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Sustainability of the Chapter I Prohibition: the changes necessary for it to survive the impact of defective design and implementation, decentralisation and the www factor

Volume I of II

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ABSTRACT

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SUSTAINABILITY OF THE CHAPTER I PROHIBITION: THE CHANGES NECESSARY FOR IT TO SURVIVE THE IMPACT OF DEFECTIVE DESIGN AND IMPLEMENTATION, DECENTRALISATION AND THE WWW FACTOR.

By Jonathan Paul Howden-Evans

The thesis identifies and tests the objectives for the new domestic control of anti-competitive agreements, that is the Chapter I Prohibition, and considers whether the Prohibition can survive the developments since the Competition Act 1998 received Royal Assent, namely European reform and technological advancement.

The objectives of prohibition, competition based assessment, flexibility, deterrence, effective investigation, transparency, urgency and a less burdensome regime are developed from the notion of competition, the Restrictive Trade Practices Act cases, the consultations for reform and the wealth of literature that that piece of legislation generated. The basis for gathering evidence to determine whether the Chapter I Prohibition can be sustained has been all information that has been put into the public domain, without recourse to questioning of the OFT or related bodies since transparency is one of the key objectives.

Examining the design of the Prohibition against the objectives identified failings in the new law. These failings are analysed against the results of the first eighteen months of the Prohibition being in force, the implications of European reform and the impact of the internet, to determine whether the Prohibition can be sustained. Together with the implications and problems raised by the further legislatory reform announced by the Government in July 2001, the work advocates the changes that should be made to ensure that the fruits of domestic reform will not be lost.

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PREFACE

The Chapter I Prohibition is the most fundamental change to the control of anti-competitive agreements in the UK since the original Restrictive Trade Practices Act in 1956. The hype in 1997 pointed to nothing less than a revolution taking place, which combined with the concerns that anti-competitive agreements were going unchecked, suggested that the start of the new millennium would be a busy time for the competition authorities, practitioners and academics.

The focus of my work has been to concentrate on identifying just what the Chapter I Prohibition was supposed to do. This was not a straight forward task seeing as reform had been mooted, and indeed draft legislation had ebbed back and forth from making it to the statute book, for over two decades.

Soon after the objectives had been identified, it was becoming apparent that the hope and promises wielded around in 1997 and 1998 would not be fulfilled. The work therefore tests the Prohibition and the problems in its design against the experience of the first 18 months of its life. However, the Prohibition could not be viewed in isolation since the end of the 1990's saw two major developments that threaten its very existence. These are the European proposals for the reform of the administration of anti-competitive agreements and the advancement of the internet. These point to a much bigger picture, taking the nature of the domestic control of anti-competitive agreements back to the debating forum.

My research has called on my skills as an academic and practitioner. If ever there was an area of law where theory and practice needed to listen to what the other was saying, this is certainly it. The ability to avoid the "theory" of the Restrictive Trade Practices Act was something that I experienced early on in practice. Yet understanding and explaining why we have such a law restricting commercial freedoms requires an appreciation of the theory. The promotion of the "market based" test has accelerated the acceptance of the need to understand the theory, and for this achievement alone, the Chapter I Prohibition is to be congratulated.

The aim of this work has been to identify the action that must be taken if the domestic changes, which on the whole are to be welcomed, are not to be flittered away. The announcement by the re-elected Labour Government that there was to be further reform in part vindicates my concerns and findings. However, even this reform would not appear to hold all the answers. It is hoped that this work can form part of the debate now taking place[1] and help to ensure that even if the Prohibition proves not to be sustainable in its own right, the benefits it has generated will not be lost.

This is the law as at 30 November 2001.

[1] Certain sections have been used to form the basis of submissions made to the DTI in response to the Enterprise Bill Consultation.

ACKNOWLEDGEMENTS

This has proved the hardest part of this work – the thank you's. It is difficult because so many people have helped inspire and support me over the last three or so years. With the caveat that this will therefore be a non-exhaustive list, here goes.

Firstly, I would like to acknowledge the encouragement, guidance and patience of Professor Rob Merkin, without whom I would probably still be writing and never submitting. His views and advice greatly fuelled my passion for this area of law; his contacts have provided me with opportunities for writing that I thought would take years to generate. I am indebted to you. Our conversations and e-mails have not only proved invaluable, but have resulted in a much improved CD collection for which I am also grateful!

This work was commenced at Cardiff Law School in 1998. I wish to thank the School for their support both academically and financially – I hope you find that the Scholarship has been a good investment. Professor Bob Lee deserves singling out for encouraging me to seize the opportunity for this research and helping with the transition from practice back to academia. I am also indebted to my secretary at the School, Sharron Alldred, for de-mystifying the processes of being a PhD student and being the source of all the answers I needed. To my PhD colleagues who shared the office – the experience has been the best and encouraged me to finish ahead of the "best before date". All the Library Staff have my utmost respect for their unfailing assistance in tracking down all my requests – thank you. My thanks also goes to my LLM students who provided me with some of the best debates on competition law I have experienced so far.

I am grateful to all at Southampton University who helped ease the progression from Cardiff. Special thanks to Kathy Pack for her assistance and patience, especially when being bombarded with my e-mails and questions.

To all my friends at Morgan Cole who helped me keep a "commercial" perspective of my work, I thank you. Linda Killick and Lorraine Crabb - you kept me laughing even when I thought I would never finish. My thanks to David Whibley for listening to my

ideas and inspiring me with confidence – your reaction to my conclusion let me know I had done something worthwhile! Bleddyn Rees deserves a special mention for his support on so many fronts, without which I would not have got to where I am today. Thank you for your belief and encouragement.

That I have survived this process is down to my family. Mum and Dad, I am grateful for your unconditional and never ending support and patience, and your ability to tolerate my doubts and single-mindedness. Together with my in-laws, you have all taken over my responsibilities for looking after my family when I became too engrossed in my work. I will always be grateful for what you have all done. For those telephone calls reminding me to break for a cup of tea, my thanks go to Nana – the tea and conversation kept me going!

This work was conceived some 12 months before my daughter Angharad, who arrived into the world a few days before the Chapter I Prohibition came to life. Your attempts to "amend" my work and reorganise my study reminded me that there was more to life than just my research. You have brought me so much love and enjoyment; as you grow up I hope that I will be able to return this energy and support.

Finally, to my wife Laura, words cannot sum up how I feel for all you have done. Becoming au fait with the law, watching for competition "news" and actively taking an interest in my thoughts and theories, goes way beyond the call of duty – you are one fine competition lawyer! Thank you is insufficient to sum up how I feel. I therefore dedicate this work to you.

Abbreviations

CC	Competition Commission
CCAT	Competition Commission Appeals Tribunal
CFI	Court of First Instance
DGFT	Director General of Fair Trading
DGIV/DGComp	European Competition Directorate
DoJ	US Department of Justice
DTI	Department of Trade and Industry
EC	European Community
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
FTA	Fair Trading Act 1973
FTC	US Federal Trade Commission
GCI	Global Competition Initiative
HRA	Human Rights Act 1998
ICANN	Internet Corporation for Assigned Names and Numbers
ICPAC	International Competition Policy Advisory Committee
ISDN	Integrated Services Digital Network
ISP	Internet Service Provider
ITC	Independent Television Commission
MMC	Monopolies and Mergers Commission
NCA	National Competition Authority
NSI	Network Solutions Inc.
OECD	Organisation for Economic Co-operation and Development
OFCOM	Office of Communication
OFGEM	Office of Gas and Electricity Markets
OFT	Office of Fair Trading
OFTEL	Office of Telecommunications
OFWAT	Office of Water Services
OJ	Official Journal
ORR	Office of the Rail Regulator
OTC	Over the Counter Medicines
PIU	Performance and Innovation Unit
RPC	Restrictive Practices Court
RPA	Resale Prices Act[1]
RTPA	Restrictive Trade Practices Act[2]
SED	Selective Distribution
SLD	Second Level Domain
TLD	Top Level Domain
URL	Universal Resource Locator
WTO	World Trade Organisation
WWW	World Wide Web

[1] Unless otherwise stated in the Thesis, this refers to the Acts of 1968 and 1976 collectively.
[2] Unless otherwise stated in the Thesis, this refers to the Acts of 1956, 1968, 1976 and 1977 collectively.

"When you have faults, do not fear to abandon them."

Confucius (K'ung Fu-tzu; 551–479 BC) Chinese philosopher; Analects

Sustainability of the Chapter I Prohibition: the changes necessary for it to survive the impact of defective design and implementation, decentralisation and the www factor

Hypothesis

The legal control of anti-competitive agreements in the U.K. was given an injection of economic realism by the introduction of the Chapter I Prohibition in the Competition Act 1998. This, it would appear, intended to provide a transparent, comprehensive, flexible, responsive and less burdensome mechanism for detecting, evaluating, punishing and deterring all significant anti-competitive agreements and one in which victims are properly compensated and businesses are assured the maximum certainty possible.

Radical change was essential, as the RTPA was fundamentally flawed. This change to substantive law and procedure, achieved by incorporating the best of what the EC had to offer, did not, however, avoid all the difficulties experienced under that regime and introduced new problems, with the result that businesses operating on both the domestic and EC markets face unnecessary complications. Sadly, the Chapter I Prohibition as designed fails to fulfil the objectives that will ensure its successful continuance.

If these omissions are addressed, the liberating effect of the Chapter I Prohibition will still not be fully realised until the modernisation of Article 81 and the promotion of the internet as an essential mechanism for commerce are accepted and provided for. Even the shock announcement of further reform, largely contradicting the arguments put forward in support of the Competition Bill 1997, does not provide solutions to all the issues that must be addressed if the Chapter I Prohibition is to be sustained.

CHAPTER ONE

Sustainability of the Chapter I Prohibition

"The Minister must know that our case against the Bill is that it is either unnecessary or premature..."[1]

1.1 Why the Chapter I Prohibition?

The pace of change taking place in commerce and regulation since starting this research has on more than one occasion deflected my focus. My initial intention was to research the legal impact of the demise of the Restrictive Trade Practices Act 1976 upon the introduction of a new control in the form of the Chapter I Prohibition. I thought that my timing could not have been better: I would be living through the end of a system of registration, whilst able to view the domestic application of an EC modelled prohibition. With vast new powers coupled with a real hunger for the new regime to succeed, there was bound to be plenty to research. Wasn't there?

[1] Mr John Redwood, Official Report, Standing Committee G, Competition Bill, 21 May 1998, part 2 p 2, House of Commons internet.

Some two years down the line, I realise how naïve I was. In my defence, this was probably not all my fault, for without the benefit of a time machine, 1997 and 1998 pointed to a very different future landscape for the legal control of anti-competitive agreements.

1.1.1 The Restrictive Trade Practices Act 1976: Ineffective Mechanical Simplicity

My first genuine meeting with the Restrictive Trade Practices Act 1976 took place whilst training to be a solicitor. This much written about, loved by some, but on the whole loathed, piece of legislation[2] had not even made a dent on my degree studies. It did receive a brief mention on the Legal Practice Course, but European prohibition stole the thunder in terms of powers and consequences.

Looking back on that day in the office, two peculiar things struck me. First, I had been asked to assess whether we needed to register an agreement that had already been through all the drawn out stages of negotiation and was about to be signed. Secondly, to my even greater surprise, I was able to deliver the answer. It was not the most complex of agreements, but to be able to apply a piece of legislation, to which everyone else pulled a face indicating feelings ranging from despair to horror, gave a real feeling of satisfaction and competence[3]. I'm not saying it was easy, but in undertaking the very mechanical exercise of ploughing through sections 6 et al, it became blatantly clear that I was not calling on my economic skills at all.

This will not be new to anyone who has lived under the RTPA. In 1997, against the backdrop of major reform, the future for competition regulation looked bright and full of possibilities.

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[2] See section 2.3.3, infra.

[3] Perhaps that should read a "rare feeling of satisfaction and competence"...

1.1.2 Hype

The Chapter I Prohibition is the most fundamental change to the control of anti-competitive agreements in the UK since the original RTPA in 1956. The debates of the Competition Bill, in both Houses of Parliament pointed to nothing less than a revolution taking place. We were told, with a great deal of passion on the part of some speakers, that it would benefit both consumers and businesses[4] because they deserved better[5]. At the second reading in the House of Commons it was made clear that anti-competitive activity "hits ordinary people and imposes extra costs on family budgets. It hits families as taxpayers"[6]. The new law would therefore look after the ordinary consumer.[7]

It has been said that the legislation has a personalisation effect in that it refers throughout to the DGFT[8]. I would go one stage further and assert that the Act itself has been personalised in that it has been portrayed as an entity that would help us all in the fight that most of us never realised we were battling against. However, it is questionable whether the Government was committed to this elevation of the consumer in competition law. At the same time that the Competition Bill was being debated, the DGFT was calling for a reform of Part III of the Fair Trading Act 1973 that governs the sanctions he may impose against:

> "the hard core of rogue traders who persistently breach the civil or criminal law. It is a cumbersome, time-consuming regime and ineffective system...[which is] legalistic and technical and requires high standards of

[4] Lord Simon of Highbury, Official Report, Competition Bill, Second Reading, House of Lords, 30 October 1997, Columns 1144 and 1145 Lords Hansard internet.
[5] Mrs Margaret Beckett, Official Report, Second Reading, Competition Bill, House of Commons, 11 May 1998, Column 25, House of Commons Hansard internet.
[6] Mrs Margaret Beckett, Official Report, Second Reading, Competition Bill, House of Commons, 11 May 1998, Column 25, House of Commons Hansard internet. The reference to the effect on the family budget is not new and as Lord MacLaurin of Knebworth claimed "much of the thrust of legislation from [his] own Benches has always had this in mind." (Official Report, Column 1179).
[7] This continues to be emphasised by the new DGFT, John Vickers in his first Annual Report (Annual Report of the Director General of Fair Trading, 2000, p 6), where he reinforces that the "...OFT's job is to strengthen the grounds for consumer confidence and, through competition, the power of choice.
[8] Freeman & Whish, Guide to the Competition Act 1998, (United Kingdom, Butterworths, 2000), p 74, footnote 1 (to paragraph 5.5).

documentary and evidential proof, placing an undue burden on consumers who will have already suffered harm"[9].

If the Competition Bill was about looking after the ordinary consumer, why did they miss this opportunity? I submit that it goes back to the basic premise that the consumer is just one factor of many taken into account when ensuring that there is efficiency in the market place through competition.[10]

Back to the hype:

Restrictive trade practices legislation

> "...had become outdated...even the most serious cartels can carry on for years...a market-sharing and price-fixing cartel of ready-mixed concrete companies was finally dealt with in the courts more than nine years after first being investigate."[11]

Powers would be increased because "[t]he powers for rooting out and dealing with serious anti-competitive behaviour are notoriously weak."[12]

The new Act would replace

> "...discredited and ineffective legislation with a clear structure for regulating a modern economy at the heart of the European Union...[leaving] scope for the economy to evolve and to increase productivity and innovation, while providing the powers to ensure that the law is enforced."[13]

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[9] John Bridgeman, Annual Report of the Director General of Fair Trading, 1998, p 13.
[10] See section 2.1.2, infra.
[11] Mrs Margaret Beckett, Official Report, Second Reading, Competition Bill, House of Commons, 11 May 1998, Column 27, House of Commons Hansard internet.
[12] Mr Ian McCartney, Official Report, Report and Third Reading, Competition Bill, House of Commons, Column 1208, 8 July 1998, House of Commons Hansard internet.
[13] Mr Nigel Beard, Official Report, Second Reading, Competition Bill, House of Commons, Column 111, 11 May 1998, Lords Hansard internet, although lack of precise details on the treatment of vertical agreements, for example, and clause 60 still bothered some (admittedly the majority of these were members of the opposition, which are perhaps best summed up b Mr Tim Boswell's closing

"A domestic prohibition which operates consistently with Article [81] would keep the burden on business to a minimum. It would reduce some of the regulatory overload and paperwork."[14]

An important part of the new regime would be

"...that businesses and consumers who have been seriously harmed by anti-competitive behaviour should be able to seek redress. To that end, we are including provisions to facilitate rights of private actions in the courts for damages."[15]

"Those on the receiving end of [anti-competitive] practices will have new rights to seek damages."[16]

There would be much to examine when these promises came to fruition. It was said that the power to fine up to 10 per cent of UK turnover would "result in a flood of requests for guidance"[17] and "[t]he director general is likely to be faced with the need to deal with a large number of cases."[18] The Chapter I Prohibition certainly gave the impression of being nothing short of a revolution.

1.2 The Scope of this Work

Although the previous regime did lead to the abandonment of many restrictive associations (that had been encouraged to grow and develop as a means of trading),

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thoughts "...it is over eight months since the Bill had its Second Reading in another place – virtually the gestation period of the human baby. Given the uncertainty still apparent in the Bill perhaps the gestation period of an elephant would have been more appropriate." (Official Report, Column 113)).

[14] Lord Simon of Highbury, Official Report, Competition Bill, Second Reading, House of Lords, 30 October 1997, Column 1146 Lords Hansard internet.

[15] Lord Simon of Highbury, Official Report, Second Reading, Competition Bill, House of Lords, 30 October 1997, Column 1148 Lords Hansard internet. This would appear to be consistent with the DGFT's work in consumer redress, which would indicate that number of consumers who claim is relatively low in relation to complaints. See John Bridgeman, Annual Report of the Director General of Fair Trading, 1997, pp 22 and 23.

[16] Mr Ian McCartney, Official Report, Report and Third Reading, Competition Bill, House of Commons, Column 1208, 8 July 1998, House of Commons Hansard internet.

[17] Mr Oliver Letwin, Official Report, Standing Committee G, Competition Bill House of Commons, part 4 p 2, 19 May 1998 (morning session), House of Commons internet.

[18] Mr Ian McCartney, Official Report, Standing Committee G, Competition Bill House of Commons, part 2 pp 3 and 4, 11 June 1998 (afternoon session), House of Commons internet.

it had its faults. Where faults have been identified in our legal control of anti-competitive agreements, we should never let them continue. To do so produces inefficiency, which, in an area of legislation designed to promote and protect competition, is the one thing that cannot be tolerated. Yet the hype conveyed a confusing message about what the Chapter I Prohibition was designed to achieve. It is only when the parliamentary debates are considered in light of the circumstances prevailing at the time when the Bill was drawn and debated, together with the DGFT's Annual Reports, can the objectives for the Chapter I Prohibition be identified. On this basis, it is submitted that the objectives of the Chapter I Prohibition were to:

(1) prohibit all significant anti-competitive agreements, whilst ensuring that those with benefits are allowed to continue;
(2) test such agreements in light of the mechanism of competition, that is analyse the market, taking account of consumer sovereignty, the price, the product, the barriers, without letting this develop into a public interest criteria where other factors become prevalent;
(3) be flexible, ensuring that its application is effective with responsive decisions that reflect the dynamic nature of the market;
(4) deter those who seek to gain through anti-competitive agreements by sending out a message of strong penalties relating directly to the benefits derived, which are actually enforced, and ensuring that harm suffered be made good;
(5) make investigating easier and swifter with legal rights respected;
(6) be transparent and fair, with cost effective, speedy decision making on terms and criteria readily understood;
(7) be able to take urgent action to prevent further harm; and
(8) be less burdensome on those being regulated by it, ensuring consistency and certainty in the European and global arenas.

The evidence in support of these objectives, and the conclusions reached, is analysed in Chapter 2 of this work.

On the second reading of the Competition Bill in the House of Lords it was said that in relation to the possibility of increased costs and burdens on businesses their Lordships "must scrutinise the Bill in order to ensure that no such unintended consequences arise from it"[19]. We should expect no less from the Legislature. Whilst the Chapter I Prohibition was not unnecessary or premature, as argued by Mr John Redwood, there are consequences of the Chapter I Prohibition that pose the danger of thwarting the success of this new regime. Indeed, the Government were reminded that "[t]he reforms in competition policy that [the Competition Bill] will introduce are likely to be in place for at least 20 years, and industry and commerce will have to live with the results."[20] Nevertheless, there are issues testing whether the Chapter I Prohibition can be sustained in the next few years, let alone the next 20.

Some "seeds" of future problems were sown, but these could not have been foreseen in 1997 with the clarity that they now present themselves. They are the consequences of European reform[21] and technological advancement[22]. These now point to a much bigger picture, which takes the nature of the domestic control of anti-competitive agreements back to the debating forum.

The design of the control of anti-competitive agreements under the Competition Act 1998, is tested against the objectives identified, to determine whether the Act provides the panacea required. This forms the basis of Chapter 3, which uncovers the failings with the construction of the Chapter I Prohibition. Chapter 4 examines these failings against the experience of the first eighteen months of the prohibition and in light of the announcement that there is to be further reform. The impact of devolved control, which is not satisfactorily dealt with in the proposed reforms, is analysed in Chapter 5, with the significant threat of the internet in respect of the viability of the Chapter I Prohibition, considered in Chapter 6.

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[19] Lord Fraser of Carmyllie, Official Report, Second Reading, Competition Bill, House of Lords, 30 October 1997, Column 1150, House of Lords Hansard internet.
[20] Mr David Chidgey, Official Report, Second Reading, Competition Bill, House of Commons, Column 55, 11 May 1998, House of Commons Hansard internet.
[21] See Chapter 5, infra.
[22] See Chapter 6, infra.

This forms the basis of my hypothesis. The conclusions of Chapters 4, 5 and 6 present the action that must be taken if the Chapter I Prohibition is to be sustained.

1.3 Methodology

The objectives of the Chapter I Prohibition are developed from the notion of competition, the RTPA cases, the consultations for reform and the wealth of literature that that piece of legislation generated. Evaluating the design of the Chapter I Prohibition in meeting those objectives is primarily based on the Parliamentary debates, with analysis of the writings on Article 81 and associated procedures to provide explanation and comparison.

It will be made clear that one of the requirements of the Chapter I Prohibition, envisaged by the Government and adopted by the OFT, was that it be transparent. In order to analyse the Chapter I Prohibition and indeed test this particular objective, no specific questioning has been addressed to the OFT, other than to clarify a mistake identified in the 2000 Annual Report.[23]

The OFT have given a great deal of information by way of conference papers. Some of these have been placed on their website, but additional papers and those delivered by other speakers, have been obtained by attendance at conferences. Whilst it is accepted this information cannot be considered as being readily available to the public at large, in light of the limited detail since the Competition Act 1998 came into force, to have not included these papers would have severely curtailed the analysis and undermined the reliability of the findings of this work. Consequently, the basis for gathering evidence for this work has been all information that has been put into the public domain, without recourse to questioning of the OFT or related bodies. This includes lectures, books, journals and news articles from both the academic and practitioner spheres. Both are relevant, since the subject matter of this work can only be understood in the combined light of both disciplines.[24] The public domain is taken to include all

[23] See Chapter 4, infra.
[24] Indeed, a failing of the RTPA was that it was *so* academic in its design, it was easy to avoid in practice.

relevant information available via the internet. In view of my submission that this technological advancement alters the basis for the Chapter I Prohibition, it is only right that this medium be fully utilised. Indeed, much of the information in Chapter 6 is only available through www. All sources have been checked for reliability, although in the process discrepancies have been noted.[25]

[25] See 3.2.1, infra.

PART I

REGULATING BUSINESS AGREEMENTS BY LEGISLATION: THE REBIRTH OF DOMESTIC CONTROL IN AN EFFECTIVE FORM

CHAPTER TWO

Setting the Objectives for the Domestic Control: What is the Chapter I Prohibition to do?

"Everybody thinks that competition is marvellous, as if it were an unambiguous notion, but it is not. Some of our difficulties about defining "competition", especially in economic terms, go back a long way and have not yet been resolved."[1]

2.1 The perplexing relationship between Economics and Regulation

The relationship between law and economics is a difficult one, no better illustrated than by the domestic treatment of anti-competitive agreements.[2] It appears that

[1] Lord Desai, Official Report, Competition Bill, Second Reading, House of Lords, 30 October 1997, Column 1177, Lords Hansard internet.

[2] Although the law is not completely at a loss when it comes to dealing with economic matters; see J Lever, QC, "UK Economic Regulation: Use and Abuse of the Law", (1992) ECLR, 55, where we are reminded that the English Courts were able to deal with restraint of trade without any legislative assistance (even though this eventually became ineffective; see 2.2.1, infra). However, competition law can remain at a loss for quite some considerable time, causing conflicting interpretations and decisions, best demonstrated by the problem of Freezer Exclusivity; see K Murphy "Irish Court Rules on Freezer Exclusivity in the Ice Cream Market" (1992) ECLR 270; A Robertson and M Williams "An Ice Cream War: The Law and Economics of Freezer Exclusivity I", (1995) ECLR 7; W Sibree "Ice Cream War: In Defence of the MMC", (1995) ECLR 203; discussed in Chapter 5. It is not just a competition law dilemma; other areas of law have just as much difficulty. See Dr. CW Maughan and SF Copp "The Law Commission and economic methodology: values, efficiency and director's duties" (1999) 20(4) The Company Lawyer, 109, which traces the development of the discipline of law and economics; fields that in effect remained discrete until the 1960's. The problems caused when using economic models, which fail in a world with far from model

some lawyers do not like dealing with economic theory and as such have treated it as divorced from law, but "to the frustration of many lawyers competition law is heavily reliant on economics".[3] If we are to achieve effective competition then we must look at what both economic theory and legal regulation have to offer, working together in partnership, recognising the role that each has to play. It is argued that there should have been no separation of these two disciplines in the first place, with Jones suggesting that:

> "...it is arguable that the very idea of a relationship between law and economy entails a particular conception of the nature of the legal and the economic as separate orders. This sort of conception is both inadequate, as far as it goes, and, moreover, heralds a portrait of the social formation which is at best unacceptable and at worst plagued with contradictions. I would question, therefore, both the manner in which the issue of the law/economy relation is traditionally posed together with the very idea of a relation between separate instances of the social formation".[4]

However, in both academic and practice disciplines, law and economics have remained separate.

Economics has been given an explicit role under the Chapter I Prohibition, although the theories were already prevalent under the Restrictive Trade Practices Acts, even if in practice they were not at the forefront of the regulation; but where do we find the roots of this form of control? Economists have studied competition across the centuries and as such, there are many differing opinions. Despite

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behaviour, is discussed in J Joskow "Economic Modelling in Litigation" (1985) ECLR 73, demonstrating the difficulty economic models raise in the contentious area of law. See also In Re a Company (Nos. 5669, 5670, 5671 & 5672 of 1998) (1999) Ch.D (Park J) 6 October 1999 (unreported) where petitions to wind up the companies were dismissed because the Secretary of State had fundamentally misunderstood the "nature and economics" of the businesses.

[3] M Furse Competition Law of the UK and EC (United Kingdom, Blackstone Press Ltd. 2000 2nd ed.) p1. See also 2.2.2(ii) regarding the concerns of the Government and judiciary in applying economic principles under the guise of the RTPA 1956.

[4] K Jones, Law and Economy: The Legal Regulation of Corporate Capital (London, Academic Press, 1982) p 19. Jones goes on to look at the work of Cutler, Hindness, Hirst and Hussain in respect of the relationship between law and economy and the role of the political process being the key to law/economy relation; he concludes that "there is no acceptable reason why law and economy should be regarded as separate orders of sociality", although this portrait of society entails

divergence in the way economies operate and academic debate in respect of the models used to assess the economy, a common thread is the acceptance that problems arise when theory leaves the discussion forum and is subjected to the full rigours of commercial reality. These theories and models do not show the real world as we live in it; what they try to identify, one by one, are the forces that operate in the real world.[5] From this study of "industrial economics" (as it is known) looking at the micro-economic perspective, economists are able to show the likely affect of operating one system as opposed to another[6], which can guide us as to how goods and services can be best provided to society.

For the purposes of this work I have accepted that where the theory breaks down, law steps in to act as a stabilising agent, to ensure that the market place operates under the conditions that the theories assert will provide the maximum benefit to society. Not only does the law operate in a pre-emptive role to maintain the competitive framework, it also acts in a remedial capacity to provide individuals with the legal redress where they feel aggrieved by anti-competitive activity they have suffered. Consequently there are many aspects to the role that legal regulation has to perform.

In order to understand what law is trying to achieve in creating a system to regulate agreements that tends to the theoretical ideal, it is necessary to draw out the aspects of economic theory that law must replicate. These identify what competition means, and more importantly, especially in light of the domestic reforms, what the market means. Indeed, in the www era, the market raises new issues that will increase our reliance on economic theory.

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problems that are inherently intractable (pp 46 and 47), due to the way that the disciplines have developed, combined with the instrument of Government policy in developing the economy.

[5] GF Stanlake Introductory Economics (United Kingdom, Longman, 1989 5th ed.) p 10.

[6] A comprehensive study of economic theory and the comparison of different academic and economist views is beyond the scope of this work, but an excellent critique is provided by Swann, O'Brien, Maunder and Howe Competition in British Industry: Restrictive Practices Legislation in theory and Practice (London, George Allen & Unwin Ltd. 1974) p 92 et seq.

2.1.1 The Roots of Competition

Stanlake[7] identifies the basic types of organisation, which he describes as "Traditional Economies", "Market Economies" and "Command Economies".

A traditional economy is one where society uses the same methods of production and distribution that their ancestors used. Economic problems have been resolved through discussion and argument over the years. Examples of such economies are to be found in primitive agricultural and pastoral communities[8].

Under a command or planned economy, economic problems are resolved by the few in power, who basically impose solutions on society. These models have been used to describe the systems that existed in communist countries such as Russia, where the command economy was a response to the problems experienced at the start of modern day capitalism[9]. Although this organisation provoked internal dissatisfaction and political struggles in communist countries, it is important to realise that there are *elements* of planned economies in nearly all economies, for "it is applicable wherever the economic resources of a nation are directly controlled by some centralised authority."[10]

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[7] GF Stanlake op cit., p 12.

[8] ibid, p 13.

[9] Karl Marx and Friedrich Engles believed that the capitalist system was flawed and would destroy itself; the more productive the system became, the more difficult it would be for it to function. However, the harsh economic system imposed in Russia, resulting in a system of "Totalitarianism" did not resemble the Communist Utopia as envisaged by Marx and Engles. Indeed, those that came to lead a communist regime lacked the essential preconditions and aims set out by that Marx and Engles. See further P Worsley Marx and Marxism (Chichester, Ellis Horwood Limited 1982), in particular chapters 2 and 4; K Marx and F Engles (edited by L Feuer) Basic Writings on Politics and Philosophy (Great Britain, Fontana 1981), in particular chapters 1 to 6; K Marx Capital: A critique of Political Economy Vol. 1 (London, Lawrence & Wishart 1977). For the development of these beliefs see the critical theory of Jürgen Habermas of the Frankfurt School, all of which are beyond the scope of this thesis.

[10] GF Stanlake op cit., p 17 where it is noted that "The UK became very much a command economy during the years of the Second World War when the government took control of all important economic affairs." Certain goods continued to remain under some form of government control after the end of the war. For example, Government controlled the price of bread from 1941 to September 1956, when price subsidies were abolished. The domestic treatment of the "utilities" prior to privatisation is another example of centralised control by the State.

A market or capitalist economy is where society deals with the economic problems of resource allocation, production and distribution by allowing the market forces to run free: the principle of "laissez-faire", the idea being that governments play very little part in these economies. It is within this model that we first encounter competition "for in theory at least, competition is the regulatory mechanism of capitalism. It limits the use of economic power since no single firm or individual is large enough or strong enough to control a market and exploit the other buyers and sellers".[11] Thus, competition is the foundation that ensures this model works. It limits exploitation.

Adam Smith[12] was a great advocate of the market system, arguing that efficiency and benefit were maximised where entrepreneurs could operate freely without any interference from the state.[13] Non-interference was justified by Smith's "invisible hand" theory;[14] every individual in pursuing his or her own good is led, as if by an invisible hand, to achieve the best good for all, thus ensuring that free market economies would generally produce more beneficial results for society[15] compared to the situation where there was intervention from government. Although this "invisible hand" theory has received much support since 1776, it is recognised that

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[11] GF Stanlake op cit., p 15.

[12] A Smith (edited by RH Campbell, AS Skinner and WB Todd) Volumes 1 and 2 An Inquiry into the Nature and Causes of the Wealth of Nations (Oxford, Clarendon Press, 1976). Originally written in 1776, this represents the first serious attempt to study the nature of the economy and the development of industry and has perhaps been the most influential single work in the formulation of economic policy and regulation. Smith noted that "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible, indeed, to prevent such meetings, by any law that either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary." (Volume 1, p 145, paragraph 27). Smith's belief that businesses would meet and contrive is perhaps best demonstrated by the development of trusts by producers in the US as a device to create a monopoly whilst giving the impression that competition still existed (and hence the Sherman Antitrust Act 1890: "As the growth of networks of railroads shrank the country and facilitated the task of getting goods to far off markets, farsighted industrial leaders combined with competitors, sometimes organising in a from called the trust. They swallowed up hundreds of small proprietors, stamping out those who declined to join the combinations." E Fox "The New American Competition Policy" (1981) ECLR 439, p 440). In time of crisis though, such meetings will be encouraged or become necessary for example war (see 2.2.2 infra) and the recent petrol crisis (see Chapter 4).

[13] For a historical account of the UK market structure and the concept of "just price" policy which Smith's economic liberalism replaced, see R Merkin and K Williams Competition Law: Antitrust Policy in the United Kingdom and the EEC (United Kingdom, Sweet & Maxwell, 1984), p 6.

[14] A Smith op cit., p 456, paragraph 9.

[15] See in particular A Smith op cit., p 72 et seq. regarding Chapter VII of the Wealth of Nations "Of the natural and market Price of Commodities".

in the real world human behaviour can never be predicted with certainty, conditions never remain constant and new factors emerge to influence the economy. All it can do is analyse the likely economic effects of such changes and the policies used in order to achieve efficiency and maximise benefit to society[16].

2.1.2 The Economic Theory of Competition

Competition is the vital ingredient of any economy, based, even in part, on the capitalist system. The starting point is "perfect competition" which is where, according to neo-classical economic theory, consumer welfare will be maximised.[17] Goods and services will be produced in the exact quantities required by the buyer thus giving "allocative efficiency". Economists call this "price competition" for it is prices that determine efficient resource allocation and maximise benefits. Put simply, when demand for a particular product increases beyond the supply of that product, a shortage develops thus increasing the price in the short run. This in turn increases profits, which attract resources (be they raw materials, labour or even new organisations) from other lines of production, ensuring that there is "productive efficiency"[18]. In the long run the supply will extend, thus reducing prices to the optimum level, ensuring a return to allocative efficiency. This process is known as the "price mechanism".[19] Together, allocative and productive efficiency ensure that the benefit to society is maximised or, in other words, the situation is "pareto optimum"; no one can be made any better off, without making someone worse

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[16] For an alternative view see CE Ferguson Macro-economic Theory (Homewood, Richard D Irwin 1972), which takes a macro-economic look towards competition. This view has been criticised by D Swann, DP O'Brien, WPJ Maunder & WS Howe, op. cit., but it must be appreciated that economics is a very young science with a great deal about the workings of the economic system still imperfectly understood and there is continuing debate about the use of empirical evidence to support the role of competition (GF Stanlake op. cit., p 10); see further FM Scherer and D Ross Industrial Market Structure and Economic Performance (Boston, Houghton Mifflin, 1990, 3rd ed.) Chapter 11.

[17] Swann Competition and Consumer Protection (Harmondsworth, Penguin, 1979) Chapter. 3; Scherer and Ross op. cit., Chapters 1 and 2. Although this concept of welfare in the economic sense "...has been less of a guiding light that generalized statements of the "public interest"." (S Deakin and J Michie, Contracts, Co-operation and Competition: Studies in Economics, Management and Law, (Oxford, Oxford University Press, 1997) p 349). This concept of "public interest" has meant that in the RTPA and Fair Trading Act 1973, competition is not the only, and not even the overriding, objective. See 2.2.2 and 2.2.3, infra.

[18] Also known as internal or technical efficiency.

[19] For a full account of the price mechanism, elasticities of price, and utility affecting consumer demand, see G Stigler, The Theory of Price (New York, The Macmillan Company, 1966, 3rd ed.) p 22 et seq., although Stigler provides a warning to the reader trying to get to grips with the theory:

off.[20] Society is served best when the maximum number of goods are produced at the lowest possible cost.[21] Under perfect competition the consumer is sovereign and each business is a "price taker", sellers being unable to charge different prices because: (i) they sell homogeneous products; (ii) there are many buyers and sellers such that none has any power to influence price; (iii) buyers have perfect knowledge of the production functions and market conditions; sellers are fully aware of buyers preferences and competitors activities; (iv) all factors of production are perfectly mobile; (v) buyers are free to move from one seller to another; and (vi) there are no barriers of entry to or from the market.

According to Stanlake this is "an extreme situation in which competition reaches its highest possible degree".[22] Although it is highly theoretical and can never exist in the real world[23], it does "provide a useful tool of economic analysis and helps us to

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"Perfect competition is a typical example of a concept of everyday life that has been taken over by economists and developed into something almost unrelated to its original form." (p 88).

[20] Invented by Vilfredo Pareto. See further R Cooter & T Ulen, Law and Economics (United States, Addison Wesley, 1998, 2nd ed) p 12 et seq.

[21] There is a third efficiency, namely, "dynamic efficiency" where there is an optimal trade-off between current consumption and investment in technological progress, used to defend a position of allocative inefficiency provided that there is innovation. See OFT Quantitative techniques in competition analysis (OFT Research Paper 17, October 1999) for an evaluation of these efficiencies in competition cases, starting at p 34. This is discussed further in Chapter 3, infra.

[22] GF Stanlake op cit., p 192. See further the work of George Stigler who formulated the problem faced by the economist (and indeed lawyers applying competition law) as follows: "The goal of the economist is not merely to train a new generation in his arcane mystery: it is to understand this economic world in which we live and the other ones which a million reformers of every description are imploring and haranguing us to adopt. This is an important and honourable goal...It is not an easy goal, however, nor one which is now or ever will be fully achieved. A modern economic system is of extraordinary complexity. Imagine a three-dimensional jig-saw puzzle, consisting of roughly 100 million parts. Some parts touch against, let us say, 1,000 other parts. (That is, each family deals with that many employers, banks, retail stores, domestic servants, and so on.) Other parts touch, let us be conservative, 50,000 other parts. (Firms that sell to retailers and buy from other firms and hire labourers, and so on.) It would be enough of a task to fit these 100 million pieces together, but the real difficulties have yet to be mentioned. The pieces change shape quite often – a family has twins, a firm does the next best thing and invents a new product. The economist has the interesting task of predicting (in the aggregate) each of these movements. Meanwhile a busy set of people – congressmen, members of regulatory bodies, central bankers, and the like – are changing the rules on who the jig-saw pieces will be and how they are shaped. And of course there are other jig-saw puzzles of comparable complexity, and these other puzzles (foreign economies) are connected at literally a million points in our puzzle." (G Stigler, op cit., p 7). Stigler recognises that even this analogy is imperfect (pp 7 and 8) because rather than fit together, the pieces are like gears, that is, it is a dynamic model and the change in the relation between two parts will affect other parts that neither of them directly touch. This same puzzle exists today, but with the internet not only altering how the existing pieces are shaped, but altering the board on which this puzzle is played. See Chapter 6, infra.

[23] The theory soon runs into trouble in practice because even undertakings that operate perfectly competitively may attract some degree of consumer loyalty, which in itself renders the theory of "perfect competition" inapplicable.

make sense of the real world."[24] As a means of developing legal control, the theory does lay the foundations for what needs to be taken into account, by identifying the concepts of price change, benefit to society, nature of product, power, mobility, barriers, and of course consumer sovereignty. No wonder the legislature had problems in trying to design a system in 1956 that would allow these factors to be evaluated with certainty. A further problem for legislation is presented by the Pareto Optimum theory, but flexibility is to be found in its development that allows changes where there are gainers and losers, provided that the gainers gain more than the losers lose.[25] This opens the door for allowing certain anti-competitive activity, which in practice can be seen in the gateways and tailpiece of the RTPA, but is perhaps best expressed legalistically in the test adopted in Article 81(3)[26].

When the model of perfect competition is compared with that of monopoly,[27] or imperfect competition, be it oligopoly[28] or duopoly, the detriment to society is realised. Economists argue that there will not be allocative efficiency or productive efficiency and there will be a "welfare loss" to society. According to Liebenstein, such undertakings become "X-inefficient"[29] meaning that resources are used to make the right product but less productively than they might be.[30] Further, due to the increased prices under imperfect competition, consumers switch to purchasing other goods or services as a substitute, resulting in an inefficient distribution of

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[24] GF Stanlake op cit., p 192. Although according to Stanlake it is possible to point to some markets where there is some approximation to this ideal (see further p 199), which conforms with Stigler's view that "A perfect market is one characterised by perfect knowledge on the part of the traders. Or stated differently, in a perfect market no buyer pays more than any seller will accept, and no seller accepts less than any buyer will pay. These conditions can be met only in a completely centralised market, which is approximated by a few exchanges such as the New York Stock Exchange." (G Stigler op cit., p 87). Similarly the London Stock Exchange approximates to the conditions necessary for perfect competition, but even here elements of the wider market display monopolistic features, such as the way in which regulatory information about listed plc's is communicated. The Financial Services Authority has proposed to open this market up to competition by allowing other information providers the right to communicate regulatory information currently reserved for the Regulatory News Service and the London Stock Exchange (FSA press release FSA/PN/051/2001, 2 May 2001).

[25] Kaldor-hicks Efficiency / Potential Pareto Improvement. See further R Cooter & T Ulen op cit., pp 41and 42.

[26] See Chapter 3, infra.

[27] In the same way that perfect competition is rare in the real world, so will be a pure monopoly in which there is only one seller in the market, and, as noted by M Furse, (op. cit., p 8) "...empirical observations suggest that monopolies, even where they do exist, are unable to remain monopolies in the long run unless they are protected by legislative barriers to entry".

[28] See p 20 infra.

[29] "Allocative Efficiency vs X-Efficiency" (1966) Am Ec Rev 392.

[30] An undertaking will be "X-efficient" where there is organisational efficiency.

resources, making the economy as a whole less efficient and compounding the loss to society[31]. However, the theories allow the factors[32] that gave rise to these situations to be identified and examined in order to see how the regulatory role that "competition" provides has broken down and in what ways it can be assisted. In these models, economic theory suggests that output will be lower and price will be higher (compared to perfect competition), but this all assumes that perfect competition produces the most beneficial result.[33] It must be remembered that these are only the *possible* consequences of imperfect competition; it is by no means absolute that such detriment will fall upon society.[34] Benefits can and do arise from a monopolistic market. The economies of scale (that is, the benefits that arise from the production process) afforded to the monopolistic producer may indicate that the industry can only sustain one efficient producer. This was a strong argument in the case of public utilities, which itself is also a good example of changing conditions, since over recent years it has been thought that efficiency is maximised where there is competition of some form in these former "public" sectors. Merkin and Williams[35] point out that the monopolist has a crucial role to play in subsidising one class of consumer by the profits earned from other classes. By adopting a policy of price discrimination, those who could not afford the economic price determined by competition are able to have access to the good or service. A monopolistic producer may have more resources for research and development, and as a consequence there may be more innovation under such a structure.[36] A similar result may be achieved by two or more smaller undertakings that restrict competition by acting together in order to develop a new product on an efficient scale, thus producing considerable benefits.

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[31] See further Consumer Detriment under Conditions of Imperfect Competition, (OFT Research Paper 11, August 1997 (prepared for the OFT by London Economics)).

[32] Be they technical barriers, legal barriers, problems with raw materials or restrictive practices for example.

[33] For opposing views, that perfect competition is incompatible with progress, see the works by Clarke infra; J Schumpeter Capitalism, Socialism and Democracy (London, Unwin University Books, 1974), in particular Part II; J Schumpeter "Business Cycles: A Theoretical, Historical and Statistical Analysis of the Capitalist Process Volumes 1 and 2 (Philadelphia, Porcupine Press, 1939); and JK Galbraith American Capitalism: The Concept of Countervailing Power (Oxford, Blackwell, 1980 2nd ed.), Chapter 9.

[34] Hence UK regulation developed to assess an undertakings' conduct under such a structure (under the Fair Trading Act 1973), rather than condemn that structure per se.

[35] R Merkin and K Williams op cit., p2.

[36] See further JA Schumpeter Theory of Economic Development: an enquiry into profits, capital, interest and the business cycle (Cambridge Mass, Harvard University Press 1961), Chapter 6 for his theories on motives to innovate and monopoly rewards.

For any argument for a monopoly, there will almost certainly be an argument against[37]. For example, the monopolist has little incentive to innovate because it does not face any competition; will not use the profits from price discrimination to benefit society as a whole; there is no pressure to update plant and equipment; complacency will set in. However, the fact that there are be pros and cons indicates there will be instances where allowing anti-competitive activity could provide a greater benefit to society, and this must be catered for in the legal control. Indeed these theories have been given a greater role in our application of competition law, thanks mainly to EC developments, beginning most notably with the advent of the EC Merger Regulation[38], and continuing with the Notice on defining the relevant market[39]. Most recently the increased reliance on economic theory can be seen in the new market share thresholds in the EC block exemptions[40]. The successful application of these new rules and principles depends on the use of economic models and tests such as econometric tests calculating price elasticities and price parallelism[41].

There are however, two caveats: firstly, the reality of the situation must always be looked at; all that the economic models can do is suggest the likely affects of such a structure to help foresee and remedy any problems before they develop. According to Stanlake "there is no theory of the behaviour of the firm which commands general acceptance. Firms clearly have several goals, for example, profits stability, maximum sales, protecting their share of the market, management status, and so on. There is no theory which successfully embraces all these aspect of decision

[37] The market for solicitors professional indemnity insurance provides an interesting example of a monopoly that has recently ended (a process that began with a solicitor, Michael Dalton, challenging the validity of the "SIF" as contrary to Article 81), with a word of warning as to the future. Following the end of Solicitors Indemnity Fund's monopoly and the ability of solicitors to obtain their insurance from the open market, a survey for brokers Alexandra Forbes found that 73 per cent of law firms had saved money ((2001) Solicitors Journal, 23 February 200, 147). More than a quarter making savings of at least 40 per cent, with only 17 per cent worse off. However the warning that "premiums will rise over the next few years as the market settles down" has been given by the brokers.

[38] Council Regulation 4064/89 as amended by Council Regulation 1310/97.

[39] Commission notice on the definition of the relevant market for the purposes of Community Competition law [1997] OJ C371/5, 9 December 1997. See further Chapter 3.

[40] See Chapter 3, infra.

[41] See D Ridyard, "Economics and Econometrics: Using economists in merger control cases" (1997) II(3) Global Counsel 39

making."[42] The models do not evaluate the *potential* competition that sellers face; the theory only focuses on *actual* competition. As Furse points out, "potential competition serves as a restraint on the conduct of incumbents (those already in the market) in just the same way as does the actual competition being faced."[43]

Secondly, not all of our market problems can be solved by theories. Swann, O'Brien, Maunder & Howe note[44] that, given that interdependence within industry is a prevalent characteristic of industrial life, it is surprising that conventional theory fails to provide a proper theory of oligopoly[45]. They go on to recognise the problems of trying to formulate a model for "...the very complexity of oligopolistic competition makes it unlikely that there can be any one answer to this sort of problem. One of the major problems facing anyone attempting to analyse

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[42] GF Stanlake op cit., p 216. According to Stanlake (p 129) the underlying assumption, and generally accepted view, of much economic theory, has been that the main function or motivation of the firm is to earn maximum profits for its shareholders. But "while the rights of shareholders to profits is generally upheld, the rights of employees, customers, and the general public must be given far more weight in the management decisions taken within the firm". However, that the "validity of the assumption of profit maximisation has been questioned on several grounds" (p 215). Some firms do not have the knowledge necessary to be able to maximise their profits; others may not want to risk loosing goodwill by increasing prices. Some economists have suggested a theory of "workable competition". This was put forward by JM Clark who suggested that the failings in the perfect competition model are not great enough to warrant government intervention in order to improve the situation. Workable competition accepts that there are elements of some form of monopoly in nearly all market sectors and its goal is to ensure that such structures are compatible with strong competition. ("Towards a Concept of Workable Competition" (1940) 30 Am Ec Rev 241. See also Sosnick "A Critique of Concepts of Workable Competition" (1958) 72 Qu J Ec 380, but this in itself has caused difficulties as to what it should consist of, since no precise criteria have been developed leaving it a rather vague theory). Both the UK and EEC competition authorities have invoked this idea of workable competition on various occasions (See Case 26/76 Metro-SB-Grossmarkte GmbH & Co. Kg v Commission [1978] 2 C.M.L.R. 1; R Whish "Competition Law" (London, Butterworths, 1993 3rd ed.) pp 456-459). D Swann, DP O'Brien, WPJ Maunder & WS Howe (op cit., pp103-109) are highly critical of this theory, but do acknowledge that it is a significant step forward in economic theory. Another theory that has been advanced is that of the "contestable markets" (See Bailey "Contestability and the Design of Regulatory and Antitrust Policy" (1981) 71 Am Ec Rev 178). However, Whish suggests that it is questionable whether this "adds anything to traditional thinking on industrial economics or whether it simply involves a difference of emphasis" (R Whish op cit., p 12.). See also RH Coase The Firm, the Market and the Law (Chicago, The University of Chicago Press, 1990), which shifts the focus from the market onto the firm, finding that competition policy would be irrelevant if undertakings were free to conduct their own affairs, although Coase recognises that his view does not generally command agreement.

[43] M Furse op cit., p 14.

[44] D Swann, DP O'Brien, WPJ Maunder & WS Howe op cit. p 120.

[45] The game theory has been used to try to help analyse oligopolistic markets and understand how businesses react in such situations. See further R Cooter & T Ulen, op cit., pp 33 to 36. Smith and Round call for greater use of the assessment of strategic behaviour as opposed to market structure, in oligopolistic markets, drawing on Article 82 jurisprudence to assess the "...actions which a firm takes to improve its competitive position relative to actual and potential rivals, in order to gain a permanent commercial advantage ...[where it is] non co-operative strategic behaviour in that the

oligopoly is that oligopolistic competition takes so many forms"[46]. They also explain that oligopolistic competition "has a tendency to produce collusion and cartelisation"[47], the main motive usually being a desire to increase stability and certainty and to reduce rivalry, and hence the legislature is faced with a problem that requires some form of action to be taken. No economic model has been able to deal with the situation satisfactorily. Consequently, law has not found a coherent and accepted way to address the problem, confirming the dependence that competition law has on economic theory. This is one reason used by the UK Government for retaining the FTA complex monopoly provisions.[48]

2.1.3 Defining Competition

A basic definition of competition is "rivalry", but there are many others.[49] However, our legislation does not contain a definition of competition.[50] Dewey states that

> "...no definition of competition is possible; indeed, in a modern economy that makes extensive use of markets and an elaborate division of labour, the term competition is virtually a synonym for "economic activity". However,

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firm acts unilaterally." (R Smith and D Round, "Competition Assessment and Strategic Behaviour" (1998) ECLR 225, p 227).

[46] D Swann, DP O'Brien, WPJ Maunder & WS Howe op cit., p 122. Economic theory "cannot be expected to cover all the varied situations of monopoly and competition." (A Hunter, Competition and the Law, (London, George Allen & Unwin Ltd, 1966), p 35); Stigler refers to the fact that no one has been able to deal with this problem since its original formulation by Cournot in 1838 when explaining the problem in two firms each owning a mineral water spring: "The theory of price formation with oligopoly is, and for more than a century has been, one of the less successful areas of economic analysis, in spite of the fact that almost every major economist has thought about the problem, and a large number have written on it." (G Stigler, op cit., p 216). Dewey finds that "In both oligopoly and imperfect competition there is the difficult question of deciding how to draw the demand curve for the individual firm. In the case of imperfect competition the curve, is so to speak, pulled out of the air; no effort is made to relate it to the demand curve for the industry's product. In the case of oligopoly the usual practice is to treat competition as a form of "incomplete collusion."" (D Dewey, The Theory of Imperfect Competition: A Radical Reconstruction (New York, Columbia University Press, 1969), p 16).

[47] D Swann, DP O'Brien, WPJ Maunder & WS Howe op cit., p 129

[48] See Chapter 3, infra.

[49] "The act of competing"; "The opposition offered by others". (Collins New English Dictionary (United Kingdom, Harper Collins, 1999)).

[50] The RTPA 1976 did not contain a definition; neither does the Competition Act 1998 nor even Article 81 or 82 EC (so there can be no s 60 argument put forward for the silence on the part of domestic law). Hunter argues that "The term itself, "competition", camouflages important value judgements on the necessity and desirability of competition" (A Hunter, op cit., p 15); these value judgements have proved an issue for both UK (see 2.3.1) and EC law (see Chapter 3 infra).

four features of competition are explicitly or implicitly stressed by virtually all definitions."[51]

He identifies these as:

1. "the process of free exchange whereby one trader persuades others to comply with his wishes by offering them a service or commodity in return"[52]
2. "connotations of rivalry (the conspicuous exception being, of course, the definition of perfect competition). Rivalry is merely another name for "incomplete collusion" and hence always exists to the extent that sellers fail to behave "as if" they were employees of the same firm"[53]
3. "some part of the behaviour of individuals and business firms in the market place is predictable"[54]
4. some part of the behaviour of individuals and business firms in the market place is not predictable"[55]

This does not help a great deal in trying to draw the parameters for the objectives of the Chapter I Prohibition. Our starting point must be the strict economic definition of competition, that is, the regulatory mechanism of the free market. From this system we know that the consumer is sovereign. When the Competition Bill was debated the Government promoted the importance of the consumer[56]:

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[51] D Dewey, op cit., p 1.
[52] ibid.
[53] D Dewey, op cit., p 2.
[54] D Dewey, op cit., p 3.
[55] ibid.
[56] The latter stages of debate took place following the publication of Consumer Affairs – The way forward (OFT 241 November 1998), which called for reform of Part III of the Fair Trading Act 1973 and increased recognition and reward of good practice amongst suppliers. This document was the result of a two year consultation process, starting with Consumer Affairs Strategy (OFT 166 June 1996), but publication of the DGFT's findings had been delayed until 1998 because of the change in Government. However, this Government did know the concerns regarding consumer issues: the DGFT had called for the reform needed to increase his powers to protect consumers in his Annual Reports: see in particular Annual Report of the Director General of Fair Trading, 1996, p 15; Annual Report of the Director General of Fair Trading, 1997, p 29; and Annual Report of the Director General of Fair Trading, 1998, pp 8 to 13, where the DGFT took the opportunity, since the Competition Act 1998 had received Royal Assent, to press for legislation to reform consumer protection. In the 2000 Report we are told that the OFT continued to "advise and work with the DTI...in anticipation of a new Consumer Bill" (Annual Report of the Director General of Fair Trading 2000, p 18), but this is not on the legislative timetable for the first year of the re-elected

"...it might be argued that the whole purpose of the legislation is to protect the consumers' interests."[57]

"Competition law holds the ring between competing businesses and the various interested parties concerned."[58]

"...the whole purpose of competitive activity is, or should be, for the benefit of the consumer."[59]

"Competition is vital to ensure choice and value, and weak competition law means lower quality at higher prices. Anti-competitive behaviour hits ordinary people and imposes extra costs on family budgets. It hits families as tax payers."[60]

It is slightly curious that the Government spent so long making promises about the role of the consumer under the Competition Act 1998. However, when viewed purely from the consumer sovereignty perspective, the Government is showing that it was only following the economic definition of competition. The danger is that statements suggesting that the consumer is of paramount concern obscure what the Government actually intends by competition law and the protection of the consumer. The DGFT has said that combining his functions in "...two distinct but complimentary areas of responsibility: protecting consumers from detriment, and promoting vigorous competition between providers of goods and services...creates a potent force for the benefit of the British Consumer..."[61] However, protecting the

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Labour Government (see Chapter 4 infra, regarding the reforms proposed to enable consumer actions, announced by the Government as part of a new Enterprise Bill).

[57] Lord Ezra, Second Reading Competition Bill House of Lords, Column 1155, 30 October 1997, Lords Hansard internet. Lord Ezra continued by considering more adequate representation of consumer interests within the OFT and utilities.

[58] Lord St. John of Blesto, Second Reading Competition Bill House of Lords, Column 1156, 30 October 1997, Lords Hansard internet.

[59] Lord Borrie, Committee Stage, Competition Bill House of Lords, Column 871, 25 November 1997, Lords Hansard internet.

[60] Margaret Beckett, Second Reading, Competition Bill House of Commons, Column 25, 11 May 1998, Lords Hansard internet.

[61] Speech given by John Bridgeman to the Air Transport Users' Council 9 June 1999 (http://www.oft.gov.uk/html/rsearch/specific-arch/spe16-99.htm 15 June 1999, p 1), where the DGFT pointed out that such a dual role was also enjoyed in the US, France and Australia.

consumer does involve more than purely looking after their economic interests, that is "...the supply of the right product at the right price..."[62]. The new DGFT described the two functions as "...a single over-arching task, which, in essence, is helping to make markets work well."[63] In this first Annual Report, he continues the trend that exploded during the debate of the Competition Bill, that "competition is at the heart of consumer protection."[64] Notwithstanding this comment, John Vickers reminds us that his powers stem from both "...consumer and competition legislation" calling for a strengthening of the consumer law powers.[65] This is perhaps an attempt to draw a line under the confusing statements of old, by reintroducing the caveat that consumer law is a separate legal base to competition law providing just one string of the OFT's bow. However, this caveat must be made more explicit as the statement of the DGFT (referred to above) only muddies the waters. This is not a call for the separation of the way in which competition and consumer protection are delivered by legal means[66], but rather a more transparent statement of the objectives of each, recognising the limits that the two issues face and the conflicts that arise. The real danger is that this leads to a disparity of interests that have become what Whish describes as the different objectives of competition law[67]. According to Whish, competition means a "struggle or contention for superiority, and in the commercial world this means a striving for the custom and business of people in the market place".[68] This struggle can lead to unfair competition, a situation that would not fall within the economic definition of competition, but rather concerns fairness in the way that undertakings compete, and

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[62] Description applied by John Vickers in Annual Report of the Director General of Fair Trading, 1999, p 11.

[63] Speech given by John Vickers to the Law Society European Group Annual Dinner, 6 December 2000, "Some aspects of UK Competition and Consumer Policy" (http://www.oft.gov.uk/html/rsearch/specific-arch/spe19-00.htm 5 January 2000, p 1), where the DGFT later noted that whilst the major reform needed to strengthen consumer protection had not taken palace, improvements to domestic law were being delivered in the shape of EC measures (p 3).

[64] John Vickers, Annual Report of the Director General of Fair Trading 2000, p 9.

[65] Annual Report of the Director General of Fair Trading 2000, p 7.

[66] As John Vickers pointed out, there had been views expressed that his roles should be separated, but he thought this would "...be a disservice to consumer welfare"(Annual Report of the Director General of Fair Trading, 1999, p 11).

[67] It has been recognised that only one aspect of the legislative framework is competition regulation in the sense of ensuring that the market mechanism works effectively; legislation designed to secure "a more equitable balance of market forces so that individual firms or groups of firms cannot (or do not) exercise undue market power" is only one piece of the jigsaw making up UK competition law (GF Stanlake, op cit. p 128).

[68] R Whish op cit., p 1.

as such has been dealt with by separate domestic remedy.[69] The notion of trade also becomes entangled in defining what competition law is about; after all, competition regulates the relationships between traders. Trade raises issues for government polices, particularly on the international scale, but is wider than the role of pure competition regulation[70]. However, trade plays an extremely important role in defining the jurisdictional relationship between EC and domestic regulation, with the "effect on trade[71] between member states" set as the threshold separating Article 81 from the Chapter I Prohibition.

According to Whish, there are six different objectives to this area of law, which can be loosely described as "Competition Law":[72] protecting the consumer[73], dispersal of power and redistribution of wealth, protecting the small firm,[74] providing an instrument for other government polices, achieving single market integration (in the

[69] For example passing off. An attempt was made to include specific provision for combating unfair competition in the Competition Bill, but this was rejected. See 2.3.2 infra. The problems posed by competition law in this "extensive sense" are discussed in J Kirkbride "The law of unfair competition: is there an E.C. approach?" (2000) 21(8) The Company Lawyer, 230.

[70] For example, anti-dumping policies are a trade policy, rather than a competition issue. In the same way that trade raises international questions, so does competition policy, both in terms of globalisation of substantive law and procedure. As issues of market access and trade barriers diminish, the effectiveness of competition policies become the new concern (see Chapter 6 infra).

[71] Trade being a flow of goods/services; a much easier notion to define than the effect on competition. (J Boyce "Commercial agreements revisited." (2000) V(1) Global Counsel, 43). See further Chapter 5 for the impact of modernisation on the inter state trade test.

[72] R Whish, op cit., pp 13-16.

[73] Bork views this as short sighted as a producer might in the long run leave the market rather than comply with unreasonable competition law – see The Antitrust Paradox: a policy at war with itself (New York, Free Press, 1993). M Furse argues that competition law is not directly concerned about consumer protection or trading standards, although he suggests that both may benefit from the application of competition law (op cit., p 1). There is a wealth of specific consumer protection law, which today is, in the main, EC driven, and most notably of late the Stop Now Orders under the Injunctions Directive 98/27 [1998] OJ L166/51 (the umbrella directive supplementing existing consumer protection laws), which came into force in the UK on 1 June 2001 (Stop Now Orders (EC Directive) Regulations 2001, SI 2001 No. 1422). However, the conflict that the "consumer" causes to the promotion of competition was recognised in the Green Paper of 28 July 1999, (see Commission press release IP/99/580), where concern was expressed that the competitiveness if European businesses could be jeopardised by the Directive); other notable measures include regulating unfair terms in contracts (Directive 93/13/EEC OJ L95/29) and the European Extra Judicial Network (EEJ-Net) which seeks to bring together the existing ADR systems in each Member State to make it easier for consumers to seek individual redress (see "Empowering the European-consumer" (2000) 27 Fair Trading 15).

[74] This has been attacked by the "Chicago School" of economists. See further E Fox "The New American Competition Policy – from anti-trust to Pro-Efficiency (1981) 2 ECLR 439, where it is noted that despite there being "...many views about what anti-trust should do...there is one view by which anti-trust does very little. That view is that anti-trust is not appropriately applied except in an attempt to improve efficiency." at pages 442 and 443, noting the views of the Assistant Attorney General Baxter (see 2.1.4 infra).

case of the EC, that is, "providing the level playing field") and finally enabling other parties/organisations to make the important business decisions.[75]

Due to the way that the economy develops in real life, as influenced by human behaviour, social and political changes, there is no constant definition of competition. Any definition needs to evolve in order meet the new challenges set. The fact that there is a patchwork of control and remedies, demonstrates that competition law has many facets to its legal use. The wider aspects of competition form a competition policy, wider than just regulation of competition in the economic sense as "...competition policy has had to accommodate a number of different economic and non-economic goals."[76]

The role of government in economics is diverse, from redistributing income and wealth, and stabilising the economy, to ensuring fairness in all business relations. This goes beyond competition regulation in the economic sense (with concerns related to unfair competition and unfair trading[77]), as the government is responsible for enacting laws[78] to protect the public from fraud[79], misleading advertising[80],

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[75] Whish gives the example of the EC and suggests that "there is more than a whiff of dirigism in the way that the EC Commission has developed its policy, although many Commission officials would deny this" and goes on to conclude that the "invisible hand of competition is replaced by the much more invisible hand of DGIV" (op cit., p 15). See 2.2.2

[76] S Deakin and J Michie, op cit., p 29. This competition policy is described as a "system of competition law" by Gerber and is used by Dabbah as one of the ways of measuring the success of what the law is tying to achieve, rather than focusing on the question of economic efficiency (MM Dabbah "Measuring the Success of a System of Competition Law: a Preliminary View" (2000) 8 ECLR 369, 370 to 371; this is examined in Chapter 4 infra). Where such broad policies exist, Furse calls for the regulators to make the goals "...as transparent, and as open to examination, as is possible." (M Furse, "The Role of Competition Policy: A Survey", (1996) ECLR, 250, p 258).

[77] See "When is Trading Unfair?" A Speech to the David Hume Institute, Edinburgh, by John Vickers 26 April 2000 (www.oft.gov.uk/html/rsearch/sp-arch/spe04-01.htm as at 29 April 2001) in which the DGFT notes that competition and fairness are inextricably linked "but there is more to fair trading than competition" (p 3) with the illustrative examples of legislation to control advertising, distance selling, and unfair contract terms. In 1990 Gordon Borrie (the DGFT at that time) published a report following consultation on a general duty to trade fairly. The report recognised that such a duty was over ambitious, but did call for the reform of Part III of the Fair Trading Act 1973 (Trading Malpractices: A report by the Director General of Fair Trading following consideration of proposals for a general duty to trade fairly, (OFT July 1990)).

[78] There are also general non-statutory measures to increase the protection of consumers, for example, by involving consumer groups in the telecoms industry (see Encouraging self and co-regulation in telecoms to benefit customers, by OFTEL, http://www.oftel.gov.uk/about/self0600.htm (as at 02/09/2000); and there are also the information initiatives, for example, Buyers Goods (OFT Know Your Rights Series, no. 5), and the CAT Standards voluntary benchmark for standardising information made available by mortgage lenders (HM Treasury press release 07/00, 26 January 2000).

rogue traders[81], unfair contract terms[82], unfair practices[83], unsafe products[84], (all of which were included in the Government's White Paper Modern Markets: Confident Consumers[85]), to implement health and safety provisions[86], and to protect certain industries[87]. The government also controls the economy through its inner city regeneration schemes and its regional planning policies to stimulate growth in

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[79] Note the European Commission Green Paper Combating Counterfeiting and Piracy in the Single Market, (November 1998), although it is argued that the Commission's attack is based on economic premises that are difficult to quantify since it does produce beneficial consequences in the form of employment and wealth even if these are within the black economy; J Phillips "Fakin'it" (1999) EIPR 275. However, it is submitted that the black economy will causes a welfare loss to society in that individuals are exploited as consumers, employees or owners of legal rights.

[80] The Consumer Protection Act 1987, Consumer Credit Act 1974, Trade Descriptions Act 1968, and the Control of Misleading Advertising Regulations 1988.

[81] Although the legislation is ineffective and the OFT have not been using its powers to the full extent, requiring the problems to be remedied by a consumer protection bill, see "Watchdog timidity 'risks consumers' lives" (2000) FT, 30 August 3. The Government have passed Regulations to implement the EC Directive on injunctions (see footnote 74, supra) and "Widening the Net" (2000) 26 Fair Trading, 13.

[82] The Unfair Terms in Consumer Contracts (Amendment) Regulations 2001 (SI 2001 No. 1186), The Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999 No. 2083), the Unfair Contracts Terms Act 1977. The number of cases in which unfair terms have been abandoned rose from 25 (as at May 1996) to 1,200 (as at October 1998), with some 3,000 complaints being investigated (Dr H Wilkinson "Unfair Contract Terms – Hydra-headed monsters" (1999) New Law Journal May 21, p 773). See for example warning given to the International Air Transport Association "Airlines told to drop unfair contract terms" OFT press release PN 20/99, 9/6/99. See generally the OFT Unfair Contract Bulletins (No. 1 May 1996, No. 2 September 1996, No. 3 March 1997, No. 4 December 1997, No 5 October 1998) and OFT Annual Reports.

[83] For example, Estate Agents; warning given to estate agents under these powers following a rise in consumer complaints ("Putting their house in order" (2000) 25 Fair Trading 3).

[84] For example, Consumer Protection Act 1987; General Product Safety Regulations 1994 (SI 1994 No. 2328).

[85] Cm 4410. Amongst the wealth of provisions, Chapter 4 outlined the development of codes of practice (see Chapter 4 infra) and Chapter 7 stated the Governments intention to extend the OFT's powers to take action and seek injunctions to trading standards authorities, the Consumers' Association, industry regulators and the Data Protection Registrar, when Parliamentary time allows. See also OFT press release PN 26/99, 22/7/99 (Bridgeman welcomes new focus on consumers); "Small-print watchdogs set for big changes" (1999) 24 Fair Trading 26; and "Spreading the net" (2000) 25 Fair Trading 2. The Stop Now Orders (see footnote 73 supra) have amended the provisions of Part III of the Fair Trading Act 1973 in respect of community infringements, widening the range of bodies that can issues proceedings against traders.

[86] Such legislation deals in part with the "social costs" of the production process such as protecting employees from injury and pollution concerns. This legislation is not in the strict sense "competition regulation"; with Bork (op cit., pp 114-115) arguing that competition law should not concern itself with these social costs.

[87] Agriculture causes concern when it comes to competition regulation because of the nature of the industry and difficulties faced by those trying to make a living from it. Hence the partial exclusion from the EC prohibition on anti-competitive agreements by virtue of EC Regulation 26/62, which did not extend the competition rules to agreements entered into in respect of the Common Agricultural Policy. A similar exclusion was sought in respect of the Chapter I Prohibition by the National Farmers Union and the Federation of Agricultural Co-operatives. It was formulated by Lord Lucas in Official Report Committee Stage, Competition Bill House of Lords, Columns 336 and 337, 13 November 1997, Lords Hansard internet. At the Report stage Lord Simon of Highbury proposed an amendment along the lines of Regulation 26/62 so as to exclude certain agreements relating to agricultural products (Official Report, Report Stage 1, Competition Bill House of Lords,

particular areas.[88] It may actively encourage co-operation between undertakings where this results in innovation and benefit to the public and will often provide the rules to stimulate this.[89] Whish gives the example of intellectual property rights[90] where without some "immunity from competition" the undertakings would be unlikely to enter into such an expensive project. Competition maybe inappropriate in some sectors of the economy as certain goods and services would not be provided under the free market prices system, such as health services[91], education, defence and agriculture.[92]

Columns 973 to 976, 9 February 1997, Lords Hansard internet), now contained in Competition Act 1998, Schedule 3, paragraph 9 "Agricultural Products".

[88] For example, the location of the DVLA (then the DVLC) in Swansea, Wales.

[89] For example the Private Finance Initiative (PFI), although such projects fall within EC driven public procurement regime to ensure that there is competition introduced into the scheme. The procurement regime ensures that there is transparency, objectivity and equal treatment of tenderers, and as such "while compliance with these rules does not guarantee that public sector bodies will not fall foul of the prohibitions in the [Competition Act 1998], it should limit the risk of infringement" (Public sector bodies and the Competition Act 1998 (OFT 440, April 2001) p 11). Provided these principles are adhered to there is no need to award the contract to the tenderer who comes in lowest if in the awarding authorities professional opinion a different tenderer is likely to be lowest in ultimate cost see Opinion of Advocate General Jacobs in SIAC Construction Ltd v The County Council of the County of Mayo Case C-19/00, 10/5/01. Public procurement rules have been modernised and simplified to "open up all the benefits of the Single Market to guarantee the competitiveness of companies, best value for money for tax payers and improved quality of public services" (Frits Bolkestein, European Commission press release IP/00/461, 10 May 200) and as such, impact on aspects of work where competition rules would ordinarily have been the relevant consideration for the undertakings involved. Despite simplification, they still cause problems, for example, Western Power Distribution Limited found itself in trouble following its plans to outsource the management of Welsh Water (see "Public Procurement" (2000) XI(11) PLC , 71). See generally, S Arrowsmith The Law of Public Utilities Procurement: A Practical Guide to the UK Regulations & Associated Community Rules (London, Sweet & Maxwell Ltd., 1996) and S Arrowsmith & A Brown Public Procurement Law Review 1999 (London, Sweet & Maxwell Ltd., 2000).

[90] R Whish op cit., p 9. See WR Cornish Intellectual Property (London, Sweet & Maxwell, 1999 4th ed.) Chapter 1 and Appendix 1.

[91] Health was a contentious issue whilst the Competition Bill 1997 was being debated, with the suggestion that resale price maintenance of medicaments not receive any special exclusion or exemption causing a divergence of opinion. The arguments for special protection for medicaments included looking after the consumer, the community and protecting the pharmacy sector. See in particular the comments in 2.3.2 infra and more generally Official Report Competition Bill, Committee Stage 1, House of Lords, 13 November 1997, Columns 269 to 281 and Official Report Competition Bill, Report Stage 1, House of Lords, 9 February 1998, Columns 873 to 883. It is also to be noted that under the re-elected Labour Government the "internal free market" (introduced by the Conservative Government) will be replaced by free market reforms allowing services to be provided by both the public and private sectors.

[92] According to Whish "legislatures have tended to view that agriculture possesses special features entitling it to protection from the potentially ruthless effects of the competitive system. An obvious illustration of this is the common agricultural policy of the EEC" (op cit., p 7).

2.1.4 Justification of Regulating Agreements in the UK

The assumptions regarding the invisible hand guiding entrepreneur behaviour have not proved true. There are not enough producers and suppliers in all sectors of production to prevent any of them from having an influence on the market. Some undertakings desire to evade the role of competition. Strong undertakings can and do emerge, frustrating the policing role competition is to provide. The variables that come into play seem endless. Although the economic models do not deliver the conclusive answer, they provide the factors that must be taken into account when drawing up a legal system that enables competition to perform its role as regulator of the marketplace. In our domestic mixed economy, competition remains the crucial regulator if we are to have efficient methods of production and distribution. It was said during the second reading of the Competition Bill in the House of Lords "competition law provides the framework for competitive activity. It protects the process of competition. As such it is of vital importance".[93] Legal controls can assist or ensure that competition is effective in the role it plays in the economy. The role of regulation must be to create an environment for competition to exist in order to enable the market to succeed. As Swann et al point out "Competition policy should then approach an industry with a view to detecting the existence of impediments to the operation of competition....The primary impediment to the operation of competition is likely to be the existence of restrictive practices, although the firms operating these should be given the chance to demonstrate that these do in fact contribute to static efficiency, X-efficiency and dynamic efficiency."[94]

Although the UK has accepted the need to regulate, it must be remembered that some argue against any legal intervention. The regulatory debate has existed for many decades, divided into two schools of thought, both of US origin[95]: the

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[93] Lord St. John of Bletso, Official Report, Second Reading, Competition Bill House of Lords 30 October 1997, col 1156, House of Lords internet.

[94] D Swann, DP O'Brien, WPJ Maunder & WS Howe op cit. p133; "static efficiency" being the optimisation of costs achieved by output without altering any of the factors of production and dynamic efficiency being the use of technical changes in order to lower costs.

[95] For a critique of US theory of competition regulation, see D Dewey, op cit., pp 122 to 141; "Over the years, economists, especially in the United States, have been intermittently concerned with an

Harvard school and the Chicago school. Basically, the Harvard approach (developed in the 1930's) supports the rights of regulators to intervene where there is anti-competitive conduct in the market – the "SCP" or Structure-Conduct-Performance model[96]. The Chicago thought is that there is no need for regulators to be involved in these situations; structure results from performance and thus monopolistic or imperfect markets should not be attacked because the undertakings in them have flourished.[97] The Chicago school of thought has been subject to attack[98] although it does represent the most recent version of neo-classical model.[99]

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ill-defined business phenomenon that is variously called "unfair competition," "predatory competition," "cutthroat competition," and "economic warfare." This last description has been favoured by Europeans, while Americans have been inclined to use the more emotionally laden term "unfair competition." This terminology difference is not without interest, for it suggests what, in fact, has been the case. European writers have usually viewed economic warfare as a not-too-important type of business behaviour that is capable of dispassionate analysis. To many American economists such behaviour is both important (or, at any rate, would be important if it were not prevented by antitrust laws) and thoroughly obnoxious. We might say that the unfair competition of American economists equals economic warfare plus the observer's condemnation...The problem of identifying unfair competition is further complicated by the fact that, in the United States, the term denotes a much wider range of behaviour to lawyers and laymen than it does to economists. Indeed, any small businessman who has lost out in the competitive struggle to a larger rival is likely to believe that *ipso facto* he is a victim of unfair competition. If only to preserve his self-respect, he is loath to concede that he may have suffered defeat because the greater size of his rival conferred economies of scale that he could not match." (pp 122 and 123).

[96] Performance is determined by the conduct of the undertaking, conduct itself being determined by the market structure; see further Kaysen and Turner Antitrust Policy: An Economic and Legal Analysis (Cambridge Mass, Harvard UP, 1959).

[97] This school of thought relies very much on the assumption that behaviour in the real world will match that forecast by the perfect competition model – see further Bork, op cit. The Chicago view formed the basis of US policy under the Reagan and Bush (Snr) administrations. Already we are starting to see a return to this policy under the new Bush (Jnr) administration, and this will impact on the future of any global competition initiative, with its implications for e-commerce control (see Chapter 6). Dewy is critical of the US approach to regulation since he finds that "American lawyers and laymen generally brand as unfair competition business practices which they believe to be unethical or immoral regardless of the effect of such practices on market structure." (op cit., p 123), whilst non-intervention in the market palace to protect competition resulting in "The rise of the large firms compelled the economists, especially in the United States, to engage in some painful rethinking. He had been trained to believe that economic welfare was increased when businessmen were given wide freedom of contract...as long as businessmen enjoyed no legal protection against others who envied their profits, competition would persist." (pp 139-140). Hunter would support this proposition for intervention by his observations that "Regardless of the precise background of industrial or market structure legislators wish to see companies making decisions independently of one another, as rivals, and without reference to one another's actions." although in practice "independence is a matter of degree" for there will always be some attention paid to the decision made by others for example in prices, marketing terms (A Hunter, op cit., p 67).

[98] Although Deakin and Michie find that "In the USA, the treatment of antitrust legislation has shifted away from a concern with the abuse of monopoly power towards a more clearly focused efficiency-based analysis, mainly under the influence of the Chicago school of law and economics. (S Deakin and J Michie, op cit., p 29), and further "Under the influence of the Chicago school, economic analysis has come to play a more prominent role in the judicial construction of the legislation and this has prompted a more tolerant attitude towards vertical restraints, notwithstanding a slight re-tightening of controls in recent years." (p 339). However, in concluding their study on co-operation and trust in inter-firm relations, Deakin, Goodwin and Hughes find that "It may be instructive...for policy-makers to reflect on Coase's comment [R Coase, The Firm, the Market and

Indeed we are witnessing a growing trend to not only liberalisation of market sectors regulation, but also liberation of regulatory burden generally.[100] Dewey argues that "As long as production in the industry is technically inefficient, it will pay somebody to undertake its rationalization: but this end can be achieved most cheaply with the aid of mergers and cartels, since the "fact" of technical inefficiency ensures that rationalization can make every member of the industry better off without making any member worse off."[101] However this should not prevent legal control because legislation can take into account the resulting benefits of anti-competitive activity (as in the case of the gateways and tailpiece and Article 81(3) EC. As to the justification for law regulating an economic system based on "laissez-faire" assumptions Jones says that "There is, of course, a possible distinction to be made between the role of law, insofar as it may provide a series of enabling provisions for the pursuit of entrepreneurial endeavour and the explicitly interventionist stance of law, in the sense that it sets limits to such endeavour."[102] The whole purpose of the Chapter I Prohibition must be to encourage and enable business to compete. The dangers of limiting endeavour are very real and now raise concerns in this current climate of promoting e-commerce.[103]

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the Law, (Chicago, University of Chicago Press, 1988), 9], that 'for anything approaching perfect competition to exist, an intricate system of rules and regulations would normally be needed'." (S Deakin and J Michie, op cit., pp 363 and 364), with the danger that an increased regulatory regime will lead to undertakings leaving the market.

[99] J Leisner and D Glynn, "Does Anti-trust make Economic sense?" (1987) ECLR, 34, to which the authors conclude it does, but find that there is "considerable support for a shift in policies in the US, UK, and EEC, away from intervention which impedes the market mechanism towards intervention which complements it." (pp 368 and 369). However, M Furse "The Role of Competition Policy: A Survey" (1996) ECLR, 250 points to the challenge to the Chicago School by new industrial economics, and he quotes S Martin "Monopoly is undesirable because a monopolist will restrict output and charge more for the product than the opportunity cost of the resources used." (Industrial Economics; Economic analysis and Public Policy (1994 2nd ed) p 27).

[100] See DTI press release P/99/471, 3 June 1999, where Stephen Byers, speaking at the British Chambers of Commerce conference, announced measures to cut red tape and reduce the burdens on business generally in respect of all regulation, saying "We will have a presumption against regulation. Regulations will only be introduced where absolutely necessary and where all other avenues have been pursued." This is expanded upon by A Hicks, "Philosophy, politics, and economics" (2000) 21(3) The Company Lawyer, 92.

[101] D Dewey, op cit., p 128.

[102] K Jones, op cit., p 108. Jones is very critical of viewing law and economy separately and the way that "anti-trust legislation is regarded as an interventionist apparatus capable of remedying defects generated within a separate economic sphere. The fact that it is less than successful in this objective is seldom traced to the viability of using law in this way but is, all to often, reduced to the fallibility of individuals or institutions and to the corruption of political control." (p 109).

[103] See Chapter 6, infra.

Despite the majority accepting the need for competition (whilst disagreeing on how to treat some of the consequences of that competition), there are also some who would go further and question the need for any legal regulation to ensure competition was present in society.[104] However in the same way as pure command economies fail in the modern world of commerce, so will this argument. The difficulty faced by government is that there are certain times when positive action is required to meet ensure that benefit to society is not diminished.

2.2 Developing a form of controlling agreements in the UK

The origins of competition legislation are traced back to significant market problems[105], and although identifying what is, or is not, a problem is not an easy task, deciding on how to deal with those problems proves even more problematical. This is hardly surprising given the diversity of issues that the Government legislates for, the tension between economics and law, the need to provide effective remedies and the necessity to keep pace with the evolution of anti-competitive practices. Whish makes the point that "much of the UK law (and to a lesser extent EEC law) has developed without any overall conception of the function either of competition or competition law, and that this has produced many of the difficulties that

[104] Indeed Jones suggests that the viability of law as a regulatory agency is ignored in the general discussion because it is forgotten that "Law as an appropriate context and law as a regulatory agency are two very different ways of looking at the nature of law" (K Jones, op cit., p 110). However, law in the context of competition is all about regulating the market to ensure that the role of competition regulation persists. Although, Jones's point does raise the legitimate question about which agency of the legal system is best placed to apply the law (see 2.3 and Chapter 3, infra). Although Hunter reminds us that "Note first of all that it is possible to do nothing. Indeed this was the British position until recently. Only in the post-war years has belief in the merits of competition been resuscitated." (A Hunter, op cit., p 15). Indeed, one of the questions to be answered when looking at the Chapter I Prohibition in light of e-commerce is whether the prohibition should be applied in this sphere at all.

[105] For example in the US where "...economists seem first to have become interested in unfair competition during the era of the trusts (roughly 1890-1910) when in a great number of industries (approximately sixty-five) a single firm came to produce 60 per cent or more of the total national output." R. L. Nelson, Merger Movements in American Industry: 1895-1956 (Princeton, N.J., 1959), p 102, quoted by D Dewey, op cit., p 123, footnote 1. However, Jones argues that "...it must be remembered that the essence of anti-trust legislation concerned the way in which the corporate form of ownership threatened the very basis of American democracy and entrepreneurial behaviour." (p 178), having argued that the aims of the regulation were quite specific and involved an attempt to prevent the growth of a form of ownership deemed to be an anathema to democratic society (p 126). Hence the problems were not just related to the market but again went back to the issues raised under the disparity of interests involved in this area of regulation. On US Antitrust see S Deakin and J Michie, Contracts, Co-operation and Competition: Studies in Economics, Management and Law, (Oxford, Oxford University Press, 1997) pp 341 to 345.

exist".[106] In the development of competition control by legal means "...there was a strong presumption in favour of the freedom to trade (a policy which in a different milieu persisted in USA common law until ratified by the passing of the Sherman Act). But the "reasonableness" tests[107] emerged to modify this view and eventually push the balance of favour to the other extreme. The explanation of these apparently arbitrary swings in public policy of the law on competition must be sought mainly in extra-legal considerations; the social and political environment and the personal valuations of judges themselves."[108] These extra legal considerations have meant that competition law has developed in a piece meal fashion, for which no one can be completely blamed, for like law, economics is also a dynamic subject, ever changing as new factors emerge and behaviour alters. It is only when these have been identified can the aims of the Chapter I Prohibition be understood and its impact addressed.

2.2.1 Defective Common Law

Prior to 1948, the domestic law dealt with competition problems on an ad hoc basis. Control was very much trial and error, partly due to lack of information and the inability to predict the consequences of such practices, and partly because, as Merkin and Williams point out, the controls that existed, were "in response to economic or political events, particularly the seventeenth century conflict between Crown and Parliament" [109]. Consequently the first reason "...why parliamentary action was necessary was the impotent state of the common law when it came to dealing with the problem of restrictive practices."[110]

The common law had done very little to provide a substantive legal framework for

[106] R Whish op cit., p 20.
[107] Inherent in the application of what is in the public interest.
[108] A Hunter, op cit., p 76.
[109] Merkin and Williams, op cit., pp 5 to 10, discussing the various criminal and civil offences that were used such as regrating (Buying goods and then reselling them at a higher price in the same market), engrossing (Purchasing large quantities of goods for speculation) and forestalling (Limiting supply to a market by prior agreement with, or the inducement of other suppliers).
[110] D Swann, DP O'Brien, WPJ Maunder & WS Howe, op cit., pp 49 and 50; the three common law doctrines were monopoly, conspiracy (both civil and criminal) and restraint to trade.

evaluating restrictive agreements.[111] Consequently "...a generation of business man became imbued with an almost pathological fear of excess capacity and so-called "cut-throat competition". The lesson they learnt from this experience was to organise comprehensive restrictive agreements through the membership of strong trade associations"[112] with these associations becoming "...the vehicles to carry on the doctrines and practice of restrictions to another generation of business men."[113] Agreements were dealt with by a common law doctrine developed from the 1414 Dyer's Case[114], which proved at the time a major deterrent to anti competitive agreements, although now most familiar in relation to covenants in employment contracts and agreements for the sale and purchase of company shares or business assets[115]. This case represented a significant advancement in regulating anti-competitive agreements and demonstrates the inherent tension that exists when legal regulation is injected into the competitive process. Agreements that restrained trade were rendered unenforceable unless the parties to the agreement could positively demonstrate that they were reasonable both as between themselves and in the public interest. This "public interest" test provided scope for the judiciary to develop and formulate competition policy and public policy[116], whilst allowing their own "value judgements", be they economic or social, to filter through. Consistency in respect of achieving economic objectives was not guaranteed; a change in value judgements explains in part the reason for the more lenient

[111] Cooter and Ulen note that "The courts in England and America were reluctant to enforce nineteenth century contracts to create cartels. However, the common law did nothing beyond not enforcing cartel contracts to undermine cartels. Cartels were finally outlawed by antitrust statues, not common law." (op cit., p 251).

[112] A Hunter, op cit., pp 15 – 16.

[113] Jewkes, J. "British Monopoly Policy 1944-56", Journal of Law and Economics, October 1958, quoted by A Hunter, op cit., p 16, footnote 8.

[114] (1414) YB 11 Hen 5 fo 5 pl 26; see JD Heydon, The Restraint Of Trade Doctrine (London, Butterworths, 1971), p 8.

[115] "Though the modern doctrine operates mainly in the area of negotiated contracts, it was formed partly as a result of the law's response to three other problems, namely the attempts of private individuals to make a profit by interfering with food supplies, the attempts of guilds to regulate the economic affairs of their members, and grants of monopolies by the Crown." JD Heydon, op cit., p 3.

[116] Heydon refers to Jessel, M.R., in Printing and Numerical Registering Co. v. Sampson (1875), L.R. 19 Eq. 462, 465, "you are not expected to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and voluntarily shall be held sacred and shall be enforced by the Courts of justice." (JD Heydon, op cit., p 29).

application of the doctrine as time went by[117], although the other reason for the judges more liberal approach was the extreme difficulty (if not impossibility) in assessing what was and was not in the public interest. As Merkin and Williams point out the eventual merging "...of the two limbs had effectively deprived restraint of trade of any economic meaning" [118].

This doctrine was overtaken by the introduction of the RTPA 1956, and although not repealed "...in relation to agreements to which the legislative provisions apply, the legislation takes precedence by virtue of the fact that its provisions are more stringent than the common law tests and a restriction which fails the legislative tests is unlikely to be upheld under the common law rules."[119] However, the most notable legacy of the restraint of trade doctrine was the continued use of the public interest test under the subsequent legislation, most particularly in the RTPA.

2.2.2 Reform through Legislation

The ability of enterprises to avoid the working of any legislation designed to prevent anti-competitive agreements, has proved to be a real problem in domestic legislation[120]; it was not until the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, with its general power to investigate restrictive agreements and

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[117] As Merkin and Williams summarise (at p 8), "early cases struck down guild rules intended to prevent non-members from trading and denied the existence of customs under which common prices could be imposed" but along with the economic liberalism of laissez-faire, "it became established that the public interest merely required that businessmen adhere to their contracts, so that an agreement reasonable between the parties would automatically satisfy both limbs of the test. On this basis the courts upheld price fixing agreements and market division, including covenants not to compete (not ancillary to an employment contract or business transfer)."

[118] Merkin and Williams, op cit., p 9.

[119] J Wilkinson, Restraint of Trade, (London, Format, 1991) p 114.

[120] The Trade Union Act 1871 was an attempt at curbing restrictive agreements, but as Merkin and Williams note (op cit., p 9), the reality was somewhat different an trade associations could avoid the ambit of the legislation because "it was soon established that bodies set up ostensibly as trading companies fell outside the legislation, and the many associations choosing to take the benefits of registration as trade unions simply set up internal procedures to ensure conformity with agreements". The Profiteering Act 1919 followed an investigation into anti-competitive conditions in industry (The Report of the Committee on Trusts 1919 Cmd. 9231), but "Despite the relative competitiveness of British Industry the Committee on Trust and the Committee of Enquiry under the Profiteering Acts of 1919-20 remarked on the widespread arrangements for restricting competition." (A Hunter, op cit., p 74). This legislation required the Board of Trade to investigate prices, costs and profits under cartels and businesses charging excessive prices could be prosecuted. "One thousand eight hundred committees were set up and two hundred and two convictions were obtained in the 18 months before the Act was allowed to lapse, but it was of little practical use" (Merkin and Williams, op cit., p 10).

practices, that the UK finally took the opportunity to develop effective control. This Act proved to be the catalyst for change, but the social and political objectives prior to this time, demonstrate the wider difficulties faced in developing a form of competition legislation.

Of most impact was conflict, since "in modern times wars have always tended to stimulate collective action in industry."[121] By the time of the First World War, manufacturing was largely under association control[122] with the problems of war encouraging, if not forcing, the government and businesses and associations to co-operate. However, post war economic difficulties saw a new breed of agreement and collective action, which were more elaborate than before, with anti-competitive practices becoming a widely used "tool" of industry. This focused the Government's attention on improving economic management post conflict and led to the 1944 White Paper on Employment Policy[123], based on the impact of Keynesian thinking.[124] This wider picture of economic management is summarised by Pope, "Wartime organisation is generally praised but the potential for long-term damage acknowledged. While there is some criticism of government economic policy in the immediate post-war years, it is acknowledged that the late-1940s difficulties were generally beyond British control"[125] with other problems in the make-up of the British economy, that is, over-commitment to slower growing sectors; government action or inaction; "stop-go" economics; high taxation; a heavy commitment to "non-market" goods – welfare, military; lack of coherent economic planning, all playing their part.[126] These other factors are recognised in the 1944 White Paper since the attainment of full employment, industrial expansion and stable prices by preventing restrictions on competition, required more than just the theory of competition. Pure economic factors and social and political

[121] D Swann, DP O'Brien, WPJ Maunder & WS Howe, op cit., p 36.
[122] Merkin and Williams, op cit., p 10. The 1929 Balfour Committee on Trade and Industry (Cmd. 3832) argued that there should not be any government intervention as this would prevent businesses from recovering and growing. This attitude was typical in the inter-war years, yet the government was only going along with the tried and tested notion of the free market.
[123] Cmd. 6527.
[124] There was concern that restrictive practices might make it harder to attain full employment. D Swann, DP O'Brien, WPJ Maunder & WS Howe, op cit., pp 46 and 47. Paragraph 54 of the White Paper recognised that "...agreements or combines do not necessarily operate against the public interest; but the power to do so is there. The Government will therefore seek power to inform themselves of the extent and effect of restrictive agreements, and of the activities of combines..."
[125] R Pope, The British Economy Since 1914: A Study In Decline? (London, Longman, 1998) p 4.

considerations became fused, somewhat confusing the application of the economic theories and models in devising domestic control.[127] No wonder economists have so many different views and angles on the legislative models, for the government took competition from its economic sphere and placed in a much larger pool of policy. A point well put by Merkin and Williams, "Whilst the legislation itself has been expanded and refined on several occasions since 1948, social and political objectives in the control of monopoly and cartels have remained as important as purely economic considerations".[128]

The impact of the White Paper made its mark on restrictive agreements since

> "...the first targets of competition law following the 1944 White Paper were the trade associations. Trade associations were involved in nine out of the first ten Monopolies Commission reports; the Commission tended to see trade associations as mechanisms for facilitating horizontal and vertical anti-competitive agreements, primarily regarding price and certain other matters."[129]

However, the provision of a comprehensive domestic competition law did not start until the passing of the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948[130], although the purpose of which was "not to promote competition, but rather to ensure that dominant firms were efficiently organised".[131] The Act was "a milestone – it was the first specific piece of anti-trust legislation introduced by a U.K. government in modern times. It was, however, a modest step. It did not condemn monopoly or restrictive practices outright – there was no parallel with the *per se* approach which characterises American anti-trust. Instead it embodied a case

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[126] ibid.
[127] Policies based on improving competitiveness still encourage co-operation between businesses in certain respects, such as the Governments plans to improve learning amongst employees by actively encouraging business networks (Learning through business networks (DTI URN 99/957, July 1999)); whilst not encouraging cartels, this demonstrates policy objectives being delivered through the assistance of businesses getting together.
[128] Merkin and Williams, op cit., p 11. However, note that under the Competition Act 1998 there is a shift in emphasis from the "public interest" to more economically based test (well, at least in theory), explored in Chapter 3 infra.
[129] S Deakin and J Michie, op cit., p 360.
[130] See A Hunter, op cit., p 68 et seq.
[131] S Deakin and J Michie, op cit., p 346 explaining section 14 of the 1948 Act.

by case approach."[132] An approach which used the public interest notion developed under the common law as the means for evaluation and "in determining whether a particular practice operated against the public interest, the Commission was empowered to take into account 'all matters which appear in the particular circumstances to be relevant'."[133] The inevitability of the scope of the test to be used under the RTPA thus becoming clearer.

(i) "Collective Discrimination"

The Monopolies and Restrictive Practices Commission Report[134] is the watershed in controlling agreements. It explains why we have a general legislative control on anti-competitive agreements in the UK. It has been much written about, but without it the reasons for the RTPA become rather abstract. More importantly, it is clear that it foretold some of the problems that would in time arise, namely the difficulty caused by form, the importance of effect, the need for effective powers of enforcement and the problems of the public interest.

Following reports into particular industries[135] and 3 official inquiries,[136] the Board of Trade sent a reference to the Commission[137] in respect of the general effect of "specified practices" on the public interest,[138] which despite being wider than

[132] D Swann, DP O'Brien, WP.J Maunder & WS Howe, op cit., p 51
[133] S Deakin and J Michie, op cit., p 346.
[134] Collective Discrimination: A report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and other Discriminatory Trade Practices, June 1995 (Cmd. 9504).
[135] The Supply of Dental Goods; the Supply of Cast Iron Rain Water Goods; the Supply of Electric Lamps; the Supply of Insulated Electrical Wires and Cables; and the Supply of Insulin. These reports had dealt with restrictive arrangements in a particular trade. Now the Commission was to investigate only some of these arrangements that had been adopted in many trades – thus regard was to be had to these, together with the reports on the Supply of Imported Timber and the Supply and Export of Certain Semi-Manufactures of Copper and Copper-Based Alloys.
[136] There were 3 official inquiries between 1919 and 1952 that were relevant to the reference, as they dealt with Fixed Retail Prices (1920), Resale Price Maintenance (1949) and Restraint of Trade (1930) (paragraph 15 and Appendix 1 of the Report).
[137] On 17 December 1952, under section 15 of the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948
[138] Paragraph 4 of the Report. The key question to be answered was whether *collective* discrimination to adopt or enforce a restrictive practice was in the public interest and not whether restrictions alone were a good or bad thing, reinforcing the elevated status of the public interest as the criteria for determining / assessing anti competitive agreements. This is a severely limiting test when it is applied – the Commission noted in paragraph 25 that it was difficult to seek the views of consumers "partly because few consumers can speak in any representative capacity and partly because few are sufficiently informed of the arrangements in particular trades for them to be able to assess their general effects. Our conclusions as to the effect of those practices cannot, therefore, be

anything previously, was limited by the exclusion of certain agreements[139], although, the range of agreement and arrangements investigated was wide enough to prove conclusively that there was a case for the whole system of domestic protection of competition to be reformed. The Report constantly referred to the "effect" of anti-competitive practices (since the 1948 Act was effect based). When assessing the arguments for and against such discrimination, the Commission recognised that there were difficulties in attempting to discuss the general effect on the public interest, not least because "the extent to which competition is restricted may depend less on the form of the agreement than on the way in which it is operated."[140] Hence the problems of form were identified early on. Having identified effect as the key indicator or assessor of anti-competitive activity, it is a great shame that this was not followed through when it came to deciding how the legislation would deal with the conclusions of the report (as this was only given a secondary status in its use to justify agreements).

The Commission identified six broad categories of agreements:[141] Category I – Collective discrimination by sellers (without any corresponding obligation on the buyers)[142]; Category II - Collective discrimination by sellers in return for exclusive

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entirely a matter of weighing one body of evidence against another. We have had rather to attempt to make broad general judgements taking into account both the views of those who have come before us and our own assessment of the effect of the practices on those who were not in a position to formulate their views so precisely." The views of consumers receive greater attention under the Chapter I Prohibition with the market definition test and the increasing consumer awareness requested by the OFT (and likewise the European Commission, see Chapter 3 infra).

[139] Paragraph 5 of the Report: the excluded agreements were those between a supplier and purchaser to which there were no other parties; IPR licence agreements; agreements to allocate markets on a territorial basis; and agreements between interconnected bodies (the exclusion of vertical agreements was implicitly catered for by the way that the RTPA was drafted; see 2.2.2 (ii) infra). The Commission found that they were looking at discriminatory practices and thus "the whole question of common price arrangements" (Paragraph 12) was excluded from the investigation.

[140] Paragraph 72 of the Report.

[141] Many undertakings operated agreements falling within two or more of the categories and some had agreements with restrictions falling outside the scope of the reference (paragraphs 36 and 37).

[142] These included discrimination in price, where traders agreed what preferential terms in respect of prices would be given to a favoured class of customer, and exclusive selling, whereby goods were sold to certain buyers, with other traders and consumers being forced to obtain the product from those favoured buyers. The rational for this being that "carpet baggers" (paragraph 57) who only engage in a trade temporarily or as a sideline is prevented. Designed to ensure a certain standard of service, this should actually be a concern for other legislation for the consumer to receive redress and a remedy where the service is not of the level they contracted for. This is outside the strict realm of competition regulation. Arguments advanced in favour of the agreements included maintaining the general standard of service, since competition may result in distributors debasing the level of service (paragraph 75) and concentrating trade in fewer hands promotes a more economical use of the country's resources (paragraph 78) (but is this not the very function that the free market performs when it is working perfectly – indeed it was noted that "in time of normal

buying[143]; Category III - Collective *adoption* by sellers of a policy of maintaining resale prices or imposing other collateral trading obligations on the buyers; and Category IV - Collective discrimination by sellers to *enforce* resale prices or other contract terms[144]; Category V - Collective discrimination by buyers (without any corresponding obligation on the sellers)[145]; and Category VI – Aggregated rebates[146].

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prosperity freedom of entry to a trade should be regarded as providing an important potential source of beneficial competition."(paragraph 85)). However, these practices restricted innovation, impeded the development of new methods of distribution and "in so far as consideration of safety arise these should be met...by legislation covering those particular trades." (paragraph 83). The Commission concluded that in general the agreements operated against the public interest (paragraph 96).

[143] This was where sellers gave some form of price concession or confined supplies to favoured buyers and those buyers undertook to buy all of their requirements from those suppliers. The Commission found that it was within this category that it found some of the most rigidly defined qualification for admission to an "approved list" (paragraph 104). They concluded that (apart from arrangements between an individual seller and an individual buyer, which were outside the terms of the reference) "this form of restriction is one that in general most clearly operates against the public interest." (paragraphs 122 and 123).

[144] The Commission recognised that in may trades there were agreements providing for both the adoption and enforcement of such restrictions/discrimination, but these were two distinct categories, where adoption was concerned with the policy or practice, enforcement was not concerned with policy; although it was found that trades tended not to distinguish between an agreement to have a policy of retail price maintenance and an agreement to enforce it by collective action – collective action being the most effective way of enforcing any such policy (paragraph 138). The most important type of rule or practice was resale price maintenance (paragraph 125) used to eliminate price competition between distributors, and the Commission found that resale price maintenance generally operated against the public interest as it made it more difficult for both manufacturers and distributors to try different methods of marketing their goods, and for the consumer to choose freely (paragraph 146). The Commission concluded that "rigid price maintenance applied to a substantial proportion of the goods in any trade virtually eliminates price competition between retailers and is likely to lead to a waste of economic resources." (paragraph 175). Again, this would operate against the public interest, but here it is interesting that the wording used refers to purely economic resources, as opposed to the effects on the public interest generally used elsewhere in the Report

[145] These took the form of agreements to buy exclusively from favoured suppliers, to ensure that such suppliers adopt a selling policy that is in the interests of the buyers to the collective agreement. The Commission noted that there were very few examples of exclusive buying by itself being precisely set out in a written agreement and used the example of the National Union of Retail Tobacconists who had given "advice" to its members to boycott a supplier. Although it was only advice the members could have been placed under an obligation to follow the advice given (paragraph 181). However, the Commission found that arrangements that took the form of recommendations, where there were no obligations imposed on those involved, fell outside the terms of the reference. With hindsight, this can be seen as a weakness in the reference, but the RTPA introduced a "statutory fiction" in respect of association recommendations (Section 8(2)-(5) RTPA 1976), and on the European front, the concept of a concerted practice was included to deal with such arrangements in practice. The Commission found that exclusive buying appeared to be employed relatively seldom by itself, but where it was put into practice they concluded that such agreements operated against the public interest (paragraph 180).

[146] This category related to rebates calculated at rates that varied according to the total value (taken to mean quantity) of an individual customer's purchases from those members of the group of sellers (paragraph 189). Individual suppliers in a competitive market normally allowed a rebate where the size of the order or orders meant that some saving is made, that is, results in efficiencies through economies of scale, but the Commission concluded that such agreements accentuated the more dangerous features of common prices and this effect generally outweighed any advantage that such

The Commission briefly looked how three other countries had dealt with the problems of similar anti-competitive activity. The USA had passed the Sherman Act 1890, with its prohibition approach, making all such practices illegal per se, leading to the Supreme Court of Justice developing the "rule of reason" making only unreasonable restraints that could not be justified illegal in all circumstances[147]. Canada's regulation of anti-competitive practices was essentially part of the criminal law, with the practices under scrutiny being either the subject of certain sections of the Criminal Code or the provisions of the Combines Investigations Act 1923[148]. However, Sweden had followed a different route, having introduced a comprehensive system of registration for restrictive agreements in 1946[149], with the register being open to public inspection. It was claimed that the publication of such agreements in the register promoted "public comment and criticism and thus [led] to the elimination of some of the worst abuses."[150] Further, it was noted by the Commission that "over one-third of the agreements on the register in 1954 had been cancelled and a significant proportion of the remainder had been modified; it is, however, not yet possible for us to assess what the economic effect of the cancellation or modification of agreements in all these cases has been."[151] This was a pity, since within a few years the ingenuity of undertakings to avoid the register by drafting an acceptable form, the effects of which could still be injurious to competition, or worse still the development of informal arrangements that were difficult if not impossible, to catch and punish, would become apparent. The Commission further noted that Sweden had later introduced a prohibition on resale price maintenance, and other agreements were subjected to a process of review by the Commissioner for Business Freedoms.[152]

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rebates had in assisting smaller manufacturers operating within this system (paragraph 213). Any benefits arising from such practices were the exception rather than the rule.

[147] Paragraph 216 of the Report. The Commission noted the other US legislation used to combat anti-competitive practices such as the Clayton Act of 1914 which made it unlawful for an individual trader to discriminate in price where the effect may be substantially to lessen competition (paragraph 217), but felt that the types of specified practices where there was a collective agreement involving price discrimination would fall to be covered by the Sherman Act.

[148] Paragraphs 221 to 224 of the Report.

[149] Paragraph 225 of the Report.

[150] Paragraph 226 of the Report.

[151] ibid.

[152] Paragraphs 227 to 229 of the Report.

However, the weakness of this system appeared to be the lack of powers to enforce its findings. A warning for our Government that was not heeded.

In summing up, although the Commission noted that the practices used differed in many important respects from industry to industry and from time to time, they found that there existed a common feature – the imposition of a collective obligation,[153] and the majority[154] of Commission members found that the types of agreement examined adversely affected the public interest.[155] However, they found that they could not conclude that there should be no exceptions to this general finding since "it appears to us that the exceptional use of practices of these kinds might be justified, subject to safeguards to avoid any restrictive effects which were not directly necessary to deal with the particular problems involved.[156] The Commission went on to list the circumstances where such practices could be justified, which formed the basis of the "gateways" in the RTPA 1956[157].

The Commission were not criticising the existence of the policies themselves since they could be "perfectly reasonable and sensible" for individual concerns to adopt where the restriction protects a legitimate interest, but if such rules/restrictions are required they should be implemented without resorting to a system of collective approval, allowing for the final verdict on the better policy to be left to the market since the consumer can vote with his or her feet as to which trader they will do business with.[158] Clearly new legislation was needed since the powers available were insufficient.[159] This much was agreed on. It was the way in which the legislation should take shape that caused problems for the Commission with the suggestion of two possible forms; one would "...ensure a measure of publicity and supervision by requiring all agreements falling within the scope of [the] reference to be registered, and then to prohibit such of them as after individual scrutiny were

[153] Paragraphs 231 and 232 of the Report.
[154] Sir David Cairns, Professor GC Allen, JA Birch, CN Gallie, CHP Gifford (although he did not agree that collective agreements for the enforcement of resale prices by individual manufacturers generally operated against the public interest – paragraph 254 of the Report), Professor Sir Arnold Plant and Sir Richard Yeabsley.
[155] Paragraph 233 of the Report.
[156] Paragraph 240 of the Report.
[157] See 2.2.2 (ii) infra.
[158] Paragraphs 235 and 236 of the Report.
[159] Paragraph 242 of the Report

not found to be in the public interest. The alternative would be to prohibit generally by statute all agreements covered by [the] reference, with provision for exceptions in particular cases".[160]

Each solution was examined further. The first would require legislation that precisely defined the types of agreement to be brought within the realms of regulation, with registered agreements subsequently being referred to an "independent body" for adjudication and ultimate prohibition where the agreement was found not to be in the public interest after scrutiny along the lines of criteria defined in the legislation.[161] The advantages of this were seen as "ensuring that the existence and contents of agreements falling within its scope would be publicly known. This might lead the parties to abandon or modify arrangements that were likely to incur criticism and to proceed with care when new arrangements were in contemplation."[162] This would have been all very well had there been powers of investigation to weed out those arrangements that were not registered and if parties had taken care to comply with the essence/purpose of the legislation when entering into new agreements, rather than taking care so as to draft outside the ambit of the legislation. Although the same criticism could be directed at undertakings drafting an agreement so as to fall within an EC Block Exemption, it must be appreciated that where there is a general prohibition to start with, the agreement is drafted so as to fit within an approved form exempted from that prohibition because of its benefits, rather than drafting a form so as to fall outside the regulation. In other words, it is drafting so as to comply with the purpose of the legislation, since the primary emphasis on "effect" will counter any use of a particular form that in reality has an unjustifiable anti-competitive effect[163].

This style of regulation was seen "to have the merit of avoiding drastic action that might not be accepted as necessary or fair by many of the interests most closely

[160] Paragraph 242 of the Report. The first solution is similar to what became the RTPA, with the alternative being similar to the approach mooted for the Treaty of Rome at this time (see Chapter 3 infra).
[161] Paragraph 243 of the Report.
[162] Paragraph 244 of the Report.
[163] The advent of the Chapter I Prohibition will require a change in the culture amongst solicitors when drafting agreements.

affected"[164] when compared with a general prohibition approach, but this is surprising for the whole undertone of the report indicated that it was only fair to all (competitors and consumers) that all necessary action be taken as soon as possible. This was recognised by the majority of the Commission who did not feel "that legislation of this kind would be an adequate or satisfactory method of implementing the conclusions"[165] that they had reached; to do so would be "cumbersome, slow and unfair".[166] This majority preferred that such practices should be generally prohibited with advantageous agreements being excepted "from the general prohibition where a case for doing so has been established".[167] It was felt that "a general prohibition would give industry clear and unequivocal guidance[168] as to the Government's policy, and would avoid the uncertainty and waste involved in detailed inquiries in each individual case. It would be much more effective than placing any reliance on the voluntary abrogation of harmful agreements which might result from publicity following the registration of agreements."[169] Perhaps the Commission recognised the likelihood of this option of this not making it to the statute book when it stated that "such a general prohibition would certainly be a new departure in this country".[170]

The majority proposed legislation that created a new criminal offence[171] requiring the prohibitions to be clearly defined so that undertakings understood what they could and could not do, but "the definition should not be too narrowly drawn, or there would be opportunities for the exercise of ingenuity in evading the prohibition

[164] Paragraph 244 of the Report.
[165] Paragraph 245 of the Report.
[166] ibid. The scale of the task in hand would tie up the reviewing body/tribunal for many years whilst the offending practices continue to operate to the detriment of the public interest.
[167] Paragraph 246 of the Report. The Commission noted that if it were "impracticable to deal fully with all claims for exception before the general prohibition came into force, some procedure for allowing interim exceptions where a prima facie case had been made out could be devised." As we will see later, this is the procedure that was used for the implementation of the Competition Act 1998.
[168] But would it really have given unequivocal guidance? Article 81 led to a flood of notifications for guidance when it came into effect and has itself had to change over its time (see Chapter 3, infra). As such, this statement cannot really be supported.
[169] Paragraph 247 of the Report.
[170] ibid. A departure that they would not be ready to take until accession to the EC in 1972.
[171] Paragraph 248 of the Report.

by arrangements falling technically outside its scope but having the same effect as those prohibited."[172] Basically they suggested the legislation would:

- define the prohibited practices;
- specify the grounds for exceptions and the procedure for granting such exceptions;[173]
- make provision for applications to be determined by an independent body, which would consider whether the agreement fell within one or more of the exceptions and the effect on the public interest of those practices;
- allow the Minister responsible for this area of regulation to only act after obtaining the advice of this independent body, and where he recommended an exception, this was to be effected by an Order laid before Parliament; and
- specify a review procedure to deal with a change in circumstances.[174]

This could almost have been the checklist for the Chapter I Prohibition debate, although this later debate did not call for the creation of a criminal offence and replaced the public interest focus with a market based test.

A minority[175] dissented from this preferred option. They did not perceive that the referred practices were generally injurious to the public interest and thus could not recommend that there should be a general prohibition, since such a general prohibition would lead to injustices.[176] They were concerned that businesses should not be deprived of the benefits flowing from their practices without first having those practices and circumstances examined on an individual basis. They were conscious of the fact that "economic circumstances may change and a practice

[172] ibid. The Commission recognised that this was a difficulty with any kind of general legislation regulating such practices and that it would arise as a hurdle to implementing the other suggestion of a "scheme for registration". The Commission did not think that the task was insuperable, for although we have the warning, the answer is given in a system of regulation that will catch those agreements with the same effect. The real difficulty they did not foresee was the impact of the lack of investigatory powers, enforcement and sanction.
[173] Based on the factors listed in paragraph 240 of the Report.
[174] Paragraphs 250 to 253 of the Report. The RTPA very much followed this in the way that it was put into operation.
[175] Sit Thomas Barnes, B Davidson and Professor AL Goodhart. This minority also dissented from the majority's findings on the collective enforcement of resale prices prescribed by individual manufacturers, but were amenable to such agreements being made subjected to a general registration procedure.
[176] Paragraphs 255 and 257 of the Report.

which today is thought contrary to the public interest may in tomorrow's conditions appear justifiable. A general statutory prohibition seems to us to create a degree of inflexibility in the law which might in the future prove undesirable."[177] Thus the alternative of a system of registration was preferred, a system that would give publicity to agreements and allow examination of those that warranted a positive decision that the arrangement was operating against the public interest.[178]

(ii) The RTPA

The RTPA 1956 removed restrictive practices from the ambit of the 1948 Act[179], and subjected them to the stricter regime of adjudicatory control. The RTPA was non-political.[180] The Government of the time drew on both the majority and minority conclusions as set out in "Collective Discrimination"; the majority view that restrictive agreements were against the public interest was followed (with the agreements covered by the RTPA being wider than those reported on by the Commission), but instead of prohibiting them per se, the RTPA followed the minority suggestion that such agreements should be subjected to a system of registration. The problem for the Government was how to replace the investigatory

[177] Paragraph 258 of the Report. History has since shown that these were justified concerns. Article 81 has had to change and develop as economic circumstances have altered and business practice developed. See for example, the reform of the block exemptions (Chapter 3 infra). However, as will become apparent from the review of cases under the RTPA, the provision for assessing the effect of a change in economic circumstances itself created a degree of inflexibility to the system of regulation (see 2.3.1 infra).

[178] Paragraph 259 of the Report.

[179] The 1948 Act continued until the Fair Trading Act 1973, with the investigation of anti-competitive activity that was not covered by the specific agreement legislation still being subjected to investigatory control under its provisions; such as the complex monopoly provisions explored in Chapter 3 infra.

[180] Hunter sums up the lack of party politics with his comments that "An interesting facet of these developments towards a legislative control of restrictive practices and monopolies is that they were pursued, to a very large extent, independently of the political scene. No vociferous pressure group favoured legislative control. Neither of the major parties were enthusiastic converts or regarded it as a major item of policy. The Conservatives, with one or two outstanding exceptions, were inclined not to question the regulative control of business by trade associations. The Labour Party was more critical but, at this period, was mentally conditioned to regard control of industry problems as a proper subject of nationalisation policy. Had it not been for the Civil Service giving continuous study to the problems and pressing the results on their political masters it seems unlikely that monopolies and restrictive practices proposals would ever have appeared in the 1944 White Paper and been carried forward to the 1948 Act...It is an interesting thought that the banner of free competition initially was carried in the corridors of a liberal-minded bureaucracy and not in Parliament." (A Hunter, op cit., p 78). Even Ministers were behaving without regard to their own Party beliefs and tendencies: As for the 1955 Report, "The then president of the Board of Trade (Mr P Thorneycroft), who took the view (unusual at that time for a Conservative minister) that the logic of free enterprise demanded competition..." (A Hunter, op cit., p 82).

system (disliked by business[181]) with one of judicial enquiry, whilst keeping the judiciary happy. A system along the lines of the one adopted by Sweden was newer, arguably more innovative and would avoid the problems experienced by the US judiciary in having to develop a rule of reason. Nevertheless choosing the judicial route would place our judiciary in a similar predicament. Strict boundaries were called for: after all, the development of the restraint of trade doctrine illustrated how the purpose of a legal rule can be altered by developments in judicial thinking. The law must be allowed to develop and be responsive to changes and problems in the society it controls, but to allow it to shift its focus and leave what was intended to be controlled unregulated[182], is another matter entirely.

The problems inherent in the use of the judicial process were alleviated by firstly introducing technical form criteria for determining the jurisdiction of agreements caught[183], and secondly, in determining the effect of agreements, the potential for problems was alleviated by the use of strict and limiting gateways. Although registration was the "condition precedent to adjudication"[184] both registration and assessment, caused problems for the High Court and the Restrictive Practices Court (RPC), respectively. The RTPA adopted an overly legalistic approach "in an attempt to disregard economic issues".[185] The judiciary were not happy dealing with "matters of considerable economic complexity and delicacy"[186] and consequently this formalistic approach produced some truly bizarre results. In reality it was the registration criteria that caused most problems, but if the agreement could be found registrable, the chances of successfully defending it before the RPC were slim. The public interest test was unrealistic in its assessment

[181] Industry itself was overwhelmingly in favour of a judicial solution although it was to regret this: by 1967 the C.B.I. was calling for a return to the Commission approach. The Monopolies Commission was unpopular being regarded as prosecutor, judge and jury all rolled into one. D Swann, DP O'Brien, WPJ Maunder & WS Howe, op cit., footnote 109 to p 57.
[182] In the case of the restraint of trade doctrine, emptying it "...of much of its potency." (R Whish, op cit., p 50).
[183] "...involves only one issue and that is of a kind which the courts are accustomed to determine and for which the judicial process is well adapted." Lord Diplock The Role of the Judicial Process in the Regulation of Competition (The Hebrew University of Jerusalem: Lionel Cohen Lectures, Oxford, Oxford University Press, 1967), p 6.
[184] Lord Diplock op cit., p 10.
[185] M Furse op cit., p 6. Although in its assessment under the gateways some pro-economic decisions were reached (see Re Yarn Spinners Agreement infra).
[186] R Whish op cit., p 123.

of the market and business activities[187]. It was always going to be far from perfect.[188]

(iii) Decartelisation

In 1956 cartels were a big problem for competition in the UK, and the Act "...was a useful piece of legislation. It resulted in a significant number of price fixing and other major cartels in manufacturing industry either biting the dust following court proceedings or, alternatively, being abandoned by the manufacturers as they knew that to fight the case would be a hopeless task."[189] However, within a decade[190], the structures which the RTPA had been aimed at were on the whole no longer prevalent – a success? Some agreements could not be found; attention was switched to the emergence of market dominance and merged undertakings, indicating there had become a new means of organising business activity to obtain an advantage. As Stigler notes,

> "If a large number of producers wish to escape the rigours of competition, they must do so by forming an agreement to act together (called a cartel, after their German name) or by actually merging into one firm...The distinction between a cartel and an outright merger is only one of degree."[191]

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[187] See 2.3.1 infra.

[188] For a review of the pros and cons identified by the cases decided under the RTPA, please see Appendix II infra.

[189] Lord Borrie, Second Reading Competition Bill House of Lords, Column 1169, 30 October 1997, Lords Hansard internet.

[190] The most active years of the RPC were between 1957 to 1968; it has "...been largely inactive since its decision in the collective reciprocal exclusive dealings ABTA case in 1985." (S Deakin and J Michie, op cit., p 349). The Report on A Review of Restrictive Trade Practices Policy: A Consultative Document, (Cmnd. 7512, March 1979) recognised this decrease in agreements being registered and the slow down of cases coming before the court (Paragraphs 3.8, 3.10 and 3.26).

[191] G Stigler, op cit. p 230. Stigler continues "When the cartel agreement is legally enforceable, and provides for a joint sales agency, it differs in only minor respects from a full merger. The chief economic differences, in fact, are only two; the cartel contract is not perpetual (as a merger is); and if independent firms continue to operate the plants in a cartel, any economies or diseconomies of scale are avoided." (p 231; see generally pp 231 to 238 for the economic theory behind comparing mergers and cartels). This line of argument is also addressed by Jones who finds that "...A.E.Khan (1953) has argued that there has always been a double standard in the anti-trust laws, in that restrictive agreements between separate firms are treated more severely than proprietary consolidations enjoying the same and even greater market power...[and] Arnold (1937) has gone further and suggested that anti-trust legislation actually encouraged capital centralization because it led to the replacement of "soft" combinations (collusion, conspiracy) by "hard" combinations

The glut of cases decided in the early 1960's, many straight after one another, soon petered out as agreements were abandoned and more inventive ways of avoiding the Act were dreamed up[192].

In response, salient changes were made to the control of restrictive agreements: individual agreements in respect of resale price maintenance were prohibited[193] by the Resale Prices Act 1964[194]; in 1968, unregistered agreements became void and unenforceable[195], with a cause of action[196] conferred upon a third party harmed by the operation of such an agreement; information agreements in respect of goods were brought within the fold of control;[197] a de minimis provision of sorts was introduced discharging the Registrar of his duty to take an agreement to the RPC where the restrictions were of no significance;[198] in 1973, agreements relating to services were provided for[199] (although after a blitz of cases the work of the RPC petered out again); provision for the DGFT to apply to the court for interim relief was introduced by the FTA[200].

(concrete mergers)." (A E Khan "A legal and economic appraisal of the "new" Sherman and Clayton Acts." 63(3), Yale Law Journal and Arnold T W, The Folklore of Capitalism. (Yale University Press, New Haven) quoted by K Jones, op cit., p 120). One reason given for creating a new Competition Commission with both investigatory and appellate functions was to would allow for cross fertilisation of ideas and understanding, enabling better decision making. This demonstrates that that although the regulation of agreements is distinct in its approach compared to the treatment of mergers, the issues may be very similar. See Chapter 3, infra.

[192] A Review of Restrictive Trade Practices Policy: A Consultative Document, (Cmnd. 7512, March 1979), found growing evidence of evasion by failure to register and the ability to fall outside of the scope of the Act by the need for two parties to accept restrictions and the separation of goods and services (paragraphs 3.26 and 5.21).

[193] The first time vertical agreements were brought within the specific control of the regulation of agreements.

[194] Collective resale price maintenance was originally catered for in the RTPA 1956 (section 24), being singled our for special treatment in that they could not be justified at all under the gateways, that is, they were prohibited per se.

[195] Introduced by section 7, RTPA 1968; section 35(1) RTPA 1976.

[196] Section 35(2) RTPA 1976.

[197] Restrictive Trade Practices (Information Agreements) Order 1969, SI 1969 No. 1842.

[198] Section 9(2) RTPA 1968. This became section 21(2) of the 1976 Act, the most widely used section of them all. Although the number of agreements exempted in this way were set out in the DGFT's Annual Reports, the details as to how the DGFT applied for directions and the information required, was not made public. The Secretary of State in theory retained power here since the Secretary had to direct that the agreement be granted this exemption, although the decision in practice rested with the DGFT.

[199] With control extended over service agreements by the Restrictive Trade Practices (Services) Order 1976 (SI 1976 No. 98), although the power to call up information agreements as to services for registration was never exercised.

The majority of cases had been dealt with by the time that alterations were made by the 76 and 77 Acts, illustrating how outdated this means of control had become. However, the technical nature of the Act meant that agreements of no significance were still being caught, draining the resources of the DGFT in using his section 21(2) discretion. In 1989 exemption orders[201] were passed, removing agreements that were not anti-competitive from the ambit of the legislation. However, still agreements that had no real impact on competition were being caught by the Act[202]. Consequently, these types of agreement were made non-notifiable[203], but the defects in the Act were too great to continue with amendment by subordinate legislation.

2.3 The Problems with the Domestic Regime

The "Criticisms of the Act centred originally on three aspects: the basic posture, detailed drafting of parts of the Act (notably the gateways) and the general and fundamental question of justiciability."[204] For a piece of legislation aimed at improving efficiency in the market place, it is ironic that it should prove to be so inefficient in dealing with those market problems. The lethargy of the RTPA 1976 is well documented, with the case for liberation beginning in 1978. The Labour Government's Green Paper "A review of Monopolies and Mergers Policy"[205] was

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[200] Becoming section 3 of the RTPA 1976.

[201] The Restrictive Trade Practices (Sale and Purchase and Share Subscription Agreements)(Goods) Order 1989, SI 1989 No. 1081 and The Restrictive Trade Practices (Services)(Amendment) Order 1989, SI 1989 No. 1082.

[202] A Collinson "The Restrictive Trade Practices Act 1976 and the 1989 Exemption Orders: Defects of Form?" (1995) 4 ECLR, 252.

[203] Introduced by the Deregulation and Contracting Out Act 1994, sections 2A and 27A RTPA 1976. The classes of non-notifiable agreements were put in palace by SI: Restrictive Trade Practices (Non-Notifiable Agreements)(Turnover Threshold) Order 1996, SI 1996 No. 348; Restrictive Trade Practices (Non-Notifiable Agreements)(EC Block Exemptions) Order 1996, SI 1996 No. 349 - this threshold was increased by Restrictive Trade Practices (Non-Notifiable Agreements)(Turnover Threshold) Order 1997, SI 1997 No. 2944; Restrictive Trade Practices (Non-Notifiable Agreements)(Sale and Purchase, Share Subscription and Franchise Agreements) Order 1997, SI 1997 No. 2945. These were important changes: "Over 40 per cent. of the agreements furnished to the OFT are company and business sale agreements, none of which have ever been referred to the Restrictive Practices Court. Franchise agreements also constitute a substantial proportion of notifications and again are viewed by the OFT as harmless." ("UK competition law reform" (1997) PLC July 46).

[204] D Swann, DP O'Brien, WPJ Maunder & WS Howe, op cit., p 68.

[205] A Review of Monopolies and Merger Policy: A Consultative Document, (Cmnd. 7198, May 1978). The Report did recommend that the definition of monopoly situation in the Fair Trading Act 1973 be considered further to include an oligopolistic situation (that falls outside of the ambit of the RTPA) (paragraph 5.31).

in response to the emergence of new forms of monopoly[206] and the need to develop a new strategy for the examination of mergers[207]. The committee examined the impact of the EC competition rules, but found there to be "...no serious conflict between [those rules] and their enforcement and UK competition legislation...although some aspects of EEC competition policy and practice deserve further examination"[208] recommending that the impact of the RTPA on "joint action in the national interest,...the question whether there should be some wider power of exemption"[209] and "...the development of EEC competition policy"[210] should all be considered. The call for an investigation into the efficiency of the RTPA was taken up, leading to "A Review of Restrictive Trade Practices Policy"[211] which found that it was "...too inflexible in its operation; as a result it may deter or prevent both insignificant and significant but desirable agreements. We have therefore concluded that the legislation should be made more flexible. We have also concluded that the means of enforcement should be strengthened and that it would be desirable to simplify the operation of the legislation and improve is comprehensibility"[212]. The Group considered the case for introducing an effects based system but concluded that "...the advantages to be expected from a fundamental change of direction at this point were unlikely to be sufficient to outweigh the disadvantages resulting from the upheaval and cost to industry."[213]

It is a pity that such a negative view of EC competition law, in terms of the burden and expense for business[214], was formed at this time. The Report recognised that EC competition law was already having an impact on business in that the DGFT

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[206] With abuse by dominant firms emerging as an undesirable practice in need of regulation (ibid, paragraphs 5.33 and 5.34).
[207] ibid, paragraphs 2.5, 3.25, 3.40 to 3.45.
[208] ibid, paragraph 1.6 and 4.28.
[209] ibid, paragraph 5.8.
[210] ibid, paragraph 6.1.
[211] A Review of Restrictive Trade Practices Policy: A Consultative Document, (Cmnd. 7512, March 1979).
[212] ibid, paragraph 1.6.
[213] ibid, paragraph 1.7. The main proposals could be summarised as providing the DGFT with a discretion not to proceed against insignificant cases and a power for the DGFT to approve cases without taking them before the Court (to replace the DGFT's section 21(2) discretion (paragraphs 7.18 and 7.26)), with further consideration for discretionary fines for failure to register agreements (paragraph 1.9(i), (ii) and (iii)).
[214] ibid, paragraphs 7.8. Ironically, in less than a decade, the next review would conclude that the RTPA was burdensome and costly (Review of Restrictive Trade Practices Policy; A Consultative Document, (Cm. 331, March 1998), paragraph 2.7).

had to consider whether EC law was applicable under section 21(1) of the Act[215], and found the EC Articles to be more flexible for assessing the circumstances of an agreement[216]. Also of disappointment, despite one of the main weaknesses of the Act being the lack of investigatory powers, the Group concluded that a power to search premises and ask for explanations on the spot would only "...encourage the growth of unrecorded agreements and the adoption of new methods of evading trading."[217] However, the Group did find that if regulation were being introduced for the first time "...there would be much to be said for adopting a full effects system"[218] and indeed in making their recommendations they "...kept in mind the advantages apparently offered by effects based systems [with the recommendations representing] some reshaping of our legislation in that direction."[219] The move to an Article 81 style of control was inevitable.

The Government chose to concentrate on the aspects of the reports dealing with abuse of monopoly positions, consequently introducing the Competition Act 1980. However, the 1979 Report recognised that eventually the investigation of anti-competitive practices might "...involve a change from the traditional UK approach to monopoly investigation towards something like the control of abuse of dominant position adopted by the EEC"[220]. Nevertheless, to date, despite having adopted the Chapter II Prohibition on these lines, the Government is still determined to retain its scale and complex monopoly powers. Indeed, reform to strengthen the complex monopoly provision is now almost certain.[221]

The quest for reform of the law on restrictive agreements was resurrected in June 1986, following further criticism of the RTPA and calls for a new national law to reflect the same principles as EC law[222]. This culminated in "Review of Restrictive

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[215] A Review of Restrictive Trade Practices Policy: A Consultative Document, (Cmnd. 7512, March 1979), paragraphs 2.16(c) and 5.56.
[216] ibid, paragraph 2.30.
[217] ibid, paragraph 5.51, although these would be necessary if the system of regulation became effects based (paragraph 7.7(vi)).
[218] ibid, paragraph 7.8.
[219] ibid, paragraph 7.46.
[220] ibid, paragraph 7.36.
[221] See Chapter 4, infra.
[222] DTI – the department for Enterprise, (Cm 278), paragraph 2.24.

Trade Practices Policy: A Consultative Document"[223], which concluded that UK law should be defined in terms of the effects of agreements and concerted practices[224], scrapping the registration system. The domestic regime would be modelled on Article 81, with the key words interpreted along the lines of EC jurisprudence[225] and incorporation of the block exemptions[226]. Powers of investigation, along the lines of those in the EC, would be included in the new legislation[227] and there would be fines for "first offences"[228], although the Review suggested that (unlike the EC position) there should not be immunity from fine following notification[229]. A right of private action for compensation would be provided as a "...useful supplement to the efforts of the authority...and a added deterrent to the making of anti-competitive agreements"[230] with the Government "...considering the possibility of enabling exemplary damages to be awarded and class actions to be brought."[231] This review made it to a White Paper, "Opening Markets: New Policy on Restrictive Trade Practices"[232], but the intention to introduce legislation replacing the RTPA and RPA with an Article 81 prohibition was never realised. This intention was reaffirmed by the Conservative Government following its re-election in 1992, at which time they consulted on the reform of monopoly powers by adopting an Article 82 style prohibition[233].

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[223] Review of Restrictive Trade Practices Policy; A Consultative Document, (Cm. 331, March 1988). For the first time competition would form the basis of assessment rather than the public interest, thus clearly stating "...that the promotion of competition is at the root of the Government's economic philosophy" (R Eccles "Transposing EEC Competition Law into UK Restrictive Trading Agreements Legislation: The Governments Green Paper" (1988) ECLR 227).

[224] Review of Restrictive Trade Practices Policy; A Consultative Document, (Cm. 331, March 1988), paragraphs 3.14 to 3.17 and 4.2.

[225] ibid, paragraph 4.3.

[226] ibid, paragraphs 5.8 to 5.17.

[227] ibid, paragraphs 7.2 to 7.5.

[228] ibid, paragraph 7.6.

[229] ibid, paragraphs 6.6 to 6.11. This was criticised for immunity encourages notifications and "...provides a safeguard against administrative delay in responding to notifications." (Editorial "Proposals for New UK Restrictive Practices Law: Commentary on the UK Government's White Paper 'Opening Markets – New Policy on Restrictive Trade Practices Published in July 1989'" (1989) ECLR 469, 470).

[230] Review of Restrictive Trade Practices Policy; A Consultative Document, (Cm. 331, March 1988), paragraph 7.8.

[231] ibid, paragraph 7.10. Whilst some respondents to this Review urged caution on this point, others commented that "...in the absence of treble damages and contingency fees, private actions are unlikely to be as significant as they are in the United States." (Opening Markets: New Policy on Restrictive Trade Practices, (Cm. 727, July 1989), Annex B paragraph 8). See Chapter 4.

[232] Opening Markets: New Policy on Restrictive Trade Practices, (Cm. 727, July 1989).

[233] Abuse of Market Power: a Consultative Document on Possible Legislative Options. (Cm 2100, November 1992). One of the options mooted here was the introduction of a prohibition but the retention of the Fair Trading Act 1973 monopoly provisions, which although Government recognised was a potentially complex system (paragraph 1.8), it did mean that they would not have

Nothing happened in the next sessions of Parliament, but the Government was honest in its 1996 Consultation[234] when it expressed that it was "...established Government Policy to reform competition law"[235]. Indeed, a draft Bill was published in August 1996[236] following the 1989 White Paper, adopting an Article 81 style prohibition[237], excluding the majority of vertical agreements[238] and land agreements[239], with interpretation based on EC jurisprudence[240] and decisions of the DGFT appealable to a new tribunal.[241] However, there was a shift in policy in that under the new legislation notification would provide immunity from fine[242]. As for private actions, the Government believed that this basis was provided by the fact that an agreement infringing the prohibition was unlawful, although they were "...still considering if any further provisions to assist private actions should be included in the Bill."[243] Once again this draft Bill did not make it to the legislative timetable[244], but within twelve months a further draft Bill[245] would be published, this time by the new Labour Government, providing for both Article 81 and 82 style prohibitions.

With 20 years worth of consultation and investigation, and draft Bills already

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to widen the scope of Article 82 to cover oligopolistic markets (paragraph 4.15). However, The Government did not find a compelling case for reform, instead opting to strengthen the procedures under the Fair Trading Act 1973 and Competition Act 1980 by measures introduced in the Deregulation and Contracting Out Act 1994. As for the use of the complex monopoly provisions, see Chapters 3 and 4 infra.

[234] Tackling Cartels and the Abuse of Market Power; Implementing the Government's Policy for Competition Law Reform: A Consultation Document, (URN 96/760 – DTI, March 1996).

[235] ibid, paragraph 1.2; a policy that had been in place for at least a decade.

[236] Tackling Cartels and the Abuse of Market Power: A Draft Bill, (URN 96/905 – DTI, August 1996), which again confirmed that no consensus had been reached regarding the adoption of an Article 82 style prohibition (p 128, paragraph 21), although there had been support from the legal profession and a significant number of businesses (p 125, paragraphs 3 and 5).

[237] ibid, p 60, paragraph 1.6. Despite disagreement on some of the provisions, the overwhelming consensus was that reform of the RTPA was by this time well overdue (M Furse "The role of EC Law in UK Reform Proposals" (1996) 2 ECLR 134; A Robertson "The Reform of UK Competition Law – Again?" (1996) 4 ECLR 210; S Rose "Tackling Cartels: The Green Paper Proposals for Implementing the Government's Policy on Restrictive Trade Practices" (1996) 7 ECLR 384).

[238] Tackling Cartels and the Abuse of Market Power: A Draft Bill, (URN 96/905 – DTI, August 1996), p 63, paragraph 1.20.

[239] ibid, p 67, paragraph 1.40.

[240] ibid, p 73, paragraph 1.66.

[241] ibid, p 102, paragraph 4.7.

[242] ibid, p 112, paragraph 5.23.

[243] ibid, p 113, paragraph 5.28.

[244] "Draft Competition Bill Shelved" (1996) PLC November, 55.

[245] A Prohibition Approach to Anti-competitive Agreements and Abuse of Dominant Position: draft Bill, (URN 97/803 – DTI, August 1997).

drawn, the new Government were provided with an easy win in terms of being the Government to actually deliver the long overdue reform[246]. Before examining the Government's aim for the Chapter I Prohibition, an appreciation of the DGFT's concerns is necessary. After all, with more than 20 years of ineffective domestic control, the requirement to deliver a forceful and productive legislative regime cannot be underestimated.

2.3.1 The DGFT's View

The DGFT was extremely dissatisfied with way the RTPA hindered his work; "While the Fair Trading Act has proved to be an exceptionally useful and flexible piece of legislation, the RTPA and the Competition Act are no longer effective in dealing with anti-competitive activity."[247] This inflexibility and ineffectiveness needs to be seen in the context of the growing number of complaints:

[246] In November 1996, at a joint CBI/Clifford Chance conference, Margaret Beckett said that the Labour Party broadly supported the Bill as drafted by the Conservative Government and assured that if Labour were elected, they would introduce new laws as soon as possible. However, the mood at the conference was that reform was more likely under a re-elected Conservative Government, as competition law was unlikely to be high on a Labour Government's legislative priorities in a first term ("Competition reform: Party politics" (1996) PLC December 10). When the Labour Bill was published the plans for the treatment of anti-competitive agreements bore "...a striking resemblance to the Bill produced [in 1996]" (P Mallick, "Reform of U.K. Competition Law – Distinct Signs of Life" (1997) 5(7) In Competition September, 1). However, the eagerness to change things as quickly as possible is evident by the secondary legislation to exempt share and business sales and franchise agreements from notification under the RTPA and increase to the de minimis threshold for non-notification (see 2.2.2(c) supra)

[247] John Bridgeman, Annual Report of the Director General of Fair Trading, 1997, p8. His predecessor, Sir Gordon Borrie had described the RTPA as "...certainly the most complex of the various United Kingdom competition statutes." (G Borrie "Restrictive Practices Control in the United Kingdom" (1986) JBL September 358, 359).

Table 1 - Enquiries and complaints

Year	General enquiries from the public[248]	Law and procedure enquiries from business[249]	Competition complaints[250]
1996	3,079[251]	3,938[252]	1,396[253]
1997	3,756[254]	58,961[255]	909[256]
1998	3,736[257]	61,468[258]	1,173[259]
1999	3,958[260]	56,239[261]	1,728[262]

It is a shame that no figures were given for the number of complaints made under the RTPA 1976[263]. Subsequently the OFT advised that under the Competition Act 1998, they were expecting between 2,000 to 3,000 complaints (being 2 to 3 times the number of complaints made under the previous regime). On the basis that pre Competition Act 1998 the figure was about 1,000, it would seem that the largest number of complaints were RTPA related. These complaints would never *all* be satisfactorily dealt with. The DGFT identified seven problems that he thought summed up what was wrong with the legal regime for controlling anti-competitive agreements:[264]

[248] In respect of all the Office of Fair Trading's work.
[249] In respect of all the Office of Fair Trading's work.
[250] Complaints against all alleged anti-competitive practices, monopoly abuses and resale price maintenance.
[251] Annual Report of the Director General of Fair Trading, 1996, Appendix A p 58.
[252] ibid, p 34.
[253] ibid, Appendix A p 66.
[254] Annual Report of the Director General of Fair Trading, 1997, Appendix A p 60.
[255] ibid, Appendix A p 60.
[256] ibid, p 35. No reason for this fall is given.
[257] Annual Report of the Director General of Fair Trading, 1998, Appendix A p 60
[258] It is stated that this figure included Competition Act 1998 enquiries for the first time (but there is no indication as to how much of the increase from 1996 to 1997 was due to enquiries about the Competition Bill) ibid, Appendix A p 60.
[259] ibid, p 35.
[260] Annual Report of the Director General of Fair Trading, 1999, Appendix A p 66.
[261] ibid, Appendix A p 66. This figure includes is split between 51,309 enquires processed by the Consumer Credit Bureau and 4,930 enquires about the Competition Act 1998 (Appendix A p 67).
[262] ibid, p 37.
[263] Separate figures are published for complaints under the Resale Prices Act 1976 as set out in Table 2, infra.

(i) Nothing was prohibited with the exception of resale price maintenance

Compared to the total number of complaints and agreements being considered by the OFT, the prohibition legislation was not the cause of the DGFT's anxiety.

Table 2 - RPA complaints

Year	**Number of complaints**	**Outcome**
1996	185[265]	Written assurances obtained in 6 cases[266]
1997	58[267]	Written assurances obtained in 10 cases[268]
1998	39[269]	Written assurances obtained in 6 cases[270]
1999	49[271]	Written assurances obtained in 2 cases[272]

Consequently, the RTPA provided approximately 20 times the number of complaints.

The rejection of prohibiting restrictive agreements was not necessarily the wrong choice at the time it was made. It did send out the right message to cartels and was pro economic in the way that the gateways were on the whole applied. However, the certainty that "form" provided was a stumbling block at the first hurdle ensuring that the UK missed the opportunity for a long term effective system of regulation, although from the point of view of drafting an agreement, it generally aided the drafter in the way that it could be broken down into a mechanical checklist[273]. Such a checklist would not turn the drafter's attention to economic effects. Neither did Form RTP(C), on the face of it, require any certification of

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[264] John Bridgeman, Annual Report of the Director General of Fair Trading, 1997, pp 9 and 10.
[265] Annual Report of the Director General of Fair Trading, 1996, p 45.
[266] ibid.
[267] Annual Report of the Director General of Fair Trading, 1997, p 48.
[268] ibid.
[269] Annual Report of the Director General of Fair Trading, 1998, p 48.
[270] ibid.
[271] Annual Report of the Director General of Fair Trading, 1999, p 46.
[272] ibid.
[273] "Checklist for the Restrictive Trade Practices Act 1976" Encyclopedia of Forms and Precedents, (London, Longman, 1993 Reissue) Volume 1, p 304, paragraph 1205. No mention or thought was given to the effects of the agreement in this checklist.

market effects in order to register an agreement, although Annex to Form RTP(C) did pose the possibility of the DGFT exercising his discretion under section 21(2), and consequently asked the parties to provide details of turnover, the market (geographical and product) and the market share (questions 5 to 8). However, this analysis was only needed where the agreement form first fell with ambit of registration[274].

Agreements were widely defined[275] but the High Court still had difficulty in its interpretation. The requirement for two parties to accept restrictions[276] together with the confusion over whether a restriction[277] included a positive obligation[278], whether it was synonymous with a term[279] or depended upon it relating to a previous freedom[280], meant that drafting was the friend of the perpetrator of anti-competitive activity.[281]

In its case against the Premier League Broadcasting Agreements, the DGFT contended that the Premier League clubs' exclusive broadcast arrangements with BSkyB and BBC were against the public interest[282]. It was submitted by counsel for

[274] See Chapter 3 infra.
[275] Section 43 RTPA 1976, to include any agreement or arrangement, whether or not it is intended to be enforceable by legal proceedings, although not wide enough to cover parallel behaviour in an oligopolistic market, thus leaving this question to be answered by the investigatory mechanisms (M Howe "Relationships between Competitors under United Kingdom Competition Law" (1986) ECLR 327, 333).
[276] Sections 6, 7, 11 and 12 RTPA 1976.
[277] Defined in section 43(1) to include a negative obligation, whether express or implied and whether absolute or not. A definition which continued to cause problems right up to the end of the RTPA, with Ferris J commenting on the lack of assistance by the wording used, in The Matter of an Agreement between the Football Association Premier League Limited and the Football Association Limited and the Football League Limited and their respective Member Clubs and Agreement relating to the Supply of Services facilitating the broadcasting on television of Premier League Football Matches and the Supply of Services consisting in the broadcasting on television of such matches (1999) (available on www.courtservice.gov.uk/pltmtint.htm as at 30/07/99), paragraph 125. The concept of negative obligation was never satisfactorily dealt with, with Black finding that it produced obscure results, which in any event did not do the job required under the legal control of competition (O Black "Competition and Negative Obligation" (1993) 2 ECLR 53).
[278] See Re Cadbury Schweppes Ltd. and J. Lyons & Co. Ltd.'s Agreement infra.
[279] O Black "What is the difference Between a Term and a Restriction? Associated Dairies and the Scope of Section 9(3) RTPA" (1995) 7 ECLR 437, 438 and 439, taking issues with Whish's analysis of section 9(3) in R Whish op cit., p 144.
[280] See Re Ravenseft Properties Ltd.'s Application infra.
[281] See Appendix II for a review of the cases, illustrating the problems under the RTPA.
[282] The lesson from this case was that even though the market in question might be structured under agreements that would prima facie appear anti-competitive, without an economic analysis of that market, the results of those agreements or arrangements is meaningless. This critical view of the

the BBC that the arrangements positively demonstrated competition at work, rather than impeding competition as the DGFT contended and as such were not restrictions for the purposes of the Act[283]. However, the court found that despite this and other anomalies, they were registrable, although this was

> "...the inevitable consequence of an attempt to promote competition by striking down commercial provisions which have to be identified by applying the highly technical provisions of the 1976 Act. No doubt this was one of the reasons why Parliament has now repealed the 1976 Act so far as future cases..."[284]

The DGFT was rightly frustrated by these problems. The lack of a prohibition meant that avoidance of this system for controlling agreements could be legitimate. Drafting and intention are important considerations that go hand in hand. Businesses did find a way around the regulation by the careful drafting of their agreements or arrangements. The solicitor advising under the RTPA was placed in a special position; with the complexity of the Act and the concentration on form, the importance of a good drafter is axiomatic. Indeed in many a case, a cry of "my lawyer told me it was acceptable if drafted in this way" seemed to becoming a defence[285] that the Act had forgotten to explicitly include. A solicitor's duty is to act in his clients' best interests[286] but also to uphold the law[287]. No argument was ever made to the effect that those drafting an agreement that fell outside the Act, should in some way be made responsible. Obviously there would be a potential negligence claim by the client against his legal adviser should the agreement be found void under the Act for non-registration (should advice on this point not have

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"idealised competitive benchmark" used by the OFT is put forward by B Bishop and A Oldale "Sports Rights; the U.K. Premier League Football Case" (2000) 3 ECLR 185.

[283] The Matter of an Agreement between the Football Association Premier League Limited and the Football Association Limited and the Football League Limited and their respective Member Clubs and Agreement relating to the Supply of Services facilitating the broadcasting on television of Premier League Football Matches and the Supply of Services consisting in the broadcasting on television of such matches (1999) (available on www.courtservice.gov.uk/pltmtint.htm as at 30/07/99), paragraph 128.

[284] ibid, paragraph 143.

[285] Re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd's Agreement op. cit., where the fact that counsel had advised on the wording used was put forward as a defence in resisting registration.

[286] Solicitors' Practice Rule 1(c) The Guide to the Professional Conduct of Solicitors, (London, The Law Society, 1999 8th ed.) p 1.

been given), but no formal action could be taken by the DGFT.

Riley considers the solicitor/client relationship from the point of European competition law[288], noting that the activity of professional advisers has been called into question[289]. Drawing on Re Italian Cast Glass[290], he refers to the ECJ's finding that an independent services agency infringed Article 81(1) where it enabled and consciously assisted in the implementation of restrictive agreements[291] (in this case an undertaking established to supervise the agreement) arguing that one possible interpretation of this "...is that where a supplier enables and consciously assists anti-competitive participators it itself becomes a party to an infringement."[292] Although Riley recognises that there is another interpretation in that it requires the assisting adviser to carry on a complementary economic activity, thus precluding a finding of infringement by a legal adviser.

The requirement of knowledge and intent are prerequisite to any punishment, but the structure of the old law legitimised the assisting of an agreement that was in effect anti-competitive; acting in the clients best interests within the law was the solicitor's primary duty, thus enabling the solicitor to legally exploit sections 9 and 18 of the RTPA 1976 so as to bring the agreement outside of the registration system[293]. With the position under the Chapter I Prohibition focusing on effect, solicitors will now have to approach their advice from a different perspective. Indeed this change in direction will mean that knowledge and intent to procure an anti-competitive agreement or arrangement will be a matter of professional misconduct for the Law Society, thus negating the need for specific measure in the Competition Act 1998 or constructing an argument relying on Riley's fragile interpretation.

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[287] ibid.
[288] AJ Riley "European Competition Law: The Client v the Public Interest" (1991) 1 ECLR 39
[289] The author refers to the Fayed Brothers take-over of Harrods, where the DTI's report was sent to the Law Society for them to consider the action of a law firm (ibid, pages 39 and 40).
[290] [1982] 2 CMLR 61.
[291] op cit., p 41.
[292] ibid.
[293] Failure to register under the RTPA (let alone drafting around it) was not a criminal offence, so there was no question of a solicitor being found guilty of aiding and abetting.

(ii) No fines for first offences

Unregistered agreements could not be defended before the RPC. Restrictions that had been declared void could not be enforced, but there was no power to fine for failure to register or operate an agreement. Once an order had been made the court would punish those who flouted it. In Re National Federated Electrical Association's Agreement[294] the Association terminated its agreement and the RPC, by consent, made an order declaring that the restrictions were contrary to the public interest. The Association gave undertakings not to enforce or give effect to the agreement or any other agreement to the like effect. The restrictions related to the charges for electrical work that were set out in a schedule. As a result of disorganisation, a schedule was subsequently sent to a local authority, even though the Director of the Association had given orders to the contrary. The Registrar argued that the Director be committed to prison for contempt of court for breaching the undertaking and for the undertakings to be replaced by injunctions. The court held that breach of undertaking was as serious as breach of an injunction, but since the breach was not wilful, the Director was only ordered to pay costs.[295]

In Re Flushing Cistern Makers' Ltd.'s Agreement[296] it was held that the failure to register agreements operating a price ring for 12 years amounted to a grave and persistent dereliction of duty. Accordingly injunctions were granted "for it was proper to infer that there would be a risk of a future failure to comply with the law...such a risk was likely to be significantly reduced if the sanction of contempt proceedings were imposed".[297] The injunction exposed those who acted in contempt of it, in giving effect to, or enforcing any other agreement that was registrable, to the possibility of proceedings for contempt, which would "hang like

[294] [1961] L.R. 2 R.P. p 447.
[295] The undertakings being replaced by injunctions. Although where it is a clear and serious breach of any order or undertaking the court had said that those who manage the business might face a prison sentence; see further British Concrete Pipe Association's Agreement ([1982] I.C.R. 182). The future for criminal sanctions is discussed in Chapter 4, infra.
[296] [1973] I.C.R. p 654.
[297] ibid p 655. The court ordered injunctions against all the member companies save for one, Shires Ltd., where it accepted an undertaking in lieu of an injunction on the basis that this company's managers had taken positive steps to review and check their trade agreements. However, the court

a sword of Damocles over the necks of the responsible officers of the company".[298] Thus they would be anxious to scrutinise all existing and future agreements in great detail to ensure that no one was giving effect to an unregistered registrable agreement.

The threat of contempt of court did have limited success. In Re Garage Equipment Association's Agreement[299], the members of the association gave an undertaking not to give effect to the restrictions in a terminated agreement without first giving notice to the Registrar. Subsequently, a new sales manager of one of the member companies, not being aware of this undertaking, refused discount to a non-member in accordance with the restrictions. Yet again, the court found that although the company was aware of the undertaking, since the breach had not been wilful, the appropriate penalty was a fine (of £100) and payment of the Registrar's costs. In Re Galvanised Tank Manufacturers' Association's Agreement[300] the court accepted undertakings in respect of an undefended restrictive agreement. Subsequently, "notification" agreements were entered into, admittedly in breach of the undertakings. The court held that the breaches were wilful and constituted a serious and grave contempt of court. Companies are under a duty to take adequate control and steps to ensure that their responsible officers and employees do not forget, misunderstand or overlook the obligations imposed by such undertakings.[301] The case of Director General of Fair Trading v Pioneer Concrete (UK)[302] strengthened the enforcement power of the act considerably. The court held that a company would be liable for contempt of court if its employees deliberately act in contravention of an injunction, even if the employees acted against a prohibition imposed by the company and without the company's knowledge[303]. This case concerned injunctions obtained against four companies that supplied ready mixed concrete, restraining them from entering into unlawful price fixing agreements.

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did note that there was something seriously wrong if the chairman could permit that company to operate a restrictive price ring over a period of a dozen years (p 661).

[298] ibid, p 659.

[299] [1964] L.R. 4 R.P. p 491.

[300] [1965] L.R. 5 R.P. p 315.

[301] pp 348-350.

[302] sub nom Re Supply of Ready Mixed Concrete (No. 2) [1994] 3 W.L.R. 1249 (H.L.)

[303] "Requiring compliance schemes...to be all the more effective" (A Robertson "Corporate Liability for Contempt of Court under the Restrictive Trade Practices Act 1976" (1995) 3 ECLR 196, 198). See Chapter 3, infra.

The DGFT sought to sequestrate the assets of the companies on the grounds that they were vicariously liable for the acts of their employees. At first instance the court found that the companies were vicariously liable. The Court of Appeal allowed the appeal of one of the companies. On appeal to the House of Lords by the DGFT, it was held that the actions of employees in the course of business constituted the carrying on of business by the company. The effect of the prohibition imposed by the company went to mitigation rather than liability,[304] and since the employees had acted deliberately, their conduct rendered the companies guilty of contempt.

It is not just businesses that faced penalties as a result of the acts of its management and staff. In August 1995, the RPC imposed fines totalling £8,375,000 on 17 ready-mixed concrete companies in Re Agreements relating to the Supply of Ready Mixed Concrete[305]. Additionally, five directors were found guilty of aiding and abetting this breach of injunctions and each received a fine of between £10,000 and £20,000. This was the first time that sanctions had been imposed on company directors. Buckley J issues a warning to all directors in general that if there was ever another case in which individuals were brought before the court for such blatant disregard of court orders "on anything like such a scale, they should expect to go to prison for a significant period".[306]

The RTPA did eventually start to flex a limited amount of muscle, but never really had the teeth of an effective sanction to act as a deterrent and prevent unlawful restrictive agreements; prevention being better than cure. The threat of a real sanction, invoked upon finding an infringement would have made a real difference, if not to the business culture, then certainly to the advice that undertakings would receive from their legal advisers. It was stated during the passage of the Competition Bill 1997, that against the risk of potentially a large fine:

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[304] Thus the effectiveness of a competition compliance programme is of the utmost importance, rather than the mere fact that the company has such a programme in place.
[305] [1996] 15 Tr.LR 78. This case emphasised that compliance programmes would only be of use in mitigation if they were properly designed, implemented and reviewed. Ineffective programmes would not provide a reduction in fine (P Treacy "What Price Compliance? The Most Recent Decision of the Restrictive Practices Court in the Ready Mixed Concrete Case" (1996) 6 ECLR, 347, 349). See Chapter 3, infra.
[306] ibid; see Chapter 4, infra.

"...most companies will be hugely cautious in making new arrangements. Part of that caution will be that they will apply to the Director General of Fair Trading under sections 12 and 13 of the Act for guidance about whether their arrangements might infringe chapter I of the Act. Tens of thousands of such requests might flood into the director general's office, because the downside of not making them will be the risk of a fine...What adviser would be sufficiently cocky or confident not to advise following that procedure."[307]

(iii) Procedures were too lengthy

The time scale involved in bringing an agreement to court was on average two years following registration; enough time for the parties to reap the benefits of the agreement's effect and then terminate it at the door of the court without fear of any sanction[308]. The court process itself was time consuming. In Re Aluminium Manufacturers' Agreement[309] an unwritten agreement (consisting of informal and unrecorded conversations) in respect of prices, trade terms and tendering for MoD contracts, commenced in 1955, but was not registered with the Registrar until September 1966. It was terminated shortly before registration and the parties never sought to justify the restrictions. There are instances of agreements being revised during the hearing.[310] The DGFT lost[311] the case against the Premier League

[307] Mr Nick Gibb, Official Report, Fourth Standing Committee on Delegated Legislation, Draft Competition Act 1998 (Land and Vertical Agreements, Determination of Turnover for Penalties) Order 2000, House of Commons, Part 2 p 6, 3 February 2000, House of Commons Hansard, internet, expressing concerns at the potential level of fine and that the orders had been left until very close to the start date. Mr Gibb concluded by stating "The new Labour Government continues to distrust business. As a result of the order, businesses will feel obliged to use the guidance notification regime in sections 12 and 20 of the Act. The Director General of Fair Trading will be inundated with tens of thousands of requests, which is what happened in Ireland and Sweden when they introduced similar measures." (Official Report, Part 3 p 3).

[308] "The parties to many agreements have taken advantage of this and when their agreement has ultimately been referred to the Court have abandoned it and submitted to a declaration of its invalidity." Lord Diplock op cit., p 14.

[309] [1965] L.R. 6 R.P. p 510.

[310] See further Re Motor Vehicle Distribution Scheme (op cit.), where it was held that the agreement both as originally drafted and subsequently varied was contrary to the public interest.

[311] The Matter of an Agreement between the Football Association Premier League Limited and the Football Association Limited and the Football League Limited and their respective Member Clubs and Agreement relating to the Supply of Services facilitating the broadcasting on television of Premier League Football Matches and the Supply of Services consisting in the broadcasting on

following a seven year investigation[312]. MD Foods plc (formerly Associated Dairies Ltd) v Baines and others[313] ultimately went to the House of Lords, which delivered its judgement in February 1997.[314] The agreement in question had been entered into in August 1989, with the restrictions becoming an issue in January 1992. Decisions must be reached quicker than this since delay in the process only allows more harm to be done and the competitive process to be hindered yet further.

However, notwithstanding the time taken to get to court being so protracted (enabling parties to operate their agreement and gain their benefit), some undertakings did spend much time, effort and no doubt expense, in trying to draft a form to escape the ambit of the Act. This would avoid the bad publicity that might follow from the discovery of the operation of an unregistered (but registrable) agreement and also avoid the court adjudicating on terminated agreements. In Re Newspaper Proprietors' Agreement[315] the proprietors agreed to fix common retail prices, trade prices, discounts and allowances. The agreement was twice varied before being terminated. It had been registered, but was terminated before the

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television of such matches (1999) (available on www.courtservice.gov.uk/pltmtint.htm as at 30/07/99). Five (the main ones) out of the eight restrictions were declared not contrary to the public interest (OFT's statement on the Premier League Case, www.oft.gov.uk/html/new/premier.htm as at 29/07/99).

[312] A case which the OFT began investigating in 1992, referred to the RPC in 1996, but was not heard until January 1999 ("TV football case starts" (1999) 22 Fair Trading, April, 3). Broadcasters activities in the downstream broadcast markets has caused concern for the authorities with both BSkyB and NTL bids for football clubs being prohibited and dropped, respectively. The danger of the resulting numerous small scale investments going unregulated is a concern raised by D Harbord and K Binmore in "Toeholds, Takeovers and Football" (2000) 2 ECLR 142, while those advising on these acquisitions voice concerns about the influence of opposition by football fans colouring the competition analysis ("Legal surprise over Man Utd Bid" (1999) 15 Law Society Gazette, 14 April, 95).

[313] [1995] I.C.R. 296 (Ch Div.); [1996] I.C.R. 183 (CA); [1997] 1 All ER 833 (HL).

[314] The agreement had expired by the time the case reached the Court of Appeal. However, the dairy wanted to establish the validity of the restrictions partly to determine their own liability on its cross undertaking in damages, but, more importantly because this was their standard form contract (p 836).

[315] [1962] L.R. 3 R.P. p 81. The decision was affirmed by both the Court of Appeal ([1962] L.R. 3 R.P. p 360) and the House of Lords ([1963] L.R. 4 R.P p 361), redressing the disturbing message sent out by Re Federation of Wholesalers and Multiple Bakers' (Great Britain and Northern Ireland) Agreement, where the agreement had been referred to the court on 17 July 1957, but varied by a memorandum requiring recommendations to be made in the form of a maximum price, on 9 April 1958, during the hearing. The court held that its powers under section 20(5) were discretionary and since the original restrictions were now a matter of past history, it would not be appropriate to make any declaration in respect of them. Although it is suggested that such a declaration is of importance as it is useful in later claims of agreements or arrangements to the like effect.

proprietors were served with notice of reference to the RPC. It was held that on a true construction of sections 1(2), 20(1) and (3), all agreements entered in the register whether subsisting or determined (as in this case) were referable to and justiciable by the RPC, since the Act was designed to ensure that all relevant agreements were subjected to the scrutiny and powers of the RPC, including the most important of those powers, that of restraining further agreements to the like effect. Had this case been found differently, then the system of subjecting agreements to scrutiny would have ground to a halt as there would be nothing to stop parties terminating the agreement at the doors of the court and then entering into a new agreement on identical terms.

The DGFT's concern about procedures was justified. A vast number of agreements were being submitted for registration or assessment under the section 21(2) procedure, straining the OFT's resources. The OFT set a target of registering agreements and assessing the significance of the restrictions within 6 months of receiving the agreement, in 70 per cent of cases.[316] Further despite the Act effectively exempting the majority of vertical agreements, such agreements "...formed a large proportion of the overall number of agreements" furnished to the OFT, necessitating a review of the significance of the restrictions. As was noted by the Secretary of State for Trade and Industry during the Competition Bill 1997,

> "I am told that currently well over 10,000 agreements have had to be registered with the Office of Fair Trading, although they are not significant in competition terms. About 6,000 of those have been added to the register since 1989. All that is unnecessary work for the authorities and for business."[317]

[316] See footnotes to Table 3, infra.
[317] Margaret Beckett, Official Report, Second Reading, Competition Bill, House of Commons, Column 27, 11 May 1998, Lords Hansard internet.

Table 3 - Agreements submitted and registered

Year	Number of agreements submitted	Number of agreements registered	Number of s21(2) directions
1996	1,599[318]	699[319]	1,617
1997	1,375[320]	643[321]	1,216
1998	1,119[322]	763[323]	1,075
1999	179[324]	271[325]	260

The decline in the number of agreements being submitted can in part be attributed to the secondary legislation used to make certain categories of agreement non-notifiable.[326] These measures also explain the reduction in the number of section 21(2) directions made. The DGFT was still critical however for, despite the orders introduced by the Deregulation and Contracting Out Act 1994, there was a

[318] Annual Report of the Director General of Fair Trading, 1996, p 47. In the preceding years the number of agreements submitted were 1991 – 1,039; 1992 – 1,334; 1993 – 1,361; 1994 – 1,406; 1995 – 1, 391. In 1996 a sort of de minis threshold was introduced, the Restrictive Trade Practices (Non-notifiable Agreements)(Turnover Threshold) Order 1996 SI 1996/348.

[319] ibid. 70 per cent. of these were assessed within six months of the Office of Fair Trading receiving the agreement (Appendix A, p 58).

[320] Annual Report of the Director General of Fair Trading, 1997, p 49.

[321] ibid. 75 per cent. of these were assessed within six months of the Office of Fair Trading receiving the agreement (Appendix A, p 60).

[322] Annual Report of the Director General of Fair Trading, 1998, p 49. In 1998 the de minis threshold was increased, the Restrictive Trade Practices (Non-notifiable Agreements)(Turnover Threshold) Order 1997 SI 1997/2944 and the Restrictive Trade Practices (Non-notifiable Agreements)(Sale and Purchase, Share Subscriptions and Franchise Agreements) Order 1997 SI 1997/2945 was introduced.

[323] ibid. 80 per cent. of these were assessed within six months of the Office of Fair Trading receiving the agreement (Appendix A, p 60).

[324] This is the figure for agreements made between 9 November 1998 and 29 February 2000 when only price fixing agreements needed to be registered. No figure was given for agreements made on or before 8 November 1998. The 271 agreements that were registered include 99 agreements (out of the 179) that were made in the interim period. Annual Report of the Director General of Fair Trading, 1999, p 47.

[325] ibid. 40 per cent. of these were assessed within six months of the Office of Fair Trading receiving the agreement (Appendix A, p 66). This reduction in ability to turn around agreements within 6 months was no doubt due to the OFT having to get to grips with the interim period. The DGFT had said that the new regime "...would enable cases to be pursued to a decision more quickly and, in that event, I would aim to set administrative targets for handling cases" (Annual Report of the Director General of Fair Trading, 1997, p 12). However, no time limit was set; rather, the DGFT will act in a "timely manner" (see 3.2.6 (notification) infra).

[326] See 2.2.2 (c) supra.

"...persistent rise in the number of agreements notified" to him[327]. This was not a great increase in the number of agreements being submitted, but because of the limited powers of investigation, it will always remain the case that the true number of agreements falling within the registration requirement of the RTPA 1976 will never be known.

The number of cases coming before the RPC was not great. Even if an agreement was registrable, very few actually made it to the RPC to be defended, the majority being terminated or amended if the restrictions were not acceptable to the DGFT. From the 1970's onwards, the DGFT lost very few of the cases that he referred[328]: the majority of undertakings heeded this message and took all necessary steps to avoid the expense associated with being the loser in an adversarial system. This expense is another reason why the system could not remain the same.

[327] Annual Report of the Director General of Fair Trading, 1996, p 7.
[328] The most notable defeat being in The Matter of an Agreement between the Football Association Premier League Limited and the Football Association Limited and the Football League Limited and their respective Member Clubs and Agreement relating to the Supply of Services facilitating the broadcasting on television of Premier League Football Matches and the Supply of Services consisting in the broadcasting on television of such matches (1999) (available on www.courtservice.gov.uk/pltmtint.htm as at 30/07/99).

Table 4 - Cases

Year	Number of cases concluded	Number of cases in progress
1996	6[329]	3[330]
1997	3[331]	2[332]
1998	5[333]	2[334]
1999	5[335]	0

[329] Scottish Solicitors Property Centres (RPC found that the agreement fell within the legal services exemption); National Federation of Newsagents (failure to comply with undertakings given in previous court action); Reinforced Concrete Flooring (price fixing and market sharing: court orders made against four parties, undertakings accepted from the fifth); Association of Policy Market Makers (agreement on charges to be made; undertakings given by association members); British Sugar plc and Tate & Lyle Industries Ltd (price fixing; undertakings given by both companies); Personal Shipping services (price fixing and market sharing; court order against one party, undertakings given by the remaining five) (Annual Report of the Director General of Fair Trading, 1996, p 48 and Appendix B p 60).

[330] Net Book Agreement (under the RPA); Football Association Premier League Ltd (restrictions on selling rights and collective selling); Powder Coatings (price notification and maintenance agreement) (Annual Report of the Director General of Fair Trading, 1996, p 49).

[331] Powder Coatings (price notification and maintenance; undertakings given by all nine parties); Blast-protection polyester film (collusive tendering; undertakings given by all five parties); Ready Mixed Concrete (price fixing and market sharing; court orders made against two parties, undertakings given by the remaining eleven) (Annual Report of the Director General of Fair Trading, 1997, p 50 and Appendix B pages 61 and 62). Note that it took nine years from first complaint until conclusion of court case in the ready mixed concrete cartels (Annual Report of the Director General of Fair Trading, 1996, p 50).

[332] Football Association Premiere League Ltd; Laboratory Filters (price fixing) (Annual Report of the Director General of Fair Trading, 1997, pages 50 and 51).

[333] Bus Services in North West England (market sharing and price fixing; court orders against three parties, undertakings given by remaining seven)(see also OFT press releases PN 20/98, 28/4/98 and PN 47/98, 5/11/98); Ceiling Tiles (price information sharing; court orders against four parties, undertakings given by the fifth)(see also OFT press release PN 31/98, 27/7/98, following one of the parties "whistleblowing"; see OFT press release PN 16/98, 6/4/98); Laboratory filters (undertakings given by both parties); Replacement Car Panels (withholding supplies to market entrant; Court order against one party, undertakings given by the other two)(see also OFT press releases PN 8/98, 25/2/98 and PN 34/98, 29/7/98); Rugby Football (exclusive agreement for ticket sales and travel/accommodation; court order against one party, undertakings given by the other) (Annual Report of the Director General of Fair Trading, 1998, p 50 and Appendix B pages 61 and 62). In addition to the cases, an MOT price fixing cartel amongst at least 69 garages (in the Cleveland area) was discovered. The DGFT accepted that this agreement was entered into as a result of ignorance of the law and decided not to notify it to the RPC following its abandonment after informal warnings; OFT press release PN 37/98, 12/8/98.

[334] Bus Services in Hull (price fixing)(see also OFT press release PN 49/98, 19/11/98); Football Association Premiere League Ltd (Annual Report of the Director General of Fair Trading, 1997, pages 51 and 52).

[335] Bus Services in Hull (price fixing and collusive tendering; court orders against two parties, undertakings given by eight, proceedings discontinued against the remaining two parties because of inconclusive evidence of participation)(see also OFT press releases PN 19/99, 25/5/99 and PN 28/99, 29/7/99); Football Association Premiere League Ltd (main restrictions held not to be contrary to the public interest, three minor restrictions held to be contrary to the public interest); Animal

Of the agreements that made it to the court room, the majority were disposed of by the parties to the agreements giving undertakings.[336] The lack of court action should not lead one to conclude that there will be few cases under the Chapter I Prohibition: the RTPA criteria meant many anti-competitive agreements were not caught, and it must be remembered that the DGFT had suspicions that numerous other cases existed, but could never obtain enough evidence to prove these[337], as demonstrated in Table 5, below.

(iv) Urgent remedies were not easily available

Interim relief pending the agreement being adjudicated by the RPC was available in theory[338] having been introduced by the Fair Trading Act 1973. Whish notes that the threat of an interim order was sometimes enough to induce parties to abandon their restrictive agreement[339], however the standard of proof required on the part of the DGFT meant that the section was rarely invoked[340]: the first application did not come before the court until 1991[341].

Food Supplement (price fixing; Court order against one party and undertakings given by another. The remaining parties escaped action as they did not carry on business in the UK. This was the first case involving action against members of an international cartel)(see also OFT press release PN 45/99, 29/11/99); Bus Services in Staffordshire (price fixing and market sharing; court orders against two parties, undertakings given by the third)(see also OFT press release PN 44/99, 29/11/99); Scottish Electrical Retailers (price fixing; Court orders made against the four parties). In addition, informal remedies in the shape of assurances were accepted in three cases, which did not therefore come before the RPC: They were Volvo Car UK Ltd (price fixing)(see also OFT press release PN 24/99, 9/7/99); Northern Ireland Slaughterhouses (price fixing) and Manufacturers of Foam Rubber (price information sharing)(see also OFT press release PN 46/99, 17/12/99) (Annual Report of the Director General of Fair Trading, 1999, pages 48 and 49 and Appendix B p 6).

[336] See (ii) supra and footnotes to Table 4.

[337] See (v) infra.

[338] Section 3 RTPA 1976.

[339] R Whish Competition Law (London, Butterworths, 1993 3rd ed.) p 170.

[340] C Bright "Interim Relief in UK Competition Law" (1992) 1 ECLR, 21, criticised the high standard of proof and the inefficiency of the procedural requirements, although Bright recognised that this strict interpretation was in part was due to the high standard of proof required for interim injunctions, that in general, prevailed at the time (p 22).

[341] R v The Institute of Independent Insurance Brokers (1991) The Times, 19 February, discussed by Bright, ibid.

(v) Limited powers of investigation

As investigation featured so prominently in the legislation leading to the RTPA 1956, it was surprising that no adequate power of investigation was included in the resulting control. This omission enabled parties to persist not notifying agreements and assisted in the development of more informal arrangements that were difficult to trace. The DGFT had limited power to obtain information under the RTPA,[342] but this was interpreted in an objective manner, effectively requiring the DGFT to know[343] that an unregistered agreement existed before he could obtain evidence of it[344]. Apart from this he had no power to investigate and therefore had to rely on information from third parties and complainants.

However, section 36(3) allowed the DGFT, to require further documents/information as he considered necessary after an agreement had been furnished to him. In Automatic Telephone and Electric Co. Ltd and Another v Registrar of Restrictive Trading Agreements[345] the Registrar applied for discovery of documents relating to the question of for what purpose or purposes the parties had made the agreement. The parties contended that the agreement fell within section 8(4) and was exempt from registration as an excepted agreement. At first instance it was held that the Registrar had to look at the terms of the agreement and not the purpose which the parties had in mind when making it. This was applied in Schweppes Ltd. and Others v Registrar of Restrictive Trading Agreements[346] where the Registrar tried and failed to discover documents regarding the purposes for which the companies entered into the agreement. Subsequently, this was reversed

[342] Section 36 RTPA 1976.
[343] "reasonable cause to believe".
[344] Described by Sir Gordon Borrie as "...a catch 22 situation if ever there was one." (G Borrie "Restrictive Practices Control in the United Kingdom" (1986) JBL September 358, 364). Although if this high standard of proof could be satisfied, the DGFT did have strong powers under sections 37 and 38 in respect of who could be ordered to provide information (the Fair Trading Act 1973 amended the powers as to who could be required to provide the information requested, rectifying the restrictive interpretation in Registrar of Restrictive Trading Agreements v W.H. Smith & Son Ltd ([1969] L.R. 7 R.P. p122) which prevented a branch manager with actual knowledge from being called) and made it a criminal offence not to comply with a section 36 notice.
[345] [1964] L.R. 5 R.P. p 1.
[346] [1964] L.R. 5 R.P. p 23.

on appeal.[347] The Registrar was entitled to discovery regarding the circumstances in which the agreement was made, for without knowledge of these circumstances he could not tell whether or not the arrangement was one that needed to be referred to the RPC. It had not been possible to determine this on the face of the agreement.[348] However, this section was only available where an agreement had *actually been furnished* to the DGFT.

In Re Flushing Cistern Makers' Ltd.'s Agreement[349] the Registrar referred a price fixing agreement, which had operated for the previous 12 years without registration, to the RPC. The respondent was a company that had as its members seven companies engaged in making or fitting flushing cisterns. It attempted to register the particulars of price agreements as information agreements on 19 April 1970,[350] after the 1968 Act came into effect. The companies did not seek to justify the restrictions, but did oppose the Registrar's application for injunctions to restrain the member companies from giving effect to any other registrable agreement. Cumming-Bruce J commented that the court had heard much about the difficulty that the companies had experienced in discovering the law in "this still novel field",[351] but found that there was a "short and not very difficult solution to those who are wondering whether they are sailing too close to the wind. They should confide in the registrar, so that they will at least have the benefit of the experience and learning of his department."[352] However, without a sanction for non-compliance or the threat of an investigation, it is submitted that those intending to sail close to the wind in order to gain an unlawful advantage, would not feel compelled to confide in the Registrar. The number of investigations illustrates how ineffective section 36 was:

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[347] [1964] L.R. 5 R.P. p 103.
[348] Wilmer LJ dissented as he said that the appropriate machinery for investigating those circumstances were contained in section 14 and 15 of the 56 Act: enquiry could not be properly made under section 13(2). However, the Court of Appeal's decision in Schweppes decision was followed in the appeal of Automatic Telephone ([1964] L.R. 5 R.P. p 135).
[349] [1973] I.C.R. p 654.
[350] In accordance with the Restrictive Trade Practices Acts (Information Agreements) Order 1969 (S.I. 1969 No. 1842).
[351] ibid, p 662.
[352] ibid.

Table 5 - RTPA 1976 investigations

Year	Number of new investigations started	Outcome
1996	44[353]	10 section 36 notices issued. A number of informal letters of inquiry sent[354]
1997	44[355]	4 section 36 notices issued. A number of informal letters of inquiry sent[356]
1998	52[357]	7 section 36 notices issued. A number of informal letters of inquiry sent[358]
1999	47[359]	7 section 36 notices issued. A number of informal letters of inquiry sent[360]

However, the DGFT noted that "Several of the cases investigated raised strong suspicions of the existence of a cartel, but the Task Force was unable to make progress in its attempt to prove those suspicions."[361] The OFT did have limited success towards the end of the RTPA's life, with thirteen hard-core cartels being unearthed in its last 24 months[362]. One example was the investigation into a pricing cartel in operation amongst UK Volvo dealers: Volvo Car UK Limited admitted the unlawful agreements and undertook not to support agreements on discounts in the future. This investigation was launched following an investigation by the BBC's Panorama programme[363], but in view of the fact that the Chapter I Prohibition was less than 12 months away, it was to Volvo's advantage to come clean when it did.

[353] Annual Report of the Director General of Fair Trading, 1996, p 47.
[354] ibid.
[355] Annual Report of the Director General of Fair Trading, 1997, p 49.
[356] ibid.
[357] Annual Report of the Director General of Fair Trading, 1998, p 49.
[358] ibid.
[359] Annual Report of the Director General of Fair Trading, 1999, p 47.
[360] ibid.
[361] Annual Report of the Director General of Fair Trading, 1998, p 49.
[362] Annual Report of the Director General of Fair Trading, 1999, p 13.
[363] "Volvo involved in car pricing cartels." OFT press release PN 24/99, 9/7/99; "Volvo admits price rigging" (1999) 24 Fair Trading (October) 4.

Before moving on to look at the DGFT's remaining concerns, there is one further set of figures important to the assessment of the Chapter I Prohibition, namely the number of investigations under the Competition Act 1980.

Table 6 - Competition Act 1980 Investigations

Year	Number of references	Number of reports published
1996	0[364]	1[365]
1997	1[366]	0[367]
1998	0[368]	1[369]
1999	0[370]	0[371]

Whilst the 1980 Act was designed to investigate and punish anti-competitive practices, rather than agreements, the reason for including Table 6 is to provide a warning. The Act was designed to deal with a gap in the law. It was the result of concern about ineffective domestic control.[372] However, it proved ineffectual and by the time the Competition Bill was being drawn it was of little consequence. There is a very real danger that the 1998 Act could go the same the same way as this piece of legislation with which it shares its name.

(vi) No penalty for past actions

It was all very well to prevent future abuse (as detailed in (ii) above), but under the RTPA no financial sanction was imposed until an agreement was discovered and any subsequent order or undertaking was breached. The length of time during which an unregistered agreement had been operated only went to the question of whether an injunction should be granted. Only after this decision had been taken,

[364] Annual Report of the Director General of Fair Trading, 1996, p 43.
[365] In respect of a 1995 reference, ibid, p 43.
[366] Annual Report of the Director General of Fair Trading, 1997, p 44.
[367] ibid.
[368] Annual Report of the Director General of Fair Trading, 1998, p 43.
[369] ibid.
[370] Annual Report of the Director General of Fair Trading, 1999, p 45.
[371] ibid.
[372] As detailed at the start of this section 2.3 supra.

did subsequent action count for anything. In reality the Act lacked an effective sanction.

(vii) Breach of statutory duty was of limited deterrence since it was virtually impossible to invoke

The hopes of third party actions never materialised. There is only one instance of proceedings to recover damages being issued, which resulted in an "out-of-court" settlement.[373] This failure was recognised in the Competition Bill 1997, where it was promised that "Those on the receiving end of [anti-competitive] practices will have new rights to seek damages"[374], repeating the promises made in earlier reform consultations.[375]

The RTPA was used as a sword to challenge agreements, although the difficulty in interpreting the Act and case law meant that this an easy alternative to pursue. In Fisher v Director General of Fair Trading and Another[376] registration of the rules of the National Greyhound Racing Club Ltd ("NGRC") was in issue.[377] The applicant, who was licensed to train greyhounds, contended that these bilateral licences/agreements created a series of implied interlocking agreements or a multilateral agreement or arrangement falling within section 11(1) of the RTPA 1976, and thus applied for a declaration[378] that the agreement was registrable. The RPC held that there was no agreement to which the 1976 Act applied. The Court of Appeal reached the same conclusion as they found that it was impossible to imply

[373] "The Post Office agreed to accept £9m in respect of loss suffered as a result of the operation of a price cartel agreed between a number of telephone cable manufacturers in the 1970s." (G Borrie "Restrictive Practices Control in the United Kingdom" (1986) JBL September 358, 363).
[374] Mr Ian McCartney, Official Report, Report and Third Reading, Competition Bill, House of Commons, Column 1208, 8 July 1998, House of Commons Hansard internet.
[375] See start of 2.3 supra.
[376] [1981] I.C.R. 71 (C.A.).
[377] This body issued licences for greyhound racing activities at its approved racecourses, but on obtaining such a licence, licensees were subjected to a rule that provided for the disqualification or warning off of the licensee should they have anything to do with any racecourse not approved by the club. Of the 107 greyhound racing stadia in Great Britain, only 48 were approved by the NGRC. Thus it could be argued that the system they had in palace was *in effect* restrictive of competition since it prevented its licensees from training/racing at other grounds. It was argued that the principal objective of the rules was to ensure an orderly and reliable method of conducting greyhound races, but if you were not licensed then this was in fact a barrier to entry to nearly half of the racing venues.
[378] Pursuant to section 26 of the 1976 Act.

any acceptance of mutual obligations between the individual licensees. Waller L.J. said that it was "important to bear in mind the independent constitution of the NGRC...[t]he club makes rules in the interests of the greyhound racing public. These interests are quite different from the persons licensed."[379] The licensees had played no part in setting up the NGRC or its rules. They had not set up the rules for their own benefit. This was indistinguishable from Austin Motor[380] as there was no evidence of any obligation being undertaken by one licensee to another[381]. His Lordship went on to distinguish British Basic Slag[382] as in that case there had been a *meeting of the minds* thus giving the mutuality which formed the agreement/arrangement.

Before considering what the Government intended to achieve by the Chapter I Prohibition, I submit that there should have been an eighth category to this list of defects, emphasising the problems with the utilisation of (or not using as the case may be) economic effects in the RTPA regime. Although covered in parts by the deficiencies identified in (i) to (vii), this issue is deserving of consideration in its own right.

The court used economic theory and models to help in applying the Act. The composition of the RPC encouraged this by the appointment of those from industry to adjudicate with members of the judiciary. Despite the gateways and tailpiece providing strict legislative tests by which the RPC determined whether an agreement should be allowed to continue, it was clear that in the majority of cases the court relied on economic theory for their application. For example in Re National Federation of Retail Newsagents', Booksellers' and Stationers' Agreement[383] in assessing whether the publisher against whom the restriction was intended was a preponderant supplier, the court looked at what the market would be for the particular good in question. It found that the publication "Romeo" was not so different form other publications of the kind to which it belonged as to make it commercially sensible to segregate it from others and treat it as a distinct category

[379] op cit., p 75.
[380] See Appendix II.
[381] This case would now be better argued from the point of view of an abuse of a dominant position under the new Chapter II Prohibition.
[382] See Appendix II.

of goods. The courts' attitude to restrictions did change over time. For example, note the subsequent distinguishing of Re Black Bolt and Nut and the resistance that developed to allowing minimum prices, even where these agreements were based on costings formula and independent collation of information[384]. These changes can be explained by the court increasingly looking at the wider economic picture. Indeed, the court took a pro-competitive stance in Re Yarn Spinners, which no doubt led to the abandonment of many agreements.

However in the application of the RTPA, jurisdiction was purely based on a legislative test. The High Court judges[385] were more comfortable with this aspect of the RTPA, as economic analysis was not required. Yet this comfort was to the detriment of producing the necessary outcomes to rectify situations where competition in the market was not working.

Section 4 of the RTPA 1976[386] enabled the RPC to discharge any previous declaration and order[387] that it had made, on the application of either party. Having

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[383] [1965] L.R. 5 R.P. p 236.
[384] The change from Re Cement Manufacturers to Re British Bottle.
[385] There were no lay members from industry in the High Court.
[386] Previously section 22 of the 1956 Act.
[387] With regard to undertakings, In Re British Paper and Board Makers' Association's Agreement and British Waste Paper Association's Agreement (No.2) ([1966] L.R. 6 R.P. p 161) the associations had, in a previous case, given undertakings to the court on behalf of themselves and their members, not to give effect to certain price fixing agreements and related restrictions affecting the supply of waste paper (which the court had declared contrary to the public interest) or to any other arrangement to like effect. This case involved an application to the court for leave to implement recommendations that had been made by the Economic Development Committee for the Industry (the recommendations had been accepted by government but the associations were advised that any attempt to implement those recommendations might involve a breach of undertaking and consequently put them in contempt of court). However, the application was not made under section 22 RTPA 1956 because the associations argued that the wording used in the undertakings, that is, shall not be done "without the leave of the court", implied that "the court had power to give them leave to do any or all of the forbidden things"(p 179). The court queried the form of wording used in the original order and whether the court had jurisdiction to grant leave to a respondent to do an act which might or would be a breach of an undertaking given to the court otherwise than on an application under section 22 to the court to vary its previous decision. Parliament had provided section 22 for resolving such questions of varying an order. The court did note that if leave had in some unforeseen way been required it would not have been prepared to grant it on the present application. The associations argued that if they had applied for leave under section 22 they would first "have to adduce evidence of a change in the relevant circumstances affecting the industry, which would have undoubtedly have taken time, and then they would have to issue a separate application for leave which could not come before the court for some time" (p 173, Owen Stale QC and Thomas Bingham for the associations. Further, they also queried the expense involved in bringing such an application "as it would entail a reference of no less substance than perhaps the original references". The "enormous expense" to be incurred in a further hearing was also put forward by the Federation in Re Cement). This surely cannot carry much weight since they had

discharged a declaration, it could and further, put in its place such other declaration and order as appeared "to be proper at the time of the hearing of the application".[388] Leave was required for such a hearing; this would only be given where there was "prima facie evidence of a material change in the relevant circumstances"[389] and the court took a very narrow interpretation of what this meant.

Lord Wilberforce, Campbell and Elles[390] note that as economic circumstances change, agreements that were once the subject of an adverse adjudication may become justifiable and vice versa. However, it was not sufficient to simply show a change in the economic considerations and consequences from those that existed when the original agreement was defended. Rather, one had to show that "any change must have occurred in either the facts on which the original judgment was based or in the manner in which the agreement has been operated by the parties".[391] Stevens and Yamey recognise that in the process of regulating restrictive agreements "there have been positively harmful effects in the judicial solution,

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already done much of the work in the form of the time and effort put into formulating the new recommendations, which weakens their argument. Indeed the court found that such fears were "excessive"(p 179) as it would do all it could to assist a party to bring proceedings quickly and pointed to the rules of the court that provided a means for the court to achieve this. The Practice Direction of 11 December 1986 simplified and expedited the procedure under this section ([1987] I.C.R. 128). The procedure required affidavits to be filed, but there was no requirement for the parties to attend open court, unless the court was not satisfied with the evidence before it, in which case there would be a hearing in the normal course. This was intended to save time and costs. The court eventually recognised that the application process would lead to extra costs and may be quite lengthy, which in the case of insignificant variations that do not adversely affect competition, cannot be justified as being in anyone's best interests. So these fears at least had some founding, and as can be seen with the discussions leading to the "Woolf Reforms", access to justice is a slow, expensive and frustrating process.

[388] Section 4(1). The provisions laid down in the gateways and the tailpiece were applicable subject to any necessary modifications in relation to this second hearing (the meaning of this section was argued in Re Cement, infra).

[389] Section 4(4), although it was possible to obtain leave without meeting this test in respect of an order made prior to the commencement of the RTPA 1968 where the applicants relied on gateway (h).

[390] Lord Wilberforce, A Campbell and N Elles Restrictive Trade Practices & Monopolies (United Kingdom, Sweet & Maxwell, 1966, 2nd ed.), paragraph 759.

[391] R Merkin Encyclopedia of Competition Law (United Kingdom, Sweet & Maxwell, 2001) paragraph 2-174, p 2137. It is hardly surprising that the court applied a narrow interpretation of "material change in the relevant circumstances" since it will be remembered that other phrases were also interpreted narrowly, as was demonstrated by the interpretation of "to the like effect" in Re Black Bolt and Nut Association's Agreement, although there were instances of liberal interpretation of the wording used in the Act, such as the wide meaning applied to "arrangement" in Re Mileage Conference Group of Tyre Manufacturers' Conference Limited's Agreement (see 2.2.2 (ii) supra) but a narrow meaning here would have seriously limited the ability of the Act to catch the mischief that it was aimed at.

which may well be far reaching."[392] They found that "the idea that the court has power to revise its own earlier decisions is contrary to the idea both of res iudicata and stare decisis, and that lawsuits should not be protracted"[393]. I understand their objection, but submit that surely this whole area of regulation is one that positively requires the ability to evolve as economic conditions change[394]. Not allowing the matter to be reopened and reassessed would cause more detriment and loss to other undertakings and consumers than is saved by preserving the sacred principles of precedent. That said, it does provide an insight into why the court interpreted the section so narrowly.

The difficulty with interpretation of the test was identified in Re Cement Makers' Federation Agreement (No. 2)[395]. The Registrar applied[396] to the court for it to reconsider its previous decision[397] upholding restrictive practices on the ground that there had been a material change in the relevant circumstances.[398] The court dismissed the application. In order to succeed under section 22(4), the Registrar had to show that by reason of the new facts there was "prima facie evidence of a change in an essential part of the reasoning by which the court arrived at its previous decision."[399] The court went on to say that whilst it was not essential to the success of the application to have the evidence supported by an economist or merchant banker, it may be on the facts in any particular case that success would be

[392] RB Stevens & BS Yamey The Restrictive Practices Court – A Study of the Judicial Process and Economic Policy (United Kingdom, Morrison & Gibb Ltd, 1965) p 144; and this was before the trouble caused by Cement, infra.
[393] ibid.
[394] Lord Diplock found that the issues before the court made it very difficult to find that any one case was similar to another and thus the court discouraged the tendency to find binding precedent (Lord Diplock op cit., p 25).
[395] [1974] I.C.R. 445.
[396] Under section 22(4) of the 1956 Act.
[397] supra.
[398] The Registrar alleged that the industry was no longer expanding, that the return on capital employed was not now below what investors would require in a free market, the prices fixed were not substantially below those that would be obtained in a free market, there had been a vast increase in the use of bulk depots which had not been reflected in lower costs, and that there had been a lack of significant changes in base prices since 1961.
[399] op cit., p 452. There was "acute difference" between the suggested meanings of the words "relevant circumstances"(p 451). The Federation's Counsel argued that these "circumstances" were circumscribed or defined by the gateways (p 451), which did not include reference to the tailpiece, although he did accept that there were remarks in Black Bolt and Nut that were contrary to his submission). However, the court preferred the interpretation put forward by Counsel for the Registrar, that the words in section 22(4) "referred to a change in an essential part of the reasoning by which the court had reached its previous conclusion"(p 452).

difficult to achieve without such evidence.[400] On the facts presented to it, the court found that there had been no evidence advanced in support of some of the Registrars contentions and in respect of the others, no prima facie evidence of a material change in the relevant circumstances had been adduced.[401] The court was more concerned with the strict form of the criteria for the application rather than looking at the economic realities. Perhaps a different decision would have been reached if expert economic evidence had been adduced. However, this was only the second time that this section had been invoked, the first being National Sulphuric[402], thus it is appreciated that the court had little to go on in the way of precedent. This strict interpretation prevented opening the floodgates to allow further challenges to other decisions of the RPC. As most agreements had been abandoned and the number of cases coming before the court was dwindling, it would have been a good time to inject some economic consideration into the system of control. Unfortunately, this case was heard before the calls for reform had gained a loud enough voice.

Another weakness highlighted by the Cement saga, was that in the first case[403] assurances had been given by the federation to supply information to the Registrar if he had reason to suppose that there may have been a material change in the relevant circumstances to enable him to apply under section 22. The court noted that this assurance was essential, as the power in section 22 provided an inadequate safeguard for the Registrar, as he would not be in a position to place before the court evidence that there had been such a change. The Registrar should have realised from this dicta that he was always going to face an uphill task in adducing enough supporting evidence to satisfy the court!

Allowing validity of the agreement until such time as the DGFT could prove a material change compounded the problem. If a time limit to had been imposed, it

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[400] ibid.
[401] ibid, p 459.
[402] In Re National Sulphuric Acid Association's Agreement (No.2) (op cit.). The agreement had previously been declared not contrary to the public interest, gateway (d) having been successfully pleaded. The question of a material change in circumstances was not considered or expanded on by the court since having interviewed the association's principal witness, the Registrar concluded that he would be unlikely to succeed in contesting gateway (b) and thus did not oppose the argument.
[403] [1957] L.R. 2 R.P. 287.

would have placed the emphasis on the parties to justify the continued operation of the restrictions and the difficulty for the court in applying economic considerations could have been alleviated[404]. Subsequently, the court managed to extricate itself from the problems in Cement without expressly overruling it. In Re Building Employers Confederation's Application[405] the Confederation succeeded in obtaining leave under section 4 to vary or discharge a number of previous orders of the court. The application was not opposed by the DGFT, but this may have been due to the fact that the Confederation had "kept in touch"[406] with the OFT whilst formulating its customer guarantee scheme. Here the court took a more realistic approach to the situation. Whilst it recognised that it had the power to vary any previous decision "upon prima facie evidence of a material change in the relevant circumstances", it found that once the scheme was in operation, it may need modification and therefore to prevent the additional expense of future court applications for approval of such modification "that neither related to a restraint of competition nor was substantial in nature"[407] it ordered that such variations as the DGFT should approve or as the court might permit, were permitted restrictions. Although such modifications were limited in nature by the wording of the order, they did not have to show a material change in the relevant circumstances before they were allowed. This can be viewed as the court moving away from the problems imposed by Cement with the court being more realistic in letting the OFT assess changes and itself make the decision. Any changes that were not substantial would have fallen within the DGFT's discretion anyway, but his discretion could only be exercised in accordance with a direction from the Secretary of State. The court was giving a much wider power to the OFT than that provided for in the Act (unless the DGFT still felt obliged to get a direction from the Secretary of State in accordance with the section 21 procedure, although this was not implicit in the court's order).

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[404] The EC position is that individual exemptions granted under Article 81(3) exist for a fixed period only and thus require renewal, that is, approaching the question of change from the opposite end, rather than allowing restrictions to be valid indefinitely, until challenged. This is examined in Chapter 3, infra.
[405] op cit.
[406] supra, p 167.
[407] ibid, p 168.

In the Matter of Medicaments & Related Classes of Goods[408], the court was persuaded by the general change in the pattern of retail trading in pharmaceuticals and the previous material change that had led to the abandonment of enforcing resale price maintenance for ethicals. This was a high profile case that had polarised the arguments and split the support for and against RPM in this industry, which in itself provided overwhelming evidence that the changes since 1970 had been material[409].

To conclude this analysis of the difficulties that have were experienced when applying economic consequences, it must be noted that the inconsistency in decisions can be explained by the adversarial system used in assessing restrictions. Inevitably, decisions become "...coloured by economic theories held by the evaluator"[410], with the decision to be made under the tailpiece "...conditioned by the economic and social views of those who have to make it."[411] Since dissenting judgements of the RPC were not delivered, we may never know the extent of those views and beliefs[412]. Of more concern was the lack of faith that business had in this system, with the 1988 review noting that "A number of those who submitted comments argued for keeping matters of economic analysis from all courts on the grounds that court procedures are ill-adapted to resolving such issues and are, furthermore, likely to be slow, cumbersome and costly."[413]

2.3.2 The Government's Response

With a history of attempts at reform and the pleas of the DGFT, what was it about 1997? Is there some truth in the cynical comment made earlier that it was an easy win? It is difficult to point to a substantial underlying theme of this reform; there were various issues concerning the Government, which continued in accordance with practice to mix competition control with social and political objectives.

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[408] Under the RPA. See Chapter 3 for the implications of the Human Rights Act 1998.
[409] This was particularly visible during the Competition Bill debates; see 2.3.2 (v) infra.
[410] Lord Diplock op cit., p 18.
[411] ibid.
[412] Although Lord Diplock records that in his time on the RP.C all decisions were unanimous (Lord Diplock op cit., p 21).
[413] Review of Restrictive Trade Practices Policy; A Consultative Document, (Cm. 331, March 1988), paragraph 6.15.

(i) RTPA 1976 Ineffective

Generalised comments to this effect, that "...the RTPA 1976, which was based upon legislation passed in the 1950s, has become ineffective and, in part, outdated"[414] were a theme of the parliamentary debates[415], but little else was said to elaborate on this apart from the importance of ensuring the consumer was looked after[416]. It does appear that cartels were still the main concern, since these formed the majority of examples that were given:

> "...by the 1980s it was apparent that secret cartels could operate for years to the detriment of business, private customers and the economy as a whole because the law was slow to operate, the investigative powers in the Office of Fair Trading were extremely limited and the sanctions were so mild as to constitute nil deterrent. Even the failure to register a cartel with the Office of Fair Trading, which was a requirement of the law, attracted no penalty under the law."[417]

> "...one only has to read the press notices from the Office of Fair Trading to realise that it has been a tortuous task to uncover the workings of cartels. The paint makers' price fixing cartel, which was ended by an undertaking to the Restrictive Practices Court in early June [1997], had been going on for years. It was quite obvious that the companies involved knew exactly what they were doing and knew that it was illegal. Why else would they have used assumed names to book hotel conference facilities? Some companies blamed employees for price collusion without authorisation by the companies. But this House ruled in 1994 that such an argument is not acceptable.

[414] Lord Simon of Highbury, Official Report, Second Reading, Competition Bill, House of Lords, 30 October 1997, Column 1146, Lords Hansard internet.
[415] See also those quoted in 1.1.2 supra.
[416] See quotes in 1.1.2 and 2.1.3 supra.
[417] Lord Borrie, Official Report, Second Reading, Competition Bill, House of Lords, Column 1169, 30 October 1997, Lords Hansard internet.

> Just eight days ago, five suppliers of protective polyester film used for glazing as part of bomb-proofing gave undertakings to the Restrictive Practices Court that they would no longer collude on tenders nor share information about prices to be charged or quoted.
>
> Last month, it was revealed that sales managers of two high technology firms involved in the manufacture of filters used for removing impurities from liquids swapped information on product prices charged to customers and put a limit of the extent to which they undercut each other."[418]
>
> "A secret cartel between laboratory equipment manufacturers was recently broken up by the Office of Fair Trading. As the Director General of Fair Trading said, in the end, taxpayers and consumers had to foot the bill for that cartel because it rigged the market against the hospitals and public bodies that it supplied, as well as against its other buyers. Business and consumers deserve better than that, and they will get a better deal from the Government and the Bill."[419]
>
> "The current restrictive trade practices legislation was passed in the 1950s and has become ineffective and outdated. Under that legislation, even the most serious cartels can carry on for years. In another recent case, a market-sharing and price-fixing cartel of ready-mixed concrete companies was finally dealt with in the courts more than nine years after first being investigated."[420]

There was one particular recurring competition problem in respect of the bus industry that would not go away under the RTPA, with at one stage cartels in this industry being uncovered on a monthly basis.[421] Indeed, this sector of commerce

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[418] Baroness O'Cathain, Official Report, Second Reading, Competition Bill, House of Lords, Columns 1167 and 1168, 30 October 1997, Lords Hansard internet.
[419] Margaret Beckett, Official Report, Second Reading, Competition Bill, House of Commons, Column 25, 11 May 1998, House of Commons internet.
[420] Margaret Beckett, Official Report, Second Reading, Competition Bill, House of Commons, Column 27, 11 May 1998, House of Commons internet.
[421] "Coach cartel referred", (1999) 23 Fair Trading, July 5. See also "Local authorities on tender-rigging alert after cartel uncovered", (1999) 24 Fair Trading, October 2. See also Table 4 supra.

had the privilege of its own bespoke OFT guide.[422] Of course, these are only the cartels that we know about, but from the statements made and the work of the DGFT indicated by Tables 3 and 4[423], it is apparent that this is a far cry from the vast cartelisation of industry in the 1950's.[424]

Besides cartels, the lack of effective powers of investigation and enforcement were of concern. Powers would need to be increased because "The powers for rooting out and dealing with serious anti-competitive behaviour are notoriously weak"[425], but there was much argument about whether the new test of "a reasonable suspicion" should be deleted and replaced by "reasonable grounds for belief"[426]. This was vigorously resisted, particularly by Lord Borrie who, of course, had had to live with the limiting powers of investigation under the RTPA 1976.[427] As for the need for interim measures: "there have been extremely serious cases in the past when it has not been found possible to complete an investigation...The lack of interim measures has been significant."[428]

Not all participants in the parliamentary debates were of the opinion that the UK system needed to change. Even some Government statements were inconsistent in support of the campaign for improving the economy through competition reform, with Nigel Griffiths commenting that "Looking at studies of car prices, there has not been a long-term trend of British car prices being higher than those in other countries." [429] Viscount Trenchard, concerned about the short time given for consultation of the Bill, shrewdly commented that this "is an area where it may

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[422] The Restrictive Trade Practices and the Bus Industry, (OFT 0039). It is the only sector so far to have the benefit of a block exemption under the Chapter I Prohibition; see Chapter 4 infra.
[423] supra.
[424] See 2.2.2 (i) supra.
[425] Mr Ian McCartney, Official Report, Report and Third Reading, Competition Bill, House of Commons, Column 1208, 8 July 1998, House of Commons Hansard internet.
[426] See Lord Kingsland, Official Report, Committee Stage, Competition Bill, House of Lords, Columns 367 and 368, 17 November 1997, Lords Hansard internet. See also columns 370 to 376. The same arguments were made in respect of the grounds for interim measures (Columns 420 to 422). See further Chapter 3, infra.
[427] Official Report, Committee Stage, Competition Bill, House of Lords, Columns 368 and 369, 17 November 1997, Lords Hansard internet.
[428] Lord Borrie, Official Report, Committee Stage, Competition Bill, House of Lords, Column 421, 17 November 1997, Lords Hansard internet. See Chapter 4, infra.
[429] Mr Nigel Griffiths, Standing Committee G, Competition Bill House of Commons, Part 3 p 2, 2 June 1998 (morning session), House of Commons internet. Yet two years later the Competition Commission would find that British consumers were paying too much! (see Chapter 3, infra).

well be that the British flexible approach works better than the European model...and rather than throw away our own tried and tested methods, perhaps we should try to persuade the European Commission to develop its own system of regulation to be more like our own."[430] Perhaps Brussels was listening.[431]

(ii) European Consistency/International Objective

The need to minimise the burden and expense on business had been established previously[432]; "A domestic prohibition which operates consistently with Article [81] would keep the burden on business to a minimum. It would reduce some of the regulatory overload and paperwork."[433] When questioning the nature of the overlapping jurisdiction between the UK an EC, Lord Kingsland said that he understood that "the philosophy behind the Bill is to ensure that our legislation on this matter dovetails with the European Community regime. Above all, it aims to introduce certainty and economy into the operation of the regime."[434] This certainty and consistency

> "...would be of great benefit to so many of our businesses that currently have to worry about two different approaches to competition policy. It delivers a level playing field for our business community in the UK as firms become more and more engaged in European home markets."[435]

However, there was a wider concern for the new Government, that of improving the UK economy both at home and on the global stage:

> "It is perhaps more obvious that competition provides value and choice for consumers. But, as Minister responsible for trade and competitiveness in

[430] Official Report, Second Reading, Competition Bill, House of Lords, Column 1177, 30 October 1997, Lords Hansard internet.
[431] See Chapter 5, infra.
[432] 2.3.1 supra.
[433] Lord Simon of Highbury, Official Report, Competition Bill, Second Reading, House of Lords, 30 October 1997, Column 1146 Lords Hansard internet.
[434] Official Report, Committee Stage, Competition Bill, House of Lords, Column 439, 17 November 1997, Lords Hansard internet.
[435] Lord Simon of Highbury, Official Report, Competition Bill Second Reading, House of Lords, 30 October 1997, Column 1145 Lords Hansard internet.

> Europe, I feel just as strongly about the spur which strong competition in the UK and continental Europe provides to the competitiveness of our companies in overseas markets outside the European Union; that is, in the global market. The European Union should be the most competitive joint market in which our companies can prepare for global competition, particularly in the fast developing markets in the Americas and Asia. Time is short and, as we all know, world competition is accelerating."[436]

The prohibition based approach would

> "...not only modernise our law, but bring it more into line with the prohibition-based regimes that already operate in the EU and in much of the Organisation for Economic Co-operation and Development. That approach will itself be a far more effective deterrent against anti-competitive behaviour."[437]

But the OECD was important for another reason:

> "Ministers have done a great deal by other measures to tackle the underlying problems that have caused our slide down the Organisation for Economic Co-operation and Development league tables. The Bill is a key part of the programme to halt that decline and put it into reverse."[438]

Generally, European scepticism did not play any part in the arguments. At the time that the Competition Bill was debated, Europe was still using its lists of white, black and grey clauses, (that is, relying very much on "form") to make the block exemption system work, although it has now shifted further to market analysis[439]. Whether some MP's supported the structure of the Bill because of this reliance on form, cannot be discounted. However the domestic reform had the potential to

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[436] Lord Simon of Highbury, Official Report, Second Reading, Competition Bill, House of Lords, 30 October 1997, Columns 1144 and 1145 Lords Hansard internet.
[437] Margaret Beckett, Official Report, Second Reading, Competition Bill, House of Commons, Column 25, 11 May 1998, House of Commons internet.
[438] Mrs Linda Gilroy, Official Report, Second Reading, Competition Bill, House of Commons, Columns 78 and 79, 11 May 1998, House of Commons internet.
[439] See Chapter 3, infra.

place the UK in the driving seat since the adoption of the EC style and improvement in procedures:

> "...in particular...the powers extended to the sectoral regulators, could produce innovative thinking and practice on competition law. Like the sign-up to the Social Chapter, the new competition law should prove to be another instance of the U.K. placing itself at the centre, rather than on the margins, of the Community".[440]

(iii) The Safety Net

Lord Fraser of Carmyllie sought to amend the Bill so that the provisions relating to complex and scale monopoly investigations would cease to have effect. For the retention of these powers "would provide for the imposition of a more extensive regime than anywhere else in Europe or North America..."[441] However, Lord Borrie expressed concern at removing these provisions should there be a "gap between what can be proved as an agreement or concerted practice under Chapter I and what can be regarded as an abuse of a dominant position of a single company under Chapter II."[442] He went on to say that "It seems to me undesirable that we should throw overboard the possibility of references under the Fair Trading Act in order to rely solely on what is for United Kingdom law something entirely new; namely, the prohibitions and their particular wording in Chapters I and II."[443]

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[440] P Mallick, "Reform of U.K. Competition Law – Distinct Signs of Life" (1997) 5(7) In Competition September, 3. This has taken on a greater significance with the reform of EC competition law procedures, especially in light of the domestic reforms for the punishment of cartels and complex monopoly investigations. See Chapters 4 and 5, infra.

[441] Official Report, Committee Stage, Competition Bill, House of Lords, Column 298, 13 November 1997, Lords Hansard internet.

[442] Official Report, Committee Stage, Competition Bill, House of Lords, Column 299, 13 November 1997, Lords Hansard internet. However, the former DGFT also said on this matter that "as regards scale monopolies, the case is less strong: nonetheless I make it because if one examines the remedies in the Bill where an abuse of a dominant position is established and proved one does not find among those remedies the possibility of a structural remedy such as a demerger or the separation of certain activities of one firm from another in order to create a more competitive situation." (Official Report, Column 299).

[443] Official Report, Committee Stage, Competition Bill, House of Lords, Column 300, 13 November 1997, Lords Hansard internet; Lord Fraser of Carmyllie found this "belt and braces" argument "...that at some time and some place in the future it might be desirable to be able to resort to these powers is a less than compelling argument." (Official Report, Third Reading, Competition Bill, House of Lords, Column 1331, 5 March 1998, Lords Hansard internet).

In defence of retaining the scale and complex monopoly provisions, Lord Borrie said "This Bill is intended to make a dramatic and radical change in competition law, but not in such a way as to ignore valuable experience from the past."[444] Perhaps this is ground for also arguing that we should not be so quick to forget our RTPA 1976 jurisprudence. Why single out the FTA if it was purely a question of remedies needed for attacking such structures, which could have after all been filtered into the Competition Bill? Although this would run the risk of deviating from the EC regime, which the Government seemed to want to avoid as far as possible, it did so deviate when it could improve on the EC system, as was the case with interim measures.[445] Surely they could have simply improved on EC remedies? However, oligopolies are still a problem for the EC as well as the UK:

> "European experience has shown that a prohibition-based regime is not well suited to dealing with parallel non-collusive behaviour. Consequently, the Government is proposing that the Fair Trading Act provisions on complex monopolies should be retained to deal with such cases."[446]

The powers under the FTA were retained. After all they provide "scope for wide ranging remedies"[447] and "the complex monopoly provisions will continue to be a more effective tool for dealing with anti-competitive parallel behaviour by companies where there is no agreement between them"[448] that is, "where the problem is market structure..."[449] The number of references in the past has been relatively constant (see Table 7, infra), but the future might produce more complex monopoly work, despite an express caveat being given in that the Government believed "...the provisions will continue to have value in such limited circumstances"[450].

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[444] Official Report, Third Reading, Competition Bill, House of Lords, Column 1332, 5 March 1998, Lords Hansard internet.
[445] See Chapter 4, infra.
[446] J Bridgeman, Annual Report of the Director General of Fair Trading, 1997, p 11.
[447] Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill, House of Lords, Column 300, 13 November 1997, Lords Hansard internet.
[448] ibid.
[449] ibid.
[450] ibid, Column 301.

Table 7 - FTA Monopoly References

Year	Number of references made	Number of reports published
1996	3[451]	2[452]
1997	1[453]	3[454]
1998	2[455]	0[456]
1999	2[457]	2[458]

In 2000, four monopoly reports were published[459] and undertakings were given in one complex monopoly situation[460].

(iv) The "we can do it": Government image

This was not only a Bill introduced by a new Government; it was a "New Labour" Government. There was the new image to be projected to the electorate. The Government made much of the "...long delay...under the previous government.

[451] (Scottish Solicitors Estate Agency Services; Foreign Package Holidays; Travel Agency Services) Annual Report of the Director General of Fair Trading, 1996, p 34.
[452] (Performing Rights: scale monopoly; Classified Directory Advertising services: scale monopoly) Annual Report of the Director General of Fair Trading, 1996, p 34.
[453] (Underwriting Services for Shares) Annual Report of the Director General of Fair Trading, 1997, p 35.
[454] (Supply of domestic electrical goods: complex monopoly; Scottish Solicitors Estate Agency Services: complex monopoly (the earlier case under the RTPA had found that there were restrictions, but that as they concerned the supply of legal services, the agreement was exempt); Foreign package holidays: complex monopoly) Annual Report of the Director General of Fair Trading, 1997, p 36.
[455] (Raw Cows Milk; Impulse Ice Cream) Annual Report of the Director General of Fair Trading, 1998, p 35.
[456] Annual Report of the Director General of Fair Trading, 1998, p 35.
[457] (New Motor Cars; Supermarkets) Annual Report of the Director General of Fair Trading, 1999, p 40.
[458] (Underwriting Services for Shares: complex monopoly; Raw Cows Milk: scale monopoly) Annual Report of the Director General of Fair Trading, 1999, p 40.
[459] Supply of Impulse Ice Cream: complex monopoly; New Cars; complex monopoly; Supermarkets: complex monopoly; Scottish Milk: scale monopoly (Annual Report of the Director General of Fair Trading, 2000, p 79).
[460] Birds Eye Wall's Ltd (Annual Report of the Director General of Fair Trading, 2000, p 79).

There had been a commitment in the Conservative election manifesto as far back at 1987 that legislation would be introduces, but in fact there was none."[461]

> "The bill emerges after years of what I can only call procrastination on the part of the previous government. From the forthright and imaginative White Paper of 1989, we were time and again promised legislation by that government, but they delivered nothing. From my experience as Director General of Fair Trading, during the whole of the 1980s I repeatedly said to successive Secretaries of State that the weaknesses and inadequacies of the existing law must be dealt with. I was therefore delighted by the 1989 White Paper. However, lack of political will meant that repeatedly the government excused themselves and pleaded lack of parliamentary time – an excuse which the all-party trade and industry committee in another place said in 1995 had worn a bit thin."[462]

Like the RTPA, this was "...not a party politically contentious Bill"[463], but this was New Labour and it was the friend of business and enterprise: "There has been widespread consultation about the Bill and a wide general welcome for its approach – from the business community, from competition lawyers and from bodies such as the National Consumer Council"[464]and "It is worth recording that Mr Sharpe, a distinguished Silk, states that this is a major Bill and it is a major achievement for the Government."[465] This was a Government that had left no stone unturned in its quest to deliver a comprehensive reform: "in short, [clause 63] put right a widely recognised weakness in the Fair Trading Act regime. They fit within the Government's overall determination to establish a modern and effective system of competition law. The amendments...tidy up various loose ends in the clauses."[466]

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[461] Lord Ezra, Official Report, Second Reading Competition Bill, House of Lords Column 1154, 30 October 1997 Lords Hansard internet.
[462] Lord Borrie, Official Report, Second Reading Competition Bill, House of Lords, Columns 1168 and 1169, 30 October 1997, Lords Hansard internet.
[463] Lord Clinton-Davis, Official Report, Second Reading Competition Bill, House of Lords, Column 1190, 30 October 1997, Lords Hansard internet, in his speech drawing a close to the debate.
[464] Mrs Margaret Beckett, Official Report, Second Reading, Competition Bill, House of Commons, Column 36, 11 May 1998, House of Commons internet.
[465] Lord Fraser of Carmyllie, Official Report, Report Stage 3, Competition Bill, House of Lords, Column 455, 23 February 1998, Lords Hansard internet.
[466] Lord Haskel, Official Report, Committee Stage, Competition Bill, House of Lords, Column 967, 25 November 1997, Lords Hansard internet; amendment agreed to.

Comparisons were made with the US:

> "We know from the cartels that the OFT has uncovered under its existing powers that they can be long-lived, often enduing for years. The United States Department of Justice has based its sentencing guidelines on research showing that cartels can lose the economy 20 per cent. of the volume of the commerce affected over their life. That is made up of a 10 per cent. Increase in prices and a 10 per cent. dead-weight cost."[467]

Was the Labour Government's real concern to be seen to be delivering as the Government of not only consumers, but also as the friend of business and the economy? This certainly provided impetus and even a sense of urgency to the reforms. Unfortunately, the absence of UK figures suggests a distinct lack of preparation time on the part of the Government. Indeed, for a "modern" Government, all was not well. Much of the important detail was lacking.[468]

> "Having had to approach this Bill from the point of view of Opposition for the first time, it is interesting to note that not only probing amendments, but also Pepper amendments are being tabled in order to secure from time to time statements from the Government about what is intended in relation to any particular statutory provision, this is extremely valuable."[469]

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[467] Dr Kim Howells, Official Report, Fourth Standing Committee on Delegated Legislation, Draft Competition Act 1998 (Land and Vertical Agreements, Determination of Turnover for Penalties) Order 2000, House of Commons, Part 1 p 6, 3 February 2000, House of Commons Hansard, internet.

[468] "One reason why the Conservative Government did not go ahead with legislation between 1989 and 1997 was that we were never able to answer satisfactorily all the questions we are now putting to Ministers and it appears that they have not been able to answer then either. We decided that it was best not to put shambolic legislation before the House, but instead to continue to consult to try to find a way to solve the problems. Labour Ministers just blunder on." (Mr John Redwood, Standing Committee G, Competition Bill House of Commons, Part 3 p 3, 19 May 1998 (morning session), House of Commons internet). With suggestions that "The appropriate action for the Government would be to delay the Committee stage of the Bill for about two years." Mr Oliver Letwin, Standing Committee G, Competition Bill House of Commons, Part 4 p 1, 19 May 1998 (morning session), House of Commons internet, in expressing his concern that the Committee would not be able to make proper judgments on the implications of the Bill. See Chapters 3 and 4, infra.

[469] Lord Fraser of Carmyllie, Official Report, Report Stage 2, Competition Bill, House of Lords, Column 382, 19 February 1998, Lords Hansard internet. But is this the best way to make and explain the law? After all, it requires those applying it and challenging it to have read Hansard.

Such Pepper statements will be useful in indicating whether the Chapter I Prohibition meets its objectives. Although as we enter a further consultation period for a new Competition Bill, it appears that the attention to detail in respect of the aims for Chapter I Prohibition fell short of what was required.[470]

(v) Recurring issues

The Government was caught up in the "rip off Britain" campaign, which had been fuelled by the media[471]. There were recurring issues during the passage of the Competition Bill in the guise of the future of over-the-counter medicaments[472] and

[470] See Chapters 3 and 4, infra.

[471] Started by The Sunday Times in July 1998. For example, "Inquiry examines new cars 'rip-off'" (1999) The Times 18 March, 6; "MMC to check out supermarket prices" (1999) The Times 26 March, 1; "Chemist Shop Prices Storm" (1999) Daily Mail 12 May, 1 and 4; "A knockdown blow: Designer labels win fight to stop supermarkets' price-cutting" (1999) Daily Mail 17 July, 25; "Store giant slashes cost of designer perfumes" (1999) The Express 25 January, 20; "Watchdogs sleep as the rip-offs roll on" (1999) The Sunday Times 14 March, 10.

[472] In October 1996, the DGFT announced his decision to ask the RPC for leave to apply for a discharge of the 1970 court order (see Annual Report of the Director General of Fair Trading, 1996, p 46). See Lord Fraser of Carmyllie, Official Report, Second Reading, Competition Bill, House of Lords, Column 1152, 30 October 1997, Lords Hansard internet; Lord Graham of Edmonton's amendment to remove any agreement relating to the price to be charged on the retail sale of over-the-counter medicinal products sold in pharmacies from the Chapter I Prohibition was unsuccessful at the House of Lords Committee Stage and was withdrawn. (see Official Report, Committee Stage Competition Bill House of Lords, Columns 269 to 281, 13 November 1997, Lords Hansard internet); A further amendment was suggested at the House of Lords Report Stage which was to enable the existing RPM regime to have a moratorium of 5 years before the DGFT could apply the Competition Act 1998, again this was unsuccessful (Official Report, Report Stage 1, Competition Bill, House of Lords, Columns 873 to 884, 9 February 1997, Lords Hansard internet); Official Report, Report Stage 3, Competition Bill, House of Lords, Columns 529 to 537, 23 February 1998, Lords Hansard internet, where again the real concerns were discussed of the contradiction with Government Health policy and the service that local community pharmacies provide in terms of advice and looking after the consumer by providing important advice on what products can or cannot be used together; Official Report, Third Reading, Competition Bill, House of Lords, Columns 1301 to 1318, 5 March 1998, Lords Hansard internet, where it was made clear that there were some consumers who could not afford certain medicines because of the prices (Column 1310). Despite the best attempts of Lord Simon of Highbury to convince that it was best that the matter be dealt with by the DGFT, who had initiated formal proceedings, the Lords voted to approve an amendment to stay the DGFT's legal proceedings and provide a five year transitional period for the rpm in respect of over-the-counter medicines. See also the Official Report, Second Reading, Competition Bill, House of Commons, Columns 37 and 38, 43 to 47, 11 May 1998, House of Commons Hansard internet. See also Official Report, Standing Committee G, Competition Bill, House of Commons, Part 3 p 3 to Part 12 p 1, 23 June 1998 (morning session), House of Commons internet; "We do not seek to abolish resale price maintenance for such medicines...When the restrictive practices court considers the director general's application under the 1976 Act, it will undoubtedly take full account of the role played by local pharmacies and of the harm that would be caused if, as they fear, many were unable to survive without resale price maintenance." (Mr Nigel Griffiths, Official Report, Part 3 p 3); "The origins of the matter are to be found in a complaint made in 1995 by the supermarket chain Asda to the Office of Fair Trading and to the European Commission... The Commission has made it clear that it was not pursuing its own investigations on the basis of action initiated by the DGFT." (Mr Nigel Griffiths, Official Report, Part 3 p 4). See

predatory pricing in the newspaper industry[473] with cries that "The Bill is...a mess and muddle in its impact on businesses such as retail pharmacies and newsagents."[474] Also recurring on the agenda, to a lesser extent, was the protection against look-alike products[475] with an attempt to also specifically single out the licensing of copyright works from the application of the Chapter I Prohibition.[476] These specific issues did not secure explicit provision in the Bill by the time it had completed its journey through Parliament, but the Government was determined to

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Chapter 5 where the development of the decentralisation of the EC competition law enforcement is explored. "Article [81] is directly applicable to the UK. Aggrieved companies such as Asda could argue on that basis that restrictions on pricing are void." (Mr Nigel Griffiths, Official Report, Part 3 p 4) See Chapter 3 where the issues of civil action and remedy is discussed. The debate was continued over to another session. See also Official Report, Standing Committee G, Competition Bill, House of Commons, Part 1 p 1 to Part 8 p 1, 23 June 1998 (afternoon session), House of Commons internet, where the new Schedule 13 was added to the Bill. See also Official Report, Report and Third Reading, Competition Bill, House of Commons, Columns 1100 to 1129, 8 July 1998, House of Commons Hansard internet, where an amendment to exclude rpm was defeated. Here accusations were alluded to the effect that the Government had somehow been involved in the complete turnaround in the support of the Community Pharmacy Action Group, who were now no longer in support of an exclusion, see Mr John Redwood, Official Report, Column 1106. See also Official Report, Consideration of Commons amendments, Competition Bill, House of Lords, Columns 1338 to 1343, 20 October 1998, Lords Hansard internet, Lord Simon of Highbury confirming that the 5 year exemption period should RPM be upheld would only begin when the RPC has reached its verdict (Official Report, Column 1343), so there is the potential for this issue to be with us until at least 2006; the new RPC hearing began on 24 April 2001and concluded that the exemption could no longer be justified (not yet reported).

[473] Against the Government's wishes, a new clause to deal with abuse of dominant position by national newspaper was added to the Competition Bill at Official Report, Report Stage 1, Competition Bill, House of Lords, Columns 913 to 934, 9 February 1998, Lords Hansard internet). It was in January 1998 that the DGFT received a complaint from the publishers of The Independent, The Daily Telegraph and The Guardian in respect of The Times strategy of predatory pricing (See Annual Report of the Director General of Fair Trading, 1998, p 47 and "The price was wrong" (1999) 23 Fair trading July 4). See also Official Report, Second Reading, Competition Bill House of Commons, Columns 29 to 33, 38 to 40, re the "Murdoch Amendment", 11 May 1998, House of Commons Hansard internet. See Official Report, Standing Committee G, Competition Bill, House of Commons, Part 1 p 1 to Part 5 p 4, 9 June 1998 (morning session), House of Commons internet, where "Clause 19" (Abuse of dominant position by national newspaper) was ordered not to stand part of the Bill. See also Official Report, Report and Third Reading, Competition Bill, House of Commons, Columns 1136 to 1166 , 8 July 1998, House of Commons Hansard internet, where further amendment was unsuccessful, as was the attempt when the House of Lords considered the Commons amendments (Official Report, Consideration of Commons amendments, Competition Bill, House of Lords, Columns 1346 to 1369, 20 October 1998, Lords Hansard internet).

[474] Mr John Redwood, Official Report, Standing Committee G, Competition Bill House of Commons, Part 1 p 4, 19 May 1998 (morning session), House of Commons internet.

[475] Lord Fraser of Carmyllie, Official Report, Second Reading, Competition Bill, House of Lords, Column 1153 Lords Hansard internet; see also Official Report, Committee Stage, Competition Bill House of Lords, Columns 968 to 975, 25 November 1997, Lords Hansard internet; Official Report, Report Stage 3, Competition Bill, House of Lords, Columns 520 to 525, 23 February 1998, Lords Hansard internet. See also Official Report, Standing Committee G, Competition Bill House of Commons, Part 7 p 1 to Part 9 p 3, 25 June 1998 (morning session), House of Commons internet, where a further attempt was made to introduce explicit provision into the Competition Bill.

[476] Baroness Hamwee, Official Report, Report Stage 1, Competition Bill, House of Lords, Columns 960 to 964, 9 February 1997, Lords Hansard internet. The amendment was again introduced at

deliver benefits to ordinary people and the debates provided the opportunity to show how it would deal with anti-competitive activity[477].

2.4 Conclusion: The Objectives for the Chapter I Prohibition

Simply increasing the powers of the OFT and adding new remedies was insufficient. Attempts by subordinate legislation to reduce the burden caused by form had proved ineffective. A fundamental change to a primary test based on the market was needed to try to prevent the difficulty experienced by the injection of economic evaluation in a strict, legislatory, adjudicatory system. The RTPA had proved to be an expensive and burdensome regime. Overhauling the system was the only way to truly solve the problem of numerous innocuous registrations being processed and the more serious problem of significant anti-competitive agreements remaining untouched.

However, the Government appeared to more concerned with past and present issues, instead of turning their minds to new possible competition concerns and future developments. The Bill was described as "...a charter for lawyers and for chaos and confusion throughout British industry"[478] and "[o]nly in so far as the Government demonstrate the extent to which the present competition legislation does not meet its objectives can one see how prohibition should be introduced."[479] The failure of the RTPA (in its 1997 state) to meet the objectives of an effective system of regulation were clear, but the aims for the Chapter I Prohibition were not. A few cartels were given as examples, but it was not the widespread concern that existed in 1956. We no longer had the problems that existed when the RTPA 1956 was imposed. One pertinent quote that sticks in mind is "...I am not entirely sure

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Official Report, Standing Committee G, Competition Bill House of Commons, Part 7 p 1 to Part 8 p 2, 2 June 1998 (afternoon session), House of Commons internet.

[477] "High UK prices crackdown" 10 March 1999 (www.news.bbc.co.uk/hi/english/business as at 11/03/99); "Wiping out the rip-offs" 10 March 1999 (www.news.bbc.co.uk/hi/english/business as at 11/03/99); "Byers looks to hit rip-off Britain" 1 March 2000 (http://www.news.bbc.co.uk/hi/english/businesswww.news.bbc.co.uk/hi/english/uk_politics as at 1/03/00).

[478] Mr John Redwood, Official Report, Second Reading, Competition Bill, House of Commons, Column 42, 11 May 1998, House of Commons Hansard internet, as to the state of the Competition Bill.

[479] Mr Andrew Lansley, Official Report, Standing Committee G, Competition Bill House of Commons, Part 10 p 1, 19 May 1998 (morning session), House of Commons internet.

whether the primary objective of the Bill is harmonisation with European competition law or the improvement of competition in Britain."[480]

In summary, from the concerns expressed by the DGFT, the experience of business and the requirements laid down by governments over the last 20 years, it is submitted that for the Chapter I Prohibition to be sustained it must:

(1) prohibit all significant anti-competitive agreements, whilst ensuring that those with benefits are allowed to continue[481];

(2) test such agreements in light of the mechanism of competition[482], that is analyse the market, taking account of consumer sovereignty, the price, the product, and the barriers, without letting this develop into public interest style criteria where other factors become prevalent[483];

(3) be flexible, ensuring that its application is effective with responsive decisions that reflect the dynamic nature of the market[484];

(4) deter those who seek to gain through anti-competitive agreements by sending out a message of strong penalties relating directly to the benefits derived, which are actually enforced, and ensuring that harm suffered be made good[485];

(5) make investigating easier and swifter with legal rights respected[486];

(6) be transparent and fair, with cost effective, speedy decision making on terms and criteria readily understood[487];

(7) be able to take urgent action to prevent further harm[488]; and

(8) be less burdensome on those being regulated by it, ensuring consistency and certainty in the European and global arenas[489].

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[480] Mr Howard Flight, Official Report, Report and Third Reading, Competition Bill, House of Commons, Column 1212, 8 July 1998, House of Commons Hansard internet.
[481] Sections 2.1.4, 2.2.1, 2.2.2 and 2.3.1(i) supra.
[482] Sections 2.1.2 and 2.1.3, supra.
[483] Sections 2.2.2(ii), 2.3.1 and 2.3.2(v), supra.
[484] Sections 2.3.2(i) and (iii), supra.
[485] Sections 2.3.1 (ii), (vi) and (vii), supra.
[486] Section 2.3.1 (v), supra.
[487] Section 2.3.1 (iii), supra.
[488] Section 2.3.1 (iv), supra.
[489] Sections 2.3.2(ii) and (iv), supra.

The RTPA taught us that we need to catch agreements of many forms, a flexibility that we should strive to keep. This must be retained, without allowing the difficulties caused by the interpretation of positive obligations, previous freedoms, goods and services relationship, two parties and disregarded provisions to remain. Taken together, these objectives form the basis by which the success of the Chapter I Prohibition is determined.

However there are limits as to what it can achieve: the different areas to competition regulation raise the question of the resources available to put the Chapter I Prohibition into practice. As Merkin and Williams point out "Objectives are rarely static, however, and the impact of substantive rules may alter entirely with political decisions as to which, if any, aspects of competition law merit the most resources".[490] There will be times when the market in question requires specific measures directed at it in order for competition to become the prevalent regulator of activity. In the UK, this is best demonstrated by the break up of the utility monopolies, which have drawn on the Governments resources in order to introduce competition and make the privatisation programme a success. The application of competition rules to these sectors is a drain on resources[491]. The EC experienced it[492], when competition rules were extended to telecommunications, air and sea transport[493], and the UK has similarly had to deal with the question of prioritisation of resources. Even though the aim is to increase competition as the

[490] R Merkin and K Williams op cit., p 4.

[491] A report for HM Treasury found that the costs of regulating the electricity, gas, rail, telecommunications and water industries had doubled since 1995/96, with the highest increase at OFGEM, although the report did find that the regulators are well organised and professionally managed ("Cost of regulating 'doubles in past 4 years'" (2001) FT 20 February, 5). Indeed, as Pitt finds, "...effective the legislation, effective enforcement depends to an even greater degree on the skills and energy of the personnel in the enforcement agency" and these skills have to be paid for (E Pitt, "Telecommunications Regulation: Is it Realistic to Rely on Competition Law to do the Job?" (1999) 5(3) CTLR 65, 68.

[492] See 3.1.1, infra.

[493] I Van Bael "The Role of National Courts" (1994) 1 ECLR 3, 6. In the EC, air transport, maritime transport and insurance have all be singled out for special treatment, but perhaps the best example of sector regulation has been the telecommunications market, which has separate specific control in both the EC and UK. This is one sector that having had competition introduced by specific measures is now being redefined by new technology, which brings with it the questions of maintaining specific sector regulation. See Chapter 6 on this point. Interestingly, domestic control of this sector introduced a "Fair Trading Condition" based on the EC competition Articles, in 1995, although this condition and the EC Articles themselves produced relatively few cases, with the domestic authorities relying instead on a specific licensing regime: E Pitt "Telecommunications Regulation: Is it Realistic to rely on Competition Law to do the Job" (1999) 5(3) CTLR, 65.

regulator of the market[494], the implications of privatised industries for the consumer means that specific control will always be present[495]. Thus it is accepted that priorities will need to be established for the Chapter I Prohibition.[496]

In considering the reform of the domestic law, Robertson concludes, "...it can confidently be predicted that sectoral regulation will continue to play an increasingly significant role within the general competition law framework."[497] Technological advances will change the landscape once more, with a new regulator sharing concurrent jurisdiction with the DGFT following the proposals in the White Paper "A New Future for Communications".[498] This new regulatory regime, OFCOM – Office of Communications, will replace the existing separate regimes for telecommunications and broadcasting, with replacing OFTEL, the ITC, the Radiocommunications Agency, Radio Authority and the Broadcasting Standards Commission.[499] This is just one of the issues raised by the new technology economy.[500]

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[494] "the UK's approach to opening up utility markets to competition can deliver significantly lower prices and create more dynamic markets." (A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraph 1.14). These markets are at differing stages of competitiveness: the merging of the control of gas and electricity markets represents the wish to see greater competition delivering the benefits desired although in part was a response to the increase in the number of mergers taking place in those industries, blurring the boundaries ("Indecent proposals?" (1999) 23 Fair Trading July, 16). The Government has recently described these markets as "fully liberalised" (Productivity in the UK: Enterprise and the Productivity Challenge (HM Treasury and DTI, June 2001), p 21); the benefits of competition were the drive for reform in the postal sector, culminating in privatisation of sort with the Postal Services Act 2000; the most contentious market is that of telecommunications where technological innovation is outstripping the regulation in place and increasing the tension between undertakings and their regulator (BT challenged the Director General of Telecommunications' ruling that it had to pay half of the £32 million cost for installing auto-dialling equipment in telephone exchanges ("BT goes to court over £16 million bill" (2000) Daily Telegraph 2 June, 35); OFTEL extended its price controls on BT , claiming the former monopoly was still holding back competition ((2000) FT 28 October, 1).

[495] The Utilities Act 2000 increases the protection for consumers in the gas and electricity markets. The water sector also illustrates this point well, with the last 18 months seeing OFWAT consult on the future structure of charges and provision for low income tariffs ("Approval of companies' charges schemes 2001/2002", available on www.open.gov.uk/ofwat/dpffiles/approvalspdf.pdf as at 29/6/00) and the purchase of Dwr Cymru by Glas Cymru subject to conditions imposed by OFWAT to safeguard customers by providing lower water bills and forming a reserve to prevent against future risks ("Go-ahead for Welsh Water Plan" (2001) The Times 1 February, 24).

[496] See Chapter 4, infra.

[497] A Robertson "The Reform of EC Competition Law – Again?" (1996) 4 ECLR 210, 218. Although the DGFT and MMC had roles to play pre Competition Act 1998, the introduction of concurrent regulation is a fundamental advancement in delivering competitive markets (see 3.2.6, infra).

[498] 12 December 2000.

[499] "Co-ordination of regulatory and competition policy towards rapidly converging means of communication is of great importance. A key role has continued to be played by the 'Group of Six' [OFT, OFTEL, ITC, Department of Culture Media and Sport, DTI and the Radiocommunications

Agency]...to share thinking on strategy and casework, and to deepen understanding of technical and market developments." (Annual Report of the Director General of Fair Trading, 1999, p 50). See Annual Report of the Director General of Fair Trading, 2000, p 27.

[500] See Chapter 6, infra.

CHAPTER THREE

Meeting its Objectives

Be not seduced by sweet elixirs.
There's no free lunch and no quick fixers.
Resist a rule by coalition.
Respect the roots of competition.
Increase the spurs of innovation.
Bring harmony to regulation.
Let the winds of competition blow.
Keep barriers to trading low.[1]

3.1 Choice of Article 81

Whilst it is well established that Community law is supreme and takes precedence over conflicting national law,[2] the Chapter I Prohibition "...takes E.C. law right into the heart of domestic legislation. The European approach will become an

[1] E Fox (1981) ECLR 127.
[2] Case 14/68 Walt Wilhelm V Bundeskartellamt [1969] ECR 1, [1969] CMLR 100.

integral part of the new domestic regime."[3] Although some commentators approve of this[4], it is of concern that its policy is not comprehensive, especially when it comes to oligopolies where "...other systems, in particular the almost ad hoc U.K. system, seem to be more suitable."[5]

The Chapter I Prohibition makes greater use of economic theory. Despite adopting EC style[6], the domestic regime uses law that in theory follows very closely the model of perfect competition. Indeed, single market motives have been explicitly denounced[7]. This liberates our prohibition from the shackles of old, with the potential for transparent procedures in its application, enabling competition to be the sole concern. Although not without its own pitfalls and dangers[8], the Chapter I Prohibition was generally welcomed as a success:

> "In respect of Chapter I (Article [81]) our evaluation is uniformly positive. The chapter passes all our tests with respect to the objective policy, the design of policy rules and their implementation (including fines for breaches of the rules), and harmonisation with Europe...Overall competition policy in the UK after the Competition Act is definitely "more like Europe", and on the whole it is a change for the better, at least in principle."[9]

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[3] F Barr "Has the U.K. Gone European: Is the European Approach of the Competition Bill more than an Illusion?" (1998) 3 ECLR 139, 140.

[4] "European competition policy is one of the most developed and successful areas of policy-making in the EU, in terms of...its practical significance and for governments, firms and consumers..." (H Wallace & W Wallace, Policy-Making in the European Union, (Oxford, Oxford University Press, 2000 4th ed.) p 116. A positive review is given by P. Sutherland in "Towards a Positive Competition Policy: Future Trends and Actions" ((1985) ECLR 283), although he accepts that "To argue that [this] framework has proved its worth is not to argue that it is immutable..." (p 290)).

[5] SM Willimsky "The Concept(s) of Competition" (1997) 1 ECLR 54, 56.

[6] Which itself would cause concern amongst Chicago supporters for its object of single market integration.

[7] "Single market objectives will not be relevant to the interpretation of the domestic prohibitions." Lord Simon of Highbury, Official Report, Third Reading, Competition Bill House of Lords, Column 1321, 5 March 1998, Lords Hansard internet.

[8] "...if you go down the opposite route from the RTPA you have complications as well. Perhaps one of the tasks in implementing the Competition Act in the United Kingdom, of which I am sure the authorities are aware, is to keep that process of exemption and exception as simple and as comprehensive as possible." (C Bellamy "The Europeanisation of United Kingdom Competition Law" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 3).

[9] D Hay "Is More Like Europe Better?: An Economic Evaluation of Recent Changes in UK Competition Policy" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 59.

> "Businesses seek above all certainty in the laws and regulations to which they are subject. The Competition Act, the procedural rules, OFT Guidelines, community precedents (incorporated into the Act by section 60) all help towards that objective. Notifications for guidance to the OFT of particular business intentions, before commercial decisions are taken and money spent[10], are a further way of achieving such certainty."[11]

However, in considering the European principles applicable to the Chapter I Prohibition, Singleton finds that "...some of the EC case law is contradictory"[12]. This is rather an understatement when one considers exactly what the Chapter I Prohibition has imported.[13] The demise of the RTPA was described as ending the "tremendous fun" of uncertainty and argument by the adoption of a "cold...clinical and boring EC-type test".[14] However, I submit that scope for argument and uncertainty is wider than initially forecast.

3.1.1 A tried and tested Prohibition

The adoption of a tried and tested formula appears, at face value, to provide the solution to problems faced under the RTPA. Originally called the European Economic Community (EEC), until renamed the EU[15], this supranational body's

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[10] However, it is submitted that commercial decisions will have to be reached and money spent in order for the agreement to be signed, a prerequisite before any notification (even for guidance) can be made. The comments are better viewed as referring to requests for informal guidance.

[11] Lord Borrie "Foreword" to BJ Rodger and A MacCulloch The UK Competition Act: A New Era for UK Competition Law (Oxford, Hart, 2000) p vii. However, Lord Borrie also acknowledges that perfect certainty is unachievable.

[12] S Singleton Blackstone's Guide to the Competition Act 1998 (London, Blackstone Press Limited, 1999) p 3.

[13] Best demonstrated by the "Freezer Exclusivity" litigation: Case T-9/93 Schöller v Commission [1995] ECR II-1611; Case T-7/93 Langnese-Iglo v Commission [1995] ECR II-1533. The ECJ has finally ruled on the freezer exclusivity saga, stating that national courts must avoid giving decisions that may conflict with a decision *contemplated* by the Commission (Case C-344/98, Masterfoods Ltd judgment, 14/12/00). This market is one that has dogged the authorities for two decades. In 1994, the MMC gave freezer exclusivity the thumbs up, but the market did not develop as anticipated, resulting in the 1998 MMC inquiry which found the arrangement to be against the public interest.

[14] C White "The Restrictive Trade Practices Act – RequiescaT in PAce" (2000) NLJ 7 April, 490, 491.

[15] By the Maastricht Treaty of European Union in 1993. This is made up of the "Three Pillars": EC, Common & Security Policy, and Justice & Home Affairs, with the concept of "closer co-operation" changing the way the new Union operates ("Flexibility and the Treaty of Amsterdam: Europe's New Byantium?" University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 3,

catalyst was more than pure economic considerations. The consequences of war and political agendas were also factored into the mix of objectives that would ultimately reshape the legal order in the European continent[16]. As McGoldrick summarises,

> "There were economic motives, but these were subsidiary. If the nations of Europe could gather together their factors of production, and organise their resources on a common basis, they would present a strong challenge to the leaders in the world economy. There was also a broader *security* link, in the sense of the general argument that nations which trade together do not tend...to go to war with each other."[17]

The amalgamation of these factors resulted in greater interdependence, a harmonisation of policies[18], and the legal order transforming to encompass further aspects of European citizenship[19] with social policies very much at the forefront[20].

(November 1997), p iii). The Treaties we have today are the result of amendment and addition over the last fifty years. The latest plan for reorganisation of these provisions has been carried out by the Robert Schuman Centre of the European University Institute in Florence, which produced a draft Basic Treaty of the European Union for consultation (www.europa.eu.int/comm/igc2000/offdoc/index_fr.htm#repoflo as at 18 May 2000).

[16] This process of creating a new legal order began with the European Coal and Steel Community, created by the Treaty of Paris 1951: DG Goyder, EC Competition Law, (Oxford, Oxford University Press, 1998, 3rd ed.) pp 17 to 24; R Whish, Competition Law, (London, Butterworths, 1993, 3rd ed.) pp 28 to 36, and 186; more generally, F McDonald & S Dearden, European Economic Integration, (England, Longman, 1999 3rd ed.) pp 5 to 14; and P Craig & G De Burca EU Law: Text, Cases and Materials, (Oxford, Oxford University Press, 1998 2nd ed.) Chapter 1. Politics had an even greater influence than economic considerations in 1951, in a climate of uncertainty and the threat of further conflict (JS Hyden "The Demise of the ECSC Treaty: Some Competition Law Implications" (1991) 4 ECLR 161, at p 165).

[17] D McGoldrick, International Relations Law of the European Union, (England, Longman, 1997) p 7. Similar political worries still raise concern today, but paradoxically, Austrian travel agents threatened to use the competition articles to sue foreign companies advocating a tourist boycott of Austria following the inclusion of the far-Right Freedom Party in the Austrian government ("Austrians threaten to sue over tour boycott" (2000) Daily Telegraph, 1 March, 16). The crisis that was brewing between Austria and other Member States was averted with the removal of certain members from that coalition government, but this demonstrated the potential for political objectives of the EU and competition rules to clash head on.

[18] A discussion of which is given in F McDonald & S Dearden, op cit., Chapter 2.

[19] Glaringly obvious by its omission, the original European Treaties made no provision for the protection of human rights, which following the atrocities of war, one might have thought would be primary on the agenda. A separate legal order in the form of the European Convention of Human Rights 1950, with its own bodies materialised around the same time (this remains a separate legal order, although the EU institutions have increasingly made use of the Convention in their cases and at the end of 2000 proposed the adoption of a Charter of Fundamental Human Rights, the background to which is summarised in "The Human Rights Opinion of the ECJ and its Constitutional Implications" University of Cambridge, Centre to European Legal Studies, Occasional Paper No. 1, (June 1996); P Craig & G De Burca EU Law: Text, Cases and Materials,

The role of competition (as discussed in Chapter 2) is undoubtedly a key factor in the EU[21], which has made provision for the regulation of agreements[22], monopolies[23], and concentrations[24] where these might impinge on the performance of the competitive mechanism, with liberalisation measures for particular industries requiring specific action to open up those markets to competition[25] and exclusion of other sectors altogether where separate action is required to control those markets[26]. Although sectors are singled out for special treatment, the aim is to allow full application of Article 81 where possible.[27]

(Oxford, Oxford University Press, 1998 2nd ed.) pages 296 to 317; P Craig and G De Burca The Evolution of EU Law (Oxford, Oxford University Press, 1999) Chapter 13; and F McDonald & S Dearden, op cit., Chapter 7. The importance of human rights under the domestic control of anti-competitive agreements is explored below, but it has already made its mark with the Human Rights Act 1998 bringing the first DGFT challenge to the Medicaments RPM exemption to a sudden and premature end (Director General of Fair Trading v Proprietary Association of Great Britain (Re Medicaments and Related Classes of Goods (No.2)) (2000) (Court of Appeal) (2001) The Times 2 February. See also OFT press releases PN 1/98, 8/1/98, PN 4/99, 3/2/99, PN 7/99, 11/3/99 and revised OFT statement, www.oft.gov.uk/new/medicaments.htm (as at 28 February 2001); see 3.2.5, infra).

[20] For example Deutsche Telekom AG v Vick (Case C234/96) (2000) The Times 28 March 28, where the ECJ held that the direct effect of Article 119 could be relied upon in the period before the landmark judgement of Defrene v Sabena, since the "social aim" of the Article prevailed over its economic aim (thus entitling all part time workers to retroactive membership of the pension scheme at issue). The Commission's aims for "A better quality of life" for European Citizens are set out in Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Strategic Objectives 2000-2005 "Shaping the New Europe" (COM(2000) 154 final, 9/2/2000), pp 11 and 12.

[21] A Jones & B Sufrin, EC Competition Law: Text Cases and Materials, (Oxford, Oxford University Press, 2001) pp 30 to 35, and 69 to 76.

[22] Article 81 EC.

[23] Article 82 EC.

[24] Council Regulation 4046/89 as amended by Council Regulation 1310/97 (The "ECMR").

[25] Telecommunications (which is the sector of the moment with the emerging new technology economy; liberalisation of this market is the key to meeting the objectives for "eEurope" (6th Annual Report on telecommunications liberalisation, available at www.europa.eu.int/comm/information_society/policy/telecom/6threport/index_en.htm as at 7/12/00, and explored in Chapter 6; Energy (the developments of which are traced by L Hancher and PA Trepte in "Competition and the Internal Energy Market" (1992) 4 ECLR 149, with the Commission's latest plan to open the gas and electricity markets fully by 2005 – "the genuine energy single market" Commission press release IP/01/356, 13/3/01); and more recently the Postal sector with plans to open up a substantial share of the postal services market to competition by 2003 (Commission press release IP/00/541).

[26] The best example of a sectoral exception is that of agriculture, with its Common Agricultural Policy. Exception is also given to Coal and Steel, and Defence. Sectoral exemptions are provided for transport and financial services.

[27] The Commission is keen to abolish restrictions on price and advertising in the professions (whilst recognising purely ethical rules are legitimate, and has called for "...Member States to press ahead with liberalisation of [this] sector, clarifying the legislation so that it is not applied solely in order to protect the economic interests of members of the professions without guaranteeing the quality of

Consumer implications have also been caught up in the way that undertakings compete in the market, with provisions introduced to ensure that trading is fair[28]. This is one area where co-operation within the EC is more explicit and rapid. Recent consumer measures include the EEJ-Net and Stop now Orders, which aim to improve access to redress. These Orders have been welcomed by the new DGFT as they "...will speed up and sharpen enforcement for a range of consumer protection measures, and they will allow cross-border enforcement in Europe."[29] The international trade arena has also been catered for with anti-dumping provision[30] and trade agreements[31]. The wider notion of commerce on a global scale is pre-occupying the Commission more and more[32]. This is particularly

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services." (XXXth Report on Competition Policy 2000 (SEC (2001) 694 final, 7/5/01) p 57, paragraph 223). See Chapter 4, infra.

[28] Article 81(3) provides for consumer benefits to be taken into account, but does allow restriction of competition (where there are outweighing beneficial effects), thus not providing comprehensive protection for consumers (AC Evans "European competition Law and Consumers: The Article 85(3) Exemption" (1981) ECLR 425, pp 428 and 429). Indeed, regarding the second condition that consumers be allowed a fair share of the resulting benefit, Goyder finds that it "appears to be satisfied rather too easily, in that the Commission tends to assume that, if the first positive condition is satisfied, then the mere existence of at least a moderately competitive market will ensure that the benefits of progress will be passed on, or 'trickle down', to the 'consumers' (DG Goyder, op cit., p 141). Although a detailed analysis of consumer protection is beyond the scope of this work, see footnotes in Chapter 2 and P Craig and G De Burca The Evolution of EU Law (Oxford, Oxford University Press, 1999) Chapter 19, in particular pp 707 to 720; S Weatherill, EC Consumer Law and Policy (England, Longman, 1997).

[29] John Vickers, Annual Report of the Director General of Fair Trading, 2000, p 8. Perhaps this will provide some lessons in the post Regulation 17/62 era, the answers to which are discussed in Chapter 5.

[30] That is price discrimination between markets within the EU, and between the EU and the rest of the world where it affects trade on the global market, both of which raise conflict with competition rules (M Clough "Conflicts between EEC Anti-dumping and Competition Law" (1992) 5 ECLR 222) and issues of fairness and legitimacy, drawing in the ECJ (R Greaves "Judicial Review of Anti-dumping Cases by the European Court of Justice" (1985) ECLR 135) and the WTO to resolve the problems that arise ("Anti-Dumping and Competition" (1997) 5(5) In Competition, June, 1).

[31] Bilateral, multilateral and the increasing pressure for global agreement: A Jones & B Sufrin, op cit., pp 1066 to 1073; R Hall, A Smith & L Tsoukalis, Competitiveness and Cohesion in EU Policies, (Oxford, Oxford University Press, 2001) Chapter 3; F McDonald & S Dearden, op cit., Chapters 12 and 13; H Wallace & W Wallace, op cit., Chapters 14 and 15; D McGoldrick, op cit., Chapters 3 and 4 (on competence of the EC) and more specifically Chapter 10 on its international relationships, in respect of which, see Chapter 6 infra. International trade also concerns developing trade eliminating barriers with Developing Countries, the latest trade initiative governed by the Commission's "Everything But Arms" trade measures, eliminating quotas and duties on all non-arms products (Commission press release IP/01/261, 26/2/01).

[32] See 3.2.8, infra. "The Europe we want, the Europe which can show genuine leadership on the world stage, will be a Europe that heeds the warnings of globalisation, not least from those who feel disenfranchised from it. What we are aiming at, therefore, is a new kind of global governance to manage the global economy and environment." Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Strategic Objectives 2000-2005 "Shaping the New Europe" (COM(2000) 154 final, 9/2/2000), p 4, in achieving its aim to ensure that Europe becomes a "globally competitive economy" (p 9). This aim was echoed by Romano Prodi in his speech "Shaping the New Europe" describing Europe as "...a global civil power at the service of sustainable global development"

evident in the Commission taking the lead in the GCI (Global Competition Initiative) for the creation of a global competition forum[33].

One aspect of the promotion of European citizenship is the initiative to increase understanding of the competition rules and how they benefit consumers. This included the launch of "Competition Day"[34] and the publication of a user friendly guide, "Competition policy and Europe and the Citizen". Mario Monti admits the aim is to arouse citizens' interest and canvass help in implementing the policy[35]. This is the same, framed in a less subtle way, is being delivered by the OFT in encouraging complaints against anti-competitive activity; both indicating the extent to which competition authorities need the help of the public.[36]

However, one cannot get away from the basic fact that the EEC envisaged the creation of a single common market[37]. The Treaty of Rome resolves to "ensure the

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(Speech to the European Parliament, Strasbourg 15 February 2000; Speech/00/41, p 2). The issues raised by this are considered in Chapter 5.

[33] "...the Commission's initiative to persuade our WTO partners that negotiations should commence on the conclusion of a competition agreement, and of our ideas...for the creation of a global competition forum." Mario Monti "The EU views on a Global Competition Forum", speech delivered as ABA meeting, Washington, 29 March 2001 (Speech/01/147), p 2. The intention of pioneering this is reaffirmed in the XXXth Report on Competition Policy 2000 (SEC (2001) 694 final, 7/5/01) p 123. This idea is not new, with both the UN, the OECD and the WTO attempting to draw up substantive global rules of substantive law and procedure (A Kaczorowska "International Competition Law in the Context of Global Capitalism" (2000) ECLR 177, at p 125). This is considered in Chapters 5 and 6 infra.

[34] Inaugural day held on 9 June 2000 in Lisbon, to show how citizens have benefited as consumers and workers through the liberalisation of the telecommunications sector and the consequent increase in services and job opportunities, and the fine imposed on Volkswagen ensuring cheaper prices (Commission press release IP/00/590, 8/6/00). The turn out from consumer associations greatly improved at the Second Competition Day held in Paris on 17 October 2000 (XXXth Report on Competition Policy 2000 (SEC(2001) 694 final, 7/5/01) p 11). A third Competition Day was held in Stockholm on 11 June 2001, where the summarised the objectives of competition policy as ensuring "wider consumer choice, technological innovation and price competition" (Mario Monti, Speech/01/275, p 2). The emphasis in terms of how the consumer benefits continued in the XXXth Report on Competition Policy 2000 (SEC(2001) 694 final, 7/5/01) pp 31 and 32.

[35] ibid, p 6.

[36] See 3.2.5 infra.

[37] Treaty of Rome 1957, Article 2; DG Goyder, op cit., pp 13 to 16, "If the Common market was to be, as its name implies, a market where economic progress would result from the efforts of independent undertakings, large and small, from any of the Member States, then the individual territorial markets of Member States had to be made open and kept available to them. If this were prevented, then the other important political and economic aims of the Treaty would be largely futile." (at p 16). For an economic analysis of the impact of the single market on the member states generally, see R Hall, A Smith & L Tsoukalis, op cit., Chapter 2. For a discussion of economic integration through the use of the single market see F McDonald & S Dearden, op cit., pp 34 to 70, and H Wallace & W Wallace, op cit., Chapter 4. The development of the Single Market is guided by the Commissions Action Plan of 1997, available on www.europa.eu.int/comm/internal_market/en/update/action/plan.htm (as at 9 March 2000): the

economic and social progress of [the member states] by common action to eliminate the barriers which divide Europe"[38], recognises "that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition"[39] whilst being "anxious to strengthen the unity of [member states] economies".[40] Specifically Article 3(1)(g) provides that the activities of the Community shall include "a system of ensuring that competition in the internal market is not distorted."[41] This internal market requires specific rules to regulate member state activity, that is provision for state aid[42] and free movement[43], but has also impacted on the way that the primary competition articles have been interpreted. As Jones and Sufrin observe, the:

> "...role of competition policy as an instrument of single market integration is absolutely crucial to any understanding of EC competition law. It makes EC law different from any system of domestic competition law, whether in the Member States, the USA, or elsewhere.[44] EC competition law serves

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Eurobarometer survey at the end of 2000 indicated that the majority of EU citizens surveyed had a favourable view of membership and the plans for the single market, although the prospects of a single currency and enlargement found less support in the UK (Commission press release IP/01/179, 8/2/01).

[38] Treaty of Rome 1957, preamble.

[39] ibid.

[40] ibid. This unity might need to be further strengthened for the reform of Regulation 17/62 to be a success (see Chapter 5, infra).

[41] Amended, by removal of the words "the institution of" from the start of the Article, and renumbered and by the Treaty of Maastricht 1993; renumbered again by the Treaty of Amsterdam 1999.

[42] Article 86; for which see FG Wishlade "Competition Policy, Cohesion and the Co-ordination of Regional Aids in the European Community" (1993) 4 ECLR 143 and P Craig & G De Burca EU Law: Text, Cases and Materials, (Oxford, Oxford University Press, 1998 2nd ed.) Chapter 25.

[43] Articles 28, 39, 43 and 49; for these see generally P Craig & G De Burca EU Law: Text, Cases and Materials, (Oxford, Oxford University Press, 1998 2nd ed.) Chapters 13 to 17 and P Craig and G De Burca The Evolution of EU Law (Oxford, Oxford University Press, 1999) Chapters 10 and 11.

[44] Article 81 drew on Article 65 of the ECSC Treaty, which provided the original means for abolishing restrictive practices that tended toward the sharing or exploitation of markets (since these were prescribed by Article 4(d) ECSC as incompatible with the new market) (DG Goyder, op cit., pp 20 to 27). This prohibition approach is in sharp contrast to the control adopted by the UK in 1956. It also differs from the US regulation, with its split into per se prohibitions and the rule of reason test. However, the commentary by Jones and Sufrin refers to the fact that a new German competition law came into force on the same day as the Treaty of Rome – a law that had been demanded by the Americans before they ceased their occupation of Germany. This law went on to influence EC law (they note that the majority of DG Competition Directors General have been German) and thus a line between US and EC can be established (A Jones & B Sufrin, op cit., pp 27 to 29). The simplicity of this summary, they recognise, must be seen in light of the work by Gerber who finds EC competition law drawing from Austrian and German "Ordoliberalism" (p 29; D Gerber, Law and Competition in Twentieth Century Europe: Protecting Prometheus (Oxford, Clarendon Press, 1998)). Whilst remembering that Article 81 was a development of the agreement reached in the ECSC Treaty, those provisions did in part reflected "heavily the content of US anti-

two masters, the 'competition' one and (even more demanding) the imperative operation of single market integration."[45]

This is a goal, which they describe as sometimes dictating " the entire development of the law..."[46] There is, in theory, a fluidity between these two masters, but the difficulty in practice has been compounded by the predominance of legal staff in DG Competition, where the "...professional staff ratio of 7:1, lawyers:economists...has helped to shape the legalistic nature of the competition rules."[47]

The problem this poses for the application of economic theory is no better demonstrated than by vertical agreements. As Korah notes "The [EC] Commission and the Court have taken the view that vertical agreements can have the effect of dividing up the common market and hence should remain under review by competition law. This policy has been pursued to the extent of marginalizing arguments based more generally on economic welfare, giving rise to suggestions that undue costs have been imposed on European businesses both by the prohibition of certain efficiency-enhancing agreements and by the expense involved in

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trust" (H Wallace & W Wallace, op cit., 119) and were themselves expanded on in part by the success of the USA approach (M Furse, Competition Law of the UK & EC, (London, Blackstone Press, 2000 2nd ed.) p 17), with the concept of concerted practice arising from the concept of concerted action in the US (DG Goyder op cit., p 98), which was an inevitable consequence of having the first modern competition law in the form of the Sherman Act 1890 (R Lane, EC Competition Law, (England, Longman, 2000) p 16). However, because of its "evolutionary and empirical character" (referred to by C Harding and A Sherlock, European Community Law, (London, Longman, 1995) p 411) in being shaped by the Commission over the last 40 years, EC Competition law has after this piecemeal fashion become its own distinct system in its own right. Whilst the ideals and objectives have interpreted some American virtues into the substantive law, they are *not* the same in the way they deal with agreements and procedurally they remain somewhat different.

[45] A Jones & B Sufrin, op cit., p 32. "...Articles [81] and [82], reflect the thinking of nineteenth century professional economists, with the difference that those economists usually made clear the simplifying assumptions upon which their theoretical models were constructed, while the Treaty of Rome takes competitive markets to be realisable states, and the prevention, restriction or distortion of competition to be meaningful objectives realisable by administrative action bearing down on, and indeed usurping, the decision making prerogatives of private enterprise where these affect trade within the Community." M Hall "EEC: Competition – or Competition Policy? An economists Enquiry" (1980) ECLR, 287, pp 289 and 290.

[46] ibid.

[47] S Wilks and L McGowan "Competition Policy in the European Union: Creating a Federal Agency?" in GB Doern and S Wilks, Comparative Competition Policy, (Clarendon Press, 1996) p 237, referred to in P. Craig and G De Burca The Evolution of EU Law (Oxford, Oxford University Press, 1999) p 600.

clarifying the law."[48] Whish and Bishop find that there is an "overwhelming significance attached to single market integration in decisions by the Commission imposing fines on vertical agreements under Article [81]."[49] Bearing in mind this observation, *all* EU cases should be viewed subject to the caveat that market integration issues may have predominated. According to Whish "Unification of the common market is the obsession of the Community authorities, but this has meant that decisions have sometimes been taken which are arguably inimical to the pursuit of consumer welfare in economic terms. Faced with a conflict between the narrow interests of a particular firm and the broader problem of integrating the market, the tendency will be to subordinate the former with the latter."[50] This is a warning for the application of section 60 of the Competition Act 1998 in that European cases are of limited value in the application of the Chapter I Prohibition.[51]

The objective of integrating the market causes problems in trying to define the scope of competition articles. They are increasingly being invoked, in addition to other Treaty provisions, in the general sporting sphere where there has been an explosion of activity (Commissioner Karl Van Miert described the Federation Internationale de l'Automobile (FIA) as one of the worst cartels he had ever

[48] V Korah, "EEC Competition policy – Legal Form or Economic Efficiency" Current legal Problems, (1986) 39: 85-109, quoted by S Deakin and J Michie, Contracts, Co-operation and Competition: Studies in Economics, Management and Law, (Oxford, Oxford University Press, 1997) p 351. This is a view echoed by R Van der Bergh in "Modern Industrial Organisation versus Old-fashioned European Competition Law" ((1996) 2 ECLR 75) where he finds that "Among European competition lawyers, the view tends to dominate that efficiency is not necessarily the best approach." (p 75), and calls for the incorporation of modern economic principles (p 86); following on from the plea made by AS Pathak who criticises the lack of economic analysis in decisions in "Articles 85 and 86 and Anti-competitive Exclusion in Competition Law" (1989) ECLR 74 (Part I) & 256 (Part II).

[49] R Whish and W Bishop The Treatment of vertical agreements under the Competition Bill: a report for the Competition Bill Team of the Department [of] Trade and Industry (DTI) p 4; "...we find that the fining decisions are overwhelmingly concerned with single market issues...[such that these decisions] would have no application in the domestic UK context." (p 6). However, they go on to find that when looking at the Commission's informal practice, the majority of interventions would appear to be the result of more "'conventional' competition concerns – such as access to the market – than single market issues." (pp 8 and 9).

[50] R Whish, op cit., p 15, where he refers to the case of Distillers v Commission (Case 30/78 [1980] ECR 2229; [1980] 3 CMLR 121) as a good example of an "...occasion on which the economic justification for Distillers' behaviour and the political zeal for single market integration clashed headlong with one another." (at p 566).

[51] See 3.1.2 infra.

seen[52]), and are being used to counteract other treaty measures, a friction no better demonstrated than by the promotion of intellectual property rights[53].

[52] Although following a court challenge by the FIA, later issued a statement of regret ("Goodbye DGIV, Hello Commissioner Monti" (1999) 7(7) In Competition, August, 2). However, other sporting problems have brought competition rules into play where they might not necessarily have been thought applicable. An explosion due to the sudden growth of sport as a lucrative industry, emerging as a recognisable economic activity and thus falling within the EC Treaty (D Brinckman and E Vollebregt "The Marketing of Sport and its Relation to E.C. Competition Law" (1998) 5 ECLR 281; JP van den Brink "E.C. Competition Law and the Regulation of Football" (2000) 8 ECLR 359 (Part I) and (2000) 9 ECLR 420 (Part II)), that was starting to suffer under a system of self regulation (I Blackshaw "Regulating sport globally" (2000) New Law Journal April 28, 671; B Khela "The new rules of the game" (2000) The Lawyer, 24 July, 27). In the much publicised case of Bosman (Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman (Case C-415/93) [1996] 1 CMLR 645), although the ECJ found solely on free movement provisions, it was the Advocate General's opinion that Article 81 would be applicable (M Pullen "Summary of the Advocate General's Opinion in the Bosman Case" (1996) 1 ECLR 51, pages 56 to 58), can be seen as the watershed, although many of the later cases were similarly decided within the free movement provisions (prohibition on rules preventing basketball clubs from fielding players from other Member States after certain dates when players from non-Member States have been transferred later than those dates (Lehtonen v Federation Royale Belge des Societes de Basket-ball ASBL (Case C176/96) ECJ 13/4/00 (www.europa.eu.int/jurisp as at 14/4/00))), with others not successful at all (national rules requiring authorisation to be given to athletes to participate in international events at a high level did not infringe the freedom to provide services (Deliege v Ligue Francophone de Judo et Disciplines Associees ASBL (Cases C51/96 & C191/97) ECJ 19/4/00 (www.europa.eu.int/jurisp as at 30/4/00))). The Commission recognises that these two cases set out the principles for how the competition rules apply in this sector (XXXth Report on Competition Policy 2000 (SEC(2001) 694 final, 7/5/01) p 59.). State aid was raised as an issue when the BBC planned to impose an additional licence fee on digital television viewers ("Brussels watching "unfair" BBC digital TV" FT, 13 October 1999, 1). There have however been investigations purely under the competition Articles: the investigation into Fifa's system of regulating football agents (Commission press release IP/99/782, 21/10/99) and most notably the symbolic fine imposed on the Comite Francais d'Organisation de la Coupe du Monde de Football 1998 for its abuse of dominant position in its ticket sale arrangements (Commission press release IP/99/541; S Weatherill "003314987354: Fining the Organisers of the 1998 Football World Cup" (2000) 6 ECLR 275). Perhaps as a way of stemming the flow, the Commission issued a press release entitled "Limited to application of Treaty competition rules to sport: Commission gives clear signal" (Commission press release IP/99/965, 9/12/99; followed up by a speech at the conference on "Governance in Sport", Speech/01/84, 26/2/01) publicising its decisions that UEFA rules stipulating that teams play home matches at their own ground and banning football clubs with the same owner from participating in the same competition were not within the scope of the competition Articles, although the complaint by Massimo Lombardo to the Commission, following his inability to transfer clubs because of the transfer fee system, has led to another area of sport being examined under the competition microscope (A Gwillam "They thought it was all over..." (2000) NLJ December 22, 1896). The Commission has recently issues a Statement of Objections to UEFA, challenging the arrangements it has for selling television rights for the UEFA champions league (IP/01/1043 and Commission Memo/01/271).

[53] A detailed study of European treatment of Intellectual Property Rights and its conflict with Article 82 is beyond the scope of this work, but the extent of protection afforded by trade marks was hotly contested by Tesco's complaint against Levi, following from the cases of Javico International and another v Yves Saint Laurent Parfums SA (Case C-306/96) [1998] 5 CMLR 172; Silhouette International Schmied GmbH & Co. KG v Hartlauer Handelsgesellschaft GmbH (Case C-335/96) [1998] 2 CMLR 953 and Sebago Inc and Ancienne Maison Dubois et Fils SA v GB-Unie SA (Case C-173/98) [1999] 2 CMLR 1317 (although Mr Justice Laddie fought to reduce its impact in Zino Davidoff SA v A&G Imports Ltd (1999) The Times, 24 May, this was subsequently distinguished by the Court of Session in J GmbH v M&S Toiletries Limited 4 April 2000 (reported in (2000) XI(7) PLC 67)). The use of trade marks has been pushed to the limits, with Levi at one point arguing that where there has been parallel importation by Tesco, even goods made in their own factories were "counterfeit" because Levi had not authorised their sale in the EC, although this claim

The last decade has however, seen an injection of economic realism[54] in to the application of competition law. The internal market will undoubtedly remain the primary objective[55], but while it is being achieved, the Commission still aim to continue to modify the rules and interpret with greater regard to economic principles. Deakin and Michie note that "In the EC, the establishment of the common market[56], rather than economic efficiency as such, has been the goal of legislation dealing with vertical restraints. However, the more recent legal instruments in this area represent important attempts to balance the pro- and anti-efficiency aspects of vertical contracting."[57] These observations are reiterated by Mario Monti who states that the reforms already in place adopt

> "...a more economic approach both for the block exemptions and individual cases. We should recognise in particular that for most forms of co-operation, where the companies involved do not have market power, the effect of co-operation is not anti-competitive, provided that there are no hardcore restrictions. This focus on the really anti-competitive agreements will make our policy towards horizontal co-operation more effective for today's economic environment."[58]

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was subsequently withdrawn (Panorama, BBC1, 12 April 1999). Tesco, which has not had the best of luck on imported goods trade mark cases (see Sony Computer Entertainments Inc v Tesco Stores Ltd (1999) Ch.D 21/9/99, where it was injuncted against fitting an adapter plug and RFM unit, not made by Sony, to Sony PlayStations) did claim a favourable opinion from Advocate General Stix-Hackl (5/4/01), although both sides in the case found that it supported them. The fears that the final answer might not resolve the problem "...and yet more years should pass in which the only people who profit are lawyers" ("It's the grey look for Levi jeans" (2001) The Times (Law Supplement) 24 April, 5), appears to be materialising following the ECJ ruling in Levis favour (Levi Straus & Co Ltd v Tesco Stores Ltd available on www.curia.eu.int as at 20/11/01) As to the future of IPR in the EC see C Whiddington "How will the expansion of the European Union affect the protection of Intellectual Property?" (2000) March European Current Law, xi, although measures are already under way to create a Community wide patent (Commission press release IP/00/714, 5/7/00; Promoting Innovation Through Patents: European Commission Green Paper on the Community Patent and the patent systems in Europe) and an EU Copyright Directive.

[54] Although this is not universally accepted; Griffiths finds that the treatment of vertical restraints is still too formalistic, with its long list of black clauses and an over-emphasis on market share such that "...the Regulation can be seen as no more significant than an extension of the de minimis Notice" (M Griffiths " A Glorification of de minimis – The Regulation on Vertical Agreements" (2000) 5 ECLR 241).

[55] Even more so should further accession take place.

[56] See generally S Deakin and J Michie, op cit., pp 351 to 354.

[57] S Deakin and J Michie, op cit., p 30.

[58] Mario Monti, "Competition in a Social Market economy", Speech at the Conference of the European Parliament and the European Commission on 'Reform of European Competition law' in Freiburg on 9/10 November 2000 (Competition Policy Newsletter, 2001 February, No.1, p 2) at p 6.

This must be viewed against Commissioner Monti's general comment that reform of the competition law framework provides "an excellent opportunity to re-visit and to re-examine what is basic to our understanding"[59], explaining that the "...concept of Social Market Economy stands for reliance on the market mechanism...[and] therefore calls for a maximum of free market, for reliance on competition wherever possible."[60] However, this does"...not stand for Laissez-faire-capitalism...but to create a strong framework that ensures first, that social standards and other objectives of society are respected. This is reflected for example in individual and collective workers' rights. The control of working conditions, the protection of persons with specific needs etc."[61] It would appear that consumer welfare is being redefined to encompass more than just welfare in the economic sense[62].

A further word of caution needs to be included here, for despite the growing shift towards using economic efficiency as the predominant criteria, in the new technology market, the EC stance is somewhat adrift from the current US position. Ahlborn and Evans[63] use the example of the complaint made against Intel (US undertaking) by a competitor (again, a US undertaking)[64]. There was no EC undertaking involved, no complaint was made to the US Department of Justice of Federal Trade Commission, but technically the European Commission had jurisdiction to rule on the complaint. The EC was chosen over the US (which is principally guided by consumer harm) because of its focus on free access to markets[65]; the Commission's policy "...has been characterised by a concern to prevent the development of market structures which have the capacity to exclude competitors, particularly small and medium-sized competitors, from markets within

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An environment with "increasing competitive pressure and a changing market place driven by globalisation, the speed of technological progress and the generally more dynamic nature of markets." (Mario Monti "European Competition Policy for the 21st Century", Speech at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/1 0/00, p 5).

[59] ibid, p 2.

[60] ibid, p 2.

[61] ibid, p 3.

[62] Although more recently the Commissioner appears to be limiting competition policy to once again protect consumer welfare in a more perfect economic sense ("The future for Competition Policy in the European Union" Speech/01/340, 9/7/01).

[63] C Ahlborn & D Evans "Does the European Commission Serve a free lunch? Protection of competition versus protection of competitors" (2001) In Competition, May, 1.

[64] Commission Memo/01/129, 6/4/01.

the EC."[66] If you are trying to enter the new economy, market access is key, but this does not allow for consideration of long term economic welfare. This direction and current interpretation of EC competition law is an issue for concern in light of the adoption of the market share test.[67]

3.1.2 Section 60

Lord Fraser of Carmyllie described this as the "Eldorado" Clause.[68] It is supposed to ensure consistency.[69] Everything hinges on "...the concept that Community jurisprudence is to be followed unless the court is driven to some different interpretation by some provision in that part of the Bill. In all other respects, Part I is not to be interpreted as an ordinary statue....One construes [the terms] from the outset on the basis of Clause 60."[70] The section can have far reaching effects since section 60(1) may include rulings given on references by other Member States[71], which assist in achieving consistency in the post devolution era (although this added benefit was not planned with this in mind).

The problems created by the lack of clarity in section 60 are well versed.[72] Some preferred to choose "maximum consistency" as opposed to "no inconsistency" as

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[65] ibid, p 2.
[66] S Deakin and J Michie, op cit., p 392.
[67] See 3.2.2, infra.
[68] Official Report, Report Stage 3, Competition Bill House of Lords, Column 513, 23 February 1998, Lords Hansard internet.
[69] "Consistency is only required where there are "conventional" competition rules in issue"(R Whish "UK Competition Law; Comments" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00).
[70] Lord Simon of Highbury, Official Report, Consideration of Commons Amendments, Competition Bill, House of Lords, Column 1383, 20 October 1998, Lords Hansard internet. Indeed, section 60 imports EC jurisprudence that will change with the application of the teleological interpretation.
[71] "are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community Law in relation to competition within the Community".
[72] For example, see A Robertson "UK and EC Competition Laws: Will They Operate in Complete Harmony" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) pp 96 to 99; A Robertson "Judicial Interpretation" (Speech delivered at "The New Competition Act" The Hatton, London, 2/12/99); summarising these problems as: what is a relevant difference, the uncertainty as to whether it applies to procedural rules as it relates "to competition", the problems with the interpretation of the concepts of competition law such as oligopoly, and the issues of remedies and damages; these points were also raised by S Goodman "The Competition Act, Section 60 – The Governing Principles Clause" (1999) 2 ECLR 73. Mr John Redwood posed the question as to whether a statement included a Commissioner "...making an off-the-cuff remark in a television interview" (Official Report, Standing Committee G, Competition Bill House of Commons, Part 8 p 2, 18 June 1998 (afternoon session), House of Commons internet). This was dismissed as "The clause does not refer to a statement by a Commissioner, but to a "statement of the

the obligation imposed by section 60.[73] Whilst in theory they should produce the same result, the positive overtones in "maximum" would have ensured that those applying the obligation worked harder to not find a relevant difference. One issue that remains is what is meant by "competition" in the phrase "in relation to competition". There is no accepted definition, as illustrated in Chapter 2, yet it is a point not subjected to academic or legal debate. It would not be surprising to see an argument under the Chapter I Prohibition[74] along the lines that the interpretation given by the Commission or ECJ has nothing to do with competition: this raises more than just single market issues and goes to the very heart of what the section is trying to achieve – a matter that raises considerable concern in light of Mario Monti's statements above.[75] This flaw in section 60 will become more apparent when the OFT has to apply article 81 in the era of devolved control[76], unless the OFT set out what their understanding of competition.

Secondly, section 60 as envisaged by the Government "extends not only to substantive law but also to the general procedural safeguards developed under EC law; for example, the right against self-incrimination."[77] The Government accepted

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Commission". The meaning of the clause is clear." (Dr. Stephen Ladyman, Official Report, Standing Committee G, Competition Bill House of Commons, Part 9 p 1, 18 June 1998 (afternoon session), House of Commons internet); "The Act itself does not explain what is meant by Commission statements. However the DGFT's view is that the statements must carry the authority of the Commission itself...It is understood that the DGFT also regards comfort letters which have been preceded by a notice in the Official Journal under Article 19(3) of Regulation 17/62 and the various Notices of the Commission as having the authority of the Commission." (R Whish "UK Competition Law; Comments" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 10); "We should not have relevant differences -- those that exist should be specified." (Mr Andrew Lansley, Report and Third Reading, Competition Bill, House of Commons, Column 1203, 8 July 1998, House of Commons); "The parenthesis in clause 60(1) which states that the purpose of the section is to ensure consistency but "(having regard to any relevant differences between the provisions concerned)" may mean relevant differences not only in the statutory language (that is, the exemptions) but in the underlying philosophy behind the provisions in question." (N Green "Some Observations on the Civil consequences of the Chapters I and II Prohibitions " in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 27).

[73] J Scholes and others "The U.K. Draft Competition Bill: Comments Based on Observations of the Comp Law Association""(1998) 1 ECLR 32, 44.

[74] "It will be possible to appeal against the director general's decision to the tribunal on the grounds that his decision was not in accordance with the requirements set out in clause 60." (Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 6 p 1, 18 June 1998 (morning session), House of Commons internet).

[75] Section 3.1.1, supra.

[76] See Chapter 5, infra.

[77] Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Column 960, 25 November 1997, Lords Hansard internet., in response to Conservative allegations that the clause contained expressions that were too vague and loose-limbed. See also column 962.

that it will not

> "...always [be] possible completely to separate substance from procedure...the very fact that Articles [81] and [82] now have an internal dynamic means they have to be understood in the context of the general principles which apply to them as part of Community law. These, which one might call high level principles, may impinge on the meaning of effect and effect of the prohibitions as a question of law. They range from the principle of legal certainty, which carries with it the proposition that contracts should not be lightly set aside, to the principle of fairness in administrative action. They can perhaps best be summarised as the necessary underpinning of the rule of law and, in this context, law means the whole system of Community law....For this reason, we did not feel that it was right to attempt to confine the effect of Clause 60 to issues relating purely to the meaning of Articles [81] and [82] in isolation."[78]

Bloom confirms the OFT will follow this: "The Director's rules cannot depart from the high level principles of Community law which are imported under section 60...There is no exhaustive list of high level principles of Community law. They include the principles of fairness, legal certainty and proportionality."[79] However Bloom later stated that "...in considering whether the Act gives effect to the high level principles, the rules of both the OFT and the CCAT need to be considered as a whole"[80], suggesting that the OFT may depart from the high level principles. However, there has still been no response to the final part of Lord Kingsland's query as to the extent that Clause 60 "extends beyond the substantive law to the

[78] Lord Simon of Highbury, Official Report, Third Reading, Competition Bill House of Lords, Column 1363, 5 March 1998, Lords Hansard internet.
[79] M Bloom "The OFT's Role in the New Regime" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 18. Whish summarised these as "quality, legal certainty, legitimate expectation, proportionality and privilege against self-incrimination (R Whish "UK Competition Law; Comments" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 7)
[80] M Bloom "The New UK Competition Act" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 10.

procedural and *remedial* law."[81] (emphasis added). The Government did not explicitly deal with the issue of all aspects of remedial law under section 60. Silence though, does enable a different route to be developed in terms of the types of remedies and sanctions that may be imposed in the future.[82] This may have benefits for the domestic regime in that it will prevent any argument that consistency under section 60 prevents such development.

A third point of concern under section 60 is that the OFT have found that the clause means"...the UK authorities...*must act* with a view to ensuring that there is no inconsistency with either the principles laid down by the E.C. Treaty and the European Court or any relevant decision of the European Court. A second, weaker obligation is to *have regard to* any relevant decision or statement of the European Commission."[83] Thus it will be the Court's narrower interpretation of Article 81(1) that will be followed, as opposed to the Commission's practice of finding that it applies to a greater number of agreements[84]. Accordingly, the prospects of developing a UK rule of reason based on the ECJ's interpretation (and academic analysis) in the interpretation of the first part of section 2 appear very good. However, this will do nothing to aid certainty in the application of the new domestic provision,[85] and consequently section 60 may be the weakest link in the successful application of the prohibition.

As to interpretation of Article 81 (and the remedies it provides, should the right to damages still not be readily accepted), recourse can be had to Article 234 EC.[86]

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[81] Official Report, Third Reading, Competition Bill House of Lords, Column 1362, 5 March 1998, Lords Hansard internet.
[82] See Chapter 4, infra.
[83] H Emden "A Blueprint for Reform: Response by the Office of Fair Trading" (1999) 6 ECLR 309, 310 and 311.
[84] "On the whole, the Commission has tended to interpret Article [81](1) more widely than the European court, so as thereby to catch a wider range of restrictions in Article [81](1)."(R Eccles "Transposing EEC Competition Law into UK Restrictive Trading Agreements Legislation: The Government Green Paper" (1988) ECLR 227, 238). See 3.2.1 infra.
[85] See 3.2.1 infra.
[86] Article 234 references should start to become quicker now that the ECJ has the ability to answer simpler rulings by means of a reasoned order, where the answer can be clearly obtained from existing case law (Article 104, ECJ Rules of Procedure OJ 2000 L122, 24/5/00); this is important as the number of references continues to rise: In 2000, the UK made 317 references (24 by the House of Lords, 16 by the Court of Appeal and 317 by the lower courts and tribunals, a steady increase on the previous years (although Germany made the most at 1,209) ("Time waits for no court" (2001) The Lawyer 9 April, 24, 29)). The court/tribunal may, as an alternative, request guidance from the Commission as to the Commission's view of points of law which have arisen in the domestic

Courts and tribunals have an ECJ meaning; "the body must be established by law, have a permanent jurisdiction, be bound by rules of adversary procedure and be required to give a ruling, in complete independence, in proceedings intended to result in a judicial decision."[87] The CCAT's rules explicitly provide for references to the ECJ (by the CCAT itself or by a party) for a preliminary ruling.[88] As for the DGFT and sectoral regulators, Middleton finds that they arguably meet the criteria set out by the ECJ as a body that is capable of making references, [89] and backs up this finding by the wording in section 60(4):

> "Moreover, since the Director General of Fair Trading and the sectoral regulators will be bound to ensure that the 1998 Act is harmoniously interpreted with the Community model, it would be anomalous if they did not have equal access to the European Court. Whether or not the Director would exercise his discretion is, however, a policy decision."[90]

Although questions on interpretation would be needed for the application of national law, the ECJ's ruling in Bernd Gilroy v Hauptzollamt Frankfurt am Main-Ost[91] and Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co KG and others[92] would support the ability of domestic bodies to make references where national law is based on EC law, thus ensuring the uniform application of EC law. Indeed, Whish finds that references to

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proceedings: where such guidance is sought, the Commission cannot be made to publish that guidance to third parties even though it may be of general interest, and it is a matter for the requesting court to determine whether—under its own rules of procedure—the guidance can be made public (Case T – 83/96 Van Der Wal v Commission [1998] 4 CMLR 954), although such a request will hamper the public understanding of the Chapter I Prohibition and is contrary to the principle of transparency. See 3.2.6, infra.

[87] C Boch EC Law in the UK (England, Longman, 2000) p 61.

[88] The Competition Commission Appeal Tribunal Rules 2000 (SI 2000 No. 261), section 31.

[89] K Middleton "Harmonisation with Community Law: the Euro Clause" in BJ Rodger and A MacCulloch The UK Competition Act: A New Era for UK Competition Law (Oxford, Hart, 2000) p 38; based on the cases of Almelo and Others (Case C-393/92, [1994] ECR I-1477) and Dorch Consult v Bundebaugesellschaft Berlin (Case C-54/96, [1997] ECR I- 4961).

[90] K Middleton "Harmonisation with Community Law: the Euro Clause" in BJ Rodger and A MacCulloch The UK Competition Act: A New Era for UK Competition Law (Oxford, Hart, 2000) p 38. This is despite Robertson finds that only the CCAT is "capable of utilising the Article 234 procedure." (A Robertson "Judicial Interpretation" Speech delivered at "The New Competition Act" The Hatton, London, 2/12/99) and the Government finding that the DGFT is not a body that falls within the scope of Article 234 (Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Column 975, 25 November 1997, Lords Hansard internet, despite stating the opposite earlier at Column 963).

[91] Case C-130/95, [1997] ECR I-4291.

the ECJ may be necessary as to the appropriate interpretation of earlier judgment, that is, what parts are single market motivated, although it is unclear how the ECJ will respond.[93]

As Lane finds, the advantage of transposing EC law by Section 60 makes easier what would otherwise be a formidable interpretative task, but the "...irony is that it voluntarily nails the direction of purely British law to the Community mast, to the independent development and evolution of law directed from Brussels and Luxembourg to Community ends, and this in a member state from certain quarters of which there is perennial grousing about overbearing European interference in national affairs."[94]

Despite attempting to adopt the best of the EC regime, relevant differences enable the domestic bodies to steer a different course, risking that the regime is devoid of certainty. More time spent considering what we wanted to adopt would have paid bigger dividends in the long run. Perhaps these unanswered points were the very issues that account for the inertia on the part of the reform process pre 1997. The potential problems caused by whether a decision was based on the definition of "competition" that we accept, the future domestic remedies, and the development of a rule of reason, all risk divergence from the EC regime, but of greater, pressing concern is the reduction of certainty in the system. Even if these points never materialise in practice, the application of the teleological interpretation as used in the system of no binding precedent might mean that the Chapter I Prohibition is no easier for the courts to apply (under the doctrine of stare decis), keeping the system akin to that found by Stevens and Yamey under the RTPA.[95] This places pressure on the OFT and CCAT to ensure that between them they get things right.

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[92] Case C-7/97, [1998] ECR I-7791, [1999] 4 CMLR 112.
[93] R Whish "UK Competition Law; Comments" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 6.
[94] R Lane, op cit., p 356.
[95] See 2.3 supra.

3.2 Can the Chapter I Prohibition, as designed, meet its objectives?

3.2.1 Prohibit

The Chapter I Prohibition, set out in section 2 of the Competition Act 1998, adopts verbatim the prohibition of anti-competitive agreements formulated in Article 81. Section 2(1) prohibits restrictive agreements that have the object or effect of preventing, restricting or distorting competition in the UK.[96] Section 2(4) renders such agreements void, although in light of Passmore v Morland plc this nullity is transient with the prohibition.[97] Severance of the void term follows the domestic practice under Article 81; calls to make this explicit in the Act, were rejected.[98]

The prohibition requires an agreement to 'affect trade' *and* 'restrict competition'. In practice it is very unlikely that an agreement which restricts competition in the United Kingdom does not also affect trade in the United Kingdom, thus in applying

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[96] See Appendix I for the detail of Section 2 The list is identical to that in Article 81 and like that Article, it is a non-exhaustive, illustrative, list that does not set a limit on the investigation and enforcement activities of the DGFT.

[97] Chadwick LJ in Passmore v Morlands plc (CA) [1999] 3 All ER 1005. Although for the purposes of the Competition Act 1998, a UK High Court decision relating to Article 81 is not binding "...under the terms of section 60 of the Act, it is likely that the OFT will give careful consideration to any U.K. jurisprudence on the scope of Articles 81 and 82 when reaching decisions under Chapters I and II." (S Preece "Glass and others v. Dowelhurst and Swingward: litigation and the scope of Article 81" (2000) 7 ECLR 330, 333).

[98] Prohibition makes such agreements are automatically void under Article 81(2), interpreted to mean the provisions of the agreement that actually affect competition are void (Case 56/65 Société La Technique Minière v Maschinebau Ulm GmbH [1966] ECR 234, [1966] CMLR 357.) and as such it may be possible to sever such offending provisions. "...the doctrine of severance in English common law provides that where you cannot sever the illegal part from the legal part of a covenant, the contract is altogether void, but where you can sever them, whether the illegality be created by statute of the common law, you may reject the bad part and retain the good. It seems sensible to recognise that in the Bill." (Baroness Nicol, Official Report, Committee Stage, Competition Bill House of Lords, Column 267, 13 November 1997, Lords Hansard internet). This amendment was unsuccessful; at a later stage Lord Simon of Highbury confirmed that "The relevant test of severance in English law is whether, after severing the void terms, that alters entirely the scope or intention of the agreement or removes the heart and soul of the agreement." (Official Report, Report Stage 1, Competition Bill House of Lords, Column 890, 9 February 1998, Lords Hansard internet.). To have allowed otherwise "...would risk divergence from EC law and therefore create more burdens on business." (Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Column 268, 13 November 1997, Lords Hansard internet.). The restrictive provisions are void, but the consequences for the agreement as a whole are determined by national law. Lane questions the sense in this, referring to remarks made by Advocate General van Gerven that this "entails serious risks for the uniform and effective application of community law." (R Lane, op cit., p 199 quoting the opinion is Case C-128/92 Banks v British Coal Corporation ECR I-1209).

the Chapter I prohibition the focus will be on the effect on competition.[99] The distinction in the treatment of horizontal and vertical agreements remains, as vertical agreements are excluded under section 50.[100]

The Chapter I Prohibition applies only if the agreement is, or is intended to be, implemented in the United Kingdom or any part of the United Kingdom where an agreement operates or is intended to operate.[101] As for agreements implemented by undertakings outside of the United Kingdom, guidance will come from the ECJ's judgment in Wood Pulp, although Rodger and MacCulloch find that the "line between implementation and effects is not particularly clear and the Court of First Instance's approach in the recent Gencor judgment [Case T-102/96, [1999] 4 CMLR 971] albeit under the Merger Regulation, suggest the potential for a wider interpretation of the concept of implementation."[102] However, the OFT have taken a different view in that "if EC law subsequently develops to include the effects

[99] The Chapter I Prohibition (OFT 401, March 1999) paragraph 2.16. Indeed the Government appeared unclear as to the use in retaining these words: defending the Bill against what it found to be "nit-picks" it stated that "There is a considerable overlap between the effects of trade and what affects competition, but that does not render the effect on trade test redundant...We risk diverging from the meaning of the European Commission prohibition is we do not include it" (Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 2 p 2, 2 June 1998 (morning session), House of Commons internet. It is submitted that Middleton's view is correct in that since the requirement that trade be affected represents the jurisdictional divide between Community law and national law, there is no necessity for a similar line to drawn in domestic law and as such "...it is unproductive to consider whether or not trade patterns are affected when assessing an agreement under domestic law" (K Middleton "Harmonisation with Community Law: the Euro Clause" in BJ Rodger and A MacCulloch The UK Competition Act: A New Era for UK Competition Law (Oxford, Hart, 2000) p 27).

[100] However, the new legislation is much clearer compared to the way that the RTPA treated vertical agreements.

[101] Section 2(7): The United Kingdom means Great Britain (England, Wales and Scotland and the subsidiary islands, excluding the Isle of Man and the Channel Islands) and Northern Ireland (The Chapter I Prohibition (OFT 401, March 1999) paragraph 2.15). It was confirmed that the Bill "was to follow the current jurisprudence of the European Court of Justice based on the term "implementation" as set out in the case known as Woodpulp" (Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Column 261, 13 November 1997, Lords Hansard internet, repeated at Official Report, Standing Committee G, Competition Bill House of Commons, Part 9 pp 2 to 4, 2 June 1998 (morning session), House of Commons internet) rather than adopt the "effects doctrine".

[102] BJ Rodger and A MacCulloch "The Chapter I Prohibition: Prohibiting Cartels, or Permitting Verticals? Or Both?" in BJ Rodger and A MacCulloch The UK Competition Act: A New Era for UK Competition Law (Oxford, Hart, 2000) p 176.

doctrine, section 60 will not apply in this respect."[103] In the light of this, whether it is realistic to stick with the implementation doctrine, seems doubtful.[104]

This section also ensures that agreements that restrict competition in just a part of the UK are caught. The OFT were keen to stress the applicability to of the Act to local markets, even going to the sublime lengths of publicly condemning a soap opera story line.[105]

A restrictive agreement will only be prohibited if it has an appreciable effect on competition[106]. The Conservatives sought to limit the scope of the Chapter I Prohibition by explicitly confining it to agreements having significant effect on competition, as the 1996 draft bill had set out.[107] This, it was said, would "help to ensure that unnecessary notifications [were] not made."[108] However, the de minimis principle is established in the case law[109] of the ECJ in respect of Article

[103] M Bloom "The New UK Competition Act" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 22.

[104] Arnull questions whether there is any real difference in practice (A Arnull, The European Union and its Court of Justice (Oxford, Oxford University Press, 1999) p 421) and recent practice would point to less concern about the strict differences between these rules in a commercial world that is shrinking (see 3.2.8, infra). Kiriazis, in his paper on jurisdiction, finds that the CFI's finding in Gencor means that the effects doctrine is now applicable under all the EC competition provisions (G Kiriazis, DG Comp-A-4 "Jurisdiction and cooperation issues in the investigation of international cartels" available on www.europa.eu.int/comm/competition (as at 20/7/01) pp 3 and 4).

[105] A "market sharing agreement between Rita Sullivan (newsagent) and Ravi Desai (grocer) in "coronation Street" was publicly condemned by the OFT ("Watchdog attacks Street deal" (1999) The Times 24 March, 11). Granada Television justified the agreement as "the Coronation Street residents can go to the Freshco Supermarket if they don't want to shop locally", demonstrating a sound understanding of the substitution test...

[106] See 3.2.2, infra.

[107] Lord Fraser of Carmyllie, Official Report, Committee Stage, Competition Bill House of Lords, Column 257, 13 November 1997, Lords Hansard internet.

[108] ibid. This was again an issue at the House of Lords Report Stage (Official Report, Report Stage 1, Competition Bill House of Lords, Columns 884 to 891, 9 February 1998, Lords Hansard internet.), where Lord Fraser backed up his argument by referring to the fact that Dutch competition law included an explicit reference declaring the prohibition inapplicable to agreements of minor significance (Column 885). The concern was to avoid a deluge of notifications of agreements that raised had no appreciable effect on competition. The Government stuck to their guns explaining that express provision was unnecessary by virtue of Clause 58. The amendment was again tabled at the Third Reading, (Official Report, Competition Bill House of Lords, Column 1319, 5 March 1998, Lords Hansard internet), and again, later withdrawn. Again, amendments to include an explicit reference to significantly and appreciable were unsuccessfully tabled at committee Stage (Mr Andrew Lansley, Official Report, Standing Committee G, Competition Bill House of Commons, Part 9 p 3, 21 May 1998 (morning session), and Parts 1 to 5 p 4, 2 June 1998 House of Commons internet.

[109] Bellamy and Child, Common Market Law of Competition (London, Sweet & Maxwell, 4th ed., 1993) paragraphs 2-105 and 2-13. Agreement not having an appreciable effect do not fall within

81[110]. It is followed by the DGFT by virtue of section 60 of the Competition Act 1998 when applying the Chapter I Prohibition.[111] Undertakings are allowed to continue such agreements, although they need to keep watch on their market share and consider their position should they exceed the de minimis thresholds in the future[112]. This de minimis principle applies to restricting competition by object or effect.

Any agreement that does not have an *appreciable effect* on competition in the UK should not be notified to the DGFT.[113] Generally this is a 25 per cent combined market share test, but the DGFT will, generally regard any agreement between undertakings which: directly or indirectly fixes prices or shares markets; or imposes minimum resale prices; or is one of a network of similar agreements which have a cumulative effect on the market in question, as being capable of having an appreciable effect even where the combined market share falls below the 25 per cent threshold. The market share threshold figure is a prima facie rule only, and an agreement that exceeds the 25 per cent threshold will not automatically be regarded

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Article 81(1); Case 56/65, Société La Technique Minière v Maschinebau Ulm GmbH [1966] ECR 234, [1966] CMLR 357.

[110] And is set out in a Notice, OJ 1997 C372/13, 09/12/97. An agreement, which falls within the terms of the Commission's Notice on Agreements of Minor Importance, is regarded as falling outside Article 81(1). The 1986 Notice, designed to encourage co-operation between small and medium-sized enterprises as a counterbalance to the market power of larger undertakings (a principle that remains intact) was based on the twin criteria of market share and turnover. The 1997 Notice is more generous in its approach, abolishing the turnover criterion and drawing a distinction between horizontal and vertical agreements. A new draft Notice had been published to revise the 1997 notice (OJ 2001 C149/5; Commission press release IP/01/709, 16/5/01) increasing the horizontal de minimis threshold from 5 to 10 per cent. Aggregate market share, and the vertical de minimis threshold from 10 to 15 per cent. A new de minimis of 5 per cent for agreements forming part of a parallel network, is to be introduced. The notice also lists hardcore restrictions that remove the benefit of the notice, and it is unlikely that individual exemption would be granted in such cases. The Commission repeats its exclusion for agreements between SME's (as defined in Recommendation 96/280 (OJ 1996 L107/4)) and its promise not to fine undertakings that assume in good faith that they are covered by the notice. However, these revised thresholds point to a system that is becoming more complex: the basis of assessment of the safe harbour threshold of vertical agreements remains out of synchronisation with that of market share for the purpose of de minimis, where it is the combined market share of the parties that is relevant; and the recent guidelines on horizontal restraints include a 15 percent combined market share in respect of commercialisation agreements (Commission Guidelines on the applicability of Article 81 to horizontal co-operation (OJ 2001 C3/02) section 5, paragraph 149). These matters should be specifically addressed in the final Notice.

[111] The Major Provisions (OFT 400, March 1999) paragraphs 3.4 to 3.7.

[112] See also the considerations in Passmore v. Morland plc [1999] 3 All E.R. 1005, infra.

[113] Indeed, the OFT are discouraging any notifications under the Chapter I Prohibition, with their mantra "do complain, don't notify" (see 3.2.6, infra).

as falling within the Chapter I Prohibition[114]. This should prove of benefit in the application of the prohibition, although not all agree this to be the case.[115] Confusion has been created by the Director of Cartels and Competition Act Policy, stating that "Innocuous agreements which have no effect on competition will not fall within the scope of the Chapter I Prohibition..."[116] Why use the word "innocuous", when the EC has consistently referred to appreciable or significant? Later, when referring to notification, the Director said that this should only be considered if the agreement "...affects competition to an *appreciable* extent."[117] The use of "innocuous" sends out a confusing signal, suggesting that appreciability is the trigger for notification.

The task of catching all significant agreements is assisted by the wide interpretation given to the words of the prohibition. "Undertaking"[118] and "decision"[119] should

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[114] There is no distinction drawn between horizontal and vertical agreements since the Competition Act 1998 generally excludes vertical agreements from the ambit of the Chapter I Prohibition Competition Act 1998 section 50; The Competition Act 1998 (Land and Vertical Agreements Exclusion Order) 2000 (SI 2000 No. 310).

[115] "...appreciability is an ambiguous concept and the more it is hedged by definitional elements which are themselves open to uncertainty, the wider its scope will become." (F Barr "The New Commission Notice on Agreements of Minor Importance: Is Appreciability a Useful Measure?" (1997) 4 ECLR 207, 212).

[116] H Emden "A Blueprint for Reform: Response by the Office of Fair Trading" (1999) 6 ECLR 309. Repeating the DGFT's message: "The new Act has been designed to enable businesses to know clearly what is or is not permitted and to remove the need for them to bring innocuous agreements to my attention" (J Bridgeman, Annual Report of the Director General of Fair Trading, 1998, p 17).

[117] H Emden "A Blueprint for Reform: Response by the Office of Fair Trading" (1999) 6 ECLR 309.

[118] This includes any natural or legal person capable of carrying on commercial or economic activities relating to goods or services, irrespective of its legal status and financing structure for example, companies, firms, businesses, partnerships, individuals, agricultural cooperatives, trade associations, state enterprises, and non-profit making organisations (The Major Provisions (OFT 400, March 1999) paragraph 1.9) and catches parent undertakings where the subsidiaries are not autonomous. In the case of public sector bodies "the key question is whether or not they are engaging in economic or commercial activities" (Public sector bodies and the Competition Act 1998 (OFT 440, April 2001) p 3, but even if they do, such agreements might fall within the general economic interest (p 12)). "Person" in the Bill includes any undertaking (Amendment by Lord Simon of Highbury, Official Report, Report Stage 3, Competition Bill House of Lords, Column 511, 23 February 1998, Lords Hansard internet., since "...there are undertakings that are not regarded by our legal system as persons. We therefore felt that we should make clear...that a "person" is to include any undertaking").The cases developing this are analysed by A Jones and B Sufrin op cit., pp 89 to 107. More recently the CFI held that Italian customs agents were undertakings engaged in an economic activity and that the CNSD, a public-law body governing Italian customs agents (and establishing the tariff agreement held to fall within Article 81) was an association of undertakings (Case T-513/93 Consiglio Nazionale degli Spedizioneri Doganali (CNSD) v Commission 30/3/200). However, it does not cover a collective agreement concluded by way of a collective bargaining between employer's representatives and employees concerned solely with working conditions (AG Opinion in Case C222/98 Van der Woude v Stichting Beatrixoord, www.europa.eu.int/jurisp as at 11/5/00).

not cause any new difficulties. However, with other definitions, the position is not so clear:

(i) Agreement

This has been defined widely[120]. It may be horizontal or vertical agreements[121] (or a mixture of both), may be made up of a series of arrangements.[122] It catches "terms and conditions even if imposed by one party on the other"[123] by what appears to be unilateral conduct (and ordinarily an issue for Article 82) if the instruction is acknowledged[124], adhered to[125] or accepted by virtue of becoming a member of a dealer network[126]. An element of following what another undertaking does may be sufficient to find an agreement.[127] Further, "the reasons which induced the making of an agreement need not be identical on all sides."[128] "Most recently the Commission found an agreement to exist in an export ban imposed by

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[119] Decisions are widely interpreted to catch trade associations, co-operatives "...or a body set up by statute and with public functions if they represent the trading interests of the members even if there are some members appointed by the government or another public authority" (A Jones and B Sufrin op cit., p 118) acting by "...resolutions of the association, recommendations, the operation of certification schemes or through the association's constitution itself." (ibid).There is no real change from the practical approach taken under the RTPA (see Chapter 2 supra).

[120] A Jones and B Sufrin op cit., pp 109 and 110.

[121] Cases 56 & 58 Etablissements Consten SA & Grundig-Verkaufs-GmbH v Commission [1966] ECR 299, [1966] CMLR 418.

[122] Polypropylene 86/398 [1986] OJ L230/1

[123] A Jones and B Sufrin op cit., p 114 referring to Case 32/78 BMW v Commission [1979] ECR 2435, [1980] CMLR 370.

[124] WEA-Filipacchi Music SA [1973] CMLR D43; referred to by DG Goyder op cit., p 95

[125] Case 107/82 AEG Telefunken v Commission [1983] ECR 3151, [1984] 3 CMLR 325; referred to by DG Goyder, op cit., p 96. This applies even in the case of so called "recommended guidelines" where even though they are susceptible to unilateral alteration by one of the parties, the other has indicated its intention to use reasonable efforts to ensure compliance (Anheuser-Busch Inc/Scottish & Newcastle [2000] OJ L49/37).

[126] Cases 25-26/84 Ford v Commission [1985] ECR 2725, [1985] 3 CMLR 528, referred to by DG Goyder, op cit., p 97. Playing a peripheral role is a matter for taking into account the level of fine, not for deciding whether there is an agreement; Furse examines this point in relation to the Polypropylene decision (supra) and the LdPE decision (89/191 (1989) OJ L74/21) (M Furse, op cit., p 1190). This is the correct approach as otherwise there would be deterrent effect of a prohibition and the consequences of invalidity would be lost.

[127] Cases IV/F-3/33.708 to 711 British sugar plc. Tate & Lyle plc, Napier Brown & co Ltd, and James Bidgett Sugars Ltd. (1999) OJ L76 (22/3/99)

[128] DG Goyder, op cit., p 93, referring to Bayer (Adelat) (Case T-41/96R [1996] ECR-II 381, [1996] 5 CMLR 417) "where it was clear that the primary reason for the terms of the distribution contract for pharmaceuticals from the supplier's viewpoint was to prevent parallel imports, whilst for their distributors it was to safeguard supplies." Despite the Bayer decision being overturned by the CFI, should the points raised by Goyder be proved, his arguments remain valid where there is evidence that both parties are aware of what they are doing. Lane finds that this case, where tacit consent so constituted the agreement, to significantly go beyond existing precedents and as such is an abuse of

a manufacturer by a system of preventative and monitoring measures and penalties given effect by circulars and word of mouth in Volkswagen".[129] There may be an agreement even though there is no enforcement machinery and some of the parties do not in practice adhere to its terms.[130]

However, this latitude has been curtailed by the CFI decision on appeal in Bayer[131]. The Court annulled the Commission's decision, that Bayer[132] had operated an export ban on Adalat products in that it had discouraged wholesalers from making parallel imports into the UK, because the court found that no agreement had been proved. The Commission had failed to show that the wholesalers had tacitly acquiesced in Bayer's policy, when there was no evidence that they knew or supposed what Bayer intended. The Commission has appealed to ECJ on the basis that the CFI imposed a higher standard of proof than previous cases.[133]

(ii) Concerted practices

The Commission has avoided defining the concept of concerted practice in an exhaustive fashion. The DGFT will follow EC jurisprudence but has loosely defined the elements needed to establish a concerted practice as "the existence of positive contacts between the parties; and the contact has the object or effect of changing the market behaviour of the undertakings in a way which may not be dictated by market forces"[134]

Generally the Commission does not decide whether the arrangement that they are

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Article 81, "significantly limiting contractual and commercial freedom" and correctly predicted that it would be found unacceptable (R Lane, op cit., pp 64 to 66).

[129] R Lane, op cit., p 63 referring to Decision 98/273, OJ 1998 L124/60. Volkswagen's appeal against the decision that there was an agreement, was dismissed, although the fine was reduced because the Commission had failed to prove that the agreement continued beyond 1996 (Case T-62/98 Volkswagen v Commission [2000] ECJ press release 50/00, 6/7/00). A further fine of Euro 30.96 million was imposed on Volkswagen in respect of an agreement breaching Article 81, where it sent circular letters to it's dealers urging then not to sell the new VW Passat at below recommended prices or offer discounts (IP/01/760, 30/5/01).

[130] LdPE [1990] 4 C.M.L.R. 345.

[131] Case T-41/96 Bayer AG v Commission [2000] 26/10/01; ECJ press release 78/00, 26/10/00.

[132] Bayer did not occupy a dominant position, removing Article 82 as an option for the Commission.

[133] Commission Memo/01/4, 10/1/1.

[134] The Chapter I Prohibition (OFT 401, March 1999) paragraph 2.12. Cases 40-48, 50, 54-56, 111, 113 & 114/73 Suiker Unie v Commission (Sugar Cartel) [1975] ECR 1663, [1976] 1 CMLR 295

faced with is an agreement or a concerted practice, which prompts Whish to comment that although they are "...conceptually distinct, there is little point in defining the exact point at which agreement ends and concerted practice begins"[135]. This is designed to prevent undertakings from finding a way to behave anti-competitively without reaching agreement. Whish finds a correlation between the formulation in Dyestuffs and Re Austin Motor Car and between Sugar Cartel and Basic Slag and Mileage Conference; and "To the extent that there is a difference between the [RTPA] and EEC law on this issue, the distinction lies not in the legal definition of arrangements and concerted practices but in the culture of enforcement, the EC Commission being prepared to proceed against alleged cartels where the domestic competition authorities might fear to tread"[136]. The change in emphasis to *effect* and new wording might not however prove to be the catalyst for increased domestic action under this provision, since the complex monopoly provisions remain.

The definition of concerted practices does raise issues in oligopolistic markets. Here the behaviour is a case of following the leader without any collusion. Where undertakings in an oligopolistic market behave as if they were colluding, even though they never actually communicate, they will both be better off (collectively) than if they took a different course of action. This is the outcome of the game theory or prisoners dilemma.[137] The EC has sought to solve this problem by recourse to Articles 81 and 82 and the ECMR.[138] This bundle of attempts at

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[1975], building on Cases 48/49/51-7/69 ICI and Others v Commission (Dyestuffs) [1972] ECR 619, [1972] CMLR 557

[135] R Whish, op cit., p 191, arguing that the important distinction is between collusive and non-collusive behaviour. The Commission in Cartonboard (94/601, (1994) OJ L74/21) at paragraph 128 found in unnecessary "...particularly in the case of a complex infringement of long duration, for the Commission to characterise it as exclusively an agreements or concerted practice. Indeed it may not even be feasible or realistic to make such a distinction." Against the tide of this opinion, Jones and Sufrin find that for a concerted practice to be established "...it is necessary to show both concertation *and* subsequent conduct on the market" whereas upon finding an agreement, that in itself is sufficient to show infringement, assuming all the criteria for Article 81 are met (op cit., p 113).

[136] R Whish, op cit., p 197. Black also finds that there was no difference between the RTPA use of arrangement and the EC use of concerted practice. (O Black "Communication and Obligation in Arrangements and Concerted Practices" (1992) 5 ECLR 200), but is highly critical of the lack of an accepted definition and other writers interpretations of the cases.

[137] J von Neumann and O Morgensten The Theory of Games and Economic Behaviour (Princetown University Press, 1944) quoted by A Jones & B Sufrin, op cit., p 632.

[138] Oligopolistic behaviour is not prohibited by Article 81, unless the market is not in actually oligopolistic in economic terms *or* the undertakings actually collude through some form of contact to replace their parallel behaviour (Cases C-89, 104, 114, 116-117, 125-129/85 Re Wood Pulp

controlling oligopolies is the EC's endeavour at a flexible approach, in response to the lack of a precise economic definition. As Alese contends, the "...root of the problem, arguable, is due to the fact that the participants in oligopolistic markets do engage in several forms of tacit monitoring that are necessary or almost customary to the success of their business"[139]. The problem of identifying what is meant by oligopolistic co-ordination is explored by Carffarra and Kühn who find that factors "...typically thought to facilitate co-ordination [are] high concentration levels; stable and symmetric market shares; similarity of cost structures; stagnant demand; inelastic demand; homogenous products; [and] low levels of technological change."[140] However they warn that these should not be reduced to a "box-ticking" exercise, for "even in economics the analysis of tacit collusion is ambiguous and

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Cartel: Ahlström Oy v Commission [1993] ECR 1-1307, [1993] CMLR 407. Unusually in Woodpulp the Court commissioned its own expert report on the market, which differed from the conclusions reached by the Commission's experts (M Furse, op cit., p 117). This would support the comments made by Professor Salop at the 2000 Fordham Conference, where he suggested that market definition as invoked by the Commission could be used to prove that result that the Commission desired (see 3.2.2 infra). The undertakings could possibly be collectively dominant under Article 82, in which case any abuse would be prohibited (Although there would have to be evidence of this joint dominance and abuse (Cases T-68, 77 and 78/89 Società Italiana Vetro SpA v Commission ("Flat Glass") [1992] ECR II-1403, [1992] 5 CMLR 302. Jones and Sufrin conclude that the applicability of article 82 to undertakings holding a collective dominant position seems to be settled (op cit., p 691). This is more so following Cases C-395 & 396/96, Compagnie Maritime Belge Transports SA (West African Liner Conference) 16/3/00, where the ECJ emphasised that the same facts may point to infringement of both provisions (that is, a weakening of Flat Glass). The ECJ found that "...the existence of a collective dominant position may...flow from the nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings which result from it. Nevertheless, the existence of an agreement or of other links in law is not indispensable to a finding of collective dominant position; such a finding may be based on other connecting factors..." In this case the agreements fell within the block exemption, hence the need to invoke Article 82). Collective dominance is also a consideration under the Merger Regulation, where concentrations create or strengthen a collective dominant position. In Gencor Ltd v Commission (Case T-102/96, [1999] 4 CMLR 971, the CFI found that the intention of the Merger Regulation was to preserve the competitive structure of markets in the EC, and consequently, the neutral wording of that Regulation did not preclude it from prohibiting concentrations that would have that effect. Whilst collective dominance under the ECMR places an emphasis on prospective analysis, with Article 82 placing a greater emphasis on retrospective analysis, Maher concludes that this should not be seen as a strict division following the Airtours/First Choice decision (Commission Decision IV/M.1524 [2000] OJ L93/1) where considerable time was spent examining the existing market conditions (under the ECMR) (I Maher, "Linking it all together: Collective Dominance in EC Competition Law" (2000) European Current Law August, xi, xiv)). However, Niels finds that the CFI's description of collective dominance in Gencor as requiring both oligopolistic interdependence and joint profit maximising, has been reduced to focusing on interdependence only (G Niels "Collective Dominance: more than Just Oligopolistic Interdependence" (2001) 5 ECLR 168, 169). Whilst his review is in respect of the Commission's approach to mergers, it illustrates the problems still caused by not getting to grips with oligopolies.

[139] F Alese "The Economic Theory of Non-Collusive Oligopoly and the Concept of Concerted Practice Under Article 81" (1999) 7 ECLR 379.

[140] C Caffarra and KU Kühn "Joint Dominance: The CFI Judgment in Gencor/Lonrho" (1999) 7 ECLR 355.

difficult to understand, and it will be some time before E.U. legal rules fully reflect the complexity of the underlying economics."[141]

The EC's trial and error approach lacks certainty for business and as Jones found (following the Woodpulp decision), the Treaty provides no obvious means as to how the Commission should regulate parallel behaviour[142] prompting the conclusion that the best approach would be "an investigative system which does not condemn, but which provides a means of correcting such malfunctions."[143] Concurring with this, the Government found the EC's arrangement to be lacking:

> "...the Fair Trading Act provisions enable wider market investigations than are possible under the prohibitions. Essentially they enable investigations where the competition issues arise fundamentally from the structure of the market rather than from restrictive agreements..."[144]

Consequently it was envisaged that in the UK, competition problems would first be examined against the prohibitions with the Government promising that "The prohibitions will be the primary tools for dealing with anti-competitive behaviour in the market place. The Fair Trading Act provisions will be reserve powers to deal with limited market circumstances."[145] The Government expected "...the Secretary of State to veto a monopoly reference in relation to matters that were the subject of current proceedings under the prohibitions; nor would [it] expect the director to wish to make such a reference."[146] This is the view repeated by the new DGFT with these powers being kept in reserve for when "[t]he structural remedies

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[141] ibid.
[142] A Jones "Woodpulp: Concerted Practice and/or Conscious Parallelism?" (1993) 6 ECLR 273.
[143] Ibid, p 278; preferring the view taken by Whish (R Whish, op cit., cit., Chapter 14).
[144] Lord Simon of Highbury Official Report, Committee Stage, Competition Bill House of Lords, Column 263, 13 November 1997, Lords Hansard internet.
[145] Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Column 264, 13 November 1997, Lords Hansard internet.
[146] Lord Simon of Highbury, Official Report, Report Stage 2, Competition Bill House of Lords, Column 351, 19 February 1998, Lords Hansard internet; Following the concern that it was "...a recipe for disaster [for the Chapter I Prohibition and the complex monopoly provisions to be] handled by different organisations. Therefore, our firm recommendation is that the former MMC responsibilities which, under the current draft, will become CC responsibilities, should be given to the OFT." (Lord Kingsland, Official Report, Second Reading Competition Bill House of Lords, Column 1186, 30 October 1997, Lords Hansard internet.).

available...may be the only effective means of preventing further abuse."[147]

Following Royal Assent, the Government confirmed that it had no plans to change the regime for the control of monopolies. It was happy to allow this system to continue with public interest considerations, which should be exercised by the Secretary of State.[148] The investigation powers under the FTA were strengthened by the Competition Act 1998.[149] This is acceptable provided that the OFT does not depart from the Government's intention that the complex monopoly provisions remain a "last resort" form of control. However, there is potential for the FTA status to be redefined: "It is not intended that the prohibitions and the retained complex monopoly provisions...should be used in parallel on the same matters....The complex monopoly provisions are retained for activities which are not caught by the prohibitions."[150] There could develop a practice of recourse to the complex monopoly provisions, without carrying out any investigation under the Chapter I Prohibition, to establish whether there is a concerted practice.[151] Reliance on the FTA has no doubt been inspired by the "rip off Britain" investigations into cars, supermarkets and banks, but it is worrying that the Chapter I Prohibition has not produced anything like the number of investigations and decisions predicted.[152]

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[147] Annual Report of the Director General of Fair Trading, 2000, page 23.5

[148] Mergers: The Response to the consultation on proposals for reform (DTI, October 2000 available on www.dti.gov.uk/CACP/cp/mergers/index.htm as at 26/11/00), executive summary.

[149] Section 66 to 68 Competition Act 1998 amending section 44 and 46 of the FTA. "The powers of investigation currently provided under the Fair Trading Act are widely agreed to be unsatisfactory....[the amendment puts] right a widely recognised weakness in the Fair Trading Act regime. They fit within the Government's overall determination to establish a modern and effective system of competition law. The amendments...tidy up various loose ends in the clauses." (Lord Haskel, Official Report, Committee Stage, Competition Bill House of Lords, Columns 966 and 967, 25 November 1997, Lords Hansard internet).

[150] M Bloom "The OFT's Role in the New Regime" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 20.

[151] Dr Derek Morris, Chairman of the CC, speaking at The Cardiff Management Lecture 2001 on "Competition, Regulation and Consumers" (14 March 2001, Cardiff Business School, Cardiff University), has indicated that he and the Government support the reform of the scale and complex monopoly provisions. Reform is being contemplated so as to make the scope for investigations broader. The example given by Dr Morris is the Cruickshank Report, where the Treasury initiated the inquiry. Such enquiries in the future could be left to the remit of the OFT/CC. The Government has announced its intention to consult on this point and introduce a new Competition Bill in the next Parliament (Productivity in the UK: Enterprise and the Productivity Challenge (HM Treasury/Department of Trade and Industry, June 2001), paragraphs 3.19 to 3.22) (see Chapter 4, infra).

[152] See Chapter 4, infra.

In oligopoly, typically, the "parallel behaviour is not attributable to an agreement or concerted practice in the sense of Article 81 EC or the Chapter I prohibition."[153] Whish is happy to see the complex monopoly provisions retained as "this type of investigation often gets to the truth more easily than through Article 81 and 82".[154] The present system also accords to Rodger's hope that we "...accept that there are certain industries with structural problems, abandon the search for blame but instead investigate and monitor behaviour prospectively"[155]. However, it needs to be explicitly set out in the guidelines at the very least so as to ensure certainty and prevent argument over which statue has jurisdiction. Buyer power provides an example of a situation where recourse was had to the FTA; Dobson, Waterson and Chu find that the "...treatment afforded to the development of retailing in this country has broadly been one of laisez faire"[156], but the "rip-off" Britain campaign required this to be reassessed[157]. Whilst Hay finds the "...complex monopoly" provisions...a much more appropriate vehicle for dealing with this situation...it might be better for the guidelines to acknowledge this from the outset."[158] Unfortunately, they don't. Consequently this "dual regime with the Competition Act 1998"[159] exhibits some objectionable features:

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[153] R Whish "UK Competition Law; Comments" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 23.

[154] ibid.

[155] BJ Rodger "Oligopolistic Market Failure; Collective Dominance versus Complex Monopoly" (1995) 1 ECLR 21, 29.

[156] The Welfare Consequences of the Exercise of Buyer Power (OFT 239; Research Paper 16 (Prepared for the Office of Fair Trading by Paul Dobson, Michael Waterson, and Alex Chu) September 1998) paragraph 1.2.

[157] "Even when there is no harm to the process of competition itself, buyer power may be used exploitatively" (M Bloom "Retailer Buyer Power", Speech at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/10/00, p 31. The inquiry into supermarkets, under the FTA (announced in July 1998; OFT press release PN 33/98, 30/7/98) failed to produce the results hoped for by Government and the media, although concerns over the buying power of the big five supermarkets were evidenced (DTI press release P/2000/674, 11/10/2000). The inquiry into new cars (announced on 17 March 1999) was more successful ("New Cars: A Report on the Supply of New Motor Cars within the UK" available on www.competition-commission.gov.uk/439.htm as at 31/7/00) with legislation introduced, effectively reducing the prices of new cars by up to 10 per cent (The Supply of New Cars Order 2000 (SI 2000 No. 2088; DTI press release P/2000/403, 12/6/00). However, the car manufacturers and dealers turned this legislation to their advantage, mounting a positive advertising campaign informing that they had cut the prices of their cars (even before the new law took effect), although a recent Commission study shows that the price differential is still to great (IP/01/1051; report on www.europa.eu.int/comm/offices.htm as at 25/7/01).

[158] D Hay "Is More Like Europe Better?: An Economic Evaluation of Recent Changes in UK Competition Policy" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 42.

[159] D Morris, "Competition, Regulation and Consumers" Speech delivered at the 2001 Cardiff Management Lecture, Cardiff Business School, 14 March 2001.

(1) whilst the domestic stance avoids the "...need to use a concept of collective dominance...since we will retain power to refer a complex monopoly situation to the...MMC"[160]. For as long at the Commission continues to try to deal with oligopolies partly on the basis of Article 81, 82 and the ECMR there will be an argument afforded to undertakings that the DGFT should have investigated under the Chapter I Prohibition in the first instance, in line with the Government's intention. This only adds to the confusion where there are oligopolistic findings under Article 81(1) and threatens future divergence should the Commission find that it can use Article 81 to adequately deal with oligopolies.

(2) Following an investigation by the DGFT, he may refer the matter to the CC[161]; the Secretary of State also has power to make a reference[162]. Alternatively the DGFT may accept undertakings instead of making a reference.[163] However, in determining whether there is a monopoly situation, section 84 of the FTA imposes non-exhaustive public interest criteria[164], which are vague and difficult to challenge.[165]

(3) Interim remedies (prior to the CC reporting) are not provided for under the FTA complex monopoly investigations, thus providing an incentive to find that the Chapter I Prohibition applies, where there is an urgent situation to remedy. [166]

(4) More worrying, is the use of the FTA where it is questionable whether the criteria for its application have been met. Brent refers to Sir Bryan Calsberg

[160] V Korah "The Competition Act: Some Foreseeable Problems" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 64.
[161] Section 50(1), FTA.
[162] Section 51, FTA.
[163] Section 56A, FTA.
[164] As Hay goes on to find, "...it seems odd to have competition as the basis for the Chapter I and Chapter II policy, and then have something different [that is, the public interest criterion] for structural policy." (D Hay "Is More Like Europe Better?: An Economic Evaluation of Recent Changes in UK Competition Policy" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 56.).
[165] See judicial review, 3.2.6 infra.

who found that "...of the 38 cases investigated between 1970 and 1992 involving some kind of oligopoly, 42 per cent involved markets where the combined share of the top four firms was less than 25 per cent."[167]

(5) Remedial legislation will be introduced under the FTA if undertakings are not adhered to[168], but the business failing to comply with the undertaking commits no criminal offence[169], nor does it give a right to civil proceedings.[170] This restriction on the ability of third parties to claim damages, is a very good reason why recourse must be had to the Chapter I Prohibition in the first instance.

(6) More drastic powers, allowing structural changes to the industry in question, providing for the transfer of assets or other forms of divestiture are given by Part II of Schedule 8, posing an incentive for recourse to the FTA over the Chapter I Prohibition.[171]

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[166] Neither are there any interim relief powers during monopoly references; the MMC commented on this gap in the law in Southdown Motor Services Ltd, Cmnd 2248 (1993).
[167] R Brent "The Certain Pursuit of Oligopoly; A Reply" (1996) 3 ECLR 163.
[168] Section 88, FTA.
[169] Section 93, FTA.
[170] Section 90 of the 1973 Act is silent on the question whether a person harmed by breach of the order has an action for statutory duty, although where the Secretary of State has accepted undertakings, section 93A states that any person may bring civil proceedings in respect of the failure or apprehended failure of the responsible person to fulfil the undertaking. However, Mid Kent Holdings plc v General Utilities plc ([1996] 3 All ER 132) held that since there was no action for breach of statutory duty under section 90, the same principle applied to breach of an undertaking given under section 93A of the FTA. Knox J found that since Parliament had intended undertakings to be enforceable only by the Secretary of State, no right of action arose for a third party, despite wording in the Act that suggested otherwise (see 3.2.4, infra).
[171] The EC can order the infringing agreement to come to an end (Regulation 17/62, Article 3) and impose fines (Article 15; for substantive (15(2)) and procedural (15(1)) infringements). Despite the wide interpretation given to what it can do when ordering the infringement to be brought to an end, Jones and Sufrin conclude that this does not allow solutions to be suggested to solve other market problems nor the making of "...more dramatic orders such as 'divestiture' to alter and to improve the competitive structure of the market..." (A Jones and B Sufrin, op cit., p 694, noting the Commissions desire to be able to impose remedies of a structural nature). The Commission has the power under Article 12 of Regulation 17/62 to investigate a market that it considers to be malfunctioning, but cannot apply any remedies beyond the utilisation of Articles 81 and 82 (if applicable). Consequently there have only been two investigations under this provision: margarine and brewing (A Jones and B Sufrin, op cit., p 695, who find that "Although there may be understandable concern about giving the Commission such large elements of discretion in respect of oligopolistic markets it is doubtful whether it is more worrying than the prospect of the Article [82] prohibition applied wholesale to the complex behaviour of oligopolies" (R Whish and B Sufrin "Oligopolistic Markets and EC Competition Law" (1992) YEL 59,83 quoted by A Jones and B Sufrin, op cit., p 696). Indeed Furse comments on the Commission's examination of markets without recourse to Article 12 (op cit., p 59), demonstrating that this is a concern that must be

The reporting side of the CC continues to deal with complex monopoly investigations. Consequently, until explicit provision is included to formalise the relationship between the Chapter I Prohibition and the FTA, application of the domestic law has the potential to be ad hoc and cause uncertainty and unnecessary complication.

(iii) Object or effect – or a rule of reason?

Section 2(1) enables agreements to be viewed as to whether they restrict competition significantly. If they don't, they fall outside the prohibition, with the advantage that they cannot be held void for non-notification.[172] Agreements, decisions and concerted practices are examined for their object or effect[173] as to whether they prevent, restrict or distort competition. If object is satisfied (such as a price fixing agreement), no examination of effect of the provisions is required; the only analysis undertaken is to establish whether the agreement is insignificant in terms of market share[174].

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addressed for to allow this to continue without regard to regulatory control will only increase uncertainty in a devolved competition regime (see Chapter 5, infra)).

[172] If within section 2(1) you can only get exemption if you notify (in theory).

[173] A disjunctive test; Case 56/65 Société La Technique Minière v Maschinebau Ulm GmbH [1966] ECR 234, [1966] CMLR 357, although there is the view that the difference between object and effect is nothing more that the difference between the potential effects (that is, object looks at the terms of the agreement) and actual effects of the agreement (KPE Lasok "Assessing the Economic Consequences of Restrictive Agreements: A Comment on the Delimitis Case" (1991) 5 ECLR 194, 197). Despite accepted texts finding that object is not satisfied by a finding of subjective intent, with PLC advising that "object does not mean the intention of the parties, but the objective meaning and purpose of the agreement considered in its economic context." ("The Competition Act 1998: The new EC style regime" (1998) PLC December, 23, 27), Odubu argues that case law can be interpreted to indicate the acceptance of subjective intent as another situation where an examination of effect is not necessary (O Odubu "Interpreting Article 81(1); Object as Substantive Intention" (2001) 26(1) EL Rev 60, 65 to 74). This is a further departure for the UK where intention has not been an issue for examination, but a danger of reliance on the subjective intent is that it might point to an intention not to actually abide by a restriction. For example, in the case of a cartel, it is hoped by participants that the others will stick to the agreement, whilst they themselves cheat and cut prices. What is important for competition policy is that there is an agreement which can be *demonstrated* as to restrict competition, and the if this means that subjective intent can show this, it should not be discounted.

[174] Although some writers find that de minimis requires and examination of the actual or potential effect of the agreement to see whether competition is affected, support for the argument that this is not so required, is found in Odubu's assertion that de minimis does not require effect to be shown (O Odubu "Interpreting Article 81(1); Object as Substantive Intention" (2001) 26(1) EL Rev 60, 61).

Jones and Sufrin find the question of what is meant by a restriction of competition "...is one of the most difficult problems of EC competition law. Anyone who could define exactly what amounts to a restriction of competition would have achieved the competition law equivalent of finding the Holy Grail."[175] However, it is submitted that although the search for a definition would be fruitless, it is also rather unnecessary and indeed dangerous. Defining what was meant by a restriction proved costly to the application of the RTPA, and as for defining the prevention, restriction or distortion of competition, Lane finds that although these three taken together do have a "...very wide ambit,...[g]iven the ingenuity with which undertakings will seek to play the market to their best advantage, it is prudent that this is so."[176] What is or is not a restriction of competition can only properly be established in light of the market analysis[177]. Cynically, one could say that this is the reason why lawyers are so keen for a definition of restriction, distortion or prevention of competition. However, the lawyer is helped in that agreements can be categorised and types of provision that ordinarily are restrictive begin to emerge[178] illustrating that form and effect will never be divorced. The non-exhaustive illustrative list in section 2(2) is the lesser of two evils.

However, the wide interpretation given to "prevention, restriction or distortion" of competition has, according to Jones and Sufrin,[179] meant that many agreements fall within the prohibition even where on economic terms they might tend toward a beneficial effect. This raises conceptual difficulties for Bishop and Walker[180] in

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[175] op cit., p 149.
[176] R Lane, op cit., p 79.
[177] A point that Jones and Sufrin note on pp 153 and 156; this is supported by Goyder's view that the "...meaning becomes clearer if one considers the normal mental process of any businessman seeking to enter a specific geographic and product market." (op cit., p 118). Arnull notes that following its encouragement of the Commission in developing competition control, "the [ECJ] began to feel the need to dampen the Commission's enthusiasm...requiring the Commission to provide more detailed economic evidence." (A Arnull, op cit., p 397). Whether this is strictly true given some of the latitude in the Commission's findings in the 1990's and Hartley's observations that the Court decisions making is to quite a large extent based on policies for the promotion of integration (TC Hartley, The Foundations of European Community Law (Oxford, Oxford University Press, 1998, 4th ed.) p 78); it does support the necessity of viewing the "restriction" in light of the market in question.
[178] For example restrictions that result in the imposition of minimum prices.
[179] A Jones and B Sufrin, op cit., pp 138 to 146. "Legally nothing turns on which of these three expressions applies to a particular agreement." (R Whish, op cit., p 205); affirmed by R Lane op cit., p 79.
[180] S Bishop and M Walker The Economics of EC Competition Law: Concepts, Application and Measurement (United Kingdom, Sweet & Maxwell, 1999) quoted by A Jones and B Sufrin, op cit., p 139.

that an agreement may be found to restrict competition but then gain an exemption because of its pro-competitive effects.[181] On the EC front, this "inherent tension"[182] has led to calls for the consideration of a rule of reason interpretation to be used when applying Article 81(1)[183]; with Article 81(3)[184] being used for exempting agreements which although anti-competitive provide wider benefits from an "...economic, social, industrial, environmental, employment and/or regional perspective."[185] The DGFT has attempted to overcome this tension in relation to the Chapter I Prohibition by stating that "Economic efficiencies should be the prime objective of any *competition* law- not the vague promotion of public interest...".[186]

Goyder's view is that to "...discuss the alleged 'rule of reason' in the context of [81](1), especially in the context of the scope of 'prevention, restriction or distortion of competition' leads to confusion rather than clarity"[187] finding that the words provide a jurisdictional test[188] for the Commission as opposed to an assessment test (which is the purpose of Article 81(3)[189]). Deakin and Michie

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[181] This causes concern because having an agreement not within the Chapter I Prohibition is the preferred result for the undertakings concerned, since there is no possibility of a time limit nor conditions being imposed on the operation of the agreement, like there is under section 4.
[182] R Lane, op cit., p 79.
[183] Whish traces the judgements that have "encouraged the view that the ECJ may be moving to wards the adoption of a rule-of-reason analysis under Article [81](1)" but finds on closer analysis the court is not adopting this test, and like Goyder, the labelling of a rule of reason under Article 81(1) "confuses more than it clarifies" (op cit., pp 208 and 209).
[184] The criteria of which would be used in applying a rule of reason test to assess the economics effects in terms of competition only.
[185] A Jones and B Sufrin, op cit., p 144; continued at p 191, drawing on the issues arising under reform of Regulation 17/62. See Chapter 5, infra.
[186] John Bridgeman "A New Era in UK Competition Policy", a speech to the Reception to mark the launch of the Competition Act 1998, 2 March 2000.
[187] DG Goyder, op cit., p 117. This confusion is evidenced in practitioner texts which explain the new approach in the block exemptions as "...applying a "rule of reason" approach" (F Carlin "Spotlight on horizontal restraints" (2000) V(3) Global Counsel 30 March, 13. As for the safe harbour for vertical agreements, this is described as taking agreements "outside Article 81(1)" (J Nazerali and D Cowan "Unlocking EU vertical agreement rules: Has the European Commission found the right keys?" (2000) PLC May 31, 36), whereas in fact it is only de minimis agreements that are outside article 81(1); agreements above the de minimis, but below the 30 per cent threshold are within 81(1), but exempted by 81(3). This is the effect of Articles 1 and 2 of the block exemption, but its misinterpretation supports a rule of reason style approach.
[188] It is best viewed as the second jurisdiction test for the application of the EC rule on anti-competitive agreements: The first test to satisfy is jurisdiction in geographical terms that is, affect on trade between Member States; if this is met, then the next test is whether the agreement significantly restricts competition. This raises no issue of whether it should be allowed.
[189] "The object of Article [81] is to eliminate or reduce the number of [agreements effecting the businessman's ability to compete], and to try to distinguish between agreements without sufficient redeeming virtues and those whose effect on competition, or whose purpose of reducing

support Goyder's view and find "The [European] Court has held that certain features of vertical contracts may fall outside Article [81](1) altogether, but it seems that these do not form the basis for a US-style rule of reason which would be administered by the courts."[190] Despite others interpreting the case law so as to point to the ECJ applying a rule of reason principle from LS Nungesser KG and Kurt Eisele v Commission of the European Communities[191] onwards, this has not developed substantially or been fully accepted as a separate test under EC law.[192]

No doubt the increased calls for a rule of reason test were fuelled, firstly, by the expectations that the appointment of Mario Monti would "...introduce a different approach to European competition law which will concentrate on economic assessment of competition policy"[193], and secondly, by the Commission already applying such a wide interpretation[194] of Article 81(3) allowing it to grant

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competition, is nevertheless accompanied by substantial advantages of the kind set out in Article [81](3)." (DG Goyder, op cit., p 118); and one of the ways the number of agreements falling within Article 81 has been restricted is by the characterisation of restrictions as ancillary, where without such a provision the transaction would never have taken place (p 124).

[190] S Deakin and J Michie, op cit., p 353.

[191] Case 258/78 [1981] E.C.R. 45; [1983] 2 C.M.L.R. 278. See further Encyclopedia of Competition Law, (London, Sweet & Maxwell, 2001) paragraph 1-169. For those supporting the adoption of a rule of reason test, it should be noted that the division between per se and rule of reason is not without its complications. The US per se/rule of reason approach hasn't necessarily made it any easier for a realistic assessment of agreements, with US antitrust attempting to justify a middle ground for assessing the benefits of restrictive agreements that are not of the per se category, without invoking an open-ended rule of reason enquiry. Whilst such an inquiry permits "sensitivity to the particular circumstances of the case" it lacks the goal "...of predictability in the application of law."(NR Ellis and BT Valad "Uncertainly in Joint Venture Analysis" (2000) In Competition February, 1, 3). Maximum price fixing in vertical agreements (that is, maximum RPM) was illegal per se until 1997 when the Supreme Court found in State Oil v Khan (522 U.S. 3 (1997)) that it fell within the rule of reason. Calvani provides some thoughts on the developments on the rule of reason in the US in light of the California Dental Association v FTC ([1999] 119 S.Ct. 1604), finding it is not necessarily any easier to evaluate restrictions in the US, quoting Judge Souter who found that "[t]he truth is that our categories of analysis of anti-competitive effects are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear" (T Calvani "Some Thoughts on the Rule of Reason" (2001) 6 ECLR 201, 206).

[192] R Whish, op cit., pp 208 to 211. For an alternative view see Bellamy, who finds that "...little by little, without ever really admitting it, it can perhaps be said that Community law is itself now developing its own rule of reason, with the general effect that certain restraints in certain agreements are not to be regarded as restrictions of competition within the meaning of Article [81](1)." (C Bellamy "The Europeanisation of United Kingdom Competition Law" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 4).

[193] "Van Miert goes out on a high note but leaves a full programme for Monti" (1999) FT 28 July, p 2.

[194] As identified by Whish: R Whish Exemption criteria under Article 85(3) EC: a study of the case-law of the European court of Justice, the Court of First Instance and the decisional practice of the European Commission (1997), pp 4 and 5. This is supported by Doherty's review of exemptions (B Doherty "Community Exemptions in National Law" (1994) 6 ECLR 315), where he refers to Sutherland's finding that "competition must not be determined in isolation; it must also be related to and integrated with economic, industrial and also social policy" (Sutherland, (1985) ECLR 283,

exemptions where there is benefit to the environment[195], benefit to health[196], social benefits, including safeguarding jobs, co-ordinating plant closures and job creation[197], and network benefits in respect of telecommunications and of transport[198]. Jones and Sufrin rely on the teleological interpretation applied by the European Courts and suggest that it is "...entirely conceivable that the four criteria set out in Article 81(3) might be interpreted broadly against the backdrop of wider Community aims and objectives..."[199] Support for this can be seen in the exemption grated to the agreement between the majority of European producers and importers of washing machines to cease manufacturing/importing the least efficient machines, which benefits both consumers and the environment.[200] Although, measures to save energy might fall outside of Article 81 altogether, as in the case of an agreement amongst European Manufacturers of low voltage electric motors to reduce their sales of low energy efficiency motors. The agreement, drawn up in consultation with DG Comp, and leaving much discretion to the parties as to how to meet the objectives, was found not to restrict competition within the meaning of Article 81(1)[201].

Mario Monti has said that the aim of recent reforms is to "clarify" rather than "rewrite",[202] with horizontal agreements still being "...analysed in their economic context to establish whether they produce negative effects on the market. This is nothing new"[203]. The Commission's most recent view from its guidelines on horizontal agreements would indicate that agreements concerning selling,

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248; quoted at p 318), with the list completed by objectives stemming from "agricultural policy, research policy, transport policy, environmental policy, consumer protection policy etc." (Verstrynge (1984) Fordham Corporate Law Institutes 678; quoted at p 318).

[195] ibid, pp 28 to 36.

[196] ibid, pp 36 to 39.

[197] ibid, pp 40 to 44.

[198] ibid, pp 44 to 49.

[199] op cit., p 192.

[200] Mario Monti said "...that environmental concerns are in no way contradictory with competition policy. This decision clearly illustrates this principle, enshrined in the Treaty, provided that restrictions of competition are proportionate and necessary to achieving the environmental objectives aimed at, to the benefit of current and future generations." (Commission press release IP/00/148, 11/2/00 in respect of the agreement notified by CECED (European Council of Manufacturers of Domestic Appliances)).

[201] Commission press release IP/00/508, 23/5/00.

[202] Mario Monti, "Competition in a Social Market economy", Speech at the Conference of the European Parliament and the European Commission on 'Reform of European Competition law' in Freiburg on 9/10 November 2000 (Competition Policy Newsletter, 2001 February, No.1, p 2) at p 5.

[203] ibid, p 6.

standardisation and environmental issues, may fall to be assessed under either Article 81(1) or 81(3)[204], thus there is no clear answer to achieve Jones and Sufrin's desire. Indeed the development of Article 81(3) into such an EC "public interest test" would be another concern for the Chicago School, but on a more practical level, would take the Chapter I Prohibition back to the RPC era. Whatever happens, the unquestionable requirement for Article 81(3) is that it provides for transparency and encourages, to quote Mario Monti, "the optimal allocation of resources...in granting appropriate incentives to pursue productive efficiency, quality and innovation."[205] Without this, the ability for the Chapter I Prohibition to survive is clearly hampered.

At a time of heightened pressure for greater cooperation on the global scale, it would appear that there is a move to draw out any similarities between the EC and US style, as a means of evidencing that we are so close already. Schaub described the hardcore list in the block exemption for vertical restraints as "...resembling what would be called per-se rules in the US"[206] before illustrating convergence by the fact that both US and EC rules "...apply a kind of rule of reason where positive and negative effects are weighed against each other as required under Article 81".[207] We must overcome this passion (obsession?) for identifying the similarities with the US approach. This is a dangerous pastime that can lead to no good, as Gerber argues:

> "Competition law in Europe is not, contrary to popular myth, an import from the United States or the mere extension of administrative controls to a new area, and the current proposals [for reform] do not represent the adoption of a U.S. model of competition law. To assume otherwise

[204] Guidelines on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements (OJ 2001 C3/2), sections 5, 6 and 7.
[205] Mario Monti "European Competition Policy for the 21st Century", Speech at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/10/00, p 2
[206] A Schaub, "Vertical Restraints; Key points and Issues Under the New EC Block Exemption Regulation" Speech at Fordham, p 14.
[207] ibid, p 28.

misreads (or disregards) the history of European competition law and risks not only misinterpreting European decisions, but distorting them as well."[208]

Nevertheless, the rule of reason analogy has even been applied where US analogy is not the primary focus. For example, Dobson, Waterson and Chu find that the UK's treatment of buyer power "...is based on a rule of reason approach"[209] which they find is "...fundamentally sounder as a basis on which to develop policy, allowing a competition authority to weigh up the efficiency benefits against anti-competitive effects for a particular case..."[210]

It is submitted that attempts at making these comparisons will only confuse the application of both Article 81 and the Chapter I Prohibition. From a purely selfish domestic point of view, this cannot be tolerated as it will result in a confused and uncertain regime no easier or cheaper to apply that the one we rejected. Undertakings already face an uphill struggle in determining between Article 81(1) and Article 81(3) because of confused reporting of cases in standard texts. For example, the recent decision on the joint venture between General Electric Aircraft Engines (GEAE) and Pratt & Whitney (P&W)[211] is correctly reported in "EU Focus"[212] as receiving exemption under Article 81(3)[213], subject to conditions, for a period of 15 years. However in "European Current Law", it is reported that the Article 81(1) did not apply to the agreements notified, although it goes on to state that conditions and obligations were imposed.[214] Similarly, Sweet & Maxwell's

[208] DJ Gerber "Modernising European Competition Law: A Developmental Perspective" (2001) 4 ECLR 122, 129.
[209] The Welfare Consequences of the Exercise of Buyer Power (OFT 239; Research Paper 16 (Prepared for the Office of Fair Trading by Paul Dobson, Michael Waterson, and Alex Chu) September 1998) paragraph 1.5. Bloom referred to the problem that buyer powers posed for the OFT in that there is no precise competition law on this problem, thus requiring us to look at Articles 81, 82 and the ECMR to see what they have to offer (M Bloom "Retailer Buyer Power", Speech at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/10/00, opening comments to her speech). This supports the fear that the rule of reason will be developed under the domestic regime to cover various concerns that may or may not fall outside of the Chapter I Prohibition.
[210] The Welfare Consequences of the Exercise of Buyer Power (OFT 239; Research Paper 16 (Prepared for the Office of Fair Trading by Paul Dobson, Michael Waterson, and Alex Chu) September 1998) paragraph 7.9.
[211] GEAE/P&W (Decision 2000/182) (2000) OJ L58/16.
[212] "Commission approves joint venture for new aircraft engine" (2000) 50 EU Focus 16 March, 6.
[213] This joint venture was notified prior to the amendments to the Merger Regulation (by Regulation 1310/97) introducing the full function joint venture concept, and thus fell to be examined by Article 81.
[214] (2000) European Current Law May, 13.

Alerter Service reported the BIB ("Open") joint venture as receiving an "exemption under Article 81(3)"[215], but only after previously reporting that the Commission had declared "Article 81 inapplicable"[216]. The Commission had in fact granted a seven year exemption.[217] Whilst this may be an oversight on the part of those reporting, it is bound to cause confusion; although admittedly sometimes the confusion is caused by the Commission's decisions themselves.[218]

OFT guidance is silent on the role of the rule of reason and Europe is sending out conflicting messages. Despite my submission that the UK must move away from this US comparison to achieve the requisite certainty and clarity, it is accepted that, in an era devolution of Commission control, the limits to national authority resources will mean that it is very likely that a rule of reason will be implied.[219]

(iv) Exclusions

Various exclusions were suggested at Committee stage to rein in the impact of the Chapter I Prohibition by excluding its application to particular agreements (that is, those sharing licensed technology protected by patent; offering discounts to larger purchasers; offer promotional discounts; recommending selling prices which are not mandatory; representing partnerships to take on projects which are too large for individual companies[220]; or encouraging development of new markets and technologies through joint action). These efforts failed.[221] An amendment was suggested so as to explicitly remove the application of the Chapter I Prohibition to undertakings with revenues below £10 million per annum, that is, small businesses,

[215] EU Alerter 17/9/99.
[216] EU Alerter 16/9/99.
[217] Commission press release IP/99/686, 16/9/99.
[218] The Reuter/BASF decision in respect of non-competition clauses is an example of this, with Professor Whish finding the decision found that the clause did not infringe Article 81(1) at all, but Julian Maitland-Walker finding that the clause was caught, but viewed in the context of Article 81(3) (see "Letters" (1982) ECLR 275).
[219] However, at the EC level, the ECJ has recently criticised the sure of the rule of reason, and reaffirmed the distinction between Article 81(1) and /93) (Case T-112/99, Métropole Télévision (M6) v EC Commission, Available on www.curia.eu.int as at 18/9/01. For the domestic experience under the Competition Act 1998, see Chapter 5, infra.
[220] Mr John Redwood and Mr Oliver Letwin argued that it might be that the PFI constituted a set of anti-competitive practices, which the Bill could have an adverse effect upon, and thus required safeguarding (Official Report, Standing Committee G, Competition Bill House of Commons, Part 2 pp 3 and 4, 21 May 1998 (morning session), House of Commons internet).

because although there was already immunity from fine, small businesses were still left open to having their agreement declared void and/or third party actions.[222] This was rejected because it "...is the effects on competition that count, not the size of the perpetrators...[and] other small business, as well as consumers...are likely victims of such agreements...As small businesses, they deserve the protection provided by the Bill."[223] It was suggested that this amendment would "greatly reduce those prospective compliance costs."[224] An attempt to make specific exclusion from the Chapter I Prohibition in the Competition Bill for trade associations[225] was unsuccessful. However, Lord Haskel conceded that "There may well be a case for a block exemption relating to, for example, co-operatives."[226] when discussing the ability of the DGFT to grant an exemption where there are countervailing benefits. A further attempt to exclude agreements constituting trade associations was made by introducing an amendment at Committee Stage.[227] This was resisted by the Government, with Mr Nigel Griffiths pointing to the 183 trade association recommendations that had been caught by the RTPA.[228]

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[221] Official Report, Standing Committee G, Competition Bill House of Commons, Parts 1 to 9, 21 May 1998 (morning session), House of Commons internet.

[222] Mr Tim Boswell, Official Report, Standing Committee G, Competition Bill House of Commons, Part 1, pp 1 and 2, 2 June 1998 (afternoon session), House of Commons internet.

[223] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 4 p 1, 2 June 1998 (afternoon session), House of Commons internet.

[224] Mr John Redwood, Official Report, Standing Committee G, Competition Bill House of Commons, Part 1 p 2, 21 May 1998 (morning session), House of Commons internet.

[225] Lord McNally, Official Report, Third Reading, Competition Bill House of Lords, Column 1328, 5 March 1998, Lords Hansard internet; this is surprising given the fact that the main purpose of the RTPA in 1956 had been to bring an end to the problems beings caused by associations that the government had previously encouraged. Perhaps the noble Lord thought that there might be a case in the prevailing economic climate for a similar kind of promotion of associations, but this was not argued by anyone at the time.

[226] Official Report, Third Reading, Competition Bill House of Lords, Column 1329, 5 March 1998, Lords Hansard internet.

[227] Official Report, Standing Committee G, Competition Bill House of Commons, Part 8 p 2, 2 June 1998 (afternoon session) to Part 6 p 3, 4 June 1998 (morning session), House of Commons internet.

[228] Official Report, Standing Committee G, Competition Bill House of Commons, Part 4 p 3, 4 June 1998 (morning session), House of Commons internet, in response to Mr Tim Boswell's statement that he was aware of at least one (Part 1, p 4); the reference to 183 was later qualified by Mr Ian McCartney who said that of that number "more than 70 per cent...had been found not significant in competition terms." (Official Report, Standing Committee G, Competition Bill House of Commons, Part 9 p 2, 9 June 1998 (morning session), House of Commons internet), although he was still wary about the possibilities that might be afforded should certain categories of recommendations be explicitly excluded from the Chapter I Prohibition; "Article [81] has applied to the United Kingdom for more than 25 years. Trade associations have lived with EU competition law for that period without special treatment." (Part 9 p 3). This was the Government's recurring argument when defending calls for explicit provisions to be made in the Competition Bill.

It was right for the Government to stick to the EC "framework" approach, as to allow the amendment would have taken the Competition Bill back to the realms of the RTPA, that is, form based.[229] Despite this, a number of exclusions were provided for, although where the Chapter I Prohibition does not apply to an agreement in part, because of an exclusion[230], the provisions to which the exclusion relate are not required to be disregarded when considering whether the agreement infringes the prohibition for other reasons.[231] This prevents the potential abuse of the exclusion system. However, notable concerns remain:

Mergers and concentrations: To the extent that an agreement results in two enterprises ceasing to be distinct within the meaning of the FTA, the agreement is excluded from the Chapter I Prohibition.[232] This exclusion extends to any provision directly related and necessary to the implementation of the merger.[233] The DGFT may withdraw the exclusion where the information he has requested regarding the agreement is not forthcoming[234] or where he considers that the agreement would, if not excluded, infringe the Chapter I Prohibition and he would not be likely to grant an unconditional individual exemption[235] (provided that it is not a protected agreement)[236]. This power of clawback overcomes the "....distinct

[229] A point made by Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 6 p 2, and Part 7 p 2, 21 May 1998 (morning session), House of Commons internet.
[230] Under the Competition Act 1998 or any other enactment.
[231] Section 59(2).
[232] Schedule 1, paragraph 1. Specific provision is made for the exclusion of agreements relating to the transfer of a newspaper/newspaper assets (Schedule 1, paragraph 3), and concentrations subject to the control of the ECMR (Schedule 1, paragraph 6).
[233] Schedule 1, paragraph 2, adopting the concept of an ancillary restriction, developed under the ECMR so as to "avoid the need for parallel proceedings under the Merger Regulation and Articles 81 and/or 82", thus ensuring that restrictions ancillary to a merger will not be considered under the Competition Act 1998 (Exclusion for Mergers and Ancillary Restriction (OFT 416, September 1999) paragraph 4.2), but this does not recognise the problem of co-operative elements. The Commission has recently changed its policy so that ancillary restrictions are no longer automatically exempt: it expects undertakings and advisers to assess whether any such restrictions can be covered by the ECMR, a block exemption or individual exemption (IP/01/908, 27/6/1; Commission Notice on restrictions directly related and necessary to concentrations (OJ 2001 C188/3) see Chapter 5, infra).
[234] Schedule 1, paragraph 4(1), (2) and (4).
[235] Schedule 1, paragraph 4(5).
[236] Schedule 1, paragraph 5. A protected agreement is one that: the Secretary of State has decided not to make a merger reference in respect of; is the subject of a merger reference which the CC has found would give rise to a merger situation qualifying for investigation; falls within section 65 of the FTA; or the Secretary of State has made a merger reference to the CC under section 32 of the Water Industry Act 1991 and the agreement has been found to give rise to a merger of the kind to which that section applies.

possibility that a tougher policy regime in respect of horizontal agreements will simply increase the incentives for merger."[237]

Joint ventures illustrate a divergence with the EC regime. The concept of full function joint venture (by which a merger is examined under the ECMR, including the co-operative elements although these will be assessed against Article 81 within the ECMR procedure as opposed to Regulation 17/62[238]) is not adopted by the Competition Act 1998. This leaves joint ventures falling within the FTA to have co-operative elements examined by the public interest test. Joint ventures that do not qualify as a merger situation under the FTA, but have an appreciable effect on domestic competition, may benefit from parallel exemption under the new horizontal block exemptions, although Brankin considers it unfortunate that the OFT's guidelines do not deal specifically with this issue.[239] This is a missed opportunity by the OFT who accept that agreements raising questions of significant investment will no doubt want to be notified. This is true of the majority of joint ventures[240].

Section 21(2) agreements: The majority of agreements furnished to the DGFT under the RTPA had the benefit of section 21(2) directions[241], and are excluded

[237] D Hay "Is More Like Europe Better?: An Economic Evaluation of Recent Changes in UK Competition Policy" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 58; although Carstensen found that there was significant incidence of cartels dressed as mergers, following the plans to change the RTPA (L Carstensen "The UK merger regime: Backdoor reform?" (1998) PLC January/February 1998, 19).

[238] Regulation 1310/97, Article 2(4).

[239] SP Rankin "The Application of the U.K. Competition Act 1998 to Joint Venture Agreements" (2000) 3 ECLR 175, 179.

[240] See individual exemptions, infra.

[241] Schedule 3 paragraph 2. Exclusion for section 21(2) directions first mooted by Lord Currie of Marylebone (Official Report, Committee Stage, Competition Bill House of Lords, Columns 340 and 341 13 November 1997, Lords Hansard internet). "...we believe that an exclusion for the generality of agreements which have received directions under Section 21(2) is the right approach. However,...there is a possibility that there may be agreements which received Section 21(2) direction but turn out in practice to have anti-competitive effects." (Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Columns 983 and 984, 25 November 1997, Lords Hansard internet). Thus justification for the power of claw back. It was inserted as an amendment by Lord Simon of Highbury at the Report Stage in the House of Lords (Official Report, Report Stage 1, Competition Bill House of Lords, Columns 965 and 966, 9 February 1998, Lords Hansard internet; "This amendment...provides an exclusion for agreements in respect of which at commencement a direction under Section 21(2) RTPA is in force. It includes the power for the DGFT to claw back the exclusion in certain circumstances...[and] provides that an agreement should continue to enjoy the benefit of this exclusion as long as there has been no material variation of it." (Column 965).

from the Chapter I prohibition for their duration,[242] although the benefit is lost if, after the starting date, there is a "material variation" to the agreement[243]. The DGFT will consider variations to be material if the agreement has an appreciable effect on competition within the meaning of the Chapter I prohibition, thus drawing a line under the problems encountered with material change under section 4 of the RTPA.[244]

Services of general economic interest etc.: An agreement made by an undertaking entrusted with the operation of services of general economic interest or of a revenue producing monopoly is excluded insofar as the Chapter I Prohibition would obstruct the performance of those tasks.[245] Services of general economic interest may be delivered by specific provision where market forces will not produce a satisfactory result. The Commission recently adopted a new communication, clarifying the situation where the activities affect trade between Member States, ensuring that the rules are: neutral with regard to the public or private ownership of companies; defined by Member States; subject to control for manifest error; and proportional in that the restrictions of competition do not exceed what is necessary to guarantee effective fulfilment of the mission.[246] It is probably for this reason that the DGFT has only recently published a first draft of the Guideline dealing with this exclusion.[247] This relies heavily on EC law although it acknowledges that in light of the liberalisation of UK sectors, the reliance on EC cases will be limited[248] and exclusion will be invoked rarely.[249]

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[242] Schedule 3 paragraph 2(1).
[243] Schedule 3 paragraph 2(2). The choice of material variation is surprising considering that elsewhere in the Competition Act 1998, the DGFT has the ability to act where there has been a material *change*. Indeed, the RTPA referred to a material change (section 21(3)). However, this should to cause any difficulties in practice as the test used to asses change and variation will be the same (see 3.2.3, infra).
[244] See 2.3.1, supra, and 3.2.3 infra.
[245] Schedule 3 paragraph 4; Robertson finds this "likely to be of great significance", criticising the fact that it is tucked away in the schedule (A Robertson "UK and EC Competition Laws: Will They Operate in Complete Harmony" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 93). Although the comments made by the DGFT in the draft guidelines would suggest otherwise.
[246] Mario Monti, "Competition in a Social Market economy", Speech at the Conference of the European Parliament and the European Commission on 'Reform of European Competition law' in Freiburg on 9/10 November 2000 (Competition Policy Newsletter, 2001 February, No.1, p 2) at p 4; Communication from the Commission, Services of General Economic Interest in Europe (OJ 2001 C17/4, 20/9/00).
[247] Services of General Economic Interest (OFT 421, July 2001).
[248] ibid, paragraph 1.9.
[249] ibid, paragraphs 3.9 to 3.17.

Similarly, the liberalised UK markets means that it is unlikely that an undertaking could be classed as a revenue-producing monopoly for the purposes of the exclusion.[250]

Public policy: Exclusion is provided for an agreement which is necessary for compelling reasons of public policy, provided that it has been made the subject of an order by the Secretary of State.[251] This is described as "a discretionary fall-back power of exclusion, the "public policy" exclusion power in paragraph 7 of Schedule 3."[252] There was concern that this public policy safeguard allows the Secretary of State "...to undercut many of the Bill's effects in a way that virtually escapes parliamentary scrutiny."[253] As for paragraph 7, the Government stated that they had "...no plans to exercise that power, and we believe that its exercise should be subject to the high test of "exceptional and compelling" reasons of public policy...That test is deliberately intended to be higher than the public interest test...It represents not a weakening but a strengthening of the arrangements to prevent the Secretary of State from being able to use the public interest as a narrow threshold on which to make decisions."[254] No such exclusions have been made, nor are any envisaged. This power can be seen as another materialisation of the Government's fear and distrust of the potential consequences of what they were importing.

Professional rules: These rules caused some concern:[255] "the government do no consider that replicating an exclusion as wide as that contained in the RTPA would be justified...We see no reason why the normal run of agreements between members of a profession in the carrying out of their professional services should not be subject to competition law just like those of any other business....I do not, however, accept that professional rules are necessarily the same as the normal run of agreements into which businesses may enter..."[256] An exclusion was therefore framed[257], but "The scope of the exclusion from the Chapter I prohibition

[250] ibid, paragraph 4.4.
[251] Schedule 3 paragraph 7.
[252] Lord Simon of Highbury, Official Report, Report Stage 1, Competition Bill House of Lords, Column 968, 9 February 1998, Lords Hansard internet.
[253] Mr Oliver Letwin, Official Report, Standing Committee G, Competition Bill House of Commons, Part 7 p 2, 4 June 1998 (morning session), House of Commons internet

is...narrower than that from the RTPA in that it is limited to the designated rules of the profession rather then applying to any restrictive agreement relating to the supply of the professional service in question"[258] However, we are now seeing that this was premature as a review of professional rules was felt necessary in 2000.[259]

Exclusions were also provided by section 50. These exclusions were singled out for special treatment as the detail was not ready for inclusion in the Bill. The difficulty with vertical agreements was "how to frame a definition"[260]; a difficulty that continued until the Bill was debated in the House of Commons.[261] This issues

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[254] Mr Ian McCartney, Official Report, Standing Committee G, Competition Bill House of Commons, Part 5 pp 1 and 2, 9 June 1998 (afternoon session), House of Commons internet

[255] Official Report, Committee Stage, Competition Bill House of Lords, Columns 285 to 294, 13 November 1997, Lords Hansard internet.

[256] Lord Simon of Highbury, Official Report Committee Stage, Competition Bill House of Lords, Column 291, 13 November 1997, Lords Hansard internet. See also Official Report, Standing Committee G, Competition Bill House of Commons, Part 6 p 2 to Part 8 p 1, 9 June 1998 (afternoon session), House of Commons internet.

[257] An agreement, to the extent that it constitutes a designated (As "designated" by the Secretary of State (Schedule 4, paragraph 2). Any body regulating a professional service may apply to the Secretary of State for the rules of that body to be designated (see The Competition Act 1998 (Application for Designation of Professional Rules) Regulations 1999 (SI 1999 No. 2546), section 2). Professional services are defined in Part II of the Schedule to be: legal, medical, dental, ophthalmic, veterinary, nursing, midwifery, physiotherapy, chiropody, architectural, accounting and auditing, insolvency, patent agency, parliamentary agency, surveying, engineering and technology etc., educational and religious), professional rule (that is, rules regulating a professional service or the persons providing, or wishing to provide, that service); imposes obligations arising from designated professional rules; or constitutes an agreement to act in accordance with such rules, is excluded (Schedule 4, paragraph 1; Trade Associations, Professions and Self-Regulating Bodies (OFT 408, March 1999) paragraph 6.8).

[258] Trade Associations, Professions and Self-Regulating Bodies (OFT 408, March 1999) paragraph 6.8.

[259] See Chapter 4, infra.

[260] Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Column 296, 13 November 1997, Lords Hansard internet. Concern was expressed that although the Government had made their intention as to the special treatment that vertical agreements were to have under the Competition Bill, no meat was put on those bones for quite some period of time, see Official Report, Report Stage 1, Competition Bill House of Lords, Columns 900 to 903, 9 February 1998, Lords Hansard internet, where in the Government's defence, Lord Simon of Highbury explained that a working group/task force had been established to provide the answers, consisting of experts from the CBI, Office of Fair Trading, MMC together with Professor Richard Whish and Dr. Bill Bishop (Column 901).

[261] See further Official Report, Second Reading, Competition Bill House of Commons, Columns 54 to 56, 11 May 1998, Lords Hansard internet. "The Government nevertheless want to leap ahead the Bill, despite the fact that Ministers admitted on the Second Reading tat some substantial technical issues remained to be resolved, such as the full extent of exemptions for vertical agreements...The extent of exemptions for vertical agreements will be important in our consideration of the Bill's impact and of Chapter I prohibition." Mr Andrew Lansley, Standing Committee G, Competition Bill House of Commons, Part 3, p 1, 19 May 1998 (morning session), House of Commons internet. The Conservatives were concerned about the potential treatment given that the majority of vertical agreements were excluded under the RTPA, a point made by Mr Tim Boswell (Official Report,

was important in order to ensure that "the administrative burden on the Office of Fair Trading, caused by people seeking clearance of their agreements for safety's sake" would be reduced.[262] Land agreements were another category that required special treatment[263], but again "finding a clear definition which will prove if real value is complex"[264], not to mention the danger in providing definitions that would make the legislation so form based, that it could be abused. The new clause to deal with vertical and land agreements was introduced at Committee Stage,[265] the task

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Standing Committee G, Competition Bill House of Commons, Part 8 pp 3 and 4, 2 June 1998 (afternoon session), House of Commons internet), meaning that the "Section 21(2) exemption" would not be available to vertical agreements for that very reason. The debate continued into Standing Committee G, (Official Report, Competition Bill House of Commons, Parts 1 to 6 p 3 , 4 June 1998 (morning session), House of Commons internet). The main concern being that the committee was being asked to consider an issue without the full detail being available, but all that Mr Nigel Griffiths could say was that "...the Government do not accept that existing vertical agreements that may be anti-competitive should be let off the hook because of weaknesses in the current regime, which we inherited." (Official Report, Standing Committee G, Competition Bill House of Commons, Part 4 p 2, 4 June 1998 (morning session), House of Commons internet). However, the situation that had developed was not helped by Mr Nigel Griffiths stating that he was not "...as a Minister, receiving interim reports from the task force." (Official Report, Standing Committee G, Competition Bill House of Commons, Part 5 p 3, 4 June 1998 (morning session), House of Commons internet).

[262] Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Column 295, 13 November 1997, Lords Hansard internet. See also Dr Kim Howells, Official Report, Fourth Standing Committee on Delegated Legislation, Draft Competition Act 1998 (Land and Vertical Agreements, Determination of Turnover for Penalties) Order 2000, House of Commons, Part 1 pp 1 to 5, 3 February 2000, House of Commons Hansard, internet. "The purpose of the land and vertical agreements exclusion order is to remove any need to notify such agreements to the Office of Fair Trading or regulators on a precautionary basis, while putting in place mechanisms to deal with any agreements within the categories that raise competition concerns." (Part 1 p 1). "It would not be a good start to the new regime if the Office of Fair Trading and the regulators were flooded with innocuous agreements. It took years for the Commission to recover from the 30,000 agreements that were notified to it in the six months after what is not Article 81 of the treaty came into force, if it ever has recovered." (Part 1 p 3).

[263] "...the Government's view is that land agreements are unlikely to raise competition concerns...if we do not treat land agreements differently, we fear that uncertainty as to the application of the Chapter I prohibition will lead to unnecessary notification of agreements and uncertainty in the property sector." Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 2 p 1, 25 June 1998 (morning session), House of Commons internet. See further Dr Kim Howells, Official Report, Fourth Standing Committee on Delegated Legislation, Draft Competition Act 1998 (Land and Vertical Agreements, Determination of Turnover for Penalties) Order 2000, House of Commons, Part 1 p 2, 3 February 2000, House of Commons Hansard, internet, where he stated that restrictions in leases and licences in respect of the goods or services that may be sold or the sue of the premises might be thought to affect competition, but "...they are unlikely to have an appreciable effect on competition since that depends on the market as a whole and not individual outlets and the shopper should have alternative outlets to patronise." See also Lord Sainsbury of Turville, Official Report, Draft Competition Act 1998 (Land and Vertical Agreements, Determination of Turnover for Penalties) Order 2000, House of Lords, Column 758, 9 February 2000, Lords Hansard internet, "...when the Irish Government introduced a domestic prohibition modelled on Article 81, their Competition Authority was inundated with notifications of leases for shops."

[264] Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Column 340, 13 November 1997, Lords Hansard internet.

[265] Official Report, Standing Committee G, Competition Bill House of Commons, Part 1 p 1 to Part 7 p 1, 25 June 1998 (morning session), House of Commons internet.

force having concluded that "..the Bill's existing power to make exclusions may not be adequate to provide special treatment for vertical agreements..."[266] However, disappointment was expressed because the clause still did not provide a definition of vertical agreements, rather only provide for a meaning to be prescribed.[267]

Vertical: The exclusion from the Chapter I Prohibition for vertical agreements is intended to follow closely the treatment of vertical agreements in the EC so that the burden on business of operating under different systems is minimised. Indeed, the theory behind the domestic definition and treatment of particular restraints (for example, price fixing and IPR provisions is virtually identical),[268] although at first

[266] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 1 p 3, 25 June 1998 (morning session), House of Commons internet

[267] Mr John Redwood, Official Report, Standing Committee G, Competition Bill House of Commons, Part 3 p 1, 25 June 1998 (morning session), House of Commons internet, the Government's defence being that "The value of secondary legislation is that it allows for full consultation while the European Commission conducts its review of the treatment of vertical restraints. That will mean that the Bill will be in line with the Commission's views." (Mr Nigel Griffiths, Part 5, p 2). It was confirmed at Consideration of Commons Amendments, Official Report, Competition Bill, House of Lords, Column 1379, 20 October 1998, Lords Hansard internet, that the Government saw "...great merit in using the same language as that proposed by the Commission." (Lord Simon of Highbury) and this time the opposition agreed that there was benefit in allowing the detail to be dealt with by secondary legislation taking into account "...what may emerge in a European context." (Lord Fraser of Carmyllie, Column 1380).

[268] At European Community level a broad range of vertical agreements is exempted from the Article 81(1) prohibition by the EC Block Exemption (Regulation 2790/1999) which applied from 1 June 2000. There are significant differences between the *scope* of the Exclusion Order and that of the EC Exemption in that: the EC Exemption applies only to agreements where the market share of the supplier (or buyer, in the case of an agreement with an exclusive supply obligation) does not exceed 30 per cent of the relevant market. There is no market share cap in order to benefit from the Exclusion Order; and the EC Exemption contains a number of 'hardcore' restrictions which, if included in the vertical agreement, have the effect of taking the agreement outside its scope. The only equivalent restriction in the Exclusion Order relates to price-fixing vertical agreements. Although Rodger and MacCulloch find that the only similarity in the systems is that the domestic definition reflects the Community one (BJ Rodger and A MacCulloch "The Chapter I Prohibition: Prohibiting Cartels, or Permitting Verticals? Or Both?" in BJ Rodger and A MacCulloch The UK Competition Act: A New Era for UK Competition Law (Oxford, Hart, 2000) pp 188 and 196), the *theory* behind the two is somewhat closer: A Vertical Agreement (for domestic purposes) is defined (Article 2) as "an agreement between undertakings, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services and includes provisions contained in such agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods or services by the buyer or its customers." The UK position is that vertical agreements do not generally give rise to competition concerns unless one or more of the undertakings involved possesses market power on the relevant market or the agreement forms part of a network of similar agreements (identified in Vertical Restraints and Competition Policy (OFT Research Paper 12 (Prepared by P Dobson and M Waterson), December 1996) pp 52 to 57)). Both UK and EC have accepted that generally competition concerns only arise where there is insufficient inter-brand competition that is, competition between manufacturers or suppliers. Common to both is that certain aspects of the operation of distribution networks, and particularly the various types of supplementary provision

sight there appears to be a divergence in treatment, with one regime providing for exclusion[269] and the other providing for exemption. This apparent contradiction is explained by a "relevant difference" for the purposes of section 60, that is, single market integration. The exclusion does not apply to vertical agreements which directly or indirectly has the object or effect of restricting a buyer's ability to determine its sale price. Agreements where the seller imposes a maximum or recommended sale price may benefit from the exclusion, unless this has the effect of being a fixed or minimum sale price because of pressure from, or any incentives offered by, any of the undertakings involved.[270] In practice the two systems should not produce any divergence in the practical treatment of vertical agreements that do not divide up the community, with the DGFT following EC jurisprudence in considering whether to withdraw the exclusion because of an anti-competitive effect.

Land agreements: The second from of exclusion provided by section 50 is particular to the Competition Act 1998. The Exclusion Order[271] excludes these agreements because they do not generally give rise to competition concerns[272]. This exclusion is designed to provide certainty and avoid the unnecessary burden on business of scrutinising a large number of agreements that do not raise

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commonly found in distribution agreements (so-called ancillary restraints) will fall subject to scrutiny where there are negative effects.

[269] The Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000 (SI 2000 No. 310). There is no exclusion from the Chapter II prohibition, nor the FTA, Vertical Agreements and Restraints (OFT 419, March 2000) paragraph 1.9.

[270] Where an agreement is only partly covered by the exclusion, and the DGFT has competition concerns about the object or effect of the agreement, he will be able to have regard to the whole agreement (including those parts of the agreement that benefit from the exclusion for vertical agreements (Section 59(2)) to assess whether the Chapter I Prohibition has been infringed. The DGFT will not be able to take any action against the parts which benefit from the exclusion without first withdrawing it. Where an agreement does not fall within the Exclusion Order, it may benefit from another exclusion or exemption; for example, a simple patent license would not benefit from the exclusion since the purpose of the agreement is to license the patent, but it may however, benefit from a parallel exemption if it falls within the EC technology transfer block exemption (Commission Regulation (EC) No 240/1996 of 31 January 1996 on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements, OJ L31/2, 9/2/1996).

[271] The Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000 (S.I. 2000 No. 310). Where an agreement does not fall within the Order, it may still benefit from another exclusion or exemption. The Act contains, for example, exclusion for agreements to the extent that they are planning obligations (Schedule 3, paragraph 1). This includes planning obligations made, for example, under section 106 of the Town and Country Planning Act 1990.

[272] However, this approach is not a wide and as the result of the RTPA and Ravenseft Properties v DGFT [1978] Q.B 52.

competition concerns.[273] These agreements are defined in terms of: the creation, alteration, transfer or termination of an interest in land[274], and certain obligations and restrictions.[275] As is the case for vertical agreements, the exclusion may benefit only certain provisions of an agreement rather than the whole agreement[276].

[273] However, there is no exclusion from the Chapter II Prohibition for land agreements.

[274] Only agreements that create, alter, transfer or terminate an interest in land benefit from the exclusion. The term 'interest in land' is defined as including any estate, interest, easement, licenses, and, in Scotland, interests under a lease and other heritable rights in or over land including heritable securities. The exclusion also covers agreements to enter into land agreements.

[275] Obligations and restrictions are defined (Article 6) in relation to the concepts of 'capacity' and 'activity'. For an obligation or restriction to benefit from the exclusion, it must be either accepted in, or for the benefit of, an undertaking's capacity as holder of an interest in land. This requirement ensures that such obligation or restriction relates to the interest in land, as opposed to any trading capacity or other (non-land) business interests of the undertaking, which will not have the benefit of the exclusion. Examples given by the DGFT include a restriction in a lease which requires that the tenant of a petrol station must buy the petrol he sells only from the landlord would not be covered by the exclusion (such a restriction may, however, benefit from the exclusion for vertical agreements also provided in the Exclusion Order); an obligation in a lease for a tenant to insure the leased property *with* its landlord, who is an insurance company, would not have the benefit of the exclusion. Such an obligation would be regarded by the DGFT as relating to the trading interests of the insurance company and the insurance company would be regarded as acting in its capacity as an insurer. An obligation to insure a property *through* an insurance company landlord, however, would be likely to benefit from the exclusion. Such an obligation would be likely to be regarded by the DGFT as relating solely to the relevant interests in land of the undertakings involved and the insurance company would be regarded as acting in its capacity as holder of an interest in land (Land Agreements (OFT 420, March 2000) paragraph 2.9). However, such a distinction appears so slight that it leads to the possibility of confusion and potential avoidance of the Chapter I Prohibition: Singleton finds the distinction "...to subtle to understand" (S Singleton "Competition Act 1998: application to land agreements" (2000) Solicitors Journal 28 April, 390, 391). Indeed, the DTI noted that this sort of distinction "... may not be easy to draw." (Competition Bill Exclusion of Land Agreements: A Discussion Paper (Department of Trade and Industry, URN 98/932 February 1998) paragraph 20(c)).

[276] An agreement may benefit from both exclusions in the Order, since each exclusion could apply to different parts of the same agreement. Beer tie and petrol solus agreements are the examples given by the DGFT. The UK has followed the move away from specific provision when competition is predominant in the market. In the EC, Articles 6 to 9 of Regulation 1984/83 applied to any bilateral agreement whereby a tied house agrees to purchase specified beers. However, there is no specific mention in Regulation 2790/99. Agreements concluded post 1 June 2000 will therefore be assessed in light of the safe harbour and more general provisions. The majority of such restrictions on the domestic level were covered by the Beer Orders (The Supply of Beer (Loan Ties, Licensed Premises and Wholesale Prices) Order 1989 (S.I. 1989 No.2258), The Supply of Beer (Tied Estate) Order 1989 (S.I.1989 No.2390)), which ended in 2000 as the OFT concluded they were no longer necessary since the reasons for their introduction (to widen consumer choice, reduce prices and reduce barriers to entry) had been rectified as a result of the changes the orders had made to the structure of the industry, negating the need for specific regulation ("Beer advice passed to DTI" OFT statement 31/7/00; The Supply of Beer: A report on the review of the beer orders by the former Director General of Fair Trading, Mr John Bridgeman, published under section 125(4) of the Fair Trading Act 1973 (OFT 317, December 2000); "Time called on Beer Orders" (2001) 29 Fair Trading February, 3) From now on, agreements seeking exclusion from the Competition Act 1998 will generally be assessed in light of the Exclusion Order 2000 with the elements of land restrictions and retail restrictions viewed separately to establish whether or not they benefit from the exclusions provided. Similarly, the operation of the petrol industry has been considered by the CC in The Supply of Petrol to Retailers ((1965) H.C. 24), The Wholesaling of Petrol (Cmnd. 7433 (1978)), and The Supply of Petrol by Wholesale (Cmnd. 972 (1990)). From now on, agreements previously subjected to non-statutory undertakings ("Review of non-statutory undertakings given by petrol wholesalers in 1996" OFT statement 22/7/00) and new agreements seeking exclusion from the

(v) Exemption

Section 9 follows Article 81(3) in providing the criteria[277] for exemption of agreements, which fall within the scope of the prohibition, but have, on balance, a beneficial effect.[278] However, these criteria are not exhaustive since, in addition to the four conditions in Article 81(3) (all of which must be met[279]), Whish finds a fifth requirement in that the benefit derived by the parties "...must be demonstrated to exist in an objective manner."[280] This is not explicitly included in the OFT guidelines, which instead require the nature of the improvement to be "clearly justified"[281]. Unfortunately, this does not have the same clarity as Whish's requirement, thus depriving undertakings of the focus they need in considering whether their agreement will benefit from an exemption, and potentially hindering the successful application of the Chapter I Prohibition.

Individual exemption: An individual exemption must be applied for by way of a notification on Form N.[282] The date of the notification is taken as the date on which Form N is received together with the fee payable, unless Form N is incomplete.[283]

Competition Act 1998 will likewise be assessed under the Exclusion Order (In the EC, Articles 10 to 13 of Regulation 1984/83 made specific provision for the block exemption of exclusive purchasing obligations undertaken by retail outlets, but there is no specific provision for such agreements in Regulation 2790/99. Agreements concluded post 1 June 2000 will therefore be assessed in light of the market share test and more general provisions). However, this assumes that the clear pecking order between the Chapter I Prohibition and complex monopoly provisions is adhered to.

[277] See Appendix I for the detail. The wording of the section is identical to that of Article 81(3) except that unlike Article 81(3) it does not refer to 'improving production or distribution *of goods*'. The intention of this omission is to make clear that (as is consistent with European Commission practice in applying to Article 81(3)) the exemption provisions also apply to agreements contributing to improvements in the provision of services (The Chapter I Prohibition (OFT 401, March 1999) paragraph 4.9).

[278] Currently only the Commission can grant such exemption, although national courts must consider this when questions of Article 81 are raised in national proceedings. One thrust of the modernisation of Article 81 is to empower all national authorities with the ability to apply the exemption criteria in EC competition cases; see Chapter 5.

[279] Métropole v Commission [1996] ECR II-652, [1996] 5 CMLR 386.

[280] R Whish Exemption criteria under Article 85(3) EC: a study of the case-law of the European court of Justice, the Court of First Instance and the decisional practice of the European Commission (1997), p 14.

[281] The Chapter I Prohibition (OFT 401, March 1999) paragraph 4.12.

[282] Set out in Annex 1 of The Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No. 293); (Form for Notifications for Guidance (OFT 409). Confidential information should be set out in a separate annex and marked as such (Rule 4, The Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No. 293)).

[283] Rule 5, The Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No. 293).

This date is important for the immunity from penalty. Applications for a decision will be published, as will the DGFT's decision and reasons for making that decision.[284] The DGFT may make a provisional decision[285] if it is likely that the Chapter I Prohibition is infringed and it would not be appropriate to grant an individual exemption.[286]

The cost of applying for a decision is £13,000.[287] This encourages parties to think carefully before applying (and thus reduces the number of insignificant notifications).[288] The mantra of "do complain, don't notify" can be seen as actively discouraging notifications. This mantra, chanted at conferences attended by the OFT, is not repeated verbatim in the guidance, although this does state the "OFT takes the view that few cases will genuinely need to be notified and strongly discourages undertakings from notifying on a fail-safe basis...[although] it recognises that there may be circumstances where there are genuine reasons for notification. One example might be where there is real uncertainty as to whether an agreement is likely to have an appreciable effect on competition and it carries sizeable financial risks that make it unlikely to proceed without some degree of certainty that it will not be prohibited by the Act. Another might be where an agreement...raises novel legal issues."[289] I would submit that these examples display an element of naiveté given the actions of solicitors under the RTPA and the demands made by business clients. Any professional adviser could find that the majority of agreements they encounter satisfy these "genuine reason". When faced

[284] Schedule 5 paragraphs 5 and 6. Rule 8, The Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No. 293). Before granting an individual exemption, the DGFT shall consult with the public (Rule 12, The Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No. 293). Where the DGFT proposes to make a decision that the Chapter I Prohibition has *not* been infringed he *may* consult with the public). Should the DGFT propose to make a decision that the Prohibition has been infringed or that he will grant an individual exemption subject to conditions or obligations, he will give notice to the parties concerned of what he proposes to do, the facts relied upon and his reasons for doing so (Rule 14(1)-(4), The Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No. 293)). The parties will be afforded a reasonable opportunity to inspect the documents in the DGFT's file relating to the proposed decisions, unless such information is confidential (Rule 14(5) and (6), The Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No. 293)). Similarly, where the DGFT proposes to give notice of his decision, he will provide the facts on which he has based it and the reasons for doing so (Rule 15, The Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No. 293)).

[285] Rule 9, The Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No. 293). The DGFT shall give the facts on which he based his decision and his reasons for giving that decision.

[286] Schedule 5 paragraph 3.

[287] Rule 6(2)(b), The Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No. 293).

[288] Although parties might opt for the cheaper "guidance" instead.

[289] Is notification necessary? (OFT 434, August 2000) pp 4 to 6.

with the uncertainty of the way that market definition has been interpreted at the EC level, either advisers will turn into economists with crystal balls or the OFT will have to deal with a host of informal enquiries.[290]

An individual exemption may be granted subject to conditions or obligations as the DGFT considers appropriate and/or for a specified period.[291] The exemption can have effect from a date that is earlier than that on which it is granted.[292] This differs from the EC, where exemption cannot be earlier than the date of notification, unless it is an agreement under Article 4(2) of Regulation 17/62.[293] This has caused some confusion in the literature: "...under Community law, an individual exemption granted by the Commission has effect from the date of notification and this has certain important effects. Section 4(5) makes parallel provision but its effect is unclear. It does not state explicitly that the exemption is retrospective to the date of notification although this is probably the intention."[294] However, others find that the exemption can be back-dated to "before the date of notification (unlike Article 81(3) exemption)."[295] Indeed Bloom has stated that backdated exemptions are possible,[296] and later asserted that "...it is possible for any UK exemption to be backdated to the date of the agreement."[297]

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[290] Indeed a telephone number has been given along with the OFT's confirmation that it "is happy to provide informal advice to enable [undertakings] to determine whether or not they need to notify a particular agreement." (Is notification necessary? (OFT 434, August 2000) p 14). See Chapter 4, infra.

[291] Section 4(3). See also Rule 20, The Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No. 293), in respect of application for an extension of the individual exemption.

[292] Section 4(5).

[293] If the Commission grants exemption under Article 81(3) to a notified agreement, it may (and generally will) backdate the validation to the date at which the agreement was *notified*. This preserves the validity of the agreement in the period between notification and exemption. There are nevertheless a limited number of agreements which qualify for exemption without notification: agreements which have no direct or indirect impact on inter-state trade; bilateral contracts of sale fixing resale terms; bilateral licences or assignments of intellectual property rights; and agreements the sole object of which is the development of uniform standards, joint research and development, and small specialisation agreements.

[294] BJ Rodger "Interrelationship with Community Law Enforcement" in BJ Rodger and A MacCulloch The UK Competition Act: A New Era for UK Competition Law (Oxford, Hart, 2000) p 57.

[295] G Smith "Prohibition of anti-competitive agreements cartels and concerted practices" (Speech delivered at "The New Competition Act" The Hatton, London, 2/12/99) .

[296] Speech delivered to the Thames Valley Commercial Lawyer Association, 1 July 1999.

[297] M Bloom "The New UK Competition Act" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 19.

Once a favourable decision has been reached, the DGFT can take no further action under the Chapter I Prohibition unless he has reasonable grounds for believing that there has been a material change in circumstances or he has a reasonable suspicion that the information he was provided with was incomplete, false or misleading in a material particular.[298] Material change here differs from "material variation" used in the clawback of the section 21(2) RTPA exclusion, but since both will be viewed in terms of the "effect on competition" they should in practice not produce any real difficulties, although consistency would have been the preferable option.

It is also possible to notify for guidance at a fee of £5,000. There is no equivalent to this in the EC procedure, although it could be compared to the giving of a comfort letter, albeit a more formalised version (if that is not a contradiction in terms). Having given guidance, the DGFT can take no further action under the Chapter I Prohibition unless he has reasonable grounds for believing that there has been a material change in circumstances, he has a reasonable suspicion that the information he was provided with was incomplete, false or misleading in a material particular, one of the parties to the agreement applies for a decision under section 14 in respect of the agreement, or a complaint about the agreement has been made to him by a third party.[299]

Block and Parallel exemptions: The Act provides for the Secretary of State to make domestic block exemptions where a particular category of agreement falls within the statutory criteria for exemption set out in section 9.[300] It is possible to include an opposition procedure for agreements that do not qualify for the block exemption, but meet certain other specified criteria.[301] However, this is unlikely to be used following the EC move away from this procedure in its latest block exemptions. When the Act came into force no domestic block exemptions had been put in place. It is likely that the DGFT will seek to rely on the EC block exemptions.[302] Although this is drafting according to form (and the EC has defined

[298] Section 16(2).
[299] Section 15(2).
[300] Section 6(1).
[301] Section 7.
[302] By virtue of parallel exemption (see below). EC Block exemptions currently in force are: Regulation 3932/92 in respect of agreements in the insurance sector; Regulation 1617/93 in respect of passenger transit consultations and slot allocations at airports; Regulation 3652/93 in respect of

them narrowly in the past, making them difficult to use in practice), there has been a shift in style "...marked by increased intense activity aimed at adapting the rules and practice of competition policy to the new environment."[303]

Historically, a source of difficulty for domestic authorities applying EC law, has been identifying the correct course of action when there is a conflict. Article 10 EC imposing an obligation on Member States to ensure fulfilment of the Treaty obligations and to abstain from anything that could jeopardise their attainment, backed up by Walt Wilhelm's ruling that Article 81 takes precedence. Nevertheless, questions of exemption by Community law that cause a conflict with national law are left unresolved.[304] Whish finds argument for and against allowing a stricter domestic prohibition where there is an individual exemption, but ultimately favours the interpretation that the positive action of an individual exemption should prevail, in the absence of the Commission classing its exemptions as either positive actions in policy or merely permissive.[305] The situation is more complex when a community block exemption exists. A suggestion to distinguish between national law that conflicts with the "core purpose" of a block exemption and with "an aspect of the block exemption which is 'periforal'"[306] would be difficult to operate in practice, but in the absence of direct guidance from the Commission in its block exemptions, as to what national law can

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agreements relating to computerised reservation systems; Regulation 1475/95 in respect of distribution agreements for motor cars (this is under review following a report in July 2000 indicating that price differentials between Member States for new cars remained high, with the UK having the highest prices (Commission press release IP/00/781, 13/7/00) and the Commission's evaluation report of 15/11/00 (www.europa.eu.int/comm/competition/car_sector/eval_reg_1475_95 as at 5/12/00) criticising the situation the regime has resulted in, with Mario Monti concerned that the objectives of the exemption had not been met, it had not been properly applied in the industry and the UK's inquiry had shown that it generated negative effects on car prices ("Who will be in the driver's seat?" Speech at the Forum Europe Conference, Brussels, (Speech/00/177, 11/5/00)); a new legislative regime for distribution and servicing of motor vehicles is due to be issues by the end of 2001, following the two day hearing on 13 and 14 February 2001 (IP/01/204, 14/2/01)); Regulation 240/96 in respect of Technology Transfer Agreements (a questionnaire has been issued to establish the views as to changes to be made (www.europa.eu.int/comm/competition/antitrust/others as at 15/03/01)); Regulation 2790/1999 in respect of vertical restraints; Regulation 2658/2000 in respect of specialisation agreements and Regulation 2659/2000 in respect of R&D agreements. In respect of these last three Regulations the Commission has published quite lengthy guidelines to assist in the interpretation of the block exemption and allow those falling outside of the criteria to asses whether their agreements are capable of exemption generally; the aim is to allow such agreements where there is a positive contribution to economic welfare.

[303] XXXth Report on Competition Policy 2000 (SEC (2001) 694 final, 7/5/01) p 8.

[304] R Whish, op cit., pp 38 to 42; DG Goyder, op cit., pp 504 to 510; R Lane, op cit., pp 214 to 219; A Jones and B Sufrin, op cit., pp 1011 and 1012.

[305] R Whish, op cit., pp 39 and 40.

do (and which is then consistently applied[307]) there will be scope for argument and tension[308]. The difficulty in finding an acceptable answer is compounded by Doherty's finding that there is no consensus among national authorities as to the correct course of action[309]. Lane points to the attempt in the draft block exemption of vertical restraints to specifically set out that "national laws on competition cannot be applied to vertical agreements which fall within Article 81(1) and are exempted by this Regulation".[310] Although this was watered down in the final version, this may be the approach adopted in future (particularly following devolved control), either through explicit measures or through practice as Member States apply more EC law themselves.[311] However, the amending of Regulation 19/65 by Regulation 1215/1999 (so as to enable competition authorities in Member States to withdraw the benefit of a block exemption where the agreement has certain effects which are incompatible with the conditions laid down in Article 81(3) in the territory of the Member States, where that territory has all the characteristics of a distinct market[312]), provides an escape route for national competition authorities.

Section 10 would appear to resolve this problem of inconsistency because "...agreements which are covered by a block or an individual exemption under Article 81(3)...will benefit from a parallel exemption from the Chapter I Prohibition..."[313] It will also cover those agreements that would be covered by a European Commission block exemption if the agreement had an effect on trade

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[306] ibid, p 41.
[307] Whish refers to the Regulation 123/85 that allows for stricter national law regarding motor car selective distribution agreements, but the Commission did not question the UK's condition of beer distribution despite the fact that they were stricter that what was permitted by Regulation 1984/83 (op cit., p 41). Lane supports this assertion by reference to Case C-41/96 VAG-Händlerbereit v SYD-Consult [1997] ECR I-3123.
[308] Arnull rejects this view finding that it "...would be to the prejudice of the full effect of measures adopted in implementation of Article 81", supporting his argument by the Advocate General's Opinion in Buneskatellamt v Volkswagen and VAG Leasing (Case C-266/93, [1995] ECR I-3477)and BMW v ALD (Case C-70/93, [1995] ECR I-3439) that once exempted they were outside the jurisdiction of the national authorities (A Arnull, op cit., p 416).
[309] B Doherty "Community Exemptions in National Law" (1994) 6 ECLR 315, 321 and 322.
[310] R Lane, op cit., p 218, recognising that this was watered down so that "no measure under national law should prejudice".
[311] See Chapter 5 infra.
[312] Regulation 19/65, Article 7(2).
[313] H Emden "A Blueprint for Reform: Response by the Office of Fair Trading" (1999) 6 ECLR 309.

between EC Member States[314]. These types of agreement are automatically exempted under the Act without the need for individual exemption, but will cease should the relevant EC exemption cease to have effect or the DGFT cancels the exemption.[315] Where an agreement which benefits from a parallel exemption has produced, or may produce, significantly adverse effects on a market in the United Kingdom or part of it, the DGFT may impose (additional) conditions or obligations on the exemption,[316] or vary[317] or cancel[318] the exemption following procedures specified in rule 21 of the DGFT's rules[319].

Lane finds that this use of parallel exemptions does solve the dilemma of how to deal with agreements that infringe EC and national rules but enjoy exemption under Article 81(3).[320] However, Lane overlooks section 10(5), which permits the DGFT to impose his own conditions and obligations, vary those imposed by the EC or even cancel the exemption for domestic purposes. Even if the DGFT decides that consistency requires him not to use his powers by Section 10(5), parallel exemptions will mean that "European objectives will be imported and applied to a purely domestic situation"[321], accordingly bringing into play the question of relevant difference under section 60. Consequently the issue of what is "core" and "periforal" will still be raised in an attempt to distinguish the two systems where there is a desire to follow a particular course of action, creating uncertainty for business.

Regarding individual exemptions, the majority of agreements notified to the European Commission receive an informal indication of the European Commission's likely assessment, by means of a comfort letter rather than a formal decision. EC comfort letters are not legally binding but the European Commission will re-open the file only in certain limited circumstances. The Competition Act

[314] Section 10(2). This is similar to the wording used in Article 3 of The Restrictive Trade Practices (Non-notifiable Agreements) (EC Block Exemptions) Order 1996 (SI 1996 No. 349) treating such agreements as non-notifiable for the purposes of the RTPA (see 2.2.2(c) supra).
[315] Section 10(4).
[316] Section 10(5)(a) and (c).
[317] Section 10(5)(b).
[318] Section 10(5)(d).
[319] The Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No. 293).
[320] R Lane, op cit., p 219.
[321] F Barr "Has the U.K. Gone European: Is the European Approach of the Competition Bill More than an Illusion?" (1998) 3 ECLR 139, 141.

1998 does not make specific provision for these informal procedures of the European Commission under section 10, but as a general rule[322], the DGFT will not depart from the European Commission's assessment of an agreement as set out in an EC comfort letter. However exceptions to this policy will arise when, for instance, the agreement raises particular UK competition concerns, the European Commission has given a discomfort letter, or the European Commission has indicated that the agreement does not have an appreciable effect on inter-state trade. In these instances the parties will need to notify the agreement to the DGFT.

Exemption for certain other agreements: Where a ruling has been given under Article 84 as to whether an agreement of a particular kind is prohibited under Article 81, this does not prevent the application of the Chapter I Prohibition. However, the Secretary of State may grant domestic exemption in respect of such agreements.[323] This section demonstrates a willingness to accept other Member States findings, since:

> "...the main thrust of the section goes further by providing that if a Member State grants an exemption, under Article 81, to such an agreement, the Secretary of State may make regulations so that an exemption may be granted from the Chapter I prohibition in respect of such agreements."[324]

This would appear to bode well for devolved control.[325]

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[322] Under section 60.
[323] Sections 11(1) and (2)
[324] BJ Rodger "Interrelationship with Community Law Enforcement" in BJ Rodger and A MacCulloch The UK Competition Act: A New Era for UK Competition Law (Oxford, Hart, 2000) p 63. As for clause 11, "...even though the Commission has not been given powers by regulation to apply Article [81], it does not mean that the sector is excluded from Article [81]. Under the treaty, member states have the power to apply Article [81] in such sectors and the Commission also has the power to make a decision that there is an infringement and can propose measures to bring it to an end. This clause provides that if a member state grants an exemption, under Article [81], to such an agreement, the Secretary of State may make regulations so that an exemption may be granted from the Chapter I prohibition in respect of such agreements." (Mr Ian McCartney, Official Report, Standing Committee G, Competition Bill House of Commons, Part 10 p 1, 11 June 1998 (morning session), House of Commons internet).
[325] See Chapter 5, infra.

(vii) An opportunity missed

The Government chose not to deal with many salient issues arising from the interpretation of Article 81. Some politicians did recognise potential problems arising from the existing flaws in EC law, but these were in the minority and, even then, some of these issues were never addressed at all. Baroness O'Cathain suggested an amendment to deal with the dismantling of exclusive distribution agreements.[326] Her concern was with the inability of supermarkets to sell branded goods such as Levis and Calvin Klein at competitive prices. In response, Lord Simon of Highbury stated that "The Bill is not designed to deal explicitly with every conceivable anti-competitive practice. We could not do that."[327] Howev submit that this statement accurately reflects the limits to the Chapter I Prohibiti in that the Government did not take the opportunity to satisfactorily deal with a number of the EC problems, and consequently have added to the uncertainty, ra than maximising the certainty needed in a regime dependent on economic analy

3.2.2 Test in light of the mechanism of competition

Although it is not explicit in the domestic legislation (or the E.C. Treaty), the test of the relevant market is the crux of the correct application and understanding competition law. This is where economic theories and models[328] become crucial. They enable us to collate and process the information, allowing one to define a particular market in terms of the products/services available in a certain area: it enables the information that exists in the commercial sphere to be applied in the context of competition regulation. The market is at the heart of the reforms and arguably forms the most important consideration, especially in light of the de

[326] Official Report, Committee Stage, Competition Bill House of Lords, Column 281, 13 November 1997, Lords Hansard internet. The Baroness was concerned that although the European Commission had allowed exemptions for Yves St. Laurent and Givenchy, the Commission had not come down strongly enough and wanted to make the Competition Bill stronger (Official Report, Committee Stage, Competition Bill House of Lords, Column 905 25 November 1997, Lords Hansard internet).

[327] Official Report, Committee Stage, Competition Bill House of Lords, Column 284, 13 November 1997, Lords Hansard internet. Instead reliance would be made on the Chapter II Prohibition, following EC jurisprudence, with the "safety net" of the FTA in place to ensure that anti-competitive practices would always be examined somehow.

[328] As discussed in Chapter 2, supra.

minimis tests and safe harbour thresholds now filtering through in the latest E.C. block exemptions. Indeed, the European approach has itself become more refined and more economic, as its tests become purely based on market share as opposed to a conjunctive test with "turnover"[329].

When the effect of the Competition Act 1998 is compared to the RTPA it is blatantly clear that determination of the relevant market was not the primary concern of the old regime, although parties were asked to submit market information for the application of section 21(2) discretion.[330] To some extent, market definition already played its part in the FTA (for example, when assessing scale or complex monopolies[331], or when considering whether the merger provisions of that Act[332] apply). Therefore, despite protests to the contrary, businesses and practitioners are acquainted with it. Indeed, the DGFT reminds us that the ides of market "is familiar".[333] However, this means of analysis is not without its critics.[334]

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[329] Bellamy and Child, op cit., paragraph 2-142.
[330] See 2.3.1 (i) supra.
[331] Sections 6 and 7, FTA.
[332] Section 64, FTA. However, in the latter case it was possible to opt for the turnover test instead – a much quicker test to apply and favoured by the majority caught by those provisions.
[333] Market Definition (OFT 403, March 1999) paragraph 2.6.
[334] The desire to change the basis for testing agreements from the public interest to the promotion of competition, is clear from the consultation process, but Jones argues that "..a reliance upon economic definitions of the market and market power would provide...a plethora of escape hatches for there are innumerable ways of defining the relevant market and an infinite number of constructions of economic power." (K Jones, op cit., p 125); "Market share tests by their very nature introduce definitional problems both in establishing the relevant market and in calculating the appropriate market share. The very fact that they focus the assessment of appreciability to the economic effect of an agreement undermines any clear cut solution."(F Barr "The New Commission Notice on Agreements of Minor Importance: Is Appreciability a Useful Measure?" (1997) 4 ECLR 207, 209); Indeed the basis for defining the market share is dismissed by Crowther who finds that supply side substitution as providing little use, and generally the approaches are not sufficiently reliable (P Crowther "Product Market Definition in E.C. Competition Law: The Compatibility of legal and Economic Approaches" (1996) JBL March 177); "A market share limit might be more appropriate for targeting regulatory resources to where there is most competition concern...[however], the definition of a market, and hence calculation of market share, may give rise to uncertainty and therefore may provide less comfort to business than a straight turnover test." (Lord Haskel, Official Report Committee Stage, Competition Bill House of Lords, Columns 433 and 434, 17 November 1997, Lords Hansard internet).

(i) Defining the Relevant Market

There is no single test that will apply to all situations, but what the process of defining the relevant market hopes to achieve is sorting out the information that is of most use and disregarding those pieces of evidence whose significance is questionable. This exercise should be seen as a tool used to assess whether the impact of an agreement or conduct is anti-competitive. It is neither an exact science nor a mechanical formula. Although market definition is the key to analysing and applying legal regulation NERA remind us[335] that it is:

> "important to keep in mind the rationale for market definition in order to prevent the task from assuming undue importance in its own right. The act of defining the relevant market should be seen as an exercise which improves the application of competition policy, and not an objective of policy itself".

London Economics reiterate that:

> "...market definition should never take place in a vacuum. Rather, it is always important to keep in mind exactly what it is about competition that is of concern and how market definition helps us in analysing this aspect of competition. Indeed, there may be several possible market definitions, each of which is valid for looking at a particular issue."[336]

The DGFT acknowledges this and confirms that the guideline is not mechanical, but rather a "conceptual framework within which evidence can be organised."[337]

The US approach[338] to market definition is accepted by the competition authorities of the UK and EC. The DGFT has confirmed that he will identify the relevant

[335] Market definition in UK competition policy (OFT Research Paper 1 (Prepared by National Economic Research Associates), February 1992) p iii.
[336] Competition in Retailing (OFT Research Paper 13 (Prepared for the Office of Fair Trading by London Economics) September 1997) p xi.
[337] Market Definition (OFT 403, March 1999) paragraph 1.5.

market based on the European Commission's procedure as set out in their Notice on the definition of the relevant market for the purposes of Community Competition law[339]. This is to be welcomed (although it has taken too long in being expressly adopted into UK analysis[340]). Whilst the terminology of substitution[341], competitive price[342], market share and market power in this test are a departure from the legal definitions under the RTPA, undertakings will already be used to their meanings from market analysis carried out to prepare production, advertising, distribution etc. Their business plans and reports will set out the market in which

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[338] In 1984 the US Department of Justice attempted to formulate the relevant market. Its' merger guidelines set out what is probably the best known formulation: "A market is defined as a product or group of products and a geographical area in which it is produced or sold such that a hypothetical profit-maximising firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and non-transitory' increase in prices assuming the terms of sale of all other products are held constant." (1984 US Department of Justice Merger Guidelines, superseded by the US Department of Justice and the Federal Trade Commission guidelines on horizontal mergers, April 1997, section 1.0).

[339] OJ 1997 C371/5, 9th December 1997; Market Definition (OFT 403, March 1999) paragraph 1.3.

[340] This approach was identified as the most useful back in 1992; Market definition in UK competition policy (OFT Research Paper 1 (Prepared by National Economic Research Associates), February 1992).

[341] The starting point of market definition will generally be identification of other goods or services that can be replaced for the one under examination. It involves identifying those effective alternative choices of supply for the customers of the undertaking being investigated. If the undertakings concerned increased their prices above competitive levels (that is, it is the "hypothetical monopolist" referred to in the guidelines of the DoJ, above), would its customers still purchase their product or service or would they switch to some other– the substitute? It need not be a majority of customers who switch to a substitute, rather just enough to prevent the hypothetical monopolist from raising prices above the competitive level. This test is repeated until the point of no substitution is reached and a definition of the relevant market begins to emerge. As a general rule this substitution must take place within one year if that product is to be included in the market definition.

[342] The DGFT will look to see whether an agreement allows the parties to increase prices beyond the current levels. The basic test is evaluating the effect of a small (in the range of 5 to 10 per cent) but permanent increase in price above the competitive level (Commission Notice on the definition of the relevant market for the purposes of Community Competition law, paragraph 15). This is known as the SSNIP ("Small but Significant Non-transitory Increase in Price") test. As a general rule the competitive price for this assessment will be the current price level. However, problems do arise when applying this test (ibid, paragraph 19), where the current market price is the result of anti-competitive activity already taking place in the market (the "Cellophane fallacy", summarised by D Harbord and G von Graeventiz "Market Definition in Oligopolistic and Vertically Related Markets; Some Anomalies" (2000) 3 ECLR 151) When an undertaking raises its prices above the competitive level, these higher prices allow greater profits ("supra-normal profits") to be made. The need to earn profit is not disputed – profits form a necessary ingredient for the continued existence of undertakings, for example in order to pay dividends to shareholders and repay capital borrowed. Even supra-normal profits in the short term are not objectionable. An increase in profits on the short term will attract new entrants into that market, thus encouraging competitive and beneficial results for all (see further Assessment of Individual Agreements and Conduct (OFT 414, September 1999) paragraphs 2.6 to 2.19; and The Assessment of Profitability by Competition Authorities (OFT Research Paper 10 (Prepared by M Graham and A Steele), February 1997) paragraphs 1.3, 1.5 and Chapter 2). However, supra-normal profits earned in a particular market in the long term indicate that there is inefficiency in that market. Protected from the forces of competition, these may induce the undertaking to produce at higher costs. The undertaking in question might feel that it is doing well, but this is at the detriment of its competitors, customers and ultimately the consumer.

they operate, their share of that market and probably which other undertakings are seen as the competitors.

The alternative choices or substitutes for the customer will be examined both in terms of the other products or services available (the product market[343]) and the geographic territory of other suppliers (the geographic market[344]). When considered with the applicable time factor[345], these three dimensions establish the

[343] Paragraph 7 of the Commission's Notice provides "A relevant product market comprises all those products and/or services which are regarded as interchangeable by the consumer, by reason of the product's characteristics, their prices and their intended use." If one product is directly substitutable for another, they may be regarded as being within the same market. The application of this analysis is demonstrated by the ECJ's decision in Europemballage and Continental Can v Commission (Case 6/72: [1973] E.C.R. 215, [1973] C.M.L.R. 199.), where the ECJ annulled the Commission's finding of dominance based upon a division of the product market for metal containers into three distinct types. The Commission had, in the ECJ's view, failed to consider whether glass and other containers were substitutes for metal containers. The product market is divided by reference to demand-side and supply-side substitution. Demand side is analysed from the actions of the customers. Substitution will be possible between suppliers when a supplier can, easily change production (in the short term without incurring significant costs or risks) to the supply of another product in the event of a relative change in prices. We are looking at the position in the short term only, since in the long term (the long term being more than one year, and would not therefore be considered a substitute) the increase in price might attract new entrants into that market, subject to barriers to entry (which were themselves the subject of separate consideration to defined the types of barrier and the data available in Barriers to entry and exit in UK competition policy (OFT Research Paper 2 (Prepared by London Economics) March 1994). If a manufacturer had to make a significant investment, this would delay the possibility of substitution in the short term. The example often used is that of paper for use in publishing (Torras/Sarrio, Case IV/M166 OJ (1992) C58/20, [1992] 4 CMLR 341 where the Commission defined the relevant market based on supply side substitution). It seems that the demand-side substitution in test is favoured by competition authorities, as it is felt that it provides a quicker, clearer result. The calculation of market shares when applying the supply-side substitution test is more difficult. Problems in working out market shares might mean that suppliers may be treated as potential new entrants as opposed to existing competitors. However, both have value and in certain cases supply side substitution can produce a quicker and clearer result. In the paper example, finding that supply substitution was possible by many paper producers indicated early on in the investigation that the manufacturer in question had no market power and thus removes the need for any further analysis. The Commission Guideline on horizontal agreements (OJ 2001 C3/2, p 7) makes specific reference to the "technology market" recognising that where R&D exists, it might not only concern a new product, but also new technology. The principles of defining the relevant product market will still be applicable in defining the relevant technology market (see Chapter 6, infra).

[344] As stated in paragraph 8 of the Commission's Notice: "The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of the products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas." This second market is particularly important, as it will establish whether the competition problem is one that affects inter state trade or not, and consequently who should have jurisdiction to deal with the issues in question. It will also be relevant in assessing whether the agreement affects competition in the whole to U.K. or a part of it (section 2(7)). As with the product market, the same division of demand-side and supply-side substitution arises, with consideration also being given to imports

[345] Many markets operate within certain time scales affected by seasonal changes, daily changes and periods of temporary change. Further, as time progresses, so does the development of products. Customers might prefer to wait a short time in order to purchase a superior substitute in the future, rather than spend on what is available now – such as electronic goods. The market will be defined

relevant market. However, they are not necessarily to be read conjunctively. As the DGFT has made clear in his guidelines[346] he will not follow every step, but will look at the areas of evidence relevant to the case in hand. The availability of evidence will be a factor constraining what guides he follows[347] and what method of analysis is the most appropriate[348], but the DGFT has requested that as much detail as possible is provided when a complaint is made[349] to ensure that the process of defining the relevant market can be as comprehensive as possible. The different sources of evidence will produce a range of alternative definitions and no doubt the OFT will need to carry out further investigations. The important thing to bear in mind for the undertaking concerned, is that when asked to provide evidence, it is not simply a case of providing the most favourable definition of the market. It is better to offer the possible variants and explain which is the most relevant:

> "The Director General will...consider carefully the implications of the conceivable alternative definitions and may seek more detailed evidence. Information submitted by the undertakings will therefore be of more use if it

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by reference to a time period when it is not possible for customers to substitute between such periods and when a supplier's capacity to produce differs between such periods. This is an important consideration in new technology markets.

[346] Market Definition (OFT 403, March 1999) paragraph 1.5.

[347] The evidence required varies depending on the competition problem under investigation, but the following are relevant to a greater or lesser degree: (1) information from the undertaking itself in Form N; (2) substitution in the past; (3) consumer preferences (although this information can be misinterpreted; a high market share could be nothing more that the result of innovation and consumer demand for that new product); (5) barriers to switching to a substitute product; (6) the views of customers and competitors (customers may exert their own power in the market place, thus limiting the actions of the undertaking under investigation. This happens when the customer is able to exert pressure to keep prices down. However, these customers may also be sellers themselves and might not necessarily pass on the lower prices in their downstream markets. Thus buyer power also requires special attention as this can prove harmful to suppliers and ultimately consumers (for example, the CC's recent finding in its supermarket enquiry, for example see 3.1.1, supra); (7) size of competitors; (8) different categories of customer (some customers may be captive in that they cannot switch to a substitute); (9) different categories of use (in Hoffmann-La Roche v Commission (Case 85/79: [1979] E.C.R. 461; [1979] 3 C.M.L.R. 211) the ECJ upheld the Commission's view that the vitamins manufactured by Roche could be divided into seven different markets based on use); (10) complements (sometimes markets are defined to include not only substitutes, but compliments as well. These are products that are consumed together for example, tea and milk, or produced together for example, petrol and diesel oil (Market Definition (OFT 403, March 1999) paragraph 5.4); (11) chains of substitution; (12) primary and secondary markets. Evidence obtained for analysing supply side substitution will be similar to that mentioned above that is, looking at trends in past price, changes to market shares, together with barriers to switching production such as contractual commitments, spare capacity, technological constraints, government regulation, customer preferences and loyalty.

[348] The different methods for analysing the evidence/data, were reviewed in Quantitative techniques in competition analysis (OFT 266; Research Paper 17 (Prepared for the Office of Fair Trading by LECG Ltd) October 1999).

includes market shares under plausible alternative market definitions and an explanation of why one definition might be more relevant that another"[350]

Consequently, the amount of information required will be much greater that anything demanded under the RTPA.

(ii) Precedent

When assessing cases already considered by the European Commission and the ECJ, the DGFT will ensure that the question of defining the relevant market is dealt with in a manner that is consistent with Community law[351]. Previous investigations into the same goods or services could be utilised. They could provide useful information to speed up the analysis. However, market conditions will change over time as a result of legislation, innovation, branding/image, new entries on to the market and these changes will affect the ability to substitute.

Market analysis is here to stay. This is flexibility at the price of predictability, but it is of growing importance and stature, and is increasingly being used as the means for testing when competition problems are likely to arise.[352] The acceptance of the

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[349] Making a complaint (OFT 427, February 2000) p 4.

[350] Assessment of Market Power (OFT 415, September 1999) paragraph 4.8. Just because an undertaking has a high market share it does not automatically follow that it has the power to exploit the market. Whilst a high market share is an indicator that the undertaking exerts market power, it is not always the case. Market power will also depend on other factors such as potential competitors of strong buying power exercised by customers. If the definition is wrong, then the application of the prohibitions on the basis of market share will be fundamentally defective.

[351] Market Definition (OFT 403, March 1999) paragraph 5.16.

[352] For example, the Significant Market Power test proposed for the new framework on regulating electronic communication services based on the concept of dominant position under Article 82. (European Commission Working Document on Proposed New Regulatory Framework for Electronic Communications Networks and Services (Com(2001) 175); Commission press release IP/01/456, 28/3/01). OFTEL adopted a "market influence" test as a threshold for activating licensing conditions in order to prevent abuse (Guidelines on Market Influence (OFTEL, March 2000). OFGEM similarly based licence conditions in the wholesale electricity market with reference to market analysis (The Prevention of Wholesale Market Abuse: Guidelines for Generators (OFGEM, January 2000). Competition focused tests are the future for domestic control, with the merger reforms proposing that the assessment of competition be placed on a clearer footing, rather than relying on this to happen through an explicit public interest test (Mergers: A Consultation Document on Proposals for Reform (DTI URN 99/1028, August 1999) section 3; DTI press release P/99/690, 6/8/00; DTI press release P/2000/705, 26/10/00; Mergers: The Response to the consultation on proposals for reform (DTI, October 2000 available on www.dti.gov.uk/CACP/cp/mergers/index.htm as at 26/11/00), section 2). Surprisingly though, the legislation necessary to implement these changes would not be introduced before 2003, and only then will reform happen when

SSNIP test by DGIV, has been welcomed by Bishop, for whilst recognising it is not without difficulty, it represents a convenient way of defining the market by reference to substitution and deriving, as it does, from US techniques, this "conformity to international standards offers business less arbitrariness and more predictability, which can only be for the good".[353] This assertion adds weight to the arguments for greater comparison of all aspects of competition regulation, but Bishop does not attempt to make this point.

There are lessons to be learnt from the use of Commission precedents. The Commission's reforms for the increased reliance of market share in the treatment of vertical restraints, were criticised by Mackenzie Stewart who found that "Businesses and their legal advisers have argued until blue in the face that use of market share to determine the applicability of legislation is unduly onerous". The Commission's response was "if industry wants an economics-based approach it must be prepared to give up some legal certainty."[354] Article 9 of Regulation 2790/99 states market share shall be calculated on the basis of the market sales value of the good/service sold by the supplier, which are regarded as interchangeable or substitutable by the buyer. If this information is not available, estimates based on other reliable market information, including market sales volume may be used. The increased reliance on economists is apparent.[355] The new

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parliamentary time allows ("Merger reform will not happen until 2003" (2000) FT 7 November, 8). However, the Enterprise Bill will now include these measures in the next Parliamentary session.

[353] B Bishop "The Modernisation of DGIV" (1997) 8 ECLR 481, 484.

[354] J Mackenzie Stewart "A Flexible Friend? The proposed new regime for Vertical Restraints" (1998) 6(6) In Competition June 19, 1, 2. During the consultation process for the future treatment of vertical agreements "There was marked opposition at the Public Hearing to any use by the European Commission of market share tests." (J Nazerali and D Cowan "The Commission's Draft Communication on Distribution Agreements – Market Shares are Predictably Back on the Table!" (1998) 7 ECLR 409, 410). Business and the legal profession "...ultimately failed to convince the Commission that [the market share threshold test] would often be so unclear in practice as to be unworkable." (J Goyder "Pigeons Beware" (1999) 7(8) In Competition September 28, 1. However the Commission would argue that this method of analysis has become a developed, well known system which can be understood, following its role in the ECMR (JB Alonso "Market Definition in the Community's Merger Control Policy" (1994) 4 ECLR 195). This view is not shared by those applying it with Schroder stating that the "Commission itself has no clear conception of how to define the relevant market. Market definition is clearly not based on the substitutability of products. The Commission is more prone to use a concept of "reasonable substitutability."" (D Schroder "The Green Paper on Vertical Restraints: Beware of Market Share Thresholds" (1997) 7 ECLR 430, 431 and 432).

[355] In the consultation for reforming the treatment of vertical agreements, it was noted that "most commentators...pointed out the difficulties of defining markets and assessing market shares." (Commission Follow up to the Green Paper on Vertical Restraints p 7). However, Desai, when considering the 1997 notice felt that it could not be ignored "...that the use of econometric tools

block exemptions are based on the premise that competition law should generally only prohibit those agreements where the undertakings have significant market power. They represent a decrease in reliance on form (that has been seen to be a straight jacket in past vertical[356] and horizontal[357] regulations), but Salop questions the benefit of the safe harbour exemption approach since he finds that certainty for business will only be truly present where the business's "...advisers are able to accurately predict the [Commission's] concerns"[358] and suggests that the current potential for various market definitions enables the Commission to reach the decision it wants.[359] However it should be remembered that "...the definition of the relevant market represents only an intermediate step in the investigation."[360] Of more concern is the Commission's ability to alter its view of what is a relevant market. Great consideration was given to the "portfolio or range effects" theory in reaching its decision to block the GE/Honeywell merger. The Commission looked at the range of products that the new entity would be able to supply, as opposed to merely aircraft engines, despite having found that the theory was not relevant when it considered the merger between Honeywell and Allied Signals less than twelve months earlier.[361]

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might become central to establishing market definition, as is the case in the United States. If this forecast is correct, the practical conclusion for competition lawyers is that they should ensure they know a good statistician or economist, and educate themselves to enable them to understand the results of that person's work." (KS Desai "The European Commission's Draft Notice on Market Definition: a brief Guide to Economics" (1997) 7 ECLR 473, 477).

[356] Which ran the risk of "...exempting agreements that distort competition" Commission Follow up to the Green Paper on Vertical Restraints p 4. Where the form was satisfied, object – be it an objective or subjective test - was not an issue.

[357] Described as "...an irreconcilable tension that might exist between the economic benefits of the co-operative research and development and EC competition controls and procedure" J Kirkbride and T Xiong "Controlling research and development co-operation through EC competition controls: some concerns" (1998) 19(10) The Company Lawyer 296, 301.

[358] SC Salop "Analysis of Foreclosure in the EC guidelines on Vertical Restraints" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 23; the reality for industry is that this will lead to a degree of uncertainty given the "...questionable market definitions that the Commission has arrived at in [some] previous cases" (T Reeves and P Brentford "A New Competition Policy for a New Millennium" (2000) 11(3) ICCLR 75, 79), although there is the view that the new approach will assist legal advisers in compliance with Articles 81(1) and 81(3) (A Riley "A Revolution?: The Draft Vertical Restraints Block Exemption" (2000) European Current Law January xi, xv, with Schaub describing the guidelines as a "...uniquely comprehensive tool for competition analysis" (A Schaub, "Vertical Restraints; Key points and Issues Under the New EC Block Exemption Regulation" Speech at Fordham, p 5).

[359] Professor SC Salop's view during round table discussion at Fordham.

[360] S Bishop and M Walker The Economics of EC Competition Law (London, Sweet and Maxwell, 1999) p 47.

[361] Commission press release IP/01/298, 2/3/01; "General Electric/Honeywell" (2001) PLC April, 62.

Veljanovski is worried by this new direction:

> "The Commission has become schizophrenic about the role and significance of market definition in merger clearance...[and] increasingly avoids rigorous market definition, preferring to take literally the E.C. Market Definition Notice requirement that markets be defined as narrowly as possible, while ignoring that this must be consistent with market reality and evidence."[362]

Ahlborn, Evans and Padilla conclude:

> "by focusing on short-term demand side substitutability, the Commission fails to recognise that product innovation is the key in new economy industries: the main competitive constraint faced by producers of existing goods and services comes from new, superior products, whose time of introduction is, however, uncertain...In sum, the Commission's stance on market definition is bound to lead it to define excessively narrow markets and to frequent, though mostly unjustified, findings of dominance in new economy industries."[363]

This unpredictability, which is unavoidable in new economy industries, does illustrate the inherent dangers when defining the market, of removing predictability and clarity from the process of evaluating an agreement. Ahlborn, Evans and Padilla call for the competition authorities to keep in mind that "...competition policy is about protecting competition and not competitors or as Commissioner Monti has recently put it, "the consumer is king!"[364] The Commissioner appears to be delivering a conflicting message of what consumer means[365], but arguably

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[362] C Veljanovski "E.C. antitrust in the New Economy: Is the European Commission's View of the Network Economy Right?" (2001) 4 ECLR 115, 118; fining in the case of Vodafone/Manessmann "...the Commission slid close to claiming that the merged entity had a dominant position in a market which did not yet exist, while failing to show that it would be dominant in one that did!". See also the comments regarding the lack of economic analysis at 3.1.1, supra.

[363] C Ahlborn, DS Evans and AJ Padilla "Competition Policy in the New Economy: Is European competition Law Up to the Challenge?" (2001) 5 ECLR 156, 161 and 162.

[364] ibid, p 167.

[365] See 3.2.1, supra.

"consumer" in this context, should refer to the role of consumer in the perfect competition model, to ensure the market definition process is both just and effective.[366]

Despite its inability for precise prediction, the change to an explicit focus on market analysis is an improvement on the public interest test that judges were so unhappy about using. However, unless the potential for defining the market in terms of delivering the outcome believed to be required, for what ever (non-economic) reasons is recognised and avoided, this new approach will hinder the success of the Chapter I Prohibition.

3.2.3 Flexibility

The Chapter I Prohibition is an organic creature that in line with the teleological interpretation applied to Article 81, should be revised as policy and economic theory are tested and knowledge increases. This makes the provision of flexibility an easy win for the Chapter I Prohibition.

It has rectified the DGFT's inability to attack agreements previously approved under the RTPA where there had been a change in circumstances, vastly improving the DGFT's scope to act and is a triumph for common sense. Individual exemptions will be issued for a limited period, following which the undertakings may apply for a renewal of the exemption.[367] Where, following the grant of an individual exemption, the DGFT has reasonable grounds[368] for believing that there has been a material change of circumstances, he may cancel the exemption, vary or remove any condition or obligation, or impose one or more additional conditions or obligations.[369] He may take this same action, should he have a reasonable suspicion that the information he based his decision on was incomplete, false or

[366] This is confirmed by Commissioner Monti's most recent statement that "Actually, the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market" (M Monti, "The Future for Competition Policy in the European Union" Speech/01/340, 10/7/01, pp 1 and 2).
[367] Council Regulation 17/62, Articles 8(1) and (2).
[368] Based on the DGFT's own initiative or following the complaint of a third party (section 5(7)).
[369] Section 5(1). The DGFT will specify the time from which the individual exemption is modified or cancelled (section 5(5)).

misleading; or an obligation imposed has not been complied with.[370] If a condition attached to an exemption is breached, then the exemption is automatically cancelled without any positive action required by the DGFT.[371]

The UK follows the EC in that exemption is given for a limited period, and the parties must apply for renewal.[372] If the agreement is no longer required for the aims of the parties to be met, renewal will be refused. However, by way of warning, the Commission's latest application of market analysis in the new technology sector demonstrates how easy it is for the flexibility via exemptions to be made redundant when markets are narrowly defined. Such a narrow interpretation prevents benefits arising from the dynamic nature of the market, in that no exemption is permitted.

Also of concern is that Article 8(3) of Regulation 17/62, allowing exemptions to be withdrawn, has not yet been exercised.[373] This suggests that either undertakings are complying absolutely to the letter or agreements are not being closely monitored. These are warnings the DGFT should heed, if the flexibility provided is to be allowed to flourish in practice.

3.2.4 Deterrence

Deterrence under the Act, like the EC approach, is two fold: sanctions and remedies. However, like the Commission, the OFT are only concerned with sanctions, rather than compensating those who suffer harm.

(i) Sanctions

Where the DGFT makes a decision that an agreement infringes the Chapter I Prohibition, he may give to such persons as he considers appropriate such

[370] Section 5(4).
[371] Section 5(3). Where the exemption is cancelled because of an incomplete, false or misleading information; or failure to comply with an obligation, the DGFT may specify that the cancellation takes effect retroactively (section 5(6)).
[372] Application for extension is made by submitting Form N (The Competition Act 1998 (Director's rules) Order 2000 (SI No. 293) section 19).

directions as he considers appropriate to bring the infringement to an end[374], requiring the undertakings to modify or terminate their agreement.[375] Failure to comply with any directions, without reasonable excuse, entitles the DGFT to apply to the court for an order requiring the defaulter to make good the default within a specified time.[376] However, unlike the EC[377] the DGFT cannot impose periodic penalties in respect of failure to comply.

A decision that an undertaking has infringed the Chapter I Prohibition, may result in the DGFT requiring an undertaking to pay a penalty of up to 10% of its turnover[378] by a specified date.[379] A penalty may only be imposed in respect of an infringement committed deliberately or negligently[380], although a purely innocent infringement is subject to any other sanction. "Intentional or negligent" is the same requirement as that under Regulation 17/62, although Lane identifies a minor difference in that in the EC

> "...liability to a fine turns upon whether the infraction was intentional or negligent, whilst under [the Competition Act 1998] it turns upon whether the Director is satisfied that the infraction was committed intentionally. This may imply a more objective test under Regulation 17, and that a decision of the Director can be set aside only if he has acted (Wednesbury?) unreasonably."[381]

However, the way that the Commission has behaved in imposing fines has been challenged under Article 230, so there is unlikely to be much difference between the two regimes in practice.

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[373] A Jones and B Sufrin, op cit., p 211. See also 3.2.6, infra, where it is noted that the chances of appealing a decision under Article 81(3) in the EC regime have been very slim.
[374] Section 32(1). Directions must be in writing (section 32(4)).
[375] Section 32(3).
[376] Section 34. If the directions relate to anything done in the management or administration of an undertaking requiring directors to take positive action, the order may be addressed to the undertaking or any of its officers (section 34(1)(b)).
[377] Regulation 17/62, Article 16(1)(a).
[378] Section 36(8).
[379] Section 36(1), (6); There is a right of appeal to the CC, and the time specified for the payment of the penalty must be after the final date for an appeal (section 36(7)). Both EC fines and penalties are appealable to the CFI in accordance with Article 229 EC (Regulation 17/62, Article 17), enabling the court to change the decision reached by the Commission.
[380] Section 36(3).

Lord Kingsland had proposed an amendment to provide a defence to penalty under section 37 where the undertaking could show that it had "exercised all due diligence to avoid infringing the prohibitions."[382] This was rejected as the Government considered "...that the decision whether there is an infringement should not depend on the parties having exercised due diligence to avoid infringement...The Bill itself provides amply for the opportunity for businesses to take precautions against infringing a prohibition. In particular...firms may seek guidance or a formal decision from the director on whether agreements or conduct infringe the respective prohibitions. The effect of such guidance or decision is that immunity from penalty is conferred in respect of the agreement..."[383] Of course this was decided prior to the Commission's plans for a system of ex post control.[384]

However, Lord Borrie queried the phrase "by the undertaking"[385] as he was concerned that it would be interpreted as meaning "only the directing mind of the company", thus providing a defence where it was the junior employee who acted intentionally or negligently. Obviously this would reduce the deterrent effect of the sanctions.[386] Lord Borrie went on to discuss the facts of Ready Mixed Concrete[387] where the House of Lords said, overruling the Court of Appeal, that even though employees had acted outside their authority and contrary to instructions, as they acted in the course of their employment the contracts they had made were attributable to the companies and the companies were liable in contempt for breaching the court orders. In the judgments much was made of the fact that the companies were liable in contempt because the law of contempt does not require intention on the part of the employer, but "if the employer is supposed to be the one who has intention or is negligent, would the director be able to impose penalties

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[381] R Lane, op cit., p 348.
[382] Official Report, Third Reading, Competition Bill House of Lords, Column 1345, 5 March 1998, Lords Hansard internet.
[383] Lord Simon of Highbury, Official Report, Third Reading, Competition Bill House of Lords, Column 1346, 5 March 1998, Lords Hansard internet.
[384] The majority of queries have been dealt with informally that is, no immunity from penalty conferred, but this may well change when Regulation 17/62 is reformed, requiring the whole system of advice and immunity to be re-evaluated. See Chapter 5, infra.
[385] In section 36(3).
[386] Official Report, Consideration of Commons amendments, Competition Bill, House of Lords, Columns 1374 and 1375, 20 October 1998, Lords Hansard internet.
[387] See Chapter 2, supra.

under the new wording..."[388] Lord McIntosh of Haringey responded by saying that it was clear "...from the principles set out in the decision of... Ready Mixed Concrete (No2) that an employee, acting for an undertaking within the scope of his employment, who makes a prohibited agreement will be doing so as the company. The company will therefore be in breach of the prohibition and be liable accordingly."[389] At no time was it suggested that the US approach of imposing personal liability on individuals be followed, in respect of breaches of the Chapter I Prohibition.

Turnover is defined by SI[390] and, like the EC, is calculated by reference to the undertaking's preceding business year, although it relates only to UK (not worldwide) turnover.[391] The Guidelines[392] draw on EC law, drawing extensively from the Commission's notices and decisions,[393] and developing these into a five-step approach[394]. The Government believed that they "...may be able to improve

[388] Official Report, Consideration of Commons amendments, Competition Bill, House of Lords, Column 1375, 20 October 1998, Lords Hansard internet.
[389] ibid, Column 1376.
[390] The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000 No. 309).
[391] The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000 No. 309), Schedule, Article 3.
[392] Section 38; Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty (OFT 423, March 2000).
[393] The European Commission's power to impose penalties is derived from Council Regulation 17/62, and requires any penalty to be assessed having regard to the gravity and duration of the infringement. Its policy is enshrined in a Notice published in December 1995 and a further more detailed notice published in January 1998 (Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation 17/62 and Article 65(5) of the EC Treaty [1998] OJ C9/3). Gravity depends upon the nature of the infringement, its actual impact on the market and the size of the relevant geographic market. The 1998 Notice makes it clear that the amount of fine may vary as between participants to an infringement of Article 81(1), and that the largest fines are likely to be imposed upon the largest undertakings, as they have the resources and expertise to recognise that an infringement has taken place. Once the basic amount has been determined, it will be multiplied by a factor representing the duration of the infringement. The amount of fine given by the formula "gravity plus duration" may then be altered by aggravating or mitigating circumstances. This moves away from the concentration on turnover as the main criteria for calculating the fine and attempts to improve the transparency of the method employed. Jones and Sufrin find that it is still impossible for undertakings to calculate precisely the fine that they will suffer because of the framing of the criteria in discretionary language (op cit., p 916), but to provide an accurate system of calculation provided undertakings the opportunity to be certain in any cost-benefit analysis it undertakes as part of a decision making process as to whether it should enter into an anti-competitive agreement. Wils argues that any fining policy should accept that companies operate such policies and therefore the criteria for calculating the amount of fine should ensure that the sum is greater than the benefits derived (WPJ Wils "The Commission's new method for calculating fines in antitrust cases" (1998) 23 ELRev 225, quoted by A Jones and B Sufrin, op cit., p 908).
[394] Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty (OFT 423, March 2000) paragraph 2.1: (1) the appropriate percentage of relevant turnover is ascertained, by reference to the seriousness of the nature of the infringement; (2) the duration of the infringement

on commission practice. For example, I believe that the OFT has an ambition to be more predictable in its fining policy than the commission."[395] The Guidelines improve transparency, but too much transparency here is counter productive as it could enable undertakings to perform a cost-benefit analysis of the likely penalty versus the gain from the anti-competitive agreement.[396]

Mr Nick Gibb was concerned that the fine could triple from 10 per cent. to 30 per cent. as a result of the 3 years window, when no mention of this had been made during the passage of the Competition Bill through Parliament.[397] He also disagreed with the definition of turnover as it would discriminate against companies that traded in high value or luxurious items[398], and argued that group turnover should not be taken into account as "A group might have a varying proportion of minority holdings, and some minority holdings within the group might have no interest in the offending subsidiary that generates the fine."[399] Notwithstanding these objections, the definition as designed is justified as it prevents undertakings from structuring themselves in a way as to avoid the impact of the financial penalties under the Act. The aim of the fining policy, after all, serves not just as punishment, but as an effective deterrent.

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is calculated, with an annual multiplier being used; (3) any profits made by the undertaking are taken into account, as are profits made by the undertaking in other markets; (4) once the level of the fine has been determined by reference to criteria (1) to (3), the DGFT will consider whether there are any aggravating factors (for example, leadership or repeated infringements (Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty (OFT 423, March 2000) paragraph 2.11)) or mitigating factors (for example, unwilling participation in the cartel, willingness to participate in the DGFT's investigation (Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty (OFT 423, March 2000) paragraph 2.12) or compliance programme "the fact that a compliance programme is in place may be taken into account as a mitigating factor when calculating the level of penalty" (How your business can achieve compliance (OFT 424, August 1999) p 13)); and (5) the fine as calculated under (4) is then, if necessary, to be adjusted downwards so that it does not exceed 10% of the undertaking's turnover (This can be 10 per cent of turnover for up to the last three years, but not before 1 March 2000 (if the infringement has gone on that long) (The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000 No. 309), section 3)).

[395] Lord Simon of Highbury, Official Report, Report Stage 2, Competition Bill House of Lords, Column 359, 19 February 1998, Lords Hansard internet.

[396] See footnote 394, supra.

[397] Official Report, Fourth Standing Committee on Delegated Legislation, Draft Competition Act 1998 (Land and Vertical Agreements, Determination of Turnover for Penalties) Order 2000, House of Commons, Part 2 p 4, 3 February 2000, House of Commons Hansard, internet.

[398] ibid, Part 2 pp 5 and 6.

[399] ibid, Part 2 p 6.

Special provision is made for "whistle-blowers"[400]. The UK adopts the US approach (minus the imprisonment of Directors) which is more lenient that the EC notice[401] with its three levels of reduction based on the amount of co-operation and the actual amount left very much to the Commission's discretion[402]. Under the UK leniency programme, total immunity from fine can be obtained after the OFT has started to investigate (unlike the EC). The UK also differs in that it has followed the US example of using immunity agreements in the form of draft letters setting

[400] Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty (OFT 423, March 2000) paragraphs 3.1 to 3.11; "...modelled on the DoJ policy rather than on the EC one" (M Bloom "The New UK Competition Act" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 16). Although MacNeil finds that the "...conditions stipulated in the Director General's guidance for the granting of total immunity or the reduction of fines are similar to those adopted by the European Commission"[400], the differences are very much real and explicit.

[401] 1996 Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C207/4, designed to "...promote and exploit that inherent instability of cartels" MA Peña Castellot "An overview of the application of the Leniency notice" (2001) 1 Competition Policy Newsletter February, 11.

[402] Since its introduction, it has been applied in only seven cases, all of whom received a reduction of between 10 and 50 per cent, under section D of the Notice (MA Peña Castellot "An overview of the application of the Leniency notice" (2001) 1 Competition Policy Newsletter February, 11, 12 to 13). This is much lower than the US experience where "...applications for corporate amnesty...rate closer to two per month" (L Brokx "A Patchwork of Leniency Programmes" (2001) 2 ECLR 35, 38, footnote 2). This lack of successful leniency cases, with no one receiving more that a 25 per cent reduction in fine was predicted by Hornsby and Hunter, who argued that without either the imposition of criminal penalties or the removal of the requirement of the information provided to the fresh or decisive, the balance will remain against blowing the whistle (S Hornsby and J Hunter "New Incentives for "Whistle-blowing"; will the E.C. Commission's Notice Bear Fruit?" (1997) 1 ECLR 38, 41), although other firms have received a reduction of fines for actively providing evidence to confirm the infringements or passively co-operating after the Statement of Objections is issued by not contesting the facts. This has been applied in the majority of cartel cases (MA Peña Castellot "An overview of the application of the Leniency notice" (2001) 1 Competition Policy Newsletter February, 11, 14), but its ability to unfairly discriminate is questioned by Van Bael who find that "when substantial rebates are granted such as in Cartonboard [Commission Decision 13/7/94, OJ 1994 L234/1], a party with a high degree of culpability (who chooses not to defend itself) may end up with a fine considerably lower than a party who is shown to have played a very minor role(if any) in the conduct complained of, simply because this other party has decided to use its fundamental right to defend itself." (I Van Bael "Fining à la Carte: The Lottery of EU Competition Law" (1995) 4 ECLR 237, 242), although Spink finds that when "an undertaking which expressly sates that it is not contesting the factual allegations on which the Commission bases its objections may be regarded as having furthered the Commission's task of finding and terminating an infringement" thus justifying a reduction in the fine imposed (PM Spink "Recent Guidance on Fining Policy" (1999) 2 ECLR 101, 105) and in any event the main instigator or those playing a determining role in the cartel do not qualify for a reduction in fine under the EC Leniency Notice (Section B, paragraph (e)). But without safeguards, this remains objectionable since undertakings could factor in the cost of a reduced fine into the decision of whether to go ahead with the anti-competitive agreement. The "Dutch Minister of Economic Affairs has proposed that the E.C. Leniency Notice be amended to include protection and awards to employees who blow the whistle on their employers." (L Brokx "A Patchwork of Leniency Programmes" (2001) 2 ECLR 35, 42). The draft Notice recently published follows more closely the UK/US style (although the Commission only refers to its proximity with the US Notice), by increasing transparency and enabling complete immunity (in theory). However, "awards" for employees are not included in the draft (IP/01/1001, 18/7/01; Draft Notice available on www.europa.eu.int/comm/competition/antitrust/leniency as at 19/7/01 (see Chapter 5, infra).

out the conditions for the reward of immunity. Brokx finds this advantageous since parties will know what to expect beforehand thus making an approach to the OFT more attractive compared to the EC situation where "Companies might be more willing to make use of the E.C. Leniency Notice if they had more legal certainty as to the outcome."[403]

The first member of a cartel to come forward and provide full information as to the cartel's activities is potentially immune from all fines, providing that the undertaking continues to co-operate in the DGFT's investigation[404]. Other cartel members who subsequently admit to participation (before the rule 14 notice is issued) and assist the DGFT by providing evidence of the cartel's activities may benefit from a reduction in their fine of anything up to 50 per cent[405]. The UK have also followed the US notion of "amnesty plus", where an undertaking may gain an additional reduction in penalty imposed for the first cartel, by providing information that qualifies for immunity in relation to a second cartel.[406] Whistle-blowing is encouraged, in addition to the draft letters setting out how the agreement between the OFT and undertaking will work[407], by the provision of a "whistle-blowing hotline".[408] Further "[t]he amount of a fine may also be reduced to take account of the fact that the undertakings in question may have been fined for the same agreement by the European Commission, or a court or another Member State under Article 81"[409]. This is a sensible approach which Bloom describes as "possibly unique"[410], and in taking into account penalties imposed by other Member States, the Act demonstrates again an intention to accept other Member

[403] L Brokx "A Patchwork of Leniency Programmes" (2001) 2 ECLR 35, 42.
[404] Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty (OFT 423, March 2000) paragraph 3.4. Once an investigation has commenced, it is still possible for the first to come forward to receive total immunity, but this is discretionary (paragraphs 3.6 and 3.7).
[405] Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty (OFT 423, March 2000) paragraph 3.8.
[406] "...a significant proportion of the DoJ leniency cases involves amnesty plus – which says something about the extent of cartel activity!" (M Bloom "The New UK Competition Act" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 18).
[407] The conditions are set out in the "Draft letter for Full Leniency" and the "Draft letter for Partial Leniency", www.oft.gov.uk/html/comp-act/leniency/letter-1.htm and www.oft.gov.uk/html/comp-act/leniency/letter-2.htm as at 16/05/00.
[408] Leniency in cartel cases (OFT 436, February 2001), p 6.
[409] Section 38(9); Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty (OFT 423, March 2000) paragraph 2.15.
[410] M Bloom "The OFT's Role in the New Regime" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 15.

States' findings, which bodes well for devolution. In respect of the international perspective, a decision to co-operate with a competition authority should be considered as a decision to co-operate with all who could have jurisdiction, since working with one authority does not prevent another launching an investigation.

Section 39 provides limited immunity from fine for "small agreements", that is, where the applicable turnover does not exceed £20million.[411] The comfort that this provides goes some way to proving the fears of those who find that market share tests are not particularly helpful for business. Immunity in respect of fining can be withdrawn,[412] although an undertaking which has acted on the reasonable but mistaken assumption that it qualified for this limited exemption (for example,, by reason of a miscalculation of turnover) is in any event given exemption[413]. There is no EC equivalent of this although an agreement between small and medium-sized undertakings which is intended to provide countervailing power against a dominant undertaking will rarely be capable of appreciably affecting trade between Member States.[414]

The Commission is happy with its fining regime[415], imposing fines in 2000 "...totalling 199.5 million euros, an increase of 77.6 per cent on 1999."[416] More than half of this amount was in respect of the cartel decision taken against five producers of lysine "...who were fined a total 110 million euros."[417] However,

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[411] The Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 200 No. 262). This does not apply to price fixing agreements (Section 39(2)). The statutory instrument refers only to turnover, and applies to an agreement between undertakings the combined applicable turnover of which for the business year ending in the calendar year preceding one during which the infringement occurred does not exceed £20 million (the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulation 2000 (SI 2000 No. 262), section 3).
[412] Section 39(4) to (8). Immunity does not prevent other directions being given in respect of the agreement and is not to be confused with the de minimis principle.
[413] Section 36(4).
[414] Notice on agreements of minor importance (OJ 1997 C372/13), Article 19.
[415] White Paper on the Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty (28/4/99), paragraph 123.
[416] Commission press release IP/01/698, 15/05/01. The Commission has recently imposed a fine of 219 million Euros on eight steel making companies for price fixing in the steel mini-mill industry ("Brussels fines steel cartel £133 million" www.ft.com, as at 19/7/01).
[417] Ibid; XXXth Report on Competition Policy 2000 (SEC (2001) 694 final, 7/5/01) pp 25 to 27. Opel Nederland were fined 43 million euros for obstructing exports of new cars to other Member States; JCB Service was fined 63.9 million euros for operating exclusive distribution agreements that partitioned the market by preventing sales to other territories; and the fifteen liner shipping companies making up FETTCSA (Far East Trade Tariff Charges and Surcharges agreement) were fined 7 million euros for their (now defunct) agreement prohibiting discounts (pp 25, 28 and 29).

Lane questions its effectiveness by comparing the US approach, where Hoffmann-La Roche received a "...[record] fine of $500 million (£312 million)...for monopolistic price fixing, personal fines ($150,000 and $100,000) and terms of imprisonment (five and four months) visited upon two executives of the company (both Swiss citizens and residents)."[418] On the domestic level, the shift from no fine for non-compliance in the first instance, to a system of fining up to a potential 10 per cent of turnover (without requiring a previous order of the court or an undertaking to be given) is enough to make the majority of companies take note of the new regime. However, the OFT must not be afraid of using these powers to fine, up to the maximum where deserved. Any practice of not fining in the first instance, or imposing low fines, will send out the wrong message and be counterproductive to the deterrent effect. A useful development of both systems would be along the lines of Wils's suggestion to relate the amount of fine to harm caused.[419] This would represent a policy that would put right the welfare loss caused under the model of competition. However, it is submitted that whilst the proceeds of fines remain with the authority imposing them, this would not put the market back to equilibrium. For the equilibrium to be restored, all those harmed must be compensated, which in the real world is an unrealistic proposition. The better option would be to make it easier for those harmed to have their losses made good. However, until such time as this happens the aim of fines must be to deter, and the use of the proceeds must be put to detecting and stamping out other infringements, to ensure that welfare loss is minimised and the Chapter I Prohibition can be championed as the appropriate mechanism for punishing anti-competitive agreements.

(ii) Damages

It is submitted that this is the most unquestionable failing of the Competition Bill debate. Whilst the problems of the rule of reason has been left open to abuse in the domestic regime, the Government can hide behind the excuse that this was not

[418] R Lane, op cit., p 177. However, the Commission has just fined Hoffmann La Roche 462 million euros (approximately £288 million) for its part in the Vitamin Cartel, where the total fine imposed on the cartel participants totalled a record 855.22 million euros ((2001) FT 21 November, 25
[419] WPJ Wils "The Commission's new method for calculating fines in antitrust cases" (1998) 23 ELRev 225, quoted by A Jones and B Sufrin, op cit., p 908).

raised as an issue in the consultation or debate. However, the availability of damages was on everyone's mind, in light of the problems experienced in the EC regime.

Article 81 has horizontal direct effect in that it produces rights between individuals.[420] The Commission cannot award damages. Private actions under Article 81 are left to national courts, which must ensure that the rules and procedures governing the claim are no less favourable than those governing analogous domestic claims and must not make it impossible or excessively difficult to obtain redress.[421] Those brining a claim can rely on the findings of the Commission in domestic proceedings[422]. Against this background, it would have been thought that the award of damages for a breach of the prohibition would be straight forward; after all, the RTPA provided for a breach of statutory duty.[423] In its present state calls for the EC to invoke the treble damages approach of the US system[424] are pointless, when even the basic approach to awarding damages cannot be agreed upon.

Jones finds many reasons given by Advocate General Jacobs objecting to national courts awarding damages, the majority of which point to a lack of coherency amongst Member States as to whether damages are available under national

[420] Case 127/73 BRT v SABAM [1974] ECR 51, [1974] 2 CMLR 238.
[421] R Lane, op cit., p 197 traces the development of this requirement.
[422] Iberian UK Ltd v BPB Industries plc [1997] 4 CMLR 33 where Laddie J found that if the plaintiffs had to prove all the relevant facts from scratch without reliance on the Commission's findings it would be almost impossible for them to ever recover any compensation and as a matter of policy "...English courts should respect the decision of Community institutions in order to ensure consistency of treatment and avoid the risk of conflicting decisions from the Community and national courts and authorities" (DG Goyder, op cit., p 515). As to the legal basis for this decision, whilst issue estoppel was not an option for the court since the Commission's proceedings were administrative rather than civil, "...as a matter of public policy, a similar result could be reached. The High Court is influenced by the practical reality and the Commission and the European court proceedings had already taken nine years. A plaintiff seeking damages in a national court for the infringement of Article [82] E.C. would face another decade of litigation if he could not be able to rely on the Commission decision in the national proceedings" (RP Gerrits and K Muylle "The Effect of a Commission Infringement Decision in a National Action for Damages" (1997) 22 EL Rev June, 265, 269).
[423] Although Whish expressed concern abut the reliance on breach of section 35(2) of the RTPA as a means of claiming breach of statutory duty for Article 81 infringements, under the principle of non-discrimination or equality of treatment, since this section was limited by the focus on registrability and the exclusion of vertical agreements, thus providing no real comparable to invoke the principle (R Whish "The Enforcement of EC Competition Law in the Domestic Courts of Member States" (1994) 2 ECLR 60, 63).
[424] Section 4, Clayton Act 1914.

competition rules, issues of standing and differences in interlocutory proceedings, the risk of forum shopping and in any event, "...courts are not appropriate agencies to decide complex issues of fact and policy present in the competition field."[425] The domestic experience of courts adjudicating on anti-competitive agreements has clearly been less than satisfactory[426]. Even though the awarding of damages is a remedy that the court is used to, in competition cases there is inertia in the establishment of a guiding principle. The lack of court awards is a problem even where the competition breach has already been established by the competition authorities investigations and despite guidelines established to aid the national court when an Article 81 issues is raised.[427]

Domestic courts have resisted awarding damages to an third party[428]; writers all agree that the authority is sparse with no clear judgment on the point.[429] Goyder finds there "...is no longer any doubt that plaintiffs bringing actions under Articles [81] and [82] in UK courts have the right to claim damages, even if the precise cause of action upon which they must rely has not been authoritatively determined."[430] This should not present a problem, for as Steiner concludes, "...from the point of view of Community law it is of little relevance which remedy in which areas of law is deemed to be equivalent, as long as it is applied without discrimination and is effective, both to protect individuals' community rights and to

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[425] CA Jones Private Enforcement of Antitrust Law in the EU, UK and USA (Oxford, Oxford University Press, 1999) pp 88 and 89, quoted by A Jones and B Sufrin, op cit., p 962.
[426] Chapter 2, supra.
[427] Case C-234/89 Delimitis v Henninger Bräu [1991] ECR I-935, [1992] 5 CMLR 210.
[428] Although Jones an Sufrin find that "successful actions have, however, been brought in Germany and France: see for example, Metro-Cartier Düsseldorf Court of Appeal, 20 Dec. 1988 and Euro Garage v Renault, Cour d'Appel, de Paris, 23 Mar. 1989." (op cit., p 960), these are the exceptions to the inert state that has developed.
[429] A Jones and B Sufrin, op cit., pp 977 to 991; DG Goyder, op cit., pp 510 to 518; R Lane, op cit., pp 197 to 204. The role of the ECJ in requiring a national court is considered by Arnull, who finds that the cases point to inconsistency with interventionism ebbing and flowing to varying degrees, creating uncertainty; although this focus is very much based on the development of State liability, it demonstrates the difficulty in pointing to a concrete verdict on the award of compensation to third parties (A Arnull, op cit., pp 142 to 189). This is at odds with other developments in the national courts to promote the rights of individuals seeking to rely on EC law (for example, in R v (1) Durham County Council (2) Sherburn Stone Co Ltd (3) Secretary of State for the Environment, Transport & The Regions, ex parte Rodney Huddleston (2000) CA 8/3/00, where it was held that an individual was not precluded from enforcing a Directive against a State solely because of the consequence to other individuals (in this case a company that would lose the benefit of the planning permission that is had obtained)).
[430] DG Goyder, op cit., p 515.

secure compliance, by public and private parties, with EC law."[431] Jones and Sufrin find that the little authority there is, suggests that the award of damages is based on a breach of statutory duty[432], following the majority decision in Garden Cottage Foods Ltd v Milk Marketing Board[433], although they recognise that others find the correct courses of action to be a claim under the tort of unlawful interference with trade or business, conspiracy, or a new tort.[434] They conclude however, that the best course of action to adopt would be breach of statutory duty and draw on Jones's argument that Francovich[435] dictates that damages should be available to all breaches of EC law, whether committed by a Member State or private entity, which Jones finds is supported up by the Advocate General's Opinion in Banks v British Coal Corporation.[436] Steiner reaches the contrary

[431] J Steiner, Enforcing EC Law (London, Blackstone Press Ltd, 1995), p 59.

[432] op cit., p 978. This is supported by DG Goyder who finds that the plaintiffs claim in Garden Cottage "...could be categorized in English law probably as a breach of statutory duty 'imposed not only for the purpose of promoting the general economic prosperity of the Common Market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty.' (op cit., p 517); and M Furse who finds that "...although there has been inevitable debate about the characterisation of the right of action as being one for the breach of statutory duty...this pigeon-holing of the action, which is a consequence of the dualist approach taken by the United Kingdom to international law, is of little significance, and the route taken to obtain a Community-derived remedy is less important than the fact that the remedy is available." (op cit., p 94). Whish finds that following Garden Cottage, cases "...have tended to assume that damages are available, although there has yet to be case...in which a court has actually made an award; it is understood that some cases have been settled out of court." (R Whish "The Enforcement of EC Competition Law in the Domestic Courts of Member States" (1994) 2 ECLR 60, 63).

[433] [1984] AC 130.

[434] op cit., p 980; and M Furse, op cit., pp 291 to 295. Steiner prefers that the dissenting judgment of Lord Wilberforce in Garden Cottage in that finding "...an action prohibited under Community law automatically becomes a tort or breach of statutory duty was...'a conclusionary statement concealing a vital but unexpressed step'" and points to the Court of Appeal's findings in Bourgoin SA v Ministry of Agriculture, Fisheries and Food ([1985] 3 All ER 585) that a breach of Article 30 was akin to ultra vires (J Steiner, op cit., p 102). However there are writers who find the position clear cut, such as Goh who finds that the difficulty that statute does not provide for private remedies for breaches of Community competition law "was laid to rest when the House of Lords decided in Garden Cottage...that a breach of Article [82] can be categorised as a breach of statutory duty...[entitling] the successful complainant to damages." (J Goh "Enforcing EC Competition Law in Member States" (1993) 3 ECLR 114, 115), although Goh concedes that the "...United Kingdom is far from having a developed anti-trust framework where private remedies can be made available to private individuals whose interests have been injured by monopolistic or anti-competitive practices. If competitiveness and efficiency are to be the orders of the day, it must be able to provide a system of remedies on which private individuals can rely to enforce their rights." (p 117). Similarly MacCulloch and Rodger find that Wilberforce's argument is "now clearly flawed" in light of Factortame and Banks (AD MacCulloch and BJ Rodger "Wielding the Blunt Sword: Interim Relief for Breaches of EC Competition Law before the UK Courts" (1996) 7 ECLR 393, 401).

[435] Cases C-6 & 9/90 Francovich v Italy [1991] ECR I-4367, [1993] 2 CMLR 66, clarified in Cases C-46 & 48/93 Brasserie du Pêcher SA v Germany and R v Secretary of State for Transport, ex parte Factortame Ltd [1996] ECR I-1029, [1996] 1 CMLR 889.

[436] Case C-128/92 [1994] ECR I-1209, [1944] 5 CMLR 30. However, this view, whilst preferred and more satisfactory in achieving development of effective redress, is novel in that it has not been considered in other works, for example, the works of Arnull (op cit.), Steiner (op cit.), Boch (op cit.)

conclusion, finding that "...persons seeking damages for breaches of EC competition...rules should use and develop existing torts rather than indiscriminately applying the much criticised remedy of breach of statutory duty."[437]

The situation in the EC regime was further confused by the different treatment afforded parties to an agreement and those who are harmed as a consequence of an agreement. Originally, a party to an agreement prohibited by Article 81 could not recover damages for loss suffered; the prohibited provisions were void and illegal: the *in pari delicto* rule.[438] However, this point has now been the subject of an Advocate Generals Opinion in Courage Ltd v Crehan[439] which was followed by the

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and Hartley (op cit.) all examine Francovich and its possible developments in great detail, but none consider the possibility of horizontal effects. That said, support for the argument put forward by Jones can be seen even before the judgment in Banks, with Whish describing Factortame as of "major significance" for competition law remedies (R Whish "The Enforcement of EC Competition Law in the Domestic Courts of Member States" (1994) 2 ECLR 60, 64). In Banks, Advocate General Van Gerven found that the question of whether Francovich set a precedent extending to allow one individual to claim against another individual for damages in respect of a breach of a Treaty provision having direct effect in the relations between them, *must be answered in the affirmative* (paragraphs 71 and 73) concluding that the "national court is under an obligation to award damages for loss sustained by an undertaking as a result of the breach by another undertaking of a directly effective provision of Community competition law" (ibid, p 74) and further "the amount of compensation payable by the Community should correspond to the damage which it caused." (ibid, p 82).

[437] J Steiner, op cit., p 104; although later goes on to recognise the need for effective enforcement in competition law, which could be aided by national courts awarding exemplary damages (p 114).

[438] Gibbs Mew plc v Gemmel (CA) [1991] 1 EGLR 112. Although the agreement was de minimis, the Court of Appeal made several observations of which Maitland-Walker is concerned "Article [81] was designed and its scope limited to the protection of competitors and did not provide any remedy to parties to a beer tie "who were the cause not the victims of the distortion, restriction or prevention of competition". In doing so the Court of Appeal ignored the ruling in Delimitis that the responsibility of the beer tie lay with the landlord and not the tenant in the pub lease. Secondly, the court of Appeal ignored all the evidence offered by Article [81](3) and the E.C. Commission's group exemptions demonstrating the objective of protecting the freedom of the contracting party in the weaker position....the court failed to have regard to the fact that responsibility for the illegality rests primarily with the landlord who imposed a standard form agreement on tenants on the basis that the terms were non-negotiable." (J Maitland-Walker "Have English Courts Gone Too Far in Challenging the effectiveness of E.C. Competition Law?" (1999) 1 ECLR 1, 3).

[439] Case C-453/99, Courage Ltd v Crehan Advocate Generals Opinion 22/3/01. The Advocate Generals Opinion changes the conclusion reached in Gibbs for it was stated that Article 81 must be interpreted as meaning that a party to a prohibited lease may rely on the nullity of that lease in a national court; Community law *does preclude* a rule of national law which prevents a party subject to a clause infringing Article 81 from recovering damages for the loss suffered by it on the sole grounds that it is a party to that contract; Community law *does not preclude* a rule of national law which provides that courts should not allow a person to plead and/or rely on his own illegal actions as a necessary step to recovery of damages, *provided* that it is established that this person bears no more than negligible responsibility for the distortion of competition. The responsibility borne is negligible if the party is in a weaker position than the other party such that it was not genuinely free to choose the terms of the contract (paragraph 79). This latest condition is consistent with the finding of AG Van Gerven in Banks that Community law does not prevent a national court from

ECJ[440]. Further, when one party tries to rely on the unenforceability of a term (because of voidness) has resulted in the question of whether this unenforceability is for all time or is a fluid concept that can cease when the voidness ceases[441]. Preece finds:

> "The Court of Appeal's judgment in *Passmore* shows a sophisticated understanding of the intention and application of the Article 81(1) prohibition, recognising that it is fundamentally effects based....Moreover, declaring that the infringing agreement was dead for all time would arguably be disproportionate to the aim of Article 81(2)."[442]

However Maitland-Walker criticises the judgement for failing to indicate:

> "...at what point the assessment as to voidness or otherwise needs to be made. This will make it extremely difficult for anyone seeking to challenge an agreement in the national courts, since the point at which the anti-competitive assessment is to be made will never be known and it would appear that the alleged infringer would be able to avoid the consequences of invalidity merely by altering the economic circumstances prior to trial."[443]

In Passmore, the acquisition of the freehold reversion by Morlands plc is better viewed as a new agreement.[444] The old one would have been void, and the new one valid. The new agreement could still potentially exceed de minimis, at which stage the restrictions would be. However, Passmore would have had a claim against its original landlord, Inntrepreneur Pub Company limited, in light of the Advocate Generals Opinion in Crehan. Maitland-Walker's concern about the Passmore and Gibbs cases includes the fact that they provide no incentive for parties to blow the

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ensuring that the protection of rights guaranteed by the Community legal order does not result in the unjust enrichment of those entitled and would satisfy Maitland-Walker's concerns following Gibbs.

[440] www.curia.eu.int as at 20/9/01.

[441] Passmore v Morland [1999] 1 CMLR 1129.

[442] S Preece "Passmore v Morland: I'm not bitter" (2000) 9 ECLR 433, 436.

[443] J Maitland-Walker "Have English Courts Gone Too Far in Challenging the effectiveness of E.C. Competition Law?" (1999) 1 ECLR 1, 2.

[444] Support for this is found in G Cumming "David John Passmore v. Morland and Others" (2000) 5 ECLR 261, 265; if interpreted this way, the judgment would have provided legal certainty and have meant that the original party would remain liable for the breach.

whistle and further "...the whistle blower will not even be allowed in practice to discover whether there is an anti-competitive practice."[445] However, the whistle-blower will receive immunity from fine for blowing the whistle, and advice on whether there is an anti-competitive can be obtained through the appropriate legal adviser.

Although European court rulings are not binding, the history points to them being followed in almost all cases[446]. Consequently, an argument based of lack of precedent or fear as to how the system for awarding damages will develop is not acceptable. Accession to the EC obliged the domestic courts to give effect to obligations and remedies arising by the Treaty;[447] it was intended to confer rights upon individuals, which would become part of their legal heritage[448]. Lane finds the domestic enforcement of Article 81 through the award of damages "astonishingly underdeveloped"[449] in light of the BRT v SABAM decision. This cannot be argued with - to have acquiesced in the inability of those harmed to recover their losses in a timely and effective manner, points to a fundamental lack of acceptance of the losses caused by anti-competitive agreements. The current position is devoid of legal certainty[450]. The rut in which we have become stuck runs contrary to the principle of effectiveness, depriving those harmed of a remedy.[451] Whilst an undertaking would always be advised of the prospects of

[445] J Maitland-Walker "Have English Courts Gone Too Far in Challenging the effectiveness of E.C. Competition Law?" (1999) 1 ECLR 1, 4.
[446] TC Hartley The Foundations of European Community Law (Oxford, Oxford University Press, 1998, 4th ed.) pp 76 and 76; Hartley noting that judgements are normally followed, although where they are not, they are ignored as opposed to overruled, except in the exceptional cases like HAG GF (Case C-10/89, [1990] ECR I-3711).
[447] Section 2(1), European Communities Act 1972.
[448] Case 26/62 van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1.
[449] R Lane, op cit., p 204.
[450] A "...fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly" which is of "...particular importance in economic law [since] economic and commercial life is based on advance planning so that clear and precise legal provisions reduce transaction costs and promote efficient business." (T Takis The General Principles of EC Law (Oxford, Oxford University Press, 1999) p 163. The case for a concrete ruling on damages is not calling for legal certainty so that undertakings can carry out their cost-benefit analysis, but rather so that any arguments of interference with legitimate expectations and/or retroactivity do not defeat the claimant in the court room.
[451] J Steiner, op cit., pp 42 and 43; or in the least has made it excessively difficult for individuals to rely on their rights under Article 81; this is in contravention of the requirement of an effective remedy (T Takis, op cit., p 279). In his review of the possible approaches to find a basis for awarding damages, Whish found this argument that Member States must not render the enforcement of community rights impossible or excessively difficult to be "one of the more promising" (R Whish

being sued and that advice may have a deterrent effect, an injured third party must find the current regime disheartening to say the least[452], thwarting the will to bring such a claim. This raises doubts as to whether the domestic route was the right one after all. Commissioner Monti is concerned about this aspect of competition law, finding that national law "...may need revisiting, at least in those Member States where claims for damages for competition law violations are difficult to bring."[453] Those who have suffered loss might decide to shop around amongst the relevant jurisdictions, for the one most likely to give the remedy they desire. This forum shopping can be legitimate[454] since the third party might be hurt commercially in a number of Member States and will have to weigh up the pros and cons of balancing the amounts he can recover against the costs of the actions involved. This is yet one more reason why the domestic courts must establish a firm basis for damages resulting from an anti-competitive agreement. The domestic reform provided an ideal opportunity to grasp the nettle and take the lead.

(iii) The Chapter I Prohibition Damages Puzzle

The 1988 consultation stated that "Article [81] has direct effect and national courts may grant injunctions for infringements; moreover a majority of the House of Lords has taken the view that damages are available for breach of the competition rules in the treaty."[455] In 1994, Whish identified a lack of direction and the possibility that the ad hoc adaptation of existing legal bases (so as to find a peg to hang the right to damages on) would lead to "warnings of floodgates".[456] The fact that the ability to claim damages remains an issue following the Competition Act 1998 is unjustifiable.

"The Enforcement of EC Competition Law in the Domestic Courts of Member States" (1994) 2 ECLR 60, 63).

[452] Without even taking into consideration the costs of litigation or the knowledge of EC law needed; C Boch, op cit., p 40.

[453] M Monti "Speech to the Nordic Competition Policy Conference" Speech/00/295, 11 September 2000. These difficulties will be amplified following devolution (see Chapter 5, infra).

[454] Rather than forum shopping to find the most amenable court.

[455] Review of Restrictive Trade Practices Policy; A Consultative Document, (Cm. 331, March 1988), Annex F pp 36 and 37.

[456] R Whish "The Enforcement of EC Competition Law in the Domestic Courts of Member States" (1994) 2 ECLR 60, 64 and 65.

The confirmation that "Where third parties would have had rights under the old regime, the Bill preserves them; they will continue to be able to take action for breaches of statutory duty under the RTPA and the Resale Prices Act 1976"[457] is bizarre considering that no one ever actually successfully brought an action before the court.[458] This in itself should have been enough for the Government to take positive legislative action under the Competition Act 1998 to deliver an effective remedy. Leaving the question of damages to be pinned to EC jurisprudence (which also had not produced a successful award of damages in the UK), illustrates how naïve the Government were. In its draft Bill[459] the Government rejected the idea of the CCAT being the appropriate tribunal to hear private law actions, instead opting for the courts to safeguard "...the rights of those who may be damaged by anti-competitive behaviour"[460], implying that the courts were actually protecting these rights.[461] The domestic courts' experience of not recognising third party rights was blatantly left unchecked and unchallenged, allowing the judiciary to continue to re-write what was intended. In addition to the problems noted above, Lane is concerned by the Court of Appeal in Gibbs "expressly ignor[ing] a Commission Notice (OJ 1984 C101/2) on the interpretation of block exemption 1984/83 on exclusive purchasing agreements (OJ 1983 L173/5) on the ground that, as a mere notice, it was insufficiently persuasive."[462] In Mid Kent Holdings where General Utilities was in breach of its statutory duty and had caused damaged to Mid Kent, the court concluded that there was no private right of action, which promoted commentators to write:

> "...even section 93(2) and section 93A(2) appear, on their face, to give a right of action to a third party who apprehends the breach of an order, under section 93(2), or an undertaking, under section 93A(2)....the reasons given

[457] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 3 p 3, 23 June 1998 (afternoon session), House of Commons internet.
[458] See Chapter 2, supra.
[459] A Prohibition Approach to Anti-competitive Agreements and Abuse of Dominant Position: draft Bill, (URN 97/803 – DTI, August 1997), paragraphs 7.25 and 7.26.
[460] A Prohibition Approach to Anti-competitive Agreements and Abuse of Dominant Position: draft Bill, (URN 97/803 – DTI, August 1997), paragraph 7.26.
[461] Although the cases in which interim injunctions were unsuccessfully sought would suggest that damages are accepted as available.
[462] R Lane, op cit., p 206; Robertson is also concerned by this case, where the Court of Appeal did not refer the question to the ECJ until it was raised for in a third case, Courage v Crehan (A

> by Knox J were based on the application of the general law governing the availability of civil remedies for the breach of a statutory provision....[these] same principles will be used to establish if the prohibitions in the 1998 Act are enforceable by private parties. The fact that an ostensibly enabling provision was interpreted in that case in such a restrictive manner gives cause for concern."[463]

Knox J found that there was no clear Parliamentary intention to provide a private remedy for individuals, and arguably if the wording of the FTA did not provide a clear intention, then the Pepper statements made in both houses of Parliament are of little worth.

Both before and after Royal Assent, the issue remained at the forefront of discord: We consider that there should be an express right to damages"[464]; "not awarding damages for loss suffered by a party will in many cases amount to allowing a wrongdoer the enjoyment of profits earned as a result of illegal activity"[465] However, despite Government promises, the Act contains no express provision: a situation Peretz compare to that of the Yeti in that the "footprints of such an action can be found, but there is no clear proof of its existence"[466]:

> "...if someone has suffered from an anti-competitive agreement, he will have to establish it and of course he will be entitled to compensation under third party action. In order to receive that compensation, the courts would consider the failure of the director general to take action."[467]

Robertson "Judicial Interpretation" (Speech delivered at "The New Competition Act" The Hatton, London, 2/12/99)).

[463] A MacCulloch "Private Enforcement of the Competition Act Prohibitions" in BJ Rodger and A MacCulloch The UK Competition Act: A New Era for UK Competition Law (Oxford, Hart, 2000) pp 101 and 102. Rodger is concerned by the "...clearly flawed interpretation of the statutory terms." (BJ Rodger "Mid Kent Holdings plc v. General Utilities plc: Remedies under the Fair Trading Act 1973" (1997) 4 ECLR 273, 275).

[464] J Scholes and others "The U.K. Draft Competition Bill: Comments Based on Observations of the Comp Law Association""(1998) 1 ECLR 32, 45.

[465] JS Sandhu "When all is not fair for customers" (2000) The Times (Law Supplement) 12 October, 11.

[466] G Peretz "Detection and Deterrence of Secret Cartels Under the U.K. Competition Bill" (1998) 3 ECLR 145, 150.

"I welcome the possibility of court action for compensation at the instance of those businesses and individuals that have suffered loss from cartel activity or from predatory pricing or other anti-competitive activities by dominant companies. The Director General of Fair Trading should not be the only gate-keeper to open up an inquiry into business misconduct and abuse. I am not sure precisely where the Bill deals with private actions. I thought I heard the Minister say in his introduction that there would be provisions on that matter."[468]

"There has been some suggestion that, somewhere in its crannies and crevices, the Bill gives third parties additional rights to take action on the causes set out in the Bill in the courts rather than through the director. I have heard that, but I have not been able to detect it."[469]

At the Third Reading in the House of Lords, an amendment was proposed (unsuccessfully) to make infringements of the Chapter I Prohibition "actionable by any person who may be affected by that infringement, subject to any defences under this Act and to the defences and other incidents applying to actions for breach of statutory duty."[470] Lord Borrie supported this since:

"...it is most important that third party rights are not only available but also that they are widely known to be so...I have always thought...that one of the great advantages of the changes being made in this bill by the Government is to enable businesses individually if they so wish, to attack the anti-competitive practices of others and to do that in their own name, quite irrespective of the duties and responsibilities of the director-

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[467] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 4 pp 1 and 2, 2 June 1998 (afternoon session), House of Commons internet.
[468] Lord Borrie, Official Report, Second Reading Competition Bill House of Lords, Column 1177, 30 October 1997, Lords Hansard internet; at Column 1148 Lord Simon of Highbury said that the Government was "including provisions to facilitate rights of private action in the courts for damages."
[469] Lord Lucas, Official Report, Committee Stage, Competition Bill House of Lords, Column 454, 17 November 1997, Lords Hansard internet.
[470] Lord Kingsland, Official Report, Third Reading, Competition Bill House of Lords, Column 1324, 5 March 1998, Lords Hansard internet.

general."[471]

He continued:

> "if the response of my noble friend to the amendment is that it is unnecessary because such private rights of action are clearly incorporated into the Bill through what is now Clause 60...that is fine as far as concerns the substantive matter of there being third party rights. However...is there any good reason why this should not be made explicit, if only for educative purposes?...if there are reasons against making it explicit in the Bill, what recommendations does my noble friend have for the director-general, or his own department, to ensure that the availability of private rights of action, and all that that involves, is widely known throughout the business community?"[472]

Lord Borrie, as a former DGFT who had to make the best of a difficult system in which the odds were staked against him, should know what was needed for the law to be effective. However, Lord Simon of Highbury responded that the Government:

> "...did not want to go wider or narrower that the rights which exist for breach of the EC prohibitions. We believe that the best way to achieve this result is for the Bill to remain silent on the issue of private rights of action....Community law is still in the process of development, for example, in terms of the class of persons able to claim such rights. If, say, a company with a wide consumer base were to breach the EC prohibitions, could it be said that all the consumers affected directly or indirectly had Community rights arising from the breach? Such a question is yet to be resolved."[473]

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[471] Official Report, Third Reading, Competition Bill House of Lords, Column 1324, 5 March 1998, Lords Hansard internet.
[472] Lord Borrie, Official Report, Third Reading, Competition Bill House of Lords, Column 1325, 5 March 1998, Lords Hansard internet.

Further, "We do not want a situation where the extent of the rights of private action depended on whether the agreement affected trade between member states, often a difficult line to draw."[474] This is worrying, in that it sounds like an admission of the problems of trying to apply the domestic position and EC regimes; although market analysis will aid the division between the two, it does point to uncertainty on the part of those supporting the new approach.

It is acknowledged that the Government faced a difficult task in defining an explicit third party right: to have got it wrong would have risked divergence and ultimately allow two different processes to evolve, enabling an aggrieved third party might try to massage the market analysis to ensure that he or she ended up in the jurisdiction that most favoured their cause. This would lead to uncertainty in the findings reached by competition authorities in other jurisdiction and the whole question as to whether there was an infringement of the Chapter I Prohibition would be brought into disrepute. However, the Government were prepared to specifically define land and vertical agreements where it would be to the benefit of the OFT (as it would reduce their workload). The Government did not even call for a review of the treatment of private actions (unlike the review called for on the treatment of exemptions), in order to confirm the current status of what it would be adopting. What the Government actually did say provides little comfort, since it was no more than a rehash of what had been said before (and this hadn't taken the availability of damages any closer to fruition):

> "It is already well established under UK law that private parties may seek an injunction for breach of EC competition law. Clause 58, relating to the use of findings of fact by the director in court proceedings, clearly contemplates such private rights of action for breach of the domestic prohibition.[475] Rights to seek injunctions will therefore be available for

[473] Official Report, Third Reading, Competition Bill House of Lords, Column 1325, 5 March 1998, Lords Hansard internet.
[474] Lord Simon of Highbury, Official Report, Third Reading, Competition Bill House of Lords, Column 1325, 5 March 1998, Lords Hansard internet.
[475] Section 60(6) includes in "decision" a decision as to the civil liability of an undertaking for harm caused by its infringement of community law.

breach of the domestic prohibitions."[476]

"Equally it is generally recognised under UK law that breach if the EC prohibitions may entitle third parties suffering loss as a result of the breach to claim damages. The majority of this House, by four to one, in the Garden Cottage Foods case stated obiter that such entitlement did exist."[477]

There was even debate on of the usefulness of recourse to the courts: "...we are...worried about the potential frequency of, or over-ready recourse to, litigation as a normal means of conducting commerce."[478] Although the Government countered that "...there is no evidence in Europe of such America-style litigation. Comparisons with American anti-trust laws are not helpful."[479] In response to Lord Kingsland's assertion that third party actions provide a deterrence, Lord Borrie gave his experience that under the RTPA "small businesses have been extremely reluctant to take action themselves because of the expense. With some reason they have thought that the public office, namely the Office of Fair Trading, set up specifically to enforce the law should take action at public expense. That is the real deterrent."[480]

As a result of the empty promises, we are left to pick out a few statements of intention (in addition to those above) that may be used, relying on Pepper v Hart[481]. However, such reliance implies that a clear message is not being sent out to those expected to rely on its findings, and is thus an inefficient way of providing the remedy called for:

"The Bill is drafted to confer direct rights of action for people to take in the

[476] Lord Simon of Highbury, Official Report, Third Reading, Competition Bill House of Lords, Column 1326, 5 March 1998, Lords Hansard internet.
[477] Lord Simon of Highbury, Official Report, Third Reading, Competition Bill House of Lords, Column 1326, 5 March 1998, Lords Hansard internet.
[478] Mr Tim Boswell, Official Report, Standing Committee G, Competition Bill House of Commons, Part 8 p 3, 2 June 1998 (morning session), House of Commons internet.
[479] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 8 p 3, 2 June 1998 (morning session), House of Commons internet.
[480] Official Report, Committee Stage, Competition Bill House of Lords, Column 437, 17 November 1997, Lords Hansard internet; although Lord Borrie was one of the most vociferous supporters in calling for an explicit right for third party damages.
[481] [1993] AC 593.

UK courts in respect of breach of prohibitions."[482]

"vertical agreements would not be subject to third-party action in the courts".[483]

Nevertheless, since the Act received Royal Assent, these few statements have gained in stature and force:

"...third parties who consider they have been harmed as a result of *any unlawful agreement, practice*, or conduct may have a claim for damages in the courts."[484] (emphasis added).

"Although the Act gives limited immunity from financial penalties for 'small agreements'...this does not extend to...the possibility of being sued for damages."[485]

"Third parties who consider that they have suffered loss as a result of any unlawful agreement...have a claim for damages in the courts."[486]

One of the potential consequences of infringement will be "third party damages".[487]

Hay even finds that "The Act...includes provisions for third party actions for damages..."[488] but these are very well hidden! In the same work however,

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[482] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 7 p 4, 18 June 1998 (afternoon session), House of Commons internet.
[483] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 1 pp 3 and 4, 25 June 1998 (morning session), House of Commons internet. Land agreements receive similar immunity in this respect (see Mr Nigel Griffiths, Part 5 p 2).
[484] What your business needs to know (OFT 247, September 1999) p 10.
[485] How your business can achieve compliance (OFT 424, August 1999) p 3.
[486] Enforcement (OFT 407, March 1999) paragraph 5.1.
[487] M Bloom "Investigation and enforcement" (Speech delivered at "The New Competition Act" The Hatton, London, 2/12/99).
[488] D Hay "Is More Like Europe Better?: An Economic Evaluation of Recent Changes in UK Competition Policy" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 43.

Robertson confirms that "The Act is silent about the possibility of private rights of action for breaches of the Chapter I prohibition."[489]

Singleton finds that an express right to sue for damages "...is not needed as a breach is an actionable breach of statutory duty and anyone damaged thereby can sue the infringer."[490]

PLC's Guide stated that the Act enables "...competitors and customers damaged by illegal anti-competitive behaviour to seek damages in the courts...Injured third parties will be able to sue for damages for breach of the prohibitions in the courts as well as being able to seek interim relief."[491]

The CBI/Eversheds Business Guide sates that third parties who have suffered a loss "...can bring a claim for damages".[492]

The Law Society Gazette informed practitioners that "...companies which fail to comply will face the possibility of damages actions being brought by affected third parties."[493]

However, it is accepted that even these statements have since been watered down:

"The Act confirms the possibility of private actions through section 60, rather than containing an express provision that breach of the UK prohibitions would constitute a civilly actionable, tortious breach of statutory duty."[494]

"Section 60(6)(b)...provides that decisions of the European Court and Commission on the question of remedies available under Articles 81 and 82 will guide the UK

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[489] A Robertson "UK and EC Competition Laws: Will They Operate in Complete Harmony" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 96.
[490] S Singleton Blackstone's Guide to the Competition Act 1998 (London, Blackstone Press Limited, 1999) p 57.
[491] "The Competition Act 1998: The new EC style regime" (1998) PLC December, 23, 24.
[492] CBI/Eversheds, Competition Law (London, Caspian Publishing Ltd, 1999) p 42.
[493] "Competition Law" (1999) 96 Gazette 4 January, 42.
[494] M Bloom "The New UK Competition Act" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 11.

courts in making similar decisions"[495], but the ECJ and Commission have left this decision to the national courts anyway?

The task facing the claimant is eased slightly by DGFT findings: "parties who have obtained a decision that their agreement is not restrictive of competition will not have to prove again findings of fact made by the director if there were ever court proceedings attacking the agreement under the prohibition. Such facts could not be contested in such court proceedings."[496] Section 56 confirms that the Iberian decision will be applied.[497]

The lack of concrete guidance or a ruling means that associated aspects of bringing a claim are also unclear. Kon and Maxwell expressed concern at the absence of any provision in the Bill to regulate the possibility of a third party issuing a private action whilst the DGFT was investigating.[498] Although they note that the High Court has an inherent jurisdiction to stay proceedings and draw analogy to MTV Europe v BMG Record (U.K.) Ltd[499] and Flynn's argument that "...the court might consider it better for the OFT to reach a position on the notification which could then be the subject of independent challenge through the appeal process rather than risking a different assessment in the civil litigation."[500]

Public policy was a reason given by the Court of Appeal in Courage v Crehan[501] for prohibiting a party to a prohibited agreement from recovering damages. Surely at the very least public policy now demands damages to be awarded for breach of the Chapter I Prohibition. It was held in Arkin v Borchard Lines Ltd[502] that there was a

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[495] K Middleton "Harmonisation with Community Law: the Euro Clause" in BJ Rodger and A MacCulloch The UK Competition Act: A New Era for UK Competition Law (Oxford, Hart, 2000) p 27.
[496] Lord Haskel, Official Report, Committee Stage, Competition Bill House of Lords, Column 956, 25 November 1997, Lords Hansard internet.
[497] "We are also including provision in Clause 56 of the Bill to facilitate private actions by those harmed by breaches of the prohibition." (Lord Haskel, Official Report, Committee Stage, Competition Bill House of Lords, Column 874, 25 November 1997, Lords Hansard internet).
[498] S Kon and A Maxwell "Enforcement in National Courts of the E.C. and New U.K. Competition Rules: Obstacles to Effective Enforcement" (1998) 7 ECLR 443, 452 and 453.
[499] [1997] 1 CMLR 867.
[500] S Kon and A Maxwell "Enforcement in National Courts of the E.C. and New U.K. Competition Rules: Obstacles to Effective Enforcement" (1998) 7 ECLR 443, 453 at footnote 60; referring to J Flynn "Using the Courts: Strategic Overview" Competition Law Compliance Conference, 19/5/98.
[501] Morritt LJ, (1999) The Times, 27 May.
[502] [2000] Eu. L.R. 232.

private right to sue for breach of Article 81 or 82 *akin* to a claim for breach of statutory duty. However, Doherty recalls the Irish experience where the courts operated "...on the unspoken assumption that damages are available...this pragmatic approach on the part of the Irish courts means that the classification of E.C. law remedies is not an issue, as it has become in England. However, the absence of a theoretical basis for a right of action in Ireland may become a difficulty; every action before the courts must comply with some established procedure, if only to establish which court has jurisdiction, or which limitation periods apply."[503] In addition, questions of the evidence needed, causation, remoteness and quantification also need to be addressed by a ruling.

The possibility of public policy coming to the rescue seems rather remote at present: "The courts may of course simply interpret the statute as giving a general right of action, but Articles 81 and 82 EC have had direct effect since 1974 and, as yet, the UK courts have not come up with a definitive answer on private rights."[504]

Despite national courts being able to award damages and costs, and are supposedly quicker[505], this is of no comfort while the bickering on the availability of damages continues. Uncertainty in the ability of third parties to bring private actions will hamper the development of another effective sanction. MacCulloch uses the US studies to show that the lack of certainty about the potential rewards will be detrimental.[506]

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[503] B Doherty "E.C. Competition law before the Irish Court: the First 25 years" (1999) 2 ECLR 78, 81 and 82.

[504] A MacCulloch "Private Enforcement of the Competition Act Prohibitions" in BJ Rodger and A MacCulloch The UK Competition Act: A New Era for UK Competition Law (Oxford, Hart, 2000) p 105. The first case under the Competition Act 1998 proceeds on the assumption that there is a right to civil proceedings for damages (Network Multimedia Ltd v Jobserve Ltd (5/4/01) unreported: see Chapter 4 infra).

[505] Although as Kon and Maxwell note, the "...Commission had developed considerable expertise in dealing with the legal and economic issues peculiar to competition cases" (S Kon and A Maxwell "Enforcement in National Courts of the E.C. and New U.K. Competition Rules: Obstacles to Effective Enforcement" (1998) 7 ECLR 443, 444) making it more attune to reaching the correct decision without undue complication.

[506] A US study of over 2000 cases showed that there was a great increase in private actions between the mid 1960's to the late 1970's (although the number of administrative actions remained relatively unchanged) as "...claimants became more attuned to the potential rewards available and secure in the procedural framework." (A MacCulloch "Private Enforcement of the Competition Act Prohibitions" in BJ Rodger and A MacCulloch The UK Competition Act: A New Era for UK Competition Law (Oxford, Hart, 2000) p 114).

Furse hopes "that as the principles of competition law become increasingly familiar additional credence is given to individual rights in the system, following, to a limited extent, the vigorous American model."[507] The calls for more individual actions is not a new one[508], although if these hopes are to be realised, we need firstly to move away from the debate about what the basis for damages is, and accept that there is a breach of statutory duty (if not implicit, the Government need to revisit this and make it explicit); and secondly the mantra do complain don't notify should become "Do sue, don't notify", although it is accepted that the likelihood of this happening (in a climate of growing complaints about an increasingly litigious society) is even more remote than the first condition being satisfied.

There can be no defence for the Government's choice of not providing a definitive answer to enable a line to be drawn under the unsatisfactory state of affairs that had been allowed to develop. Our trust must be placed in the OFT to encourage complaints before the courts. Even though this means that third parties will incur the expense (although they may be able to recover certain costs at trial) they will be assisted by the fact that provision may be introduced for the OFT to be called as a friend of the court[509] and the new CPR rules should help[510], although admittedly it is "...not clear how much these actions may be helped by the new UK rules on group actions and conditional fees."[511] This admission on the part of the OFT must serve as a wake up call on how these actions are likely to be brought, if at all.[512]

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[507] M Furse, op cit., p 100.

[508] Lane traces this back to the Commission's Fifteenth Report on Competition Policy (1985) (R Lane, op cit., p 205).

[509] Section 58(3); although as Roth finds, "no such rules have been made and it is unclear what scope for intervention is envisaged." (PM Roth "The New UK Competition Act – The Private Perspective" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 10), but in light of Roth's observation that the Commission's reforms for devolved control consider that the Commission or national authorities should be an *amicus* of the court (p 11), it is only a matter of time before the rules appear.

[510] M Bloom, comment made at the Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00.

[511] M Bloom "The New UK Competition Act" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 12.

[512] When Menzies brought legal action against WH Smiths (see Chapter 4, infra) to force WH Smiths to honour the exclusive distribution agreements, Menzies found that the management time lost to fight them and the legal costs incurred significantly contributed to their reduction in profits ("Menzies counts the cost of all-out warfare" Birmingham Post (2001) 24 January, 21). A warning for those relying on third parties to help police the system.

3.2.5 Investigation

The DGFT may investigate[513] if there are *reasonable grounds for suspecting* that the Chapter I prohibition has been infringed.[514] It is a much lower threshold than under the RTPA, and one that Peretz and Hutton find will be "easily cleared".[515] Whether there are reasonable grounds will depend upon the information the DGFT has, based on copies of agreements provided by disaffected members of a cartel, statements from employees or ex-employees, or a complaint[516]. There was much debate and argument that "reasonable suspicion" should be replaced by "reasonable grounds for belief"[517]. This was vigorously resisted, none more so than by Lord Borrie who, of course, had to live with the limiting powers of investigation under the RTPA.[518] The OFT's view is that the powers of investigation and enforcement "...should be viewed positively by the majority of businesses, as a means of ensuring they can operate in a healthy competitive environment"[519], dismissing fears that the OFT has too much power and discretion.

The domestic system differs from the EC investigatory procedure where: requesting information must be done informally in the first instance[520]; the power to enter by

[513] The powers of investigation can be delegated to an officer authorised to act on the DGFT's behalf.
[514] Section 25.
[515] G Peretz and I Hutton "Competition Act 1998 (3)" (2000) Solicitors Journal 28 January, 72. Although Carstensen and Goodman express concern that it is higher than the Commission's threshold of all information "necessary" (L Carstensen and S Goodman "Defending a competition complaint: Managing the risks" (2001) XII(1) PLC 37). This is unlikely to cause any problem in practice since information from undertakings suspected of being party to a restrictive agreement must be relevant to the inquiry (Regulation 17/62, Article 11(1) and (3) and Article 14(1) and (3); Case T-34/93, Société Générale v Commission [1995] II E.C.R. 545, [1996] 4 C.M.L.R. 665).
[516] Powers of Investigation (OFT 404, March 1999) paragraph 2.1.
[517] Lord Kingsland, Official Report, Committee Stage, Competition Bill House of Lords, Columns 367 and 368, 17 November 1997, Lords Hansard internet. See also columns 370 to 376. The same arguments were made in respect of the grounds for interim measures (Columns 420 to 422).
[518] ibid, columns 368 and 369.
[519] H Emden "A Blueprint for Reform: Response by the Office of Fair Trading" (1999) 6 ECLR 309, 310. Although "The distinguished firm of lawyers Clifford Chance has said that no case has been made for such greater powers [of investigation]." (Mr John Bercow, Official Report, Second Reading, Competition Bill House of Commons, Column 108, 11 May 1998, Lords Hansard internet), this is very much the minority opinion.
[520] At the start of an investigation, if deciding to request information, the Commission must initially request this informally (Fines may be imposed by decision where incorrect information is supplied; Regulation 17/62, Article 15(1)(b)). If the information is not forthcoming at all, there is no sanction by way of fine, but the Commission may reach a decision requiring the relevant information to be supplied within a stated period. Although Regulation 17/62 does not explicitly mention documents,

force and search appears more limited[521]; daily penalty payments can be imposed for non-compliance[522]; and formal decisions requesting information or to conduct an on site investigation can be challenged[523]. The intention was to leave matters of investigation very much to the DGFT's discretion.[524] Investigation is further made easier by the encouragement of whistleblowers[525] and complaints. There is no prescribed form to complete to make a complaint, but third parties are encouraged[526] to make complaints in writing or by telephoning the OFT's "cartels

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the ECJ in AM&S v Commission (Case C155/79, [1982] ECR 1575, [1982] 2 CMLR 264) ruled that information covers documents.

[521] Invoking the on site investigation powers enables the Commission to examine books and other business records; take copies or extracts from the books or records; ask for oral explanations on the spot; and enter any premises, land or means of transport (Regulation 17/62, Article 14(1); although this list is not exhaustive). Whilst in the EC regime the Commission may not itself use force to enter where entry is refused (Cases 46/87 & 227/88 Hoechst AG v Commission [1991] 4 CMLR 410), it may call upon the Member States to provide this assistance (Regulation 17/62 Article 14(6) refers to Member States as opposed to competent national authorities used elsewhere in the Regulation (see 3.2.8, infra), enabling the assistance of law enforcement bodies if necessary). The UK powers supporting this are stronger than the Commission's in that a warrant for entry by force may be obtained where an investigation is likely to be obstructed (Section 62(1), rather then the requirement that the "undertaking opposed" entry in Article 14(6)). Although as Furse notes, even though the "...Commission will be able to act more vigorously in the United Kingdom than it will in some other Member States...any such actions will remain subject to the scrutiny of the Court of Justice notwithstanding the fact that they are authorised under a domestic statute" (M Furse, op cit., p 67). This strengthening of the power might appear at odds with its obligations under Article 14, but is perhaps a response to a decision not to allow the OFT to apply Article 81(1), since the opportunity to provide for this in the Competition Act 1998 was not taken (despite calls in the 1997 Notice on cooperation with National Competition Authorities (OJ 1997 C313/3), paragraph 15).

[522] If the parties fail to comply with the decision, or supply incorrect information, the Commission may impose a fine (Regulation 17/62, Article 15(1)(b)) and may additionally impose a periodic penalty for each day during which there was default (Regulation 17/62, Article 16(1)(c) and (d)).

[523] A Commission decision is subject to judicial review by the CFI under Article 230.

[524] "Were we to start from the assumption that the director would always try to behave unreasonably and make provision in the Bill to prevent it, we would end up with an unworkable bill and an unworkable system." (Lord Haskel, Official Report, Report Stage 2, Competition Bill House of Lords, Column 341, 19 February 1998, Lords Hansard internet). Although "The new competition laws are very different from the old. They give extremely wide discretions" (Lord St. John of Bletso, Official Report, Report Stage 3, Competition Bill House of Lords, Column 497, 23 February 1998, Lords Hansard internet), the Government was determined that they would "...do everything in our power to ensure that there is a minimum of bureaucracy in any way in which the Office of Fair Trading behaves." (Lord Simon of Highbury, Official Report, Third Reading, Competition Bill House of Lords, Column 1380, 5 March 1998, Lords Hansard internet).

[525] See 3.2.4, infra.

[526] Examples of grounds for complaint, to encourage third parties to come forward, are given in Making a complaint (OFT 427, February 2000) p 3; with the signs of how to spot a cartel described in more detail in Cartels and the Competition Act 1998 (OFT 435, November 2000) pp 4 to 7. "...the Act is expected to operate as a mechanism for controlling anti-competitive behaviour more through the means of *complaints* from third parties and the Office's *own-initiative investigations* rather than through the voluntary notification." (H Emden "A Blueprint for Reform: Response by the Office of Fair Trading" (1999) 6 ECLR 309, 310). This is supported by Schroeder who finds that "a system based on complaints is bound to be efficient, because problems surface easily if competitors, distributors and customers know that the Commission is willing to hear them and to investigate the issues raised" (D Schroder "The Green Paper on Vertical Restraints: Beware of Market Share Thresholds" (1997) 7 ECLR 430, 434).

24 hour hotline"[527]. The DGFT has said that the OFT will do its best to pursue even anonymous complaints (although there may be practical difficulties in doing so where full information is not available and clarification cannot be sought from the complainant).[528]

The fact that "the DGFT may pursue a complaint"[529] imposes no binding obligation: "If he decides to take no further action he will inform the complainant as soon as possible and the matter will be closed or redirected to another body if appropriate." Although this is not an *appealable decision* for the purposes of the Act[530], Mr Nigel Griffiths assured that the DGFT was required "...to give people an opportunity to make representations, so the director general is obliged to take account of any such representation"[531], rejecting an amendment to make this explicit.[532] This is a rather weak statement allowing much discretion on the part of

[527] Most OFT literature repeats this call, for example, Your Business and the Competition Act (OFT PUB/280, September 1999); What your business needs to know (OFT 427, September 1999) p 11, Making a complaint (OFT 427, February 2000) p 4.

[528] The Major Provisions (OFT 400, March 1999) paragraph 8.2. Complaints should detail whether the complainant is a competitor, customer or a final consumer, together with an explanation of the reasons for the complaint (including any appropriate evidence for example, copies of relevant correspondence or notes of telephone conversations).

[529] The Major Provisions (OFT 400, March 1999) paragraph 8.3. If the complaint does provide grounds for further investigation of a possible breach of the prohibitions, the DGFT may seek further information from the complainant before he can pursue the matter. If the DGFT concludes that either of the prohibitions has been infringed, appropriate enforcement action will be taken.

[530] Section 46(3).

[531] Official Report, Standing Committee G, Competition Bill House of Commons, Part 3 p 4, 16 June 1998 (afternoon session), House of Commons internet.

[532] Mr Andrew Lansley, Official Report, Standing Committee G, Competition Bill House of Commons, Part 3 p 2, 16 June 1998 (afternoon session), House of Commons internet, relating to test used in Camera Care v Commission (Case 792/79R [1980] ECR 119, [1980] 1 CMLR 334. EC complaints (Regulation 17/62, Article 3(2) entitles natural or legal persons with a legitimate interest to apply to the Commission) may be made by completing Form C (Regulation 3666/93), but this is not compulsory. There is not time limit in which the Commission must respond on the complaint provided they do so within a reasonable time. If they decide to take no further action, they must inform the complainant, who has a right to respond (Regulation 2842/98, Article 6). Only after this can the Commission proceed to its formal decision. If the Commission decides to proceed to investigate, the complainant also has the right to be heard (Regulation 2842/98, Article 7). Should the Commission fail to act, the complainant may initiate proceedings under Article 232, however this failure to act is only is so far as the Commission has not rejected the complaint in accordance with the procedures and not defined its position (This phrase is not without its difficulty (TC Hartley op cit., pp 381 to 383; R Forster "Taking on the Commission: Procedural Possibilities for an Applicant Following Submission of a Complaint" (1993) 6 ECLR 256, 259, where it would appear that from the case law an Article 6 letter does constitute a definition of position)). The Commission has the right to prioritise its workload and choose not to follow every case through, but must examine the points raised (both legal and factual) and deliver a decision to the complainant (Case T-24/90 Automec srl v Commission (Automec II)[1992] ECR II-2223, [1992] 5 CMLR 43), allowing the Commission to focus on complaints where issues of political, economic or legal significance to the EC are prevalent (Cases T-185, 189 and 190/96 Rivera Auto Service Établissements Dalmasso SA et al. v Commission [1999] 21/1/99, reaffirmed in Système Europé Promotion (SEP) SARL v

the DGFT. Whilst the complainant cannot appeal against the DGFT's decision not to investigate, it may be that they will have sufficient interest to qualify for a third party appeal should a decision be made in the future. Willis finds that "...short of judicial review, there is no provision to challenge a mere rejection of a complaint or failure to pursue it"[533]. This in fact places the domestic complaint in a similar position to that of the EC complainant where a decision not to pursue is only challengeable under Article 230, which is a judicial review procedure. Takis finds the rights of the complainant in the EC regime deriving "less from the right to a hearing and more from the general principles of legality and good administration."[534] Consequently, it is submitted that whilst the Act does not require the DGFT to allow complainants to respond or appeal his decision, good practice to ensure that the system works demands this happens.

(i) Production of specified documents and information

If the DGFT has reasonable grounds for suspecting that the Chapter I Prohibition has been infringed he can, by written notice,[535] require any person[536] to produce specified documents[537] or to provide specified[538] information which he considers

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Commission (Case T-115/99, 14/2/01); Maselis and Gilliams find this development has reduced the benefit, to the complainant, of an investigative and enforcement system that used to be a "...privileged instrument in the protection of rights which private persons [had] been granted by Community Law" (I Maselis and HM Gilliams "Rights of Complainants in community Law" (1997) 22 EL Rev April, 103)). A formal decision not to investigate can only be challenged under Article 230 (Case C-282/95P Guerin Automobiles v Commission (1997) 5 CMLR 1997).

[533] PR Willis "Procedural Nuggets from the "Klondike Clause": The Application of section. 60 of the Competition Act 1998 to the Procedures of the OFT" (1999) 6 ECLR 314, 323. Even with the advent of the Human Rights Act 1998, in light of the restrictive interpretation, Article 6 will not provide a basis for demanding a hearing (see HRA below).

[534] T Takis, op cit., p 267.

[535] Section 26(2) and (3). The written notice must state the subject matter and the purpose of the investigation; and set out the nature of the offences created by the Act (section 42 to 44; see offences, infra). The DGFT may also specify the time and place for the information to be produced and the form in which it is to be provided (section 26(5)).

[536] Section 26(1). The DGFT is not limited to approaching the undertakings alleged to have infringed one of the prohibitions and the notice may be addressed to third parties such as complainants, suppliers, customers and competitors and ex employees.

[537] The term 'document' includes 'information recorded in any form" (section 59) and includes records, such as invoices or sales figures, held on computer.

[538] 'Specified' means documents or information that are specified or described in a written notice or that fall within a category which is so specified or described (section 26(4)). A category of documents may include invoices, agreements and minutes of meetings. The DGFT can use this power to require the compilation and production of information that is not already in recorded form. For example, a person may be asked to provide market share information or to provide a description of a particular market using the knowledge or experience of the sales manager.

relates to any matter relevant to the investigation[539]. Thus it is the DGFT who decides what is relevant. He can take copies or extracts from any document produced[540], require an explanation of the produced document[541], and require a statement as to where the document can be found, if the document is not produced.[542] The DGFT does not have to use this power first before carrying out an on-site investigation.[543] However, without invoking any of the Competition Act 1998 powers, the DGFT may obtain information about undertakings, agreements, practices and markets at any time through informal enquiries[544], although he cannot compel an undertaking to respond to an informal enquiry, undertakings are encouraged to co-operate.[545]

(ii) On-site investigation without a warrant

If the DGFT has reasonable grounds for suspecting that the Chapter I Prohibition has been infringed he may conduct an investigation and has the power to enter premises to carry out on-site investigations without a warrant[546]. 'Premises' generally refers to business premises, but includes domestic premises if the home is used in connection with the business or if business documents are kept there, and

[539] This will be the investigation power most frequently relied on; it is akin to the Commission proposing and specifying the information required under Regulation 17/92, Article 11.
[540] Section 26(6)(a)(i).
[541] Section 26(6)(a)(ii). A person required by the DGFT to provide an explanation of a document may be accompanied by a legal adviser (rule 13 of The Competition Act 1998 (Director's Rules) Order 2000 (SI 200 No. 293)).
[542] Section 26(6)(b). As to amendments to limit the questioning of officers or senior employees of an undertaking, Lord Borrie found that it would be "unduly restrictive to say that it is not permissible for the investigation to include inquiring of people and obtaining documents for people who may have recently or some time ago left the company's employment." (Official Report, Committee Stage, Competition Bill House of Lords, Column 389, 17 November 1997, Lords Hansard internet). It is also necessary to "have the ability to speak to both secretaries and personal assistants." (Lord Simon of Highbury Official Report, Committee Stage, Competition Bill House of Lords, Column 391, 17 November 1997, Lords Hansard internet. See also Official Report, Standing Committee G, Competition Bill House of Commons, Part 1 p 2 to Part 4 p 2, 16 June 1998 (morning session), House of Commons internet. The ability to question employees and past employees remained an issue with concern about the "...veracity of the information passed to the director general by a disaffected employee." (ibid, Mr David Chidgey, Part 3 p 2).
[543] Powers of Investigation (OFT 404, March 1999) paragraph 3.2.
[544] Powers of Investigation (OFT 404, March 1999) paragraph 2.3, through his general monitoring responsibilities under section 2 of the FTA.
[545] Akin to the Commission's power under Article 11(2) of Regulation 17/62.
[546] Entry to premises in connection with an investigation can generally only be made if the investigating officer has given the occupier of the premises at least two working days' written notice of the intended entry indicating the purpose of the investigation and the offences committed under sections 42 to 44 (section 27(2)). Akin to Article 14(2) of Regulation 17/62.

also includes any vehicle.[547] This power enables any authorised officer of the DGFT ('an investigating officer')[548] to enter premises and require the production of documents relevant to the investigation.[549]

(iii) On-site investigation with a warrant

An application can be made to a judge of the High Court[550] for a warrant for a named officer of the DGFT and other officers authorised in writing by him to *enter and search* premises in three circumstances.[551] The warrant indicating the purpose of the investigation and the offences under sections 42 to 44[552], will authorise: entry to the premises using such force as reasonably necessary; searching the premises and taking copies of, or extracts from, any documents appearing to be of the kind in respect of which the warrant was granted; taking possession of any documents

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[547] Section 59; "I would confirm that homes can be entered only if they are business premises" (Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Column 374, 17 November 1997, Lords Hansard internet).

[548] Section 27(1).

[549] Ordinarily two days notice must be given, but an investigating officer may enter premises in connection with an investigation *without a warrant and without notice* if the DGFT has a reasonable suspicion that the premises are, or have been, occupied by a party to an agreement which he is investigating, or the investigating officer has been unable to give notice to the occupier, despite taking all reasonably practicable steps to give notice (Section 27(3)). However, there is no power for the use of force under this provision, nor to search for documents. An investigating officer entering premises without a warrant may require any person on the premises to produce any document that he considers relates to any matter relevant to the investigation; take copies of, or extracts from, any document produced; an explanation of any document produced or require an explanation of where any document that the investigating officer considers relates to any matter relevant to the investigation can be found; and any information held on computer that relates to the investigation, and which is accessible from the premises, to be produced in a form in which it can be read and can be taken away (section 27(5)).

[550] Court of Session, in Scotland.

[551] Section 28(1); where there are reasonable grounds for suspecting that there are on the premises documents which: (a) the DGFT has required to be produced, either by written notice (section 26) or in the course of an on-site investigation without a warrant (section 27), but these have not been produced; (b) the DGFT has the power to require documents to be produced by written notice (section 26), but that if they were so required to be produced they would be concealed, removed, tampered with or destroyed (this ground for obtaining a warrant is the only ground that will enable the DGFT to carry out an on-site investigation with a warrant without using one of the other investigatory powers first, and is akin to the test applied by the court under the Civil Procedure Rules ("CPR") in deciding whether to grant a search order (formerly known as an Anton Pillar Order). However, unlike a normal search order, the DGFT will not have to give an undertaking to compensate the undertaking if the search was not appropriate. In light of the low threshold that he DGFT has to discharge in being able to investigate, this could lead to problems where undertakings subsequently shown not to have infringed the prohibition, suffer loss of profits or damage to their reputation as a result of the investigation); or (c) the investigating officer could have required to be produced in an on-site investigation without a warrant (section 27), but the investigating officer who attempted to do so has been unable to enter the premises without a warrant.

[552] Section 29(1); see offences infra.

appearing to be of the kind in respect of which the warrant was granted if such action appears to be necessary for preserving the documents or preventing interference with them, or if it is not reasonably practicable to take copies of the documents on the premises[553]; requiring any person to provide an explanation of any document appearing to be of the kind in respect of which the warrant was granted or to state to the best of his knowledge and belief where it may be found; requiring any information held on computer that the named officer considers relates to any matter relevant to the investigation, and which is accessible from the premises, to be produced in a form in which it can be read and can be taken away. The occupier, his legal advisers or other representatives must be given a reasonable opportunity to be present when the warrant is executed. [554]

Where the warrant was granted because there were reasonable grounds for suspecting that the documents would have been tampered with etc., the named officer can take copies of any documents which the DGFT had power to require to be produced under section 26. In addition, if the judge is satisfied that it is reasonable to suspect that there are also *other* documents relating to the investigation on the premises the warrant will also authorise the named officer to take copies of any such document.[555] Where the warrant was granted because the investigating officer was unable to enter premises, the named officer can take copies of any document which could have been required to be produced under section 27 had he been able to enter the premises. These are strong powers that place a great deal of trust in the DGFT in ensuring that the aims of this section are respected. The increase in powers pushed the DGFT from position 206 to 50 in the

[553] Original documents that are taken will be returned within three months; section 28 (7). Although access during this time is possible at the DGFT's discretion: "If documents have been taken in the limited circumstances in which they are now permitted, we should leave it to the director to behave reasonably and to allow access, where that is necessary, to the company concerned." (Lord Haskel, Official Report, Report Stage 2, Competition Bill House of Lords, Column 341, 19 February 1998, Lords Hansard internet.). This followed amendment made by the Government to make it clear that the taking of originals is a last resort "to deal with serious cases of obstruction." (Lord Simon of Highbury, Official Report, Report Stage 1, Competition Bill House of Lords, Column 340, 9 February 1998, Lords Hansard internet).

[554] Section 29(3), added as an amendment at the House of Lords Report Stage (Official Report, Report Stage 2, Competition Bill House of Lords, Columns 342 and 343, 19 February 1998, Lords Hansard internet). This is not provided for in section 27, but the OFT will allow a reasonable time for legal advisers to attend (see access to legal advice, below.)

[555] Section 28(3).

Observer/Channel 4 "Power 300: the people with the power to shape our lives".[556] However, the powers are "significantly weaker than US and Canada"[557], and there "...will not be covert surveillance or telephone tapping."[558] Whilst no fishing expeditions will ever be permitted, IT will play an important role in assisting the OFT to search under section 28. The OFT have looked at the use of forensic IT "...including a number of techniques to access material thought to have been deleted from computers."[559] However, even a more basic "word search" on e-mails and word documents will greatly assist in finding information (even if it has not been "specified"). Consequently section 28(3) could be the green light for utilising all the benefits provided by modern technology.[560]

However, comparing the situation with the increase in powers in relation to unfair contract terms, the reality might be less rosy (or more so, if you are an undertaking)[561]. The potential for investigation to be effective is readily apparent, but a change in culture in shaking off the shackles of old may be required.

(iv) Offences

The Act sets out a number of criminal offences[562] that may be committed where a person fails to co-operate with an investigation.[563] These go beyond the EC

[556] (1999) The Observer Magazine, 24 October, 39, 49.
[557] M Bloom "Investigation and enforcement" Speech delivered at "The New Competition Act" The Hatton, London, 2/12/99.
[558] M Bloom "The New UK Competition Act" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00.
[559] "Cartel busters collude in Brighton" OFT press release PN 46/00, 21/11/00.
[560] See Chapter 4, infra, for how this is working in practice.
[561] Colbey found that in relation to the 1994 Regulations "despite having some of the most draconian interventionist powers ever given to a government organ, [the DGFT's] office has for the last two and a half years, been more concerned with convincing itself of the validity of excuses not to use them than in giving the public the benefit of this important legislation." (R Colbey "Unfair terms and the OFT" (1998) NLJ 16 January, 46, 47.
[562] Section 42 to 44; rule 17, The Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No. 293).
[563] It is an offence for a person: (i) to fail to comply with a requirement imposed under the investigation powers (section 42(1)), subject to certain defences (section 42 (2) to (4)), resulting in fine of up to the statutory maximum (currently £5000) on summary conviction or unlimited fine on conviction on indictment (section 42 (6)); to intentionally to obstruct an officer carrying out an on-site investigation either with or without a warrant, resulting in a fine of up to the statutory maximum (currently £5000) on summary conviction or unlimited fine on conviction on indictment (section 42(7)); (ii) to intentionally or recklessly to destroy or otherwise dispose of or falsify or conceal a document that he has been required to produce or cause or permit its destruction, disposal,

practice of only fining undertakings. The officer[564] as well as the body corporate is guilty of any of the offences, if the offence committed by that body corporate is proved to have been committed with the consent or connivance of an officer or to be attributable to his neglect. Where the affairs of the body corporate are managed by its members, a member is also guilty of an offence if the offence of the body corporate is proved to have been committed with the consent or connivance of the member or to be attributable to his neglect as if he were a director. Offences will be tried either summarily in the Magistrates' Court or Sheriff Court or, in the case of more serious offences, on indictment in the Crown Court or the High Court of the Justiciary. Factors that will be taken into account when determining where to commence proceedings include the gravity of the alleged offence and the complexity of the matter. Whilst these impose personal liability[565], they are not offences in respect of breaching the Chapter I Prohibition, and are better classed as non-cooperation offences to borrow the terminology used by Singleton,[566] as opposed to criminal offences for breach of the prohibitions.

Although these are draconian powers in terms of investigation and non-cooperation offences, legal rights are respected in line with EC jurisprudence. Section 60 extends consistency to certain fundamental principles[567] in the handling of cases by the DGFT.

(v) Access to legal advice

An undertaking is able to contact its legal advisers during the course of an on-site investigation. The investigating officer will wait a short time for legal advisers to

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falsification or concealment (section 43(1)) resulting in a fine of up to the statutory maximum (currently £5000) on summary conviction or unlimited fine on conviction on indictment; and/or up to two year's imprisonment (section 43(2)); or (iii) to provide information that is false or misleading in a material particular if he knows, or is reckless as to whether, it is false or misleading, either to the DGFT or to another person, for example, an employee or legal adviser, knowing that it will be used for the purpose of providing information to the DGFT (section 44 (1) and (2)) resulting in a fine of up to the statutory maximum (currently £5000) on summary conviction or unlimited fine on conviction on indictment; and/or up to two year's imprisonment (section 44(3)).

[564] An 'officer' is defined to mean a director, manager, secretary or other similar officer of the company or a person purporting to act in any such capacity (Section 59).

[565] Section 72.

[566] S Singleton, op cit., p 55.

[567] See 3.1.2, supra.

arrive at the premises[568] before the investigation continues, if he considers that it is reasonable to do so in the circumstances[569]. It is intended that the practice of the DGFT will go no further than the practice of the European Commission when determining how long to wait for the legal advisers to arrive.[570] When agreeing to wait a reasonable time, the investigating officer may attach such conditions as he considers appropriate in the circumstances, including the sealing of cabinets, keeping business records in the same state and place as when the investigating officer arrived, suspending external e-mail and allowing the investigating officer to enter and remain in occupation of offices of his choice.

(vi) Legal privilege

The power to require the production or disclosure of documents, either on written notice or during an on-site investigation, does not extend to privileged communications[571]. A privileged communication is defined[572] as a communication: between a professional legal adviser and his client; or made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings, which would be protected from disclosure in proceedings in the High Court on grounds of legal professional privilege or in the Court of Session on grounds of confidentiality of communications. This was intentionally wider than the categories of communication that the ECJ recognised as being privileged in AM&S.[573] The definition in the Act refers to a 'professional legal adviser', which has been interpreted by the United Kingdom courts as including in-house lawyers as well as lawyers in private practice. When the powers of investigation set out in the Act are used to investigate suspected infringements of the Chapter I Prohibition,

[568] Unless an undertaking has an in-house legal adviser on the premises, or if the undertaking has been given notice of the investigation.
[569] Rule 13, Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No. 293).
[570] Powers of Investigation (OFT 404, March 1999) paragraph 4.10.
[571] Section 30(1); "Section 30...confers a greater degree of legal professional privilege against production of documentation than exists under Community law." (K Middleton "Harmonisation with Community Law: the Euro Clause" in BJ Rodger and A MacCulloch The UK Competition Act: A New Era for UK Competition Law (Oxford, Hart, 2000) p 27).
[572] Section 30(2). In the EC privilege only attracts to correspondence following the initiation of proceedings by the Commission and concerns the defence of the client; or the correspondence existed before the initiation of proceedings but is closely linked with the subject-matter of the proceedings.
[573] Case 155/79 AM&S v Commission [1982] E.C.R. 1575; Powers of Investigation (OFT 404, March 1999) paragraphs 6.2 and 10.7.

the interpretation of privileged information under Community law will not apply.[574] Passmore questions the effectiveness of recent privilege claims where search warrants have been executed[575], concluding that "one might perhaps be surprised by the readiness with which the courts, albeit recognising the practical difficulties faced by those who execute a search warrant, were prepared to accept that the enforcing officers had to have some access to privileged materials in order to determine whether a claim to privilege was properly made or not."[576] Murphy suggests that officers be accompanied by a barrister to act as independent counsel for the purpose of determining privilege.[577] Although the expense factor may be prohibitive, the OFT should ensure that it is respecting legal privilege through an open and consistent procedure.

(vii) Self-incrimination

The defence against self-incrimination, recognised by EC jurisprudence, will apply. Applying EC jurisprudence[578] the DGFT may compel an undertaking to provide specified documents or specified information, such as requesting documents or information relating to facts, for example, whether a particular employee attended a particular meeting.[579] However, he cannot compel the provision of answers that might involve an admission on its part of the existence of an infringement, which it is incumbent upon the DGFT to prove.

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[574] Powers of Investigation (OFT 404, March 1999) paragraph 6.2. The EC regime does not cover an in-house solicitor because, as Faull tries to justify, "What is sought is that the person claiming privilege is a servant of the law, a participant in the administration of justice, rather than just another employee serving his or her master or mistress. It is therefore not education that counts; nor can it be a professional qualification that is not actually used in the profession concerned. The legal professions have rules on ethical conduct relating to legal advice on compliance with and possible breaches of the law. Lawyers are said to play a key role in the administration of justice, to owe a duty to the law. Are legal employees to be considered to be loyal above all to their employers leaving aside questions of moral conscience?" (J Faull "Privilege revisited" (1998) II(93) Global Counsel April, 45, 47); the announcement that this would not be altered as part of the modernisation process drew a scathing attack from the president of the ECLA, accusing the Commission of deterring in-house compliance efforts (as undertakings avoid brining the issues to their legal departments for advice) and of violating the ECHR ("ECLA's call to arms" (2000) V(2) European Counsel March, 8). See Chapter 5, infra.

[575] C Passmore "Search warrants and privilege" (2000) NLJ February 11, 161 and February 18, 219.

[576] ibid, p 220.

[577] G Murphy "A Proposed Strategy to Settle Legal Professional Privilege Claims Under the Competition Act 1998" (2000) 3 ECLR 180, 182. This is akin to the role of the independent Supervising Solicitor who has to be present when a search order is exercised under the Civil Procedure Rules.

[578] Case 374/87 Orkem v Commission [1989] E.C.R. 3283.

(viii) Access to the file

The DGFT's procedural rules follow the Commission approach towards access to the file.[580] However, this is of increased importance in light of the Human Rights Act 1998 ("HRA"), which will increase the scrutiny of the DGFT's actions.

(ix) The HRA

The HRA explicitly imports the Convention Rights as defined in the European Convention of Human Rights ("ECHR") into all domestic law[581]. Section 6 of the HRA makes it unlawful for a "public authority"[582] to act in a way which is incompatible with a Convention Right unless it is required to do so by primary legislation which cannot be interpreted compatibly with the Convention.[583] The OFT, sectoral regulators, CC and the courts are all public authorities for the purposes of the HRA. A breach of the HRA provides an action for those harmed.[584] The Government believe that the changes introduced by the new competition "...regime [are] fully compatible with the European Convention on

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[579] Under investigation? (OFT 426, December 1999) p 10.
[580] I MacNeil "Investigations under the Competition Act 1998" in BJ Rodger and A MacCulloch The UK Competition Act: A New Era for UK Competition Law (Oxford, Hart, 2000) p 91.
[581] This goes beyond the special treatment that the ECHR has been given in the European Community. Looking at the development of the ECHR as a source of principles for the interpretation of EC law, Takis notes that although not formally bound, the accepted view is that the Convention has this effect on the EC (T Takis, op cit., p 237) and Arnull, who finds that whilst the adoption of these fundamental rights praiseworthy, the present position could certainly be improved upon (A Arnull, op cit., pp 190 to 223). Until such a time as more formal action is taken, it will be for the ECJ to balance these rights against the "...need to ensure the effective enforcement of Community competition law" (T Takis, op cit., pp 238 and 239).
[582] Section 6(3) defines "public authority" to include: "a court or tribunal" (sub-section (a)); and "any person certain of whose functions are functions of a public nature" (sub-section (b)).
[583] Pure public authorities will be caught wherever the applicant's complaint is of breach of a Convention Right, regardless of whether the complaint arises out of a relationship which would otherwise be regarded as private in nature. This is a significant departure from existing practice under RSC Order 53, according to which a *private claim* against a public body *cannot* be brought by way of judicial review.
[584] The provisions may only be used by a person who is or would be a "victim" of the unlawful act. A person is only a victim if he or she would be a victim for the purposes of Article 34 of the ECHR if proceedings were brought in the European Court of Human Rights in respect of that act. The HRA therefore takes a very narrow approach in respect of standing (see the Director General of Fair Trading v Proprietary Association of Great Britain costs application, below) and removes the possibility of applications from public interest groups unless they are the victims (and is therefore narrower than the test for standing in judicial review). However, there is nothing in the HRA which prohibits such groups from supporting litigants, and it seems likely that the courts will admit amicus briefs from such organisations during the course of proceedings.

Human Rights and that the Bill would pass the test."[585] This is interesting because section 19 of the Human Rights Act 1998, which requires a compatibility statement to be given before the second reading of a bill, did not apply to the Competition Act 1998, since the HRA received Royal Assent immediately after the Competition Act. However, a compatibility statement was in fact made! Consequently the legislatory excuse (that is, that the terms of the primary legislation mean that it cannot be compatibly read with the Convention[586]) enabling a public authority to apply law which is contrary to a Convention Right, should not be an issue for the Competition Act 1998.

The relevant rights[587] for the purpose of the Chapter I Prohibition are Article 6 - Right to a Fair Trial, and Article 8 - Right to Respect for Private and Family Life. The OFT already complies with the HRA in so far as it give reasons for its decisions and provides for the right to be heard[588]; although Article 6 would require closer attention to be paid to the duty to give reasons and the time taken to reach a decision. At first sight it would appear that Article 6 is breached on the basis that:

> "It is arguable that the DGFT is insufficiently independent from the team if investigators within the OFT...If the proceedings are not criminal, the Convention is probably satisfied by the fact that there is a full right of appeal to the Appeals Tribunal of the Competition Commission[589], at which any defect can be cured. However, this argument may not prevail if the proceedings before the DGFT were to be regarded as criminal."[590]

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[585] Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Column 370, 17 November 1997, Lords Hansard internet.
[586] Sections 3 and 4 of the HRA.
[587] Which are set out in section 1 of the HRA.
[588] Following the investigation, if the DGFT proposes to make a decision that the Chapter I Prohibition has been infringed he must first give notice to the persons likely to be affected and allow those persons an opportunity to make representations (Section 31; Rules 15, 25 and 26, The Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No, 293)).
[589] Roth supports this, finding that the full appeal to the CCAT is "probably required under the European Convention on Human Rights." (PM Roth "The New UK Competition Act – The Private Perspective" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 4).
[590] R Whish "UK Competition Law; Comments" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 11.

Lord Kingsland pointed out[591] that the ECHR provides through the case of Funke/France[592] that the individual not only has the right to withhold any documents involving an admission, but also (unlike Orkem) the right to withhold a document that may be used to establish the existence of anti-competitive behaviour. Furse finds that Orkem produces an "uneasy distinction"[593], and there have been calls for the ECJ to review its definition of the right against self-incrimination in line with Funke[594]. Admittedly the way in which the European Courts have gone about explaining the compliance with this right is less than clear[595], but following this jurisprudence on the effect of the prohibitions, it is unlikely that the Chapter I Prohibition will be held to be criminal in nature. Although the ECHR considers the nature of the competition law and procedures to be of criminal character, the act of derogation is easier to justify than it would be if there was a criminal penalty per se in respect of the prohibition. The non-cooperation offences do create criminal liability, but since this liability arises not from the breach of the prohibition, the right not to incriminate oneself has not been an issue[596]. Should Article 6 be found to have been breached, the public authority will be allowed a margin of appreciation, allowing for the needs of individuals and the community, and questions of time and resources, to be taken into account, provided that limiting the right pursues a legitimate aim.[597] Competition law enforcement is a legitimate aim, and consequently Article 6 should not pose any problems in light of the rules, and interpretation of those rules, adopted by the DGFT.

[591] Official Report, Committee Stage, Competition Bill House of Lords, Column 401, 17 November 1997, Lords Hansard internet.
[592] Case 82/1991/334/407, Series A no 256A.
[593] M Furse op cit., p 64.
[594] WBJ van Overbeek "The Right to Remain Silent in Competition Investigations: The Funke Decision of the Court of Human Rights Makes Revision of the ECJ's Case Law Necessary" (1994) 3 ECLR 127, 133.
[595] M Furse op cit., pp 64 to 66.
[596] Support for this argument is found in the CFI's latest ruling on the right against self incrimination in Mannesmannröhren-Werke AG v Commission (Case T-112/98, judgment 20/2/01, available on www.europa.eu.int/en/jurisp as at 5/6/01), paragraph 59 et seq. However, the potential for a finding that the investigations and decision making process are criminal will be beyond doubt if the reforms in respect of personal criminal liability for breach of the prohibitions come to fruition. See Chapter 4.
[597] Ashingdane v UK (1985) 7 EHRR 528.

Article 8 has been held to protect corporations as well as individuals.[598] However, the right may legitimately be interfered with by the public authority where it can prove that it was acting in accordance with the law or that the interference was necessary in a democratic society. For Jones and Sufrin[599], the status of a private office remains contentious with the European Court of Human Rights finding that Article 8 of the ECHR protects certain business premises[600], is at odds with ECJ rulings[601] although Arnull points to the "broadly worded derogation in Article 8(2)" providing justification for the Commission's actions and ECJ's findings.[602] Any interference by the OFT must be in accordance with the principles set out in the ECHR, that is, in accordance with the law, necessary to pursue a legitimate aim and proportionate. This test of proportionality will be the key, in that any interference must be necessary and in balance with the issue it is trying to address. It is important here to bear in mind the original objective of the ECHR. In February 2001, the CFI ruled in Mannesmann-Röhrenwerke AG v Commission[603] that whilst acknowledging the ECHR and Charter of fundamental rights of the European Union (although finding it was of little consequence because the investigation pre-dated it), the right to silence would seriously hinder the Commission's ability to enforce competition rules. This is true of the domestic application of the HRA, indicating that interference is likely to also be found both necessary and proportionate.

Despite the issues under Regulation 17/62, the HRA has raised little concern in the application of the new domestic procedures. The original OFT challenge to the RPM exemption for OTC medicines, was abandoned on 21 November 2000 when the Respondents made an application regarding the potential bias of Dr Penelope Rowlatt, one of the lay members of the RPC, who had applied, unsuccessfully, for a position in a company in which the DGFT's principal expert witness was a director.[604] However, on an application for wasted costs, it was found that the trade

[598] R v Broadcasting Standards Commission, ex parte BBC [2000] (CA) 3 WLR 1327 (reversing the High Court decision (1999) The Times 9 July.
[599] Jones and Sufrin op cit., pp 859 to 861, and 868 and 869.
[600] In that case a lawyers office (Niemitz v Germany (1993) EHRR 97, paragraph 31.
[601] Cases 46/87 & 227/88 Hoechst AG v Commission [1991] 4 CMLR 410.
[602] A Arnull, op cit., p 443.
[603] op cit., paragraphs 59 and 66.
[604] www.oft.gov.uk/html/new/medicaments.htm as at 1/5/01; Director General of Fair Trading v Proprietary Association of Great Britain (CA) (2001) The Times, 2 February.

associations were not victims for the purposes of the Act and furthermore, nor there had been any breach of Article 6.[605] Although Jacob J argued that parallel traders (such as those in the Tesco/Levi saga) should be allowed to rely on Article 10 of the ECHR, which guarantees the right to freedom of expression in defending any actions brought by the trade mark owners[606], this view has not found much support. Lane finds that early indications from Scottish courts did show that a "robust view of Article 6 of the Convention" was being taken.[607] However, after the numerous cases launched in the Autumn of 1999 (for example, challenges to Lay Sheriffs in Scotland[608]), recent cases in the courts of England and Wales have severely criticised arguments run under the guise of the HRA with reference made to the intention of the ECHR being to prevent torture, degrading treatment and severe restriction of the liberty of the person.[609] Whether the criminalisation of aspects of the Chapter I Prohibition will force a change in the right to silence and access to a lawyer remains to be seen.

3.2.6 Transparency

Having originally called for a new Competition and Consumer Standards Office to take over from the OFT and MMC as part of the reform of competition law, to make it more consumer orientated[610], Labour changed its mind upon election to government: "The Office of Fair Trading will be the primary enforcer of the new

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[605] Director General of Fair Trading v Proprietary Association of Great Britain (Costs) (CA) (2001) New Law Online, 26 July (unreported).
[606] "A classic clash between competing rights" (2000) The Times (Law Supplement) 11 January, 13.
[607] R Lane, op cit., p 362.
[608] There were approximately 200 arguments raised, alleging that the Convention had been breached following devolution, but only three were successful as at 15 February 2000 (The Times, 15 February 2000).
[609] In R v Perry ((2000) The Times, 28 April) where a breach of PACE was at issue, Swinton Thomas LJ said that "The Convention had been promulgated following the horrors of the Second World War and had been intended to protect citizens from true abuses of human rights but now it appears that lawyers are jumping on the bandwagon." Claims made out as abuses under the HRA ran the risk of brining the Act into disrepute. Further, the recently promoted senior Law Lord, Lord Bingham, is on record as predicting that the impact of the HRA will not be as great as some commentators have thought. It appears that he will resist the more extreme attempts to create unexpected rights for the citizen and unwanted obligations for the Government. A similar call for lawyers not to misuse the HRA has been made by Lord Lester of Herne Hill, the QC who led the campaign for the introduction of the Act for over 20 years ("Lawyers told not to waste court's time" (2001) The Times 12 September 12).
[610] When in opposition, Statement 1 May 1995, quoted by MB Hutchings "The Need for Reform of UK competition Policy" (1995) 4 ECLR 211, 213.

regime."[611] A statement by Lord Ezra best sums up the Government's view of the OFT's role: when seeking an amendment to include in the Bill wording to ensure that the DGFT would consult interested parties in preparing the guidelines, the noble Lord said "I may well get the answer that, "Of course he will do that: he would be out of his mind if he did not"."[612] This is a common theme throughout the debate, with the Government placing its trust in the DGFT rather than explicitly setting out the procedures:

> "...we do not believe that it would be right to compartmentalise the Office of Fair Trading in its exercise of the functions in the Bill in respect of investigating and decision making decisions. That would be wasteful of resources and would require duplication of effort."[613]

Lord Borrie referred to the Office of Fair Trading's work under the Consumer Credit Act where the investigating officers and adjudicating officers have been kept separate not by legislation, but rather as the result of administrative arrangements within the Office of Fair Trading.[614]

The OFT has seen its powers increase vastly[615]. The OFT as the main investigation and enforcement body, has spent much time and effort in training and recruiting

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[611] Lord Clinton-Davis, Official Report, Second Reading Competition Bill House of Lords, Column 1194, 30 October 1997, Lords Hansard internet. An attempt to amend the Competition Bill so that the DGFT would be prevented from investigating a matter where that matter was already the subject of proceedings before the court was unsuccessful (Lord Kingsland, Official Report, Report Stage 1, Competition Bill House of Lords, Column 985, 9 February 1998, Lords Hansard internet; as Lord Simon of Highbury made clear "...there may be cases where he considers he should investigate because of the effects on those who are not party to the proceedings." (Column 986). Intimating at the underlying concern that where there is an issue of anti-competitive activity, the OFT need to act as swiftly as possible).

[612] Official Report, Committee Stage, Competition Bill House of Lords, Column 901, 25 November 1997, Lords Hansard internet.

[613] Lord Simon of Highbury, Official Report, Report Stage 2, Competition Bill House of Lords, Column 337, 19 February 1998, Lords Hansard internet, in response to a proposed amendment to divide those who conduct investigations from those who reach the conclusions. This lends some weight to the laissez faire approach adopted by the Government in not spelling out explicitly all of the rules that the Office of Fair Trading must follow. The lack of explicit division between the different sides of the CC was raised again at Committee stage, where Mr Andrew Lansley expressed his "fear that activity on the reporting side of the commission would eventually compromise the objectivity of its appeal and tribunal side", comparing the European regime where executive and judicial functions are exercised separately (Official Report, Standing Committee G, Competition Bill House of Commons, Part 2 p 3, 18 June 1998 (morning session), House of Commons internet).

[614] ibid, Column 338.

[615] See 3.2.5, supra.

staff to tackle the application of the new regime. 55 new posts were created in 2000 to enable the OFT to discharge its obligations under the Competition Act 1998, taking "...the total number of staff in the Competition Policy Division to 170. There are plans for further recruitment."[616] The Treasury agreed an additional budget for the OFT to assist in this recruitment and training.[617] Indeed the OFT, sectoral regulators and the CCAT have been busy recruiting following Royal Assent, with vacancies advertised in the legal press on an almost weekly basis.

The DGFT saw the main changes for the OFT resulting from the Competition Act 1998 as the need for "greater transparency, the growing international nature of the markets and the need to be proactive."[618] As for transparency, the DGFT believed there was "...considerable scope to explain more of what [they] were doing and why"[619], while the need to be proactive meant that the OFT should "...focus its attention on those issues that involve the greatest detriment to the consumer and to competition."[620] To ensure transparency the OFT promised:

> "When the Competition Act 1998 comes into force, notification and reasoned decisions will be published in a weekly gazette...It may also be possible, in due course, to publish a less frequent journal modelled on the DGIV's *Quarterly Competition Newsletter* with articles and 'thinkpieces' about developing policy in the light of experience/precedents which take forward the debate on competition issues. Another approach could be

[616] Annual Report of the Director General of Fair Trading, 2000, p 62. "We have recruited 55 new members of staff, mostly lawyers and economists, and introduced a major programme to train all case officers and assistant case officers in economics, law and competition policy." (M Bloom "The New UK Competition Act" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 5).
[617] Annual Report of the Director General of Fair Trading, 1998, p 35. "...we forecast in the explanatory memorandum to the Bill the additional annual figure of £6.5 million to resource adequately the director general's office, as well as a net increase in the director's staff of about 50. In the planning stages, we made sure that there is adequate financial and physical resources to enable the job to be done effectively and professionally." (Mr Ian McCartney, Official Report, Standing Committee G, Competition Bill House of Commons, Part 3 p 1, 11 June 1998 (afternoon session), House of Commons internet). The Treasury has provided the OFT with an additional £15.4million over three financial years, starting 1999/2000 ("OFT open for business on new competition law" OFT press release, PN 51/98, 26/11/98; Annual Report of the Director General of Fair Trading, 1999, p 40).
[618] Annual Report of the Director General of Fair Trading, 1998, p 15.
[619] Annual Report of the Director General of Fair Trading, 1998, p 17.
[620] *ibid.*

written-up case studies, anonymous if appropriate. Production of the journal would, however, be resource-intensive."[621]

Such a journal would be most welcome in light of questions on interpretation and how the act is being implemented. Should there be few formal decisions[622], it would be of benefit to know the type of requests the OFT was dealing with, the advice being given, and what was being investigated. This would further encourage compliance amongst those who operate similar types of agreements. Despite being resource intensive, it would appear that the OFT has the capacity to produce such a journal, and in any event the greater the clarity, the less work for the OFT. Although investigations remain in principle confidential (until a final decision is adopted), the Commission has found that press releases during cartel investigations can be beneficial.[623] This may well become a practice followed by the OFT, which whilst beneficial in obtaining evidence and encouraging compliance, would not meet the objectives of transparency and certainty. A regular journal could prove of great benefit.

Both the OFT and CC have sought to increase openness and transparency by extensive revamping of their websites. Indeed, the OFT find that their "...implementation of the new Act introduces a significant increase in openness. This includes the consultations on the guidelines, our education programme for business, the commitments to publish summaries of agreements notified for decision and to publish reasoned decisions, and a new weekly Gazette."[624]

(i) Restructure

Although "a survey conducted by *Global Competition Review* in March 1998 of "95 top competition lawyers and economists" reported that 79 per cent "are comfortable with the powers given to the OFT under the Bill", only 52 per cent

[621] Opening the door on fair trading: A consultation paper on improving transparency in the operations of the OFT (OFT 265, July 1999) p 19, paragraph 5.8.
[622] See Chapter 4, infra.
[623] XXXth Report on Competition Policy 2000 (SEC (2001) 694 final, 7/5/01) p 24, paragraph 72.
[624] Opening the door on fair trading: A consultation paper on improving transparency in the operations of the OFT (OFT 265, July 1999) p 3. This consultation was to gather the views on the

agreed that "the OFT and the MMC, in its Competition Commission format, [will] be able to change their decision making processes sufficiently to permit legal scrutiny."[625] Consequently, the DGFT was restructured to increase the number of branches from five to seven, with four of the new branches based on industry sectors, following DGComp.[626] In addition the new DGFT has recreated the role of Deputy Director General[627] to assist in discharging the obligations of the "Director General of Fair Trading".

Resources were a big concern especially in light of DG Comp's experiences:

> "As a result of this bill the Office of Fair Trading does not have, and will not have, any local or regional resources of any kind...It will be reliant on local officials who are trading standards officers"[628];
>
> "...we do not know to what extent the Office of Fair Trading will have the necessary resources to deal with industry's requests for precautionary notifications."[629]
>
> Resources are stretched by the focus needed in specific sectors, although this is offset by the increased roles of sectoral regulators.[630] The OFT identified that the only way to effectively implement the Chapter I

OFT's accessibility, processes and procedures, consultation mechanisms and making casework public.

[625] M Bloom "The OFT's Role in the New Regime" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 12.

[626] CB1 – Policy Coordination, CB2 – Mergers, CB3 - Cartel Investigations; CB4 – Media, Sport and Information Industries, CB5 – Service Industries, CB6 – Basic Industries, Energy and Vehicles, and CB7 – Consumer Goods Industries (Annual Report of the Director General of Fair Trading, 1998, p 33). In respect of the EC, a new cartel unit (E1) was created at the end of 1998 to deal exclusively in unearthing and pursuing cartels. It has about 20 permanent officials, an improvement on the 1994 attempt at establishing an anti-cartel unit, which only had two officials, lacked a system for the referral of cases to it, and "...quickly disappeared into obscurity, having handled only one case." ("Cartel busters" (1999) European Counsel February, 17).

[627] Penny Boys took up this position in December 2000.

[628] Lord Borrie, Committee Stage, Competition Bill House of Lords, Column 901, 25 November 1997, Lords Hansard internet.; The OFT has, on a more informal basis, been encouraging Trading Standards Officers to report suspected anti-competitive activity ("The power of partnership" (2000) 27 Fair Trading August, 26).

[629] Mr Andrew Lansley, Official Report, Standing Committee G, Competition Bill House of Commons, Part 3 p 2, 19 May 1998 (morning session), House of Commons internet.

[630] See below.

Prohibition was to focus on "education"[631], encouraging compliance and complaints:

"It is exceedingly important not only to reduce the amount of resources spent on addressing innocuous notifications but also to uncover and deter as much anti-competitive behaviour as possible. Hence we have an extensive education programme for business both to encourage complaints and deter anti-competitive practices"[632];

"A workforce well versed in the new legislation will help firms not only to avoid infringements, but also to recognise when they are being subjected to anti-competitive behaviour by competitors, customers or suppliers."[633]

However, this recognition process would be accelerated and encouraged more effectively, if there was a "carrot" in the form of a certain right to damages.

Concurrent Regulation was a contentious issue: "The discretionary nature of the prohibitions means that uncertainty and inconsistency are bound to be increased if there are multiple enforcers. I am not convinced that more "policemen" will mean better enforcement."[634] The Conservative Lords tried to amend the Competition Bill so as to remove the exercise of concurrent jurisdiction by the DGFT and utility regulators.[635] Concern was expressed about the fear of inconsistency[636], the fact

[631] Through its web site ("weekly hits are well over 6,000" (M Bloom "The New UK Competition Act" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 4), dedicated enquiry line, radio interviews, magazines, guidelines, newspapers, open days, video ("Compliance Matters"), mail shots ("HM Customs and Excise agreed to include...material with the value added tax form, so 1.6 million businesses received a leaflet on the new Act with their tax return." (M Bloom "The New UK Competition Act" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 4), and advice for businesses on compliance programmes.

[632] M Bloom "The New UK Competition Act" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 4.

[633] K Pitt, "New Act wake-up call needed" (1999) 23 Fair Trading July, 6.

[634] Lord St. John of Bletso, Official Report, Second Reading Competition Bill House of Lords, Column 1158 30 October 1997, Lords Hansard internet, regarding the relationship between the DGFT and utility regulators – a point that is relevant in relation to the European Commission's proposals for decentralised control. See Chapter 5, infra.

[635] Official Report, Committee Stage, Competition Bill House of Lords, Columns 907 to 932, 25 November 1997, Lords Hansard internet.

that the Government was in the process of its review of utility legislation (the outcome at that time unknown) and that the market was pointing to the emergence of conglomerate utility operators. The new era would cause chaos:

> "The informal arrangements – the casual chats on the telephone; the ad hoc meetings summoned in order to resolve a particularly knotty problem – may be highly appropriate to the old informalities of competition law, but it will not do where there are eight of nine regulatory directors who have jurisdictional enforcement powers in addition to those possessed by the Director General of Fair Trading."[637]

The strict division[638] they called for was rejected by the Government, who did "not want gaps or litigation about whether the DGFT or a regulator has jurisdiction. Hence, powers have to be exercisable concurrently by the regulator and the Director General of Fair Trading."[639] This would draw on the best of both worlds:

> "Sector specific regimes quite properly cover competition matters and can rightly prescribe a more focused regime than would be the case with the Bill's prohibition regime alone. It is therefore right that the regulator should be able to choose whichever regime he or she considers to be the more appropriate route for pursuing the matter...The Office of Fair Trading

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[636] Lord Simon of Highbury responded by saying that "there is already a systematic body of law with which the regulators must ensure that they do not act inconsistently" and pointed to the bilateral concordats and understandings in place between some of the regulators and the DGFT, together with the working group being set up to deal with the system under the Competition Bill (Official Report, Committee Stage, Competition Bill House of Lords, Columns 914 and 915, 25 November 1997, Lords Hansard internet). "...it is appropriate that the regulators, including the Director General of Telecommunications, should have concurrent functions under general competition law because there is no clear distinction between sectoral regulation and the promotion of competition in those sectors. The regulators have competition-related duties so that sectoral regulation merges seamlessly into competition issues and the regulators are inevitably drawn into competition issues." (Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Column 922, 25 November 1997, Lords Hansard internet).

[637] Lord Kingsland, Official Report, Report Stage 3, Competition Bill House of Lords, Column 465, 23 February 1998, Lords Hansard internet.

[638] "It seems to me that the purpose of regulation and the purpose of competition law are different. Competition law protects the competitive process. Regulation is concerned with many other and varied objectives. There should not be confusion between the creation of competition and the protection of competition." (Lord St. John of Bletso, Official Report, Report Stage 3, Competition Bill House of Lords, Column 472, 23 February 1998, Lords Hansard internet).

[639] Lord Simon of Highbury, Official Report, Third Reading, Competition Bill House of Lords, Column 1355, 5 March 1998, Lords Hansard internet.

and the regulators have taken five key steps to ensure consistency of approach. They have set up a joint working party[640] to develop working arrangements and to produce draft guidelines for consultation. They have agreed on a single notification point at the Office of Fair Trading. They have also agreed to set up effective mechanisms to share information, for example on complaints...they have agreed to set out these arrangements in a draft concurrency guideline...they have committed themselves to avoiding double jeopardy."[641]

In controlling markets where competition is present to some degree, but not to the extent where competition can act as the regulatory mechanism per se, the boundary is never going to be precisely drawn, so a commitment to avoid double jeopardy was perhaps the best we can ever expect. Although concurrency is achieved in theory through section 54 and Schedule 10, this lacked the detail as to how the relationships would work in practice. The OFT and Regulators have to a large extent remedied this by building on the promises[642] made during the debates: "The general principle will be that a case will be dealt with by whichever of the Director General of Fair Trading or the relevant regulator is better, or best, placed to do so"[643] and "Regulators and the Director General of Fair Trading will always consult each other where it appears that there is a possibility of concurrent jurisdiction before either acts on a case."[644]

The Concurrency Working Part has continued in operation to ensure that concurrent application works[645], although this deals with co-ordination between the regulators as opposed to the determination of individual cases[646]. This has taken on

[640] The "Concurrency Working Party".
[641] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 3 p 4, 18 June 1998 (afternoon session), House of Commons internet.
[642] Indeed, the guidelines were revised in November 2000 to be explicitly cater for more of the issues raised by the Competition Bill debates (see below).
[643] Concurrent Regulation to Regulated Industries (OFT 405, November 2000) paragraph 3.8.
[644] ibid. The DGFT is likely to have a wider jurisdiction geographically since a regulators control may be limited to parts of the UK, and "...it is anticipated that the majority of decisions under the new prohibitions will be those made by the OFT." (M Bloom "The New UK Competition Act" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 20).
[645] Concurrent Regulation to Regulated Industries (OFT 405, November 2000) paragraph 3.3.
[646] To assist this co-ordination, it is developing a secure website that will include a document library and secure email facility (M Bloom "The New UK Competition Act" Speech delivered at Fordham

increased importance, with details being published as part of the revised guideline. The principle of concurrency is further backed up by the Concurrency Regulations imposing a positive obligation on the DGFT and Regulators to decide who is to exercise the functions under the Act.[647] In the event of a dispute, the Secretary of state is drafted in to determine who is to act.[648]

Concurrent jurisdiction boosts the opportunity for regulators to effectively control competition concerns, since it may be more effective or more efficient to use the powers available under the Act.[649] The DGFT has stated that "...while regulators should continue to have regards to their sectoral duties when carrying out utility functions, they should not do so when exercising concurrent functions under the Act. Regulators may, however, have regards to matters covered by their sectoral duties provided they are matters to which the Director General of Fair Trading could have regard in exercising his powers under the Act".[650]

Nevertheless, concerns about the lack of demarcation of powers and reliance on discretion seem justified considering the revised Guideline explicitly providing that "information gathered using sector specific powers can be used for the purposes of an investigation under the Act and vice versa".[651] This follows the advice set out by the regulators in their guidelines.[652] This immediately causes concern in the gas

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Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, p 21).

[647] The Competition Act 1998 (Concurrency) Regulations 2000 (SI 2000 No. 260), section 5. Concurrent Regulation to Regulated Industries (OFT 405, November 2000) paragraphs 2.5 and 3.1.

[648] The Competition Act 1998 (Concurrency) Regulations 2000 SI 2000 No. 260, section 6.

[649] Concurrent Regulation to Regulated Industries (OFT 405, November 2000) paragraph 4.3.

[650] Concurrent Regulation to Regulated Industries (OFT 405, November 2000) paragraph 4.1. This follows the Government's intention that "...the statutory duties contained in utility legislation do not apply in relation to the regulators' concurrent functions under the Bill...[however] when exercising a concurrent function, a regulator may have regard to the matters which are the subject of the statutory duties if the DGFT could have regard to those matters if he were exercising that function." (Lord Simon of Highbury, Official Report, Third Reading, Competition Bill House of Lords, Column 1375, 5 March 1998, Lords Hansard internet, explaining the amendments introduce by the Government). This is adopted by the regulators in their guidance: Application to the Energy Sectors (OFT 428, 30/5/00 draft) paragraph 2.2; The Application in the Water and Sewerage Sectors (OFT 422, February 2000) paragraphs 2.6 and 2.7; Application to Railway Services (OFT 430, March 2000 draft) paragraph 2.2. Although "OFTEL would very much welcome the views of respondents to this consultation on which approach the Director General of Telecommunications should take when...[an] agreement can be dealt with under the Competition Act or the Telecommunications Act."(Application in the Telecommunications Sector (OFT 417, 1998 Draft) p 23).

[651] Concurrent Regulation to Regulated Industries (OFT 405, November 2000) paragraph 4.3.

[652] The Application in the Water and Sewerage Sectors (OFT 422, February 2000) paragraph 2.8; "When requesting information, OFGEM will specify the potential infringement it is investigating

and electricity markets, where it is proposed that a breach of a licence condition could result in a fine of up to 10 per cent. of *global* turnover[653], which is greater than that permitted by the Competition Act 1998 and may pose the incentive to switch to the specific regulatory regime. The discretion will make it difficult to challenge decisions. As Whish points out, in respect of regulators decisions, those:

> "...in the exercise of their Competition Act powers lie to the Appeal Tribunal of the Competition Commission. References in relation to their licensing functions and certain monopoly references may be made to the reporting panel of the Competition Commission. Regulators' decisions may therefore come up for review by the Competition Commission through two different routes. Other decisions of the regulators are subject to appeal/review provisions in their controlling statutes. It is perhaps unfortunate that there should be three different types of review of the regulators functions."[654]

Concurrency also presents the possibility of a public interest test emerging if transparency is missing:

> "To an extent that we have not yet seen from the Government, several regulators are beginning to look beyond the promotion of competition to a wider range of public interests that they are trying to secure through regulatory activity. For example, the water regulator considers the environment, supply, viability of industries and investment programmes and

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and the power(s) it will use to address the suspected infringement. Where more than one of the powers [competition law of sector specific] are considered to be potentially appropriate, it is likely that OFGEM will specify all the relevant powers. It may not be possible of OFGEM to decide which specific power(s) are likely to be the most appropriate to address the suspected infringement at the commencement of an investigation" (Application to the Energy Sectors (OFT 428, 30/5/00 draft) paragraph 4.5); "If it becomes clear to OFGEM when conducting its investigation that a particular power is no longer appropriate to the particular case, it will cease to request information under the respective power and inform the undertaking concerned" (paragraph 4.6); "Where information has been gathered using powers under one of the Acts...OFGEM may use the information gathered to investigate other matters under the [Competition Act 1998], the Gas act 1986, the Electricity Act 1989 or the Fair Trading Act 1973, subject to and in accordance with the provisions of these various acts." (paragraph 4.7).

[653] Utilities Act 2000 Financial Penalties: Determination of Turnover (DTI Consultation, April 2001).

compliance with legislation....We might reasonable deduce that those objectives are in a sense complimentary, as they all provide benefit to the public and are construed as part of the public interest. In some circumstances for example, when setting prices for dominant suppliers in the marketplace, such as regulated utilities we may even deduce that the consumer benefit is a direct result of the regulator's activity. Nevertheless, there is an inherent tension among regulators, which often compete not so much within their own sector, but against other regulators to try to deliver the maximum consumer benefit as fast as they can. They may not necessarily look to the development of competition in the long term."[655]

Therefore despite the good work achieved in adopting a market share test and analysing agreements in terms of competition significance, even if a rule of reason test is avoided, concurrency produces a delicate situation: one that has the potential to deliver a just, transparent and effective system, but one that could just as easily thwart the attainment of these objectives. The problems inherent in relying on regulators are identified by Veljanovski's comment that the approach by OFTEL "...does not meet the standards required of a competition authority."[656] This was prompted by the MMC Report on Cellnet and Vodafone[657], following a reference by OFTEL, in which the MMC agreed that the fixed charges were too high, but rejected every competition argument advanced by OFTEL.

The final significant restructure was the creation of the CC out of the former MMC. Lord Borrie was in favour of the CC in order to "build up specialised knowledge of competition matters."[658] The noble Lord was concerned at the OFT exercising all

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[654] R Whish "UK Competition Law; Comments" Speech delivered at Fordham Corporate Law Institute, Twenty-Seventh Annual Conference on International Antitrust Law & Policy, New York, 19/10/00, pp 31 and 32.
[655] Mr Andrew Lansley, Official Report, Standing Committee G, Competition Bill House of Commons, Part 2 p 3, 18 June 1998 (afternoon session), House of Commons internet.
[656] CG Veljanovski "Competition in Mobile Phones: The MMC Rejects OFTEL's Competitive Analysis" (1999) 4 ECLR 205
[657] Cellent and Vodafone HC 011 5154590 (21/1/99).
[658] Official Report, Committee Stage, Competition Bill House of Lords, Column 442, 17 November 1997, Lords Hansard internet; that is, the benefit of "cross fertilisation" as it became referred to as the Bill proceeded. See also Official Report, Report Stage 2, Competition Bill House of Lords, Columns 372 to 374, 19 February 1998, Lords Hansard internet, where the notion of cross fertilisation was reiterated, and again at the Third Reading, Official Report, Competition Bill House of Lords, Column 1352, 5 March 1998, Lords Hansard internet). Lord Borrie was strongly opposed

the powers to be given by the new legislation and the FTA,[659] so the CC's retained a reporting arm (to deal with the FTA) and gained an adjudicatory arm to rule on all aspects of the OFT's work under the Chapter I Prohibition. The Government denounced criticism against the split structure of the CC finding:

> "The placing of the tribunal alongside the reporting arm of the Commission will not undermine the independence of the tribunal...There will be a finite pool of people able and willing to become panel members who have the necessary skills and experience...If people have the right skills for both jobs, they should be allowed to be members of both the appeal and the reporting panels. The new organisation would thus benefit from cross-fertilisation, which will facilitate the transference of expertise."[660]

The OFT welcomed the adoption of the Tribunal since it would "...be more court like while retaining flexibility to deal with cases speedily."[661] This flexibility and speed are essential in overcoming the problems experienced under the RPC.[662] Should the sharing of ideas and understanding of competition and the market actually occur, all the better, as it will increase the reliance on economic theory and the use of economic analysis in applying the Chapter I Prohibition. As for consistency in decision making in the past, a word of caution remains: Bishop has expressed concern at the unpredictability of the MMC, finding that the:

> "...high water mark of the non-interventionist approach was probably the MMC's 1986 *Tampons* report. In this case, the MMC decided against intervention in a market in which market power was being exercised on the

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to the creation of a court instead of the CC and reminded those in the debate the structure of the RPC, although a court, relied on expert lay members and could not be described as a usual court (Official Report, Committee Stage, Competition Bill House of Lords, Column 369, 17 November 1997, Lords Hansard internet).

[659] Official Report, Committee Stage, Competition Bill House of Lords, Column 444, 17 November 1997, Lords Hansard internet.

[660] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 3 pp 1 and 2, 18 June 1998 (morning session), House of Commons internet.

[661] M Bloom "The OFT's Role in the New Regime" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 21. The CCAT, presided over by Judge Christopher Bellamy, has members drawn from academia, accountants, economists, solicitors, the civil service, and associations/unions. Its rules of procedure are set out in The Competition Commission Appeal Tribunal Rules 2000 (SI 2000 No. 261).

[662] See Chapter 2, supra.

basis that "currently rewarding profit levels should act as a magnet to attract new suppliers". Contrast this with the decision in the recently published *Domestic Electrical Goods* report. Here, there was evidence to suggest that manufacturers were making barely adequate returns, much less profits, in an environment in which prices were both highly visible and declining in real terms [with no suggestion that this was due to sustaining an inefficient market structure]. Yet the MMC recommended that legislation be adopted prohibiting a whole variety of practices..."[663]

Whilst this relates to the reporting arm of the CC, it demonstrates that the CC, like the OFT need to be certain of the interpretation given to the substantive law, especially the issues raised in 3.1.3, above.

Should undertakings in the future merge so as to avoid the Chapter I Prohibition, it would be better for the CC and OFT to be one and the same, like DG Comp. However, until there is evidence of successful avoidance via mergers, the current set up provides significant checks and balances in the operation of two expert competition bodies (one decision making and one appellate), and allows a greater expertise to develop. In summary the restructuring of the umbrella of bodies tasked with putting the Chapter I Prohibition in to practice should enable more effective and speedier decision making in the competition sphere. Transparency is provided for (in theory) and the commitments to this are promising. However, resources will remain the Achilles heel. The OFT is already used to sharing power in other areas of the OFT's work (such as trading standards responsibilities under the unfair contract terms regulations). John Vickers refers to this as the:

"pro-consumer cartel [which] also includes the National consumers Council, National Associations of Citizen's advice Bureaux, the Advertising Standards Authority, local authorities, the Consumers' Association and many other organisations on whom [the OFT's] effectiveness depends."[664]

In the future greater reliance on these and other bodies will be required, at which

[663] B Bishop "Antitrust Enforcement and the Rule of Law" (1998) 1 ECLR 1, 2.
[664] Annual Report of the Director General of Fair Trading 2000, p 10.

time the relationships within such pro-consumer cartel must become transparent and defined. The OFT's role under the new Stop Now orders, where it is the lead body amongst other protection and enforcement bodies entitled to seek injunctions in both EC and domestic courts, will perhaps set a precedent for defining the future working roles.[665] What started in the Competition Bill as principles of concurrency and cross fertilisation in order to deliver a superior standard of understanding and decision making, is with hindsight, a first step towards more effective control. This transition is already under way in the shape of the Government's plans to make the OFT an Authority with executive responsibility, vesting in an statutory board, to be set out in the new Enterprise Bill[666].

(ii) Advice

The Government chose to leave precise detail to the DGFT, to put be in place by means of rules and guidance. These details were not debated during the passage of the Bill (posing the possibility that the achievement of transparency might be defeated), but the Government assured that matters were well in hand:

> "...I am pleased to report that the Director General of Fair Trading wrote to me on 6th February reporting considerable progress in preparing procedural rules and guidelines...He expects to publish the vast bulk of the guidelines series by September of this year."[667]

> "On 26 November [1998], a formal consultation process started with the publication of nine draft guideline booklets: The Major Provisions; The Chapter I Prohibition; The Chapter II Prohibition; Market Definition; Powers of Investigation; Concurrent Application to the Regulated Industries; Transitional Arrangements; Enforcement; and Trade Associations, Professional Bodies and Self Regulatory Organisations."[668]

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[665] See further Annual Report of the Director General of Fair Trading 2000, pp 17 and 18.
[666] See Chapter 4, infra.
[667] Lord Simon of Highbury, Official Report, Report Stage 2, Competition Bill House of Lords, Column 361, 19 February 1998, Lords Hansard internet.
[668] Annual Report of the Director General of Fair Trading, 1998, p 33.

The first two guidelines to be drafted were A Guide to the Major Provisions of the Competition Act 1998 (Based on Bill as at 9/3/98) and Market Definition[669]. The Guide[670] was void of any real depth, but in general, later drafts rectified this.[671] Whilst not perfect, and varying in quality and usefulness, they do meet the objective of "educating". More importantly, these OFT guidelines, though not law, are significant in terms of delivering certainty since they will be followed.[672] They do "borrow" quite substantially from parts of EC Notices[673], but on the whole succeed in providing this information in a clearer and more manageable way. Also envisaged, but never published were: Rights of Appeal; the CC and Third Party Actions; Access to File; Meaning of affect trade within the UK; Position of existing agreements having negative clearance or Article [81](3) comfort letters; Interaction

[669] OFT press release PN 13/98, 20 March 1998.
[670] OFT 220.
[671] The Major Provisions (OFT 400, March 1999); The Chapter I Prohibition (OFT 401, March 1999); The Chapter II Prohibition (OFT 402, March 1999); Market Definition (OFT 403, March 1999); Powers of Investigation (OFT 404, March 1999); Concurrent Application to the Regulated Industries (OFT 405, November 2000 replacing March 1999 version); Transitional Arrangements (OFT 406); Enforcement (OFT 407, March 1999); Trade Associations, Professional Bodies and Self Regulatory Organisations (OFT 408, March 1999); Form N (OFT 409, February 2000); Form EG (OFT 410, Draft); Early Guidance Directions (OFT 412, Draft); Assessment of Individual Agreements and Conduct (OFT 414, September 1999); Assessment of Market Power (OFT 415, September 1999); Exclusion for Mergers and Ancillary Restrictions (OFT 416, September 1999); Application in the Telecommunications Sector (OFT 417, Draft); Vertical Agreements and Restraints (OFT 419, March 2000); Land Agreements (OFT 420, March 2000); Application in the Water and Sewerage Sector (OFT 422, February 2000); Director General of Fair Trading's Guidance as to the Appropriate Amount of Penalty (OFT 423, March 2000); Director General of Fair Trading's Rules on Fees (OFT 425); Application to the Energy Sector (OFT 428, Draft); Application to Railway services (OFT 430, Draft); Application to the Northern Ireland Energy Sector (OFT 437, Draft); all of which have been finalised bar 417, 428, 430 and 437 (Form EG and Early Guidance directions remained in draft; and the Director General of Fair Trading's Rule on Fees became part of The Competition Act 1998 (Director's rules) Order 2000 (SI 2000 No. 293)).
[672] "Guidelines, by their nature, are not binding. I believe that it is essential for these matters to be incorporated into the Bill to provides clarity of definition." (Lord St. John of Bletso, Official Report, Second Reading Competition Bill House of Lords, Column 1157 30 October 1997, Lords Hansard internet); "[The guidelines] need to evolve and change over time, to reflect case law and developments in EC jurisprudence. This sort of evolution is not consistent with an order-making process. Indeed, any attempt to give legal force to guidelines might risk the UK prohibitions getting out of step with EC case law, with a consequent increase in burdens on business." (Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Column 902, 25 November 1997, Lords Hansard internet); "The guidelines have to reflect the dynamics of the market place. They will not be case in stone" (Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Column 922, 25 November 1997, Lords Hansard internet); "..the appeal tribunal and the courts should have to take account of the general information and advice issued by the director, when assessing cases." (Lord Haskel, Official Report, Committee Stage, Competition Bill House of Lords, Column 906, 25 November 1997, Lords Hansard internet). By comparison, EC notices, are not binding for the purposes of Article 249 EC, but are followed. In the current climate they are seen as the means of delivering certainty to undertakings for example, the guidelines on vertical and horizontal agreements. Although some call for such notices to be made legally binding (MP Broberg "The De Minimis Notice" (1995) 20 ELR August, 371, 386) this is the minority view.

between the concept of "small agreements/ conduct of minor importance" and "appreciable effect"; Agreements involving Intellectual Property (to be OFT 418); Article 90(2)[674] (to be OFT 421); Prohibited Agreements; Interim measures; Effect on SME's. Whilst some of these featured, in part, in other Guidelines, "Intellectual Property" and "Article 90(2)" have been promised since early on, but did not materialised even in draft until eighteen months after the commencement of the Chapter I Prohibition[675]; and "Third Party Actions" seems to have vanished completely from the agenda. The Director General of Fair Trading's Procedural rules were to be OFT 411, but were set out in Statutory Instrument only.

In addition to the Guidelines, several "Pop" guides have been published: Your Business and the Competition Act (PUB/280, 9/99); What your business needs to know (OFT 247, September 1999); How your business can achieve compliance (OFT 424, August 1999); Under investigation? (OFT 426, December 1999); Making a complaint (OFT 427, February 2000); Is notification necessary? (OFT 434, August 2000); Cartels and the Competition Act 1998 (OFT 435, November 2000); Leniency in cartel cases (OFT 436, February 2001) and Public Sector Bodies and the Competition Act 1998 (OFT 440, April 2001).

On the whole this guidance received praise,[676] and has aided quite considerably understanding of the Chapter I Prohibition and its procedures. That said, it will be apparent from this work that there are aspects of the new regime that could benefit from explicit inclusion in such Guidelines. These are summarised at the conclusion of this Chapter.

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[673] This could have been avoided by reliance purely on section 60.
[674] Now Article 86 EC.
[675] Despite comments made at an OFT seminar on 28 November 2000, that the Intellectual Property draft was ready for release early in 2001, it is now due to be release in September 2001. The Guidelines on Services of General Economic Interest (OFT 421, July 2001) is now available in draft.
[676] Transparency Report - Responses to the OFT's consultation document; Opening the door on fair trading, p 2 (available at www.oft.gov.uk/html/about/trans1.htm as at 15/3/01); BJ Rodger "Compliance with Competition Law: A View from Industry" (2000) CLLR 249, 281.

(iii) Compliance

Not even an approximate figure of the cost of compliance was mooted: "Our estimate is that the on-going cost of the regime to business will be minimal, ranging between a reduction of £2.2 million and an increase of £4 million per annum."[677]

As to preparation for the prohibition, Lord Simon of Highbury said that the period of about one year's delay to the commencement of the Chapter I Prohibition "should give business adequate time to prepare for the new regime..."[678] However, all was not well, with the rules not prepared, guidelines still being drafted and a new transitional schedule adopted[679]. It was not surprising that "Fifty-eight per

[677] Lord Clinton-Davis, Official Report, Second Reading Competition Bill House of Lords, Column 1192, 30 October 1997, Lords Hansard internet, although these figures were disputed because of the lack of substantial supporting calculations. No figure could be agreed upon throughout the Parliamentary debates. "...the report on the compliance cost assessment is only five lines long. It is different from an earlier version, but without any explanation. The estimate ranges between a reduction of £2.2 million and an increase of £4 million in recurring costs. The house was not told on Second Reading, not has it been told to date, on what basis that was calculated. I cannot imagine that the Committee will take such a figure seriously, especially given the absence of any powerful analysis." (Mr Oliver Letwin, Official Report, Standing Committee G, Competition Bill House of Commons, Part 4 p 1, 19 May 1998 (morning session), House of Commons internet).

[678] Official Report, Committee Stage, Competition Bill House of Lords, Column 870, 25 November 1997, Lords Hansard internet. Later on, Lord Simon again said that he expected rules and guidelines to be issues early following Royal Assent, although the DGFT had indicated "that he would want to concentrate on which would be of most immediate use to business." (Official Report, Committee Stage, Competition Bill House of Lords, Column 899) 25 November 1997, Lords Hansard internet). Thus it is somewhat perplexing why guidelines on Intellectual Property and Services of General Economic Interest have not been published earlier. In an era of increased uncertainty about how far intellectual property protection extends, and increased use of PFI as a means of delivering services where the market will not produce the result needed by the Government, there was a case for these guidelines to be published as soon as possible.

[679] Concern was expressed at the replacement Schedule 13, an 18 page to replace the previous 6 pages, being tables so late into the process: Mr Tim Boswell and Mr John Redwood, Official Report, Standing Committee G, Competition Bill House of Commons, Part 1 pp 1 and 2, 16 June 1998 (morning session), House of Commons internet. Part of this was to enable the resale price maintenance on Over-the-Counter medicines to receive a five year moratorium preventing the DGFT from looking at the issue again should the RPC find in favour of continuing the exemption (see Official Report, Standing Committee G, Competition Bill House of Commons, Part 3 p 5, 23 June 1998 (morning session), House of Commons internet; and A Guide to the New Transitional Schedule in the Competition Bill (Department of Trade and Industry, June 1998) p 1). The comfort provided by this is questionable, when the European Commission had said that the only reason it was not looking at the issue was because the Office of Fair Trading was referring the matter to the RPC – is it therefore little comfort in the situation where the EC finds an affect on inter state trade? A similar point was later raised by Mr Andrew Lansley who questioned "Whether the Under-Secretary can exclude the possibility of the Commission seeking to take over after the transitional period, on the basis that it was a matter that affected trade between member states..." (Official Report, Standing Committee G, Competition Bill House of Commons, Part 9 p 3, 23 June 1998 (morning session), House of Commons internet). In a later Committee session, Mr Nigel Griffiths admitted that "The fact that we put words in the Bill does not exempt or exclude an agreement from

cent. of the lawyers and 63 per cent. of the economists who responded to the survey stated that they did not feel satisfied that the Bill in its present form was drafted well enough to achieve sufficient clarity and legal certainty."[680] Consequently the Government decided "...to give business more time to prepare for the introduction of the new regime. We have decided that the two new prohibitions should be brought into force on 1st March 2000."[681] In addition, to counteract these concerns of business and the legal community, it can be seen that a notion of ownership was applied to the drafting of the guidelines[682], suggesting that by involving business and making them a part of the procedure forming process, they would be more ready and willing to live by it thus increasing compliance, reducing future disputes/arguments and easing the pressure on the Office of Fair Trading's resources.

This guidance assists compliance. Whilst the DGFT will not approve a specific programme, the guidelines together indicate what is expected of a workable programme. Compliance programmes are lucrative work for the legal profession[683], and particularly welcome in light of the discouragement of notifications. Rodger's research into compliance within industry found that 77.3 per cent of respondents had a specific competition compliance programme.[684] Indeed the OFT is keen to provide assistance on all requests for advice, and this is provided free of charge. Fees are only imposed for notifications. When the issue

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the scrutiny of the Commission." (Official Report, Standing Committee G, Competition Bill House of Commons, Part 4 p 2, 23 June 1998 (afternoon session), House of Commons internet). At the eventual hearing of the case (before a panel fully compliant with the Human Rights Act 1998) the respondents, the Proprietary Association of Great Britain and the Proprietary Articles Trade Association, withdrew their opposition to the ending of the RPM exemption (OFT press release PN 22/01, 15/5/01)

[680] Mr Andrew Lansley, Official Report, Second Reading, Competition Bill House of Commons, Column 88, 11 May 1998, Lords Hansard internet, referring to a survey carried out in the Global Competition Review.

[681] Lord Simon of Highbury, Official Report, Consideration of Commons amendments, Competition Bill, House of Lords, Column 1337, 20 October 1998, Lords Hansard internet.

[682] Mr Ian McCartney, Official Report, Standing Committee G, Competition Bill House of Commons, Part 1 p 4, 11 June 1998 (morning session), House of Commons internet. See footnote 624, supra.

[683] New technology is also cashing in with Interactive Corporate Communications Ltd (a high-tech company based in Brussels and the UK) devising an internet based tool to question undertakings about imaginary scenarios and provided advise by way of feedback analysis.

[684] BJ Rodger "Compliance with Competition Law: A View from Industry" (2000) The Commercial Liability Law Review December, 249, 273, although Rodger expresses concern at the relatively low response rate.

of fees was addressed in Committee,[685] a question was raised by Mr John Redwood as to whether there would be a facility for companies to seek informal guidance.[686] However, this point was not specifically answered by Mr Nigel Griffiths on behalf of the Government. It was addressed at a later stage, when the Director's Rules draft Statutory Instrument was being considered. Here Dr Kim Howells confirmed that "Informal advice, which the OFT is already giving businesses, will...be free."[687] Whether the OFT can continue to operate an effective system of free advice is doubtful.[688]

(iv) Notifications

In relation to the way in which the Commission operated the notification process, it was asked whether the Government were "...comfortable that, in practice, the OFT will be similarly consistent throughout the manner in which the European Commission undertakes its activities?"[689] The response that "I believe that the OFT can improve on the system that is working under the Commission. That is why the Commission is especially interested in the Bill"[690], was perhaps a hint of the mantra that the OFT would adopt.

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[685] Official Report, Standing Committee G, Competition Bill House of Commons, Part 9 p 3 to Part 11 p 1, 18 June 1998 (morning session), House of Commons internet.

[686] Official Report, Standing Committee G, Competition Bill House of Commons, Part 9 p 4, 18 June 1998 (morning session), House of Commons internet.

[687] Official Report, Sixth Standing Committee on Delegated Legislation, Competition Act 1998 (Director's Rules) Order 2000, House of Commons, Part 2 p 1, 5 April 2000, House of Commons Hansard, internet, where the opposition were not happy with the imposition of flat rate fees when notifying. "The fees have been set at a level to recover the costs of dealing with the notifications, not in order to discourage them." Dr Kim Howells, (Part 2 p 2). However, bear in mind that before submitting a notification, the undertaking is very likely to obtain legal advice, and his solicitors will no doubt prepare the notification submission, thus increasing the costs quite substantially.

[688] An amendment was added to enable rules to taken into account turnover when setting the level of fees (Lord Simon of Highbury, Official Report, Report Stage 3, Competition Bill House of Lords, Column 468, 23 February 1998, Lords Hansard internet; Section 53). However, it was made clear that "...Ministers have not decided that the power to charge fees on any basis should be exercised, but we agree it would be useful were the director to have this additional option of setting fees be reference to a person's turnover." (Lord, Simon of Highbury, Official Report, Report Stage 3, Competition Bill House of Lords, Column 469, 23 February 1998, Lords Hansard internet.). The potential for changing the fees for notifications is readily apparent, although another way to help recoup costs would be to start charging for advice. See Chapter 5, infra.

[689] Mr Andrew Lansley, Official Report, Standing Committee G, Competition Bill House of Commons, Part 7 p 1, 2 June 1998 (afternoon session), House of Commons internet.

[690] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 7 p 1, 2 June 1998 (afternoon session), House of Commons internet.

The mantra of "do complain, don't notify", encourages complaints as opposed to notifications. Notifications are themselves positively discouraged further by the fee system which Furse finds is an attempt "...to encourage complainants to come forward in an effort to direct the domestic regime more towards dealing with harms, rather then confirming that conduct is lawful."[691] The aim of a legal regime should be to prevent anti-competitive harm rather than act as a conduit of approval[692]. It is impossible in a system with finite resources for law to act in such a way to provide comfort, as the EC has learnt: Despite the notification procedure in Regulation 17/62, "over 90 per cent of notifications are closed informally."[693]

An attempt was made to amend the Bill so that following notification a decision should be given within 30 days, if possible.[694] The Government rejected this as they felt that although the DGFT should not delay in giving guidance, to impose a time limit would be dangerous, especially in light of the adoption of a new regime.[695] However, comfort was given by reminding the Committee that:

> "Schedules 5 and 6, in their seventh paragraphs...allow persons aggrieved by the director general's failure to determine an application for a decision, to apply to a court for directions to secure that the application is considered without further delay...Current European practice is unsatisfactory. The Government intend to improve on it in our domestic legislation...the Bill is designed to ensure that [parties] receive such a decision in a timely

[691] M Furse, op cit., pp 51 and 52.
[692] See individual exemption, supra.
[693] White Paper on the Modernisation of the Rules implementing Articles 85 and 86 of the EC Treaty (28/4/99), paragraph 34. The reform of the block exemptions did see a decrease in the number of notifications and complaints (There were 101 notifications in 2000 compared to 162 in 1999 and complaints similarly fell to 112 from 149; although the majority of cases are still dealt with by informal procedures with only 36 formal decisions compared to 343 informal ones (Commission press release IP/01/698, 15/05/01; XXXth Report on Competition Policy 2000 (SEC (2001) 694 final, 7/5/01) p 10 paragraphs 11 and 13)), but despite the aim being that vertical agreements should not be notified (as it is for undertakings and their advisers to reach the decision themselves, since any exemption can now be backdated to the date of the agreement by virtue of changes introduced by Regulation 1216/1999), it would appear that undertakings are still relying on the Commission (B&W Loudspeakers Ltd notified its selective distribution agreement, but the Commission found that the agreement in this case contained hard core restrictions (Commission press release IP/00/1418, 6/12/00)), even thought the accompanying guidelines explain the detail in aiming to prevent this sort of situation arising.
[694] Mr Tim Boswell, Official Report, Standing Committee G, Competition Bill House of Commons, Part 2 p 2, 11 June 1998 (afternoon session), House of Commons internet.
[695] Mr Ian McCartney, Official Report, Standing Committee G, Competition Bill House of Commons, Part 2 p 3, 11 June 1998 (afternoon session), House of Commons internet.

manner."[696]

Timely decision making will be assisted by the introduction of a computerised case management system, due to be completed by the end of 2001, enabling more efficient and effective management of Competition Act cases, an increased sharing of knowledge, reduction of duplication and/or inconsistency and more accurate reporting.[697] This last benefit will be very welcome in ensuring the provision of clearer information on the issues the OFT is facing under the Chapter I Prohibition.

(v) Decision making

The OFT has indicated that "...the Office is not intending to deal with cases under the Act by means of comfort letters. The majority of cases will in fact be dealt with by means of a decision or guidance."[698] This can be seen as a response that:

> "....the Director General of Fair Trading...[should] ensure legal certainty at a relatively early point by accepting the opportunity to make early decisions rather than offering comfort letters, which is the mechanism he appears to prefer. I realise that the mechanism is simple and leaves greater flexibility for the director general, but it might be counterproductive for industry to receive comfort rather than certainty from the Office of Fair Trading."[699]

Comfort letters are relevant in the application of the Chapter I Prohibition only in so far as they are:

> "...of persuasive authority to the UK system. However, it would be dangerous to confer a blanket automatic exemption from the UK prohibition on agreements that had received comfort letters. For example, such letters may state that the agreement is not caught by Article [81] because there

[696] Mr Ian McCartney, Official Report, Standing Committee G, Competition Bill House of Commons, Part 2 p 4, 11 June 1998 (afternoon session), House of Commons internet.
[697] Annual Report of the Director General of Fair Trading, 2000, p 65.
[698] H Emden "A Blueprint for Reform: Response by the Office of Fair Trading" (1999) 6 ECLR 309, 312. Although guidance portrays comfort letter qualities, although it is a more formalised procedure, with expectations understood from the outset (see 3.2.1, supra).

does not appear to be an effect on trade between member states, while leaving open the possibility that the agreement produces harmful anti-competitive effects within the UK."[700]

This has been adopted as the DGFT's general policy.[701]

However, of concern is the reliance on informal discussions. These take on the comfort letter drawbacks[702]: nothing gets published and consequently undertakings who want to find out the OFT's latest views need to contact them directly. This is despite the fact that a comfort letter for the domestic regime was not envisaged for the OFT[703]. If the OFT avoids formalising an EC style comfort letter style process, another EC development suggests another system lacking certainty will be ready to takes its place: Jones and Sufrin point to the growing use of settlements in competition investigations whereby the parties concerned give undertakings to the Commission. They find that "several important cases have been terminated this

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[699] Mr Andrew Lansley, Official Report, Standing Committee G, Competition Bill House of Commons, Part 3 p 2, 19 May 1998 (morning session), House of Commons internet.

[700] Lord Haskel, Official Report, Committee Stage, Competition Bill House of Lords, Column 352, 13 November 1997, Lords Hansard internet.

[701] The Chapter I Prohibition (OFT 401, March 1999) paragraphs 7.11 and 7.12; The 1993 Notice provides that if the Commission has issued a comfort letter indicating that it does not intend to take any further steps, this is *not* binding on the national court, but must be taken into account by the court in determining whether or not the Treaty of Rome has been infringed. This is a statement of the Commission for the purposes of section 60 (see 3.1.2, supra).

[702] They are not all published in the OJ or press release; those they are published contain minimal information. Consequently, up to date information on trends is lacking in this system. Whish finds that in the vast majority of cases, this practice provides "...little or no transparency in the process at all. We simply know that the Commission has received a notification and that it has chosen to close its file. In some cases it may have placed a Notice in the Official Journal inviting third parties to comment on the agreement, and it may issue a Press Release or comment on the Agreement in its Annual Report. However, there is very little opportunity to find out what motivates the Commission to authorise the agreement." (R Whish Exemption criteria under Article 85(3) EC: a study of the case-law of the European court of Justice, the Court of First Instance and the decisional practice of the European Commission (1997), p55). Whether there is any comfort in their value as a precedent is debatable; the Commission has in relation to comfort letter later successfully withdrawn them, the court rejecting arguments of legitimate expectations put forward by the undertakings concerned (Cases T-7 & 9/93 Lagnese-Iglo & Schöller Lebensmittel v Commission [1995] ECR II-1533, [1995] 5 CMLR 602; case C-279/95P, Lagnese-Iglo v Commission [1998] ECR I-5609, [1998] 5 CMLR 933).

[703] "...we are all familiar with the concept of what I call "snow" – when the number of incoming messages destroys the ability of the poor mortals that we are to handle them...If the director general and the OFT are beset with huge quantities of bumph from people who think that, despite their attempts to get it right, and because they have over-fussy lawyers who are determined to have everything in black and white, they need to apply for guidance and clearance on their activities, the OFT will ultimately not be able to concentrate on its main job, which is to pursue genuine actions of anti-competitiveness." (Mr Tim Boswell, Official Report, Standing Committee G, Competition Bill House of Commons, Part 1 p 3, 2 June 1998 (afternoon session), House of Commons internet).

way"[704] most notably in the technology sector and consequently "...highly contentious matters are not fought out to the end and never reach the Court."[705] Whilst these are publicised "...and inevitably they can attain the status of precedent....on what is acceptable to the Commission...[because] of their nature they involve compromise and concession."[706] Thus implying a reduction in the value of these agreements as precedents and increasing uncertainty for other undertakings.

(vi) Appeals

Any party to an agreement in respect of which the DGFT made a decision (for example, declaring that the Chapter I Prohibition has been infringed, granting individual exemption, imposing conditions or obligations on individual exemptions, cancelling an exemption) may appeal to the CC:[707]

> "Importantly the proposed UK system would differ from the European approach in that appeal would be on the full merits of the case while, at the European level, it is limited to a restricted number of matters, such as an error of law, jurisdiction or essential procedural safeguards. Furthermore, in the United Kingdom, the range of third parties able to appeal would be wider."[708] Third parties may appeal a decisions of the DGFT to have them

[704] Jones and Sufrin, op cit., p 922.
[705] ibid.
[706] ibid.
[707] Section 46.
[708] Annual Report of the Director General of Fair Trading, 1997, page 12; "This is a potentially far-reaching difference from the structure of European institutions and should mean less focus on procedural matters and more on substance." (M Bloom "The OFT's Role in the New Regime" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 22). repeating the Government's intention that "...the accountability mechanisms are much more extensive that those which exist at EC level. In contrast to the full rehearing of the case by the appeals tribunal, the European Court of Justice is in certain respects more akin to judicial review. Similarly, the class of third parties which can appeal a DGFT decision is highly likely to be wider that the class which may appeal Commission decisions." (Lord Simon of Highbury, Official Report, Report Stage 3, Competition Bill House of Lords, Column 457, 23 February 1998, Lords Hansard internet). Commission decisions (not provisional steps such as decisions to investigate) can be challenged under Article 230, by way of judicial review by the CFI; the grounds are lack of competence, infringement of an essential procedural requirement, infringement of the Treaty of any rule of law relating to its application, or misuse of powers. Undertakings to whom the decision is actually addressed may challenge as may any other natural or legal person where the decision is of direct and individual concern to it although it is in the form of a regulation or decision addressed to another person. However this has been interpreted narrowly "so restricting significantly access to

withdrawn or varied[709] if they have "...'sufficient interest' in the decision themselves, or represent those with 'sufficient interest' in the decision as judged by the Director General".[710] The third party may appeal against a decision that they do not have sufficient interest or a decision by the DGFT not to vary or withdraw his earlier decision.[711]

Where the appeal relates to an exemption, a cautionary note for the OFT to be aware of is that decisions under Article 81(3) have been successfully appealed in only three cases[712], suggesting that the chances of successfully appealing a section 4 decision are limited. It must be hoped that the change in emphasis in respect of the greater scope for appeal will prevent such a situation arising in the domestic sphere. To find otherwise would weaken the flexibility and effectiveness of the system.[713]

Judicial review of the DGFT's and CC's acts is also possible, following precedent pre Competition Act 1998[714]. Furse finds that the new "tighter and more formal structure" should in fact mean more challenges.[715] Judicial review in competition cases has not proved very successful because of the complexity and discretion in

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judicial review." (Lord Simon of Highbury, Official Report, Report Stage 3, Competition Bill House of Lords, Column 457, 23 February 1998, Lords Hansard internet). The CFI cannot substitute its own decision; Article 231 permits it only to declare the act concerned to be void, although if the "...articles of the decision are severable, the Court can declare some void and leave others." (A Jones and B Sufrin, op cit., p 933). CFI decisions can be made to the ECJ, on points of law only. Where there is an appeal under Article 230, the court may suspend the Commission's decision (Article 242 EC, with Article 243 enabling the court to prescribe any necessary interim measures). There is a growing number of cases pending before the CFI: the average duration of a court case (all matters) in 2000 was 27.5 months; with 20 competition cases dealt with in less than five months, but 103 cases exceeding 24 months ("Time waits for no court" (2001) The Lawyer 9 April, 24, 27).

[709] Section 47(1).

[710] The Major Provisions (OFT 400, March 1999) paragraph 14.7; section 47(3).

[711] Section 47(6); Rule 28, The Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No. 293).

[712] R Whish Exemption criteria under Article 85(3) EC: a study of the case-law of the European court of Justice, the Court of First Instance and the decisional practice of the European Commission (1997), Table 3, p 56.

[713] See 3.2.3, supra.

[714] Order 53, r. 7(1); In respect of a proposed amendment (by Lord Kingsland, Official Report, Report Stage 2, Competition Bill House of Lords, Column 381, 19 February 1998, Lords Hansard internet) to specifically provide that the existence of a right of appeal against a decision of the DGFT is not to prejudice or preclude a challenge by way of judicial review, Lord Simon of Highbury confirmed that the Government was "doing nothing in the Bill to prevent the application of the normal rules of judicial review." (Official Report, Report Stage 2, Competition Bill House of Lords, Column 381, 19 February 1998, Lords Hansard internet).

[715] M Furse, op cit., p 77.

the system[716], but in line with the Woolf reforms judicial review has been reformed to simplify the system, encourage early settlement of cases, reduce delays and minimise costs.[717] The only successful challenge against the OFT was in respect of the DGFT's decision to refer the operation of a bus service to the MMC[718], although Thomsom Holidays did succeed in overturning the imposition of Articles 3 and 4 of the Foreign Package Holidays (Tour Operators and Travel Agents) Order 1998, made under section 56 of the FTA, [719]and more recently there has been partial success in the Interbrew saga: "Interbrew does articulate fundamental problems that many practitioners have in their day-to-day dealings with the commission – namely, that its workings are opaque and that there is little opportunity for negotiation."[720]

Nigel Griffiths wanted to make it clear that:

> "....nothing in the Bill interferes with the right to seek judicial review in the High Court. For example, failure on the part of the director general to follow proper procedures and his own rules might be challenged in that way *before or after he makes the decision.* That, alongside the right of a full appeal to the tribunal on the merits of a decision, strikes the right balance and protects the efficiency and effectiveness of the new regime."[721] (emphasis added).

However, this would seem to conflict with Mr Nigel Griffiths' earlier suggestion

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[716] The majority of these were unsuccessful, for example, R v MMC, ex parte Elders IXL [1987] 1 All ER 451; R v MMC, ex parte Matthew Brown Plc [1987] 1 WLR 1235; R v MMC, ex parte Stagecoach Holdings (1996) The Times 23 July; although success in more recent cases may be a spur for future actions (see below).
[717] LCD press release 130/00, 14/4/00.
[718] R v DGFT ex parte, Southdown Motor Services Limited (1993) The Times 18 January.
[719] R v Secretary of State for Trade and Industry, ex parte Thomson Holidays Ltd (Court of Appeal) (2000) The Times 12 January; [2000] UKCLR 189
[720] "Strange brew" (2001) The Lawyer 2 July, 26, 27. In respect of the CC, Green finds that "Dealing with the commission can be a guessing game...You go to the hearings and put in your submissions, but you have no idea what they're thinking" (N Green in "Strange brew" (2001) The Lawyer 2 July, 26), and Hornsby warns that bringing a judicial review application may be adversely perceived by competition authorities, thus discouraging this form of redress (S Hornsby "Judicial Review of Decisions of the UK Competition Authorities: Is the Applicant Bound to Fail?" (1993) 5 ECLR 183). Interbrew v Competition Commission and Secretary of State for Trade and Industry (Court Order 25/5/1, available on www.competition-commission.gov.uk/reports as at 13/6/01).
[721] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 7 p 3, 18 June 1998 (morning session), House of Commons internet.

that an undertaking can only challenge *at the end*, when a decision is made, so as to avoid delay. Only substantive decisions are appealable to the tribunal, that is

> "...final decisions by the director general at the conclusion of a procedure or investigation a stage at which the interested parties will be affected. We do not intend to provide an appeal to the Competition Commission on intermediate steps in the director general's proceedings or his analysis on the way to making decisions. To do so would open up endless and unnecessary scope for delay and obstruction."[722]

Admittedly, this argument was made in respect of limiting appeals to the CCAT, but, in practice, will the High Court on such an application in practice, choose to stay proceedings until the DGFT has reached his final decision? After all, we have already been told that there was real merit in including a specialist tribunal rather than a court, as only that tribunal would have the requisite expertise[723]. A clear decision is required.

3.2.7 Urgency

Previously, harm had to be inflicted before the OFT could intervene: "there have been extremely serious cases in the past when it has not been found possible to complete an investigation...The lack of interim measures has been significant."[724] To enable the DGFT to take action to tackle anti-competitive behaviour quickly, before serious damage has been inflicted, the Act provides for him (either on his own initiative or after receiving a complaint) to take such interim measures as he deems appropriate pending his final decision as to whether or not there has been an infringement, provided he has a reasonable suspicion that the Chapter I Prohibition has been infringed[725] and he considers that it is necessary for him to act urgently either to prevent serious, irreparable damage to a particular person or category of

[722] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 5 p 3, 18 June 1998 (morning session), House of Commons internet.
[723] Although the reporting arm of the CC came in for criticism in the Interbrew fiasco.
[724] Lord Borrie, Official Report, Committee Stage, Competition Bill House of Lords, Column 421, 17 November 1997, Lords Hansard internet.

persons, or to protect the public interest[726]. Therefore, protection of competition need not be the primary factor in deciding to take interim measures.

An amendment proposed to replace the words "public interest" with "competition"[727] was rejected by the Government who had:

> "already provided safeguards against taking interim measures too hastily. We have struck a balance between the alleged perpetrator and the alleged victim. The director general must have a reasonable suspicion that a prohibition has been infringed and that it is necessary for him to act urgently to prevent serious irreparable damage to a particular person of category of person."[728]

However, it was confirmed that "[r]eplacing "the public interest" with "competition" ignores the extent to which the chapter II and article [82] provisions cover exploitative as well as anti-competitive conduct. It is important to protect consumers as well as competitors."[729] This was because the Government found that,

> "There is clear authority from its European counterpart, article [82], that it prohibits exploitative pricing by a dominant undertaking. High prices are not in themselves anti-competitive indeed, in so far as they encourage new entrants to a market, they are prohibition-competitive. So the director general may need to take action against exploitation was well as anti-competitive conduct. More generally, we need to protect consumers, not

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[725] Section 35(1); examples of information that may give rise to a reasonable suspicion include copies of secret agreements provided by disaffected members of a cartel; statements from employees or ex-employees and a complaint.
[726] Section 35(2); for example to prevent damage being caused to an industry, Enforcement (OFT 407, March 1999) paragraph 3.6. An interim measures direction has effect for as long as the DGFT continues to have a reasonable suspicion that there has been an infringement of the Chapter I prohibition and until the investigation is complete (section 35(5)), but can be appealed to an appeal tribunal of the CC (section 46(3)) although the making of an appeal will not suspend the effect of the interim measures direction (section 46(4)).
[727] Mr Andrew Lansley, Official Report, Standing Committee G, Competition Bill House of Commons, Part 1 p 3, 16 June 1998 (afternoon session), House of Commons internet.
[728] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 2 pp 2 and 3, 16 June 1998 (afternoon session), House of Commons internet.

just competitors."[730]

Consumers here are not consumers in terms of their position in the model of perfect competition, but are instead part of a wider public interest. This is not reconcilable with statements elsewhere in the debates.[731] It could be argued that measures based on the public interest ground were not intended to come into play under the Chapter I Prohibition, since the Government focused on the problems of Chapter II Prohibition abuses. However, express mention would again be the preferred option, because Chapter I and Chapter II are not mutually exclusive (both having the potential to be examined in relation to the same competition problem). Thus the ability of public interest grounds being argued in relation to a Chapter I Prohibition situation is a distinct, and unwelcome, possibility.

This differs from the EC regime. Despite omission from Regulation 17/62, the Commission has power to prohibit the operation of a restrictive agreement pending a final determination of its validity. This was confirmed by the ECJ in Camera Care v Commission,[732] where it was stressed that measures are valid only if there is a strong prima facie case of infringement and if they are indispensable to the protection of the Commission's anticipated final decision. The Commission has not used this power very often, because of the high burden of proof[733], although it has been suggested that this level of proof should be lowered in line with the Competition Act 1998.[734]

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[729] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 2 p 3, 16 June 1998 (afternoon session), House of Commons internet.
[730] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 2 p 3, 16 June 1998 (afternoon session), House of Commons internet.
[731] See Chapter 2, supra. Indeed, this wider interpretation of the Chapter II Prohibition caused concern amongst come Committee members, but their concerns were not rebutted by Mr Nigel Griffiths (see Mr Tim Boswell, Mr Andrew Lansley and Mr John Redwood, Official Report, Standing Committee G, Competition Bill House of Commons, Part 3 pp 1 and 2, 16 June 1998 (afternoon session), House of Commons internet.
[732] Case 792/79R [1980] E.C.R. 119; [1980] 1 C.M.L.R. 334.
[733] M Furse, op cit., p 72; the Commission subsequent Practice Notice ([1980] 2 CMLR 369) requires complainants to also first consider whether an adequate domestic remedy might be available, which in 1980 presented difficulties because of the confusion over whether damages were available (A Farmiloe "Obtaining Interlocutory Relief in EEC Competition Cases" (1980) ECLR 393, 396). This was yet another flag for the UK for the problem to be solved when working out its position on remedies for third parties (see 3.2.4, supra).
[734] DG Comp Doc. White Paper on Reform of Regulation 17 – Summary of Observations (29.02.2000), section 7.3.

However, since the domestic conditions largely replicate the conditions in other respects, MacNeil finds "..it seems fair to assume that interim measures will probably not become a common feature in the operation of the new Act."[735] Although the worries over invoking the public interest criteria may not be realised, the problems with awarding third party damages might require the DGFT to rely on this section more than he may otherwise care to do. Action by private individuals for interim relief is also possible by way of an injunction. The domestic courts use the test laid out in American Cyanamid Co. v Ethicon Ltd.[736] which causes concern for MacCulloch and Rodger since in competition cases, only two cases successfully passed the test.[737] The requirement that damages are not an adequate remedy, that must be satisfied in order to obtain an injunction,[738] is exceptionally harsh when "...there are no recorded cases of damages ever being awarded for breaches of the EC competition provisions."[739] A third party applying to the court for interim relief would also be required to give a cross undertaking in damages (the DGFT does not need to give this when taking interim measures), as required by the American Cyanamid test.

The present state of uncertainty regarding damages, requires the DGFT to use this power where there is a breach of the Chapter I Prohibition inflicting serious loss. Such a step would be out of synchronisation with the general principle that injunctions should be ordered sparingly and only in urgent situations. If this is found to be objectionable, there is an easy solution: make the right to damages explicit.

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[735] I MacNeil "Investigations under the Competition Act 1998" in BJ Rodger and A MacCulloch The UK Competition Act: A New Era for UK Competition Law (Oxford, Hart, 2000) p 95.
[736] [1975] AC 396.
[737] Cutsforth v Mansfield Inns Limited ([1986] 1 CMLR 1; interim relief was awarded to a supplier of juke boxes, who alleged that a restriction in the defendant's tenancy agreements preventing its tenants from obtaining juke boxes other than from specified suppliers was a breach of Article 81.) and Holleran v Daniel Thwaites plc. ([1989] 2 CMLR 917); AD MacCulloch and BJ Rodger "Wielding the Blunt Sword: Interim Relief for Breaches of EC Competition Law before the UK Courts" (1996) 7 ECLR 393.
[738] This is the main reason why cases have failed: Both Whish and Furse note the difficulty in obtaining injunctions in competition matters where generally damages will be an adequate remedy (R Whish "The Enforcement of EC Competition Law in the Domestic Courts of Member States" (1994) 2 ECLR 60, 61; M Furse, op cit., p 96), although this would take it as accepted that damages are available under the Chapter I Prohibition.
[739] AD MacCulloch and BJ Rodger "Wielding the Blunt Sword: Interim Relief for Breaches of EC Competition Law before the UK Courts" (1996) 7 ECLR 393, 397. See 3.2.4, supra.

3.2.8 Less Burdensome

Liaison has always been the key to ensuring that competition law is enforced as effectively as possible. Article 10 of Regulation 17/62 provides for liaison[740] between the Commission and national authorities for establishing infringements of Article 81, and Article 13 enables the Commission to request investigations be carried out by the national authorities. Subsidiarity, the principle explicitly affirmed in Article 5 EC, by which the most appropriate authority is empowered to act where the issue does not fall within the exclusive competence of the Commission, is further enshrined in the Notice on Co-operation.[741] The consultation this encourages does work; for example a meeting to discuss cartels in the motor fuel sector, concluded that these appeared to be organised at national levels. Consequently agreement was reached that national authorities would remain in charge of investigation and prosecution, unless cross-border aspects emerged.[742]

The dangers of inconsistency through different decisions being reached, with the consequent limbo for undertakings involved, has already been recognised by the Commission.[743] Although the 1993 Notice on cooperation with national courts

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[740] With the Commission obliged to consult the Advisory Committee on Restrictive Practices and Dominant Positions (consisting of one official from each Member State) before adopting a decision that the competition articles have been infringed.

[741] Notice on Co-operation between National Competition Authorities and the Commission (OJ 1997 C313/3).

[742] Commission press release IP/00/1391, 30/11/00.

[743] Guidance for national courts in the form of the 1993 Co-operation Notice between National Courts and the Commission (OJ 1993 C39/6), building on the guidance from Delimitis. Domestic courts are used to staying proceedings: BRT v SABAM op cit.; MTV Europe v BMG Records [1997] EuLR 100 (CA) 105; although see the freezer exclusivity litigation where Lane notes "the Commission's laconic observation" that it is not inconsistent with the principles governing the concurrent powers of the courts and Commission, for the Commission to take a decision which is different from a judgment delivered by a national court, pointing out that it is for the ECJ to give the final interpretation (R Lane, op cit., p 210). The ECJ has now delivered this, holding that where a national court is ruling on an agreement or practice the compatibility of which with Article 81 or 82 if already the subject of a Commission decision, it cannot take a decision running counter to that of the Commission's, even if the Commission's decision conflicts with an earlier decisions of a national court (Case C-344/98 Masterfoods Ltd v HB Ice Cream Ltd, available on www.europa.eu.int/jurisp as at 14/12/00; (2001) The Times 2 February.

only produced fifteen requests for guidance in its first 5 years of operation,[744] it is unlikely that this is because the courts are happy in applying Article 81.

Jurisdiction is determined by the test of "affect on inter state trade"[745], which lacks complete certainty[746]. The Government intended no strict definition of division: "We believe that, in practice, if the Commission is investigating a matter it is unlikely that the director will start his own separate investigation....[but] we must be alive to the risk of loopholes...if we were to prevent the director from investigating behaviour which the European Commission had investigated some time before, or with third parties, it would not be possible to take account of market developments."[747]

The blurring of the division of jurisdiction is recognised by the DGFT, who finds that given the breadth of the interpretation given to affecting trade between Member States, "many agreements will be caught by both Article [81] and the Chapter I Prohibition" thus requiring parties to consider which is the appropriate body to notify,[748] but co-operation will ensure that the Chapter I Prohibition gels smoothly with Article 81. Comfort is provided since section 42,

> "...provides immunity from penalties for breach of the chapter I prohibition where an agreement has been notified to the European Commission for an exemption under article [81](1)...Such agreements will automatically be

[744] "Cooperation with National Courts" (1998) 4 In Competition April 24, 4, confirming the "...doubts expressed in various quarters at the time of the adoption...as to its usefulness".
[745] The difference between the Chapter I Prohibition and Article 81(1) is the requirement of an impact on trade between Member States (Bellamy and Child, Common Market Law of Competition (London, Sweet & Maxwell, 4th ed., 1993) paragraph 2-113).
[746] The CBI called "...for what it describes as a bright-line divide between two jurisdictions, so that a business should know who is responsible for looking into a particular agreement..." (Mr Tim Boswell, Official Report, Standing Committee G, Competition Bill House of Commons, Part 10 p 4, 16 June 1998 (afternoon session), House of Commons internet).
[747] Lord Haskel, Official Report, Committee Stage, Competition Bill House of Lords, Column 417, 17 November 1997, Lords Hansard internet, in response to an amendment proposed by Baroness Nicol to expressly prevent the DGFT from investigating where there is or has been a European Commission investigation. "I would have thought that one could leave it to the good sense of the Commission and the director to ensure that work is not duplicated." (Lord Haskel, Column 419). A unsafe assumption perhaps. The dangers of creating loop holes were very much apparent to the Government (Lord Haskel, Official Report, Report Stage 2, Competition Bill House of Lords, Column 366, 19 February 1998, Lords Hansard internet; Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 11 p 1, 16 June 1998 (afternoon session), House of Commons internet).
[748] The Chapter I Prohibition (OFT 401, March 1999) paragraphs 7.2 and 7.3.

> immune from penalties regarding any infringement of the chapter I prohibition, until the Commission determines the matter"[749],

with the obvious point that "When the Commission actively investigates an agreement of conduct, as a matter of practice it will be pointless for the director general to start a separate investigation. However, we do not believe that it is right to include in the Bill a rigid dividing line on matters actively investigated by the Commission."[750]

The OFT realise that co-operation is paramount to the future of controlling anti-competitive agreements:

> "To continue to tackle cartels internationally we must ensure that all the authorities are at the cutting edge of investigation techniques. We can learn from the Americans on the use of their leniency programme and from the Canadians in their ten years experience of investigative IT. We can share our experience of developing a business education programme to deter cartels and giving strong incentives to whistle-blowing."[751]

However, co-operation can easily break down and the OFT would be wise to learn from the recent EC experience. The Commission has blocked the merger between two US aircraft manufacturers, GEAE and Honeywell (billed as the world's biggest industrial merger) despite it being cleared in the US and Canada[752]. The legal press reported that "this decision was a complete shock, not least to the lawyers involved [Clifford Chance]...A shock move from Brussels...[indicating] more of a

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[749] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 11 p 1, 16 June 1998 (afternoon session), House of Commons internet. The DGFT cannot impose a penalty for the period between the notification to the European Commission and the date on which the European Commission issues its final decision on the validity of the agreement (section 41(2); If the European Commission itself withdraws the immunity, then immunity from the Chapter I Prohibition is also withdrawn (section 41(3))), but his power to investigate the agreement during this period under the Chapter I Prohibition is unaffected (section 41(4)). The implications of this are considered in Chapter 5, infra.

[750] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 11 p 2, 16 June 1998 (afternoon session), House of Commons internet.

[751] J Bridgeman, "Cartel busters collude in Brighton" OFT press release PN 46/00, 21/11/00.

[752] IP/01/842, 14/6/01.

willingness to diverge from what the US Authorities might say."[753] Whilst the US might want the final say[754], the "world's biggest merger" tag is evidence itself that was going to affect more than one continent and potentially bring many differing conclusions.

An increase in such conflicts appears likely in the future[755]. Economic globalisation brings with it the potential for damage by cartels to be increasingly severe. As such, "...the Commission reaffirmed its commitment to detecting and punishing them with the utmost determination. In this respect...the far-reaching reform of Regulation No 17...will be a major element in stepping up the European Community's fight against cartels"[756], implying global cartels are a wider concern of the Community, not just the Commission. Indeed, the largest fine ever imposed by the Commission was in respect of a price fixing cartel amongst producers of amino acid for foodstuffs, based in the US, Japan and Korea.[757] The potential for competition problems to be global is readily apparent, not just from new technology concerns[758], with the Commission launching an investigation into price fixing of compact discs by the world's five largest music companies (Bertelsmann, EMI, Sony, Universal and Warner Music) following the US FTC's decision that the companies had forced retailers to overcharge American consumers by £330 million since 1997[759]. The EC market must be investigated in its own right – that is what market analysis is all about, but the scope for repetition and conflict will increase, with the OFT also conducting its own inquiry into CD pricing at the moment[760]. The question about banking practices is yet another example, with the US[761], EC[762]

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[753] Corporate Editorial, (2001) The Lawyer June 25, 15. The Commission had previously criticised suggestions that this objection was for political reasons (IP/01/855, 18/6/01).
[754] "Senator wars Brussels over GE/Honeywell" www.ft.com as at 21/6/01; "Senator attacks EU over GE deal" www.ft.com as at 22/6/01.
[755] Although the Commission is keen to stress that this is only the second time that it has blocked a US approved deal (M Monti "The Future for Competition Policy in the European Union" Speech/01/340, 10/7/01, p 5) (so far....)
[756] XXXth Report on Competition Policy 2000 (SEC (2001) 694 final, 7/5/01) p 24, paragraph 70.
[757] The lysine cartel (XXXth Report on Competition Policy 2000 (SEC (2001) 694 final, 7/5/01) pp 25 to 27); see 3.2.4, supra.
[758] Such as MCI Worldcom/Sprint, Microsoft, TimeWarner/Aol discussed in Chapter 6 infra.
[759] "CD price fixing inquiry could force down costs" (2001) The Times 27 January, 16.
[760] See Chapter 4, infra.
[761] Visa and Mastercard were accused by the DoJ of limiting competition by tie-ups in the banking industry ((2000) The Lawyer 19 June).
[762] Visa notified its international payment card scheme to the Commission who opposed certain restrictions, most notably the interchange fee which the Commission could amount to a restrictive collective price agreement (Commission press release IP/00/1164, 16/10/00), although following

and UK[763] all investigating anti-competitive agreements. With other prominent investigations such as the EC investigating the pricing of vitamins[764] (one of the undertakings being Hoffman-La Roche, already fined in the US and Canada, and now subjected to record fines by the Commission[765]); British Midlands complaint to the Commission in respect of the Bermuda II Treaty allowing only two UK and Two US companies to fly from Heathrow to America[766], the call for the GCI (going beyond the current 1st and 2nd Generation Co-operation Agreements) can be easily understood.[767]

3.3 Conclusion

Replacing the RTPA with a homogenous conceptual basis for regulation was gratefully welcomed, and had the potential to avoid the problems under the old regime while also creating a level playing field for businesses. This was never going to be an easy task, and on balance, it has achieved more than just European consistency[768], improving some of the weaker aspects of that regime. Indeed, there are aspects of the new law that illustrate a great deal of foresight in that the OFT will take into account fines imposed by other Member States and section 60 allows other Member States' findings under Community law to be considered. It has been suggested that the Chapter I Prohibition created a "...hybrid...different enough to require separate consideration of each agreement..."[769]. A hybrid it is, but not necessarily one that means all domestic agreements must be considered separately without recourse to European findings.

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investigation the Commission has found no grounds for taking action (OJ 2001 C316/3); the Commission called on banks to reduce charges levied on small value transfers of money between Member States following discovery that both the sender and recipient were being charged unlawfully, and encouraged customers to complain to national ombudsmen (www.europa.eu.int/comm/dg24/library/surveys/sur14_en,html as at 29/5/00), this was followed by a statement of objections to a number of banks regarding allegations of a price fixing cartel for exchange of currencies in the euro-zone (Commission press release IP/00/784, 14/7/00).

[763] See Chapter 4, infra.

[764] "Brussels targets vitamin groups" (2000) FT 12 July, 10.

[765] supra.

[766] "European fight to cut air fares across Atlantic" (2001) The Times 2 February, 2.

[767] Gordon Brown as added to this by calling for Europe and America to "embrace a common agenda of common competition rules" (www.ft.com as at 20/6/01). See Chapter 6, infra.

[768] "The real merit of moving towards the European Union's style of competition law is that there should be a reduction in inconsistency and an improvement in transparency in competition enforcement."(B Bishop "Antitrust Enforcement and the Rule of Law" (1998) 1 ECLR 1).

[769] F Barr "Has the U.K. Gone European: Is the European Approach of the Competition Bill More than an Illusion?" (1998) 3 ECLR 139, 144.

However, I submit that there are aspects of the new control of anti-competitive agreements that still need to be addressed, although with an increased profile for competition law and a drive to ensure that the regime works[770], these should be achievable. This list of further work should not be seen as aiming to be too critical of the Government[771] or the OFT, for they should be commended for the majority of their actions. There was never going to be a quick fix answer. Indeed, to have attempted to find one would have retained an RTPA type scenario, with detailed legislatory rules generating consequences that were never intended. However, the following omissions from the present regime must be addressed if the objectives identified are to be attained and the prohibition sustained:

(i) Prohibiting all significant agreements

A minor point to rectify first, is that the OFT must ensure that it sticks to the use of "significant" and "appreciable"; the terminology under Article 81. To have introduced "innocuous" have appear to be of little relevance, but it has the potential to confuse rather than clarify[772]. "Significant" and "appreciable" have a meaning in terms of de minimis. I doubt that the OFT intended "innocuous" to have any other meaning than this, but since no meaning was assigned, the scope for argument remains.

Of more concern, are three aspects that have not been dealt with satisfactorily. Firstly, the silence in respect of the role that the rule of reason may play under the Chapter I Prohibition cannot continue. There have been too many calls for the rule of reason to take a greater part under Article 81[773]. Bellamy considers that:

> "...if you take a 20-year perspective...it cannot be ruled out that over time the European Community will evolve more towards the [narrow] approach,

[770] "The agendas of those who influence decisions within the system are as important as the goals associated with the system as a whole, and thus identifying and analysing them is key to evaluating the proposals and anticipating their respective impacts." (DJ Gerber "Modernising European Competition Law: A Developmental Perspective" (2001) 4 ECLR 122, 124).
[771] Apart from the treatment of damages, which is undeniably shambolic.
[772] See 3.2.1, supra.
[773] See Object or Effect, 3.2.1, supra.

> and say that more and more things do not fall within Article [81] in the first place upon the basis of some kind of rule of reason analysis, in order further to reduce the administrative burden and the legislative difficulty for legislating for every kind of pro-competitive agreement that you want to preserve. It remains to be seen. And I simply say that this is a very important area upon which some reflection is necessary".[774]

Unfortunately, there was no reflection in the Chapter I Prohibition debate. It is submitted that in accordance with what appears to be becoming the minority view, these comparisons must stop since they serve only to confuse and increase the need for notification. Transparency is thwarted if the benefits produced by restrictions are not viewed under section 9.

However, the OFT in accepting that they *must* follow the European Courts' narrower interpretation of what is caught by Article 81[775], suggests that the development of a domestic rule of reason is inevitable. This needs to be addressed in guidelines at the very least. If it is the route that the OFT prefers, then let us know about it! At least it will assist undertakings in assessing their agreements. Whilst the silence continues there will be suspicion and unease, for if recent suggestions for Article 81(1) to be a rule of reason test with Article 81(3) looking at wider perspectives of the agreements, that are not related to the competition model ever come to fruition[776], we will see a return to the use of public interest criteria. Unless the OFT focus on a workable definition of "competition" in the economic sense for section 60[777], the hopes for the introduction of economic realism could be dashed.

The second major point that needs to be addressed with greater clarity is the treatment of concerted practices. Recourse by the OFT to complex monopoly provisions, might see the UK never getting to grips with this concept and risks divergence in the future. Whilst oligopolies remain a relevant difference for the

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[774] C Bellamy "The Europeanisation of United Kingdom Competition Law" in N Green and A Robertson The Europeanisation of UK Competition Law (Oxford, Hart, 1999) p 5.
[775] See 3.1.2, supra.
[776] See Object or Effect, 3.2.1, supra.
[777] See 3.1.2, supra.

domestic regime, the disregard of the intended pecking order of the Competition Act 1998 and FTA in the area of agreements would be an unwelcome development. A dual regime would enable agreements to be condemned without any assessment of whether there is an agreement for the purposes of the Chapter I Prohibition, and this condemnation based purely on public interest criteria[778]. This was not what the Government intended. This original intention should be recognised explicitly if certainty is to prevail and economic assessment to remain the key.

Thirdly, the exercise of parallel exemptions does not provide any clear answer to the difficulties raised when EC block exemptions ought to be varied or withdrawn for domestic purposes. The debate pre Competition Bill did not produce any clear workable solution[779], but this was not addressed as part of the Bill or parliamentary debates. The OFT should be aware of this since the apparent reliance on EC exemptions as opposed to introducing our own block exemptions, will increase the likelihood of complaints, where these exemptions are varied or withdrawn. Clarity would prove of benefit to undertakings, should the OFT specifically set out the circumstances in which it envisages, or at least state the guidance it will follow, when varying EC exemptions.

Finally, some minor points to be addressed:

(1) Explicit guidance about how joint ventures falling within the FTA will have their co-operative elements assessed in relation to section 84 of that Act, and how joint ventures that are fully subjected to the Chapter I Prohibition will be assessed[780]. This detail is a must if notifications are to be avoided;

(2) Clarity is needed in the guideline for land agreements in respect of "capacity as a holder of an interest in land"[781], even if this is just to recognise that the definition is not easy to apply and should therefore be discussed with the OFT

[778] Producing results contrary to the intention of the Chapter I Prohibition; see Concerted Practices, 3.2.1, supra.
[779] See Exemptions, 3.2.1, supra.
[780] See Exclusions, 3.1.2, supra.
[781] The DTI Discussion Paper noted this difficulty, so there is no excuse of the OFT not dealing with this issue; Exclusions, 3.2.1, supra.

when difficulty arises (although admittedly, this runs contrary to the purpose of the Exclusion Order);

(3) The fifth element of the exemption criteria under Article 81(3), identified by Whish, should be made clear in the guidelines[782], so that undertakings objectively demonstrate the benefit;

(4) Confirmation that material change and material variation both mean the same and will be assessed in the same way[783], that is, the effect on competition;

(5) Confirmation in the guidelines that an individual exemption can be backdated to the date of an agreement[784] (although this will be of less significance when the OFT starts to apply Article 81(3), since the Commission have confirmed that "ex post" control will mean agreements being exempted from the date they are entered into;

(6) Publishing of the definitive versions of the guidelines on intellectual property and services of general economic interest[785]; and

(7) Confirmation as to whether the DGFT can make an Article 234 reference. The disagreement between writers and even in Government statements[786] must be addressed. It is submitted that even though the DGFT's decisions can be appealed to the CCAT (a tribunal which can certainly make Article 234 references), it is more effective in terms of certainty and cost for the DGFT to make the required reference in the first instance.

[782] See Exclusions, 3.1.2, supra.
[783] See Exclusions and Exemptions, 3.1.2, supra.
[784] See Individual Exemption, 3.1.2, and Notification, 3.2.6 supra.
[785] See Advice, 3.2.6, supra.
[786] See 3.1.2, supra.

(ii) Competition based test

The vastly increased transparency in the role and operation of market definition, is the key to understanding the operation of the Chapter I Prohibition. Provided the OFT and CCAT avoid the Commission's lack of economic analysis, the way that the Commission shifts the basis of what it finds relevant[787], and that this exercise does not become lost in the chaos caused by the development of a domestic rule of reason, there is a real chance of the Chapter I Prohibition providing practical and sensible solutions. However, for this test to be effective, it also requires an acceptance on the part of the legal profession that it is essential for economists to play a greater role, an acceptance that has been accompanied by inertia.[788]

The inevitable drawback in assessing agreements in relation to the market, is that in an era of changing selling techniques and greater availability, the market may be larger than just the UK in a greater number of cases than in the past. This was not discussed in the Competition Bill debates, but is the factor that could severely restrict the sustainability of the Chapter I Prohibition.[789]

(iii) Flexibility

Provided that unjustifiably narrow views of the market are avoided, exemptions will be allowed where restrictive agreements result in positive benefits[790]. Where exemptions are no longer required or problems arise in the market as a result of those agreements, the DGFT must act. This requires the DGFT to be effective in monitoring the agreements and actually challenge them when exemptions are not complied with. Sufficient resources will be the decisive factor in ensuring this flexibility works in practice. Flexibility must also be viewed from the point of view of the undertaking. Parties to agreements must feel they are able to challenge decisions where individual exemption is refused or granted subject to conditions

[787] See 3.1.1 and 3.2.2, supra.
[788] See Chapter 2, supra.
[789] See Chapters 5 and 6, infra.
[790] See 3.2.3, supra.

they do not agree with. The introduction of the CCAT aiming to achieve flexibility and speed, with the full rights of appeal[791], goes a long way to encourage this.

(iv) Deterrence

The ability to impose directions and fines meet the objective of providing a system of effective sanctions. Transparency is to be welcome as it delivers a strong message to those thinking about acting anti-competitively[792]. The OFT must not shy away from using its maximum powers in sanctioning breaches of the Chapter I Prohibition, and in light of the complaints it made under the RTPA[793], there is every reason to suspect that they will hit undertakings hard.

However, the treatment of damages is flawed[794]. There is no clear basis for the right to damages: the availability has so many critics, and at best even those who support it find that *probably* breach of statutory duty is the most appropriate remedy. Despite Pepper v Hart statements, the strongest messages have come from guides published by practitioners. Whilst these are no doubt aimed at drumming up business and do not carry weight in court, they are adding to the legitimate expectations of injured third parties. A clear decision is needed accepting breach of statutory duty[795] as the basis for the action (and also dealing with the issues of locus standi, evidence, costs, limitation and double jeopardy). Until such time as a court has the opportunity to set this desperately needed precedent, the OFT must issue stronger guidance. Issuing this is in their interests, for once the third party has had the pitfalls of such an action explained by its legal adviser and is aware of the costs involved, the preferred option will be to complain to the OFT instead[796]. Whilst this is a good thing in assisting the OFT, it will drain their resources, as the complainant who feels they have no option for pursing a private action, is less likely to accept a decision not to investigate. Explicit recognition would be the "carrot" to those thinking about brining an action. Without it, the requisite precedent may be a very long time coming.

[791] See 3.2.6, supra.
[792] See Sanctions, 3.2.4, supra.
[793] See Chapter 2, supra.
[794] See Damages under the Chapter I Prohibition, 3.2.4, supra.
[795] See Damages, 3.2.4, supra.

(v) Investigation

The strong powers[797] must be put into practice. The exercise of the powers should also be publicised in the same way as the Commission does, in order to add to the compliance effect[798].

In relying on complaints[799], the OFT must ensure it acts fairly in respect of all received and listens to the dejected complainant's concerns where it decides not to investigate. To not allow a right to respond, would be counterproductive to the complaints system. Consequently, this right should be made explicit by confirming that the UK practice will follow that of the EC.

Offences are stronger than in Europe, in that personal liability ensues[800], but in following on from the use of contempt of court proceedings towards the end of the RTPA, they may be viewed as no more than a formalised and clearer re-statement of this practice. However, the fact that an undertaking or previous court order is no longer a prerequisite[801] to a non-cooperation offence is an extra incentive for compliance.

It is submitted that in light of the dominant view of the judiciary that the HRA should be construed narrowly[802], the explicit introduction of respecting human rights should not cause too many problems in practice under the Competition Act 1998, in its present form. However, the CCAT should still be careful in choosing from its selection of tribunal members[803].

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[796] See Complaints, 3.2.5, supra.
[797] See 3.2.5, supra.
[798] Like the well publicised "dawn raids" on the offices of the mobile phone companies, across Europe on 11 July 2001. See Compliance 3.2.6, supra.
[799] See Complaints, 3.2.5, supra.
[800] See Offences, 3.2.5, supra.
[801] See Chapter 2, supra.
[802] See HRA, 3.2.5, supra.
[803] See 3.2.6, supra.

(vi) Transparency in decision making

This is provided for in theory, but the OFT mantra[804] suggest that few formal decisions will actually be made. Consequently, the recourse to informal advice will produce insufficient precedent. Undertakings will be forced to look to EC law, and uncertainty will be the end result[805], unless the OFT regularly provides clear details of the questions it has been dealing with and the views it has reached.[806] The decision not to publish the "Quarterly Competition Newsletter" should be reconsidered.

Concurrent regulation[807] appears to have settled down, with revised guidelines more satisfactorily dealing with the intentions realised in the Competition Bill debates. Despite the potential difficulty in challenging and the dangers of non-competition criteria being used by the regulators, it is a big bonus in the resource stakes and should allow for more effective decision making. Indeed these dangers would be avoided if *all* stick to the principle of transparency, which the guidelines suggest is the case. Making concurrency work in practice would enable the OFT to rely to a greater extent on other bodes in delivering the enforcement of the Chapter I Prohibition: the incentive for the OFT to do all it can to make this a success is obvious.

Transparency in decision making was a fundamental aim of the Government, but of concern is the lack of transparency in the procedure. A confusing message has been given regarding the High Court's ability to entertain judicial review applications during the OFT investigation, since an appeal to the CCAT is not possible as it would hinder the effective application of the prohibition. This should be reconsidered and addressed so that undertakings are made aware of the position before they incur any expense in bring an application before an unresponsive court.

[804] See 3.2.6, supra. For whether this mantra can survive, see Chapter 5, infra.
[805] The comfort letter drawbacks: 3.2.6, supra.
[806] See 3.2.6, supra.
[807] See Concurrent Regulation, 3.2.6, supra.

(vii) Interim remedies

The general lack of success in providing for an action in damages suggests a potential for greater recourse to the Chapter I Prohibition on a scale never intended. The OFT must act where serious harm is occurring to undertakings in the market.[808] If such undertakings cannot obtain the remedy themselves they will expect the OFT to act to prevent further loss. Admittedly injunctions have been unsuccessful because of the findings that damages are an adequate remedy, but the accuracy of this finding must be questioned when no damages have ever been awarded in competition cases[809]. The more that the OFT's power is invoked, however, the greater chance of public interest criteria being brought into play. This could all be avoided by confirmation that damages are available by way of breach of statutory duty.

(vii) Co-operation

Co-operation is a principle very much taken to the heart of the Act[810] in the way that other Member States' findings are recognised and non-EC procedures are selected where they have proved more successful[811]. This bodes well for the OFT's standing on the global arena. The Chapter I Prohibition builds on a history of co-operation with the EC[812], and this will become of increased importance following devolution. It is right that co-operation continues to be built upon, since more and more undertakings will find that they operate through different jurisdiction, and accordingly there is no point aiming for the perfect domestic law, if undertakings are only going to run into difficulties outside of the UK. However, aspects of the EC system that are unacceptable[813] should continue to be vehemently denounced before devolution is finalised, otherwise co-operation could work to the disadvantage of the future of our domestic regime[814].

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[808] See 3.2.7, supra.
[809] See Damages, 3.2.4, supra.
[810] See 3.1.2, supra.
[811] See 3.2.6, supra.
[812] See 3.2.8, supra.
[813] For example, see Powers and Privilege, 3.2.5, supra.
[814] See Chapter 5, infra.

Whether these points need to be recognised by amendment to the legislation, changes to the guidelines or just through the practice of the OFT, CC and the courts, is explored in the following part of this work.