

- Competition and consumer authority
- Resources are finite and work prioritised
- Focus on high-impact outcomes
- Tackle public and private restrictions
- A broad range of tools

The virtuous circle

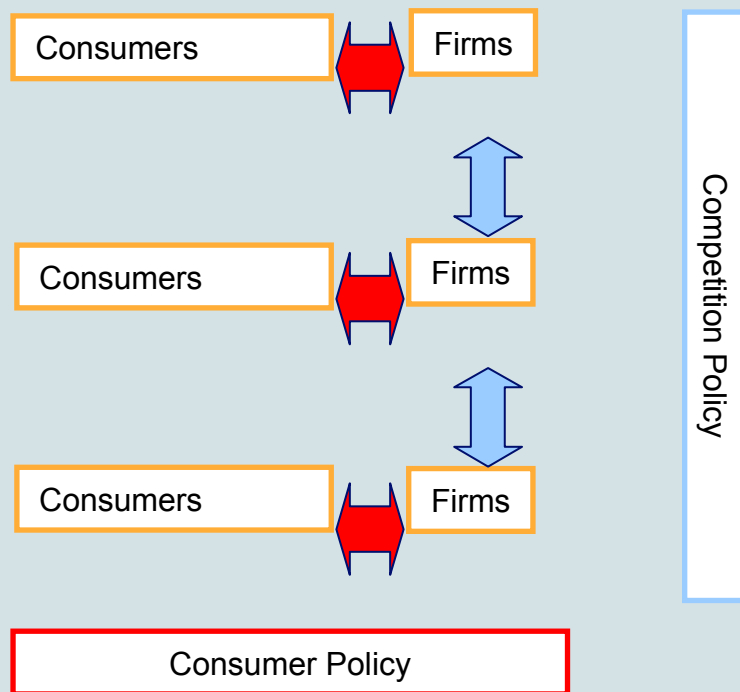


Competition and consumer tools



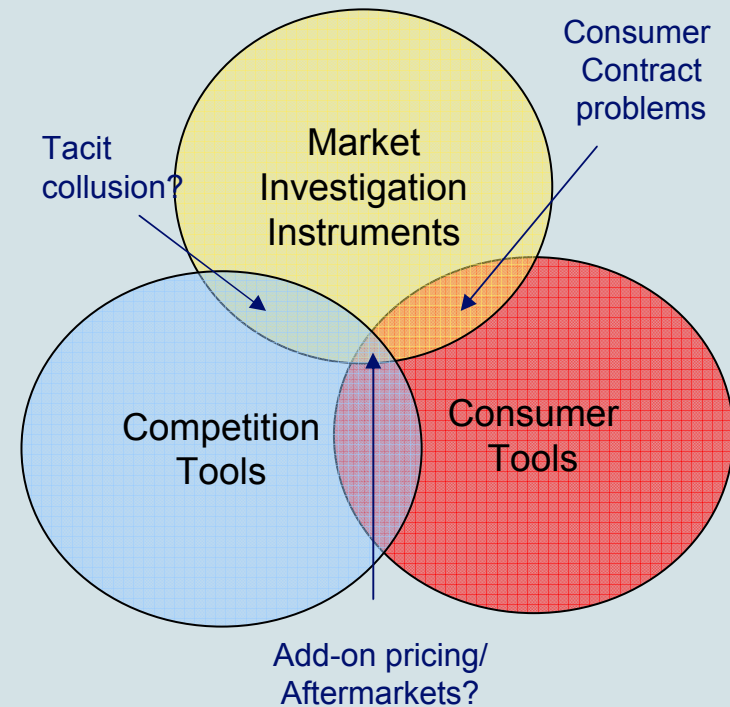
How competition and consumer regimes interact

- Relationship between firms
- Relationship between consumers and firms
- Both required for well functioning market



Choosing right set of tools

- No one instrument for category
- Several instruments necessary?
- Most effective instrument



Motivations for strengthening regime

A World Class Competition Regime

- **Close the productivity gap (45% US, 19% France, 7% Germany)**
- **Competition to drive productivity**
- **Adopt modern competition regime**
- **Series of reforms, including sanctions and private actions**

UK Civil and Criminal Competition Regimes

- **Two separate regimes**
 - **civil** - directed mainly at undertakings (public/private enforcement)
 - **criminal** - directed at individuals
- **Regimes are complementary for cartel enforcement**
 - proceedings under both regimes or one only (most likely civil)
 - parallel or sequential proceedings
 - criminal regime alongside Art 81 cases

Sanctions

Civil proceedings

- Final penalties on undertakings up to 10% global turnover
- Competition Disqualification Orders on individuals (≥ 15 ys)

Criminal proceedings against individuals

- Imprisonment of up to 5 years and/or unlimited fines
- Criminal Disqualification Orders
- Confiscation of assets under Proceeds of Crime Act 2002

Follow-on private actions

Financial Penalties- OFT Penalties Report

- **OFT penalties too high?**

OFT penalties significantly lower than EU Commission and other EU national competition authorities.

- **Large or small firms disproportionately penalised due to size?**

OFT penalties not biased by firm size.

Leniency

- **All pursued cartel cases have involved leniency (but not all originated from leniency)**
- **Number of leniency applicants ranges from 1-33**
- **16 cartel infringement decisions since 2000**
- **Focus on high impact cases, with more decisions in the pipeline**

Leniency and Immunity from Criminal Prosecution

Leniency includes process for criminal immunity

- **Automatic guarantee of criminal immunity for first leniency applicant before launch of investigation**
- **No automatic guarantees for others**
- **OFT can grant immunity from prosecution in England and Wales only. MoUs with Scotland.**
- **Sufficient assurance?**
 - **International cartels?**
 - **Separate prosecutors?**

Revised OFT guidelines on Leniency and No-action

- **Importance of practical guidance**
 - **Give predictability and transparency- revised OFT guidelines in 2005 led to high profile leniency applicants**
 - **Provide practical guidance- revised OFT guidelines in 2008 reflect OFT's growing experience**
- **Additional explanations and guidance on:**
 - **Key requirements: 'genuine intention to confess' and 'continuous and complete cooperation'**
 - **Criteria for discounts**
 - **Requirements for criminal immunity**
 - **How leniency information will be used**
 - **Carrying out of internal investigation**

Informant Rewards Scheme

- **Up to £100,000 (depending on value of information and getting the result)**
- **Opens up new source of leads from individuals**
- **Extra incentive for corporate leniency applications**

Settlements

- **Key elements of settlements**
 - Admission of liability
 - Procedural cooperation
 - Reduced penalty
 - OFT still issues infringement decision
- **Complementary to leniency**
- **Discretionary**
- **Significant resource savings to OFT and parties**
- **Relevant only to civil cases**

Plea Agreements?

- ***Marine hose- US plea agreements only***
 - **US plea agreements were not binding on UK courts**
 - **US plea agreement prevented seeking lower sentences in UK**
- **Need to better align criminal and civil regime?**
 - **Settlements relevant only to civil cases**
 - **Key incentive: certainty and reduction of penalty**
 - **If similar incentives for criminal cases: enforcement strengthened?**

Deterrence Study

- **Surveyed over 234 senior competition lawyers and 201 businesses**
- **Deterrent effect of competition enforcement:**
 - **Cartels** **5:1/16:1**
 - **Abuse** **4:1/10:1**
 - **Mergers** **5:1/ -**

Deterrence Study: Impact of Sanctions

	Lawyers	Companies
1	Criminal penalties	Criminal penalties
2	Fines	Director disqualification
3	Director disqualification	Bad publicity
4	Bad publicity	Fines
5	Private damages	Private damages

Deterrence Study: Improving Deterrence

	Lawyers	Companies
1	Private damages	Publicity and education
2	Criminal prosecutions	More activity
3	Publicity and education	Larger fines
4	Faster decision making	Faster decision making
5	More activity	Legal clarity

Substantial divergence, particularly on private damages

Optimising Competition Toolkit

- **Deterrence study- financial penalties alone not optimal**
- **OFT uses combination of financial and individual sanctions, backed by strong leniency policy (and settlements)**
- **OFT penalty report- overall OFT penalty toolkit good**
- **Consultation on Competition Disqualification Orders to achieve greater deterrence**

Recent Highlights: Criminal Regime

- ***Marine hose***
 - **Significant prison sentences:** 3 and 2.5 years (reduced to 30 and 20 months)
 - **Director Disqualification Orders:** 7 and 5 years
 - **Proceeds of crime:** over £1m confiscated
- **Charges brought in *Passenger fuel surcharges***
- **Separate parallel cases: EU Commission Art 81 EC case in *Marine hose* and Chapter I case in *Passenger fuel surcharges***

National Press

Running a cartel? Be afraid - very afraid¹

The jailing of three businessmen shows just how serious the au and US - are about competition compliance

Frances Gibb, Legal Editor

Read more of Frances Gibb's exclusive online columns

The jailing of three former Dunlop Oil and Marine Limited executives last w that conned millions of pounds out of the Ministry of Defence and others fo

OFT gets on to cartels at last²

Best practice guidelines and ethics seminars are all very

Oil industry executives jailed for price-fixing

Judge issues tough warning on cartels³

First criminal case of its kind in Britain

By Megan Murphy, Law Courts Correspondent

gation will not be open to them and any likely sentence will be higher than

nothing like hard

Three jailed for running price-fixing hose cartel⁴

Michael Herman

Three oil executives were jailed for price-fixing yesterday in Britain's first prosecution for cartel offences.

trated and comprehensive process" of fixing prices, which has been a criminal offence in the UK since 2003.

The Office of Fair Trading, which brought the prosecution, said that it

¹Times Online, 16 June 2008

²The Times, 12 June 2008

³Financial Times, 12 June 2008

⁴The Times, 12 June 2008

Recent Highlights: Civil Regime

Construction

- Bid-rigging over 6 year period, 'cover pricing'
- Financial penalties of £129.5m on 103 firms
- Leniency: 33 parties discounts between 35-65% and 41 parties 25% under 'fast track' offer
- Industry Code of Conduct

Recruitment Agencies

- Price fixing and collective boycott
- Originated by leniency application
- Financial penalties of £39.27m on 6 firms

Recent highlights: Civil Regime

- **Most recently settlements reached in:**
 - *BA/Virgin* (£121.5m)
 - *Dairy RPI* case (combined maximum over £120m)
 - *Tobacco* (combined maximum £132.2m)

Closing Remarks

- **Robust competition regime for compliance and deterrence (including credible sanctions)**
- **Criminal regime a valuable addition to civil regime– but must focus on appropriate cases**
- **Practical guidance for advisers and companies on leniency is essential**
- **Explore range of corporate and individual sanctions and other policies to maximise deterrence**
 - Financial penalties, leniency, individual sanctions, settlements, private actions
- **Competition and consumer powers in one agency provides flexibility in making markets work well for consumers**

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