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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

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PART II

REFORM OF THE CHAPTER I PROHIBITION

CHAPTER FOUR

The First Eighteen Months

"We are conscious that the Act in the process of being created will doubtless form the basis of domestic competition law for very many years and that, once enacted, there will be no opportunity to alter it for a very long time"[1]

4.1 Priorities

The DGFT declared that in the last two years of the RTPA, "Thirteen hard-core cartels in total were unearthed ... with the old and feeble powers. I expect many more to be rooted out with the new, strong powers."[2] Volvo admitted a price fixing cartel on the eve of the Chapter I Prohibition coming into force, in order to avoid

[1] J Scholes and others "The U.K. Draft Competition Bill: Comments Based on Observations of the Competition Law Association" (1998) 1 ECLR 32, 33.

[2] Annual Report of the Director General of Fair Trading, 1999, p 13. In setting out his plans for 1999, the DGFT stated that the OFT was "...uncovering more and more cartels [and he was] determined to take enforcement action whenever [he could]." (John Bridgeman, "A new competition regime for Britain" Speech delivered to the America/EC Association, 3/3/99, p 3).

the new powers and sanctions[3]. Indeed, the DGFT indicated that the OFT expected "...to be able to destroy cartels in weeks or months rather than years."[4]

Certain categories of agreement benefited from the transitional period, which postponed the application of the Chapter I Prohibition. However, this transitional period did not apply to agreements that were void or unlawful under the RTPA. If, as suggested, domestic cartels were widespread under the RTPA, there would be much for the Chapter I Prohibition to attack. When you add together the DGFT's concerns about the RTPA, the Government's aims, and the media campaign of a "rip-off Britain", one is certainly left with the impression that come the unleashing of the new law things would take off at a tremendous pace. After all, if it was the lack of powers to investigate and punish that were in issue, once they were in place there would be no stopping the OFT. Indeed in 1999 "several of the cases investigated raised strong suspicions of the existence of a cartel, but the Task Force could not make progress in its attempts to prove those suspicions"[5]. This points to a list of targets that the DGFT was ready to act on, come 1 March 2000. Surely the OFT would be like a dog straining at the lead, raring to go, come 1st March 2000?

The DGFT acknowledged that priorities had to be set in light of the resources available[6]. His intention at the dawn of the new prohibition was to :

> "...concentrate on those [agreements] that raise the most important issues – where prohibition is necessary for example, or a precedent needs to be

[3] OFT press release PN 14/00, 29/2/00. Volvo Car UK Ltd had previously admitted supporting secret price fixing agreements, but only after it was uncovered following an investigation by the BBC's "Panorama" programme (OFT press release PN 24/99, 9/7/99). Three dealers who were named in that press release were later cleared (OFT press release PN 17/00, 5/4/00).
[4] "Cartel-busters given greater powers by change in law" (1998) The Times 27 November, 35.
[5] The former DGFT, John Bridgeman, in his last Annual Report (Annual Report of the Director General of Fair Trading, 1999) at p 48, where he refers to the problems caused by the terminology in s 36 of the RTPA 1976. See Chapter 2, supra.
[6] "... I have been freed from the need to examine large numbers of agreements that were never likely to have an effect on competition, I have been given extra resources and new powers. These, together with continuing encouragement to consumers and business to come to me with any evidence of anti-competitive practices, will help me to have a more coordinated approach to establishing priorities..." (John Bridgeman, Annual Report of the Director General of Fair Trading, 1998, p 17).

established, or where the parties require legal certainty, perhaps because of the scale of their investment in a joint venture."[7]

Although the DGFT intended "....to focus on those areas where [OFT] activity would generate the greatest economic return"[8], this must be seen in light of his wish "...that [the OFT] should focus its attention on those issues that involve the greatest detriment to the consumer and to competition."[9]

But what priorities have been established? The DGFT delivered a message of cartels, cartels, cartels: "Mr Bridgeman said that his top priority when the new powers come into force will be to see out and destroy cartels."[10] The priority of cartel busting should not be underestimated. John Vickers, in his first Annual Report as DGFT, said that: "The OFT's prime targets are businesses that exploit consumers – for example, by rigging markets or trading unfairly....While OPEC is beyond our scope, the OFT will certainly break and fine all cartels unearthed in the UK."[11] However, the reality of the application of the Chapter I Prohibition fails to provide any explicit evidence in support of this assertion.

Bloom has reiterated the former DGFT's assertion that OFT priorities will focus on "decisions which establish precedents."[12] However, like the lack of cartel discoveries, the number of precedents established so far is rather less than the statement of intent delivered at the start of the Chapter I Prohibition. John Vickers

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[7] Annual Report of the Director General of Fair Trading, 1997, p 12.
[8] ibid.
[9] Annual Report of the Director General of Fair Trading, 1998, p 17.
[10] OFT press release PN 51/98, 26/11/98. He said that his "...priority under the new legislation will be to seek out the most serious of anti-competitive activity – cartels – and I will not be able to do that if I am inundated with notifications that have been made on a fail-safe basis." (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 7)). This was reinforced by John Vickers who states that one of the key areas under the Competition Act 1998 is to "[discourage] fail safe notifications to minimise resources being diverted into addressing inappropriate notifications." (Annual Report of the Director General of Fair Trading 2000, p 23). The attack on cartels was reaffirmed by the DGFT on the commencement of the Competition Act 1998, "A Speech to the Reception to mark the launch of the Competition Act 1998 – A New Era in UK Competition Policy" (2/3/00), p 2.
[11] Annual Report of the Director General of Fair Trading, 2000, p 6, building on his promise made on his appointment, to "...ensure that markets are working well." ("Vickers takes charge at OFT" (2000) 28 Fair Trading 5).
[12] M Bloom "Investigation and enforcement" (Speech delivered at "The New Competition Act" The Hatton, London, 2/12/99).

defends the lack of decisions in the first year, because "...it would be unreasonable to expect a whole host of infringement decisions"[13], having previously stated that it was "...too soon for UK case law to have developed, but our verdict on the early days is: so far so good."[14] Whether our expectations are reasonable or not, this does not explain the hollow promises that hyped up the prohibition, nor answer the comments made by just about everyone apart from the OFT, that it would need to make some hard hitting decisions in the early days.[15] No price fixing cartels have been discovered. According to John Vickers, "Evidence...suggests that a number of suspected cartels ceased when the new law took effect."[16] For a reform that was doing away with a fundamentally problematic and ineffective regime, this is an unsatisfactory surmise.

The publicity and formal releases by the OFT did not paint a very active first 12 months. Information given by way of speeches has not always been released to the public by way of press notice or inclusion in the OFT Weekly Gazette. Indeed, the Weekly Gazette was a casualty of the lack of information and activity, in that it has regularly been reinvented[17] to provide a broader base of news (not just Competition Act 1998 issues) in order to have something to publish. Even though the second year of the Competition Act 1998 has seen the pace pick up quite considerably, support for the submission that the regime is defective in certain areas, is supported by they Government's publication of a White Paper[18]. This was described in the Queen's Speech as the introduction of "...legislation to encourage enterprise,

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[13] "Taking Centre Stage" (2001) 29 Fair Trading February, 8.
[14] John Vickers "Some European Aspects of UK Competition and Consumer Policy" Speech delivered to the Law Society European Group Annual Dinner" 6/12/00, p 2.
[15] See for example the comments made by interviewees in "Competition Act prepares to bare its teeth" (2000) The Times 22 February, Law Supplement, 3; and G Muir "The New Competition Regime in the UK. EU Law for All?" (1999) European Current Law April, xi.
[16] Annual Report of the Director General of Fair Trading, 2000, p 23. The difficulty in substantiating this is that it is very unlikely that cartels would want to publicise that they have done this, since there can be no positive public relations exercise on the back of it. The only cartel of sorts to make a public admission is the top eight city law firms who "ended their unwritten agreement not to poach each other's partners and senior staff" ((2000) FT 14 January, 5), although the benefits for their expanding practices were probably the predominant factor in terminating the agreement.
[17] Finally increasing its coverage to provide information on most aspects of competition policy, from Issue 28/2000 (2-8 September 2000) onwards.
[18] The intention to publish a White Paper follows the publication of Productivity in the UK: Enterprise and the Productivity Challenge (HM Treasury and DTI, June 2001), which underlies the Government's Strategy for the next Parliament.

strengthen competition laws, and promote safeguards for consumers."[19] (emphasis added). The message of the importance of consumers is a familiar one[20]. Indeed, in one of her first speeches as the new Secretary of State for Trade an Industry, Patricia Hewitt said the Government aim "...to make competition work properly for the consumer, so that UK companies become the best at meeting consumer needs."[21] Hewitt went on to describe the Paper as delivering the Government's aim of stripping "...away obstacles to competition and put[ing] the consumer first."[22] The same message that was delivered for the Competition Bill in 1997.

The White Paper is "...a blueprint to build a world-class competition regime for the UK"[23] to ensure that productivity increases since it

> "...is the main factor which determines living standards – so raising productivity holds the key to our long-term prosperity. However, UK productivity lags behind that of out principal competitors. The labour productivity gap with the US was 45% in 1999, that with France was 19%, and Germany, 7%. If the UK were to match the productivity performance of the US, for example, output per head would be over £6,000 higher."[24]

Productivity was also a focus of the Competition Bill in 1997.

In this light, it is somewhat surprising that strengthening competition law was not something that the DGFT called for in this Annual Report for 2000. The DGFT calls for the reform of the consumer protection provisions of the FTA were again made,[25] but somewhat perversely, a Consumer Bill is *not* on the parliamentary timetable for the next session of Parliament.

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[19] Queen Elizabeth II, State Opening of Parliament, 20/7/01.
[20] See Chapter 1, supra.
[21] "Enterprise For All – The Challenge of the Next Parliament" HM Treasury 67/01, 18/07/01.
[22] DTI press release P/2001/413, 31/7/01. "...we are putting consumers at the heart of competition policy" (A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), foreword).
[23] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), Executive Summary.
[24] ibid, Paragraph 1.7.
[25] Annual Report of the Director General of Fair Trading, 2000, p 12; Consumer Affairs: the way forward – A consumer strategy for the OFT (OFT 241, October 1998).

In addition to changes already mooted since the Competition Act 1998 (that is, the OFT's added role of promoting effective competition in payment systems for the benefit of consumers[26], the introduction of a Banking Code and the removal of the exclusion in respect of professional services in its present form), the White Paper reforms include[27] a new duty to promote competition across the economy[28], the ability for consumer groups to bring a "super complaint" to the OFT, additional resources for the OFT, the publishing of a mission statement for the objective of competition policy, the modernisation of the complex monopoly provisions (with a more flexible reference test and a new duty for the CC to develop remedies[29]), criminal offences for individuals, and new procedures for those harmed to seek redress. These changes arise from the six principles identified by the Government as the way to develop the best competition regime in the world[30].

4.2 Meeting the failings of defective design by practice and reform

4.2.1 Notifications

A great deal of concern was expressed during the Competition Bill debates regarding the ability of the OFT to cope with notifications for guidance or decision:

> "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 now Article 81 of the treaty came into force, if it ever has recovered."[31]

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[26] "OFT to become payment systems regulator" (2001) FT 3 August, 4.
[27] Productivity in the UK: Enterprise and the Productivity Challenge (HM Treasury and DTI, June 2001), pp19 to 24.
[28] ibid, p 1.
[29] ibid, p 23.
[30] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), Executive Summary and pp 10 and 11. The principles are: competition decisions should be taken by strong, pro-active and independent competition authorities; the regime should root out all forms of anti-competitive behaviour; there should be a strong deterrent effect; harmed parties should be able to get real redress; Government and the competition authorities should work for greater international consistency and co-operation; and competition policy deserves a high profile because of its importance for economic performance.
[31] Dr Kim Howells, Official Report, Fourth Standing Committee on Delegated Legislation, Draft Competition Act 1998 (Land and Vertical Agreements, Determination of Turnover for Penalties)

It was envisaged that the new financial sanctions would "result in a flood of requests for guidance."[32] The risk of potentially a large fine would mean that:

> "...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."[33]

> "...for any company, whether it is small or large, a fine of 30 per cent. of annual turnover would be absolutely catastrophic. Companies will consequently want to take every step possible to ensure that even the most innocent commercial agreement has been cleared with the Director General of Fair Trading under the advanced clearance procedures contained in section 13, 14, 21 and 22 of the Competition Act."[34]

Order 2000, House of Commons, Part 1 p 3, 3 February 2000, House of Commons Hansard, internet.

[32] 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 Hansard internet.

[33] 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 concern at the potential level of fine and also of the fact that the orders spelling out the all important detail 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).

[34] Mr Nick Gibb, Official Report, Sixth Standing Committee on Delegated Legislation, Competition Act 1998 (Director's Rules) Order 2000, House of Commons, Part 1 p 2, 5 April 2000, House of Commons Hansard, internet.

Consequently, it was predicted that

> "the first year of operation will be especially complicated and expensive, because of the change and churn in the system that businesses will experience. We expect the first year...to be fraught, because many businesses will want guidance and advice from the competition authorities about whether their current practices meet the requirements of the legislation."[35]

Despite these statements being made prior to the decision to exclude vertical and land agreements, the question must be posed as to how is the OFT managing to receive so few notifications. Under the RTPA, once an agreement was registered it was lawful to operate it until any restrictions were struck down by the RPC.[36] Businesses got used to this "validity comfort". The position is different under the Chapter I Prohibition, but the ability to notify would still provide a kind of validity comfort since once notified, the parties are immune to penalty. Consequently an incentive to notify is present.

However, the turmoil predicted has not proved true: in the period 1 March 2000 to 31 December 2000, only 10 were notified for guidance and 7 for a decision.[37] Of

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[35] Mr John Redwood, Official Report, Standing Committee G, Competition Bill, House of Commons, Part 1 p 4, 18 June 1998 (morning session), House of Commons internet, in relation to his amendment to control the costs of the CC in the first year (that is, not to exceed £30 million) (Official Report, Part 1 p 2).

[36] "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." (Margaret Beckett, Official Report, Second Reading, Competition Bill, House of Commons, Column 27, 11 May 1998, Lords Hansard internet). This was not the same under the RPA where resale price maintenance was prohibited, but these cases were few compared to those under the RTPA.

[37] Annual Report of the Director General of Fair Trading, 2000, p 70; although in a speech the DGFT indicated that he had received 11 notifications during this period (John Vickers "Some European Aspects of UK Competition and Consumer Policy" Speech delivered to the Law Society European Group Annual Dinner" 6/12/00, p 2). In her paper delivered at the 27th Annual Conference on International Anti-trust Law, Bloom says that there had been nine notifications as at 19 October 2000 (Margaret Bloom, The New UK Competition Act, Fordham Corporate Law Institute, 27th Annual Conference on International Anti-trust Law, New York, 19-20 October 2000, p 6). Perhaps these include notifications for guidance, which is not information made public, but this does illustrate the confusion that is easily caused when the reporting procedures are unclear. The seven agreements notified for a decision are Mastercard/Europay: Application for Chapter I

those notified for a decision, they could all arguably be said to meet the OFT's suggested triggers for notification: they all require certainty for the agreement to take place and carry financial risk, but none of the agreements go so far as to raise novel legal issues that have not been considered in the UK or EC before. Whilst the MasterCard/Europay arrangement, Link Interchange Agreement, British Horseracing Broad and the Jockey Club, BSkyB/NTL Channel Supply Agreement, all follow high profile investigations by the DGFT[38], the remaining three agreements appear to be a "belt and braces" notification. Of course, the down side to the limited number of notifications is that there is a dearth of information as to the DGFT's current view and interpretation of the prohibition.

According to the studies conducted, awareness would not appear to be at a reasonably satisfactory level: "I have been surprised at the lack of awareness of the implications of the Government's proposals among small and medium-sized businesses"[39], despite the OFT's education programme.[40] A survey at the beginning of 1999 commissioned by the OFT showed that awareness of the Act amongst small and medium-sized enterprises was just two per cent.[41] At the end of

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Prohibition Exemption (000090/00, 2/3/00) (The DGFT has indicated that the fees involved might be excessive and has given the parties the opportunity to make representations (see www.oft.gov.uk/html/rsearch/press-no/mastercard.htm as at 29/9/01); Link Interchange Network Limited: Notification for a decision under the Chapter I Prohibition (CP/0642/00, 11/5/00); The General Insurance Standards Council: Notification for a decision under the Chapter I Prohibition (CP/1071/00/S, 20/7/00 (with an invitation for comments from interested third parties explicitly made in OFT Weekly Gazette 35/2000, 21-27 October 2000, p 5)); The British Horseracing Board and The Jockey Club: Notification for a decision under the Chapter I Prohibition (CP/1058/00/S, 3/8/00); The Society of Film Distributors: Notification for a decision under the Chapter I Prohibition (CP/1321-OO/S, 22/9/00); BSkyB/NTL Channel Supply Agreement: Notification for a decision under the Chapter I and Chapter II Prohibitions (CP/1687-00/P, 22/11/00); and Memorandum of Understanding on the supply of oil fuels in an emergency: Notification for a decision under the Chapter I and Chapter II Prohibitions (CP/1730-00/S, 6/12/00 (with invitation to comment made in OFT Weekly Gazette 01/2001, 30 December 2000 – 5 January 2001, p 2; rather quicker than the handling of the GISC notification)). At the start of November Boots and Sainsbury notified their agreement by which Sainsbury would withdraw from selling health and beauty products at its stores, and instead leasing the space for Boots to sell those products (CP/1354-01, 9/11/01).

[38] In respect of broadcasting rights and the banking sector (see Chapters 2 and 3, supra).

[39] John Bridgeman, Annual Report of the Director General of Fair Trading, 1997, p 15.

[40] "...designed to inform businesses about the new legislation to help them better understand anti-competitive behaviour and encourage then to both complain and comply." (John Bridgeman, Annual Report of the Director General of Fair Trading, 1997, p 8). A more formal education programme was launched on 26 November 199, targeting small and medium-sized enterprises. By the end of 1998 "more then 120 chambers of commerce had been invited to participate in this part if the programme and there had been a very positive initial response." Annual Report of the Director General of Fair Trading, 1998, p 34. See 3.2.6, supra.

[41] Annual Report of the Director General of Fair Trading, 1999, p 39. See also OFT press release PN 12/99, 19 April 1999. 2 per cent of respondents were aware of the Act without prompting, with

1999, a survey of "big UK companies" found that 40 per cent. had done nothing to prepare for the Act[42]. A further £350,000 was added to the OFT's budget to boost its education and compliance campaign.[43] However, there were no formal applications for early guidance.

The lack of notification cannot be due to ignorance alone. Even if businesses are ignorant of the Chapter I Prohibition, it is unlikely that awareness would alter the position much. The changes affecting the majority of agreements are not so fundamental in practice, since the RTPA already classed agreements that either met a de minimis threshold of sorts, met the terms of an EC block exemption, related to the sale of shares or assets, or were in respect of a franchise, as non-notifiable.[44] De minimis continues to catch many agreements made by small and medium sized enterprises, even if they do not realise the impact of the Competition Act 1998. The businesses that will be mainly affected are those already operating on a large scale so as to be aware of EC law, where a culture of compliance exists amongst the majority.[45] This is in part supported by Rodger's study carried out in the first half of 2000, which found that 56 per cent of businesses with a turnover in excess of £10 million were fully aware of the Act, with 93.6 per cent of such businesses being aware of the Act.[46]

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23 per cent aware after a full description of the Act. In Spring 2000 these figures had increased to 11 per cent and 44 per cent respectively (OFT Weekly Gazette, 02/2000, 4-10 March 2000, p 5). However, these still show that there is much to be done in effectively educating businesses, and the results must be rather disappointing given the OFT's reliance on complaints to police the system.

[42] Survey by CMS Cameron McKenna, (1999) FT 1 December, 3. This was a decrease from the 57 per cent of companies that indicated they had taken no action, in Cameron McKenna's survey the previous year ("OFT set to fine UK firms ignorant of EU competition rules" (1998) The Lawyer 20 October, 13.

[43] Annual Report of the Director General of Fair Trading, 1999, p 57. The OFT has recently introduced its "Complain, comply if confess" campaign with a 24 hour dedicated "Cartel Hotline" (OFT press release, PN 8/01, 15/2/01). This would suggest that the message has still not been getting through despite the publicity in the run up to 1 March 2000 and the early months following the Act coming into force.

[44] See 2.2.2(c), supra.

[45] Although for an opposing view see Whibley who finds that "there has grown up in this country a culture of non-compliance, in so far as competition law is concerned" ("Opinion" (2001) The Lawyer 30 April, 19).

[46] BJ Rodger "Compliance with Competition Law: A View from Industry" (2000) CLLR 249, 272. 64.3 per cent of businesses with a turnover of £50 million or more were fully aware of the Competition Act 1998.

Whilst an OFT survey of law firms pointed to 1,000 notifications per annum[47], this figure more to do with solicitors adopting a "belt and braces" approach when advising clients, instead of answering the questions posed by the Chapter I Prohibition. At the EC level, Article 2 of Regulation 17/62 empowers the Commission to grant negative clearances, with Articles 4 and 5 providing for notifications where an exemption is required (the exemption criteria covered by Articles 6 to 9), but the Commission encourages discussions before notifying an agreement.[48] It is this informal discussion which the OFT is basing the successful implementation of the Chapter I Prohibition. This 'open door' policy, where undertakings can obtain free informal advice as to whether they should notify an agreement, has kept notifications to a minimum. In the first year the "...OFT provided informal advice in around 50 cases."[49] Whilst informal discussion has not proved successful in the EC, in terms of the large number of notifications that the Commission still receives, Roth finds that the UK experience illustrates that "it is possible to adopt an adopt an authorisation system without a deluge of notifications."[50]

Reliance on this system is questionable as it would seem to be contrary to the "do complain, don't notify" mantra, and one must question whether such a policy can survive should more businesses approach the OFT on an informal basis. The success of the UK approach will not change the Commission's intention to move to an ex post system of control for EC competition law. It is this reform of the Article 81 procedure that will test the domestic informal advice system, since the inability of undertakings to notify the Commission will either lead to more businesses trying to find that their agreements fall within the domestic regime in order to gain

[47] 600 for guidance and 400 for decisions (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 13). Initial surveys of UK law firms in 1997/98 indicated that the OFT could expect to receive around 1,000 notifications and 1,200 complaints annually, although this was conducted prior to the vertical agreement exclusion, OFT de minimis guidance and adoption of "do complain, don't notify" mantra. See Margaret Bloom, The New UK Competition Act, Fordham Corporate Law Institute, 27th Annual Conference on International Anti-trust Law, New York, 19-20 October 2000, pp 2 and 3.

[48] Recitals (paragraph 6), Commission Regulation 3385/94 of 21 December 1994 on the form, content and other details of application and notifications provided for in Council Regulation No. 17/62.

[49] Annual Report of the Director General of Fair Trading, 2000, p 23.

[50] P Roth, comment made at Fordham Corporate Law Institute, 27th Annual Conference on International Anti-trust Law, New York, 19 October 2000.

immunity via notification, or if not notifying, businesses will turn to the OFT for informal advice on Article 81. Whether the OFT could cope with an increase in the amount of informal requests is doubtful.[51] Bloom described the notifications received up to October 2000 as requiring "...a lot of work because they [were] complicated agreements."[52] An increase in these sort of agreements being discussed informally will drain the resources of the OFT. The OFT might well live to regret their policy.

Information given following a request for informal advice or a notification for guidance is not published, so consequently potentially useful jurisprudence is wasted. Whilst so few notifications continue to be made, and while the time taken to make a decision remains drawn out, the OFT must reconsider how it proposes to provide the transparency and detail necessary to interpret the prohibition.

4.2.2 Complaints

The importance of the complainant in making the system work is widely recognised: "Successful operation of [the] new powers **will**, to a considerable extent, be dependent on information provided by those who suffer harm as a result of anti-competitive agreements..."[53], although reliance on third parties to help "police" the system, by initiating and/or assisting in investigations, is nothing new.[54] Indeed, the OFT was "...anticipating in the region of 1,200 complaints per year...a substantial number, perhaps up to 300 may require at least initial investigation by the seeking of information under Clause 26."[55]

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[51] See Chapter 5, infra.
[52] M Bloom, comment made at Fordham Corporate Law Institute, 27th Annual Conference on International Anti-trust Law, New York, 19 October 2000.
[53] Annual Report of the Director General of Fair Trading, 1998, p 14.
[54] At the end of 1999, manufacturers of replica football kits gave assurances not to enforce minimum resale prices following a investigation by the OFT, prompted by complaints from retailers ("Torn off a strip" (1999) 24 Fair Trading October, 1, although the assurances appear to have been ignored (see 4.2.4, infra).
[55] Lord Haskel, Official Report, Report Stage 1, Competition Bill, House of Lords, Column 987, 9 February 1998, Lords Hansard internet. The other 900 being "disposed of easily without the need for the use of any formal powers."

In 2000, total enquires about the Competition Act 1998 were 4,856[56], roughly split 4,000 telephone calls answered by the Competition Act 1998 enquiry line and 800 e-mails replied to.[57] The number of complaints[58] in respect of anti-competitive activity under the Competition Act 1998 or FTA that were fully dealt with between 1 March 2000 and 31 December 2000 was "...1,204[59], of which 1,187 came under the Competition Act 1998 and 17 under the Fair Trading Act 1973."[60] The majority did not require action and as at mid October 2000, "...the case handling system showed that 80 per cent. had been dismissed."[61] However, the DGFT confirmed that at the end of 2000 "[t]he bulk of complaints, upon investigation, [were] dismissed, but we are currently considering more than 20 suspected infringements of the prohibitions"[62], which is a lot less than the 238 (approximately)[63] that remained at the end of October.

We are not told of the split between the two prohibitions, but from estimates given by Bloom, it would appear that the OFT had been expecting complaints in the ratio of 1:5 between the Chapter I Prohibition and Chapter II Prohibition.[64] However, of concern is that complaints appear to be falling. Despite the first six months pointing to an increase of 2 to 3 times the number of complaints pre Competition Act 1998, the last few months of 2000 saw the number of complaints fall, suggesting that the annual rate is likely to return to the pre Competition Act 1998 level. If complainants are to police the system, more must be encouraged.

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[56] Annual Report of the Director General of Fair Trading, 2000, p 72.
[57] ibid, p 32.
[58] Complaints have been given a wider definition in 2000 to cover all preliminary inquiries, that is, "cases where the OFT has not yet established whether there is reasonable cause to believe that there has been an infringement of the Chapter I or Chapter II prohibition of the Competition Act 1998 or the complex monopoly provisions of the FTA. Although this is a wider definition that in 1999, the majority of cases that are now called 'preliminary inquiries' would have been classified as complaints last year." (Annual Report of the Director General of Fair Trading, 2000, p 69).
[59] Complaints regarding anti-competitive activity had risen by two to three times what they were pre Competition Act 1998 in the first 6 months, with 918 complaints made ("Cause for complaint" (2000) 28 Fair Trading November, 7) suggesting an annual rate of over 2,000 complaints (Annual Report of the Director General of Fair Trading, 2000, p 23).
[60] The figures given in the Annual Report of the Director General of Fair Trading, 2000, at p 69, are incorrect. The figures quoted were provided by P Tailor of the OFT Business Information Unit, by email on 12/6/01.
[61] Margaret Bloom, speech delivered at the Fordham Corporate Law Institute, 27th Annual Conference on International Anti-trust Law, New York, 19 October 2000.
[62] John Vickers "Some European Aspects of UK Competition and Consumer Policy" Speech delivered to the Law Society European Group Annual Dinner" 6/12/00, p 2.
[63] 20 per cent. of 1,187.

Consequently, the intention to give competition law a higher profile and the call for the OFT to become the competition advocate is obvious[65]. However, the OFT can still take positive action whilst waiting for the Enterprise Bill to become law. In accordance with the DGFT's promise to protect identities and confidential information, very few of the complaints are actually publicised. Nevertheless, this does not prevent information regarding the sectors in which complaints have been made or the types of agreement causing concern; such information would help assist compliance by undertakings and encourage further complaints. After all, a dismissed complaint could be the result of insufficient evidence or concern, which could be otherwise proved should other third parties come forward.

Complaints publicised have lacked consistency in their format. Some have been made public following the complaint being made[66], whilst others only came to public knowledge after the investigation by the DGFT. The first eighteen months have seen published: the complaint made by John Lewis regarding agreements that Dixons have with Packard Bell and Compaq for the distribution of PC's[67]; the complaint by the National Beef Association in respect of an alleged price fixing cartel amongst Northern Ireland Slaughterhouses[68]; compliant by independent retailers that oil majors were selling wholesale fuel to them at prices higher that the companies at their own tied forecourts[69]; ONdigital's complaint in respect of BSkyB's wholesale channel fees[70]; complaint in respect of three producers of OPC – ordinary Portland cement[71]; complaint by Claritas (UK) Limited and the Direct Marketing Association in respect of Consignia plc abusing its dominant position[72]; complaint by Swan Solutions Ltd in respect of breaches of both prohibitions by

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[64] 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 16.
[65] See 4.1, supra.
[66] Although not always by the OFT, for in some cases it is the press who break the news first.
[67] Publicised in order to seek further information, OFT press release, PN 18/00, 10/4/00 (subsequently found not to infringe the Act, although a second complaint was made jointly with fellow retailer, Tempo Holdings ((2000) 27 Fair Trading August, 5; see below).
[68] OFT Weekly Gazette, 08/2001, 17-23 February 2000 (which was not substantiated).
[69] OFT press release PN 47/00, 21/11/00). This complaint was not publicised until after the OFT concluded its inquiry.
[70] (2000) The Times 6 December, 27 (which led to the OFT inquiry, see below).
[71] OFT press release PN 34a/00 (which led to assurances being given, see below).
[72] Consignia and Postal Preference Service Limited (www.oft.gov.uk/html/competition-act/case_register/consignia.html as at 28/7/01 (see below).

Avaya ECS Ltd in its agreements with computer software developers[73]; complaint by Synstar Computer Services (UK) Limited alleging ICL had abusing a dominant position[74], complaint by William Hill that the British Horseracing Board was abusing its dominant position as the sole supplier of race and runner data[75]; and a complaint by Prisma that the BBC and ITV are acting as a cartel in the negotiations for the screening of the 2002 and 2006 Football World Cup matches[76].

According to Bloom "many complaints have been withdrawn by the complainant because after first complaining, the third party complained about has started dealing with the complainant."[77] Consequently we seeing the development of an informal remedy not envisaged by the Act. This does portray the possibility that some undertakings may not be intending to operate anti-competitive or may have been negligent in the agreements they have,[78] and in terms of effective remedies for restoring competition to the market quickly and minimising the welfare loss, this outcome is better for the complainants than any sanctions that could currently be imposed by the OFT. However, the OFT should be wary of such negotiated settlements as these could amount to anti-competitive agreements and should not therefore be left unchecked.

The White Paper outlines the intention that consumer groups will have standing to bring a "super complaint" to the OFT on behalf of consumers, with a right to a reasoned public response to its complaint within 90 days.[79] The primary motive for this appears to be the ability to award damages. Whilst this will assist in brining competition problems to light, it is unclear whether it is aimed at market problems rather than particular breaches of the Chapter I Prohibition or II prohibitions.

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[73] Swan Solutions Ltd/Avaya ECS Ltd (www.oft.gov.uk/html/competition-act/case_register/consignia.html as at 6/4/01 (see below).
[74] ICL/Synstar Decision (www.oft.gov.uk/html/competition-act/case_register/icl.html as at 20/5/01 (see below).
[75] OFT press release PN26/01, 12/6/01 (an investigation has commenced, see below).
[76] "German tycoon accuses BBC and ITV of World Cup cartel" (2001) The Times 14 August, 3.
[77] Margaret Bloom, speech delivered at the Fordham Corporate Law Institute, 27th Annual Conference on International Anti-trust Law, New York, 19 October 2000. See also Annual Report of the Director General of Fair Trading, 2000, p 23.
[78] As recognised in the fining policy, see 3.2.5 supra.
[79] See 4.2.9, infra.

4.2.3 Powers

It was expected that the new powers of investigation would be put to good use early on: "It is estimated that there will be 300 instances a year when the production of business documents is required."[80] The DGFT informed us that he would "...not hesitate to use [his] powers where they are needed."[81] However, in the first year[82] there was surprisingly little publicity regarding the formal powers and procedures under the Act, with details not readily available, other than the Annual Report summaries. Information reporting the execution of an on site investigation has not occurred to date, differing from the approach adopted by the Commission[83]. John Vickers in his Annual Report for 2000 states that:

> "A large body of casework is in progress. So far we have used our new powers to investigate around 40 cases where it is reasonable to suspect breaches of the prohibitions. Over half are still under investigation. The others were dismissed or resolved informally."[84]

In the 40 cases under investigation "...over 300 written notices were issued requiring the production of specified documents and information."[85] Margaret Bloom said that the first dawn raid under warrant took place at premises in England and Scotland in the week commencing 9 October 2000,[86] and we have also been told that "The on-site investigation powers were used in two [of the cases under investigation]".[87] The DGFT, in a speech at the end of 2000, informed the members of audience that they "...may be aware that we have already used our

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[80] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 2 p 2, 16 June 1998 (morning session), House of Commons internet.
[81] J Bridgeman "The Competition Act 1998 – why comply? Speech 9/3/99 (available on www.oft.gov.uk/html/rsearch/sp-arch/spe6-99.htm as at 15/6/99).
[82] 1 March 2000 to 29 February 2001.
[83] For example, the high profile publicity surrounding the raids on nine mobile phone companies across Europe, including all five UK operators, in July 2001 (Commission memo 01/262, 11/7/01).
[84] Annual Report of the Director General of Fair Trading, 2000, p 9. See also p 23 of the Report.
[85] ibid, pp 23 and 24.
[86] Margaret Bloom, speech delivered at the Fordham Corporate Law Institute, 27th Annual Conference on International Anti-trust Law, New York, 19 October 2000.
[87] Annual Report of the Director General of Fair Trading, 2000, p 24.

powers of entry"[88] although they would be forgiven for not being aware, in light of the lack of information published by the OFT. Admittedly confidentiality is needed, and undertakings should be "innocent 'till proven guilty", but the drive to ensure compliance can only be accomplished if undertakings know that the OFT is using its powers. This is not a call for *all* information, but rather just details that the powers are being *used*. However, the OFT has recently changed tack, by confirming in a press release that as part of its inquiry into the supply of compact discs, formal notices for information had "...gone out to seven major record companies" and went on to name those companies[89]. Also another press release indicated that following a complaint by William Hill in respect of an alleged breach of the Chapter II Prohibition by the British Horseracing Board, "[f]ormal notices requiring information will be sent shortly to the Board (BHB), its agent, bookmakers with internet betting sites and other users of pre-race data."[90]

The Government intends to extend the powers of investigation. Competition authorities will have more resources and expertise[91], to carry out more proactive and rigorous enforcement work.[92] This should provide greater certainty for business and a more transparent regime, making it easier to deal with the OFT and CC. The White Paper also proposes that the domestic authorities should be able to share information with competition authorities in other jurisdictions.[93]

There will be stronger powers of investigation, allowing the OFT to carry out surveillance and use covert human intelligence sources, for example, secret filming in hotel rooms.[94] Whilst these will raise issues under the Regulation of Investigatory Powers Act 2000 (on which the Government is consulting[95]), this is

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[88] John Vickers "Some European Aspects of UK Competition and Consumer Policy" Speech delivered to the Law Society European Group Annual Dinner" 6/12/00, p 2.
[89] OFT press release PN5/01, 9/2/01.
[90] OFT press release PN26/01, 12/6/01.
[91] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraph 4.37.
[92] ibid, p 20.
[93] "As part of the Criminal Justice and Police Bill, the Government aimed to allow our competition authorities increased opportunities to share information with overseas competition authorities – in order to assist then with their criminal inquiries. These provisions fell when Parliamentary time was curtailed. However, the Government remains committed to bringing legislation forward in this area." (ibid, p 10). Information gained in respect of mergers will be excluded from this (ibid, paragraph 4.45).
[94] ibid, paragraph 7.39.
[95] RIPA Code of Practice, www.homeoffice.gov.uk/ripa/pcdcpc.htm as at 13/8/1.

not dealt with in the White Paper. Neither is it possible to establish from the White Paper whether more power is needed, for it is only when enough investigations lead to "decisions" will we know whether the powers have worked and whether rights have been respected. However, the evidence of US investigations would indeed point to an undeniable need for the use of covert surveillance. James Griffin[96] in his presentation to the American Bar Association in 2000[97], illustrated the "brazen nature of cartels". Griffin used video footage of the secret filming of the Lysine Cartel meetings in various hotel rooms. Even without seeing the video, the transcript detailing the contempt and utter disregard cartel members had for competition authorities and their victims, asserts that it is compelling viewing. Were the UK Government to use such material, they would easily demonstrate their reasoning for increasing the powers. Such material would also assist the OFT in encouraging compliance and complaints.

As noted in Chapter 3, IT can provide the means to assist in on site investigations, and will support in the DGFT's bid to unearth those cartels that "...are trying harder than ever to cover their tracks and makes detection difficult."[98] A recent investigation used a key word search to find e-mails "relevant" to the investigation.[99] Whether this was in accordance with section 28(2)(b) or the wider power under Section 28(3), only time will tell. The Competition Act 1998 will be amended to allow the OFT and sectoral regulators with concurrent powers "to use the services of expert consultants (for example, on extracting information from computer systems) during the course of their investigations, in addition to their own staff."[100]

[96] The Deputy Assistant Attorney General, US DoJ, in 2000.
[97] "An inside look at a cartel at work: common characteristics of International Cartels" 6 April 2000 (www.usdoj.gov/atr/public/speeches/4489.htm as at 8/8/00).
[98] J Vickers "Cartel busters collude in Brighton" (OFT press release PN 46/00, 21/11/00).
[99] Undisclosed source.
[100] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraph 4.47.

4.2.4 Inquiries and Investigations

The number of investigations at the OFT's own initiative or following a complaint (apart from those relating to cartels[101]) completed in the period 1 March 2000 to 31 December 2000 was 21 under the Competition Act 1998 (all of which were completed before the formal decision stage was reached) and 5 under the FTA.[102] Investigations conducted under the Competition Act 1998 in relation to the Chapter I Prohibition[103] have been the: consultation on competition restrictions in the professions in respect of rules restricting entry to certain professions, rules on the conduct of regulated professionals such as restrictions on advertising or price competition, and legal rules requiring third parties to use qualified professionals for

[101] No cartel cases were completed by 31 December 2000 (Annual Report of the Director General of Fair Trading, 2000, p 70).

[102] Annual Report of the Director General of Fair Trading, 2000, p 70.

[103] The other investigations in the first eighteen months were: further investigation of the market for petrol and diesel in the Western Isles since it could not be said to be working competitively (A review of petrol and diesel prices in the Highlands and Islands of Scotland OFT 305, July 2000, which found that it could not be concluded that the market in the Western Isles was working competitively. Consequently, a further investigation into this geographic market in underway); assurances given by three cement companies not to withhold supplies (There had been a complaint that three companies, Blue Circle Industries plc, Castle Cement Limited and The Rugby Group limited, had agreed not to supply bulk ordinary Portland cement (OPC) for resale; OFT press release PN 34a/00, 5/9/00 and Annual Report of the Director General of Fair Trading, 2000, p 46); investigation by OFTEL into the pricing of BT's Surf together and Talk & surf Together packages, allowing unmetered internet access (OFTEL press release 94/00, 27/11/00. Following investigation, the Director General of Telecommunications concluded that there has been no breach of the Chapter II Prohibition); inquiry into motorway catering services (The OFT found no "...evidence of monopoly abuse or collusion or excess profits" (OFT press release, PN 53/00, 22/12/00. This was a Fair Trading Act investigation where the OFT concluded that there were no grounds for a CC reference since the concluded operators were not behaving anti-competitively (Annual Report of the Director General of Fair Trading, 2000, p 51), but the press release seemed to suggest that it was an investigation under both the FTA and Competition Act 1998)); investigation of the British Horseracing Broad's supply of pre-race data to internet betting sites following it a complaint by William Hill that it is abusing its dominant position as sole provider of race and runner data on UK Horseracing (OFT press release PN26/01, 12/6/01. This followed William Hill's unsuccessful defence in the cases against it for breach of copyright (British Horseracing Board Ltd and Others v William Hill Organisation Ltd (9/2/01) reported in (2001) NLJ 23 February, 271)); the Secretary of State asked the OFT to keep the supply of fresh processed milk market under close review for infringements of the Competition Act 1998 (following a CC investigation) (Annual Report of the Director General of Fair Trading, 2000, p 49. This is an early illustration of the interwoven relationship developing between the FTA and Competition Act 1998); and assurances given by Bradshaw Appliances Ltd (OFT press release PN 23a/01, 24/5/01), CDA Group Limited (OFT press release PN 28b/01, 25/7/01) and various other undertakings (OFT, press releases PN 18a/00, 12/4/00 and PN 11a/01, 15/3/01) in respect of recommended resale prices for electrical goods, following investigation into alleged breach of Order (The Restriction on agreements and conduct (Specified Domestic Electrical Goods) Order 1998 (SI 1998 No.1271)) preventing them from making such recommended prices.

certain transactions where other appropriately qualified people could do the job[104]; inquiry into the wholesale petrol market[105]; inquiry into BSkyB's actives[106]; the warning given to cab firms against price fixing[107]; the launch of the compact disc inquiry concerning the suspected concerted action taken limit the parallel imports of CD's from other member states by the practice of issuing "UK only" CD's with exclusive tracks to persuade retailers to buy from UK wholesalers, following the US investigation and commencement of an EC investigation into retail prices[108]; investigation of supply agreements between Dixons and Packard Ball and Compaq, following the complaint by John Lewis[109]; investigation in to a possible price fixing cartel between companies supplying building aggregates[110]; and an investigation into allegations of price fixing by manufacturers of replica football shirts[111] (the same manufacturers that had previously given assurances)[112].

Agreements classed "non-notifiable" under the RTPA have not raised any issues for the DGFT, and as such they can be taken as complying with the Chapter I Prohibition in that they do not restrict competition. The exclusion given for agreements benefiting from the exercise section 21(2) of the RTPA 1976 has not been clawed back, similarly suggesting that these comply with the Chapter I Prohibition. The knowledge built up under these aspects of the RTPA presents the possibilities of what the OFT might use to develop its rule of reason, since this knowledge no doubt still carries weight. After all, in applying for the DGFT to exercise his discretion, undertakings were asked to provided market analysis, and the fact that no claw back of the section 21(2) discretion has taken place, adds

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[104] OFT Statement 7/4/00; OFT press release, PN 22/00, 26/5/00. See 4.2.6, infra.
[105] This found no evidence of either price fixing agreements or abuse of a dominant position by the oil companies (OFT press release PN 47/00, 21/11/00).
[106] OFT press release, PN 50/00, 5/12/00. This follows a review of undertakings given by BSkyB in 1996 in respect of its position in the pay-TV market, and a complaint by ONdigital.
[107] OFT press release, PN 10/01, 10/1/01, where John Vickers stated "No assumption should be made at this stage that there has been an infringement of competition law..."
[108] OFT press release, PN 5/01, 9/2/01. The record companies are defending the high prices in the UK as providing the means necessary to invest in new talent.
[109] The DGFT concluded that there was no infringement of the Chapter I Prohibition. OFT press release PN 18/00, 10/4/00.
[110] "OFT puts aggregates prices under scrutiny" (2001) The Guardian 27 August, 1, and "Less than concrete" (2001) The Guardian 1 September, 1. However, a formal OFT statement has yet to be issued.
[111] "Watchdogs probe soccer kit market" www.news.bbc.co.uk/hi/english/business/newsid_1527000/1527432.htm as at 7/9/01. Again, no official OFT statement has been made.
[112] See 4.2.2, supra.

credence to the continued use of this knowledge. However, any problems with the status of the rule of reason have easily been overshadowed by the higher profile given to investigations under the FTA[113]. Their use as a *second attack* on the validity of agreements is not a new thing. When the DGFT failed in his attempt to end the restrictions in the agreement between solicitors supplying residential estate agency services in Scotland (because the agreement fell within the legal services exclusion in the RTPA 1976), the matter was referred to the MMC.[114] However, it has been unfortunate that the main domestic competition issues since the Chapter I Prohibition was assented to, have all been dealt with under the FTA. This was not necessarily any fault of the interpretation of the Chapter I Prohibition since both the supermarket, new car and bank inquiries had their origins pre-Competition Act 1998, and consequently a "concerted practice" was not relevant to the inquiry. The supermarket inquiry had its origins in 1996, when:

> "...under the previous Government, I wrote to the then Secretary of State recommending that he should use his powers to make a general reference of the supermarket sector...My recommendation was a missed opportunity...In May 1999...after an extensive eight-month preliminary investigation...I concluded that grounds existed to justify a monopoly reference under my own authority."[115]

The findings of complex monopolies supports the Government's assertions for retaining the FTA provision, although this does raise doubts as to the future use of the Chapter I Prohibition. The result of the supermarket inquiry was that complex monopolies did exist, although the remedy of a "code of practice" was not something envisaged by the Government in is reasons for retaining the FTA with the Chapter I Prohibition. The remaining inquiries do point to a blurring of the status between the two Acts.

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[113] However, the CCAT have recently made it an issue again, in their decision in the GISC appeal. See 4.2.5, infra.
[114] See Chapter 2, supra.
[115] John Bridgeman, Annual Report of the Director General of Fair Trading, 1999, p 12. Although in between these dates there had been a complaint by the National Association of Master Bakers in respect of supermarkets, which at the time was dismissed by the DGFT (Annual Report of the Director General of Fair Trading, 1997, p 47).

The new cars inquiry was launched in September 1998 in respect of a possible complex monopoly in this market:[116] "In April 1999 I referred the £24 billion-a-year market for new cars to the Competition Commission....Carefully targeted intervention of this kind can save consumers hundreds of millions of pounds each year."[117] This course of action sent out a confusing signal considering the DGFT had talked of his power to fine those businesses in the car sector under the Competition Act 1998[118] and the inquiry took into account the EC block exemption for car distribution (an exemption under Article 81).[119] This is of concern in light of the statement that "It is not the Government's intention that the prohibitions and the Fair Trading [A]ct monopoly provisions should be used in parallel on the same matters."[120]

At the start of the Chapter I Prohibition, the Prime Minister warned banks against price fixing, threatening the use of the Competition Act 1998 if they did not back down on their plans to charge customers for using rival cash dispensers[121]. Two notifications in respect of undertakings in the banking sector have been made under the Chapter I Prohibition.[122] However, the sector was already being investigated under the FTA provisions following a reference by the Treasury,[123] with the CC finding a complex monopoly to exist between the big High Street Banks in respect of price fixing for the small business sector.[124]

This practice suggests a dual regime, with both Acts being used without necessarily first disproving the ability of the Chapter I Prohibition to provide the remedy. Nevertheless, statements of the DGFT provided comfort by suggesting that the operation of the two Acts would be that as envisaged in the Competition Bill

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[116] Annual Report of the Director General of Fair Trading, 1998, p 46.
[117] John Bridgeman, Annual Report of the Director General of Fair Trading, 1999, p 13.
[118] OFT press release PN 14/00, 29/2/00.
[119] "...the [CC] found that the main problem was the system of selective and exclusive distribution used by manufacturers, which is permitted by the European block Exemption on vehicle distribution." John Vickers, Annual Report of the Director General of Fair Trading, 2000, p 43.
[120] Lord Simon of Highbury, Official Report, Report Stage 2, Competition Bill, House of Lords, Column 350, 19 February 1998, Lords Hansard internet.
[121] (2000) The Times, 2 March, 3.
[122] Mastercard/Europay UK Ltd and Link Interchange Network Limited (see below).
[123] See DTI press release No 2000/194; Gordon Brown referred the matter to the CC following the Cruickshank Report. The Treasury has announced that it intends the OFT to regulate these payment systems in the future (Competition in Payment Systems: A Consultation Document HM Treasury, December 2000 and see also OFT press release, PN 53/00, 21/12/00). See 4.2.1, supra.

debates. In the review of the professions, the DGFT made clear in the consultation that it was:

> "...not intended that the prohibitions in the CA98 and the retained complex monopoly provisions in the FTA should be used in parallel to investigate the same matters. A suspected infringement of one of the CA98 prohibitions will normally be investigated under the CA98 rather than under the monopoly provisions of the FTA. The complex monopoly provisions are retained for activities which are not caught by the CA98 provisions."[125]

Following a recent review of BSkyB's non statutory undertakings, in which two undertakings were no longer needed to be observed, the OFT stated that

> "If BSkyB was not to observe its non-statutory undertakings, the Director General would not make a reference to the Competition Commission under the Fair Trading Act 1973, but would rather use his powers under the Competition Act if its provisions had been infringed"[126].

Despite these assertions, the prediction of a dual regime would appear to be the future for the domestic control of agreements. The CACP Peer Review commissioned by the Government found that the complex monopoly provisions of the FTA were "particularly well regarded."[127] The Government recognises that EC law "is developing in a way, which in due course, may make it possible to tackle some of the practices covered by our complex monopoly provisions."[128] Despite welcoming the EC's proposals for the modernisation of the procedures for Articles 81 and 82, the Government is keen to stress that they should not "undermine the effective operation of key parts of our domestic regime – in particular the complex

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[124] Competition Commission press release 09/01, 6/3/01.
[125] A Review of Competition Restrictions in the Professions (May 2000 available on www.oft.gov.uk/html/new/professions-00.htm as at 31/5/00), paragraph 8.
[126] OFT press release PN 14a/01, 2/4/01. Although this is consistent with the feeling that Article 82 satisfactorily covers the majority of scale monopoly situations and should therefore be the primary weapon.
[127] Productivity in the UK: Enterprise and the Productivity Challenge (HM Treasury and DTI, June 2001), p 20. Indeed, the European Commission propose to introduce similar remedies for the competition Articles as are available under the replacement FTA regime. See Chapter 5, infra.
[128] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraph 6.6.

monopoly provisions..."[129] Consequently, the complex monopoly provisions will be replaced with a new power for the OFT to investigate markets, with a full investigation (where necessary) carried out by the CC assessing the market against a new competition based test, with Ministers retaining "power to decide the very small minority of cases where clearly defined exceptional public interest issues arise".[130] The new test for complex monopolies, or market investigation as it will be called, will either be whether "the OFT believes (or has a reasonable suspicion) that a market may operate in a manner which *adversely affects competition*" or, closer to the proposed merger test, "the OFT believes (or has a reasonable suspicion) that a market may operate in a manner which *substantially lessens competition*."[131] Lack of effective competition could be indicated by:

> "the conduct or practices of the firms in the market, prevailing prices, profit levels or productivity levels, the structure of and barriers to entry into the market, comparisons with similar markets in other countries; and laws or regulations which affect the operation of the market."[132]

However, such prices, productivity and barriers could be the result of anti-competitive agreements under the Chapter I Prohibition. By focusing on the desire that the proposed "...new domestic powers are intended to be complimentary to the emerging concept of collective dominance"[133], the issue of concerted practice is left open. This would appear to be deliberate since the "Government wishes to ensure that [this and the modernisation proposals] do not undermine the effective working of the complex monopoly regime and its successor."[134] However, it is submitted that the new test should be based on appreciably affecting competition, using Article 81(3) criteria to allow benefits.[135] Whilst retention of the FTA was a safeguard where the prohibitions could not deal with the situation satisfactorily, this does not prevent the other aspects of the Competition Act 1998 being used to

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[129] Productivity in the UK: Enterprise and the Productivity Challenge (HM Treasury and DTI, June 2001), p 24.
[130] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), Executive Summary, paragraph 6.43
[131] ibid, paragraph 6.15.
[132] ibid, paragraph 6.16.
[133] ibid, paragraph 6.7.
[134] ibid, paragraph 6.10
[135] ibid, paragraphs 6.27 and 6.28.

demonstrate positive benefits to the market from being incorporated into the reforms.

4.2.5 Decisions

The DGFT realised that the "[p]ublication of reasoned decisions arising from the new competition law would be an important component of the transparency of the Office of Fair Trading's operation of the new powers."[136] However, information on "public record" illustrates that sources of comfort as to DGFT's views are seriously lacking. There have not been enough decisions to tell us whether UK analysis of the prohibition is consistent with Article 81[137], but this is the outcome of a "don't notify regime" where there are few investigations.

The OFT has said that within the first six months there were two leniency cases[138], and by the end of the first year there had been another two leniency cases.[139] In about fifteen cases the threshold for suspecting an infringement has been passed and the first prohibition decision was due, "hopefully before Christmas" [2000].[140] However, the reality of what has been published does not tally with this.

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[136] Annual Report of the Director General of Fair Trading, 1997, p 12.

[137] The decisions made under the Chapter II Prohibition are: Napp Pharmaceutical holdings fined £3.2 million for breach of the Chapter II Prohibition (OFT press release PN 14/01, 30/3/01, Decision No CA98/2/2001 and Directions under section 33, NoCA98/2D/2001, 4/5/01. Following Napp's request for interim relief on 14/05/01 (www.competition-commission.org.uk/appeal/hearingsnapp.htm as at 15/05/01) the OFT agreed changes pending the decision of the CCAT in Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading Case 1000/1/1/01(IR) (OFT press release PN 23/01, 22/5/01)); Decision of the DGT that the BT Surf Together and Surf & Talk Together pricing packages did not infringe the Competition Act 1998 (OFT Weekly Gazette 18/2001, 28 April – 4 May 2001, p 3; www.oft.gov.uk/html/comp-act/case_register/bt.html as at 4/5/01); Decision of the DGFT that Consignia plc's grant of a licence to Postal Preference Service Ltd to use Royal Mail Trade Marks was not an infringement of the Chapter II Prohibition (www.oft.gov.uk/html/comp-act/case_register/consignia.html as at 20/6/01); and the DGFT's decision to fine Aberdeen Journals Ltd for its breach of the Chapter II Prohibition (www.oft.gov.uk/html/comp-act/case_register/aberdeen.html as at 21/7/01).

[138] Margaret Bloom, The New UK Competition Act, Fordham Corporate Law Institute, 27th Annual Conference on International Anti-trust Law, New York, 19-20 October 2000, p 6. "...with two organisations approaching the OFT within the first weeks of the policy being introduced." ("Confessions of a cartel member" (2000) 27 Fair Trading August, 7).

[139] Annual Report of the Director General of Fair Trading, 2000, p 23; John Vickers "Some European Aspects of UK Competition and Consumer Policy" Speech delivered to the Law Society European Group Annual Dinner" 6/12/00, p 2.

[140] Margaret Bloom, speech delivered at the Fordham Corporate Law Institute, 27th Annual Conference on International Anti-trust Law, New York, 19 October 2000.

There has only been one decision made in respect of a notification: General Insurance Standards Council ("GISC") Rules[141]. The GISC requested a decision that its new rules did not infringe the Chapter I Prohibition or alternatively were eligible for an individual exemption. The GISC estimated that there are up to 16,000 eligible members (the original 30,000 estimate based on insufficient data) covering insurers, Lloyds brokers, registered brokers, independent intermediaries, and company agents. The activities to be regulated cover selling, advising, broking and any other activity which, when engaged in connection with a general insurance product, is regulated by the codes[142] set out in the Rules. Membership is voluntary, but by a new Rule 42, GISC members are to be *prohibited* from carrying on general insurance activities with any intermediary not operating within the GISC regime[143]. This also indirectly binds appointed agents and appointed sub-agents, who are not GISC members because they are regulated through the agreements that they have entered into with GISC members (members are to ensure that their appointed agents and sub-agents shall not deal with non member intermediaries). The rules contained provision for e-commerce, membership practice (covering financial requirements for example, professional indemnity insurance, money segregation and solvency), monitoring and investigation, enforcement and intervention, but the main concern for the GISC was the restriction on who members could deal with. However, the DGFT considered the effect of all the rules together.

The analysis part of the DGFT's decision starts with the defining the relevant market. The GISC submitted that there were *three* relevant product markets; (1) general insurance, (2) reinsurance and (3) the provision of advisory, broking and related services for general insurance products (the provision of intermediary services).[144] The DGFT found that it was the activities of the undertakings governed by the rules that were relevant to the determination of the relevant

[141]Decision under the Chapter I Prohibition, Competition Act 1998, 24 January 2001 (CA98/1/2001). GISC is a self-regulatory body for the general insurance industry, established to create a harmonised set of standards for those engaging in general insurance activities from a permanent place of business in the UK (and to a limited extent, qualifying entities from outside the UK). It was developed by the insurance industry as its' self regulatory body in light of the fact that this sector was not to fall within the statutory jurisdiction of the Financial Services and Markets Act 2000, following the repeal of the Insurance Brokers (Registration) Act 1977.

[142] The General Insurance Code for Private Customers and The Commercial Code.

[143] Decision under the Chapter I Prohibition, Competition Act 1998, 24 January 2001 (CA98/1/2001), paragraph 14.

product market. However, on the facts of the case, the DGFT found that he did not need to come to a final view as to whether the relevant product markets were narrower than those proposed by GISC.[145]

GISC submitted that the relevant geographic market was *national* for general insurance and intermediary services and *global* for reinsurance.[146] On the facts of the case, the DGFT found that he did not need to come to a final view as to whether the relevant geographic markets were narrower than those proposed by GISC[147]. This stance by the DGFT might be due to the fact that he went on to find that the agreements fell outside of the Chapter I Prohibition, but to not reach a conclusion on the market curtails any useful guidance as to the DGFT's interpretation.

Next the DGFT turned to the constituent parts of the Chapter I Prohibition, finding that GISC *was* an association of undertakings for the purposes of section 2[148], and the Rules *did* affect trade within the UK.[149] As to the prevention, restriction or distortion of competition, the DGFT considered whether the rules: imposed or increased barriers preventing entry into or continued operation in the general insurance industry; reduced or distorted competition between insurers, between intermediaries or between insurers and intermediaries; or resulted in the exchange of price or non-price information. The DGFT found that *none* of the Rules, by themselves or in combination with the other Rules, had as their object or effect an appreciable prevention, restriction or distortion of competition within the UK.[150] However, it is submitted that the DGFT should have omitted the reference to appreciable, since this can only be established in light of the market analysis, on which he chose not to reach a decision.[151]

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[144] ibid, paragraph 18.
[145] ibid, paragraph 20.
[146] ibid, paragraph 22.
[147] ibid, paragraph 23.
[148] ibid, paragraph 24.
[149] ibid, paragraph 25.
[150] ibid, paragraph 29.
[151] Indeed, the subsequent CCAT decision found that there was an appreciable effect on competition, although they did not go so far as to criticise the DGFT for failing to define the relevant market, but rather find that he confused appreciability with the benefits of the restrictions (see below).

The DGFT's reasoning was that the Rules ensured that members were competent to carry on general insurance activities without imposing significant barriers to operating in the industry (since the requirements and costs of compliance appeared to be reasonable and not effect the overall level of competition); put safeguards in place to protect consumers in the form of standards and procedures that did not necessarily have an appreciable effect on competition; would impede businesses that were incompetent or operated in such a way that would jeopardise consumers, but this may be pro-competitive as between the competent businesses that have proper safeguards in place to protect consumers; were transparent, non-discriminatory and based on objective standards; and did not introduce artificial regulatory barriers on the number of insurers with whom an intermediary may do business or vice versa.[152] Rule 42 would prevent members of GISC and their appointed agents and appointed sub-agents from carrying in general insurance business with UK intermediaries who are not GISC members, but there was no evidence to suggest that this would lead to a significant number of intermediaries leaving the market such that competition would be reduced appreciably; and in any event members could enter into appointed agent and sub-agent agreements to allow then to do business with intermediaries who chose not to become GISC members.[153]

The decision does confirm the principles espoused under Article 81 in that the analysis should be based on no restriction, prevention or distortion on competition, although the use of appreciable without reaching a conclusion on the market is inappropriate. These Rules were probably never going to cause serious problems. Despite the fact that should an intermediary who is not a GISC member wish to deal with a GISC member he *will* have to enter into an appointed agent or appointed sub-agent agreement and thus be controlled by the GISC indirectly, the Rules were only putting a place a new system of control to take over from an unsatisfactory mix of codes, statues and By-laws. Indeed, Rule 42 was encouraged and supported by the Government. Perhaps this is the reason why the OFT relented from its usual cry of "Don't notify", for despite the fact that comfort was required (due to the restrictions on who the GISC members could deal with), the notification

[152] ibid, paragraphs 29 and 30.

must be seen as a fail safe belt and braces approach of the kind *positively discouraged* by the OFT.[154] If so, the DGFT will certainly regret that decision.

The CCAT has withdrawn the Decision and remitted the matter back to the DGFT for a decision as to whether there should be an individual exemption.[155] The appeal followed applications by the Institute of Insurance Brokers[156] and ABTA[157] under section 47(1) for the decision of the DGFT to be withdrawn or varied. When the DGFT did not do either, these Decisions[158] were appealed to the CCAT. The CCAT saw the main issue as whether there was a restriction under section 2[159]. Surprisingly the Government support counted for little, but it would seem that there was pressure applied on insurers etc. to join ahead of the starting date, suggesting that not all were in agreement with the plan on how self regulation should take effect[160]. The thrust of the CCAT's argument was however, that the exclusivity imposed by Rule 42 amounted to an appreciable effect on competition[161] since there are other bodies that represent a significant number of insurers etc. Indeed, the Institute of Independent Brokers is a body in competition with the GISC, which according to Kay and Vickers[162], such competition between private regulators is to be encouraged. Consequently, the omission to define the market correctly so as to

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[153] ibid, paragraph 35.
[154] Although on the European stage, the European Patent Office notified its rules regulating membership and practice, to the Commission in respect of Article 81, which on the whole were outside of Article 81(1), apart from transitional rules in respect of advertising and cross border services, which received exemption (Commission Decision 1999/298, OJ L177/42,m 10/7/98).
[155] The Institute of Independent Insurance Brokers and Association of British Travel Agents Limited v Director General of Fair Trading supported by the General Insurance Standards Council (Cases 1002/2/1/01(IR), 1003/2/1/0/ and 1004/2/1/01, 17 September, 2001 (www.competition-commission.gov.uk as at 17/9/01).
[156] 22/2/01.
[157] 23/2/01.
[158] The DGFT concluded (Decision of the Director General of Fair Trading pursuant to section 47(4), 11 May 2001 (www.oft.gov.uk/html/comp-act/case_register/gisc.html as at 21/5/01)) that insufficient reason was shown, finding that GISC was not competing with the Institute of Insurance Brokers (ibid, paragraph 18), did not prevent member so of GISC belonging to any other associations or regulatory bodies (ibid, paragraph 24) nor did the requirements of fees, segregation of monies or the ability to wave Rule F42 produce any anti-competitive effects within the meaning of the Chapter I Prohibition (ibid, paragraphs 27, 30 and 31).
[159] The Institute of Independent Insurance Brokers and Association of British Travel Agents Limited v Director General of Fair Trading supported by the General Insurance Standards Council (Cases 1002/2/1/01(IR), 1003/2/1/0/ and 1004/2/1/01, 17 September, 2001 (www.competition-commission.gov.uk as at 17/9/01), paragraph 24.
[160] ibid, paragraphs 80 to 82.
[161] ibid, paragraphs 182 to 189.
[162] "Regulatory Reform: an Appraisal" in G Majone Deregulation or Regulation? Regulatory Reform in Europe and the United States (1990), quoted by the CCAT, paragraph 230.

examine appreciability did flaw the reasoning of the DGFT. Indeed, the benefits from GISC do not affect appreciability, but rather require consideration under section 9.[163] This blurring by the DGFT caused the CCAT to look at the rule of reason.[164] Whilst they find that, in reliance on Wouters[165], a rule of reason may apply only where the agreement is exclusively competitive in nature, they disappointingly "leave open the question of whether there is any real scope for a 'rule of reason' approach to the construction of the [Chapter I Prohibition]".[166] Consequently the DGFT must now examine the benefits he identified under section 9. In light of this original reasoning of the benefits of GISC and the fact that those rules are less burdensome than the alternatives on offer, combined with Government pressure, an exemption may well be granted (although those with the power will all now have the benefit of the Kay and Vickers article that so heavily influenced the CCAT, perhaps forcing a different result).

Three other decisions all relate to complaints:

The John Lewis/Temple complaint[167] was the second complaint made in respect of the Distribution agreements Dixons had made with Compaq and Packard Bell. The decision found "insufficient grounds to exercise the power to withdraw the exclusion" for vertical agreements.[168] The DGFT's analysis of the market was more detailed compared to GISC, with much of the background market analysis being available from the OFT's previous inquiry into the PC market.[169] Both the upstream and downstream markets were considered,[170] with the DGFT finding that

[163] The Institute of Independent Insurance Brokers and Association of British Travel Agents Limited v Director General of Fair Trading supported by the General Insurance Standards Council (Cases 1002/2/1/01(IR), 1003/2/1/0/ and 1004/2/1/01, 17 September, 2001 (www.competition-commission.gov.uk as at 17/9/01), paragraph 216.
[164] A "somewhat dangerous phrase for various techniques adopted over the years" (ibid, paragraph 174).
[165] Case C-309/99 Wouters v Algemene Raad van de Nederlandse Orde van Advocaten
[166] The Institute of Independent Insurance Brokers and Association of British Travel Agents Limited v Director General of Fair Trading supported by the General Insurance Standards Council (Cases 1002/2/1/01(IR), 1003/2/1/0/ and 1004/2/1/01, 17 September, 2001 (www.competition-commission.gov.uk as at 17/9/01), paragraph 261.
[167] Decision of the Director General of Fair Trading, 6 April 2001 (No CA98/3/2001).
[168] OFT press release PN 15/01, 6/4/01
[169] In which is found consumers buying home PCs were getting a fair deal ("PC prices 'are competitive'" (2000) 25 Fair Trading February, 1).
[170] Decision of the Director General of Fair Trading, 6 April 2001 (No CA98/3/2001), paragraph 12; following EC Guidelines on analysing vertical agreements.

the product market for downstream consisted of both single and multibrand retailers[171] with no distinction between first and second time buyers[172], no distinction between retail and direct sale channels[173], and the supply side substitution test indicating that retailers could obtain PCs relatively quickly without substantial cost.[174] In the upstream market, it was found that there were a large number of competing brands which were not strongly differentiated, indicating that the market was the manufacture of home PCs for sale in the UK.[175] The geographic market for both downstream and upstream was held to be the UK[176], although there was evidence to suggest "...that the geographic market could well be wider than the UK."[177]

The Director of Legal Services at John Lewis, Terry Neville, had previously criticised this market definition (which was also used in the first complaint), since including the

> "...internet in any market is tantamount to driving the proverbial coach and horses through the Competition Act 1998 as it is most unlikely if not impossible for any trader operating in such a wide market ever to achieve a dominant position in that market."[178]

For both agreements with Packard Bell and Compaq, the DGFT detailed the criteria of section 2 finding that there was an agreement between undertakings[179], affecting trade within the UK[180]. However, in light of the market analysis there were insufficient grounds to consider withdrawing the exclusion.[181] Indeed the DGFT

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[171] ibid, paragraph 15.
[172] ibid, paragraph 34.
[173] ibid, paragraphs 40 and 45. See chapter 6.
[174] ibid, paragraph 47.
[175] ibid, paragraph 53.
[176] ibid, paragraphs 55 and 56.
[177] ibid, paragraphs 57 and 60.
[178] "Vertical agreements: Defining the correct market" (2000) XI(8) PLC 10. The complaint in respect of the Chapter II Prohibition was also dismissed, but the comments regarding the internet hold true for defining the relevant market under the Chapter I Prohibition. See Chapter 6, infra.
[179] Decision of the Director General of Fair Trading, 6 April 2001 (No CA98/3/2001), paragraphs 104 and 114.
[180] ibid, paragraphs 105 and 115.
[181] ibid, paragraphs 111, 118 and 120.

concluded that "[i]n practice, it is likely that the DGFT will exercise [the powers of withdrawal] only rarely."[182]

Swann Solutions Ltd's complaint[183] was decided upon by Oftel. It considered that Swann's complaint in respect of the interfaces connected to the Avaya Index Private Branch Exchange (PBx) infringed neither of the prohibitions. In respect of the Chapter I Prohibition, Swan alleged that Avaya and a number of computer software developers operated an agreement in breach of this prohibition[184], but Oftel found that the relevant provisions of the agreements did not have an appreciable effect on competition.[185] Whilst the subject matter of the complaint was complex, requiring the explanation of how the software and systems worked, Oftel's explanation of market analysis was less detailed than that provided by the DGFT in his decisions. If concurrency is to be accepted, the same standard should be reached in relation to the detail given, irrespective of who makes the decision.

Synstar's complaint[186] also concerned a further complaint following a prior rejection. The DGFT had dismissed Synstar's initial complaint (under the FTA) on 2 March 2000. Synstar made further submissions on 14 April 2000 and commenced court proceedings, two weeks later, claiming ICL had acted contrary to Article 81 and/or 82 and Section 2 and/or 18 of the Competition Act 1998. The High Court proceedings were stayed, pending the DGFT's decision. Again, the DGFT's analysis of the relevant market is detailed, relying on EC jurisprudence and economic studies in determining whether there were separate primary and secondary markets. The DGFT concluded that there was a single market for the supply *and* maintenance of computer equipment with mainframe functionality, in the UK.[187] In respect of the Chapter I Prohibition, the DGFT found the agreements between ICL and its customers for the supply and maintenance of computers fell

[182] ibid, paragraph 110.
[183] Swan Solutions Ltd/ Avaya ECS Ltd, March 2001, OFT Weekly gazette 13/2001, 24-30 March 2001.
[184] Swan claimed that Avaya's agreement with its licensees prevented those licensees from developing competing software (Decision of the Director General of Telecommunications, www.oft.gov.uk/html/comp-act/case_register/swan.html as at 6/4/01, paragraph 7).
[185] ibid, paragraph 38.
[186] Decision of the Director General of Fair Trading, 20 July 2001 (CA98/6/2001).
[187] ibid, paragraph 36.

within the Exclusion order, which there were no grounds to withdraw, repeating the caveat that withdrawal will be exercised rarely.[188]

The first eighteen months have also seen two consultations in respect of decisions the DGFT proposed to make following notifications of agreements. The first was in respect of the Memorandum of Understanding on the Supply of fuels oils in an emergency[189]. Although the agreement entered into force on 29 September 2000[190], it was not notified until the end of 2000, following which complaints were made to the DGFT from "oil independents"[191] and concerns raised about the meaning of "essential users"[192]. The DGFT relied on EC case law in confining the relevant product market to the down stream supply for oil fuels.[193] The geographic market was held to the whole of the UK.[194]

The Memorandum is an agreement, between undertakings, affecting trade within the UK.[195] The DGFT found an objective assessment of the purpose of the Memorandum is required, and dismissed the parties argument that their intention was not to restrict competition finding "subjective intentions ...are therefore not important in the analysis of the object of the MoU"[196]. Whilst dismissing subjective intent, it is arguable that the DGFT's reference to the specific agreement, means that it will be possible in a later case to rely on the subjective intent in finding a breach of the prohibition.[197] Despite recognising that there was no need

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[188] ibid, paragraph 40.
[189] Notice of consultation issued pursuant to Rule 12(1)(a) of the Competition Act 1998 (Director's rules) Order 2000, 12 July 2001, (Case CP/1730-00/S).
[190] "Fuel Supply Task Force Signs Memorandum of Understanding" Cabinet Office press release CAB 317/00, 29/9/00. This contains a outline of the Memorandum, but for security reasons not all the details can be published. It is these details that contain the restrictions that the DGFT is now concerned about.
[191] Notice of consultation issued pursuant to Rule 12(1)(a) of the Competition Act 1998 (Director's rules) Order 2000, 12 July 2001, (Case CP/1730-00/S), paragraphs 19 to 21, and 23 to 25.
[192] ibid, paragraph 22.
[193] ibid, paragraph 31.
[194] ibid, paragraph 34.
[195] ibid, paragraphs 35 and 36. The DGFT found no breach of the Chapter II Prohibition. The fact that supplying fuels in emergency situation's has been held by the EC not to be a breach of Article 82 (BP v Commission [1978] 3 CMLR 174), should have provided the answer to those notifying the agreement.
[196] Notice of consultation issued pursuant to Rule 12(1)(a) of the Competition Act 1998 (Director's rules) Order 2000, 12 July 2001, (Case CP/1730-00/S), paragraph 38.
[197] See Chapter 3, supra.

to also establish "effect"[198], the DGFT chose to look at other aspects of the Memorandum[199] not having the object of restricting competition, but having an effect both during and after an emergency situation.[200] This is to be welcomed, as not only does it demonstrate a thorough analysis of the agreement enabling all potential restrictions to be considered[201] in view of that fact that restrictions discovered may be severed, it also provides for the most comprehensive consultation possible, in light of the public unavailability of the specific terms of the Memorandum.

In light of the market analysis, the restrictions did have an appreciable effect, raising concern for the DGFT in that the Memorandum could "...be used to deal with fuel emergencies which are not so extreme as to result in a nearly complete failure of supply."[202] However, the DGFT found that section 9 was satisfied provided that the exchange of information between the parties is restricted to what is necessary, the DGFT is informed of any changes and is given access to all relevant documents.[203] These conditions impose obligations to ensure that the benefits can be objectively justified[204]. However, it is rather strange that this notification was made since the OFT had just concluded that there was no evidence of price fixing agreements or abuse by the oil companies[205], some two months after the Memorandum was executed. Although Schedule 12, paragraph 12 of the Competition Act 1998 repeals section 5 of the Energy Act 1976 (that is, the provision for temporary relief from restrictive practices law in relation to agreements connected with petroleum) an application of the section 9 criteria should have avoided the need to notify, in that the parties and their advisers should have ensured that all aspects of the Memorandum could be justified.

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[198] Notice of consultation issued pursuant to Rule 12(1)(a) of the Competition Act 1998 (Director's rules) Order 2000, 12 July 2001, (Case CP/1730-00/S), paragraph 40.
[199] The joint planning process and the reviewing of the level, location and roles of oil fuel stocks.
[200] Notice of consultation issued pursuant to Rule 12(1)(a) of the Competition Act 1998 (Director's rules) Order 2000, 12 July 2001, (Case CP/1730-00/S), paragraph 41.
[201] and not just those with the intent of restricting.
[202] Notice of consultation issued pursuant to Rule 12(1)(a) of the Competition Act 1998 (Director's rules) Order 2000, 12 July 2001, (Case CP/1730-00/S), paragraph 50.
[203] ibid, paragraphs 63 and 66.
[204] The MoU received individual exemption at the end of October 2001 (www.oft.gov.uk/html/case_register/decisions.html as at 31/10/01).
[205] OFT press release PN 47/00, 21/11/00.

With regard to the second consultation, the Link Interchange Network notification, the DGFT concluded that the agreements have the "effect of appreciably preventing, restricting or distorting competition between LINK members, but that the requirements for individual exemption are met."[206] The DGFT found that the relevant product market was the market for services for the switching, transmission, transaction and clearing network functionality for the ATM services in the UK[207] including both LINK and non-link ATM transactions[208]. The DGFT disagreed with the LINK members assertion that the market was personal spending: the members contended that "all forms of payment are, to a large extent, substitutable from the view point of the customer."[209] This definition is too wide, since it is questionable whether an increase in the price of an ATM transaction would necessarily result in a significant number of customers substituting to other means of payment, when these alternatives are unlikely to be regarded as interchangeable or enable the same intended use (that is, the use of cash). The DGFT's analysis represents a realistic view of the market. As for geographic market, the DGFT agreed with the LINK members that this was the UK.[210]

The DGFT continued with his practice of breaking down section 2, illustrating that there was an agreement, between undertakings, effecting trade within the UK.[211] However, of the provisions notified, the DGFT found that only one, the centrally set MIF (multilateral interchange fee) has an appreciable effect on competition.[212] The DGFT based this finding on the Commission Notice on cross-border credit transfers[213] and Commission decisions[214], but has suggested that the criteria in section 9 are met and therefore proposes to grant an individual exemption for five years. The DGFT was keen to stress that the MIF "...is based on annual cost

[206] Notice of consultation issued pursuant to Rule 12(1)(a) of the Competition Act 1998 (Director's rules) Order 2000, 30 July 2001, (Case CP/0642/00/S) p 1. Individual exemption was granted on 16 October 2001 (www.oft.gov.uk/html/case_register/decisions.html as at 16/10/01).
[207] ibid, paragraph 15.
[208] ibid, paragraph 16.
[209] ibid, paragraph 14.
[210] ibid, paragraph 17.
[211] ibid, paragraphs 18 and 19.
[212] ibid, paragraphs 20 and 25 to 27. The LINK members argue that without the MIF, they would have to enter into bilateral agreements, resulting in an additional £18.5 million per annum to the cost of running the system.
[213] OJ 1995 C251/3.
[214] Notice of consultation issued pursuant to Rule 12(1)(a) of the Competition Act 1998 (Director's rules) Order 2000, 30 July 2001, (Case CP/0642/00/S), footnote 15, p 9.

surveys carries out by independent and reputable firms with experience in this areas" with the information gathered from members "...compared for reasonableness and consistency, both between Members and with previous cost reviews". This can be seen as meeting the fifth requirement for exemption, that is, objectively demonstrating the benefit of the restriction.

4.2.6 Exclusions

Shortly after the commencement of the Competition Act 1998, the DGFT was asked[215] to consider the scope of the exclusion afforded to professional rules[216] in the "more economically significant professions".[217] This focused on rules relating to entry into the profession, reserving categories of work to certain professionals and restrictions on the conduct of regulated professionals such as advertising or price.[218] John Vickers saw the OFT's involvement here as part of the wider pro-competition agenda, that is, looking to the Government and/or the professions to remove the restrictions, where it does not have the power to tackle the competition problems directly.[219]

The Report of Competition in Professions was published in March 2001,[220] and recommended the removal of the exclusion of the Schedule 4 in relation to

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[215] Under section 2, FTA.
[216] Under Schedule 4, paragraph 1.
[217] OFT, press release PN 22/00, 26/5/00. These were described as legal and accountancy services, and the related professions of auditors and insolvency practitioners, and possible extending to pharmacists, actuaries, architects, engineers and surveyors.
[218] A Review of Competition Restrictions in the Professions (May 2000 available on www.oft.gov.uk/html/new/professions-00.htm as at 31/5/00), paragraph 1, although these were not exhaustive (paragraph 19).
[219] Annual Report of the Director General of Fair Trading, 2000, p 10.
[220] Competition in Professions (OFT 328, March 2001); OFT press release PN 10/01, 7 March 2001. Previously, the DGFT had reported to the Lord Chancellor on the competition consequences of amendments to the Bar's Code of Conduct (A Report by the DGFT to the Lord Chancellor on the likely competition effects of amendments to the Code of Conduct of the Bar of England and Wales OFT 333, February 2001). The DGFT concluded that amendments to allow the Bar Council to grant employed barristers rights to conduct litigation, whilst reducing competition to a limited extent, would not be likely to have a significant effect on the market for the conduct of litigation, subject to the caveat of the impact of concerns regarding the Bar raised following the review of the professions. Similarly, the DGFT had been asked by the Lord Chancellor to advise (under the Courts and Legal Services Act 1990) on the competition implications of amendments to the Consolidated Regulations of the Inns of Court (Competition and the Regulations of the Inns of Court OFT 304, June 2000). The DGFT concluded that none of the amendments would be likely to have a significant effect on competition, with some tending to enhance competition, subject to how

professional rules.[221] This recommendation per se has not caused any controversy amongst the professions[222]. What has been the focus of concern and disagreement are the specific proposals[223] to remove the ban on Multi Disciplinary Partnerships[224] and the division between solicitors and barristers[225] (all based on professional rules)[226], end the distinction of QC's and junior counsel[227], and change the extent[228] of legal professional privilege.[229] The professions have been given a period of one year to make their own progress in light of the OFT's recommendations.[230] Whilst the removal of the exclusion has been lost in the wider debates about professions generally, the hopes expressed by the Government to see greater challenges[231] to professional rules will not be realised unless the Government gets to grip with the rights of private actions. The exclusion is not the problem; the basis for an award of damages is.

No other exclusions have raised any issues so far. However, in light of the Commission's change to the treatment of "ancillary restraints" in merger

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those changes were implemented. Again the caveat in relation to the results of the review of professions was included in the Report.

[221] Competition in Professions (OFT 328, March 2001), paragraphs 43 and 44. The Government "has confirmed that it will" repeal the exclusion for professional services (A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), p 10).

[222] The exclusion was already much narrower that what they had enjoyed under the RTPA (see Chapter 3, supra).

[223] Argued by many to already be familiar and nothing new (Opinion, (2001) The Lawyer 25 June, 19; "Rough trade?" (2001) The Lawyer, 26 March, 37; and "Bar Council to work on direct access recommendations from the OFT's report" (2001) The Lawyer 6 August, 2).

[224] Although the Law Society is already trying to enable these to evolve, there is a greater acceptance from those already in tied legal/accountancy practices ("The OFT report: the legal profession's response" (2001) The Lawyer 12 March, 6, 7), with solicitors arguing that they are already operating in the most competitive business know ("OFT review causes confusion at firms" (2000) Legal Week 20 March, 3; "Crackdown" (2000) The Lawyer 10 April, 20, in which one solicitor described the profession as "too bloody competitive"). The debate has recently centred around the Dutch ban on MDPs, which has been challenged by Arthur Anderson and PricewaterhouseCoopers, and is the subject of an Article 234 reference. The Advocate General has concluded that there is a certain incompatibility between lawyer's advisory activities and accountants' supervisory activities, finding that the ban is lawful, although other forms of cooperation remain possible (www.europa.eu.int/jurisp as at 11/7/01). The Law Society has focused on this later part in devising ways to bring non-lawyers into legal partnerships ("Euro block on MDPs with accountants" (2001) 98/28 Law Society Gazette 12 July, 1, 3).

[225] Argued by some to be likely to produce the opposite of the OFT's desire in that it will lead to higher prices, less choice and worse services (Opinion, (2001) The Lawyer 25 June, 19).

[226] Competition in Professions (OFT 328, March 2001), paragraphs 29 et seq.

[227] ibid, paragraph 46.

[228] "Solicitors have reacted angrily to any suggestion that their privilege should be reduced, although there was a more positive reaction to privilege being extended to other professionals" ("The OFT report: the legal profession's response" (2001) The Lawyer 12 March, 6).

[229] Competition in Professions (OFT 328, March 2001), paragraph 47.

[230] ibid, paragraph 55.

agreements so that they are no longer automatically covered by the ECMR[232], consistency would imply that the UK should follow in amending its exclusion of such restrictions under paragraph 1(2) of Schedule 1. The Commission's aim is that such restrictions be assessed as whether they fall within the ECMR[233], or if not so covered, are considered under Article 81 where they may benefit from a block exemption or qualify for an individual exemption. The DGFT had previously indicated that EC practice is followed in the domestic exclusion[234], but so far no response on the Commission's change of tack has been issued.

4.2.7 Exemptions

Individual exemptions have been examined above. However, during the Competition Bill debates, there were many questions as to what block exemptions would be put in place[235]. All the Government would say was that "...it will be for the director general to recommend domestic block exemptions....We are examining the case for block exemptions for certain agreements relating to co-operatives and other matters"[236], although the number of such exemptions would not be great since the parallel exemption "...means that there will be no need for a large number of

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[231] See 4.1, supra.
[232] Notice on restrictions directly related and necessary to concentrations (OJ 2001 C118/03).
[233] That is, necessary for the implementation of the concentration, for without them, the transaction as envisaged cannot go ahead.
[234] See Chapter 3, supra.
[235] See Chapter 3, supra; "Gas purchase agreements may well merit an early block exemption." (Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Column 985, 25 November 1997, Lords Hansard internet); "I do not know the number of block exemptions, but it would be helpful if the hon. Gentleman could give us a ballpark figure." (Mr Tim Boswell, Official Report, Standing Committee G, Competition Bill House of Commons, Part 2 p 4, 11 June 1998 (morning session), House of Commons internet); an amendment was put forward to provide for block exemption "in cases that have been approved by the Secretary of State or by the Monopolies and Mergers Commission "following and inquiry prior to the Act coming into force"." (Mr Tim Boswell, Official Report, Standing Committee G, Competition Bill House of Commons, Part 2 p 4, 11 June 1998 (morning session), House of Commons internet), but the Government rejected the amendment as it would "allow a wide-ranging, vague, automatic exemption in respect of agreements that the director general of the MMC may be said to have approved." This was not the same as the exemption given a section 21(2) discretion (Mr Ian McCartney, Official Report, Standing Committee G, Competition Bill House of Commons, Part 3 p 2, 11 June 1998 (morning session), House of Commons internet).
[236] Mr Ian McCartney, Official Report, Standing Committee G, Competition Bill House of Commons, Part 3 p 1, 11 June 1998 (morning session), House of Commons internet.

agreements to be given an exemption either individually under clause 4 or by block exemption under clause 6."[237]

The first block exemption[238] did not come into force until after the commencement of the Chapter I Prohibition. Travel cards and through tickets offered by bus and train companies, were given this exemption in March 2001. This followed calls by the Confederation of Passenger Transport in January 2000[239], which had hoped for the block exemption to be in place early in the new regime. However, consultation was not launched until July 2000[240], which can partly be seen as a consequence of the OFT's work in drawing up the Transport Act 2000 and the Transport (Scotland) Act 2001 under which the DGFT assess competition in local partnerships and ticketing schemes[241], and partly due to the bus industries chequered history under the RTPA.[242] From this experience under the RTPA, the DGFT was well aware that the structure of local public transport was likely to result in operators exceeding the de minimis threshold in these local markets; even if they did not exceed the 25 per cent threshold, then there was likely to be a network of agreements together having an appreciable effect[243]. However, he noted the benefits to consumers from integrated ticketing schemes where these met the criteria imposed by section 9[244].

The exemption covers multi-operator travelcards, through tickets, multi-operator individual tickets, and short or long distance add-ons, where the routes are not substantially the same, provided that participation in the schemes is based on

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[237] Mr Ian McCartney, Official Report, Standing Committee G, Competition Bill House of Commons, Part 4 p 2, 11 June 1998 (morning session), House of Commons internet. "My understanding is that DTI doesn't want to make block exemptions because they are too much trouble" P Freeman in "Bus groups look for competition law exemption" (2000) FT 28 January, 6.
[238] The Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001 (SI 2001 No. 319).
[239] "Bus groups look for competition law exemption" (2000) FT 28 January, 6.
[240] Public Transport Ticketing Schemes, Block exemption order: consultation document (OFT, July 2000).
[241] Annual Report of the Director General of Fair Trading, 2000, pp 26 and 27.
[242] See Chapter 2, supra.
[243] Public Transport Ticketing Schemes, Block exemption order: consultation document (OFT, July 2000), paragraphs 4.1 and 4.2. Public Transport Ticketing Schemes Block Exemption (Formal Consultation Draft, OFT 439, March 2001), paragraph 1.14.
[244] Public Transport Ticketing Schemes, Block exemption order: consultation document (OFT, July 2000), paragraph 3.1.

objective, transparent and non-discriminatory tests[245]; the number of routes are not limited[246]; there is freedom to set prices[247]; timing and frequency of services is not restricted unless such restriction is indispensable[248]; there is no exchange of commercial sensitive information[249]; and distribution of revenue is transparent[250]. This block exemption is much more detailed than the draft, illustrating the DGFT's concern that the block exemption could be abused. Indeed where these conditions are not met the DGFT has confirmed that the agreements can be notified for individual exemption[251], dispensing with the usual mantra in order to ensure that the exemption is not seen as a green light for anti-competitive agreements.[252]

The OFT has revealed that it is in discussions with "at least one other industry about block exemptions"[253] but no further details have been made known. However, the Government are determined to improve "enterprise, innovation and productivity " in order to reduce the productivity gap between the UK and the US, France and Germany". As part of this their plans for reform, the Government want to build on the evidence that "...suggests that the returns to the economy as a whole from investment in R&D can be significantly greater than returns to individual companies which invest."[254] Although the subsequent White Paper does not contain any proposals for such an exemption, this intention does suggest that should the new EC block exemptions on R&D[255] not produce the result that the UK Government desire without amendment as each case arises by virtue of section 10, a domestic block exemption could be introduced.[256]

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[245] The Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001 (SI 2001 No. 319), Article 6.
[246] ibid, Article 7(a).
[247] ibid, Articles 7(b) and 13.
[248] ibid, Article 8.
[249] ibid, Article 9.
[250] ibid, Articles 11 and 15.
[251] Public Transport Ticketing Schemes Block Exemption (Formal Consultation Draft, OFT 439, March 2001), paragraph 2.4.
[252] The DGFT has promised that he will crack down on operators who try to agree ordinary fares or share routes (OFT press release, PN 4/01, 8/2/01).
[253] "Bus groups look for competition law exemption" (2000) FT 28 January, 6.
[254] Productivity in the UK: Enterprise and the Productivity Challenge (HM Treasury and DTI, June 2001), p 9.
[255] See Chapter 3, supra.
[256] The Government has already put in place a tax credit for undertakings that undertake R&D as an incentive to increase enterprise in the UK (www.dti.gov.uk/support/taxcredit.htm as at 31 July 2000).

4.2.8 Procedures

From the discussion so far, it will be readily apparent that the completeness and volume of information being disseminated is a serious problem that must be addressed. The OFT is designed to provide transparency[257], but when the information is only drip fed into the public arena (confidentiality prevailing as necessary) it makes it difficult to know what is actually being done. Indeed, the Global Competition Review for 2000 found that there were "ongoing gripes relating to the transparency of the decision making process."[258] If the OFT wants businesses and consumers to complain, all the money spent on advertising this policy will continue to be wasted, while the results continue to not be publicised fully. The Weekly Gazette was amended to carry the DGFT's advice on mergers as a result of the "...OFT's 1999 consultation exercise on how its operations could be made more transparent...[which found] widespread support for the Director General's advice on selected merger cases being made public."[259] Such support and praise would follow should the OFT decide to publish more of its advice on real issues under the Chapter I Prohibition. In the first domestic case[260] to raise the issue of defining the relevant market under the Competition Act 1998, the judge (Mr Whiteman QC) relied heavily on the OFT Guideline 403. Increased detail of how the DGFT applies these guidelines to address the questions presented to him is a must if this reliance is to deliver just results, and besides, is an easy win in the continued successful application of the "do complain, don't notify" mantra.

As for the concerns regarding the relationship between OFT investigations and court proceedings, Lightman J confirmed that parallel proceedings would not be tolerated, when he stayed proceedings issued in the High Court. A decision of the DGFT was awaited, so the EC practice of staying court proceedings, to avoid the risk of inconsistent decisions where the matter was before the Commission, was

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[257] See 3.2.3, supra.
[258] "Global Satisfaction" (2001) 98/24 Law Society Gazette 14 June, 6.
[259] Annual Report of the Director General of Fair Trading, 2000, p 26.
[260] Network Multimedia Ltd v. Jobserve Ltd, 5 April 2001, unreported (where market definition was in issue following the grant of an injunction as an interim remedy).

applied.[261] The judge distinguished MTV Europe v BMG Records (UK) Ltd since granting a stay only at the point when the matter was to be set down for trial was not in accordance with the "overriding objectives" of the Civil Procedure Rules to limit costs.

The only amendment to Act has been in light of the Utilities Act 2000, which required minor administrative changes to the wording in the Schedules. The only change proposed to any of the Statutory Instruments was for the Director's rules to be extended to cover the ability of the DGFT to withhold more types of document from those entitled to see his file of papers before he makes a decision.[262]

The Global Competition Review of 2001, surveying competition authorities around the world. "...found that both the OFT and Competition Commission were held in higher regard than in earlier years, and that they ranked above many other competition authorities (equal fourth, with five others, out of twenty five)."[263] However, despite the few investigations and decisions, the role of the OFT is due to alter: not so much changing, but evolving to address more competition issues. Already plans have been made to increase the OFT's responsibility in regulating payment systems[264] and advise on the competition impact of law and regulation[265], although the DGFT has seen powers taken away from him where they fall better under another's control.[266] These new obligations will be assisted by the introduction of a Board Structure[267], of collegiate form with three divisions: Competition Enforcement, Consumer Protection Enforcement and (the new)

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[261] Synstar Computer Service (UK) Ltd v ICL (Sorbus) Ltd and Another (2001) The Times 1 May.
[262] By increasing the scope of Rule 30(f) to cover correspondence with non-competition non-Government public bodies (consultation on an amendment to The Competition Act 1998 (Director's rules) Order 2000 (SI 2000 No. 293) (www.oft.gov.uk/html/comp-act/technical_guidelines/rules-consult.html as at 11/10/00). Consultation closed on 7 July 2001.
[263] Global Competition Review June 2001, p 14.
[264] "OFT welcomes payment systems role" OFT press release PN 53/00, 21/12/00; competition in Payment Systems (HM Treasury, December 2000). See 4.1, supra.
[265] "While competition laws address private sector behaviour that could be anti-competitive, [the OFT] is being given a new extended role to examine and report to ministers on restrictions on competition arising from existing or proposed laws and regulations." (Annual Report of the Director General of Fair Trading, 2000, p 10).
[266] The dual supervision of credit reference file information was clarified when sole responsibility was vested in the Data Protection Commissioner on 1 March 2000 ("Credit reference comes under one roof" (2000) 25 Fair Trading February, 1).
[267] The OFT would be renamed the "Fair Trading Authority" and have corporate status with between five and eight members, based on the OFGEM board (DTI & OFT press release 18/5/2000; Proposed New Structure for the OFT (DTI, September 2000) paragraphs 3 and 7).

Markets and Policy Initiatives[268]. This structure is seen to better "...reflect the OFT's unifying goal – making markets work better – and the sets of enforcement tools that [the OFT has] for competition and consumer protection"[269].

The re-elected Government views this as a high priority, with the necessary legislation to be introduced in the form of the Enterprise Bill in the 2001/2001 session of Parliament[270]. However, changes have already been made since the Competition Act 1998 came into play. A change early on was the re-introduction of a deputy DGFT post[271]. It would appear that the personalisation of the Act in referring to the DGFT has brought about a greater role and consequent workload for the DGFT, necessitating an identifiable second in command. The DGFT finds that the introduction of an Advisory Panel[272] was a bonus for:

> "under the current law the Director General carries responsibility for OFT decisions. That responsibility, like others, is best carried out in the light of information and experience from a wide perspective, which we constantly seek in any event. An advisory panel will help to take that process further."[273]

This development is somewhat surprising as during the Competition Bill it was suggested that the institutional structure include the creation of an advisory body on

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[268] To provide a stronger platform for tackling markets not working well for consumers (A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraph 4.18). This division will also be responsible for examining Government regulations (ibid, p 20).

[269] J Vickers "The OFT: Firm Goal, Evolving Role" Speech delivered to the Competition Law Association, 2 May 2001, p 5; and has been broadly welcomed by those responding to the consultation although Lord Borrie, was one of the minority who did not find a case for reform (Proposed New Structure for the OFT: Summary Analysis of Responses (DTI, March 2001)).

[270] The Government also intends to introduce a bill to create a single regulator for the media and communications industries, and reform the regulation of broadcasting and telecommunications (Queen's Speech, 20/7/01. See Chapter 6, infra). This builds on cooperation caused by the convergence of sector affected by the technology: such advancement noted by the DGFT in 1998 as requiring regular meetings between the OFT, ITC and OFTEL (Annual Report of the Director General of Fair Trading, 1998, p 51).

[271] Penny Boys was appointed to this position on 11 December 2000.

[272] OFT press release PN 18-01, 2/5/01

[273] J Vickers "Competition policy and Globalisation" Speech delivered to the European Policy Forum, 16 January 2001, p 2. The panel, who will advise on the OFT's strategy, new policy developments, areas for research and debate, market analysis and communication met for the first time in May 2001 (OFT press release PN 18/01, 2/5/01).

functions of the director or other regulators[274], drawing on the example of the arrangement in place under section 54 of the Telecommunications Act 1984.[275] However this was rejected for the "...unnecessary layer to the decision-making process"[276] that would be added as a result, but perhaps can again be explained by the lack of attention to the practical operation of the new regime. The Panel met for the first time on 30 May 2001, and subsequently met to discuss the OFT's experience under the Competition Act 1998, although no details have yet been published.[277]

The reformed OFT will have a duty to make its main deliberations public[278] in accordance with the wider objective of communication as set out in the OFT's "Statement of Purpose".[279] This statement sets the OFT's goals as enforcement, investigation and communication, and for those engaged in abuses should be seen as "...an extremely hostile message".[280] However, the statement is good news for the increase in the flow of information since it enunciates the OFT's promise to explain its decisions transparently and promote compliance by explaining to business what the law is and how the OFT will apply it.[281] At last transparency might be delivered. The White Paper is full of statements to this effect[282], which

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[274] Lord Fraser of Carmyllie, Official Report, Report Stage 3, Competition Bill House of Lords, Columns 453 and 454, 23 February 1998, Lords Hansard internet.
[275] Lord Simon of Highbury said that this was not a comparable situation to that under the Competition Bill (Official Report, Report Stage 3, Competition Bill House of Lords, Column 457, 23 February 1998, Lords Hansard internet).
[276] Lord Simon of Highbury, Official Report, Report Stage 3, Competition Bill House of Lords, Column 457, 23 February 1998, Lords Hansard internet.
[277] "OFT Advisory Panel gets under way" (www.oft.gov.uk/html/new/panel.htm as at 21/7/01).
[278] The Government's Expenditure Plans 2001-2002 and 2003-2004 and Main Estimates 2001-2002 (DTI, www.dti.gov.uk/expenditureplan as at 29/7/01) paragraph 11.23.
[279] "The OFT: Statement of Purpose" OFT press release PN 33/01, 17/7/01.
[280] J Vickers (2001) The Times 17 July, 27.
[281] "The OFT: Statement of Purpose" (OFT press release PN 33/01, 17/7/01), paragraph 7.
[282] OFT and CC to ensure that businesses and the public understand their decisions, the reasoning behind them and the likely impact they will have (A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraph 4.16); "In future, the Government would like our competition authorities to take on a high profile advocacy role, both by advising on the impact of the Government's own laws and regulations on competition; and more widely acting to promote competition on the economy in a variety of ways." (paragraph 4.14); The OFT is to work to communicate the importance of competition to business and the public in a modern, dynamic economy, and scrutinise markets to assess whether strong competition pressures are at work (paragraph 4.16).

must this time be more than rhetoric. If not, the increase in powers would be severely disturbing.[283]

The White Paper also proposes that the OFT's resources should be increased further to attract top-quality staff, and individuals will only be eligible to sit as CC members if they have expertise relevant to competition[284]. This suggests that competition based tests should in practice become the norm and should hopefully prevent the development of public interest tests, although how competition is defined will determine whether this becomes reality. The increase in resources should also be used to deliver speedier decisions since the OFT has already come under fire for the delay taken in the GISC appeal getting to the CCAT.[285]

4.2.9 Sanctions and Remedies

Statements made in respect of the cartels discovered, and the many more suspected, during the last years of the RTPA, coupled with concern that there should not be fines for pre Competition Act 1998 activity[286], suggested that there were going to be big fines and lots of them. However, no fines have been imposed under the

[283] OFT will be "enhanced by a strategic board, with increased powers and more resources...[and] duties to promote competition" (A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), foreword). The OFT's general duty under the FTA to keep markets under review is to be updated (paragraph 4.21). The OFT will be given wide ranging duties to scrutinise markets, review and report on future developments, report on the effectiveness of previous competition interventions and advise on improvement (paragraph 4.22).

[284] "Only those with expertise relevant to competition will be appointed to the Competition Commission. Only those with expertise relevant to competition or consumer affairs will be appointed to the new Board of the OFT" (A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), Executive Summary); Ability to recruit and retain suitable staff will be key – the Government will ensure sufficient funds and remove unnecessary public sector rules (paragraph 4.36).

[285] The Institute of Independent Insurance Brokers and Association of British Travel Agents Limited v Director General of Fair Trading supported by the General Insurance Standards Council (Cases 1002/2/1/01(IR), 1003/2/1/0/ and 1004/2/1/01, 17 September, 2001 (www.competition-commission.gov.uk as at 17/9/01), paragraph 270. Although the CCAT recognise that the legislation could be amended to deliver a speedier outcome, they prefer the DGFT to alter his administrative practice so as to speed up the process.

[286] "The Bill will not be retrospective. Past behaviour which took place before the new prohibitions come into force and was lawful, cannot therefore be penalised....Such behaviour may be relevant to considering whether, as regards subsequent behaviour under the prohibition, an undertaking was acting in full knowledge that its course of conduct was anti-competitive." (Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 5 p 3, 16 June 1998 (afternoon session), House of Commons internet).

Chapter I Prohibition,[287] leaving a question mark over whether there has been effective enforcement of the new regime.

In the same way that enforcement has been non-existent so far, neither has there been the rush of private actions, although there were apparently been between ten and twenty private actions contemplated up to 19 October 2000.[288] The lack of high profile private actions is not a surprise given the flawed regime that the Government believed was able to deliver private remedies[289]. Mr Whiteman QC, sitting as a deputy judge, accepted that domestic courts do have the power to grant civil remedies, in Network Multimedia Ltd v Jobserve Ltd[290]: on appeal against the grant of an interim injunction, he granted a further temporary injunction since he felt that damages would not be an adequate remedy should the claimant go on to win its cases at full trial. Whilst this clearly assumes damages are available, it is not the concrete ruling necessary to establish the basis for awarding damages. Only two other cases have been brought alleging breach of the Competition Act 1998[291], although the Government claim some "...anecdotal evidence that cases are occasionally settled out of court."[292]

In light of this lack of effective enforcement, it is obvious that changes need to be made. We have already seen the "code of practice" remedy as the means used to

[287] Only two fines have been imposed to date, both under the Chapter II Prohibition: Napp Pharmaceutical Holdings Limited was fined £3.2million, although this has been appealed to the CCAT (www.oft.gov.uk/html/competition-act/case_register/napp.html as at 4/5/01) and Aberdeen Journals Ltd has been fined £1,328,040 (www.oft.gov.uk/html/competition-act/case_register/aberdeen.html as at 31/7/01).

[288] "issued and served or likely to be in the near future." Margaret Bloom, The New UK Competition Act, Fordham Corporate Law Institute, 27th Annual Conference on International Anti-trust Law, New York, 19-20 October 2000, p 12.

[289] See Chapter 3, supra.

[290] [2001] WL 415569; (2001) The Times 25 January.

[291] Synstar Computer Services (UK) Ltd v ICL (Sorbus) Ltd (supra) and the action commenced by professional snooker players and their manager, 110 sport, against the World Professional Billiards and Snooker Association, claiming the Association is abusing its dominant position: Mr Justice Lloyd has stated that he will determine whether the association is in breach of competition law when the matter comes to trial ((2001) FT 7 July, 4). The only other case concerning anti-competitive activity was the action by Menzies against WH Smith (unreported), where WH Smiths intended to break a regional distribution agreement. Whilst Menzies intimated at "market abuse" ("Menzies law suit stuns WH Smith" (2000) Daily Telegraph 29 November, 32) by WH Smith (with its 40 per cent share of the market ("Paper tiger backs down" (2001) Printing World 8 January, 21)) in pressurising others to break the distribution agreement in favour of its new distribution initiative, the court ordered that the agreement be honoured ("WH Smith suffers court blow" (2000) Sunday Telegraph 10 December, 2). No question under the Competition Act 1998 was advanced by Menzies.

address competition concerns. The OFT is keen to make greater use of such codes in ensuring that there is fair trading and indeed has launched a new consultation to ensure that these codes are effective[293], but is it possible to transfer this over to the Competition Act 1998 sphere? Control by means of codes is advantageous in terms of resource consumption: "Self-regulation where industries abide by a code of practice can, if effective, be an efficient, low-cost means of achieving a regulated market."[294] Whilst being a restrictive agreement[295], "the speed and flexibility of the best self-regulation are highly attractive"[296], providing "...an effective but lighter touch alternative to statutory regulation".[297] The potential advantages of codes is recognised by the OFT who find that there is a compelling need for change in the way codes are administered since "[t]raditional boundaries are no longer appropriate. The growth of e-commerce and other international trade also dictates a new approach to self regulation."[298] Such changing sectors might mean a greater recourse to the use of codes rather than investigation under the Chapter I Prohibition, as the problems are novel and the OFT unsure of how EC jurisprudence would deal with the problem[299]. Although the OFT aim to use codes to "...deliver benefits to consumers beyond the law"[300], a code of practice was the suggested remedy in the supermarket enquiry.[301]

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[292] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraph 8.2.
[293] Sections 124(3) and (4) FTA; "Under the Fair Trading Act the Director General has a general duty to encourage the preparation of codes of practice by trade associations for the benefit of consumers." (Annual Report of the Director General of Fair Trading, 1996, p 20).
[294] Annual Report of the Director General of Fair Trading, 1996, p 12.
[295] In that they cover marketing, quality, terms and conditions, guarantees and warranties, after-sales service etc. (Voluntary Codes of Practice: A Consultation Paper (OFT December 1996), p 21) and compliance is mandatory (p 23).
[296] Voluntary Codes of Practice: A Consultation Paper (OFT December 1996), paragraph 3.1.
[297] The OFT's new approach to consumer codes of practice: A consultation paper (OFT 331, February 2001) paragraph 1.2.
[298] ibid, paragraph 1.10.
[299] See Chapter 6, infra.
[300] OFT press release PN 31/01, 11/7/01; Consumer codes of practice: the OFT's response to the consultation (OFT 344, July 2001) paragraph 3.5.
[301] See Chapter 3, supra. Various remedies were consulted on, from divestment of stores and/or land, to price controls (Remedies Statement available on www.mmc.gov.uk/10-00rem.htm as at 22/2/00) paragraph 5. A code of practice was considered, possibly with the DGFT monitoring adherence " in the context of his powers under the Competition Act 1998" (paragraph 12). This was what the CC favoured in it final report, "...in light of [their] overall finding that the market is generally competitive, and consistent with [their] duty to ensure that intervention in such a market must be proportionate and impose the least regulatory cost in seeking to remedy any adverse effects found." (A Summary of Supermarkets; A Report on the Supply of Groceries From Multiple Stores in the United Kingdom (available on www.competition-commission.org.uk/446.htm as at 13/10/00).

The danger with codes of practice is already known. In its review of the code of practice on the sale of extended warranties on electrical goods the OFT was "...concerned that the apparent adherence to the code by its signatories [did] not tally with the concurrent criticism of extended warranties from the press and consumer bodies."[302] Collins warns that codes of practice "...are not likely to effective unless they are the result of detailed negotiation between all the interested parties", such negotiation being genuine and monitored by the competition authorities.[303] Whilst competition law must be flexible enough to deal with any anti-competitive activity, if the use of codes becomes discretionary, the objective for the Chapter I Prohibition will be hindered. Indeed, the experience of the supermarket code so far suggests that closure of the CC supermarket inquiry will be shambolic. The code was received by the DTI in June 2001, but has yet to be approved.[304] Further, supermarket suppliers have already branded it "worse than useless" because of the get out clauses allowing supermarkets to continue with the condemned practices.[305]

The Enterprise Bill will make the legislative changes[306] to allow the OFT to implement its' new rigorous two stage approach to codes.[307] The priority sectors for the new regime will include used cars, car repair and servicing, credit, funerals, travel, estate agents and direct marketing[308], with attention also paid to computers and mobile phones[309]. In light of some of the computer and mobile phone markets having been subjected to (or currently still under) investigation for breach of competition prohibitions, it is submitted that the OFT must make it clear from the

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[302] Annual Report of the Director General of Fair Trading, 1998, p 21.
[303] PGH Collins "Retailer Buyer Power: Abusive Behaviour and Mergers/Acquisitions" Fordham Corporate Law Institute, 27th Annual Conference on International Anti-trust Law, New York, 19-20 October 2000, p 45.
[304] "Retailers condemn DTI over code delay" (2001) Independent on Sunday 9 September, Business 2.
[305] "Supermarket code 'worse than useless'" (2001) FT 25 August, 4.
[306] OFT press release PN 31/01, 11/7/01; Consumer codes of practice: the OFT's response to the consultation (OFT 344, July 2001) paragraph 1.3.
[307] In the first stage the OFT will set out the criteria, encourage implementation and confirm whether the resulting codes meet those criteria. However, OFT endorsement would not occur until the second stage had been satisfied by the submission of "robust evidence of practical success" (The OFT's new approach to consumer codes of practice: A consultation paper (OFT 331, February 2001) paragraphs 2.3 to 2.6); OFT press release PN 09/01, 27/2/01.
[308] The OFT's new approach to consumer codes of practice: A consultation paper (OFT 331, February 2001) paragraph 3.3.
[309] OFT press release PN 31/01, 11/7/01; Consumer codes of practice: the OFT's response to the consultation (OFT 344, July 2001) paragraph 3.18.

outset that codes do not replace the investigation of problems under the terms of the Chapter I Prohibition where anti-competitive agreements exist.

New criminal sanctions are to be introduced, imposing personal liability on individuals in respect of the primary breach of the Chapter I Prohibition. This follows the CCAP Peer Review in which "83 per cent of respondents in the UK believed that criminal penalties would improve the effectiveness of the UK regime, by increasing its deterrent effect."[310] It has been described by "Treasury sources" as the "biggest change to competition policy in decades"[311]. Whilst the Competition Act 1998 consolidated many of the changes already made to the RTPA by statutory instrument and practice, the shift away from registration was a fundamental change, hence it is rather an exaggeration to say that this latest proposal is the biggest change. Although these proposals are a surprise given the lack of enforcement to date, the demand for such action is not new. An interview given by Stephen Byers to promote the Competition Act 1998 in 1999, promising a better deal for consumers, was instantly attacked by consumer groups who demanded tough prison sentences to ensure that punishment was effective.[312]

These proposals therefore address such demands, making it an offence for individuals to set up and maintain hardcore cartels[313], and for senior executives or directors who condone or encourage arrangements[314], such as price-fixing, market sharing and bid-rigging cartels, implemented or intended to the implemented in the UK. Consequently catching cases where the European Commission pursues the case against an undertaking.[315] The effects doctrine will again be relevant in light of the EC shift from implementation[316] necessitating the OFT to reconsider its

[310] Productivity in the UK: Enterprise and the Productivity Challenge (HM Treasury and DTI, June 2001), p 20.
[311] "Labour to target price-fixers" (2001) The Guardian 18 June, 1.
[312] Radio One Newsbeat, 9/8/99.
[313] OECD defines a hard core cartel as being "an anti-competitive agreement, anti-competitive concerted practice or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce." (A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraph 7.4).
[314] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), Executive Summary.
[315] ibid, paragraphs 7.43 and 7.44. The modernisation proposal leaves penalties to Member States (paragraph 7.43). See also Chapter 5, infra.
[316] See Chapter 3, supra.

stance that the effects doctrine is not relevant to the application of UK competition law. If the operation of a criminal sanction is to succeed, there must be clarity to the offence.

What is surprising about the Government's proposals however, is the severity of the sanction. Despite the US providing for criminal liability for officers, under the Sherman Act[317], the majority of actions were penalised by fine rather than imprisonment, although since 1974 there has been greater recourse to the imposition of both a financial and penal sanction.[318] Many other jurisdictions have criminal sanctions for individuals, including Canada, Japan, Austria, France, Norway, and Ireland, with Australia and Sweden considering their introduction. Germany has a criminal offence for bid-rigging.[319] In the vitamins cartel, the former Managing Director of BASF-Feinchemikaliensparte received a two and a half month jail sentence and a $125,000 fine, and the former Marketing Director of Hoffman-La Roche received a four month sentence and a $350,000 fine.[320] The Government is keen to prevent undertakings being able to find ways to cover the costs of individuals being fined,[321] and therefore propose that the penalty be custodial[322], drawing on the 7 to 10 year sentence for insider dealing and obtaining property by deception. Although Canada's maximum is 5 years and the US maximum is 3 years[323], the Government prefers this 7 to 10 year option.[324] Of course, this presents a danger that "The prospect of a sojourn at Her Majesty's pleasure may encourage firms to fight lengthy battles with competition authorities in order to keep bosses out of jail."[325]

The offence for the individual is to be based on either making it unlawful to participate in an agreement which is a hard core cartel breaching Article 81 or Chapter I Prohibition (this requires a prior finding of breach by the undertaking by

[317] Sections 1 and 2, as originally enacted.
[318] GB Spivack "Criminal Prosecutions and Class Actions in US Anti-trust Law" (1980) ECLR 89, 90.
[319] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraphs 7.10 to 7.12.
[320] (2000) In Competition April, 8.
[321] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraph 7.17.
[322] ibid, paragraph 7.36
[323] ibid, paragraph 7.34
[324] ibid, paragraph A3.2

a jury and would present the jury with complex economic argument)[326], or the offence is not parasitic on Article 81/Chapter I Prohibition in that it only requires a finding of dishonest participation (a jury would only have to look at dishonesty and the individual would have a defence if he honestly believed that he was action in accordance with Article 81 or Chapter I Prohibition)[327]. As for the most appropriate basis for the offence, since Chapter I Prohibition decisions are to be binding on the court, the only issue should be whether the individual had the mens rea. This is for the jury to decide once the OFT have found a breach of the prohibitions. The problem not addressed by the Government is that the Chapter I Prohibition is on a balance of probabilities but an individual criminal offence would require a finding beyond all reasonable doubt. Therefore it should be made clear in the offence that first a prior finding of the Chapter I Prohibition has to be made, with the jury then addressing the question of dishonesty only.

The OFT will be the main prosecuting body and will have its powers extended accordingly[328], but different divisions will handle the investigation and prosecution. Indeed there will be two separate investigations - one civil and one criminal. OFT investigators should follow the PACE codes of practice, and will no doubt have regard to the CPS Code for Crown Prosecutors in deciding whether there is sufficient evidence to prosecute. Whether the OFT can recruit the appropriately qualified prosecutors remains to be seen.

In practice, when such officials are questioned in relation to *any aspect* of the Chapter I Prohibition, they will have to be cautioned that they may be facing criminal prosecution. It not, they *will* be able to rely on the privilege against self-incrimination[329]. Such a caution would not have to be made to employees, but this

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[325] "Company chiefs could face jail for price-fixing" (2001) The Times 19 June, 22.
[326] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraphs 7.29 and 7.30.
[327] ibid, paragraphs 7.31 and 7.32.
[328] ibid, paragraph 7.38.
[329] Although Re Westminster Property Management Ltd (ChD, (2000) The Times 19 January) held that evidence given under the Insolvency Act 1986 could be used in disqualification proceedings as these were civil not criminal, thus the evidence could be admitted without breaching Article 6, other cases cast doubt on this. In ILJ v UK ((2000) The Times 13 October) the ECtHR held that the prosecutions use of the DTI interview transcripts (of statements that the applicants had been required by law to give) amounted to a violation of Article 6 in that the right not to incriminate oneself was breached. This follows the findings in Saunders v UK (1996] 23 EHRR 313) and R v

in itself will mean that effective compliance is in directors and executives interests, and should encourage effective documentation (a "paper trail") and monitoring.

The Government proposes that although there is no formal plea bargain mechanism in the UK, it will ensure that the OFT is able to decide in each case that a whistle blower who comes forward might not face a criminal trial.[330] This should follow the policy in place in the US (which is available where the individual comes forward before the DoJ have any information about the cartel; the individual provides information completely and honestly, and continues to cooperate; and that individual was not the leader nor did he/she coerce others to participate in the cartel[331]), if it is to encourage confessions.

The Government would like to see greater private action[332] although there is no proposal to introduce the US style "treble damages" awards. The White Paper therefore proposes new procedures to ease private actions will be introduced, with hearings before a specialist tribunal. This runs contrary to the arguments in the Competition Bill for not making such a right to damages explicit, instead choosing to rely on the High Court and the development of EC law. The submission that the Government failed to consult or research (even adequately) on the mechanics of providing damages is vindicated. The switch of jurisdiction to the CCAT provides the common sense solution that should have been used in 1997, and makes better use of existing judicial resources, could reduce costs, and may possibly provide for them to award costs.[333] This switch is the only way to guarantee consistency and the necessary expertise. Admittedly, it could also be seen as providing a way for the OFT to abdicate responsibility, but following the EC reform of Regulation 17/62, the OFT will have less time to pursue complaints and bring its own actions. The Government must get it right this time.

Faryab ([1999] BPIR 569). The case against Kevin Maxwell collapsed for it was found that the evidence obtained by the DTI conducting section 432 or 442 Companies Act inquiries were used a prelude to criminal prosecution ("Curbing power at the DTI" (1999) The Times (Law Supplement) 16 March, 10).

[330] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraph 7.50.

[331] Department of Justice - Leniency Policy for Individuals, 11 August 1994.

[332] In the US 90 per cent. of competition cases are private actions (A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraph 8.1); "the Government is keen to achieve a system in the UK where private actions are less inhibited that at present – but in doing so, wishes to guard against the risks of the US system." (paragraph 8.4).

The White Paper states that decisions of the competition authorities are to be binding on the courts[334]. They are already binding on the parties under section 58, although is provides "unless the court directs otherwise". It would appear that the Government's proposal is to do away with this proviso. The Government must realise that the stumbling block to the increase in private actions is not whether the courts view a decision as binding, but what the basis for such an action and remedy actually are. The Government must make it clear that it is breach of statutory duty, yet the White Paper remains silent on how damages will be awarded.

In light of the John Lewis and Synstar complaints, it may be that disgruntled undertakings choose not to complain to the OFT but rather commence proceedings, in order to avoid the risk of section 58 findings being of little use to them. The High Court ruling in Synstar prevents such a tactic, but this does not help to comfort the aggrieved undertakings, rather it only adds to their dissatisfaction with the OFT and Competition Act 1998 that promised them so much. The switch of jurisdiction to the CCAT should make undertakings feel less aggrieved by a decision to stay, since it will be a decision of a specialist competition tribunal. Indeed, if third parties have not complained to the CCAT, because the OFT has primary responsibility for decision making under the Chapter I Prohibition, the CCAT will have no choice but to stay such an action. This is a much better procedure for regulating expectations and should encourage rather than hinder private action.

Two other measures are proposed in the White Paper to increase private actions. Firstly, the repeal of the vertical agreement Exclusion Order,[335] for the Government finds no strong case for retaining the exclusion since it can rely on the EC block exemption.[336] This was a surprising announcement since all the complaints regarding vertical agreements have not produced a competition concern to justify withdrawing the exclusion. The reason why EC don't exclude is because of the

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[333] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraph 8.7.
[334] ibid, paragraph 8.9.
[335] ibid, paragraph 8.14.
[336] ibid, paragraph 8.16.

single market objective: this is not relevant in the UK.[337] This is a shock move with the potential for increased notifications of vertical agreements. The Government would do better to focus on ensuring that breach of statutory duty and the procedures for awarding damages are clear.

Secondly, consumer groups (possibly the Consumers' Association, National Consumer Council, councils for regulated sectors, Financial Services Consumer Panel) will be able to bring actions for damages on behalf of those who have suffered, to "...strengthen the voice of the consumer in competition."[338] These "super-complaints", to be handled by the new MPID,[339] will be fast-tracked by the OFT[340] to ensure that consumers come first. This does however present the danger that individual complaints receive less favourable treatment in terms of time or investigation, although hopefully the extra resources promised should balance this.

It is envisaged that super-complaints will be brought where the market fails to work for consumers *rather than* in respect of the activities of particular companies.[341] However, later in the White Paper the Government state that these actions might be "possible where the OFT has found *an undertaking* in breach of competition law" (emphasis added), enabling the case to then be brought in the wider public interest.[342] If this includes a decision under the Competition Act 1998, then it conflicts with the earlier explanation for the scope of the super complaint. It must not relate to Competition Act 1998 decisions since these enable direct action for damages by those harmed, relying on the DGFT's decision before the CCAT. Damages are to be awarded for successful super complaints[343], held either in trust for a limited time for claimant to come forward or used more generally to benefit

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[337] See Chapter 3, supra.

[338] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraph 4.27. "...if consumers are to have a real voice in the new system, it must be possible for organisations such as the Consumers Association to be able to appeal a decision of their behalf." (Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Column 452, 17 November 1997, Lords Hansard internet, when debating the issue of third party appeals and the need to allow representative actions. Note that the amendment to provide for the establishment of a new office of the consumer representative, was turned down as being unnecessary in light of the role of the DGFT (Official Report, Committee Stage, Competition Bill House of Lords, Columns 870 to 875, 25 November 1997, Lords Hansard internet)).

[339] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), p 20.

[340] ibid, p 18.

[341] ibid, p 18.

[342] ibid, paragraph 8.21

consumers in the market(s) in question.[344] The practicalities of this are missing from the White Paper, raising the doubt as to whether this hype can translate into practice. The Volvo price fixing notified to the OFT just before the Competition Act 1998, is estimated to have cost consumers £250 more than they should have been paying for a vehicle,[345] but the Government do not propose what they would have done in this situation had there been a super-complaint power, and in any event, an "estimate" points to the introduction of an impractical remedy.

Despite the lack of Chapter I Prohibition infringement decisions the White Paper makes two other proposals to increase the protection of third parties. Firstly, the OFT will be able to seek a court order disqualifying company directors where serious breaches of competition law have been found, irrespective of a criminal prosecution taking place and irrespective of whether the director was aware that the agreement breached EC or UK law.[346] Leniency will be afforded those who come forward and blow the whistle, but only in respect of competition law and not any other legislation (for example, the Company Directors Disqualification Act 1986).[347] Secondly, despite the fact that interim measures have only been proposed in one instance[348] there will be a new right of appeal against a decision of the OFT not to impose interim measures, to the CCAT.[349] This right of appeal should not increase the fear of the public interest test arising in Chapter I Prohibition cases, provided that the plans for reforming the right to damages are satisfactorily dealt with this time around.

A third aspect of change that will protect the complainant will evolve should domestic notification cease.[350] The end of the notification regime would prevent undertakings notifying an agreement to block actions for damages. This development is not however considered by the White Paper.

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[343] ibid, paragraph 8.17.
[344] ibid, paragraph 8.22.
[345] ibid, p 39.
[346] ibid, paragraph 8.24
[347] ibid, paragraph 8.27.
[348] In the investigation into the Robert Wiseman Group under the Chapter II Prohibition (OFT Statement 25/7/01), although this action for interim measures was dropped when Wiseman gave assurances pending the outcome of the OFT investigation (OFT press release PN 39/01, 14/9/01).
[349] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraph 8.12.
[350] See chapter 5, infra.

4.3 Conclusion

Dabbah uses the ability of a competition authority to "advocate and educate" competition law principles and values, and the acceptance of the internationalisation of competition policy, as the joint criteria for measuring the success of a competition law system.[351] Judged against these criteria the Chapter I Prohibition scores highly, but for the more practical issues, the evidence points to a somewhat lower achievement.[352]

The first eighteen months of the Chapter I Prohibition have failed to demonstrate positive action being taken to ensure its' implementation was a success. There have not been the early wins necessary to send out the message that domestic anti-competitive agreements are no longer safe. This lack of action cannot be due to everyone complying: the absence of statements to this effect and the new Enterprise Bill confirm that this is not the case.

In response to the Enterprise Bill the DGFT said that the proposals "...will strengthen the role, independence and accountability of the OFT."[353] Curiously, he did not mention anything about the increase in sanctions or private actions, nor comment on the repeal of the vertical exclusion. The Chancellor, Gordon Brown, stated that "[by 2002] we will have put in place the framework to deliver a pro-competitive regime to match the best in the world."[354] However, it is submitted that this was what the Chapter I Prohibition was aiming to achieve, and in any event, the White Paper does not address all aspects where the Chapter I Prohibition is failing to meet its objectives. Consequently, to have the best regime in the world within the next eighteen months seems highly unlikely. Indeed, in light of the fact that consultation closes on 5 October 2001 and the admission that this is "less that the standard minimum for comments to be received in time to inform drafting of the Enterprise Bill"[355], the problems are unlikely to be solved.

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[351] MM Dabbah "Measuring the Success of a System of Competition Law: A Preliminary View" (2000) 8 ECLR 369.
[352] Although Dabbah accepts that his criteria are only the first step in providing a preliminary view (ibid, p 376).
[353] OFT Statement 31/7/01.
[354] "Enterprise for all" HM Treasury Statement 68/01, 18/07/01.
[355] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), p 61.

The ineffectiveness of the Competition Act 1980 has already been commented upon[356]. Described by Whibley as "another frightful waste of time and money"[357], the evidence of the Chapter I Prohibition enables this statement to be repeated. Whish has commented on the history of UK reform, noting that "...there is a twenty five year cycle in the domestic competition law of the UK: 2023 promises to be an interesting year."[358] The Competition Act 1998 has however been successful in so far as it has broken this cycle.

(i) Prohibiting all significant agreements

Nothing has been done regarding the OFT's initial use of "innocuous". It has not caused a problem in practice so far, but this is only because so few notifications have been made and decisions given. It should still be denounced. However, of more pressing concern is that the first Chapter I Prohibition decision (GISC) added to the confusion by finding that there were no "appreciable restrictions" even though the DGFT had not actually defined the relevant market. This has led to the successful challenge before the CCAT, which implied that the DGFT had confused appreciability with the rule of reason. Consequently the GISC rules are still in limbo and a domestic interpretation of the rule of reason is still open to debate.

The other few decisions taken point to a generally sound application of market analysis, but the fact that there has been no claw back of the section 21(2) RTPA discretion nor a change in the treatment of non-notifiable agreements, suggests that the OFT has taken comfort from this knowledge as to what affects competition. In effect, the OFT might well be relying on its own rule of reason. If this is so, it must be made explicit so that we can be guided as to the DGFT's views. This is essential for both the Chapter I Prohibition and Article 81 devolution to work.

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[356] See Chapter 2, supra.
[357] "Opinion" (2001) The Lawyer 30 April, 19.
[358] R Whish "UK Competition Law: Comments" Speech at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/10/00, p 1.

No case has been made out for a reform of the complex monopoly powers to provide a dual regime: during the Competition Bill debates the Government were explicit in their intention that they had no plans to reform this system.[359] Whilst the plan to replace the public interest test with a competition based test is to be welcomed, confusion will continue so long as the EC has recourse to concerted practices. The pecking order between the Competition Act 1998 and FTA replacement needs to be made explicit, since increased use of the new powers will only further hinder the use of the Chapter I Prohibition and blur the jurisdiction of application. If the Government choose to elevate the status of complex monopolies, they must clearly define the relationship between the two Acts and explicitly denounce the EC's use of concerted practice. However, it is submitted that neither of these is possible. The complex monopoly reforms do not deal with the lack of interim measures, the question of damages, do not impose any criminal offences, but do retain the stronger sanction of divestment. In this light, it is submitted that the Chapter I Prohibition must remain the primary weapon as originally envisaged, and subsequently adopted as the guiding principle, by the DGFT. This must be reaffirmed.

No issues under section 10 have arisen so far. However the proposal to rely on the EC Block Exemption following the repeal of the vertical agreements Exclusion Order, will require a new domestic de minimis and amendment of the safe harbour threshold: this threshold must be raised if the domestic "exemption" is to be effective in deterring notifications.

As to the minor points regarding the Chapter I Prohibition, raised in Chapter 3:

(1) Although the test for mergers is to be changed to a substantial lessening of competition (replacing the public interest criteria), how this test will differ from an appreciable affect on competition in practice (by which joint ventures not falling within the merger regime, will be assessed), is unclear. Specific guidance from the OFT will be needed to avoid notifications. Staying with the changing practice in the treatment of merger agreements,

[359] See Chapter 3, p 28.

the exclusion for ancillary restraints will require new guidance in light of the EC shift to no longer finding such restrictions as automatically exempt under the ECMR. In accordance with section 60, the domestic exclusion means that "ancillary restraints" should be assessed under the new merger test, a block exemption, or individual exemption in future. This should be made explicit in the guidelines.

(2) The potential for land agreements to cause difficulty has still not been accepted by the OFT. They should confirm that they would assess the problems on a case by case basis.

(3) The fifth element to the section 9 criteria must be made explicit.

(4) Confirmation still needs to be given that material change and material variation are the same.

(5) The OFT view that individual exemptions can be backdated to the date of agreement has now remained constant, although some writers have still not changed to reflect this in their works. It should therefore be reaffirmed by the OFT more publicly.

(6) Final versions for both IPR and services of general economic interest must be issued as a priority.

(7) Explicit acceptance that the DGFT can make an Article 234 reference is still required. The plan to made the OFT the "competition advocate" would imply this is a must.

(ii) Competition based test

Market definition was lacking in the GISC decision. Whilst this process is not a mechanical exercise, detail is needed to show appreciability (and avoid another showdown before the CCAT) and provide the much needed jurisprudence. Later OFT decisions on complaints and consultations illustrate a much better use of detailed analysis, although the OFTEL decision does not meet this standard (raising questions for successful concurrency). The fact that the John Lewis complaint indicated that the market was at least the UK, confirms the concern in Chapter 6, that the market may be European in a greater number of cases in the internet age than anticipated, negating the need for domestic control and doing away with the domestic changes that have proved a success.

Whilst market share is key and the EC has increased reliance on it in terms of changes to de minimis and the adoption of safe harbours, turnover is unlikely to be ditched on the domestic scene, with the Government proposing to replace the merger asset threshold test with once based on turnover (as an alternative threshold to the retained market share test)[360]. Section 39 has not raised any issues so far, so it seems highly likely to survive on a turnover basis.

(iii) Flexibility

Although there has not been enough action to tell conclusively, the DGFT has taken some complaints to a formal decision: the Synstar case is illustrates that having declined not to investigate, the claimants further submissions were taken on board by the DGFT and a formal decision issued. This practice of allowing aggrieved complainants to challenge the DGFT's decision not to investigate, leading to a full reasoned decision is to be commended.

The repeal of the professional rules exclusion and the Vertical Agreement Exclusion Order will increase flexibility in so far as more challenges are possible.

However, in respect of vertical agreements the Government run the risk of a greater number of notifications, or in any event, a definite increase in informal inquires, draining the extra resources promised. Vertical agreements pre-Competition Act 1998 fell outside of the RTPA, and consequently have not been excluded by the operation of the Competition Act 1998 Schedules. The repeal will send out a shock wave resulting in the desire for certainty.

(iv) Deterrence

It cannot be found that there has been effective deterrence in the first eighteen months. On the information available, the use of sanctions has been very disappointing. It is therefore somewhat surprising that the Government should find a case for extending the range of sanctions that may be imposed.

Unsurprisingly, damages have not been awarded, nor has there been the concrete ruling to solve the issues. The White Paper proposal to include an explicit right for damages, to be heard before the CCAT, is an acceptance of the ineffective design of the Competition Act 1998. However, it is worrying that the consultation does not mention the basis for such a claim, choosing only to deal with the issue of costs. Breach of statutory duty must be explicitly incorporated, and rules on evidence, limitation and calculation of damages must be clearly set out in the CCAT rules.

Besides the lack of the vital detail for private actions the consultation does not mention the code of practice as a possible remedy under the Competition Act 1998, despite its praise by the OFT in the use it served in the Supermarket inquiry. The surprise and unease following the suggestion of the introduction of a super complaint is compounded by the unclear explanation given in the White Paper.

(v) Investigation

Too little information has been published to determine whether the OFT have been effectively investigating, although the lack of cartel prosecutions suggest that they

[360] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraphs 5.11

are not. Details are starting to be made public, but more of this is needed. As far as one can tell, no personal offences have been committed.

The HRA's narrow interpretation has continued, with the application for wasted costs[361] in the medicaments fiasco refused, since as the Court of Appeal found that the associations were not "victims" and the right to a fair trial had not been breached in light of a new panel of the RPC being made available.

(vi) Transparency in decision making

It is not surprising that the OFT's implementation of the Chapter I Prohibition has been so informal, when the Competition Bill debates indicated the need to allow flexibility and a "common sense approach". We have put our faith in the fact that those with the power know what they were to do. However, unless greater illustrations of what they have learnt is given, transparency will remain absent, causing doubt as to the OFT's work and value to be placed on their decisions.

The lack of notifications has meant a dearth of good precedent and poses potential difficulties for success post devolution. Whilst the explanation of section 2 in decisions is to be commended (for example, the MoU analysis of subjective intent and the examination of effect of restrictions whose object was not anti-competitive, and reliance on EC jurisprudence), a good source of precedent is being wasted. Few decisions and ad hoc approach to the dissemination of information are no doubt the impetus for the White Paper calls for transparency to be paramount, but neither of the points arising from the lack of notifications is specifically addressed in the White Paper.

Parliament is to actively scrutinise the competition regime, with the mission statements of the Government, OFT and CC (reporting panel) assisting this check.[362] The OFT Annual Report will assume greater importance and the CC will

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to 5.16.

[361] In re Medicaments and Related Classes of Goods (No. 4) (2001) The Times 7 August.

[362] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), Executive Summary.

also produce its own annual report.[363] However, the OFT must provide more information on the types of complaint and the sort of questions being posed informally. The OFT must publish its Quarterly Newsletter. The OFT should also be careful to monitor the operation of negotiated settlements.

Whilst concurrency has not proved the contentious issue it was forecast, the difference between the reporting of OFT and OFTEL decisions should serve as a wake up call for the authorities to be extra vigilant in delivering the same high standard on a united front.

The High Court has confirmed that it will stay competition actions where the matter is being investigated in parallel by the DGFT. However no issues have been brought by way of judicial review. The White Paper is silent on his point, so judicial review of the DGFT and CCAT proceedings remains a possibility.

(vii) Interim remedies

In only one case did the DGFT suggest the possibility of taking interim measures, and this was in respect of a suspected breach of the Chapter II Prohibition. The White Paper proposes that there will be a new right of appeal against a decision of the OFT not to impose interim measures, to the CCAT.[364] This supports the submission that the DGFT's decision is a pre requisite to any application for damages before the CCAT. Further, the potential for public interest criteria to come into play in Chapter I Prohibition concerns has not been remedied.

(viii) Co-operation

Reliance on European jurisprudence (especially in the LINK consultation) and the proposal to rely on the European block exemption for vertical agreements would appear to show a strong basis for co-operation between the UK and EC. However, despite the White Paper first "accepting" the EC modernisation proposals, it then seeks to distinguish the treatment of oligopolies. It finds that European reform is

[363] ibid, paragraph 4.24.

not decided on, despite a draft Regulation has been in circulation since September 2000, and Commissioner Monti's assertions that this *will* be in place in 2003. The future of good relations must be considered as being far from certain.[365]

Whether the underlying objective of the Chapter I Prohibition was to harmonise our domestic law with that of Europe, there are two developments that raise serious questions in respect of whether the Chapter I Prohibition can be sustained. It is these developments that have given a new direction to this work.

[364] ibid, paragraph 8.12.
[365] See Chapter 5, infra.

CHAPTER FIVE

The Impact of Article 81 Devolution: a path to substantive and procedural harmony?

"...the key to success of a policy of decentralisation, he says, is the coherent application of competition rules at national and EU level. No company should face 15 different ways of applying the rules. To that end DGIV welcomes the proposed reforms in the UK, for example, which may start the process of brining UK law more in line with the rest of the EU."[1]

5.1 What the Chapter I Prohibition envisaged

It is somewhat ironic that the UK should adopt a system of notification, just before the EU proposed a system of authorisation at national level. Rather than keeping the UK in line with the EU, this in theory points to the OFT once again running two systems, thus not making it any easier for businesses. However, masked by the assertions that the EC reforms are ironic for the Chapter I Prohibition[2], the Competition Bill debates indicate that this situation could have been avoided if only greater attention had been given to the direction that the Commission was moving:

[1] Interview with Alexander Schaub, "Inside DGIV: Alexander Schaub and reform" (1997) II(8) Global Counsel 13.

> "One of the interesting things that has been happening in the European Community is the increasing desire of the Commission to see a greater number of cases under its own competition law being taken and pursued not by the Commission but individuals in member states."[3]

Devolved decision making was also apparent in the ongoing dissatisfaction with the treatment of resale price maintenance for over the counter medicaments:

> "Commissioner Van Miert has written to the President of the Board of Trade stating, in effect, that if Parliament blocks the restrictive practices court from considering resale price maintenance on over-the-counter medicines, the Commission would be likely to take up complaints that it has received from Asda under Article 8[1] of the EC treaty."[4]

That the Commission was prepared to let the RPC deal with the matter, illustrates that it was already moving to the notion of decentralisation (even though the RPC did not have the power to grant an exemption under Article 81(3)). Yet, devolved decision making was not explored further by Parliament[5]. The Government remained satisfied that they were harmonising[6] the two systems by adopting a

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[2] For example see A Burnside "Goodbye Article 85, Hello Modernisation" (1999) 7(5) In Competition 27 May, 1, 3.

[3] Lord Kingsland, Official Report, Third Reading, Competition Bill, House of Lords, Column 1324, 5 March 1998, House of Lords internet, in relation to his amendment to make explicit in the Bill the third party rights of action where Chapter I Prohibition was infringed.

[4] Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill House of Commons, Part 3 p 4, 23 June 1998 (morning session), House of Commons internet. Lord Simon of Highbury gave the similar explanation at, Official Report, Consideration of Commons amendments, Competition Bill, House of Lords, Column 1338, 20 October 1998, House of Lords internet, but again the issue of interstate trade was ignored.

[5] See 2.3.2 supra, where European consistency was an objective of the Government.

[6] Although the Act was described as necessary "...partly to align legislation with that which currently applies across much of Europe...and remove many of the anomalies" (C Taylor "Waking up to a new dawn" (1999) 20 Fair Trading (available on www.oft.gov.uk/html/trading/ftr20-2.htm as at 15/6/99)) anomalies still exist (See Chapter 3, supra. Further, the Government did not go so far as to empower the OFT to apply Article 81(1): The UK remained one of the eight Member States that had not adopted enabling legislation for the purposes of Article 84 (the other seven are Austria, Denmark, Finland, Ireland, Luxembourg, Netherlands and Sweden. The Member States with enabling legislation are Belgium, Germany, Greece, France, Italy, Portugal and Spain, although it should be noted that Germany is the only Member State not to model its domestic law on Articles 81 and 82). A fuller review of the types of national laws adopted and the application of Article 81 is found in the review conducted by Zinsmeister, Rikkers and Jones (U Zinsmeister, E Rikkers and T

notification regime. There were no other issues to be concerned about other than ensuring that the OFT did not grind to a halt through a deluge of notifications. Consequently, the Chapter I Prohibition was not designed to operate in a system of decentralisation and non-notification. Undertakings were to have "...have the option of notifying agreements to the director general, for guidance or a decision – including an individual exemption – if that is thought necessary."[7] It would also be possible to notify the Commission where there was a doubt as to the effect on interstate trade, but registration would be a thing of the past. Although the last minute unveiling of the "do complain, don't notify" mantra saved a deluge of notifications, in theory comfort can be obtained from reliance on notification if need be. However, at the very least it appears that a "belt and braces" approach will no longer be an option under either jurisdiction, but the possible implications of a redundancy to separate law and procedure should not be underestimated.[8]

5.2 What the EC proposes

The procedural enforcement of Article 81 is to radically change.[9] Whether this is the result of subsidiarity or decentralisation, is subject to disagreement. Bos finds that the demarcation of competence between the Commission and National Competition Authorities (NCA's) "...can be viewed as a genuine application of subsidiarity."[10] Indeed Ehlermann defended the proposals as necessary since the Commission's monopoly under Article 81(3) has become "...difficult to defend against the principle of subsidiarity".[11] Although NCA's which are "better placed to deal" with a European competition problem[12] will be allowed to enforce the law, it will be the enforcement of EC rules as opposed to domestic provisions.

Jones "The Application of Articles 85 and 86 of the Ec Treaty by National Competition Authorities" (1999) 5 ECLR 275, 280)).

[7] Mr Ian McCartney, Official Report, Standing Committee G, Competition Bill, House of Commons, Part 3 p 1, 11 June 1998 (morning session), House of Commons internet.

[8] See Chapter 3 supra, where the UK's improvements on the EC system are discussed.

[9] The new Regulation will replace Regulations 17/62, 19/65, 2821/71, 2976/87, 1534/91 and 479/92, but much of the detail will be spelt out in "several future notices designed to accompany the new Regulation" (XXXth Report on competition policy 2000 (SEC(2001)694 final, 7/5/01), p 124). ECOSOC is highly critical of this style of legislating (Opinion of the Economic and Social committee on the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (COM(2000)582 final, 29/3/01), p 3).

[10] PV Bos "Towards a Clear Distribution of Competence between EC and National Competition Authorities" (1995) 7 ECLR 410, 412.

[11] CD Ehlermann "Right response to competitive pressures" (2000) FT 25 January, 23.

Consequently it cannot be described as subsidiarity as originally envisaged. Indeed, Nehl argues that subsidiarity is "simply irrelevant" since the reforms will in the long run demand a harmonisation of procedural rules.[13]

Prodi described the reforms as necessary "radical decentralization" in response to the fact that "Europe is not run by European institutions, but by national regional and local authorities"[14]. Rodger and Wylie trace the emergence of the term decentralisation, first used in 1991, and note that some writers still adopt the 'subsidiarity' to describe this development. Although the distinction between the terms produces real differences[15], Rodger had concluded previously that the "...actual terminology is not so important as it signifies the devolution of decision-making power away from the centre (namely, the Commission in Brussels)"[16]. It is submitted that devolution best summarises the situation: the focus on what term best describes the Commission's actions is less important than the impact of the actual enforcement of the competition law.

Although many express concern at the extent of the proposals, Bos had already concluded in 1995 that the "quantum leap" now proposed was the only way to prevent even more discretion and...arbitrariness" being injected into the system.[17] On the whole the abolition of the authorisation and notification system is supported

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[12] M Monti, Key note address to the BIICL Conference, London, 18/5/1.
[13] HP Nehl "Changes in Legislation: Constitutional Reform and the Role of the Administrator" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 43.
[14] R Prodi "200/2005: Shaping the New Europe" Speech/00/41, 15/2/00, p 4. This five year programme calls for the rigorous application of competition law, with the simplification of the procedural rules ("Shaping the New Europe" Com(2000) 155 final).
[15] Rodger and Wylie graphically illustrate this difference, identifying that whereas subsidiarity means the application of national law up to the threshold of "notional Community interest", decentralisation enables NCA's to carry on applying national laws up to the point of the inter state trade threshold, but above this level, applying EC law, up to the higher threshold of "notional Community interest" (BJ Rodger and SR Wylie "Taking the Community Interest Line: Decentralisation and Subsidiarity in Competition Law Enforcement" (1997) 8 ECLR 485, 489 to 491). This they conclude proves that "...subsidiarity and decentralisation are essentially alternatives and not complementary." (p 491).
[16] BJ Rodger "Decentralisation and National Competition Authorities: Comparison with the Conflicts/Tensions under the Merger Regulation" (1994) 5 ECLR 251. Although subsequently Rodger is disappointed that the subsidiarity was dismissed in favour of decentralisation (BJ Rodger in B Rodger and A MacCulloch op cit., p 71).
[17] PV Bos "Towards a Clear Distribution of Competence between EC and National Competition Authorities" (1995) 7 ECLR 410.

by the majority: it has the support of the European Parliament[18], ECOSOC, twelve Member States, and several lawyers; although industry is generally opposed[19] and some lawyers argue "...that they are not is an position to give clear advice on the fulfilment of the four conditions of Article 81(3) and point out that they are liable, if they make a wrong assessment."[20]

This leap from co-operation notices, be it in part a natural progression of subsidiarity or decentralisation, is also driven by the EC's aim to become central in global competition governance. Globalisation has led to increased demand for EC analysis of extraterritorial activity. Increased global co-operation is essential in developing competition law to meet the challenges of anti-competitive activity[21]. In the words of the former deputy head of the EU cartel unit, Julian Joshua, "business has gone global, cartels have gone global, and now antitrust enforcement has been forced to go global".[22] ECOSOC find that the description that the "...ever-increasing integration of the world economy is creating an unprecedented interdependency between countries is perfectly accurate."[23] McGoldrick finds that the EU has "...clearly sought to play an increased role on the international stage [which is] observed though the development of an extensive range of international agreements..."[24] but now the Commission aim to persuade the "...WTO partners that negotiations should commence on the conclusion of a competition

[18] The European Parliament suggest that where it is in the public interest that undertakings receive advance clarification, the Commission should deliver this by means of a reasoned opinion (White Paper on reform of Regulation 17: Summary of the observations (DG Comp Document, 29/2/00) paragraph 4.6), has been adopted by the Commission (Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Explanatory Memorandum, p 11). A notice is to be published detailing how this will work.
[19] A summary of all the views put forward by industry can be found in the review provided by Nazerali and Cowan (J Nazerali and D Cowan "Modernising the Enforcement of E.U. Competition Rules – Can the Commission Claim to be Preaching to the Converted?" (1999) 8 ECLR 442, 444).
[20] White Paper on reform of Regulation 17: Summary of the observations (DG Comp Document, 29/2/00) paragraph 4.1.
[21] M Monti, Key note address to the BIICL Conference, London, 18/5/1. This is recognised in the White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99), Executive Summary, paragraph 8.
[22] "Mr Untouchable" (2001) The Lawyer 19 February, 37, although he argues against the removal of the notification system, believing it will lead to uncertainty.
[23] Opinion of the Economic and Social Committee on the 'XXXVIIth Report on Competition Policy' (OJ 2000 C51/1), paragraph 2.2.
[24] D McGoldrick International Relations Law of the European Union (London, Longman, 1997) pp 181 and 182.

agreement...[and] a global competition forum"[25]. Although Commissioner Monti is keen to stress this is not a call for the erosion of the sovereignty of NCA's or the harmonisation of substantive competition laws[26], a united Europe will be able to wield more power in drawing together the basis for which co-operation could be developed[27]. However, not all aspects of competition policy are decentralised, and most notably the ECMR continues to have provision for a one-stop shop[28]. There have been calls for a one stop shop principle to be applied in respect of a limited notification system covering agreements involving significant investment, high risk of litigation or a situation where several Member States are involved, so that such notifications could be shared out between the Commission and NCA's.[29] This has been resisted so far, although in practice the proposals encompass an implicit one stop shop of sorts in that the NCA's will need to co-ordinate activity following complaints[30].

[25] M Monti "The EU views on a Global Competition Forum" Speech delivered to the ABA Meeting, Washington, 29/3/01 (Speech/01/147) p 2. The framework agreement is a forerunner to the creation of the Global Competition Forum (GCF) (M Monti, Key note address to the BIICL Conference, London, 18/5/1).

[26] M Monti "The EU views on a Global Competition Forum" Speech delivered to the ABA Meeting, Washington, 29/3/01 (Speech/01/147) p 5; the GCF would be of minimum permanent infrastructure, aimed more at providing an inclusive venue for discussion and the sharing of experience, to complement rather than replace the WTO or OECD (pp 6 and 7). It is intended that it should be of ad hoc nature, drawing on both public and private parties, such as the legal professions, business and consumer associations (M Monti, Key note address to the BIICL Conference, London, 18/5/1). This is discussed further in Chapter 6, infra.

[27] A development called for by the International Competition Policy Advisory Committee (ICPAC) in February 2000; M Monti "The EU views on a Global Competition Forum" Speech delivered to the ABA Meeting, Washington, 29/3/01 (Speech/01/147) p 6.

[28] By which mergers with a significant cross-border effect, requiring multiple notifications, can be notified to the Commission even though they fall short of the general threshold for EC notification, in order to reduce delays, costs and discrepancies. This was in response to "...the phenomenon of multi-jurisdictional merger notifications [being] on the increase" (A Frederickson "A strategic approach to multi-jurisdictional filings" (1999) IV(10) Global Counsel 23), which could be seen as the future response of the Commission should devolution lead to multi national notifications. However, Commissioner Monti finds that the merger treatment is aimed to "...bring all cases with a true Community dimension to a Community level review" and is therefore consistent with the devolution plans for Articles 81 and 82 (M Monti "The main challenges for a new decade of EC Merger Control" Speech/00/311, 15/9/00, p 6).

[29] White Paper on reform of Regulation 17: Summary of the observations (DG Comp Document, 29/2/00) paragraph 4.3. According to ECOSOC, the call for a one stop shop should be a top priority (Opinion of the Economic and Social Committee on the 'Commission Regulation on the application of Article 81(3) of the EC Treaty to categories of vertical agreements and concerted practices' (OJ 2000 C51/2, 23/2/00, p 6).

[30] See 5.2.3, infra.

5.2.1 End of Notification

The centralised European exemption system is defective. The key difficulty "...faced by the Commission is its lack of resources"[31], but other defects aggravate this problem: "...complainants remain reluctant to apply to national courts or competition authorities when they consider that they have been harmed by an infringement of Community law"[32]; undertakings have used it "to block private action before the national courts and national competition authorities"[33]; and it will prove impossible to operate in an enlarged Community.[34]

Notification, save for perhaps the ability to notify joint ventures[35], will become a thing of the past. Article 81 thus becomes "...a unitary norm comprising a rule establishing the principle of prohibition unless certain conditions are met"[36], producing "...a system of automatic legal exemption, resulting from the direct

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[31] A Jones and B Sufrin op cit., p 1019; White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99), Executive Summary, paragraph 10. Although on average, only 233 notifications have been made each year in the last five years of the 1990's (W Wils "The Modernization of the Enforcement of Articles 81 and 82: a Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No. 17" Speech at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/10/00, p 15) this is still enough to drain the resources of the Commission and deflect its ability to concentrate on real issues of concern. Indeed some of the high profile investigations by the Commission have only come to light after consumer programmes took an interest, such as the BBC Panorama's investigation into parallel imports (BBC1, 12/4/99) and BBC Watchdog investigation into Car importation into the UK (BBC1 23/4/99).

[32] BJ Rodger in B Rodger and A MacCulloch op cit., p 68; only 30 per cent of new cases are the result of complaints (White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraph 117).

[33] White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99), Executive Summary, paragraph 6.

[34] ibid, paragraph 40. The Nice Treaty, formally signed on 26/2/01, makes way for the accession of Poland, Czech Republic, Hungary, Slovenia, Estonia, Latvia, Lithuania, Bulgaria, Romania, Turkey, Cyprus and Malta once they have successfully completed their negotiation and can satisfy the obligations of membership.

[35] Jones and Sufrin find that this is an admission by the Commission that there is no substitute for the security that notification provides, and should be extended to other transactions involving large investment etc. in line with the concerns of industry (A Jones and B Sufrin op cit., footnote 62, p 1032). However, it is likely that the mechanism for examining notified partial-function joint ventures will be achieved by amendment to the ECMR (White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraphs 79 to 81; Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Explanatory Memorandum, p 3).

[36] White Paper on Modernisation, paragraph 69; Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 1 and p 13.

effect of Article 81(3)."[37] The concern "that this may leave Article 81(3) in a "state of limbo" has been partially addressed by the proposal that positive non-prohibition decisions could be taken"[38] where they are needed as precedents[39]. However, PLC find that the future status of Article 81(3) is not a problem, describing the assessment of agreements as already being subject to "the so called "rule of reason"".[40] This is supported by Bright who finds the approach is to look to the rule of reason in applying Articles 81(1) and 81(3) together.[41] However, these findings ignore the fact that Article 81(1) provides the jurisdictional test for whether the agreement should be examined, with the benefits of the agreement not considered unless this jurisdiction is satisfied.[42]

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Positive non-prohibition decisions will however be the exception rather than the rule: the usual action envisaged by the Commission will be the proposing of legislative texts[43], adopting regulations/block exemptions[44], issuing guidelines and notices and taking prohibition decisions. It will be possible for an undertaking to

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[37] CD Ehlermann, introduction to The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 7; although it is noted that the German submissions find that Article 81(3) does not lend itself to direct effect, and this remains an issue on which the Commission must still convince some Member States.

[38] BJ Rodger in B Rodger and A MacCulloch op cit., p 70. This is declaratory in nature and is akin to the current provision for negative clearance (HP Nehl "Changes in Legislation: Constitutional Reform and the Role of the Administrator" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 21).

[39] Such decisions would be made either declaring that the agreement is compatible with Article 81 (when considering both sub sections (1) and (3)) or that it falls outside of Article 81(1) (White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraphs 87 and 89).

[40] "Competition reform" (2000) XI(10) PLC November, 65, repeating the message delivered in previous editions; "Reform of Articles 81 and 82" (1999) X(5) PLC June, 64.

[41] "Modernising the EU competition rules: The Commission's White Paper" (1999) X(5) PLC June, 7.

[42] See 3.2.1, supra.

[43] White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraph 84.

[44] ibid, paragraphs 78 and 85; Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Explanatory Memorandum, p 8. Pappalarado argues against the room for both Article 81(1) and 81(3) in a system that will become merely "declarative" (A Pappalarado "Modernisation of EC Competition Law: Some Doubts and Questions of the Forthcoming Reform" Speech at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/10/00, p 3), but ECOSOC fully support the use of such exemptions in simplifying the procedures and providing transparency (Opinion of the Economic and Social committee on the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (COM(2000)582 final, 29/3/01), p 7).

avoid a prohibition decision if it gives "commitments"[45], which would be supervised by the ability of third parties to bring a private action for breach of commitments before the national courts, in conjunction with the potential for the Commission or NCA to commence an investigation.[46] This demonstrates the Commission's vision of intensified ex post control.[47]

NCA's are to have the power to apply the Article 81(1) prohibition where the conditions of Article 81(3) are not fulfilled, and in the process "take any decisions requiring that an infringement be brought to an end, adopting interim measures, accepting commitments or imposing fines, periodic penalty payments or any other penalty provided for in their national law."[48] However, decisions by NCA's would only be binding in their own territory[49], causing concern for Nehl that this will give rise to the disparate application of competition law[50], making it impossible to avoid conflicting decisions for "...as long as there is no mechanism which renders positive or negative decisions given by a national authority binding on all other authorities"[51]. Bael is similarly concerned that following the rejection of a complaint or a decision that there is no infringement, "...authorities in a different Member State are not precluded from taking up the same complaint or to start proceedings covering the agreement or practice which has benefited from an informal settlement."[52] However these concerns are all based on the assumption

[45] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 9 and p 18.
[46] HP Nehl "Changes in Legislation: Constitutional Reform and the Role of the Administrator" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 22. The Commission may reopen proceedings were there has been a material change in any of the facts on which the decision was based (Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 9(3)(a)). Breach of commitment will be punishable by fine and periodic payment.
[47] White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraph 108.
[48] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 5.
[49] They do not bind the Commission nor have legal effects outside of the territory where they were made (Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 5 and pp 16 and 17).
[50] HP Nehl "Changes in Legislation: Constitutional Reform and the Role of the Administrator" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 22.
[51] ibid, p 25.
[52] IV Bael "Procedural Rights and Issues and Modernization of EC Competition Law: Comments" Speech at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/10/00, p 24; although it is submitted that the

that other Member States would also have jurisdiction to investigate, which is not necessarily the case. Even where other Member States assert jurisdiction under EC law, Whish finds that there is a possible argument that these other Member States "might be under a duty as a matter of Community Law to respect the prior decision" taken by another Member State.[53] Indeed, Article 3 which requires Member States' to respect Community competition law, arguably implicitly contains such a duty to have regard to the supremacy of "European decisions" and not act so as to reach a contrary decision.[54]

As for concerns that the end of notification will bring an end to certainty, Hawk argues the contrary, suggesting that there is already "...considerable legal certainty under EC law as to which agreements...will result in fines"[55] and moreover, the system of notification has generated "...more uncertainty because of the long waiting period for the adoption of decisions and the limited precedential value of comfort letter..."[56] The Commission will take comfort from these views as they back the Commission's assertion that "...after 35 years of application, the law has been clarified and thus become more predictable for undertakings."[57] Indeed the Commission finds that certainty will be improved because undertakings "...will be able to obtain immediate execution of their contracts before national courts, with

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reference to informal settlements should not be taken to refer to commitments, as these would have first been notified to the Commission (Article 10(4)) and issues of a wider jurisdictional concern could be addressed at that stage.

[53] Fourth Report, Select Committee on European Union (29/2/00), paragraph 83.

[54] See 5.2.3 infra.

[55] BE Hawk and ND Stanton "The Development of Articles 81 and 82: Legal Certainty and Efficiency" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 44.

[56] ibid, p 47. Judge Cooke supports these conclusions, finding that fears of an increase in uncertainty are exaggerated (Judge JD Cooke "Changing Responsibilities and Relationships for Community and National Courts: The Implications of the White Paper" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 66). Over 90 per cent of notifications result "...in the issue of a legally non-binding comfort letter" (IV Bael and JF Bellis "Recognition of systems failure: white paper calls for major competition law reform" (1999) 35 EU Focus 17 June, 2, 3). Although for an opposing view see Bright and Nikpay who find that "whilst comfort letters are not ideal, the notification system does provide business with a necessary degree of certainty." (C Bright and A Nikpay "Coming-of-age or mid-life crisis? The Commission's proposals for wholesale reform of Europe's Antitrust procedures" (2000) The European Antitrust Review 55, 57).

[57] White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraph 48; development over the past 35 years in the way that block exemptions have adapted, backs up the Commission's assertions (paragraph 70).

effect from the date of their conclusion, provided that the conditions of Article [81](3) are satisfied."[58]

Hawk further argues against the introduction of an ad hoc notification system, by drawing on the US experience of voluntary notifications being rarely used even when significant investments are at stake, although he does call for "...some procedural mechanism to permit parties to agreements involving large investments where there is uncertainty about the legal rules to notify, with "...appropriate sanctions imposed on the lawyers if the Commission finds that there were no true antitrust concerns raised by the agreement!!!"[59] Although made in jest, it does illustrate the real difficulty in a non-notification system where lawyers have to provide answers that are not definitive. However the experience of the Chapter I Prohibition suggests that a satisfactory "definitive" answer is being provided by informal contact with the OFT.

5.2.2 Registration

Article 4, paragraph 2 of the Draft Regulation provides a power for the Commission to "introduce"[60] a requirement of registration. This was not part of the White Paper proposals, no public consultation took place, and all the Commission will say is that it will enable the registration of agreements falling within Article 81(1) that are not covered by a block exemption.[61] This power will be invoked, supposedly, where it is "...expedient, in order to improve transparency"[62], and could arguably be seen as a safety measure to reassure any fears of devolution creating difficulties. However, its introduction was in fact "conceded by the Commission reluctantly" in response to German concerns[63]. Reassuringly perhaps, Burnside finds that the lack of detail does give "...some hope of seeing this element abandoned, for its promises jeopardy rather than certainty...[and] is surely a

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[58] ibid, paragraph 78.
[59] BE Hawk and ND Stanton "The Development of Articles 81 and 82: Legal Certainty and Efficiency" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 53.
[60] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) p 16.
[61] ibid.
[62] ibid, p 34.
[63] A Burnside "Premature Modernisation" (2000) In Competition September/October, i, 2.

retrograde step."[64] Wils questions its use as it states that "...registration of an agreement...shall confer no entitlement on the registering undertakings, and does not stand in the way of possible prohibition or fining decisions"[65]. In any event, the most serious infringements are not going to be registered.[66]

Whether it is used or not, a warning the Commission should heed was given in the debate on the Competition Bill: "Keeping the register is resource intensive"[67]. Domestic experience has shown that it does not assist the control of anti-competitive agreements.

5.2.3 Jurisdiction

Jurisdiction of the enforcement of EC competition law is split between the Commission, NCA's and domestic courts: the network of enforcers. Articles 5 and 36 of the Draft Regulation propose that NCA's shall be given power to apply the EC competition articles. NCA's will:

> "...be able to investigate cases and apply Community Law, either in response to complaints or on their own initiative, and would be able to assess whether or not a restrictive practice meets the Article 81(3) criteria. The authorities will not of course have the power to grant exemptions since the new system will not admit the possibility of exemptions."[68]

As for domestic courts, "Although [they] will not be able to grant an *exemption* to an agreement which satisfies the criteria of Article 81(3) (individual exemptions

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[64] ibid, p 2 and 3. ECOSOC find this provision entirely unacceptable in light of the uncertainty it causes for the future (Opinion of the Economic and Social committee on the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (COM(2000)582 final, 29/3/01), p 4); likewise, the European Parliament have called for it to be abandoned (Committee on Economic and Monetary Affairs Draft Report 2000/0243(CNS) 9/4/01, p 15).

[65] W Wils "The Modernization of the Enforcement of Articles 81 and 82: a Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No. 17" Speech at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/10/00, p 53.

[66] ibid, p 54.

[67] Lord Simon of Highbury, Official Report, Committee Stage, Competition Bill House of Lords, Column 984, 25 November 1997, House of Lords internet.

[68] A Jones and B Sufrin op cit., p 1024.

will no longer exist) they will be able to rule on the compatibility of the agreement with those criteria."[69]

The "core" element[70] to the success of devolution will be the network formed between the Commission and NCA's. Commissioner Monti sees this network as "...ensuring an effective allocation of cases based on the principle that cases should be dealt with by the best placed authority".[71] Indeed, in much the same way as the introduction of concurrent regulators in domestic law was trumpeted, it is hoped that this network "...will be hugely enriched by the sharing of experience".[72] However, whilst "The concept of a "network" of competition authorities, co-ordinated by the Commission, is widely welcomed, ...the proposed structures of this network are considered by some to be rather weak."[73] Article 11 calls for "close co-operation"[74]. Whilst Nehl finds that the time is right to "...make use of the administrative resources in the 15 Member States and to strive for the development of a coherent transnational enforcement system...[the White Paper] does not sufficiently take account of the "ideological" and "technical problems which the decentralisation concept may face in an enlarged community".[75] This remains unresolved. Ehlermann suggests that ideally, the Commission would

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[69] ibid; Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 6. Although Whish questions whether Article 81(3) is in fact justiciable (R Whish "National Courts and the White Paper: A Commentary" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 75) in light of the problem in identifying what issues it covers, and as a consequence finds that he is "...increasingly attracted by the possibility of deleting Article 81(3) from the Treaty altogether" (p 78).

[70] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Explanatory Memorandum, p 6.

[71] M Monti "Competition in a Social Market" Speech at the Conference on Reform of European Competition Law, Freiburg, 9 November 2000 ((2001) 1 Competition Policy Newsletter February, 2, 7). However, the European Parliament is concerned at the vagueness they find introduced by this demarcation (Committee on Economic and Monetary Affairs Draft Report 2000/0243(CNS) 9/4/01, p 15), calling for best placed authority to be clearly defined (p 17).

[72] M Monti "Competition in a Social Market" Speech at the Conference on Reform of European Competition Law, Freiburg, 9 November 2000 ((2001) 1 Competition Policy Newsletter February, 2, 7). The basic notion is that the "best placed" authority should be the one to act (White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraph 96).

[73] CD Ehlermann, introduction to The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 8.

[74] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 11(1).

[75] HP Nehl "Changes in Legislation: Constitutional Reform and the Role of the Administrator" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 17.

decide "...only those cases which require action [centrally], because of their transnational nature, their economic complexity, their character as a leading case or their political significance."[76] This will enable the Commission to "...refocus its activities on the most serious infringements".[77] However, Jones and Sufrin find that "...simply relying on the Commission and national authorities to pass cases around among themselves on the basis of what they feel to be appropriate is no substitute for some principles of jurisdiction" suggesting that jurisdiction could be allocated on the basis of the centre of gravity of the agreement.[78]

Determining jurisdiction is an essential pre requisite to the success of the system, since, if as Nehl fears, the "...national competition authorities and courts will be endowed with the bulk of administrative and enforcement tasks in the field of EC competition policy"[79], there must be a set of principles for resolving conflicts between NCA's.[80] Klimisch and Krueger develop this by reminding us that "[p]ractical procedures are an essential prerequisite for the effective implementation of the concept [of decentralisation]".[81] They suggest that the criteria should be qualitative[82], taking into account the competitive and economic impact of a case, and the significance to the Community, with a dispute resolution system provided for by the Advisory Committee or by way of a preliminary ruling by the Commission on the allocation of competence.[83] However, they reject the use of turnover thresholds, since although these offer a "high degree of

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[76] CD Ehlermann "Implementation of EC Competition Law by National Anti-Trust Authorities" [1996] 2 ECLR 88, 90.
[77] White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99), Executive Summary, paragraph 13.
[78] A Jones and B Sufrin op cit., p 1028. Support for this is also found in Bos's argument that Community dimension should be formed by the centre of gravity rule (PV Bos "Towards a Clear Distribution of Competence between EC and National Competition Authorities" (1995) 7 ECLR 410, 414).
[79] HP Nehl "Changes in Legislation: Constitutional Reform and the Role of the Administrator" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 20.
[80] ibid, p 21.
[81] A Klimisch and B Krueger "Decentralised Application of E.C. Competition Law: Current Practice and Future Prospects" (1999) European Law Review 463.
[82] "that is, the geographic market definition and territory in which the agreement...is applied." (A Klimisch and B Krueger "Decentralised Application of E.C. Competition Law: Current Practice and Future Prospects" (1999) European Law Review 463, 474). Support for the use of qualitative criteria is found in CD Ehlermann "Implementation of EC Competition Law by National Anti-Trust Authorities" (1996) 2 ECLR 88, 91.
[83] A Klimisch and B Krueger "Decentralised Application of E.C. Competition Law: Current Practice and Future Prospects" (1999) European Law Review 463 and 477.

practicability and legal certainty"[84], they are unlikely to prove adequate and "...show an inherent trend toward centralisation due to inflation, internal or external corporate growth and the accession of new Member States to the European Union".[85] Alternatively, it is submitted that a further market share de minimis level could be introduced as a guide to determine the boundary between EC cases that will go to the Commission or national authority. This will assist the determination of the best placed authority and avoid any suggestions of cherry-picking certain preferred cases, although it is appreciated that there no support for this suggestion can be found in the consultation process. The closest argument for a de minimis threshold is Nehl's suggestion that notification could be retained for agreements exceeding certain market power thresholds if their effects are felt mainly in newly acceded Member States.[86] However, until the Commission formalise their detail for the best placed authority concept, a de minimis threshold does remain an option: one that would be consistent with their recent increased reliance on de minimis and safe harbour thresholds.

The Commission already maintains close liaison with NCA's, facilitated by the Advisory Committee on Restrictive Practices and Dominant Positions.[87] Nevertheless, Rodger finds that the Commission has apparently "...accepted that the Co-operation Notices have not encountered the success expected."[88] The difficulty in ensuring consistent interpretation is best demonstrated by the freezer exclusivity cases, with domestic bodies ruling that freezer exclusivity was not prohibited, and the Commission reaching the opposite conclusion in respect of the same group of undertakings[89]: the Irish High Court ruled that freezer exclusivity

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[84] ibid, p 474.
[85] ibid.
[86] HP Nehl "Changes in Legislation: Constitutional Reform and the Role of the Administrator" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 19.
[87] Article 10, Regulation 17/62; M Furse op cit., p 52; White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraph 106.
[88] BJ Rodger in B Rodger and A MacCulloch op cit., p 68. This is recognised by the Commission in White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraph 104.
[89] The conflict is traced in the following articles: K Murphy "Irish Court Rules on Freezer Exclusivity in the Ice Cream Market" (1992) 6 ECLR 270; A Robertson and M Williams "An Ice Cream War: The Law and Economics of Freezer Exclusivity I" (1995) 1 ECLR 7, who find that freezer exclusivity should have been condemned by the national cases/inquiries (p 20); W Sibree "Ice Cream War: In defence of the MMC" (1995) 3 ECLR 203, who finds that the MMC were right to adopt a cautious approach (p 204); J Maitland-Walker "Ice-cream Wars: An Honourable Peace or

was not prohibited[90], the MMC reported that freezer exclusivity could not be expected to operate against the public interest[91], and Scholler and Langese-Iglo appealed the Commission's decision condemning *outlet* exclusivity and finding *freezer* exclusivity to be a barrier to entry[92]. Subsequently, the Commission's prohibition of the practice of freezer exclusivity of impulse ice cream, was upheld.[93]

However, in the new "network", consistency and the supremacy of EC law is ensured, since Article 3 of the draft Regulation proposes that "only Community competition law applies to an agreement...which is capable of affecting trade between Member States" and accordingly "empowers a competition authority to suspend a proceeding or reject a complaint on grounds that another competition authority is dealing with or has dealt with the case."[94] Whilst this provision is designed to prevent "...inconsistencies and differences in the treatment of agreements and practices affecting trade between Member States under different national laws"[95], ECOSOC find it of concern that it is so bold and brief[96]. However, the European Parliament assert that any amendment would seriously

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the Beginning of Greater Conflict?" (1995) 8 ECLR 451, who although questioning how Mars were impeded in marketing their ice cream in Ireland given that they gained a 10 per cent market share in two to three years (p 451), is gravely concerned that the MMC "...once again appears to be manifestly out of line with its senior authority DGIV..." (p 453); and E Bissocoli "Exclusive Purchasing Obligations: the Italian Chapter of the Ice Cream Distribution Saga" (1998) 8 ECLR 520, who found that the Italian Competition Authority's application of the Commission's decisions on freezer exclusivity defective since differences in the German and Italian ice cream markets had not been taken into account and Regulation 1984/83 had been incorrectly interpreted, raising "dangerous uncertainty as to the relationship between a Member State and the European Community jurisdictions."(p 529).

[90] Masterfoods Ltd t/a Mars Ireland v HB Ice Cream Ltd [1992] 3 CMLR 830.

[91] Ice Cream Cm. 2524, March 1994.

[92] Joined Cases T-7&9/93R Langnese-Iglo GmbH v Commission and Scholler Lebensmittel GmbH and Co. KG v Commission OJ 1993 C85/4.

[93] Van den Bergh Foods Ltd [1998] OJ L246/1, 11/3/98. Commission decision in respect of Mars' complaint against HB (subsequently Van den Bergh foods); C-344/98 Masterfoods Ltd (14/12/00). The Commission decision was criticised by Rowe who found the exclusivity was deemed to breach the competition rules "...largely because if produces just the sort of benefits that the competition rules out to encourage and protect" (M Rowe "Ice Cream: The Saga Continues" (1998) 7 ECLR 479), although Rowe was one of the solicitors who acted for Unilever, HB's parent company. For an alternative view see S Preece "Masterfoods v HB Ice Cream Ltd" (2001) 7 ECLR 281.

[94] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Explanatory Memorandum, p 8.

[95] XXXth Report on competition policy 2000 (SEC(2001)694 final, 7/5/01), p 20; by ensuring that agreements capable of affecting cross-border trade are scrutinised under a single set of rules (p 21).

[96] Opinion of the Economic and Social committee on the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (COM(2000)582 final, 29/3/01), p 3, calling for an interpretative notice.

undermine the reforms.[97] The detailed operation of the network will be spelt out in a notice on co-operation "including in particular, clear but flexible arrangements for cases allocation based on the concept of the best-placed authority" which will be assisted by "an in-depth discussion with the Member States' competition authorities [which] should lead to the adoption of a commonly shared understanding that will enable the network to start functioning."[98] Certain, aspects of the relationship are already clear. NCA's will be under an obligation to inform the Commission of the initiation of proceedings under Community Law[99] and of intention to withdraw a block exemption[100]. The Advisory Committee plays a bigger role[101] in that it shall be consulted before decisions are taken, although Jones and Sufrin are concerned that there is no provision for the Committee's opinions to be binding.[102] Although block exemptions may be withdrawn by an NCA where the criteria of Article 81(3) are not met in that territory[103], Hawk notes that as "[t]he Commission rarely has withdrawn the benefit of a block exemption" it should perhaps not be feared that the national competition authorities will do it more regularly.[104]

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[97] Committee on Economic and Monetary Affairs Draft Report 2000/0243(CNS) 9/4/01, p 14.
[98] XXXth Report on competition policy 2000 (SEC(2001)694 final, 7/5/01), p 21.
[99] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 11(3). Article 11 provides that NCA must consult before reaching a decision to terminate or penalise an infringement of Article 81, with voluntary consultation in respect of all other cases (Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 11(4) and (5) and p 21). Although the Commission has indicated that these mechanisms are a safety net only and it will not become involved in the detail of NCA decisions is an systematic manner (XXXth Report on competition policy 2000 (SEC(2001)694 final, 7/5/01), p 21), Rodger finds the proposal that NCA's notify the Commission in respect of any national law proceedings that would have implications for Community proceedings as leading "...down the road of "hard" harmonisation of national laws." (BJ Rodger in B Rodger and A MacCulloch op cit., p 72).
[100] White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraph 105; Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 11(4).
[101] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 14 and p 22.
[102] A Jones and B Sufrin op cit., p 1028. This is supported by ECOSOC's call for such opinions to be more widely publicised (Opinion of the Economic and Social committee on the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (COM(2000)582 final, 29/3/01), p 10).
[103] White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99), Executive Summary, paragraph 95.
[104] BE Hawk and ND Stanton "The Development of Articles 81 and 82: Legal Certainty and Efficiency" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 56. See below.

Dual proceedings should not arise, for the "fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or reject the complaint."[105] Consequently the need for the Commission to be informed of the initiation of proceedings is obvious, although measures should also be taken at a local level to co-ordinate complaints where there is a possibility that more than one jurisdiction could be involved. The Member States already operate a one-stop clearing shop (the EEJ-Net[106]) by which a consumer can complain in their own territory and receive assistance in pursing redress through out of court mechanisms conducted by the parallel body in another jurisdiction.[107] It would not be a quantum leap for this practice to be adopted by the Commission in providing certainty in respect of competition complaints or indeed the private actions brought for damages.

Double jeopardy is recognised by the statement that "separate penalties should not be imposed by a national authority and the Commission and that separate commitments should not have to be entered into to satisfy objections raised at the two levels."[108] Hawk goes on to suggest that decisions of the national competition authorities applying Community law could be made binding throughout the EC following referral by the Commission and an in-depth investigation: "This result could be achieved in several ways, the easiest of which seems to have the national decision endorsed by the Commission and adopted as a Community decision. This would open the right to appeal to the CFI and ECJ."[109] This is supported by Klimisch and Krueger who find that "...without the Community-wide effect of national decisions it would not be possible to achieve the objectives of the E.C. Treaty, for example, the completion of the single market."[110] However, Articles 13

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[105] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 13.
[106] See Chapter 2, supra.
[107] Commission Working Document of the creation of a European Extra-Judicial Network, Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/EC), "Empowering the Euro-consumer" (2000) 27 Fair Trading August, 15.
[108] A Jones and B Sufrin op cit., p 1028; White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99), Executive Summary, paragraph 98.
[109] BE Hawk and ND Stanton "The Development of Articles 81 and 82: Legal Certainty and Efficiency" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 57.
[110] A Klimisch and B Krueger "Decentralised Application of E.C. Competition Law: Current Practice and Future Prospects" (1999) European Law Review 463, 480.

(enabling the suspending of dual actions), 16 (reinforcing the uniform application of Community law and avoiding conflicts) together with the bold message in Article 3, already illustrate an intention at the very least that it is to be a "one decision" system.

As for national courts, their judgements "...would be *res judicata* (subject to any appeal), and would be entitled to recognition in all other Member States of the EU and Contracting States of the EEA under the Brussels and Lugano Conventions respectively."[111] However, it is the ability of the courts to reach a decision that troubles Jones and Sufrin, for they are concerned that "...since a reference to the ECJ inevitably causes delay (of at least eighteen months), a national court will obviously be reluctant to make a reference save in cases of absolute expediency."[112] Judge Cook conscious that "Article 225...identifies preliminary references as the one category of case that cannot be delegated to the CFI", calls for Treaty amendment to allow less important references to be "...removed from the ECJ"[113]. However, the Commission do not expect a vast increase in the number of references (following a slight initial increase at devolution)[114] since National courts are already able to ask the Commission for advice on points of law, which would "...appear to function as a less formal preliminary ruling style procedure available from the Commission."[115] The Draft Regulation does follow the White Paper proposals that national courts should inform the Commission of proceedings involving the competition Articles, the Commission should be able to intervene as

[111] A Jones and B Sufrin op cit., p 1029. However both industry and the legal profession question the effectiveness of the Convention (White Paper on reform of Regulation 17: Summary of the observations (DG Comp Document, 29/2/00) paragraph 5.4) raising the potential for legal argument to "abuse" the implementation of the reforms, necessitating the Commission to address this point now. However, it has become lost in the wider debate over where consumers can sue (see Chapter 6, infra).

[112] A Jones and B Sufrin op cit., pp 1029 and 1030.

[113] Judge JD Cooke "Changing Responsibilities and Relationships for Community and National Courts: The Implications of the White Paper" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 60; although he recognising that references do not necessarily confine themselves to purely single issues on competition law, thus making it difficult to prescribe the boundaries for such a new form of reference.

[114] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Explanatory Memorandum, p 9.

[115] AD MacCulloch "Inntrepreneur Estates: Co-operative Application of the EC Competition Rules in the United Kingdom?" (1995) 6 ECLR 380, although MacCulloch is concerned by the lack of the effectiveness in terms of the amount of assistance given (p 383).

amicus curiae[116], and that national courts should be encouraged to seek advice or information from the Commission regarding procedural, legal or economic matters.[117] Jones and Sufrin find this will not be an easy task to implement in light of the different national court procedures across the Community[118] and requires arguments on the grounds of sovereignty to be overcome. However, Hawk implies that we must live with these consequences since "...the benefits of the case law system outweigh the legal uncertainties."[119]

As for the differences between national courts, Bright and Nikpay believe forum shopping "...could become the norm...[as companies] choose particular EC Countries in which to bring a complaint based on procedural rules, such as liberal access to the file, or stricter standards of enforcement by an authority."[120] However, Hawk believes "...at the risk of undue optimism...that mechanisms can be developed to keep inconsistencies to an acceptable level, for example, information exchange and coordination through the Advisory Committee."[121] Although Burnside calls for a more concrete mechanism in the form of a similar template to the Brussels Convention,[122] the Commission has instead opted for the information exchange and co-operation mechanism as the means to prevent this occurring.[123]

As much as it appears that the arguments against the reliance on a network appear over cautious, it is accepted that as Bright and Nikpay warn, "it is difficult to

[116] NCA's may also submit observations to the court, acting on their own initiative (Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 15(3)).
[117] White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraph 107; Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Explanatory Memorandum, p 9; Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 15 and pp 22 and 23.
[118] A Jones and B Sufrin op cit., pp 1030 and 1031.
[119] BE Hawk and ND Stanton "The Development of Articles 81 and 82: Legal Certainty and Efficiency" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 55.
[120] C Bright and A Nikpay "Coming-of-age or mid-life crisis? The Commission's proposals for wholesale reform of Europe's Antitrust procedures" (2000) The European Antitrust Review 55, 57.
[121] BE Hawk and ND Stanton "The Development of Articles 81 and 82: Legal Certainty and Efficiency" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 56.
[122] "For Better, for worse? Proposed reform of Regulation 17" (1999) IV(5) Global Counsel June, 17, 18.

imagine a system which both releases resources by reducing the Commission's workload (which is its ultimate goal) and yet enables it to determine how cases will be allocated between competition authorities."[124] Only time will tell whether the Commission's freeing up of resources is paid by the price of an increased drain on those of the Member States.

5.2.4 Procedures

According to Middleton, "As companies expand their commercial activities, geographic and political boundaries become increasingly blurred. It is therefore appropriate that businesses operating in the single market should be subject to a uniform set of rules and principles."[125] However, Middleton does not go so far as to explicitly include "procedural rules". This omission is however, entirely consistent with the Commission's stance in not calling for the harmonisation of procedural rules.

Although Rodger finds that uniformity and consistency "...will inevitably be distorted by the distinctive national systems of procedure and remedies [and it] is not clear that the proposals suggested go far enough to solve this problem"[126], it is in fact *clear* that the Commission's proposals do not go far enough.

The Commission proposes: to increase[127] its own powers of investigation to enable it to put any questions that are justified by, and related to the purpose of the investigation, to an undertakings' staff during an onsite investigation and demand full and precise answers[128]; to search private homes if professional documents are likely to be kept there[129]; to seal cupboards[130]; increase the fines for breaches of the

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[123] Commission press release IP/00/1064, 27/9/00.
[124] C Bright and A Nikpay "Coming-of-age or mid-life crisis? The Commission's proposals for wholesale reform of Europe's Antitrust procedures" (2000) The European Antitrust Review 55, 57.
[125] K Middleton in B Rodger and A MacCulloch op cit., pp 23 and 23.
[126] BJ Rodger in B Rodger and A MacCulloch op cit., p 69.
[127] White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraph 109; Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Explanatory Memorandum, p 7.
[128] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 20(2)(f) and p 25; extending the present right to ask for explanations relating to documents only.
[129] ibid, Article 20(2)(b) and p 25.
[130] ibid, Article 20(2)(e) and p 25.

procedural rules and periodic penalty payments[131]; and enable lawyers to answer requests for information of behalf of undertakings[132]. Rules on access to the file will be detailed in a separate notice.[133]

The Commission has retained its under utilised power to "conduct a general inquiry" into a sector where the circumstances suggest that competition is being restricted or distorted within the Community.[134] However, the Commission have also sneaked in a power to "...impose all remedies necessary to bring the infringement to an end, including structural remedies" allowing divestiture[135], by the proposed Article 7. Reeves and Brentford believe that this signals that "greater use would be made by the Commission of up-to-now little used powers to investigate whole sectors of the economy"[136]. Although this would been seen as "controversial" and "excessively disproportionate"[137], it is consistent with the UK's powers and approach in investigating oligopolistic markets. However, ECOSOC have described it as "...completely incompatible with the machinery and the spirit of both existing Community competition law and the planned reform"[138] and the European Parliament find such a wide power inappropriate.[139] This should serve as a warning for any plans for increased use of the replacement complex monopoly powers in the UK. [140]

The Commission also promises "...to improve the position of complainants by introducing an initial four-month period within which it must decide whether it

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[131] ibid, Articles 23 and 23.
[132] ibid, Article 18(3) and p 24.
[133] ibid, Article 26 and p 28, although the process of decision making will be assisted by the improved role of the Hearing Officer, "...greatly contributing to a better transparency in the competition decision-making process." (Commission press release IP/01/736, 23/5/01, p 1).
[134] ibid, Article 17.
[135] ibid, pp 17 and 18.
[136] T Reeves and P Brentford "A New Competition Policy for a New Millennium" (2000) 11(3) ICCLR 75, 77.
[137] E Morony and K Fisher "Reforming EC competition rules: the end of notification?" (2001) XII(2) PLC March, 23, 25.
[138] Opinion of the Economic and Social committee on the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (COM(2000)582 final, 29/3/01), p 5.
[139] Committee on Economic and Monetary Affairs Draft Report 2000/0243(CNS) 9/4/01, p 15.
[140] See Chapter 4, supra. Divestiture must be seen as an extreme remedy, rarely to be used, with the Microsoft "split" overturned by the US Court of Appeals (US Court of Appeals for the district of Columbia Circuit Opinion, 28/6/01 ((2001) XII(7) PLC 70)).

intends to investigate the complaint or reject it."[141] It has also mooted the simplification of the procedure for rejecting complaints.[142]

Article 12 makes it "...possible for any competition authority to pass on the whole case file containing the relevant information sampled and investigated, including any confidential information to another authority which is better suited to deal with the case"[143] where an infringement of EC competition law is suspected,[144] although this information may only be used for the "...purpose of applying Community Competition law".[145] However, Judge Cooke warns that from the aspect of the court systems, "the transferability of evidence between the Commission and national authorities and between national authorities themselves...pose[s] problems for the rules of evidence in the common law courts."[146]

Despite of all these concerns, the Commission states that "it is not necessary for the implementation of the reform to embark on a full-scale harmonisation of procedural laws"[147] although certain matters must be addressed, namely, the obligation for Member States to empower NCA's to apply Articles 81 and 82, the content of decisions that may be adopted (that is, no constitutive exemption decisions), the exchange of information between NCA's and the ability of the Commission to make written and oral submissions before the domestic courts.[148] However, the Commission will in practice be looking for further harmonisation: their call for the

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[141] C Bright and A Nikpay "Coming-of-age or mid-life crisis? The Commission's proposals for wholesale reform of Europe's Antitrust procedures" (2000) The European Antitrust Review 55, 56.
[142] White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraph 118.
[143] HP Nehl "Changes in Legislation: Constitutional Reform and the Role of the Administrator" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 35.
[144] White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraph 92.
[145] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 12(2).
[146] Judge JD Cooke "Changing Responsibilities and Relationships for Community and National Courts: The Implications of the White Paper" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 69.
[147] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Explanatory Memorandum, pp 12 and 13.
[148] ibid.

"...strengthening of a common competition culture in the EU"[149] will demand a greater strengthening of procedural matters if they are to achieve this goal. Support for this assertion is found in Folguera's concerns in respect of Commissioner Monti's statement that "the application of one set of competition rules in a single market, and the association of national bodies in the application of that set of rules, is...a better guarantor of legal harmony."[150] Rodger finds that the "...Commission would obviously prefer the national systems to be assimilated more closely".[151] Indeed, the European Parliament have suggested that harmonisation should be extended to sanctions if the system is to be effective.[152]

We have already seen a harmonisation in respect of whistleblowing, by the Commission proposing to adopt a new leniency notice along the lines of "the US"[153], which by implication means harmonisation of the EC in line with the UK position in the implementation of the Chapter I Prohibition. Further harmonisation is inevitable, although it will not be an easy process since NCA's are incorporated differently: some are independent agencies, whilst others are government departments[154], all with varying degrees of resources[155]. As regards the applicant countries, the Commission finds that "...considerable progress has already been made in establishing national competition authorities"[156], although experience is vastly different[157] and Bright and Nikpay are concerned by the culture in some

[149] 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 4.
[150] J Folguera "The Impact of the Commission's Modernization White Paper and Vertical Restraints Regulation on Member State Antitrust Laws" Speech at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/10/00, p 9.
[151] BJ Rodger "The Commission White Paper on Modernisation of the Rules Implementing Articles 81 and 82 of the E.C. Treaty" (1999) European Law Review 653, 656.
[152] Committee on Economic and Monetary Affairs Draft Report 2000/0243(CNS) 9/4/01, p 14.
[153] Commission press release IP/01/1011, 18/7/01, p 3.
[154] Judge JD Cooke "Changing Responsibilities and Relationships for Community and National Courts: The Implications of the White Paper" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 63, although Judge Cooke concludes that the lack of detail in the White Paper on this issue, means that Member States will be left a wide margin of discretion as to how devolved responsibilities are discharged (p 64).
[155] White Paper on reform of Regulation 17: Summary of the observations (DG Comp Document, 29/2/00) paragraph 6.1.
[156] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Explanatory Memorandum, p 6.
[157] Observations of Whish, Fourth Report, Select Committee on European Union (29/2/00), paragraph 53.

Member States: "...new Member States from central and eastern Europe will have extremely limited experience and resources which can be dedicated to competition law enforcement – in fact, in certain Communist countries, the body that is now responsible for competition policy was formerly responsible for fixing prices!"[158] Indeed, Todino finds such harmonisation is "...hardly imaginable" given the range to administrative procedures and penalties, and how these are provided for e.g. by incorporation in to the Constitution, criminal law and/or civil law."[159]

However, it is submitted that the escalation of increased procedural harmony is only a matter of time. The resistance that exists towards the harmonisation of competition procedural rules can be seen in the context of the wider picture of European integration, with Ehlermann's belief that the "decentralised implementation of EC competition law could become a model for other sectors of Community law."[160] Nevertheless, the wider implications for a unified set of rules will not be lost on the Community or it's Member States. As McGoldrick notes, "the member states do have a strong interest in the harmonization of world trade rules on the basis of EU rules and legislation..."[161], suggesting that the harmonisation of procedural rules would make a stronger case for the adoption of the EU system of competition regulation on a larger scale. Commissioner Monti has been keen to stress the importance of NCA's ensuring that the "international integration of markets leads to maintained competitive outcomes, thus making the globalisation process both economically more efficient and socially more acceptable...to avoid resentment against globalisation and a protectionist backlash."[162] He also stresses the need to assist developing countries with the restructure of their economies and to integrate them "...fully to the world economy

[158] C Bright and A Nikpay "Coming-of-age or mid-life crisis? The Commission's proposals for wholesale reform of Europe's Antitrust procedures" (2000) The European Antitrust Review 55, 56. Ullrich warns that is these different needs and traditions are not taken into account, harmonisation will fail (H Ullrich "Harmonisation within the European Union" (1996) 3 ECLR 178, 184).
[159] M Todino "Modernisation from the Perspective of National Competition Authorities: Impact of the Reform on Decentralised Application of E.C. Competition Law" (2000) 8 ECLR 348, 353 and 354.
[160] CD Ehlermann "Implementation of EC Competition Law by National Anti-Trust Authorities" (1996) 2 ECLR 88, 95.
[161] D McGoldrick International Relations Law of the European Union (London, Longman, 1997) p 182.
[162] M Monti "The EU views on a Global Competition Forum" Speech delivered to the ABA Meeting, Washington, 29/3/01 (Speech/01/147) p 4.

in order to be able to exploit new opportunities to compete."[163] Obviously the aim is for the developing countries to be able to exploit new opportunities as opposed to the developed countries exploiting the situation, but inherent in this assistance is the message that a united Europe can lever much more power in shaping a global regulation that it prefers.[164] Indeed as Kaczorowska proposes, in "...today's supercharged global market place the establishment of new international competition law may be one of the most important and urgent tasks facing political and business leaders around the world."[165]

In the meantime, Judge Cooke suggests domestic procedures for investigation and adjudication should be parallel to those chosen for the application of the Community rules at national level, and decisions by national authorities should be appealable to specialist courts (similar to the UK CCAT), from which appeal goes straight to the CFI, not a higher domestic court.[166] However he recognises this is impossible as it creeps into the realms of federalism, even though this is the structure that "seems to me to be the logical implication of what the Commission contemplates".[167]

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[163] ibid. However, Nehl argues that "In the long run, there is no alternative to a uniform standard of basic principles governing administrative action within a closely entwined network of administrators" (HP Nehl "Changes in Legislation: Constitutional Reform and the Role of the Administrator" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 42), in calling for the codification of a comprehensive set of procedural rules. This is supported by ECOSOC, who find "...that harmonisation of the national procedural rules would be desirable in order to promote consistent application of the substantive rules" (White Paper on reform of Regulation 17: Summary of the observations (DG Comp Document, 29/2/00) paragraph 8.2; only one Member State finds that devolution will require gradual harmonisation of procedural rules, although industry finds such harmonisation a must.).

[164] "Two thirds of the 134 member states of the WTO have not yet enacted any competition law. Those states are victims of anti-competitive behaviour of undertakings from developed countries which have long experience in dealing with such behaviour under domestic laws and have at their disposal means of enforcing national decisions abroad through co-operation agreements." (A Kaczorowska "International Competition Law in the Context of Global Capitalism" (2000) 2 ECLR 117, 127).

[165] A Kaczorowska "International Competition Law in the Context of Global Capitalism" (2000) 2 ECLR 117.

[166] Judge JD Cooke "Changing Responsibilities and Relationships for Community and National Courts: The Implications of the White Paper" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 72.

[167] Judge JD Cooke "Changing Responsibilities and Relationships for Community and National Courts: The Implications of the White Paper" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), pp 72 and 73.

The ending of exemption decision making by the Commission, ends the appeal to the CFI. Judge Cooke finds this ironic, in that it means redress for most undertakings will be to appeal decisions of NCA's in their national courts, which in turn will make Article 234 references, thus returning competition questions to the ECJ "...10 years after the ECJ thought it had divested itself of the function of detailed examination of Commission decisions."[168] The White Paper is silent on the issue of appealing decisions by NCA's although it does suggest that "the element of judicial review could be centralised"[169], and this has been seized upon by industry and the legal profession in calling for the Commission to be an appeal body for national decisions.[170] Support for this can be seen in the Commission's view that national courts are not to have jurisdiction to review the validity of Community acts[171], with ultimate control resting rather with the ECJ[172], although Morony and Fisher suggest that the correct course of action will be for NCA decisions to be subject to judicial review by domestic courts.[173] A solution falling short of this would be for the argument put forward by Montag to be adopted, that is, infringement decisions "...should have a high level of acceptance by the undertakings concerned and not lead to a quasi-automatic appeal to the Community courts."[174]

These issues demonstrate that there is still detail missing and certain sectors of the Community remain opposed and/or have other ideas about how devolution should work. Nevertheless, there are enough "certainties" as to the operation of this new system to indicate that positive action in respect of the Chapter I Prohibition will be required. Yet, the UK White Paper makes very little of the impact of devolution.

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[168] ibid, p 61.
[169] White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraph 111.
[170] ibid, paragraph 6.2.
[171] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 16 and p 23.
[172] M Monti "Competition in a Social Market" Speech at the Conference on Reform of European Competition Law, Freiburg, 9 November 2000 ((2001) 1 Competition Policy Newsletter February, 2, 7). This is supported by ECOSOC (Opinion of the Economic and Social Committee on the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (COM(2000)582 final, 29/3/01), p 11).
[173] E Morony and K Fisher "Reforming EC competition rules: the end of notification?" (2001) XII(2) PLC March, 23, 29.
[174] F Montag "The Case for a Radical Reform of the Infringement Procedure under Regulation 17" (1996) 8 ECLR 428.

However, it is the uncertainties that pose the bigger question of whether the recent domestic reforms are premature. According to the submissions made below, it is.

5.3 Problems for the Chapter I Prohibition and how it will need to change

Rodger recalls that:

> "[t]he Department of Trade and Industry will be anxiously awaiting the outcome of the Commission's consultation process before deciding whether to introduce secondary legislation to amend [the provisions of the Competition Act 1998] to maintain consistency with the Community model. [Although], the DTI indicated, after the 1998 Act had been given Royal Assent, that no specific measures would be introduced to provide for decentralised enforcement of Community competition law by UK authorities ...this attitude is likely to require modification as a result of the [EC] White Paper."[175]

The House of Lords considered that the "Commission's proposals do not...fit well with the Competition Act 1998 and it would almost certainly be necessary to amend the Act."[176] However, no specific measures have been proposed, despite the Government publishing its own White Paper to provide a comprehensive framework for the future of domestic competition law. This White Paper states that the Government "broadly welcomes [the Commission's modernisation] proposals"[177] for they will allow the OFT to handle more cases which impact on the UK, should reduce the bureaucracy of (largely unnecessary notification) thus freeing up resources, and should provide greater consistency for business operating in the single markets, which has long been a UK policy goal.[178] However, the Government find that the "Commission's proposals remain at a relatively early stage of consideration [allowing] the Government to "work closely with the Commission to ensure they meet the best interests of the UK".[179] I would not say

[175] BJ Rodger in B Rodger and A MacCulloch op cit., p 67.
[176] Fourth Report, Select Committee on European Union (29/2/00), paragraph 117.
[177] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), p 5.
[178] ibid, paragraph 2.19.
[179] ibid, paragraph 2.20.

relatively early: a draft Regulation was published September 2000 and the Commission expects to see implementation by 2003[180]. Indeed, the Government recognised this date as the target for implementation, in its follow up plan for a Consumer White Paper.[181] Further, the White Paper positively demonstrates that rather than working with the Commission to resolve differences, the Government appears intent on establishing what it sees as the best competition law, which others (including the EC) should follow. Any further realignment of national competition law will be hindered at this stage by the proposals for new penalties and oligopoly rules.

Although it is accepted that as Jones and Sufrin surmise, "there is a wide variety of views across industry and the legal profession, and within Member States and not just between them"[182] and the legal basis for the implementation of the reforms is disputed[183], this is no reason for the Government to not address all its concerns in its own White Paper. According to Rodger, the modernisation "...proposals are likely to seriously affect the operation of the Competition Act 1998".[184] If this was stated in 1999 why is the Enterprise Bill White Paper not dealing with it? Why was it not delayed until after the reforms are adopted? The omission is ludicrous considering that at the same time as publishing the proposed content for the Enterprise Bill, the Government's Expenditure Plans indicated that "UK priorities are to push forward [EU] reform and improve the level of transposition and enforcement of Single Market Legislation across the UK."[185] Although this statement is made in the context of EU reforms generally, including services, procurement, utilities and the environment, the ignorance of the impact of

[180] M Monti, Key note address to the BIICL Conference, London, 18/5/1.
[181] "modern markets: confident consumers – implementation plan for the consumer white paper" (www.dti.gov.uk/consumer/whitepaper as at 8/7/00) Commitment No.4, Annex, p 6
[182] A Jones and B Sufrin op cit., p 1033.
[183] A Jones and B Sufrin op cit., pp 1034 and 1035; although they conclude that contrary to requiring amendment to the Treaty, it is likely that the ECJ would "...interpret Article 81 teleologically in a way which it considers will achieve the Treaty's aims and objectives and ensure effective enforcement of the competition rules." (p 1035).
[184] BJ Rodger "The Commission White Paper on Modernisation of the Rules Implementing Articles 81 and 82 of the E.C. Treaty" (1999) European Law Review 653, 663.
[185] The Government's Expenditure Plans 2001-02 to 2003-04 and Main Estimates 2001-02, paragraph 8.2 (available on www.dti.gov.uk/expeditureplan/expediture2001/objective_c as at 29/7/01).

decentralisation by pushing ahead with the Enterprise Bill cannot be defended.[186] Whish, who believes that the decentralisation system can work successfully, finds that the Competition Act 1998 may require amending.[187] However, this is not a belief adopted by the Government at present who state that the European developments are not a reason for holding up domestic reform[188]. Indeed, Bloom found that there was still "much work to be done" before the EC reforms would be ready for implementation.[189] The results of this work will impact on the changes made to the Competition Act 1998. The omission of proposals in the White Paper to deal with issues of decentralisation is a naivety that will hamper the sustainability of the Chapter I Prohibition.

The Government's views as to how its sees the impact of devolution can be gleamed from it's response to the Commission's proposals. These state that:

> "...we would want to ensure the two systems could work in harmony, so as to avoid increasing uncertainty or placing an unnecessary burden on business, or on the national competition authorities."[190]

> "...serious consideration should be given to the extension of legal professional privilege protection to advice provided by qualified in house lawyers who are bound by their professional code of conduct."[191]

> "...certain steps were taken in 1998 Competition Act (CA98) to minimise the number of notifications, including exclusions from the UK prohibition, e.g. certain land and vertical agreements."[192]

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[186] Unless uncertainty as to the UK's membership of the EU is a real concern: even though a private Members Bill ("European Union (implications of Withdrawal) Bill 2000 PMB HL Bill 44) was introduced, the main challenge for continued membership will come from the decision of the Euro (which is very much dependant on the form of the opposition party at such time as a referendum).
[187] R Whish "National Courts and the White Paper: A Commentary" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 74.
[188] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraph 2.22.
[189] M Bloom, Comments made during round table discussion at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/10/00.
[190] United Kingdom's Response to the European Commission's White Paper on Modernisation of the Rules applying Articles 81 and 82, paragraph 2 (www.dti.gov.uk/cacp/cp/ukresx.htm as at 4/6/01).

"The UK recognises concerns that [the absence of notification and exemption] might result in increased uncertainty."[193]

"...doubts about the ability of national courts to take decisions on whether [Article] 81(3) applies, because of the complex economic evidence that would need to be considered."[194]

"Under the existing framework, the Commission is prepared to give advice to undertakings on the application of [Article] 82, resulting in a negative clearance decision. It seems it would be possible for the Commission to adopt a similar procedure in respect of [Article] 81 as a whole, under its proposed new system. It is, however, not clear what assistance NCA's, rather than the Commission, would be able to give to undertakings in those circumstances, and to what extent undertakings could rely on such advice."[195]

Not all of these aspects can be catered for by merely re-interpreting the Chapter I Prohibition. Changes will be needed:

5.3.1 The competition based test and the requirement to maintain market integration

The increase in the EC de minimis thresholds[196] will mean that more agreements cease to have an appreciable affect on interstate trade, and as a consequence, fall to be examined under the Chapter I Prohibition to see if they affect competition in the UK. This satisfies the Government's desire to see the OFT handling more cases that impact on the UK, but brings with it the risk of increased divergence of policy.

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[191] ibid.
[192] ibid.
[193] ibid.
[194] ibid.
[195] ibid.
[196] See Chapter 3, supra.

Even if the decision making under the Chapter I Prohibition continued to take a realistic view of the market based test and section 60 jurisprudence, and avoided the potential for trouble caused by the lack of a definition of competition, the promotion of the complex monopoly replacement brings a fear that this new power will be used more and more. The UK has denounced the use of the EC competition Articles as a means of controlling oligopolies[197], but greater attention and recourse to these revised domestic powers would be looked upon unfavourably by the EC institutions[198] and could risk fragmentation. The Government would do better to deal with this head on now, by actively participating in the EC debate as to the best way to investigate and punish markets. This is essential since the UK proposals are inconsistent with its own desire to see the system working in harmony and prevent an increase in uncertainty.

5.3.2 Ability of DGFT to make Article 234 references

There continues to be disagreement as to whether the DGFT could make an Article 234 reference. Jones and Sufrin support the argument that he cannot.[199] However, it is submitted that the harmonisation already provided for by the Competition Act 1998 has placed the OFT in a better position to be seen by the Commission as capable of being able to deal with anti-competitive agreements. The details for the co-operation network could include provision for references by the DGFT (in respect of aspects of EC law arising in domestic questions) to whichever EC body is deemed the more appropriate in the future to deal with these. This would ensure the consistent and efficient appliance of EC law.

5.3.3 Flexibility

As for the flexibility provided by parallel exemptions, there will be no more individual exemptions at the EC level, although block exemptions will continue to be issued. However the ability to vary EC block exemptions for domestic purposes under section 10 could in practice be curtailed. NCA's can already withdraw the

[197] ibid.
[198] See 5.2.4, supra.
[199] A Jones and B Sufrin op cit., p 1026. See Chapters 3 and 4, supra, for arguments for and against.

effect of the block exemption for vertical restraints[200], but there will in future be a duty to notify[201] the Commission before withdrawing a block exemption. This means that the OFT's powers to vary a block exemption for the purposes of section 10 would come in for greater scrutiny from the Commission: if undertakings did not like the conditions/variations imposed at the domestic level under the Chapter I Prohibition, they may in turn argue that there is an affect on inter state trade, thus requiring the OFT to notify its action to the Commission. Increased transparency and full reasoning will be essential to the survival of section 10.

However, it is not all bad news for the OFT, for the proposed "commitments" at EC level could provide an added source of jurisprudence for the OFT in deciding what agreements should receive a prohibition decision under the Chapter I Prohibition. Indeed flexibility to the operation of the Chapter I Prohibition could be added should a domestic remedy of commitments be adopted[202]. However, due to their negotiated nature, EC commitments should not provide parallel exemption under section 10, and accordingly this section should remain unchanged.[203]

As to the question of sufficient resources, Klimisch and Krueger take comfort from the Commission's findings that there should not be a huge increase in the workload for Member States:

> "...in 1994 DGIV checked some of the pending cartel and abuse cases for the ad-hoc working group of "Decentralised Application" to determine where their competitive or economic impact was felt....It found that out of the 73 complaints and 116 notifications checked, 31 and 50 respectively involved mainly national cases. This amounts to a decentralisation of approximately 34 per cent."[204]

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[200] See Chapter 3, supra.
[201] White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraph 105.
[202] See 5.3.4, infra.
[203] Although for an opposing view see A Burnside "E.U. Competition rules, U.K." (2000) In Competition March, 1, 2, who calls for amendment to explicitly deal with the ending of the grant of exemptions.
[204] A Klimisch and B Krueger "Decentralised Application of E.C. Competition Law: Current Practice and Future Prospects" (1999) European Law Review 463, 473 and 474.

Whilst no details were given as to which NCA's would have the competence to determine these cases, Klimisch and Krueger take further comfort from finding that the annual number of notifications and complaints has remained relatively constant.[205] Todino similarly concludes "one should not expect, as a result of the move to a directly applicable system, a huge devolution of cases from the Commission to national competition authorities. This is not necessarily negative however, from the national competition authorities' viewpoint, since the main purpose of the reform is to create a more efficient system for the protection of competition and not to increase the workload of national competition authorities as such."[206] However, these studies do not account for increased work for NCA's following the raising of the EC de minimis thresholds. These may result in more undertakings (that were previously regulated at the EC level) becoming concerned about the domestic prohibition and consequently notifying to obtain comfort. If EC enforcement takes up NCA's resources and flexibility, it will cast serious doubts over the future of devolved control, since Member States were reluctant to increase the resources available to the Commission in enforcing Articles 81 and 82.

5.3.4 Deterrence

Subject to the determination of whether the domestic notification system should remain[207], the use of commitments by the EC should be adopted by the UK in the application of the Chapter I Prohibition. In effect they are akin to the conditions imposed in individual exemptions and indeed the OFT could be empowered to consult on the terms of such a negotiated settlement. Whilst the effect would be the same, the change in terminology would ensure consistency with the EC remedy, reducing the confusion for business. Although it would appear that these could be agreed on the basis of the provisions of section 32 already, specific amendment would be preferable to ensure transparency and educating those that may seek to rely on the provision or complain.

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[205] See footnote 31 supra.
[206] M Todino "Modernisation from the Perspective of National Competition Authorities: Impact of the Reform on Decentralised Application of E.C. Competition Law" (2000) 8 ECLR 348, 357.
[207] See 5.3.6, infra.

Whereas the EC does not propose the imposition of personal criminal liability, recourse may be had to all domestic remedies by the OFT in punishing a prohibition under Article 81. This will impact greatly on the ability of the OFT to encourage compliance with Article 81, but the Government should stress the reasoning for the extension of powers (as detailed in Chapter 4) in order to encourage EC acceptance of the need for such measures.

5.3.5 Investigations

The Competition Act 1998 powers of investigation are "broadly in line with other member states."[208] Whilst the Commission's increase in powers of investigation, whilst the power to search private homes is nothing new for the OFT under the Competition Act 1998, other aspects illustrate a divergence in procedural powers. Demanding full and precise answers in respect of any question related to the purpose of the investigation and summoning persons to provide information are broader than the powers in section 26 to 29. However in light of the intention that the OFT have recourse to criminal penalties, it is submitted these powers are unlikely to be used where reliance is to be had on the sanctions envisaged in the domestic reforms. Indeed, the main difficulty for the OFT in executing an EC investigation will be the way that evidence is obtained, in light of these criminal sanctions. Since EC investigations will be on a lower level of proof and evidential procedures, the OFT will would need to re-investigate to secure fresh evidence for a criminal trial (despite the Government proposal that a prior finding in EC proceedings should be admissible as evidence in a subsequent domestic trial[209]). This would not appear to be workable solution. Industry has already called for the EC reforms to include safeguards "...where that information collected by the Commission could be used in criminal proceedings or such information should not be used at all."[210] It is these criminal sanctions together with the ability to impose national remedies in discharging its EC obligations that will restrict the action taken by the OFT. This possibility of criminal penalties being imposed on EC cases,

[208] M Bloom "Investigation and enforcement" (Speech delivered at "The New Competition Act" The Hatton, London, 2/12/99).
[209] White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraph 7.45.

demands that the same high standards should be applied to both Chapter I Prohibition and Article 81 investigations. There is the argument that the Commission would consider that this hinders the prosecution of EC infringements, but if the Enterprise Bill incorporates criminal penalties, this is the unavoidable result, unless of course the Commission either decide that no national remedies can be imposed, or that all national procedural rules should be harmonised.

However, the good news is that as a consequence of this conclusion, when the OFT are obtaining evidence, its investigators will have to fully respect the UK legal privilege rules, circumventing the different approach taken by the EC and delivering the level of protection demanded by industry[211]. Even if this interpretation is disagreed with, or the subsequent enactment of the new EC Regulation excludes the imposition of personal criminal sanctions, investigations by the OFT would still demand the same respect for legal privilege. Otherwise, should the OFT following an EC investigation subsequently decide that it is a Chapter I Prohibition case, there will be a problem in relation to any material obtained that is privileged for the point of view of the UK. How can the OFT forget? This would require sufficient staff and resources in order to establish Chinese walls within the OFT at the start of each investigation, which is unlikely to be a workable solution.

However, it is accepted that no matter what the UK decides regarding its conduct of investigations, "...there will the need to establish certain harmonised procedural standards in order to secure, if necessary, simultaneous investigatory action in several Member States if a national competition authority deals with an agreement of "transnational" character."[212] This has the potential to usurp the "finality" of the Enterprise Bill provisions.

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[210] White Paper on reform of Regulation 17: Summary of the observations (DG Comp Document, 29/2/00) paragraph 6.5.
[211] The response of industry was for privilege to be extended to all in-house lawyers (White Paper on reform of Regulation 17: Summary of the observations (DG Comp Document, 29/2/00) paragraph 7.7).
[212] HP Nehl "Changes in Legislation: Constitutional Reform and the Role of the Administrator" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 39.

Byers expressed concerned that there would be human rights implications in the Commission's proposals to "...include a new right to summon to Brussels anyone thought to have useful information"[213], but it is submitted that this is yet another example of "human rights" being invoked to suit the stance of opposition to reform, without attempting to offer a solution. In light of recent judgements concerning human rights, such statements do nothing more than discredit the true purpose and aim of human rights protection.

Sealing cupboards is a possible domestic practice, implied from the OFT's ability to take measures to prevent the tampering of evidence as an on site investigation begins, although it is likely that such a power ceases following the withdrawal of OFT investigators from the premises. Until such time as a case is made out for the need of this power at domestic level, it should not be seen as a necessary amendment to the Competition Act 1998.

The EC's plan to simplify the procedure for rejecting complaints should be seen as an aspect that should be adopted in domestic procedures. If it led to a standardisation of the amount of information given, and provided consistency and quality of reasoning, it would indeed be a welcome development for the domestic procedures[214]. As for the time taken to deal with complaints, the OFT already operates a 30 working day time limit in determining whether to take up the complaint or not. However, the OFT only managed to deal with 62 per cent. of complaints within this target[215]. An extension in line with the EC four month deadline might therefore not be a bad thing, provided that interim measures were taken where serious problems were discovered and the four month was seen as the upper limit as opposed to the amount of time the OFT had to do its work. Targets are all about managing expectations: if the OFT feel uncomfortable about its current target, then adopting the EC target ensure consistency and assist the OFT/complainant relationship.

Section 55 restricts disclosure of information obtained under the Act, but the scope

[213] "Byers opposes Brussels' competition law plan" (2000) FT 29 February, 3.
[214] Note the concerns of the lack of consistency in the treatment of the complaint considered by OFTEL (see Chapter 4 supra).

of the exclusion from this restriction was justified because "The different authorities need to be able to exchange information on cases in order to determine which is best placed to deal with potential infringements of the prohibitions and to ensure that there is no unnecessary duplication of work between them."[216] This required amendment post Royal Assent because it was not wide enough! The argument had been made that there should be restrictions on who can see the information to ensure that they cannot obtain information that they would not have been able to have access to under their own regulations.[217] At the third reading in the House of Lords, this was again an issue with Lord Fraser of Carmyllie proposing an amendment to deal with his concern that confidential information could be exchanged between the UK and foreign competition authorities.[218] Lord Simon of Highbury rejected these concerns as

> "subsections (5) and (6) of Clause 55 enable the Secretary of State to specify additional persons and purposes to whom, and for which, disclosure is to be permitted. That power is exercisable by order subject to annulment by either House. The purpose of this power is to ensure that there is sufficient flexibility in the Bill to respond to developments in regulatory and competition policy without need for fresh primary legislation...The noble and learned Lord, Lord Fraser asked specifically about disclosure to foreign competition authorities. I wish to make it clear that the power was not designed for this purpose and the Government's view is that the powers conferred by this provision would not enable a foreign competition

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[215] Annual Report of the Director general of Fair Trading 2000 p 69.
[216] Lord Haskel, Official Report, Committee Stage, Competition Bill House of Lords, Column 947, 25 November 1997, House of Lords internet.
[217] Official Report, Committee Stage, Competition Bill House of Lords, Columns 946 to 949, 25 November 1997, House of Lords internet. There was also concern at this stage of proceedings whether information given to the European Commission would be subject to restrictions against disclosure. Lord Haskel said "it will be subject to European law which restricts its disclosure by the Commission." However, when Lord Lucas asked for specific section of European law, Lord Haskel replied "The European law under which this is done will surely be Articles [81] and [82] which we are the items we are debating." (Column 952). It was Regulation 17/62 the noble Lord meant to refer to – this does show, on the part of some participants, a lack of well rounded understanding of the EC competition law that was bounded about as our saviour in this sphere of competition regulation. This is dangerous ground to be on....
[218] Official Report, Third Reading, Competition Bill House of Lords, Column 1360, 5 March 1998, House of Lords internet.

authority to be designated as a person to whom disclosure can be made."[219]

Consequently, whilst amendment to ensure no inconsistency with the EC proposals could be achieved by Statutory instrument, in light of the noble Lords comments, amendment of this section is the preferred option.

5.3.6 Decision Making

When the House of Lords considered the EC reforms, it was stated that the:

> "Government thought that the current system of notification was a "poor tool in competition law enforcement". The Competition Act 1998 had adopted it in order to operate in close harmony with the EC rules. The proposed change at EC level (which would likely require amendment of the 1998 Act) would enable the Commission to prioritise and plan enforcement better."[220]

However the Competition Bill debates *positively* point to the desire to use a notification system to ensure undertakings were protected. 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."[221] This was rejected as the Government considered:

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[219] Lord Simon of Highbury, Official Report, Third Reading, Competition Bill House of Lords, Column 1361, 5 March 1998, House of Lords internet.

[220] Fourth Report, Select Committee on European Union (29/2/00), paragraph 28.

[221] Official Report, Third Reading, Competition Bill, House of Lords, Column 1345, 5 March 1998, House of Lords internet. An amendment was suggested at Committee Stage to remove the word effect from the prohibition so as to ensure that only those who are subsequently proved to have an agreement with an anti-competitive effect are treated differently in respect of the consequences they might face, that is, they would not suffer unless the effect was reasonably foreseeable (Mr Andrew Lansley, Official Report, Standing Committee G, Competition Bill, House of Commons, Part 5 pp 4 and 5, 2 June 1998 (morning session), House of Commons internet). Mr Nigel Griffiths made it clear that the issue of foresight was not relevant to whether the prohibition was breached, but would be relevant when assessing the penalty (Official Report, Standing Committee G, Competition Bill House of Commons, Part 8 p 2, 2 June 1998 (morning session), House of Commons internet). The Government later introduced an amendment, accepting that "it should be made clear in the Bill that penalties cannot be imposed unless the undertaking has committed an infringement intentionally or through negligence (Mr Nigel Griffiths, Official Report, Standing Committee G, Competition Bill, House of Commons, Part 4 pp 2 and 3, 16 June 1998 (afternoon session), House of Commons internet). However, Lord Borrie queried the reference "by the undertaking" as he was concerned that it would be interpreted as meaning "only the directing mind of the company." thus providing a

"...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..."[222]

This would at the very least suggest that despite not seeing notification as the best system, the Government would be determined to retain notification. Although notifications provide immunity from fine, those who intend to breach the prohibition are unlikely to notify; others who choose not to notify are unlikely to have the intention to breach the prohibition, or at the very least are not negligent, so that they would not suffer a financial penalty anyway. The removal of immunity would not be of great loss. We already have the majority of queries being dealt with informally, that is, with no immunity from penalty conferred, although it is appreciated that there is the opposing view that undertakings may demand such defences under the future regime. Klimisch and Krueger find that "once the Commission has relinquished its exemption monopoly, firms can be expected to notify to the national authorities cases whose main economic and competitive

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defence where it was the junior employee who acted intentionally or negligently, and consequently this would have the effect of reducing the deterrent effect of the sanctions (Official Report, Consideration of Commons amendments, Competition Bill, House of Lords, Columns 1374 and 1375, 20 October 1998, House of Lords internet). Lord Borrie went on to discuss the facts of the Ready Mixed Concrete case where the House of Lords said, overruling the Court of Appeal, that even though employees had acted outside of their authority and contrary to instructions, as they acted in the course of their employment the contracts that 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. If the employer is supposed to be the one who has intention or is negligent, would the director be able to impose penalties under the new wording..." (Official Report, Column 1375) Lord McIntosh of Haringey responded by saying that it was clear "...from the principles set out in the decision of...the Supply of Ready Mixed Concrete (No.2) 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." (Official Report, Column 1376).

[222] Lord Simon of Highbury, Official Report, Third Reading, Competition Bill, House of Lords, Column 1346, 5 March 1998, House of Lords internet.

impact is felt in that particular country"[223] and according to Judge Cooke, "it will not be surprising...if the inability to notify to the Commission leads to an increase in notifications under national rules which mirror Article 81(3) such as...under the [Competition Act 1998]".[224]

Folguera finds that the EC White Paper "...clearly advocates for an absolute elimination of the administrative authorization "ex ante" control models concerning Article 81(3), not only for the Commission itself but also for the national competition authorities."[225] However, it is submitted that there is no such clear call for the removal of domestic notification systems, where those systems are based on Article 81(3). At present, notification under the Chapter I Prohibition remains, raising the possibility of more undertakings trying to find that their agreement affects the domestic market (assisted by the increased EC de minimis thresholds) in order to gain what they see as certainty. It is readily apparent that where there is uncertainty as to whether an agreement raises issues under the Chapter I Prohibition or Article 81, it will be the OFT that will be come the more appropriate body to notify since prima facie it will be the decision maker under both domestic and EC law. Obviously the Commission would be opposed to an increase in domestic notifications, since it rejected the option to reform Regulation 17/62 that would basically allow NCA's to receive EC notifications.[226] Indeed, the consultation process highlighted industry's fears that decentralising the notification system would "...lead to multiple notifications and increase bureaucracy..."[227]. Folguera finds that where national laws are not amended, "firms wishing to implement a unified business policy on a pan-European basis (e.g. a standard distributorship

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[225] A Klimisch and B Krueger "Decentralised Application of E.C. Competition Law: Current Practice and Future Prospects" (1999) European Law Review 463, 471.
[224] Judge JD Cooke "Changing Responsibilities and Relationships for Community and National Courts: The Implications of the White Paper" in The Modernisation of European Competition Law: The Next Ten Years (University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 4, June 2000), p 67.
[225] J Folguera "The Impact of the Commission's Modernization White Paper and Vertical Restraints Regulation on Member State Antitrust Laws" Speech at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/10/00, p 31.
[226] White Paper on the Modernisation of the Rules Implementing Arts 85 and 86 of the EC Treaty (28/4/99) paragraph 60.
[227] ibid, paragraph 2.2.

agreement)...may resort to the prior notification route in each Member State."[228] Although this fear is unfounded since these agreements would affect interstate trade and fall likely to the resolved by the Commission, it does leave the potential for two or three Member States to be affected by an agreement, which is seen by the Commission as not an agreement demanding their attention.

If notification remains in all Member States, then bilateral or multilateral agreements could be developed to ease the burden on notifying, by the acceptance of a common form, similar to those put in place between the UK, France and Germany in respect of mergers[229] (prior to the EC reforms and the one stop shop). The CBI has already called for the OFT to "maintain a limited system of notifications for agreements that involved three or more states..."[230], although they later called for UK competition law "...to be brought into line with the EU to avoid any legal confusion for companies."[231]

It is noted that not all see a need to reform the system of domestic notification as a serious concern. In 2000, PLC published a comprehensive guide to various national competition laws entitled "From Notification to Approval". Whilst these highlighted the differences in the interpretation and application of the competition based "effect" test, it did not deal with the status of notifications in light of the EC modernisation.[232] However it is submitted that domestic notification should go: "It is difficult to see the Competition Act's notification arrangements surviving the abandonment by the Community of its similar arrangements."[233] Further, the OFT must not allow an informal notification replacement to develop. Despite the current domestic practice preventing reliance on notifications by the adoption of the "do complain, don't notify" mantra, this culture of informal discussion and advice

[228] J Folguera "The Impact of the Commission's Modernization White Paper and Vertical Restraints Regulation on Member State Antitrust Laws" Speech at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/10/00, p 32.
[229] Annual Report of the Director General of Fair Trading, 1996, p 51. The text of the voluntary notification form is available at www.bundeskartellarnt.de.
[230] "Business leaders call for reform of competition law to be diluted" (2000) FT 22 May, 5.
[231] "Competition law clashes with EU cartel plans" (2000) FT 10 October, 5.
[232] Global Counsel: Competition Handbook 2000 (available on www.lawdepartemtn.net/global as at 3/3/01)
[233] G Borrie, Foreword in B Rodger and A MacCulloch op cit., p viii.

has the potential to result in an increase in the number of such requests following reform. Boyce believes that:

> "...most of the time companies know whether or not they will get exemptions....It should be unusual that there should be a gulf in opinion between the Commission and the company. And you can always go for an informal chat with the Commission and get some sort of reassurance."[234]

The problem post notification days, is that this ability "to go for an informal chat" will heighten the pressure on the OFT in terms of resources and scrutiny. Consistency of advice must be ensured for the purposes of both the successful implementation of the Chapter I Prohibition and devolved control. Silence on the part of the Government and OFT in this respect only increases the uncertainty regarding the future status of informal advice.

The end of the domestic notification system would require deletion of sections 4 and 5, although section 9 should be re-framed as the criteria for finding that an agreement will not be void under the Chapter I Prohibition, by guiding undertakings in assessing agreements and offering commitments. The use of commitments should be provided for by amendment to the Chapter I Prohibition to incorporate similar provision as Articles 7, 9 and 10 of the Draft Regulation. Sections 12, 13, 14, 15 and 16 of the Act would become obsolete, as would section 41.

The EC proposals also envisage a wider role for judges who are allowed to consider Article 81(3) and rule accordingly, although under the Competition Act 1998 they are not able to make such a decision in respect of section 9.[235] However, a survey given to a conference in London indicated that "multinationals in the UK and Germany expect competition reforms to trigger a surge of litigation that national

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[234] Comments By J Boyce of Slaughter and May in "New competition rules clear the way" (1999) The Lawyer 17 May, 16.

[235] Fourth Report, Select Committee on European Union (29/2/00), paragraph 56, with doubt expressed as to whether the UK courts were up to the challenge (Mr Justice Ferris and Mr Justice Laddie, paragraphs 57 to 59), consistent with the Government's doubts as to the ability for national courts to apply Article 81(3) criteria.

courts are badly equipped to handle."[236] Rodger identifies the possibility that national courts "...may be faced with situations where undertakings argue that an agreement produces an effect on inter state trade and can satisfy the criteria of an Article 81(3) exemption."[237] Given the possibility of one party raising a defence based on Article 81(3) because the agreement is in fact an EC agreement, it is arguable that in the UK the CCAT should be the body that is given the power to apply Article 81(3) and not the High Court (since it is the CCAT that has been singled out as the best placed authority to determine Third Party Actions). Indeed, ECOSOC is in favour of the establishment of specialised courts in all Member States.[238] It is appreciated that the difficulty with this will be determining which disputes should start in the CCAT: a competition defence might not be raised until a breach of contract action has been commenced in the High Court[239]. However this should not be an insurmountable task. The domestic court system is used to specialist courts, for example the RPC and the Patents and Technology Court[240]. Emphasis would obviously be placed on legal advisers to ensure that proceedings are issued in the correct court, but this should not prevent the ability of the role of the CCAT to be extended. Bloom finds it "...likely that we shall see a variety of approaches develop to the relative roles of regulators and competition authorities in Europe"[241], with the UK model holding the potential for an effective template for others to copy. The UK should strongly advocate its proposals for the establishment of specialist courts. This is consistent with the evidence given to the House of Lords that the use of mainstream national courts should be restricted.

As for changes needed to the Competition Act 1998 guidelines, Article 2 of the Draft Regulation proposes that undertakings "...invoking the benefit of Article 81(3)" should bear the burden of proof as regards its criteria.[242] Consequently, it is

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[236] "Move for support over competition reforms" (2000) FT 13 June, 10.
[237] BJ Rodger in B Rodger and A MacCulloch op cit., p 74.
[238] White Paper on reform of Regulation 17: Summary of the observations (DG Comp Document, 29/2/00) paragraph 5.2.
[239] Jones and Sufrin also find that this will be a difficulty in the creation of specialised courts (A Jones and B Sufrin op cit., p 1036).
[240] Previously called the Official Referees Court.
[241] 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.
[242] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 2 and p 14.

even more important the DGFT publish full guidelines acknowledging the fifth element of Article 81(3). As for the development of domestic guidelines, Ridyard is concerned by the OFT's guideline on the discounts offered to customers in the telecommunications sector[243] which he finds "...is approximately 180 degrees from the position taken in paras 121/122 of the EC Commission's Notice on application of the competition laws to the telecoms sector".[244] It is therefore even more important that the Guidelines are clear and precise if uncertainty in the devolved regime is to be avoided.

5.3.7 Interim Remedies

While "...national court interim relief may be speedier than that before the Commission, an interim decision from the Commission is valid throughout the community, whereas an injunction from a national court will have little effect outside the Member States where it is granted."[245] This remains the position following the reform proposals, although the Commission advocates that NCA's will be able to make interim measures where there is a "prima facie finding of infringement"[246]. Consequently the DGFT will have to operate two tests for the imposition of interim measures, unless it continues to contest the higher burden of proof imposed under EC law.

5.3.8 Co-operation

Co-operation is the key to devolved control. Even without the specifics in place, the OFT already partakes in a great deal of co-operation. In 1998 "...international co-operation to deal with the multinational cartels...became the subject of an OECD Recommendation...[and] there was continued discussion of the scope for increased cooperation generally between Member Countries."[247] The OFT

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[243] Application in the Telecommunications Sector (OFT 417, 1998 Draft) paragraph 7.30.
[244] D Ridyard "Market Power – an Analysis of Price Discrimination Abuses under Article 82" Discussion Draft May 2001, Paper delivered at the BIICL Conference on 18 May 2001, p 11, footnote 13.
[245] 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.
[246] Proposal for a Council Regulation (implementing Articles 81 and 82 of the Treaty) (COM(2000) 582 final, 27/9/00) Article 8.
[247] Annual Report of the Director General of Fair Trading, 1998, page 55.

informally exchanges "...views on such matters as market definition and has for example, regular meetings with, and seconds personnel to and from, the German and French authorities."[248]

The DGFT informs us that:

> "In 1996, staff from my Office began an exchange scheme with the German Cartel Office, under which experts from each country spend a week or so working in the other's competition authority. A similar scheme is under consideration with the French competition authority, the Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes."[249]

> "A number of attachments were...organised as part of the staff exchange programmes established with the German and French competition authorities...A Portuguese official also visited the Division under the European Commission's Karolus Exchange Programme, which is aimed at improving communication and co-operation between Member States' authorities."[250]

> "There has been a general increase in informal co-operation on mergers between national authorities, especially, as far as the United Kingdom is concerned, with France, Germany and the United States."[251]

> "During 1998, the OFT's Competition Policy Division received a total of 39 overseas visitors, just under half of whom were visiting as part of technical assistance programmes. They included officials from the Polish, Lithuanian, and Slovakian competition authorities which, as part of the preparations for their countries' eventual accession to the European Community, are working on strengthening their national competition

[248] D Trapp and M Truman "New co-operation notice: cherry picking or double jeopardy?" (1998) III(2) Global Counsel 38, 39.
[249] Annual Report of the Director General of Fair Trading, 1996, page 11.
[250] Annual Report of the Director General of Fair Trading, 1997, page 54. This has continued with official from "Cyprus, Hungary, Malta and Turkey" in 1999 (Annual Report of the Director General of Fair Trading, 1999, page 62).
[251] Annual Report of the Director General of Fair Trading, 1998, page 17.

legislation and enforcement procedures."[252]

Further, the OFT in 2000 hosted:

> "...the largest ever gathering of international cartel busters. Senior officials from 25 competition authorities, including the US Department of Justice, the Australian Competition and Consumer Commission, the Fair Trade Commission of Japan and authorities from Europe met over two days to share experiences and methods."[253]

Walker-Smith found the international cartel workshop of huge benefit for "Although competition authorities are, in most cases, precluded by national law from exchanging information on cartel investigations, we felt we had a lot to teach each other in terms of how we approach the job"[254], for example, the Canadian's "...ten years experience of investigative IT".[255] It can therefore be seen that the basis for co-operation is already in place on an international level, even though there are no mechanism in place for formal harmonisation.

Whilst formal harmonisation may not be a requirement on the global market[256], if we are to have effective application of EC law in order not to jeopardise the development of the Chapter I Prohibition, this is an issue that requires explicit resolution by Member States. This is possible, since other areas have already achieved such agreement: "In preparation for the Injunctions Directive which aims to protect the collective interests of consumers cross-border...IMSN Europe members agreed to an OFT proposal to seek to ensure effective enforcement cooperation on cross-border cases"[257]. Similarly, "The OFT participated in the launch of the EEJ-Net, supporting the EC in its attempt to coordinate and link existing out-of-court Alternative Dispute Resolution processes across all member states. EEJ-Net was developed in parallel with and to support the Injunctions

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[252] ibid, pages 55 and 56.
[253] Annual Report of the Director General of Fair Trading, 2000, page 29.
[254] A Walker-smith in "Altogether better in cartel crackdown" (2001) 29 Fair Trading February, 12.
[255] OFT press release PN 46/00, 21/11/00.
[256] See Chapter 6, infra.
[257] Annual Report of the Director General of Fair Trading, 2000, page 87.

Directive."[258] Formal arrangement would at least decrease the potential for challenges from other NCA's. The direct action that was suggested by Belgium in considering taking the UK to the ECJ to challenge the UK's blocking of the acquisition by Interbrew, which would have been unprecedented in merger law, should act as a warning for the future success of the NCA network.

5.4 Conclusion

Gerber, in analysing the modernisation of European Competition law, refers to the "European Competition law system" to mean "both E.U. and Member State laws, because they are closely interrelated. Changes in one part of the system tend to have impacts on other components and on the relationships among them."[259] The UK's decision to press ahead with the reform of the Competition Act 1998 without waiting for the EC's reforms to be finalised is very short sighted. Devolution is already showing itself to be the sensible solution in a globalised market (for example, the Commission terminated its investigation in CD pricing, finding that the problems highlighted existed in single territories, and consequently passed the matter to Member States[260]).

Adopting the best of what each can offer is possible, for example, the EC following the UK in the latest leniency notice, and can deliver the best form of control. If this is what the UK are trying to achieve, by bull-dozing ahead with the imposition of new powers to investigate markets and criminal penalties, their time and energy would be better spent in constructive dialogue with the EC rather then implementing reforms that are on the whole premature, only serving to provide inconsistency, confusion and hinder the success of the Chapter I Prohibition.

In light of the changes that will be needed to the Chapter I Prohibition, the resistance on the apart of the Government to consider the EC issues might be a way of preserving image and standing on the domestic scene. However, the whole point of the adoption of the Competition Act 1998 was to ensure that we had a dynamic

[258] ibid.
[259] DJ Gerber "Modernising European Competition Law: A Developmental Perspective" (2001) 4 ECLR 122.

and responsive set of rules, to deal with a dynamic market place. By not tackling these issues now, the Government is setting itself up for criticism and ridicule (in the same way as it ridiculed the Conservative Party for not dealing with the reform of the RTPA). More importantly it seriously hinders the sustainability of the Chapter I Prohibition.

The steps that must be taken in order to sustain the Chapter I Prohibition, in summary are:

(1) Clarification of the relationship between the Chapter I Prohibition and the new investigating market power[261]. Rather than merely stating what the UK will do in future, the Government would be better in positively standing behind their concerns with the interpretation of Article 81 and supporting these new powers as the basis for wider application under EC law. Transparency in the relationship between the domestic powers and the interpretation of Article 81 are essential to the successful working of both the Chapter I Prohibition and devolved application of Article 81 by the OFT.

(2) Encouraging confirmation that the DGFT can make an Article 234 reference.[262]

(3) Greater transparency in the operation of the Chapter I decision making process and complete market definition analysis to ensure that aggrieved undertakings are not able to frivolously argue jurisdictional points as to the relevant law.[263]

(4) Introduction of Chapter I Prohibition commitments to ensure that a formal process exits, ready to deal with the likely increase in the demand for OFT advice resulting from the increased EC de minimis thresholds. This should

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[260] "Brussels abandons probe into CD price fixing" (2001) FT 18 August, 1.
[261] See 5.3.1, supra.
[262] See 5.3.2, supra.
[263] See 5.3.3, supra.

be implemented by specific amendment to the Competition Act 1998.[264]

(5) Domestic notification to end (by specific amendment to the Competition Act 1998)[265]. Harmony in the application of how undertakings seek comfort under the Chapter I Prohibition and Article 81 is essential if the OFT is to avoid being deluged for notification under the Chapter I Prohibition as a fail safe measure post devolution. The OFT must be forceful and clear in stressing when it will listen to undertakings and how it will respond. The introduction of domestic commitments assists these objectives.

(6) Progress the debate on the formal harmonisation of procedures and sanctions.[266] To do so now, ensures that the UK is better placed to argue that the measures taken in designing the Chapter I Prohibition are the correct way forward[267] (leaving it to later may could well result in the all the effort put into getting the Chapter I Prohibition in force, being wasted). Indeed, until the finer details of the NCA network and cooperation for investigations is established, the UK White Paper proposals for investigations are premature. Whilst progressing the debate, the OFT must ensure that it will be careful as to the evidential requirements when conducting EC investigations since all national remedies (including personal criminal offences) are to be available to the OFT, and in any event, an EC investigation might conclude that the problem is a domestic one. This should be set out in specific guidance as to the conduct of investigations post domestic and EC reform.

(7) Formalisation of complaints handling procedure, with a four month target (as the maximum period in which a decision is to be reached) to be adopted.[268]

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[264] See 5.3.4, supra.
[265] See 5.3.6, supra.
[266] See 5.3.5, supra.
[267] See 5.3.8, supra.
[268] See 5.3.4, supra.

(8) Specific amendment of section 55, so as to provide for the exchange of information between the OFT and other competition authorities within the EU[269], although this is likely to be dealt with under the Enterprise Bill[270].

(9) The role of the CCAT to be extended to deal with disputes concerning Article 81(3) defences.[271]

(10) Defence of the right to an interim measure at EC level to be judged at the lower Competition Act 1998 burden of proof.[272]

[269] ibid.
[270] See Chapter 4, supra.
[271] See 5.3.6, supra.
[272] See 5.3.7, supra.

CHAPTER SIX

The www factor: A further challenge for the Chapter I Prohibition

"The internet changes everything."[1]

6.1 Impact of the www "market"

A few Members of Parliament during the Competition Bill debate alluded to the impact of this development:

> "The traditional markets of broadcasting, telecommunications, computing and media are converging....These high-tech markets are very different from traditional commodity utilities such as gas, water and electricity. Digital information can be processed, packaged and stored and applied as new products which appear in "cyberspace"."[2]

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[1] Bill gates, "Business @ the Speed of Thought – 1999", quoted in e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) section 2.

[2] Lord Cocks of Hartcliffe, Official Report, Second Reading Competition Bill, House of Lords. Column 1182, 30 October 1997, House of Lords internet, where the noble Lord referred to Oftel's 1997 conclusions that the traditional market distinctions in telecoms, IT and broadcasting were fast breaking down. Larouche finds that the cyberspace "...aptly defin[es]the situation where communication networks become territory, albeit virtual, but otherwise like any other physical territory. As such, this virtual territory requires rules of jurisdiction, but the rules applicable to physical space do not provide much guidance in that respect. At this juncture, only close co-

"The communications and information technology revolution has limitless boundaries and we should not create a recipe for rivalry between different authorities."[3]

"...how we regulate and control the concentration of power in the information age is as big a challenge to Parliament and our democratic process in the 21st century as was brining order and responsibility to unfettered capitalism in the 19th."[4]

"I am not convinced that the information technology field should be the subject of sectoral rather than national scrutiny as regards competition. The IT field is a dynamic and evolving field with strong international features."[5]

"...broadcasting in the traditional sense is moving ever closer to the world of telecommunications and computing. Communication, entertainment and information will be linked in a new sense...channelled into the home through just one gateway."[6]

Thus international aspects of the www phenomenon and telecommunications featured strongly in the debates, with the Director General of Telecommunications being singled out to have his role as regulator and competition authority kept

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operation between the authorities concerned can avoid jurisdictional conflicts." (P Larouche Competition Law and Regulation in European Telecommunications (Oxford, Hart Publishing, 2000) p 339). For the issues of control by legal means, see 6.1.3 infra.

[3] Lord Cocks of Hartcliffe, Official Report, Second Reading, Competition Bill, House of Lords, Column 1183, 30 October 1997, House of Lords internet. The noble Lord was undoubtedly referring to the domestic scene since he goes on to state his belief that the OFT should be a "one-stop-shop" for competition regulation of the telecommunications sector. However, this issue holds true in respect of the wider picture where there is a more pressing concern for the way that the Chapter I Prohibition applies where businesses and consumers are accessing a global market.

[4] Lord McNally, Official Report, Second Reading Competition Bill, House of Lords, Column 1185, 30 October 1997, House of Lords internet.

[5] Lord St. John of Bletso, Official Report, Committee Stage, Competition Bill, House of Lords, Column 920, 25 November 1997, House of Lords internet, when discussing the regulation of telecommunications.

[6] Mr David Chidgey, Official Report, Standing Committee G, Competition Bill, House of Commons, Part 5 pp 2 and 3, 18 June 1998 (afternoon session), House of Commons internet.

separate.[7] However, little was said regarding the application of the Chapter I Prohibition in the www era:

> "If nothing else, rapid technological change means that there must be constant vigilance against new forms of predation..."[8]

> "in this area of high technology and information technology, none of use has a clue what the marketplace will look like in five or 10 years' time when the Bill will still have effect. Technology changes continuously. The Secretary of State must be given the flexibility to recognise that markets are changing and to change the guidelines as she goes along."[9]

However, the opportunity for Parliament to deal effectively with these concerns in 1997 was missed. It is appreciated that the www factor could not be accurately predicted since e-commerce was still very much in its infancy and there was the more pressing concern of dealing with the problems that had dragged on for over two decades:

> "My Lords, just because something is going to change does not mean that it should not be controlled now... it is a bit of a cop-out to say that we should not lay down precise rules because everything changes so rapidly."[10]

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[7] Lord Fraser of Carmyllie, Official Report, Committee Stage, Competition Bill, House of Lords, Columns 925 and 926, 25 November 1997, House of Lords internet. In this part of the debate, Baroness Dean of Thornton-le-Fylde said the "The average shelf-life of a Competition Act seems to be about 15 years." (Official Report, Column 927), but there was concern expressed that the Government needed to be very aware of the pace of convergence between telecoms and broadcasting, with the resulting change in our lifestyle. Lord Simon of Highbury conceded that "in relation to the pace of redevelopment in this marketplace and the fact that, not only we in this Chamber, but also the regulators will probably always be just behind the game rather than ahead of it." (Official Report, Column 929). "Without being particularly skilled in gazing into the crystal ball of technology, there is every prospect that Oftel might seek to regulate everyone from Microsoft to Asda and Sainsbury...It would be better to take the extremely complicated area of telecommunications away from Oftel and put it under the direct and exclusive authority of the director general." (Lord Fraser of Carmyllie, Official Report, Report Stage 3, Competition Bill, House of Lords, Column 461, 23 February 1998, House of Lords internet).

[8] Mr Oliver Lewtin, Official Report, Second Reading, Competition Bill, House of Commons, Column 87, 11 May 1998, House of Lords internet.

[9] Dr. Stephen Ladyman, Official Report, Standing Committee G, Competition Bill, House of Commons, Part 9 p 2, 16 June 1998 (afternoon session), House of Commons internet.

Yet it is clear that there was enough momentum and debate on the international stage at that time[11] indicating that the www factor would be a significant issue that needed addressing. That is not to say that it has in any way matured into a definable and controllable market (indeed, predictions of its success swing on a daily basis), but having adopted market share as the foundation for the new domestic law without fully exploring the issues raised, we must now examine the consequences and rectify the problems. The Chapter I Prohibition has generated a real tension: e-commerce raises fundamental questions for the Chapter I Prohibition in the shape of competition control per se, market definition, and conflict with other domestic law and international objectives.

6.1.1 Characteristics of e-commerce

e-commerce is not a new phenomenon. Prior to the development and widespread use of the internet, "other technologies based on private or closed electronic networks were already in use to provide electronic communications between commercial entities"[12]. However, the internet is different from such extranets[13]: it "...is an open network which permits communication between parties without the need for both to subscribe to the same closed network."[14] This openness makes e-commerce a "borderless world" where the "new markets will be global, and the opportunites vast".[15] The market "...will continue to shift towards the internet and away from closed system of communications. Indeed, Microsoft has all but

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[10] Baroness O'Cathain, Official Report, Report Stage 3, Competition Bill, House of Lords, Column 460, 23 February 1998, House of Lords internet.

[11] e-commerce was an issue very much on the mind of the DGFT at the time when the Competition Bill was being debated in Parliament. In his 1997 Annual Report, John Bridgeman refers to the fact that "Much of the OFT's international liaison work in the consumer affairs arena during 1997 focused on electronic commerce, the internet and the Information Society in general." (Annual Report of the Director General of Fair Trading, 1997, p 33)(see also 6.3, infra). This was in relation to consumer issues, but if it was seen as a consumer issue at that time, and the Government did spend much time telling us of the importance of the consumer in this new competition law (see Chapter 2 supra), that it was not specifically addressed in the Competition Bill is perplexing.

[12] C Reed and J Angel Computer Law (London, Blackstone Press, 2000, 4th ed.) p 299.

[13] A B2B exchange of sorts was used in the 1980's by car manufacturers (Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 85; submission of the Japanese Competition Authority).

[14] C Reed and J Angel op cit., p 299.

[15] S Edlington Marketing your Business on the internet (United Kingdom, Internet Handbooks/International Briefings Ltd, 2000, 2nd ed.) p 9.

scrapped its on-line creation, MSN, and is now turning to invest in the internet; Mr Gates said that 'The sleeping giant has awakened'."[16]

The growth, following the waking of this sleeping giant, has been incredible:

> "In 1991, the internet had less than 3 million users around the world and its application to e-commerce was non-existent. By 1999, an estimated 250 million users accessed the internet and approximately one quarter of them made purchases online from electronic commerce sites, worth approximately $110 billion."[17]

Whilst "a recent survey of Directors in the UK showed that only 2% of UK Board Directors believe that the internet poses a serious competitive threat"[18], these same people are happy to seize the benefits of increased efficiencies through lower procurement and search costs, and more streamlined processes.[19] Further, other businesses are seizing the www as the means to compete: between 1999 and 2000. "...the connectivity rate for UK microbusinesses (0-9 employees) rose from 15% to an amazing 55%".[20]

However, in beginning to examine what we are dealing with here, the first problem faced by all is what e-commerce actually means. There is no single definition, but one thing for certain, e-commerce "...doesn't boil down to simply shopping on-line. e-commerce goes to the core of "all" business."[21] According to Reed and Angel,

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[16] C Gringras "Competition in Cyberspace" (1996) 2 ECLR 71, 74.
[17] E-commerce: Impacts and Policy Changes (OECD Economics Department Working Papers No. 252, prepared by J Coppel, 30/6/00) p 3.
[18] e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) Foreword.
[19] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 2.4; E-commerce: Impacts and Policy Changes (OECD Economics Department Working Papers No. 252, prepared by J Coppel, 30/6/00) p 14.
[20] E Likkanen "Realising our vision of a global information society: from revolution to evolution" Speech delivered to the 3rd Annual Conference of the GBDe (Global Business Dialogue on e-commerce) in Tokyo, 14/9/01 (www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt.../386|0|RAPID&lg=EN as at 17/1/01).

"taken at its most generic sense electronic commerce could be said to comprise commercial transactions, whether between private individuals or commercial entities, which take place in or over electronic networks. The matters dealt with in the transactions could be intangibles, such as data or information products[22], or tangible goods such as books and T-shirts[23]. The only important factor is that some or all of the various communications which make up these transactions take place over an electronic medium."[24]

It can be further dissected into "'process' e-commerce – managing the vital flows of information within industry supply chains – and 'transaction' e-commerce, selling products and services within industry (and Government) or to consumers."[25]

All this commerce is conducted over the www infrastructure, that is "...a network of networks connected by the high speed "pipes" of the internet "backbone" providers."[26] This "interconnection between individual networks results in the internet's main feature: universal interconnectivity[27]. Each user connected to the internet can communicate with any other user, collect information or distribute it around the world."[28] Connection to this network is either made via a modem to dial

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[21] E Liikanen "Is there a third way for the Internet in Europe?" (Speech at the Global Internet Summit, Barcelona, 22/5/00) p 3.
[22] That is, products that can be "transmitted electronically or 'downloaded' to the customer's computer." (IJ Lloyd Information Technology Law (London, Butterworths, 1997, 2nd ed.) p 466).
[23] A full list of the types of goods on offer (including music, videos, DVDs, games, toys, books, newspapers, food, drink, clothes, beauty products, flowers, holidays and travel, electrical goods, cars, caravans, boats and furniture) and the web sites offering those goods on line, is given by K Lambert Shops and Shopping on the internet (United Kingdom, Internet Handbooks/International Briefings Ltd, 2000) Chapters 6 to 11.
[24] C Reed and J Angel op cit., p 300.
[25] e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) paragraph 1.3.
[26] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) p 7. A good account of the development of the internet is given in P Ruttley "E.C. Competition Law in Cyberspace: An Overview of Recent Developments" (1998) 4 ECLR 186. "The core infrastructure of the internet consists essentially of three components. *Routers* (also called switches) are computers designed to receive and forward packets of data in electronic format. The routers are supported by *hosts* (often referred to as servers, which store programs and data). The routers are linked to the hosts by telecommunications connections known as *pipes*." (C Vajda QC & A Gahnström "E.C. Competition Law and the Internet" (2000) 2 ECLR 94, 95).
[27] Openness has become a key feature of this new commerce: it is "...business occurring over networks using non-proprietary protocols established through an open standard setting process" (Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) p 7. The OECD's paper is based on a roundtable on e-commerce held by the Committee on Competition Law and Policy in October 2000), although this exchange across electronic networks, at present, may be paid or unpaid depending upon the type of exchange and access requirements.
[28] C Vajda QC & A Gahnström "E.C. Competition Law and the Internet" (2000) 2 ECLR 94.

up an Internet Service Provider[29] (ISP) using a telephone line, or the line can be converted to ISDN (Integrated Services Digital Network), a digital telephone service which increases speed of access and is always connected to the web.

Once connected, the web user is able to view various "domains". These are areas identified by unique addresses or URL's (Universal Resource Locator). This uniqueness is guaranteed by registration[30], which is constructed as a hierarchy:

> "It is divided into top-level domains (TLDs), with each TLD then divided into second-level domains (SLDs). A number of TLDs carry a country-code (ccTLDs) while a small set of top-level domains (gTLDs) do not carry any national identifier, but denote the intended function of the domain space (e.g. .com for commercial organisations, .org for not-for-profit organisations or .int for international organisations."[31]

The .com originally used mostly in the US, is now the preferred option for UK companies (instead of the .co.uk), "since it implies an international company".[32] Indeed,

> "the American ".us" domain is virtually unused...[because] American companies recognised the value of a short international domain name early

[29] ISP's are companies that provide access to the web for individual and business users. They connect the users home or business to the local loop (that is, the fixed link telecommunications network connecting the subscriber to the main distribution frame).

[30] The uniqueness led to a growth in "cybersquating" where names were registered by individuals with no connection to the actual description given by the name, in an attempt to sell the address to the individual or undertaking actually described by the wording used. The domain name system is administered by ICANN (Internet Corporation for Assigned Names and Numbers) which is a private not-for-profit US corporation, incorporated on 1 October 1998, to oversee the registration process by Nominet in the UK and VeriSign (previously Network Solutions Inc (NSI)) in the US. This system has not been without its difficulty, with the suggestions of abuse of a dominant position by ICANN. The relationship between ICANN and NSI in the registration of names was considered by the Commission to possibly violate Article 81 and constitute an abusive practice within Article 82 (p 201), Commission press release IP/99/596, 29/7/99 and JB Nordemann, C Czychowski and PW Grünter "The Internet, the Name Server and Antitrust Law" (1998) 2 ECLR 99, 105. The EU criticised the original US proposals to amend this as they "...would not ensure an appropriate representation of non-United States interests at the board level" (L Garzaniti Telecommunications, Broadcasting and the Internet: E.U. Competition Law and Regulation (London, Sweet & Maxwell, 2000) p 131).

[31] L Garzaniti op cit., p 130. The main .uk domains are .co.uk (commercial site), .org.uk (not-for-profit organisation), .net.uk (internet infrastructure company), .ltd.uk (limited company), .plc.uk (public company), .sch.uk (school) and .ac.uk (academic institution).

> on....e.g. a conceivable "http://www.ibm.com.us" seemed far less attractive than "http://www.ibm.com". In addition, ".com", which initially was virtually unknown, is also accessible to applicants who are not established in the United States. ".com" therefore provided an initial opportunity for completely overcoming national frontiers in nomenclature on the internet."[33]

As such, .com is now "the most valued"[34]. Indeed the expansion of internet usage has demanded the creation of new generic TLDs, which have been determined by ICANN following consultation.[35] Recently announced by ICANN are .biz[36], .info[37], .name[38], .pro[39], .aero[40], .coop[41], .museum[42]. The TLD .law has just been resealed for purchases to be registered[43]. Also under consideration are .firm for businesses, and .store for businesses offering goods for purchase. Consistent with the desire of business, these will all remain generic, confirming that the future of www URL's will be non-territorial, enabling undertakings to set a global service and move into new geographic territories.

However, the web user does not need to know a specific URL in order to find the good or service desired. Portals are sites bringing together a catalogue of other sites by "...providing links to – and hosting content from – other sites"[44]. In the shopping arena they are the electronic or cyber mall, allowing the customer to *search* for the product or service required.[45] The customer is further assisted by

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[32] S Edlington op cit., p 18.
[33] JB Nordemann, C Czychowski and PW Grünter "The Internet, the Name Server and Antitrust Law" (1998) 2 ECLR 99, 99 and 100.
[34] C Vajda QC & A Gahnström "E.C. Competition Law and the Internet" (2000) 2 ECLR 94, 95.
[35] L Garzaniti op cit., p 132.
[36] Businesses and corporations. Along with .info, the implementation process for registering new sites with these TLDs has begun, with the new names due to appear on the web in Autumn 2001 ("ICANN: Top level domains" (2001) XII(7) PLC August, 12).
[37] Information based services.
[38] Individuals' and personal web sites.
[39] Professions and professionals.
[40] Services and undertakings dealing with air travel.
[41] Co-operative organisations.
[42] Museums, archival institutions and exhibitions.
[43] "Name that site" (2001) 98/28 Law Society Gazette 12 July, 22.
[44] E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) footnote 25, paragraph 3.28.
[45] A full list of cyber malls is detailed in K Lambert op cit., pp 34 to 43.

"bots" that enable comparisons to be made between prices etc.[46] Once at a web site, links or banners[47] can be utilised to further assist in searching and comparing the alternatives on offer. However, some links bypass home pages so that the user may never realise that they have left one site and are now in a different domain. Recently a German court granted an injunction against a rival undertaking linking its own pages to those of a competitor[48], demonstrating just one aspect of the ability of the technology employed by the internet, to manipulate and generate and unfair advantage over competitors[49]. Another aspect of the technology that has been abused is the metatag. Metatags are the "technical term for the keywords used in [a] web page code to help search-engines software rank your site".[50] In the same way that links can divert users away to different sites, so can these codes: they can be designed to promote particular sites but unlike links and banners, this is achieved without the user knowing.[51]

E-commerce has generated a whole new language when it comes to describing the methods of trading.[52] The most common forms of trading are B2B and B2C.

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[46] See 6.1.2, infra.

[47] These are "small pieces if highlighted text or graphics that move you from one web site to another, or to another page within a web site" (S Edlington op cit., p 185) and "...are the cornerstone of many a web marketer's campaign" (p 57) as they take you to a new site, away from the one you were originally looking at. This can be curtailed somewhat by the use of frames (keeping the original site open on the screen, like a border a framing the new site).

[48] "Online recruiter wins ban on rival's web links" (2001) FT 17 January, 4, in respect of the action brought by Stepstone against OfiR. This followed a ruling in the Netherlands in September 2000 that Dagblad, a Dutch newspaper was liable for deeplinks it had created into the Dutch Association of Real Estate Agent's (NVM) online database of homes, by which the user went straight from the newspaper's website to that of NVM, bypassing NVM's home page and was thus under the impression that the site was that of the newspaper ((2001) PLC March 15). These were based on the infamous interlocutory decision by The Outer Court of the Scottish Court of Session that deep hypertext links to a third party's website are prima facie a breach of copyright in literary work under section 17, Copyright Designs and Patents Act 1988 (Shetland Times Limited v Wills (1997) FSR 604 (OH)).

[49] e-mails also provide a method of gaining a competitive advantage. Whilst lacking the interactive element of the internet, e-mail is increasing being used to market products and inform consumers. One "US convenience food company...posts e-mails to consumer's offices between 4.30 and 5.30pm because research has shown that is when they start thinking about what to buy for dinner that night on the way home." ("The appliance of e-science" (2001) E-Marketing Supplement The Times 12 June, 2). This will in the future impact on the products/services that consumers find substitutable, although unsolicited e-mails are prohibited, curtailing their use, assuming of course that the e-mail system is actually capable of being policed.

[50] S Edlington op cit., p 185.

[51] Mandata was successfully sued by its competitor Road Tech Computer systems for using metatags to divert internet traffic from the Road Tech web site to its own ("Court Rules on Internet Trade Mark Use" (2000) FT 2 June, 4).

[52] B2B (business to business), B2C (business to consumer), C2C (consumer to consumer), C2B (consumer to business), B2A (business to administration), C2A (consumer to administration), and new derivatives will continue to form as usage increases. Although some forms of contracting and

Whilst B2B is the most popular type of exchange, analysis "is made more difficult by the fact that there is no single model for electronic marketplaces. They defy standardisation and come in all shapes, sizes and colours."[53] As for B2C, this "...may have its greatest influence on goods and services deliverable over the internet (e.g. music, video, travel agency services including ticketing and computer software)"[54], but is still in its infancy[55]: B2B accounts for over 80 per cent of total e-commerce[56], while "B2C is more of an evolution. Consumer behaviour plays a critical part in the acceptance of B2C, and human behaviour is not something that can be changed by management decisions."[57]

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transacting have yet to become established, "as welfare payments and self-assessed tax returns" (B Urrutia "Internet and its effects on competition" (Speech delivered to the Univeridad Internacional Menendez Pelayo (UIMP) Workshop, Barcelona, 10/7/00) p 10) are conducted within the realms of the internet by Government, so they will increase. "The Government is committed to communicating electronically through the Better Government Initiative; the Prime Minister has set the target that by 2002, 25% of dealings by citizens with government should be able to be done electronically." ("Building Confidence in Electronic Commerce" www.dti.gov.uk/cii/ecommerce/ukecommercestrategy/archivecons.../introduction.shtm as at 5/5/01). As an incentive to encourage internet filing of tax returns, the Government introduced provision for discounts to be given (The Income Tax (Electronic Communications)(Incentive Payments) Regulations 2001 (SI 2001 56) (www.inlandrevenue.gov.uk as at 11/1/01). The Government has amended the Companies Act 1985 to allow for certain notices to be given electronically (The Companies Act 1985 (Electronic Communications) Order 2000 (SI 2000 No. 3373). The private sector is also moving to use the internet as a means of formal communication, with NAPF (National Association of Pension Funds) retaining E-Vote (an electronic voting company) to provide an internet voting system for its institutional shareholders ("Pension funds in deal to provide internet voting" (2000) FT 2 February, 6).

[53] VE Vig "Preliminary antitrust analysis of B2B e-commerce" (2001) The Antitrust Review of the Americas (A Global Competition Review Special Report) 6. "Some are founded by the companies who use them; some are founded by third parties who do not plan to buy or sell through them; some are a blend of the two...Prices can likewise be established in various ways: by auction, catalog, a bid-ask system, or negotiation..." (Entering the 21st Century: Competition Policy in the World of B2B Electronic Marketplaces (A Report by the Federal Trade Commission Staff, October 2000) p 1). "They can be carried out either in a horizontal or vertical marketplace: an exchange is horizontal when it caters for a variety of market participants and sectors; by contrast, it is vertical when the focus is on a particular industry." (F Alese "B2B exchanges and E.C. Competition Law: 2B or not 2B?" (2001) 8 ECLR 352). Collectively they may be termed "e-hub" (E Vollebregt "E-hubs, syndication and competition concerns" (2000) 10 ECLR 437).

[54] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 3. A detailed review of the economics of B2C in both non-tangible and tangible goods is given in Appendices 4 and 5, respectively, of The Emerging Digital Economy (US Department of Commerce) (www.ecommerce.gov as at 10/9/00).

[55] B2C only accounted for 0.3 per cent of total retail sales in 2000 (E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 3.61).

[56] E Liikanen "Is there a third way for the Internet in Europe?" (Speech at the Global Internet Summit, Barcelona, 22/5/00) p 4. It is likely that there are more than 900 B2B marketplaces worldwide (E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 3.66. A detailed review of B2B that has emerged so far is given in Appendix 3 to The Emerging Digital Economy (US Department of Commerce) (www.ecommerce.gov as at 10/9/00).

[57] E Liikanen "Is there a third way for the Internet in Europe?" (Speech at the Global Internet Summit, Barcelona, 22/5/00) p 4.

In the same way that B2B comes in various forms so does B2C. The web has also proved the ideal way of matching goods and services with willingness to pay through auctions. The biggest site is eBay, although more specific sites are becoming established, such as priceline.com, which enables the purchase of air travel tickets at the price the customer is willing to pay (by searching out tickets that operators have not been able to sell).

With these aspects of the new forms of commerce in mind, the question causing concern is whether internet transactions are separate from or part of the traditional market. There is no straight forward answer: "In some cases e-commerce may create new markets for the purposes of competition policy, but on other occasions it may simply constitute a new sales channel, which competes with traditional sales channels, lying within the same market."[58] Indeed, most traditional High Street[59] and mail order retailers have led the way in internet shopping, by publishing their ranges from catalogues on so called catalogue web sites.[60] These provide cheaper overheads, saving on postal expenses and allow easier updating of prices and items. Sometimes these are classed as an advertising site, but even here there is a mix between those that offer only adverts in an attempt to stimulate offline purchases and those that also take orders through this medium. Whilst some traditional High Street undertakings have developed new online services "...such as Prudential's Egg banking service and Dixon's Freeserve"[61], "eight out of 10 of the top fastest growing sites [are] traditional offline retail brands"[62] such as tesco.com.

Akin to established methods of trading such as mail order, telephone, distance selling, Frontier find that the nature of www transactions will only change if new technology provides a more efficient method of undertaking commerce[63].

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[58] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) p 101, submission of the OFT.
[59] A full list is given in K Lambert op cit., pp 67 to 81.
[60] K Lambert op cit , p 54.
[61] Competition in e-commerce: a joint OFTEL and OFT study: Consultation document (OFTEL/OFT, April 2000) p 3.
[62] "E-tailers cry out 'Long live the High Street'" (2001) The Daily Telegraph 8 February, 6E.
[63] E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 2.12; although they note that the MMC concluded in the proposed merger between Littlewoods and

However, this new medium brings with it a new generation who have grown up interacting with it. Consequently we can expect to see unprecedented usage and reliance on e-commerce, compared to any of the previous alternatives to high street shopping[64]. Even now, there are undertakings that use the www as the sole selling medium. They have utilised the internet as a means of offering only internet purchases, that is, goods or services that can only exist internet the online world, or are only offered for purchase via the web[65] (as a means to encourage use of the web site). The ability for increased choice on line combined with a www minded generation will see the shift to more transacting on line.[66]

6.1.2 Towards perfect competition

The internet alters the way that businesses and consumers meet, contract or discover each other, and has "...potentially lowered both search and transaction costs. It follows that e-commerce could widen product and geographic markets and render them more transparent and competitive."[67] It has been suggested that the internet should be monitored as "a potential ally" to competition authorities.[68]

Freemans that mail order sales were a market on their own (footnote 41, paragraph 4.6). "In Bertelsmann/Mondadori (Case IV/M.1407, OJ 1999 C145/4) the parties contended that the relevant product market consisted of the sale of books regardless of distribution channels. The Commission, however, considered that it might be possible to distinguish a market for so-called "distant selling", one including book clubs, mail order and sales via internet, as well as any other form of distant selling. The main reasons for distinguishing a potential separate product market for distant sales of consumer books were according to the Commission that consumers can make a choice from a catalogue (or similar) at home (not in the presence of the seller), consumers can send them back with reimbursement, and that a segment of the population that lives in remote areas has no alternative to home shopping. The exact delineation of the markets were, however, left open since the merger did not raise any anti-competitive concerns." (C Vajda QC & A Gahnström "E.C. Competition Law and the Internet" (2000) 2 ECLR 94, 97).

[64] Support for this submission is found in The Emerging Digital Economy (US Department of Commerce) p 41 (www.ecommerce.gov as at 10/9/00), where it is noted that "over the next decade, as today's children become adults, shopping on the internet will be easy and natural to them." However, this is one aspect which the majority of reports and articles omit to consider or mention, most notably the Frontier Report prepared for the OFT.

[65] "Wal-Mart, the major US discount chain, is already carrying more than ten times as many product lines on its Web site as in its largest store" (e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) paragraph 3.14).

[66] See 6.2 infra.

[67] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 2.2.

[68] M 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 7.

However is it necessarily the case that the www factor will wipe out the need for competition law?[69] The technological revolution has, in theory, the ability to deliver the conditions demanded by the model of perfect competition, on a scale never seen before :

> "A basement computer room at Buy.com headquarters...holds what some believe is the heart of the new digital economy. Banks of modems dial out over separate ISP accounts gathering millions of prices for consumer products: books, CDs, videos, computer hardware and software. Specially programmed computers then sift through these prices, identifying the best prices online and helping Buy.com deliver on its promise of having "the lowest price on earth"."[70]

The buyer is further assisted by the bot, which is a shopping agent programme designed to search for the products specified and display a list of the best deals available. These bots "...are fast becoming a key part of the online world."[71]

These aspects distinguish the internet from other forms of distance selling, where the consumer is limited by the choice on offer in catalogues and mailing lists. The OFT recognise that differences in "the US/UK differential on portable minidisc player prices [are] now avoidable by electronic purchasing".[72] The internet alters the OFT's characterisation of the end-consumer in retailing as small, immobile and uninformed.[73] Transparency is also provided amongst sellers since the use of search engines such as deja.com[74] will show who its competitors are and how they

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[69] After all, it was mooted that on possible remedy to solve the complex monopoly situations existing in the supermarket sector, would be to "require supermarkets to put their prices on the internet." (DTI press release P/2000/674, 10/10/00, although this was later rejected as the problems it currently presented in practice outweighed the benefits).

[70] MD Smith, J Bailey & E Brynjolfsson "Understanding Digital Markets: Review and Assessment" (www.ecommerce.mit.edu/papers/ude as at 29/9/99) p 1.

[71] K Lambert op cit., p 44. Some online retailers, such as Books.com have this software built in to the web sire so that the consumer can click a price compare button to feel satisfied that they will be getting the lowest price (MD Smith, J Bailey & E Brynjolfsson "Understanding Digital Markets: Review and Assessment" (www.ecommerce.mit.edu/papers/ude as at 29/9/99) p 15).

[72] e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) paragraph 3.9.

[73] Competition in Retailing (OFT Research Paper 13, prepared by London Economics, September 1997), p 17.

[74] S Edlington op cit., p 36. Deja.com is now part of the goggle.com group, which contains even more information.

are marketing their site. The internet is a "...challenge for territorial protection agreements"[75], because customers can "...click their way in seconds from web site to web site across the ever-expanding internet."[76] Just how easy it is to find exactly what you are looking for is perhaps best, but most alarmingly, evidenced by the "adoption" of twins over the internet by Alan and Judith Kilshaw, at the end of 2000.

However, the internet has the potential to also reinforce negative effects of anti-competitive activity: it may "reinforce monopolies or imperfect competition in related markets e.g. in telecommunications or other markets on which the price of access to e-commerce depends"[77]; "by lowering traditional entry barriers and ignoring national boundaries, e-commerce also has the potential to enhance sharply the value of strong brands"[78]; it has already been noted that "search engines can be restricted by codes limiting or distorting access to web sites"[79]; e-commerce "makes it considerably easier to quote different prices to different buyers and to use information about consumer buying habits to identify those willing to pay higher prices"[80]; it might increase buyer power[81]; undertakings still have the ability to

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[75] B Urrutia "Internet and its effects on competition" (Speech delivered to the Univeridad Internacional Menendez Pelayo (UIMP) Workshop, Barcelona, 10/7/00) p 12.

[76] S Edlington op cit., p 9. "It is now quite feasible for an individual to order electronically goods such as CD's computer software, contact lenses, books and a vast range of other commodities from anywhere in the world and the internet offers suppliers the opportunity to compete in markets throughout the world without incurring any expenses involved in establishing a physical presence." (IJ Lloyd Information Technology Law (London, Butterworths, 1997, 2nd ed.) p 467).

[77] e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) Appendix A4, paragraph 3.

[78] ibid, paragraph 3.15. "Branding will become more important with the growth of e-commerce, and especially B2C e-commerce." (E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 3.26).

[79] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 2.2. see 6.1.1, supra.

[80] ibid, paragraph 2.3. whilst the "use of cookies...may enable sellers to retain customers through personalised service and added convenience" (E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 3.30), this information has been used to discriminate between buyers in respect of the prices charged. Cookies are small pieces if text file that helps websites remember who users are, enabling quicker access to the site and abrogating the need to complete full details each time a user subsequently visits the site (www.microsoft.com/info/cookies.htm as at 30/9/00). Amazon.com was exposed for charging different prices for the same DVDs, depending on the amount of site usage: those that were new to the site gained bigger discounts. This discrimination was unearthed following a discussion it one of its' chat rooms, following which regular users reset their PC's so that the cookies were removed, enabling them to obtain the DVDs at the lower prices. Amazon explained this as a "price testing scheme that went awry and was not intended to be discriminatory." ("Amazon's old customers 'pay

confuse the consumer as to how their product is different, so as to limit inter-market comparisons.

Although "over the longer term, e-commerce should widen markets and render them more transparent thus reducing the incidence of market power, price dispersion and price discrimination"[82], any suggestion of the death of competition law is extremely premature. However, the same statement cannot necessarily be made in respect of the Chapter I Prohibition.

6.1.3 Challenges for law

There have been many legal developments attempting to control e-commerce, most notably originating from the EC[83], but these are in response to e-commerce and in many cases is dealing with problems after the horse has bolted: "The law governing electronic commerce in all of its flavours is very much in its infancy, as is clearly demonstrated by the lack of case law on the subject."[84] Generally, in order to solve problems, it is presently a matter of "...apply[ing] existing laws by analogy."[85]

Whilst the assertion that "there is no actual new law here. The law of the internet is a myth"[86] has commanded general acceptance, undertakings seem determined to make the most of the web as a means to test existing legal retrains. For example,

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more'." www.news.bbc.co.uk/hi/english/business/newsid_914000/914691.stm as at 8/9/00). Toysrus.com attempted a more detailed examination of its customers, by "whisking shoppers personal information down an unmarked internet side road to a little-known data processing firm...[to record their] shopping habits" but stopped following being exposed (www.wired.com/news/business/0,1367,38041,00.html as at 28/8/00).

[81] E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 1.17.

[82] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 2.3.

[83] A full summary of the history of EU measures aimed at promoting and controlling e-commerce and the Information Society is given by Garzaniti, op cit., pp 336 and 337. Europe is determined to steam ahead, after falling behind the US in exploiting e-commerce for commercial gain ("Continent in race to smash internal barriers" (2000) FT 27 January, 19). This race has seen the establishment of the European Internet Foundation to help speed up the passage of internet legislation ("EU e-economy forum aims to speed laws" (2000) FT 21 February, 10), and a rush to implement several prices of legislation, although this has demonstrated that "...there is no unified joined-up thinking in the EU institutions." (M Pullen "A view from Brussels" (2000) The Lawyer 21 August, 7).

[84] C Reed and J Angel op cit., p 338.

[85] "Lawless Frontier" (2000) 97/04 Law Society Gazette 27 January, 25.

[86] "Making virtual legislation into a reality" (1999) The Lawyer 27 September, 30.

Tesco's planned to extend its online shopping delivery times on Sundays beyond the legal six hours of trading permitted, by allowing staff to pick up and deliver what had been ordered online at any time. However, this project was unsuccessful.[87] It is the protection of intellectual property rights has seen the greatest legal conflict though, most notably with the challenge to copyright: "as an indication of the interest in MP3, its is consistently in the top ten of search engines!"[88] The biggest challenge has come from Napster, which allows users to search for music stored on other Napster user's computers and then download a digital copy on to their own PC via the web. Various court applications have been brought by the record companies and the odds, legally, are currently stacked against Napster[89]. However, there are plenty of other sites waiting to take over its www throne[90].

The difficulty for undertakings and governments alike, is that they all desire to make e-commerce work. When Argos advertised Sony TV's on its website in September 1999 for £2.99 instead of £299, despite the majority view that it was merely an invitation to treat and no orders had been accepted, there was still litigation commenced to force the sale of the TV's. However, relying on strict legal rules is not conducive to solving these problems in a way that will stimulate e-commerce.

The UK is determined to have the "...world's best competitive environment for electronic commerce"[91]. Yet e-commerce was notable by its complete absence from the presentations on the new UK competition regime delivered to the

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[87] (2000) The Independent 4 July, 18.
[88] e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) box 10.4.
[89] A preliminary injunction was issues in March 2001, prohibiting Napster from engaging in, or facilitating others in, copying, downloading, uploading, transmitting or distributing copyrighted sound recordings ((2001) PLC April, 12). Despite Napster arguing that its new file identification system that screens out listed copyright works will enable 99 per cent. compliance with the injunction, the US District court has imposed a "zero tolerance" standard: compliance must be complete ((2001) XII(7) PLC August, 13). Similar actions against MP3.com resulted in individual agreements between MP3.com and record companies allowing MP3.com to continue to distribute music through its website upon a lump sum payment and an additional fee each time a song is downloaded by the end user ("MP3.com shares fall 42% on music copyright ruling" (2000) FT 29 April, 1; "Warner and BMG settle web rights dispute with MP3" (2000) FT 10 June, 1; "MP3.com agrees $20m Net deal to end EMI dispute" (2000) FT 29 July, 14).
[90] Such as "imesh" and "gnutella".
[91] e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) Foreword.

Fordham Conference in 2000 – no mention was even made of the OFT/Frontier paper, despite the fact that this paper played central role at the OECD roundtable the following week. Its importance in terms of the Competition Act 1998 therefore would appear to be rather low.

Consistent with all other governments, the UK has chosen to deal with e-commerce on the basis of a light touch approach rather than specific regulation[92]: promotion of e-commerce requires encouragement, not hindrance. The UK has appointed an e-envoy and has identified three areas where progress is needed: access[93], understanding and trust[94]. This is a similar story to the European drive to create eEurope[95], that is, to "become the most competitive and dynamic knowledge-based economy in the world" by ensuring access for all, providing a digitally literate Europe, completing the legal framework for the new economy and promoting entrepreneurial Europe.[96] The UK Government find that its' objectives can only be delivered by a "sustained joint campaign between Government and business to ensure that we reap the benefits."[97] The Government would be wise to remember that reliance on businesses was what led to the mess in industry necessitating the RTPA.[98] However, there is little evidence of widespread reliance on business at this stage.[99]

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[92] It is envisaged that "UK leadership will be based on...a recognition of a unique balance between 'light touch' regulation and freedom to innovative expressed through a 'based in the UK' brand such that Government intervention is only used as a last resort" (e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) paragraph 6.3).

[93] "The ability to access high quality electronic content at reasonable cost is a prerequisite to the UK competing effectively with its international rivals in e-commerce." (e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) paragraph 9.1).

[94] The main issues of trust are "fear of fraud; concerns about privacy; anxiety about content; doubt about legal liability; and worry about how redress can be obtained when things go wrong." (e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) paragraph 10.1). to encourage trust in e-commerce the UK is leading the EMERITUS Project (the E-business Model for the Effective Realisations on a TrUst Services infrastructure (e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) box 10.8).

[95] Launched in December 1999 at the Lisbon Summit.

[96] E Liikanen "Is there a third way for the Internet in Europe?" (Speech at the Global Internet Summit, Barcelona, 22/5/00) pp 2 and 3.

[97] e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) Foreword.

[98] See Chapter 2, supra.

[99] The self regulatory watchdog "Internet Watch Foundation" (IWF) has received much praise for its ability to deal with illegal material on the internet (it has been endorsed by ISPs and the UK Government (O Ward "Cyber-policing" (2001) NLJ 9 March, 337, 338)), but its focus is primarily on illicit material.

The www does have its benefits for the OFT, which has used this medium to provide information on competition and consumer issues generally. The OFT must be commended for its excellent Competition Act 1998 website, which proved to be very effective and comprehensive to both practitioner and business whilst remaining easy to use.[100] This site was updated during 2000 and further sites added.[101] However, the www brings with it more substantive issues that the OFT has had to deal with:

> "...we will not hesitate to use new powers, such as those under the distance selling regulations that protect shoppers buying from home, whether by mail order, phone or the internet. As with e-commerce initiatives such as Trust UK[102], the aim is to make home shopping robust and free from abuse, so that consumers can trade confidently with secure rights."[103]

> "The aim of the [e-commerce] directive is to establish a legal framework for the development of e-commerce within the Single Market by co-ordinating Member States' legislation in key areas such as the provision of pre-contractual information, the treatment of electronic contracts and the liability of intermediaries."[104]

Reed and Angel find that whilst "it is valid to ask what *law* applies...and which courts have *jurisdiction*...[t]he fundamental question, and one which is rarely asked, is *whether or not* a contract was actually formed. This naturally leads to the questions of *where* that contract was formed and *when*."[105] However, "determining the location of where electronic commerce activities take place is extremely difficult."[106] Reed and Angel conclude that attempts to "localise electronic

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[100] The importance of an easy to use, clear and comprehensive website remains an issue for the competition pages on the europa website, despite a revamp in summer 2000.
[101] For example, www.oft.gov.uk/html/mergers/mergers-listings.htm for merger advice; www.oft.gov.uk/html/cars/home.htm for finding reliable car servicing and repairs. See Annual Report of the Director General of Fair Trading, 2000, p 66.
[102] The UK e-hallmark launched on 18 July 2000 to boost consumer confidence (www.which.net/whatsnew/pr/ju100/general/trustuk.html as at 19/7/00).
[103] John Vickers, Annual Report of the Director General of Fair Trading, 2000, p 8.
[104] Annual Report of the Director General of Fair Trading, 1999, p 36.
[105] C Reed and J Angel op cit., p 301.
[106] ibid, p 320. "Even where a geographic location is given, for example, http://www.supersoftware.co.uk this may not be determinative of the location of the service

commerce activities is inappropriate", instead they find that the "...most promising alternative seems to be that of accepting 'country of origin' regulation"[107], whereby a undertaking in one Member State is free to conduct e-commerce with residents of "...every other Member State provided that it complies with its own national laws, even if its activities would contravene the laws of the purchaser's Member State".[108] Whilst applicable law might be that of the undertaking's own Member State, when it comes to jurisdiction issues in the developing global market place, the country where the problem or harm has occurred will be determined to assert jurisdiction.[109]

With these concerns in mind the UK and EC have provided for digital signatures[110], the choice of law and jurisdiction[111], taxation[112], consumer protection where there

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provider. It is relatively common practice, based in part upon security concerns to keep web servers geographically separate from the physical undertaking." (IJ Lloyd op cit., p 475). The E-commerce directive defines place of establishment as the place where the operator actually peruses economic activity through a fixed establishment, irrespective of where the website or server is located, thus avoiding the potential for a re-routing of the site in order to escape home control.

[107] C Reed and J Angel op cit., p 320.

[108] ibid, p 321.

[109] See footnote 110, infra.

[110] The recognition of e-signatures "...is a crucial building block for the development of e-commerce in Europe" (E Liikanen "Is there a third way for the Internet in Europe?" (Speech at the Global Internet Summit, Barcelona, 22/5/00) p 6), which has driven the adoption of the Electronic Signature Directive (European Parliament and Council Directive 199/93 of 13 December 1999 on a Community framework for electronic signatures (OJ 2000 L13/12)). The UK Government is consulting on the implementation of this into domestic law and how it will sit with the Electronic Communications Act 2000, which does not address many of the detailed requirements in respect of certification and secure signature creation (www.dti.gov.uk/cii/ecommerce/europeanpolicy/esigncondoc.pdf as at 30/3/01). A full history of the development of digital signatures and cryptography is given in IJ Lloyd op cit., p 479 et seq. Cryptography works on the basis of encrypting material to be sent over the web which is then decoded and read by the use of keys: one transmitted with the information and the other already in the recipients possession.

[111] Without any limiting rules, an undertaking operating a website must seek advice from every jurisdiction as to the legal implications of what they are doing. Assistance for undertakings would appear to have been delivered in the form of the EU e-commerce Directive (Directive 2000/31 of 17 July 2000, OJ 2000 L178/1. The UK is consulting on how to implement this Directive by 16/1/02 (www.dti.gov.uk/cii/ecommerce/european policy/ecommerce_directive.shtml as at 11/8/01)), which is "...based on the principle of free movement enshrined in the Treaty" imposes country of origin control, allowing "operators authorised in one Member State to provide services throughout the E.U." (L Garzaniti op cit., p 135). Although the directive also addresses communications, electronic contracts and the liability of intermediaries (E Liikanen "Is there a third way for the Internet in Europe?" (Speech at the Global Internet Summit, Barcelona, 22/5/00) p 6), the main focus is that undertakings are only subject to the law of the Member States in which they are established. At the same time however, it was announced that the Brussels Convention 1968 is to be updated to take into account e-commerce. This currently provides that the consumer may choose to sue the other party to the contract in the consumer's country of domicile (Article 13: provided that the contract is a sale of goods on instalment credit terms (Article 13.1), is a contract for loans repayable by instalments to finance the sale of goods (Article 13.2) or any other contract for goods or services

is distance selling[113], and updating the specific control of the telecommunication sector[114]. Brussels has also recently launched a public consultation on the introduction of a single contract law.[115]

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provided that the conclusion of the contract was preceded by a specific invitation addressed to the consumer or by advertising carried out in the consumer's domicile country and provided that the consumer took in that state steps necessary for the conclusion of the contract itself (Article 13.3). It is this last sub-section that is causing the difficulty in the application of e-commerce). The draft Regulation (Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348, 14/7/99)) originally proposed that the domestic court would have jurisdiction over EU based undertakings irrespective of the requirements of the current Article 13.3 and as such would even apply "...when the placement of the order or acceptance of an offer is effected in a state other than the consumer's domicile" (F Greggio & A Platania "The Competent Jurisdiction in B2C Contracts" (2000) ICCLR 193, 194). The scope of this caused disagreement, such that modification was made for contracts to be caught only where the website was directed at consumer's country of residence (Article 15(1)(c), Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Council Regulation 44/2001, OJ 2001 L12/1, 16/1/01)) allowing undertakings to specifically exclude accepting orders from some countries if they so choose. Whilst this is heading in a different direction to the e-commerce Directive (where the country of origin rule applies, since attempts to impose a number of separate national restrictions were rejected as it would render the directive virtually ineffective ("Clash looms on e-commerce Regulation" (1999) FT 29 October, 8)), it would appear that the balance in favour of the consumer is preferred as a means of reassuring consumer confidence and promoting e-commerce (MD Powell "Putting the E- in Brussels and Rome" (1999) ICCLR 361, 361 and 365), as opposed to reassuring and simplifying the rules for undertakings. Whether this will actually be a problem for business in practice is unlikely, since most home pages now ask you to select the territory where you are based, upon which the site is updated with bespoke information. Further, the Alliance for Global Business (AGB) had called for governments in determining jurisdiction to "rely voluntarily on business self-regulatory practices and market pressures to develop more flexible and balanced solutions. The use of out-of-court dispute settlement procedures for consumers should be encouraged while maintaining court proceedings as the ultimate solution in the case of conflicts." ("A Global action Plan for Electronic Commerce (Prepared by Business with Recommendations for Governments)" (AGB, October 1999, 2nd ed.) p 32) (The Member States have already demonstrated their intention to co-operate where disputes are to be solved non-judicial decisions, with the implementation of the EEJ-Net (see Chapter 3, supra)). This was the message repeated at the 2001 Business-Government Forum on Electronic Commerce in Dubai where the AGB called for governments to refrain from enacting measures that impede, actually or potentially, international e-commerce ("Seizing Digital Opportunities: A Business Perspective" (AGB Joint Statement 15-17 January 2001) p 4).

[112] The Commission has proposed that services delivered online can be taxed in accordance with the principle that supplies for consumption within the EU are subject to VAT, whilst supplies for other jurisdictions are not (Commission press release IP/00/583, 7/6/00 and www.europa.eu.int/Commission/taxation_customs/proposals/taxation/tax_prop.htm as at 8/7/00).

[113] Again an E.U. initiative, "the Directive on the protection of consumers in respect of distance contracts [OJ 1997 L144/19]...aims at providing the same level of consumer protection throughout the E.U. with respect to contracts concluded by using distance selling techniques, including the internet." (L Garzaniti op cit., p 138). These were brought into UK law by the Consumer Protection (Distance Selling) Regulations 2000 (in force 31/10/00). It provides for the information that the undertakings must provide the consumer, that is, name, description of good/service, price (including taxes), payment arrangements, delivery costs, delivery arrangements, cancellation right, validity of offer or price. Whilst this covers all forms of contracting via technology over a distance such as mail order, telephone and faxes, it is submitted that the internet will be the main focus of such regulation within a generation, as it ousts these other forms of contracting (see 6.1.1 supra). Spamming is outlawed by these regulations. Spamming is the equivalent of junk mail that is sent via e-mail to consumers whose details have been obtained without their knowledge. It is "...a significant problem" (e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) paragraph 10.10) since it costs the consumer to receive this information.

Larouche surmises that:

> "competition law is often praised for its greater flexibility in handling new developments in rapidly evolving sectors such as telecommunications, in comparison with sector-specific regulation. It is true that EC competition law can more easily be used to intervene in a new situation, since it consists of a small number of general provisions which are meant to be applied across the board in every economic sector."[116]

However, "there are many different frameworks for e-commerce and each could have different, not yet clearly identified, pro- and anti-competitive impacts."[117] Although these impacts will give problems which "...are familiar ones[118]. They are likely however, to manifest themselves in different ways, which may require us to adapt the current tools of analysis to the new environment."[119] Against this backdrop, legislators are concerned that "Competition law should not act as a brake

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[114] Access remains key to both UK and EU policy, with the European Parliament and the Council adopting Regulation 2887/2000 on unbundled access to the local loop at the end of 2000 (OJ 2000 L336/4, 18/12/00, Commission press release IP/00/408, 26/4/00). The impact of liberalisation and merging of the sectors, for example, TV and telephone, has questioned whether sectoral control should be retained. On the domestic front, the Office of Communications Bill (currently in the House of Lords, having been introduced on 12/7/01 (www.parliament.the-stationery-office.co.uk/pa/id200102/ldbills/008/2002008.htm as at 14/7/01)) will introduce a new regulator called OFCOM, which will combine the functions of OFTEL, the ITC (The OFT, OFTEL and ITC have already consulted together on aspects of the new technology, for example, accessibility to digital TV (Joint ITC, OFTEL and OFT advice to Government on Digital Television: Consultation (www.itc.org.uk as at 1/9/00)), the Broadcasting Standards Commission, the Radio Authority and the Radiocommunications Agency. OFCOM will have concurrent powers under the Competition Act 1998 (S Lancaster "A new and brighter future for communications?" (2001) NLJ 23 March, 427).

[115] To be debated at the Laeken Summit, December 2001. Communication from the Commission to the Council and The European Parliament on European Contract Law (COM(2001)38, 12 July 2001). "The upcoming practical introduction of the euro and the surge of e-commerce make this discussion even more urgent as they will facilitate price comparison and the conclusion of cross-border contracts""(Commission press release IP/01/167, 13/7/01).

[116] P Larouche op cit., p 347, although he questions the effectiveness whilst it remains a procedure that "is not very open" (p 349).

[117] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 2.1.

[118] Commissioner Monti is keen to stress that the "...fundamental goals of competition policy are relevant both to the old and new economy; to the "bricks and mortars" as well as to the "clicks and portals" sectors." (M 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 6).

[119] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) p 97; submission of the OFT.

on, or undermine, the incentive to innovate. Fear of infringement should not deter legitimate innovation."[120] Consequently, until the picture becomes more focused, this innovation will be encourages with caveats: when the FTC closed its file on the first B2B it reviewed (Covisint), it gave a public statement that it could not yet "...say that implementation of the Covisint venture would not cause competitive concerns."[121]

However, this short history of the development of e-commerce control has not caused a domestic response as to how the Competition Act 1998 deals with how cartels might develop from this new system nor the impact on the mechanism for defining the market[122]. So far, the only domestic competition recommendation by the PIU was for OFTEL and the OFT to identify any emerging barriers to competition in electronic markets and make recommendations for preventing such barriers becoming serious problems.[123] This OFT and OFTEL joint study focused on process e-commerce, that is the "...infrastructure and access mechanisms necessary...to deliver e-commerce services to consumers."[124]

Europe has been much busier though, concentrating its efforts on multimedia mergers. The main issues calling on the Commissions involvement have been connectivity and service provision, with mergers involving gatekeepers who provide access to the backbone of the internet being scrutinised, to ensure that competitive internet access is protected.[125] This has been big business over the last

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[120] Lord St. John of Bletso, Official Report, Second Reading, Competition Bill, House of Lords, Column 1158, 30 October 1997 House of Lords internet.

[121] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) p 113, submission of the FTC.

[122] e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) Box 4.1. These aspects are likewise absent from the review of actions taken by the International Community (Box 4.2).

[123] ibid, recommendation 7.1. It would appear that the PIU was more concerned that there should be greater understanding of the internet as a method of trading by mounting a "concerted PR campaign...to create an e-commerce "Buzz" in the UK." (e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) recommendation 8.1).

[124] Competition in e-commerce: a joint OFTEL and OFT study: Consultation document (OFTEL/OFT, April 2000) p 1.

[125] For example, Vodafone/Manessmann, MCI WorldCom/Sprint, AOL/Time Warner, EMI/Time Warner, Vivendi/Canal+/Seagram, Microsoft/Liberty. A full review of these mergers and alliances is given by Garzaniti (op cit.) at Chapter IX; and the problems posed by regulating access explored by N Nikolinakos "The New Legal Framework for Digital Gateways – the Complementary Nature of Competition Law and Sector-specific Regulation" (2000) 9 ECLR 408; N Nikolinakos "The New European Regulatory Regime for Electronic Communications Networks and Associated Services:

three years, with the Time Warner/AOL deal delivering a "$350bn merged company...worth more than the output of Russia."[126] However, as for specific agreements, Pons correctly surmises that "by contrast, the application of Article 81 on anti-competitive agreements between companies has so far played only a minor role."[127]

6.1.4 Future of e-commerce

New technologies will enable connection to the web via the DSL (Digital Subscriber Loop) and cable modems (both allowing high-bandwidth internet access), third generation mobile telephones (offering broadband services via the UMTS – the Universal Mobile Telecommunications Service[128]), interactive DTV[129] (Digital TV), and games consoles.[130] The PIU "...expect the internet (accessed via the telephone networks) to remain the dominant core network for e-commerce, with interactive digital TV and new mobile services providing different access options."[131] Frontier point out that the development of the "Internet 2" consisting

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The Proposed Framework and Access/Interconnection Directives" (2001) 3 ECLR 93 (which discusses the use of the lower SMP (significant market power) threshold in negotiating access etc. to ensure a smooth transition to fully liberalised electronic communications markets, in which only the competition rules will apply (Commission press release IP/01/456, 28/3/01)), GB Abbamonte and V Rabassa "Foreclosure and Vertical Mergers – the Commission's Review of Vertical Effects in the Last Wave of Media and Internet Mergers: AOL/Time Warner, Vivendi/Seagram, MCI Worldcom/Sprint" (2001) 6 ECLR 214, "The Commission's review of the media merger wave" Competition Policy Newsletter, 2001 February, No.1, p 46; XXXth Report on Competition Policy 2000 (SEC (2001) 694 final, 7/5/01) p 56, paragraph 216 et seq.

[126] "Net pioneer in world's biggest deal" (2000) The Times 11 January, 1.

[127] JF Pons "European Competition Policy in the New Economy" (Speech delivered to the International Competition Policy Conference, Oxford, 26/6/01) p 5.

[128] Although the take up of the WAP (second generation "Wireless Application Protocol") service has been disappointing (Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) p 99; submission of the OFT), there "are already some 140 million mobile users in Europe – that's over one third of the EU population." (E Liikanen "Is there a third way for the Internet in Europe?" (Speech at the Global Internet Summit, Barcelona, 22/5/00) p 7) and "by 2003, there will be 1 billion mobile phones worldwide [and] two thirds of all Europeans will have a mobile telephone." (p 8).

[129] "...although still small [the market] is growing at a yearly rate of 100 to 200% in several EU countries." (E Liikanen "Is there a third way for the Internet in Europe?" (Speech at the Global Internet Summit, Barcelona, 22/5/00) p 8). However, this form of access currently only allows the consumer to see selected sites: it is a "walled garden" or "fenced prairie" service (Competition in e-commerce: a joint OFTEL and OFT study: Consultation document (OFTEL/OFT, April 2000) p 12).

[130] Competition in e-commerce: a joint OFTEL and OFT study: Consultation document (OFTEL/OFT, April 2000) p 4.

[131] e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) paragraph 3.5. Oftel has begun a review of dial-up internet access which will also consider other ways of accessing the internet to identify what form any future regulation should take ("OFTEL's

of a high-speed, high-performance, high-bandwidth network called Abilene, linked via state-of-the-art connection points called gigaPOPs[132], will change things again.

However, before looking the specific problems for the Chapter I Prohibition, it is accepted that at this stage there is a dearth of any reliable data as to the future usage of the internet. The rapid development of the internet means that statistics are changing just as quickly, making predictions difficult.[133]

Not all consumers can access the internet at present. The PIU find that "There are many factors that may contribute to individuals or groups being excluded from e-commerce in particular, and from information and communication technologies in general. Socio-demographic data highlight where some of these differences arise."[134] They describe these as gender (more men that women use the internet), age (in May 1999, 15 to 24 year olds represented 15 per cent of the population, but they accounted for 24 per cent of the total accessing the internet[135]), social grade (impacts on the cost of access and understanding), incomes, education, ethnic origin and location ("the south is over-represented in e-commerce technology penetration.")[136]. To combat this the Government aims to introduce 6,000 UK online centres in some of the most disadvantaged urban and rural communities.[137]

2000/01 review of the dial-up internet access market" www.oftel.gov.uk/competition/iamr0900.htm as at 6/10/00).

[132] E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) footnote 16 paragraph 3.6.

[133] "Because the internet is new and its uses are developing very rapidly, reliable economy –wide statistics are hard to find." (The Emerging Digital Economy (US Department of Commerce) p 2 (www.ecommerce.gov as at 10/9/00)).

[134] e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) paragraph 9.47.

[135] ibid, figure 9.5.

[136] ibid, paragraph 3.5. The US has found similar factors as indicating the profiles of the least connected (Falling through the Net II: New Data on the Digital Divide (National Telecommunications and Information Administration, 1997) pp 3 to 5 (available on www.ntia.doc.gov/ntiahome/net2/falling.html as at 6/10/99)); although the report noted that the digital divide between certain groups of Americans increased between 1994 and 1997 (p 2), access is now increasing as governments implement a positive drive e-commerce (for example, as a first step, Chile and Mexico require telecommunications operators to install rural payphones; South Africa plans to assign e-mail addresses to every postal addresses and install internet terminals in public buildings (HE Hudson "Access to the Digital Economy: Issues in rural and Developing Regions" (University of San Francisco Paper)).

[137] www2.dti.gov.uk/opportunityforall/whitepaper.html as at 3/8/01, p 5.

Despite recent .com failures[138], "it has taken four years for the commercial internet to achieve 50 million users, compared with 13 years for television and 16 for the personal computer."[139] It's growth and future success should not be underestimated.

Revenue from internet sales in Europe is expected to be $2 trillion by 2002 (compared to $288 billion in 1999)[140]. Indeed, globally "...sales will expand to 'tens to hundreds of billions of dollars' within the next decade."[141] The property developer Land Securities has already "blamed e-commerce for aiding a 2% decline in the value of its £1.37bn shopping centre portfolio" following retailers feeling a squeeze on their margins.[142]

Forrester Research Inc's most recent estimate is that "61% of homes in Europe will own a PC by 2005 and that over 50% of adults in the UK already have access to the internet."[143] The Government's aims are to ensure that "a higher percentage of people in the UK will have access to e-commerce networks from home than in any other G7 country"[144] and that "...the UK [is] the world's most attractive centre for e-commerce by 2002."[145] The task of the latest e-envoy[146] will be to "ensure universal access to the internet by 2005 and get all Government services online by that date."[147] The Government's aim for increased internet use will be assisted as

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[138] "The future of e-trading" (www.news.bbc.co.uk/hi/english/newsid_753000/753541.stm as at 18/5/00); "Top web retailer collapses" (www.news.bbc.co.uk/hi/english/newsid_752000/752293.stm as at 18/5/00) and "E-tailer Boxman collapses" (www.news.bbc.co.uk/hi/english/newsid_966000/966637.stm as at 11/10/00).

[139] "Lawless Frontier" (2000) 97/04 Law Society Gazette 27 January, 24. UK internet access increased from 2 per cent of the population in July to December 1997 to 16 per cent by January to May 1999 (C Ahlborn, DS Evans & AJ Padilla "Competition Policy in the New Economy: is European Competition Law Up to the Challenge?" (2001) 5 ECLR 156, 157).

[140] Competition in e-commerce: a joint OFTEL and OFT study: Consultation document (OFTEL/OFT, April 2000) p 2.

[141] IJ Lloyd op cit., p 466.

[142] "E-tail growth hits out-of-town stores" www.news.bbc.co.uk/hi/english/newsid_1025000/1025387.stm as at 15/11/00).

[143] Quoted by S Bright "Competition law aspects of e-commerce" (Speech delivered to the BIICL Conference, London, 18/5/01) p 1.

[144] e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) paragraph 6.5; G7 is the Group of & most highly industrialised nations. This in part will be delivered by the Government's determination to have the most extensive and competitive broadband market in the G7 by 2005 (Productivity in the UK: Enterprise and the Productivity Challenge (HM Treasury and DTI, June 2001) paragraph 2.53).

[145] DTI press release P/99/640, 23/7/99.

[146] Andrew Pinder.

[147] Cabinet Office press release, CAB 24/01, 31/1/01.

the price of connection across the UK continues to decrease[148] and by undertakings themselves as they tap into this new market by "assisting" customers to go online.[149]

Even with the lack of reliable data, what is obvious is that "the likely outcome of future developments of this kind will be to deliver an increasingly innovative array of services to consumers and give consumers increased choice as to how they receive services."[150] This will increase the ability of customers to substitute. It will also affect the potential for undertakings to behave anti-competitively.

6.2 Chapter I Prohibition concerns

6.2.1 Market

One new market has already emerged, that is, the technology or intellectual property resulting from R&D. This is recognised as being separate from goods and services by the Commission[151], although they find the same principles of market definition for products are applicable. However, it is the mechanics of defining product and geographic markets that will cause problem for the Chapter I Prohibition.

It is generally accepted that whilst "principles of market definition...are equally applicable to electronic commerce"[152],

> "the presence of e-commerce competitors may...impact upon the methodology used to determine markets. Supply side substitution may become a more prominent characteristic of retail markets, as online

[148] "Internet price war heats up" (www.news.bbc.co.uk/hi/english/newsid_668000/668484.stm as at 7/3/00).
[149] Tesco's now offers free internet training in its stores that have "internet cafés".
[150] OFT press release "Competition in e-commerce: a joint OFTEL and OFT study – Consultation Document" (www.oft.gov.uk/html/new/e-commerce.htm as at 17/4/00).
[151] Guidelines on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements, 6/1/1 (OJ 2001 C3/02), paragraphs 47 to 49.
[152] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) p 115, submission of the European Commission.

environments may add different types of products more efficiently[153] than physical outlets."[154]

Further,

> "market definitions may be difficult to make because price discrimination could become more widespread and important. This is because e-commerce enables sellers to more easily obtain and use information concerning consumer preferences and willingness to pay."[155]

Although the SSNIP test "remains an effective tool for market definition"[156], where the price is set by the interaction of supply and demand within an online market place, it may need to be modified slightly, by "considering a small but significant restriction of supply by the hypothetical monopolist, rather than an increase in price."[157]

These limit that the OFT can rely on precedent[158], and the OFT is further hampered by the lack of case law. Of the limited cases investigated, precise market definition has been left open. In the investigation of MyAricraft.com B2B venture, the Commission found that the B2B market place constituted "part of a wider market...although precise relevant product market was left open since...the proposed concentration did not give rise to the creation or strengthening of a dominant position."[159] In the OFT's investigation into the sale of home PC's, the

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[153] See 6.1.3, supra.
[154] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 4.1; views of the Australian Competition Authority, although Germany took the opposite view that whether online goods/services form the same market as their real world equivalents, must be determined from the demand side (p 67).
[155] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 3.1. See also 6.1.3, supra.
[156] E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 1.6.
[157] ibid, paragraph 1.7.
[158] ibid, paragraph 1.9. "It may be the case...that the existing tests, such as the hypothetical monopolist test, require data which are not yet available given the rapid changes which the sector is still undergoing." (Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) p 115, submission of the European Commission.).
[159] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) p 117, submission of the European Commission.

market combined both retail and direct sales channels and the geographic market was left open.[160] This may be considered to be a justifiable interpretation in light of the limited share of the market accounted for by online sale, but whilst actual sales online might not be significant at present, this does not mean that the web is not impacting on consumer decisions. For example, "only a fraction of all new cars in the United States are currently made online – about 4%. But research by industry J.D. Power suggests that 40% of all buying decision are influenced by the internet, and the number is growing."[161] Consequently this influence is already impact on substitutability.

(i) Product

The OECD's round table forum found that "...the pertinent question for the definition of the product market will be the question whether the electronic market places compete with "normal" bilateral sales or whether they constitute a separate, narrower product market."[162] When the online product is also available through traditional outlets, the Commission has stated that it will consider whether the online product has characteristics different from the offline one and whether it is possible to price discriminate between offline and online users of the good.[163] The OFT by analogy will follow this in applying Chapter I Prohibition.

Frontier find that for the purposes of the Chapter I Prohibition, the growth of e-commerce raises four issues: is there a new product market, would increased scope for price discrimination between customers imply narrow market definition, do changes in search costs and switching costs impact on market definition, and do changing cost structures impact on market definition?[164] In answer to these they conclude that whether there is a new product market depends on customers'

[160] See Chapter 4, supra.
[161] "Amazon to sell cars" www.news.bbc.co.uk/hi/english/business/newsid_893000/896413.stm as at 23/8/00.
[162] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) p 120, submission of the European Commission.
[163] ibid, p 121, submission of the European Commission.
[164] E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 4.5.

perceptions as to the differences between e-commerce and traditional sales[165]; price discrimination would appear to be made harder by the transparency of the internet, thus leading to a wider market definition[166]; search costs are reduced, but switching costs[167] might be increased, thus narrowing the product market[168]; cost structures will be lowered as the internet facilitates supply-side substitution, implying a relatively wide market definition[169].

Should the result be a wider market, this would imply lower market shares, increasing the ability of an anti-competitive agreement to fall within the de minimis threshold. Whilst price fixing or market sharing will never be de minimis, allowing other agreements where online sales factor as an additional avenue to the traditional market, to benefit from the de minimis threshold enables such agreements to escape scrutiny. It has already been made clear that the "impacts" of such agreements may not be known, and it is therefore submitted that a better premise would be to discount the safety net of the de minimis threshold where online sale are involved, and move directly to look at whether there is a restriction, prevention or distortion of competition. In this new era, the potential for anti-competitive agreements to develop as evolution continues is one which the OFT must be ready to respond to. This point was not explored by Frontier, despite the current domestic practice pointing to grouping online and offline sales together.[170]

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[165] ibid, paragraph 4.8. Arguably, at present there is not a real difference between these two avenues of sale except where they involve intangible goods or goods only available via online purchase.
[166] ibid, paragraph 4.13.
[167] Such as those faced by the consumer who would lose the one-click ordering process should he or she choose to change online retailer. While little confidence in giving payment card details on line persists, these switching costs may not be a pertinent issue at present. However, there may be other switching costs and where the consumer has to pay for accessing the content on the site (as opposed to that information being free of charge/ paid for by advertising revenue), the Commission will normally define this as a separate market (Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) p 123, submission of the European Commission).
[168] E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 4.15.
[169] ibid, paragraph 4.17.
[170] In September 2000, the music industry recognised that a significant proportion of record sales were being made online and consequently accepted that these figures should be included in the weekly charts (Radio One Newsbeat 26/9/00). Retail and direct sale were held to be channels in the same market in the John Lewis/Tempo complaint, but this has been criticised by John Lewis' Director of Legal Services (see Chapter 4, supra).

(ii) Geographic

The general consensus appears to be that "[n]otwithstanding globalisation, reports of the death of local markets are exaggerated to say the least."[171] Indeed in the only complaint to so far raise the question of www sales, the OFT found that geographic market was probably the UK:

> "...demand side evidence supports the view that retail and direct channels compete with each other. When asked to cite their closest competitors, manufacturers often cited manufacturers in both sales channels."[172]
>
> "Since a substantial proportion of consumers will be sensitive to prices in direct channels, a national market definition is appropriate."[173]
>
> "A narrower market than the UK, say regional, is implausible, due to the likelihood that most buyers would be able to source their PCs from other regions (if not further afield) in the event that prices rose significantly."[174]

However, the conclusion reached left the possibility for a wider area to be the relevant geographic market: it "...is at least as broad as the UK but is more likely to be wider."[175] This is a rather weak dismissal of the problem faced by the OFT, especially since the ability for the internet to make the market wider than the UK was *explicitly* acknowledged by Stephen Byers, when Secretary of State for Trade and Industry, who in welcoming the dawn Competition Act 1998 said that "at the click of a mouse, a consumer can access a wide range of competitors across Europe and the globe."[176]

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[171] J Vickers "Competition policy and globalisation" (Speech delivered to the European Policy Forum, 16/1/1, spe01-01) p 3.
[172] Decision of the Director General of Fair Trading, 6 April 2001 (No CA98/3/2001), paragraph 40.
[173] ibid, paragraph 55.
[174] ibid, paragraph 56.
[175] ibid, paragraph 60.
[176] S Byers "A new era in competition" (Speech delivered to the Social Market Foundation, 28/2/00, www.dti.gov.uk/Minspeech/byers280200.htm as at 11/3/00) p 5.

When this is considered in light of the introduction of the .eu TLD, designed to "...strengthen the image and the infrastructure of the internet in Europe, and ... strengthen the internal market and...stimulate electronic commerce in Europe"[177], it is submitted that the market will be European in a greater number of cases. It is appreciated that whilst "...the mere fact that the internet is a global medium does not mean that e-commerce takes place in a global market"[178], easier and wider European business presence by virtue of web together with the development of European pricing polices and European branding[179], will in future curtail the Chapter I Prohibition's application. Even national limits affecting the substitutability of goods will diminish as the determination to utilise the internet as the means for delivering the single market materialises.[180]

Support for this submission is found in Ruttley's arguments:

> "Since access to the internet is universal, it would be a rare occasion for an internet transaction to be confined to a market that is *less* than global. The effect of an internet market being almost global will therefore be to create a tendency for market shares to be smaller than would be the case in more restricted markets. However, one can envisage more restricted internet markets: an example would be an internet service concerning media services in French. Arguably, this might lead to a finding that the market in question was essentially confined to France, and the Francophone areas of Belgium and Luxembourg, rather than all 15 E.C. Countries."[181]

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[177] Commission press release IP/00/95, 2/2/00 and consultation at www.europa.eu.int/comm/dg13/index.htm as at 3/2/00. The Commission put forward its proposal to create a registry to run the .eu TLD at the end of 2000 (Commission press release IP/00/1444, 12/12/00).

[178] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 2.2.

[179] Certain of these aspects could well become global: "global supply contracts are now common throughout the commercial world: it may be a German car manufacturer buying engines from a Japanese supplier for its factories in Korea and Brazil, or it may be Walmart buying Kellogg's Corn Flakes in the USA for sale through outlets in 30 or more countries in which it operates." (M Hutchings "Globalisation of Trading – Can Regulation Keep Pace?" (Speech delivered to the BIICL Conference, London, 18/5/01) p 6).

[180] See below.

[181] P Ruttley "E.C. Competition Law in Cyberspace: An Overview of Recent Developments" (1998) 4 ECLR 186, 195.

Even this limit however, points to market *wider* than purely national. The OECD has accepted that "It is probable that geographic markets will become wider as a result of the reduced importance of geographical location for transactions between buyers and sellers."[182] In the three cases examined by the German federal Cartel Office so far[183], it "...found the relevant geographic market to be at least national. However, it appears willing to accept that many such markets will be Europe-wide or even world-wide in their scope."[184]

When a contrary view is unearthed, such as the finding that "If the internet makes "location" irrelevant, why are internet retailers making million-dollar deals for the right to showcase their products on major internet portals and content sites?"[185] it must be realised that this has less to do with location, but rather more to do with easing and encouraging internet use. Whilst usage is still increasing and the skills of the population vary, showcasing deals will make it easier for new users to transact. However, the more familiar users become, their reliance on specific portals may well diminish.

Vajda and Gahnström find that:

> "In Bertelsmann/Havas/BOL [186] the parties argued that the geographic market for sales via the internet was worldwide since sales by internet have a wider scope than traditional book clubs or mail order sales because of the international accessibility of the internet. The Commission considered that the geographic scope of the market might be wider than national, but pointed out that the first experiences showed that sales in France represented the large majority of the parties total sales via the internet,

[182] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) p 101, submission of the OFT.
[183] Covisint, CC-markets (an exchange in the chemical industry established by BASF, Degussa-Huls, Henkel and SAP) and RubberNetwrok.com (an exchange in the rubber and tyre industry established by Goodyear and Michelin).
[184] S Bright "Competition law aspects of e-commerce" (Speech delivered to the BIICL Conference, London, 18/5/01) p 5.
[185] E Brynjolfsson & MD Smith "Frictionless Commerce? A comparison of Internet and Conventional Retailers" (www.ebusiness.mit.edu/papers/riction as at 5/4/00), p 1.
[186] Case IV/M.1459, OJ 1999 C176/1.

> which according to the Commission indicated the existence of a national market."[187]

However, in the BOL joint ventures between Bertelsmann and other joint venture partners[188] the geographic market was left open although the "decision suggests that even the market for online sales of books is national...even for books written in English the geographical market seems to remain national, because there is as yet only limited trade between countries."[189] Whilst the limited material available does not give a clear answer, in light of the way that the internet has the potential to develop, it is only a matter of time before the market becomes larger than the UK. The ability for customers to substitute will drive forward this expansion of the market.

(iii) Substitutability

Likkanen finds B2C a paradox, for whilst it

> "...provides the ultimate promise [to turn] the Internal Market into a reality for European enterprises and consumers....on the other hand [it] shows the limits of the Internal Market. [In 1999] cross-border sales by European retailers accounted for only 5 per cent of the total EU online market."[190]

However, this is unlikely to hold true for the next generation, for these limits of access, trust and substitutability are already being dealt with. The aim of the Government to ensure that more of us use the internet will result in a significant number of customers being able to substitute to suppliers in other jurisdictions, thus widening the definition of the relevant market. Indeed the present limits on substitutability will be diminished as EU pressure to break down barriers continues and the next generation demands more from the internet than we do at present:

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[187] C Vajda QC & A Gahnström "E.C. Competition Law and the Internet" (2000) 2 ECLR 94, 97.
[188] www.europa.eu.int/comm/competition/mergers/cases/decisions/jv24_en.pdf and www.europa.eu.int/comm/competition/mergers/cases/decisions/jv45_en.pdf as at 9/7/01.
[189] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) p 123, submission of the European Commission.
[190] E Liikanen "An enterprise Policy for SME's" (Speech delivered to the BDI and DIHT Annual Meeting in Brussels, 29/5/00), p 5.

Price: recent studies have indicated that "...prices on the internet are 9-16% lower than prices in conventional outlets, depending on whether taxes, shipping, and shopping costs are included in the price"[191]. This suggests that at present such online goods are not substitutes for a significant number of consumers; if they were, traditional outlet prices would fall.

Tax: the Commission aim to make a level playing field for the taxation of e-commerce.[192] The OECD found that "On the B2C side, there is some evidence that consumers are willing to switch to e-commerce vendors to escape sales taxes, suggesting that at least for some products, e-commerce and traditional outlets might be good substitutes for each other"[193], although some of these obstacles "...are less of a problem for B2B than for B2C development."[194]

Law and National Controls: legal measures can specifically identify the extent of the relevant market. For example, the relevant geographic market in the British Interactive Broadcasting joint venture[195] was the "United Kingdom based on the existence of a specific national regulatory framework"[196] under the Telecommunications Act 1984. Legal control may have been introduced to prevent harm, such as "Under French law the display for sale of Nazi objects constitutes a violation of article 645-2 of the Code Pénale...[thus] by making the site visible to French internet users and enabling them to make purchases from that site, [Yahoo!]

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[191] E Brynjolfsson & MD Smith "Frictionless Commerce? A comparison of Internet and Conventional Retailers" (www.ebusiness.mit.edu/papers/riction as at 5/4/00), p i.
[192] This runs against former President Clinton's hopes of ensuing that trade in digital goods remained tax free ("VAT plan for 'virtual' internet sales" www.news.bbc.co.uk/hi/english/business/newsid_635000/635214.stm as at 8/2/00), although the US Treasury Department believes the tax treaties it has with 48 countries "...are flexible enough to be adapted to taxation of electronic commerce" to ensure taxation remains residence based as opposed to source based (ED Plock "The United States and Its trading Partners Seek Transparency for Taxation of Electronic Commerce" (US Department of Commerce www.ecommerce.gov/19.htm as at 6/10/00) p 2.
[193] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 3.1, referring to the conclusions of A Goolsbee "In a world without borders: the impact of taxes on internet commerce" (2000) The Quarterly Journal of Economics May 561.
[194] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 2.2.
[195] Commission Decision 15/9/99.
[196] L Garzaniti op cit., p 267.

had contravened French law."[197] National controls were imposed on the sale of tickets for the 1998 World Cup in France. Despite the French Organising Committee eventually being fined, Weatherill traces his correspondence[198] to the Commission, complaining that the official web site refused to sell tickets to non-French nationals, who instead had to approach national authorities. The Commission was very slow to act against a system that was "...discriminatory according to nationality."[199]

Such attempts to prevent harm could in practice be used as an instrument of government policy to ensure that e-commerce develops in a way that it perceives to be best. In this respect, France appears to be the jurisdiction that has been the most proactive is shaping what is allowed by way of e-commerce. The French court has ruled that French buyers may only participate in internet auctions where a state approved auctioneer has been appointed and French VAT is paid[200]. The French Ministry of Finance introduced a scheme to ban the use of English terminology on French websites, no doubt as an attempt to limit the spread of English in France.[201] France has also given us the debate about blocking access to foreign websites. France objected to the sale by a US auction site on Yahoo! that sold Nazi memorabilia. The French court required that Yahoo! should not facilitate the sale of such items to French nationals[202]. Despite the US court allowing a full hearing[203] of the action lodged by Yahoo that the French court has no jurisdiction to rule and fine Yahoo!, Yahoo! has already begun screening to prevent the sale of items associated with hate groups.

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[197] M Hutchings "Globalisation of Trading – Can Regulation Keep Pace?" (Speech delivered to the BIICL Conference, London, 18/5/01) p 5.
[198] S Weatherill "0033149875354: Fining the Organisers of the 1998 Football World cup" (2000) 6 ECLR 275.
[199] ibid, 282.
[200] "Court blow for French buyers at web auctions" (2000) FT 4 May, 10. Nart.com had unsuccessfully argued that it should be allowed to continue to exempt non-US buyers from all costs, including tax, because it was incorporated in the US, and transactions were paid in dollars, into a US bank.
[201] "Internet put French on the retreat" (2000) The Times 6 March, 13.
[202] "Paris bans internet sale of Nazi artefacts" (2000) The Times 21 November, 18; the judge had previously asked experts to look at ways of identifying users by origin to see if it could possibly prevent French users from accessing the website ("French seek way to bar Yahoo! Site" (2000) The Guardian 12 August, 15).
[203] The date of which has yet to be set.

How long France can continue with its polices seems very much dependent on how the Commission views what action can and cannot be allowed in controlling e-commerce. After all, "the Commission's overall priority with regard to internet markets is to create the conditions for an open, competitive environment for the development of the internet, thereby ensuring that it remains an open medium"[204], to ensure that there is a "level playing field across the EU...[and] harmonised application through strong co-ordination mechanisms at the European level."[205] Whilst the e-commerce Directive imposes "strictly harmonised rules only in those areas strictly necessary" [206] and does not alter the competition Articles, its aim is to "ensure that businesses and citizens [can] supply and receive information society services throughout the EU, irrespective of frontiers."[207] An example of this Commission objective to see the internet as a frontierless level playing field is seen in the recent steps taken in respect of a German Book price fixing scheme. Having found that the German scheme for fixing the prices of books was not subject to Article 81 on the condition that rules on re-imports of German books and direct cross-border sales to end consumers at free prices were respected[208], the Commission has sent a Statement of Objections to German publishers. The Commission finds that the refusal to supply internet booksellers established outside of Germany so as to prevent direct cross-border sales at a price other than that fixed for Germany is based on illegal collusion and infringes competition rules[209].

Language: Letsbuyit.com operates in 14 countries and 12 languages in Western Europe, implying that national language is important to the consumer. It has been noted above that France has tried to limit the use of other languages on its web sites. Garzaniti notes that in the Telia/Telenor/Schibsted co-operative joint venture[210], the Commission "defined the relevant geographic market on a national basis, possibly on a linguistic basis, i.e. the market for internet content services in Swedish including Sweden and the Swedish language communities in other Nordic

[204] XXXth Report on Competition Policy 2000 (SEC (2001) 694 final, 7/5/01) p 54, paragraph 209.
[205] Commission press release IP/00/749, 12/7/00.
[206] "Electronic Commerce" www.europa.eu.int/comm/internal_market/en/media/eleccomm/999.htm as at 22/1/01.
[207] ibid.
[208] Commission press release IP/00/651, 22/6/00.
[209] Commission press release IP/01/1035, 19/7/01.
[210] Case IV/JV.1, Commission Decision 27/5/98.

countries."[211] Similarly, the relevant geographic market was cultural in the NC/Canal+/CDPQ/BankAmerica merger[212] "in particular for cultural reasons [because of] the effect of the transaction on the pay-TV market in France or in the French–speaking territories in Europe."[213] Whilst pointing to a market somewhat smaller than the EC, these do indicate a wider than national market. In any event, the Prime minister has stated that "...English is the language of the Web."[214] English is indeed used on "more than 80% of Web sites world-wide".[215] From the point of view of the Chapter I Prohibition therefore, language does not act as a constraint to substitutability.

Transport and Delivery: it is accepted that "Distribution costs can act as...a barrier to international trade."[216] The costs of transport will affect the willingness of customers to purchase over the web and/or suppliers' willingness to supply. Where the market is for intangibles, this of course is not an issue, but even for tangible goods, steps can be taken such as localised distribution centres in various territories[217], to reduce these costs.

Security: Garzaniti notes that the

> "...use of credit cards on an open network like the internet raises issues of security (inception of credit card numbers) and privacy (tracking of customers' purchase patterns) [and] although encryption can resolve somewhat these issues, these concerns led to the creation of means of payment specific to the internet"[218],

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[211] L Garzaniti op cit., p 229.
[212] Case IV/M.1327, Commission Decision 3/12/98.
[213] L Garzaniti op cit., p 242.
[214] e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) Foreword.
[215] ibid, paragraph 1.6.
[216] E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 4.21.
[217] This is considered further in vertical agreements, infra.
[218] L Garzaniti op cit., p 141.

such as E-accounts and e-cash[219].

The PIU found that "...only 7% [of UK consumers] felt secure in submitting credit card details over the internet. In the EU generally Visa found in 1999 that only 5% of consumers trusted e-commerce."[220] However, concerns are more to do with ignorance. Whilst the internet cannot guarantee security, such security is not guaranteed when giving card details over the telephone, or even in a shop.

Availability and Choice: in the Vodafone/Airtouch merger[221], Garzaniti notes that

> "the Commission considered that the relevant geographic market remains national despite the increased availability of roaming facilities that enable subscribers to use their existing handset on a foreign network. Indeed, a subscription with a mobile operator of another country is not yet an economically sensible alternative for a customer given the additional costs associated with permanent roaming."[222]

However, many other services are developing on the internet which do present "economically sensible alternatives" for customers. Already "the largest chain bookstores carry about 150,000 different books. On the Web, readers can choose from 2.5 million titles under one roof, covering both in-print and out-of-print books."[223] Indeed, the choice they present may make such sites the first port of call in the future, as opposed to a second best or alternative option.

Despite these current limits to substitutability and decisions pointing to national markets, the fact that all writers and competition authorities recognise the need for international co-operation as an essential prerequisite to controlling anti-competitive agreements in the future, supports the submission that within a

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[219] One of the more popular is the "beenz", a virtual currency worth one US cent used by over one million users in some 17 million transactions since 1999 (K Lambert op cit., p 22).
[220] e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) paragraph 10.5.
[221] Case IV/M.1430, Commission decision 21/5/99.
[222] L Garzaniti op cit., pp 233 and 234.
[223] The Emerging Digital Economy (US Department of Commerce) p 41 (www.ecommerce.gov as at 10/9/00).

generation, the market will be wider. Consumers "...report that they shop on the Web because of conveniences, ease of research and goods prices."[224] The ability to "one search"[225] that is, find and compare goods by reference to specific user criteria, will ensure that the impact of the www factor only increases with time. This one search will counter the comfort factor where at present it may be that the vast amount of information available on the internet, leads to consumers sticking with the sites they know their way around to save time and energy.[226]

Of course some goods and services will never be available online, but this should not prevent the Competition Act 1998 recognising that is needs to specifically deal with the potential for wider market definition.

(iv) Interstate trade

Market definition will become wider, irrespective of whether the market is defined separately for online goods and services, or as a combined traditional and online market. Where an agreement is EC de minimis[227] and exceeds the UK threshold, the Chapter I Prohibition applies. Section 60 will bring into play the question of relevant differences and more fundamentally, what is meant by competition. The lack of a defined concept could lead to the massage of competition policy to further the domestic objectives of e-commerce goals. Factors that have limited substitutability could be recycled as relevant differences to back up the decisions taken to depart from EU jurisprudence.

Where EC is not de minimis, the OFT may in the future be responsible for applying Article 81, unless it is an agreement that raises novel issues, raises serious EC issues, and/or sets a precedent. Whilst e-commerce neatly meets these objectives, the fact that some find that no new issues are raised by e-commerce[228], demands a

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[224] ibid, p 35.
[225] ibid, p 36.
[226] "...some visitors regularly buy from the branded retailers such as Amazon.com, even when these retailers do not have the lowest price. This suggests that other factors, such as trust, may play an important role in internet markets." (MD Smith, J Bailey & E Brynjolfsson "Understanding Digital Markets: Review and Assessment" (www.econmerce.mit.edu/papers/ude as at 29/9/99) p 12).
[227] The recent increase in EC de minimis thresholds (see Chapter 5, supra.) means greater likelihood of agreements being a national concern.
[228] See 6.1.3, supra, and 6.2.2(i), infra.

clear course of action from the Commission as to how these issues involving online trade will be dealt with and indeed whether the EC de minimis threshold will still be applicable. The preferred option would be a dissapplication of the EC de minimis thresholds for the foreseeable future, allowing the Commission to prevent inconsistent decisions by Member States, which is indeed a real threat as certain Member States appear to be defining what can and cannot be done by e-commerce, in terms of their preferred national view. This however will remove more cases from the jurisdiction of the Chapter I Prohibition.

6.2.2 Impact on domestic agreements (where Chapter I Prohibition still applies)

(i) Horizontal

Increased speed of communication is a "double edged sword"[229]. It is accepted that "Collusion, exclusion, exclusivity and standardisation are the most serious antitrust issues in the B2B world."[230] Frontier suggests that three aspects of collusion are likely to create the highest uncertainty for businesses: information sharing, market design and general horizontal agreements.[231] These are not new issues for competition law[232], but what is different now, is the role that technology plays in facilitating these anti-competitive issues. The internet provides "...an enhanced ability to co-ordinate competitive behaviour"[233]; "...price decreases will be more quickly known to competitors and possibly more rapidly matched, while price increases can be more easily and quickly rescinded if rivals fail to follow."[234] It could also "...facilitate out right collusion by providing new ways to exchange information, some of which might be nearly impossible for competition authorities to trace and use as evidence. The most obvious means is through on-line chat

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[229] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 3.3

[230] D Lancefield "The Regulatory Hurdles ahead in B2B" (2001) 1 ECLR 9.

[231] E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 1.28.

[232] These competition concerns "...are not new...and are amenable to traditional antirust analysis." (Entering the 21st Century: Competition Policy in the World of B2B Electronic Marketplaces (A Report by the Federal Trade Commission Staff, October 2000) p 2).

[233] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 2.7.

[234] ibid.

rooms."[235] Links between colluding websites could allow affiliations to develop[236] and go unnoticed. The technology could make it easier for the parties to an agreement "...to detect cheating on anti-competitive agreements and to target retaliatory price changes thus lowering the costs of punishing cheaters."[237] The costs involved in establishing a successful B2B exchange may demand, explicitly or implicitly, exclusivity on the part of those choosing to deal through this medium. There is also the possibility that "...buyers will use B2Bs to acquire and exercise monopsony power"[238] through the use of joint purchasing agreements.

The Commission has taken these issues seriously and last year started checking the web for cartel activity[239]. To demonstrate the unease that exists where the internet is concerned, even independent trading exchanges established and operated by third parties provide "...some unrest for competition authorities worldwide"[240] since "the success of a B2B exchange will depend to a great extent on the volume of transactions it generates, [and] the nature of the relevant industry may often mean that it is difficult to sustain more than one on-line marketplace"[241]. Whilst the first B2B (that is, Myaricraft.com) was dealt with under the ECMR, the electronic market for a brokerage service among banks trading in foreign currency options

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[235] ibid. Chat rooms "...may become the 21st century equivalent of smoke-filled rooms." (E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 6.40).

[236] E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 6.53.

[237] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 2.7.

[238] ibid.

[239] "EU checking net trading sites for signs of cartels" (2000) The Daily Telegraph 29 August, 29.

[240] G Olsen "B2B Exchanges: Competition Law in Cyberspace" (2000) 11(11) ICCLR 361. The FTC had summarise five general factors to illustrate the concerns: (1) the greater the degree of concentration in the market, the greater the concern about possible effects on competition; (2) information sharing among competitors is generally, although not always, more likely to raise concern than information sharing among non-competitors; (3) the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing or information relating to less competitively sensitive variables; (4) sharing contingent or future pricing information is generally more troubling than sharing information about past transactions; and (5) sharing information that is unique to the B2B is generally more likely to raise antitrust issues than sharing information that can be found elsewhere, and sharing information that can be found elsewhere but only with difficulty is generally more likely to merit antitrust scrutiny than sharing information that can be found elsewhere just as readily as it can be found on the B2B (Entering the 21st Century: Competition Policy in the World of B2B Electronic Marketplaces (A Report by the Federal Trade Commission Staff, October 2000) pp 7 to 9).

[241] G Olsen "B2B Exchanges: Competition Law in Cyberspace" (2000) 11(11) ICCLR 361, 362.

(Volbroker.com) was notified by its constituent banks under Regulation 17/62. This received a comfort letter upon the parties agreeing others to participate and ensuring that the exchange of commercially sensitive confidential information is avoided[242]. Consequently the design and operation of online marketplaces should ensure "...strict transparency and neutrality as regards buyers and sellers and among both groups"[243].

The OFT appears to have taken a more relaxed approach:

> "It seems unlikely...that undertakings wishing to form cartels have been prevented from doing so by the practical difficulties of meeting for a discussion. For some executives travelling the world to participate in cartel meetings is, until the moment of discovery, enjoyable. If the use of devices such as chat rooms is to lead to more cartels it will probably be because it offers anonymity but this is not what participants in cartels necessarily want: to make participation in a cartel worthwhile an undertaking needs to know which other enterprises are committed."[244]

This is however out of tune with the thoughts of other NCA's.

It is accepted that horizontal agreements may produce benefits by generating efficiencies, lowering prices, improving quality and delivering greater innovation for consumers[245], although those that fix prices, limit output or share markets[246] will always be prohibited. The horizontal "safe havens [for joint purchasing] apply

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[242] Commission press release IP/00/869, 31/7/00.
[243] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 2.9. Alese suggests that "Competition law concerns can be prevented by organising the marketplace in a way which prevents a buyer participant from seeing the offers of other buyers; permitting a seller to see offers from all other buyers, but a buyer to view only its own offer; or preventing participants in auction bids from seeing other bids unless they exceed their own bid." (F Alese "B2B exchanges and E.C. Competition Law: 2B or not 2B?" (2001) 8 ECLR 352, 326 and 327).
[244] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) p 105, submission of the OFT.
[245] Entering the 21st Century: Competition Policy in the World of B2B Electronic Marketplaces (A Report by the Federal Trade Commission Staff, October 2000) p 1.
[246] Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, 6/1/01, (OJ 2001 C3/2) paragraph 25.

to horizontal agreements involving e-commerce"[247], and by virtue of section 10 will be relevant to the OFT. The relevant threshold is a combined market share not exceeding 15 per cent. on the purchasing market(s) and a combined market share not exceeding 15 per cent. on the selling market(s)[248]. Of course the wider the definition of the market, the less likely that the agreement will fall to be regulated, unless of course a clear message is sent out that de minimis thresholds do not apply. Again it is submitted, the de minimis thresholds (both EC and UK) should be not be applied at present. The danger here is that even though any agreement that fixes prices, for example, would not benefit from the threshold, the technology is capable of disguising such anti-competitive activity. Until such time as there is sufficient precedent[249] as to the effects of B2B and more importantly B2C, agreements involving online market places must be closely scrutinised.

(ii) Vertical

The internet changes the shape of distribution. Whilst some online undertakings such as Amazon are disintermediating, there are others who continue to use distributors in certain territories and we will also see the increased use of other intermediaries, be they brokers or agents, who co-ordinate the interactions of buyers and sellers through e-malls and search engines.[250] As such these may lead to new restrictive vertical agreements[251], for search engines and portals can be manipulated[252] by agreements between intermediaries and manufacturers or retailers.

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[247] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) p 119, submission of the European Commission.
[248] Guidelines in vertical restraints 13/10/00 (OJ 2000 C291/1), paragraph 130.
[249] Prior EC cases are of little use. The same applies to the RTPA although at least the internet does finally lay to rest one anomaly of the RPC decisions: no defence on the basis of "avoiding the need to go shopping" is possible, since the internet does indeed make it even easier for the customer to go shopping. T his does however pose the potential argument that an agreement should be allowed as it assist the customer to go shopping on the www, but in such a case, this benefit is dealt with under Article 81(3) or section 9.
[250] E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 3.19.
[251] ibid, paragraph 6.91.
[252] See 6.1.1, supra.

These matters have not been considered to raise any new competition issues for the control by the anti-competitive agreement prohibition. Rather, the Commission in ensuring that passive sales are not thwarted has generated the focus of concern. This is a matter that for the purposes of the Chapter I Prohibition does not at first sight appear relevant, even if the OFT should in future rely on the EC Block exemption on vertical restraints, since exclusivity of this nature implies a multi jurisdiction network in the implementation of such agreements. However, the results of the control of active sales will impact on the future ability of customers to substitute, in that is will affect the speed by which increased substitutability materialises. It is therefore relevant to market definition.

The Commission finds that:

> "...using a web-site to distribute products is in general considered a form of passive selling and...every distributor must be free to use the internet to advertise and sell products. Clauses preventing a distributor from selling online would only be permissible if a certain specific use of the internet amounted to active selling."[253]

This is fraught with difficulty since "By placing a web page containing an advertisement on the internet a commercial entity is effectively advertising across the globe."[254] The example given by the Commission is that of a French distributor, who could be prevented from sending unsolicited e-mails to German customers (where that territory was reserved for another exclusive distributor), using advertising banners and links on German websites and using a .de domain name, but could not be prevented from using a .fr domain name nor a generic one such as .com, nor from including German on its website.[255] This is however an unsafe conclusion, since as discussed earlier, the desire for generic non-country TLDs is on the increase. Indeed Bright notes that "The Commission's intention is clearly to promote sales over the internet" but questions what it would do if the

[253] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) p 124, submission of the European Commission.
[254] C Reed and J Angel op cit., p 333.
[255] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) pp 124 and 125, submission of the European Commission. Vertical Guidelines, paragraphs 50 and 51.

French distributor set up a .com website *entirely* in German as "it would seem difficult to argue that the French distributor was not actively attempting to attract sales from customers in Germany."[256] Further despite the .com address not indicating German language, it is possible to search for websites globally by using key words of the customers own language. It is not difficult to envisage metatags containing various languages. Whilst this is an "active" sales technique, the Commission or NCA's ability to discover such action is limited.

The only domestic response to this problem has been that Frontier concludes "it is far from clear how one would distinguish an 'active' from a 'passive' sale in the context of e-commerce."[257] This is a fair summary, but without explanation it is of little use in determining what can and cannot be done for the purposes of vertical agreements. Besides the .com lacuna, the Commission also send out a confusing message regarding the use of warehouses: establishing a warehouse or distribution outlet in another's exclusive territory is active selling, but responding to unsolicited requests from individual customers, including the delivery of such goods or services to such customers is passive.[258] With the Commission so keen to facilitate e-commerce transactions, it is submitted that action taken to establish smooth delivery at lowest costs to both suppliers and customer is on balance a passive sale irrespective of the active selling definition.

Vajda and Gahnström express concern that the promotion of sales via the internet may lead to conflict with traditional selective distribution systems, since if a product can be bought over the internet, "why cannot it be bought from a discount retail outlet with no smart premises or trained staff?"[259] Whilst the Block Exemption by "Article 4 (c)...precludes restrictions of any sales (active or passive) by the members of a selective distribution system to any end-user [this is] without prejudice to the possibility of prohibiting a selected dealer from operating out of an

[256] S Bright "Competition law aspects of e-commerce" (Speech delivered to the BIICL Conference, London, 18/5/01) p 8.
[257] E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 1.37.
[258] paragraph 50.
[259] C Vajda QC & A Gahnström "E.C. Competition Law and the Internet" (2000) 2 ECLR 94, 104.

unauthorised place of establishment" [260] yet the guidelines are silent on this point. They rely on the Grundig I[261] and II[262] and Yves Saint Laurent[263] cases to show that restrictions on internet selling by a selective distribution (SED) system imposing a requirement for the provision of appropriate retail premises in sufficient locations and for qualified staff etc., would not fall within Article 81(1) at all.[264] However, they fail to consider that SED's are generally allowed because face to face advice or assistance is required. Further, consumer preferences and demands for certain SED products are moving away from the requirement of such premises and service. For example, Tesco's has recently introduced a full range of high quality branded electrical goods such as TV's hi-fi's and Video machines – no frills, but cheaper prices available in store and on-line. Consequently, the justification for some selective distribution systems will be put to the test in the near future[265]. In any event, it is submitted that whatever the Commission finds can be prohibited on the part of distributors in theory, the technology exists for such restrictions to be circumvented. Substitutability is bound to increase.

6.3 Sustainability of the Chapter I Prohibition

Lack of thought in the Competition Bill debate as to these issues is not a failure by Government: no one was prepared; there was no precedent. It is right that law should remain technological neutral so as to avoid a "techie specific" law that just adds another level of control akin to the treatment of domestic utilities (where indeed the aim has been to move purely to general competition regulation[266]). In

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[260] ibid.
[261] Case IV/29.420, OJ 1985 L233/1.
[262] Case IV/29.420, OJ 1992 L20/15.
[263] Case IV/33.242, OJ 1992 L12/24.
[264] C Vajda QC & A Gahnström "E.C. Competition Law and the Internet" (2000) 2 ECLR 94, 105.
[265] Mario Monti, has recently indicated what he sees as the future for the "highway code" for motor vehicle distribution ("Who will be in the driver's seat" Forum Europe Conference, 11 May 2000 (Speech/00/177)). He has pointed to the changes since the current regulation was introduced, namely: manufacturers reorganising their distribution systems in order to make them more efficient; manufacturers reducing the numbers of dealers; the development of the use of the internet and e-commerce; and increased mobility of consumers enabling them to shop around for the best deals on offer. The Commissioner made specific reference to the CC inquiry into motor vehicle distribution and their radical suggestion to prohibit selective as well as exclusive distribution agreements in the car sector. In light of the UK developments the Commissioner looked at the three major assumptions on which Regulation 1475/95 is based, that is, the existence of effective competition in the motor vehicle industry; the provision of after-sales service by car dealers and that brand specialists are needed for the repair of motor vehicles, and questioned whether any of these still applied.
[266] See Chapter 2, supra.

their joint study on access issues, the OFT and OFTEL did not accept that "...there would never be a need for intervention in e-commerce markets, but do accept that inappropriate intervention or intervention with only short term goals in sight could be damaging to competition over the long run."[267] It was their view that

> "...the current regulatory framework in the UK, based on European Commission principles, and centred on the Competition Act, with additional specific powers granted under the Telecommunications Act and the Fair Trading Act, is sufficiently generic and technology-neutral to enable future e-commerce cases to be dealt with satisfactorily."[268]

They suggested that "cases would...be assessed according to the general principles as set out in the published guidelines to the Competition Act, and it may be useful to provide further guidance relating specifically to fast-moving markets."[269]

Whilst it is arguable that the focus of these statements was in relation to access issues, they ring true for any agreement having an adverse affect on competition. In response to the consultation, there was a general "...preference for ex-post ad hoc regulatory intervention, instead of ex-ante regulation. A light touch regime, mostly based on the Competition Act, was advocated by most."[270] Codes of practice could be used[271] in delivering a light touch regime, although the OFT would be wise to heed the warnings expressed earlier[272] before tacking this path.

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[267] OFT press release "Competition in e-commerce: a joint OFTEL and OFT study – Consultation Document" (www.oft.gov.uk/html/new/e-commerce.htm as at 17/4/00).
[268] ibid.
[269] Competition in e-commerce: a joint OFTEL and OFT study: Consultation document (OFTEL/OFT, April 2000) p 26.
[270] Competition in e-commerce: a joint OFTEL and OFT study: Consultation document (Summary of Responses) (OFT 327, December 2000) paragraph 2.7; although some sector specific rules in relation to the telecommunications network should be retained over and above general competition law (paragraph 2.8).
[271] As called for by the AGB, see footnote 110 supra.
[272] See 4.2.9, supra.

With these views in mind, it is submitted that it would *now* be a failure by the UK Government not to specifically deal with the e-commerce issues under the Chapter I Prohibition:

6.3.1 Prohibit anti-competitive agreements but allow benefits

Prohibition is the correct course of action. Specific measures to control e-commerce would only cause confusion, uncertainty and would require constant revision. No action is needed on the part of the OFT or Government in this respect.

6.3.2 Market

Market definition based on the principles in Chapter 3 will still work, but the evolution of e-commerce will demand more than the recommendation that: "Additional care will need to be taken in assessing market definitions and market power."[273] Although it has been suggested that in these early stages market shares may be calculated by using data on the number of hits on a website,[274] this is a very crude form of statistic. The Government and OFT must consider the ability to substitute, for if not already increasing, it will increase as the limits holding it back fade away with greater access, greater understanding, and all governments' desire to be the best nation at buying and selling online. This *will* increase the product market and the geographic market: (1) an increase in product market alone would mean less agreements exceeding the de minimis threshold, but the nature of the internet cannot guarantee that competition will take place. It is therefore suggested that where e-commerce has widen the market, in the short term at least, the agreements in question should be excluded form the de minimis safety net and examined for anti-competitive effect; (2) an increase in the geographic market will result in the matter more likely to be within the remit of EC law. Under devolved control, it will therefore be even more important for the OFT to be precise in defining the extent of the market. Ultimately though the extension of the market

[273] Competition in e-commerce: a joint OFTEL and OFT study: Consultation document (OFTEL/OFT, April 2000) p 30.
[274] E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 5.8.

could render the Chapter I Prohibition worthless. It would therefore be better for the Government to be more co-operative in the negotiations and discussions as to how competition law in the next generation will be framed.

6.3.3 Flexibility

The need for flexibility where the internet comes into play is already accepted. Whilst flexibility allows the Chapter I Prohibition to be responsive, it must also be seen in a new light of being responsive to new ideas of control, arising from international co-operation.[275]

6.3.4 Deterrence

The stronger sanctions suggested under the White Paper will assist in combating easier collusion facilitated by the internet. Consequently, whilst the case for increased powers is not explicitly made that White Paper, the suggestions can be justified by the www developments.

6.3.5 Investigation

New technology facilitating collusion requires new technology to unearth such activity. Frontier has suggested that the authorities might "...wish to think about procedures for keeping electronic business records for particular types of e-commerce operation"[276], and "competition authorities might wish to develop their own market-monitoring search engine software."[277]

However, the ability to define metatags and deep link will be harder to unearth. The emphasis must be on the development of new software and recruitment of increased numbers of specialist IT investigators. Indeed, it is proposed that the

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[275] see 6.3.8, infra.
[276] E-commerce and its Implications for Competition Policy; Discussion Paper 1 (OFT 308, A report complied by the Frontier Economics Group for the Office of Fair Trading, August 2000) paragraph 1.10.
[277] ibid, paragraph 1.29.

Enterprise Bill allow the OFT to use the services of expert consultants[278], but this should explicitly include IT investigators. Without this action, it is submitted that there may be an increased tendency for Chapter I Prohibition "competition problems" to be investigated by the new complex monopoly powers.

6.3.6 Fair decision making

The OFT will be faced with an increased demand for certainty where the internet is involved, which will not be made any easier should notification cease. Greater use of EC block exemptions may be one way to assist in lightening the administrative burden that would result, but the lack of clarity at EC level will hamper this. It is time for recognition of the problems in the guidelines at the very least.

6.3.7 Urgent action

The www allows agreements, and changes to such agreements, to be implemented rapidly.[279] The OFT must similarly be ready to act just as quickly.

6.3.8 Consistency

The one aspect that can be agreed on, even if we accept that "...e-commerce does not seem to raise any truly new or unique competition issues, [is that] it may well have already created a need for greater co-operation among national competition authorities and for new investigatory powers and enforcement skills."[280] An ever-widening market means global harmonisation of the role of competition law is inevitable.[281] Whilst the GCI does not call for uniform law and/or procedures yet[282], the development of online transactions will be a catalyst for this.

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[278] See 4.2.3, supra.
[279] See 6.2.2(i), supra.
[280] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 2.10.
[281] "Given the global aspects of the internet, it is...inevitable that there will continue to be co-operation between competition authorities." (C Vajda QC & A Gahnström "E.C. Competition Law and the Internet" (2000) 2 ECLR 94, 106).
[282] See below.

The future of competition laws in the wider arena was on the agenda pre Competition Act 1998:

> "In 1996 there were two meetings of the Committee [on Competition Law and Policy] and nine meetings of its working parties. One of the major subjects for discussion was regulatory reform...another was the relationship between trade and competition policies in an increasingly globalised marketplace."[283]

Likewise, e-commerce was an issue pre Competition Act 1998:

> "Much of the OFT's international liaison work in the consumers affairs arena during 1997 focused on electronic commerce, the internet, and the Information Society in general."[284]

> "The International Marketing Supervision Network (IMSN) also turned its attention to the internet and specifically to its potential use in misleading or deceiving consumers"[285],

thus illustrating the paramount concern of consumer protection in this area.

> "In 1998, the OFT's international liaison on consumer affairs continued to focus on electronic commerce and the internet...making an ongoing contribution to [the OECD's] international project developing consumer protection guidelines for electronic commerce."[286]

So the OFT has been used to partaking in the international discussions on e-commerce and the challenge for law. However, it is the OECD that has been the most assertive and comprehensive in its debates about e-commerce and its impact

[283] Annual Report of the Director General of Fair Trading, 1996, p 52.
[284] Annual Report of the Director General of Fair Trading, 1997, p 33.
[285] Annual Report of the Director General of Fair Trading, 1997, p 33.
[286] Annual Report of the Director General of Fair Trading, 1998, p 31. See also 6.1, supra.

on a "borderless world"[287]. It has been busy developing e-commerce consumer protection guidelines to promote confidence in the www market, together with provision to ensure the protection of privacy and personal data, taxation conditions, trade policy, market access, internet governance, economic and social impact, and B2B concerns.[288]

The OECD concludes that

> "since e-commerce should tend to widen geographic markets, it will also tend to increase the incidence of competition cases crossing national boundaries. That is turn means that national competition authorities will more frequently require each other's help in obtaining information and in co-ordinating the adoption of appropriate remedies."[289]

In response to this, "in order to ensure that barriers to e-commerce remain subject to appropriate regulation, the OFT proposes the...continued and close liaison and co-operation through OECD and with the European Commission, and regular bilaterals with national competition authorities."[290]

However, e-commerce has the potential to deliver something greater than a mix of bilateral and multilateral agreements. In February 2000, ICPAC[291]
"...recommended the creation of a "Global Competition Initiative" for the

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[287] The 1998 Ottawa Conference focused on the potential for the internet ("A Borderless World: Realising the Potential of Global Electronic Commerce" (SG/EC(98)14/Final, 22/12/98)), which recognised that the rapid development of e-commerce required a broad, collaborative approach by governments, the private sector and international organisations to facilitate e-commerce (p 5) and called for the establishment of ground rules for this digital marketplace (p 6).

[288] "A Borderless World: Realising the Potential of Global Electronic Commerce" (SG/EC(98)9/Final, 22/12/98; and "Progress Report of the OECD Action Plan for Electronic Commerce" (www.oecd.org/subject/e_commerce/ec_progrep.htm as at 5/2/01). Similarly, the WTO "In 1997...set up a working group on trade and competition policy to look at the interaction between trade and competition policies in the globalised market" (Annual Report of the Director General of Fair Trading, 1997, p 54) which adopted a Declaration to establish a comprehensive work program to examine all trade-related issues relating to global e-commerce in 1998 ("Orgainization of the WTO Work Program on the Trade Related Aspects of Electronic Commerce" 8 July 1998 (available on www.ecommerce.gov/usshort.htm as at 6/10/00). APEC has also been developing the expansion of e-commerce throughout the Asia Pacific region ("Electric Commerce and APEC" www.ecommerce.gov/2.htm as at 6/10/00).

[289] Competition Issues in Electronic Commerce (OECD, DAFFE/CLP(2000)32, 23/1/01) paragraph 2.10.

[290] ibid, p 107, submission of the OFT.

exchange of ideas on co-operation."[292] This need for co-operation was accelerated by the acceleration in the "rate of economic internationalisation"[293], with support for a Global Competition Forum agreed in February 2001[294]. This "flexible think tank" must now draw together professionals, undertakings, public bodies, academics and consumer bodies to deliver a common language. Where better to start than looking at the need for co-operation resulting from e-commerce? In this new era where law is grappling with all that e-commerce and technology throws at it, it forms a good basis for the discussions and prevents increasing attempts to impose one jurisdictions competition laws on others.

The fact that, unlike other transactions, e-commerce will raise jurisdictional issues at every turn, makes it the ideal candidate for forming the basis of the GCI agenda for some form of agreement.[295] Indeed as Klein found, "bilateral efforts, while absolutely essential, are not a complete answer...for global cooperation and coordination to work, we need to develop a common language even if we can't achieve pure convergence."[296] Already, there have been visible successful attempts at co-operation on a much larger scale: "In March [2001], the OFT participated in a 27-country, 150-organisation Get-Rich-Quick internet surf co-ordinated by the FTC. The surf resulted in 1,6000 suspect sites being identified and contacted."[297] This illustrates the importance of co-ordination when there is information identifying competition problems.

The UK and Canada have signed a joint statement to encourage the promotion of e-commerce and e-government, and explore arrangements to achieve a common

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[291] The International Competition Policy Advisory Committee appointed by the US DoJ.
[292] "Global Co-operation" (2001) In Competition April, 4.
[293] JI Klein "Time for a Global Competition Initiative?" Speech delivered a the EC Merger Control 10th Anniversary Conference, Brussels, 14/9/00, p 2.
[294] A meeting of 43 senior competition law officials including Commissioner Monti, senior representatives from the US DoJ, OECD and UNCTAD; "Forum to focus on competition" (2001) FT 12 February, 5.
[295] Both Barry Hawk and Mario Monti agreed that the best way for the GCI to work was for the problems that exist between authorities to be defined and debated (at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/10/00). Whilst this would not be as easy to achieve in practice since deciding what is and what is not a problem may itself be a stumbling bloc, there does appear to be consensus that co-operation is the only way to tackle the results of e-commerce.
[296] JI Klein "Time for a Global Competition Initiative?" Speech delivered a the EC Merger Control 10th Anniversary Conference, Brussels, 14/9/00, p 4.
[297] Annual Report of the Director General of Fair Trading, 2000, p 30.

framework to promote cross-border transactions.[298] The US has been keen to support

> "...the development of both a domestic and global uniform commercial legal framework that will recognize, facilitate and enforce electronic transactions worldwide" such as the supporting the model developed by UNCITRAL[299], and has been working to "enhance the ability of co-operating law enforcement officials to investigate computer crimes across international boundaries."[300]

However, the US approach has altered following Bush taking office. US business is once again left to get on with doing business, for example, the original Microsoft divestiture remedy overturned[301] and Kyoto pulled out of, suggesting international concern and co-operation are less important when it comes to ensuring economic freedom. Indeed, the new Assistant Attorney General for Antitrust, Charles James

> "...was a vocal critic of the interventionist anti-trust policy under his predecessor, the Clinton-appointee Joel Klein. His tenure at the Department of Justice is expected to mark a return to a more restrained approach such as characterised the Reagan and Bush (Sr) administrations."[302]

In spite of this, e-commerce will continue to push forward the need for cooperation, irrespective of national policy: "the advent of B2B marketplaces supports the ever-pressing need for continued and increased co-operation between competition authorities, as was the case in the Covisint investigation"[303], with such co-operation only increasing as B2B market places such as Ayaircraft.com join forces with

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[298] www.gol-ged.gc.ca/index_e.asp as at 31/5/01.
[299] The Emerging Digital Economy (US Department of Commerce) p 22 (www.ecommerce,gov as at 10/9/00).
[300] O Ward "Cyber-policing" (2001) NLJ 9 March, 337.
[301] "Microsoft wins landmark appeal against break-up" (2001) FT 29 June, 1; "US government U-turn spells defeat for Microsoft break up" (2001) The Independent 7 September, 1. However a new trail to decide penalties has been provisionally set for 11 March 2002 ("Judge's decision is setback for Microsoft" (2001) FT 29 September 9).
[302] "Appointment of Assistant Attorney General for Anti-trust" (2001) In Competition March, 5
[303] D Lancefield "The Regulatory Hurdles ahead in B2B" (2001) 1 ECLR 9, 12.

others in their industry sectors.[304] The need to co-operate, with its inevitable give and take, is unavoidable.

6.4 Conclusion

The problems remain abstract due to the lack of cases, but what is certain is that competition law is still relevant: perfect competition will not be delivered through the web; the conditions for it will not all be met.

The eEurope Action plan[305] to make the internet part of every child's education, end prohibitively expensive internet access, encourage learning and working over the internet, deliver greater confidence in online shopping and replace "opening times" with 24 hour "internet time", will, within a generation, result in a significant proportion of UK citizens using this medium as the means of interacting and contracting[306].

New technology, innovation and globalisation, whilst not revealing themselves with the same clarity at the time of the Competition Bill debates, are certainly prevalent to form part of Government policy. Yet the Enterprise Bill would not appear to be specifically addressing any of these issues for the Competition Act 1998, other than the need for specialist IT investigators. The Government's plans for e-commerce were criticised in the 10th Report of the House of Lords Select Committee on Trade and Industry[307] because its projects were unlikely to be "...capable of making a significant contribution towards the achievement of the government's ambitious goals."[308] It is a great shame pity that the new plans for competition law fall to the same criticisms.

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[304] Myaircraft.com is to merge with AirNewCo to form a new marketplace in the aviation industry (D Lancefield "The Regulatory Hurdles ahead in B2B" (2001) 1 ECLR 9, 11).
[305] Commission press release IP/00/514, 24/5/00.
[306] See 6.1.1, supra.
[307] 10/8/99, www.publications.parliament.uk/pa/cm/cmtrdind.htm as at 30/10/99.
[308] "House of Commons Trade and Industry Select Committee reports on e-commerce" (1999) IHL October, 79.

In summary, for the Chapter I Prohibition must be prepared for:

(1) Wider product and geographic market is inevitable[309]. The internet blasts away the limits to consumer choice, such that substitutability will increase[310]. It is said that "One of the peculiarities of the internet is that it constitutes a geographically ubiquitous activity"[311]. Territorial anonymity makes it difficult to establish jurisdiction, but this anonymity is tolerated in order to see e-commerce succeed. The Government have been informed that "E-commerce has the potential to drive a rapid redirection of [the] single market"[312], but no thought has been given to role of the Chapter I Prohibition in light of such development. An increase in the geographic market will result in the Chapter I Prohibition applying in only a few situations.[313]

(2) A clear policy decision should be made that where online sales factor in the market definition or form a separate market in their own right, the de minimis threshold is inapplicable.[314] This will ensure that agreements are fully examined[315] as reliance on discovery through complaints or inquiry alone is no guarantee of effective enforcement in this era where anti-competitive activity is assisted by technology. As for the interstate trade threshold, it has been submitted that the Commission may consider that e-commerce is an area that should be examined at EC level without reliance on de minimis thresholds, until sufficient precedent has been achieved[316]. The OFT must be aware that this will limit the role of the Chapter I Prohibition.

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[309] See 6.1.2, supra.
[310] See 6.2.1, supra. This will increase despite the attempt by the Commission to regulate active and passive sales (6.2.2, supra).
[311] P Ruttley "E.C. Competition Law in Cyberspace: An Overview of Recent Developments" (1998) 4 ECLR 186, 194.
[312] e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) paragraph 1.9.
[313] See 6.3.6, supra.
[314] See 6.2.1, supra.
[315] See 6.3.2, supra.

(3) The possible increased collusion should make the Government and OFT very wary of relying on business to deliver the objectives for e-commerce.[317] There must be specific guidance on e-commerce published as part of the guidelines, explaining the issues raised in this Chapter. Reliance on what has been said at international conferences is not a satisfactory way of educating, especially if codes of practice are to be developed as the way for delivering a light touch regime[318].

(4) The increased possibility of collusion and concealing evidence of anti-competitive agreements, must be counteracted by the employment of specialist IT investigators[319] (although this may well form part of the Enterprise Bill[320]).

(5) Now that support for the GCF has been formalised, the issues raised by e-commerce in terms of finding and examining anti-competitive agreements make them the ideal candidates for consideration by the Forum[321]. In this respect, like the submissions in Chapter 5, the Government and OFT should aim to be key players in taking the debate forward, by adopting a positive approach as to the benefits of the Chapter I Prohibition. Only if this course is adopted, can it be ensured that should the Chapter I Prohibition not live on in its own right, its' benefits do pervade the future control of anti-competitive agreements.

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[316] See 6.2.1, supra.
[317] See 6.1.3 and 6.2.2, supra.
[318] See 6.3, supra.
[319] See 6.3.5, supra.
[320] See Chapter 4, supra.
[321] See 6.3.6 and 6.3.8, supra.

CONCLUSION

"We even sell a pair of earrings for under £1, which is cheaper than a prawn sandwich from Marks & Spencers. But I have to say that the earrings won't last as long."[1]

The RTPA proved expensive and burdensome. 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. In this respect, the Chapter I Prohibition is less burdensome: it is less oppressive in terms of freedom to contract and freedom from regulatory burden. 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.[2]

However, all that glitters is not gold. Whilst it is accepted that it was inevitable that there would be limits as to what it could achieve, the question of the resources available is not the reason why the Chapter I Prohibition cannot be sustained in its present form.[3] Despite the best of intentions, there was short-sightedness in the design and implementation of the Chapter I Prohibition. The ineffectiveness of the Competition Act 1980 has already been commented upon[4]. Described by Whibley

[1] Gerald Ratner, speech to the Institute of Directors, Albert Hall, 23/4/91.
[2] See Chapter 3, supra.
[3] See 2.4, supra.
[4] See Chapter 2, supra.

as "another frightful waste of time and money"[5], the evidence so far in respect of the Chapter I Prohibition enables this statement to be repeated.

The question of its' sustainability has been recognised by the Government, with their surprise post re-election promise for further reform. The Chancellor, Gordon Brown, sated that "[by 2002] we will have put in place the framework to deliver a pro-competitive regime to match the best in the world."[6] Yet this was what the Chapter I Prohibition was aiming to achieve, and in any event, the White Paper does not address all aspects where the Chapter I Prohibition is failing to meet its objectives. The fact that consultation closes on 5 October 2001, which is admittedly "...less that the standard minimum for comments to be received in time to inform drafting of the Enterprise Bill"[7], together with the missing detail, such as the basis for damages and how the super complaint will work in practice, all supports the submission that the reform is premature and ill advised. It cannot remedy the defects identified by this work that go to the very heart of the sustainability of the Chapter I Prohibition:

(1) Prohibit all significant anti-competitive agreements, whilst ensuring that those with benefits are allowed to continue

At long last the UK has prohibition style control for anti-competitive agreements, but the OFT must ensure that it sticks to focusing on "significant" and "appreciable" especially in light of the poor reasoning in the GISC decision. This decision added to the confusion by finding that there were no "appreciable restrictions" even though the DGFT had not actually defined the relevant market. Consideration of what the DGFT considered innocuous in terms of anti-competitive effect confused rather than clarified. Consequently the GISC rules remain in limbo and a domestic interpretation of the rule of reason is still open to debate. Whilst the debate continues there will be suspicion and unease: even though the CCAT

[5] "Opinion" (2001) The Lawyer 30 April, 19.
[6] "Enterprise for all" HM Treasury Statement 68/01, 18/07/01. Development of public-private partnerships and the imposition of procurement rules means that undertakings are more aware of regulation designed to ensure that the benefits of the competitive process prevail (see 2.1.3, supra). However, the Chapter I Prohibition may still be brought into play, for attempts made to thwart or avoid the regimes will result in anti-competitive agreements.
[7] A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), p 61.

refused to rule on whether a rule of reason was appropriate, it is clear that they support the submission that transparency is thwarted if the benefits produced by restrictions are not viewed under section 9.[8] Yet 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[9], we will see a return to the use of public interest criteria.

The OFT must focus on a workable definition of "competition" in the economic sense for section 60[10]. If not, the hopes for the introduction of economic realism could be dashed. The fact that there has been no claw back of the section 21(2) RTPA discretion nor a change as to the treatment of agreements found to be non-notifiable under the RTPA, suggests that the OFT has taken comfort from this knowledge as to what affects competition. In effect, the OFT might well be relying on its own rule of reason. If this is so, it must be made explicit so that we can be guided as to the DGFT's views. This is essential for both the Chapter I Prohibition and Article 81 devolution to work.

The disregard of the intended pecking order of the Competition Act 1998 and FTA in the area of agreements is an unwelcome development. A dual regime enables agreements to be condemned without any assessment of whether there is an agreement for the purposes of the Chapter I Prohibition. No case has been made out for a reform of the complex monopoly powers to provide a dual regime. Indeed, during the Competition Bill debates the Government was explicit in their intention that they had no plans to reform this system.[11] Whilst the plan to replace the public interest test with a competition based test is to be welcomed, confusion will continue so long as the EC has recourse to concerted practices. Further, the complex monopoly reforms do not deal with the lack of interim measures, the question of damages, do not impose any criminal offences, but do retain the stronger sanction of divestment, although such a remedy has been criticised under the EC reforms.

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[8] See 3.3 supra.
[9] See Object or Effect, 3.2.1, supra.
[10] See 3.1.2, supra.

Increased use of the new powers will only further hinder the use of the Chapter I Prohibition and blur the jurisdiction of application. The Chapter I Prohibition must be reaffirmed as the primary weapon. Rather than merely stating what the UK will do in future, the Government would be better in positively standing behind their concerns with the interpretation of Article 81 and supporting these new powers as the basis for wider application under EC law. Transparency in the relationship between the domestic powers and the interpretation of Article 81 are essential to the successful working of both the Chapter I Prohibition and devolved application of Article 81 by the OFT.

The proposal to rely on the EC Block Exemption following the repeal of the vertical agreements Exclusion Order, will require a new domestic de minimis and amendment of the safe harbour threshold: this threshold must be raised if the domestic "exemption" is to be effective in deterring notifications. However, the OFT must be aware that the procedures for parallel exemptions do not provide any clear answer to the difficulties raised when EC block exemptions ought to be varied or withdrawn for domestic purposes. The OFT should address this, since the apparent reliance on EC exemptions as opposed to introducing our own block exemptions, will increase the likelihood of complaints, where the exemptions are varied or withdrawn. Guidance must follow.

Attempts to invoke the EC power to require registration must be vigorously opposed. Such a result would potentially take us back to the RTPA. It would do nothing to assist decision-making and only throw the system of devolution into chaos.

[11] See Concerted Practices, 3.2.1, supra.

As for the minor issues raised by the prohibition system under Chapter I:

(i) Although the test for mergers is to be changed to a substantial lessening of competition (replacing the public interest criteria), how this test will differ from an appreciable affect on competition in practice (by which joint ventures not falling within the merger regime, will be assessed), is unclear. Specific guidance from the OFT will be needed to avoid notifications. Staying with the changing practice in the treatment of merger agreements, the exclusion for ancillary restraints will require new guidance in light of the EC shift to no longer finding such restrictions automatically exempt under the ECMR. This should be made explicit in the guidelines.

(ii) Clarity is needed in the guideline for land agreements in respect of "capacity as a holder of an interest in land". The OFT should confirm that they will assess the problems on a case by case basis.

(iii) The fifth element of the exemption criteria under Article 81(3), identified by Whish, should be made clear in the guidelines[12], so that undertakings objectively demonstrate the benefit. This is especially important should notification end altogether (and accordingly, the Commission would also be wise to note this point, for their guidelines still only refer to the four explicit criteria).

(iv) Confirmation that material change and material variation both mean the same and will be assessed in the same way, that is, the effect on competition.

(v) The OFT view that individual exemptions can be backdated to the date of agreement should be reaffirmed by the OFT more publicly.

[12] See Exclusions, 3.1.2, supra.

(vi) Publishing of the definitive versions of the guidelines on intellectual property and services of general economic interest, is a priority.

(vii) Confirmation that the DGFT can make an Article 234 reference, since it is more effective in terms of certainty and cost for the DGFT to make the required reference in the first instance. The plan to make the OFT the "competition advocate" makes this an essential right. Encouraging the Commission to confirm that the DGFT can make an Article 234 reference, should be a priority for the OFT and Government.[13]

(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

The vastly increased transparency in the role and operation of market definition, is the key to understanding the operation of the Chapter I Prohibition. Whilst this process is not a mechanical exercise, detailed analysis is needed to show appreciability (and avoid another showdown before the CCAT) and provide the much needed jurisprudence. The inevitable drawback in assessing agreements in relation to the market, is that in an era of changing selling techniques and increased availability, the market may be larger than just the UK in a greater number of cases than in the past. The www factor means that wider product and geographic market is inevitable[14]: the internet blasts away the limits to consumer choice, such that substitutability will increase[15]. Within the next generation, result in a significant proportion of UK citizens using this medium as the means of interacting and contracting[16]. The Government have been informed that "E-commerce has the potential to drive a rapid redirection of [the] single market"[17], but no thought has been given to role of the Chapter I Prohibition in light of such development. The

[13] See 5.3.2, supra.
[14] See 6.1.2, supra.
[15] See 6.2.1, supra. This will increase despite the attempt by the Commission to regulate active and passive sales (6.2.2, supra).
[16] See 6.1.1, supra.
[17] e-commerce@its.best.uk (A Performance and Innovation Unit Report, September 1999) paragraph 1.9.

fact that the John Lewis complaint indicated that the market was at least the UK, confirms the concern in Chapter 6 that the market may be European in a greater number of cases in the internet age than anticipated, negating the need for domestic control and doing away with the domestic changes that have proved a success. There is no excuse for the Government not recognising this problem in the White Paper. Yet the Enterprise Bill would not appear to be specifically addressing any of these issues for the Competition Act 1998, other than the need for specialist IT investigators.

A clear policy decision should be made that where online sales factor in the market definition or form a separate market in their own right, the de minimis threshold is inapplicable.[18] It has been submitted that the Commission may consider that e-commerce is an area that should be considered at EC level without reliance on de minimis thresholds, until sufficient precedent has been achieved[19]. The OFT must be aware that this will limit the role of the Chapter I Prohibition. Even if de minimis thresholds remain and competence is divided between the Commission and OFT, complete market definition analysis is essential to ensure that aggrieved undertakings are not able to frivolously argue jurisdictional points as to the relevant law and decision making body.[20]

(3) Be flexible, ensuring that its application is effective with responsive decisions that reflect the dynamic nature of the market

This requires the DGFT to be effective in monitoring, and responsive to, developments and actually challenge agreements when the law is not complied with. Sufficient resources will be the decisive factor in ensuring this flexibility works in practice, so the intention to increase staff is welcomed. Although there has not been enough action to tell conclusively, the DGFT has taken some complaints to a formal decision: the Synstar case is illustrates that having declined not to investigate, the claimants further submissions were taken on board by the DGFT and a formal decision issued. This practice of allowing aggrieved complainants to

[18] See 6.2.1, supra.
[19] See 6.2.1, supra.
[20] See 5.3.3, supra.

challenge the DGFT's decision not to investigate, leading to a full reasoned decision is to be commended. It demonstrates that the discretion and trust placed in the OFT is capable of delivering the best results on times. However, flexibility is missing at present in so far as those harmed have no real option to sue for damages.

Flexibility must also be viewed from the point of view of the undertaking under scrutiny. Parties to agreements must feel they are able to challenge decisions where individual exemption is refused or granted subject to conditions they do not agree with. The introduction of the CCAT, with the full rights of appeal, goes a long way to encourage this.

In respect of the reform of the treatment of vertical agreements, the Government run the risk of a greater number of notifications, or in any event, a definite increase in informal inquires, draining the extra resources promised. Vertical agreements pre-Competition Act 1998 fell outside of the RTPA, and consequently have not been excluded by the operation of the Competition Act 1998 Schedules. Unless guidance is forthcoming and the issues raised in (1) above addressed, the repeal will send out a shock wave resulting in the desire for certainty.

(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

The ability to impose directions and fines meets the objective of providing a system of effective sanctions, but whilst the momentum to ensure that the Chapter I Prohibition came in all guns firing *was* present, it cannot be concluded that the regime has got off the ground. There has not been effective deterrence in the first eighteen months. The use of sanctions has been very disappointing and it is surprising that the Government should find a case for extending the range of sanctions that may be imposed.

The legitimate expectations of injured third parties have been ignored in the implementation of the Chapter I Prohibition. The treatment of damages is flawed[21]: there is no clear basis for the right to damages. Unsurprisingly, damages have not been awarded. The White Paper proposal to include an explicit right for damages, to be heard before the CCAT, is an acceptance of the ineffective design of the Competition Act 1998. However, it is worrying that the consultation does not mention the basis for such a claim, choosing only to deal with the issue of costs. The Government has a second chance to remedy this appalling situation. If they don't get it right this time, the same problems will persist: once the third party has had the pitfalls of such an action explained and is aware of the costs involved, the preferred option will be to complain to the OFT instead[22] and the complainant who feels they have no option for pursing a private action, is less likely to accept a decision not to investigate. Breach of statutory duty must be explicitly incorporated, and rules on evidence, limitation and calculation of damages must be clearly set out in the CCAT rules.

The White Paper consultation does not mention the code of practice as a possible remedy under the Competition Act 1998, despite its praise by the OFT in the use it served in the Supermarket inquiry. In view of the problems in bringing this code to fruition, and the concern over its ability to actually deal with the anti-competitive activity, the OFT should steer clear of such remedies, even where the problems is e-commerce related and a light touch regime desired.

The OFT has noted that some complaints are often withdrawn following the undertakings concerned commencing dealing with each other and resolving the problems. The OFT should also be careful to monitor the operation of negotiated settlements: a remedy not envisaged by the Act, which has the potential to result in an anti-competitive agreement.

[21] See Damages under the Chapter I Prohibition, 3.2.4, supra.
[22] See Complaints, 3.2.5, supra.

(5) Make investigating easier and swifter with legal rights respected

The strong powers[23] must be put into practice. Too little information has been published to determine whether the OFT have been effectively investigating, although the lack of cartel prosecutions suggest that they are not. Details are starting to be made public, but more of this is needed. The exercise of the powers should be publicised in the same way as the Commission does, in order to add to the compliance effect[24]. As far as one can tell, no personal offences have been found committed.

The increased possibility of collusion and concealing evidence of anti-competitive agreements, must be counteracted by the employment of specialist IT investigators[25] (although this may well form part of the Enterprise Bill[26]).

The HRA's narrow interpretation has continued, with the application for wasted costs[27] in the medicaments fiasco refused. Human rights should not cause too many problems in practice under the Competition Act 1998, in its present form. However, the White Paper reforms in terms of criminal sanctions will severely limit the way in which the OFT conducts investigations and obtains evidence under both the Chapter I and Article 81 prohibitions. The OFT must ensure that it is careful as to the evidential requirements when conducting both Chapter I Prohibition and EC investigations since all remedies (including personal criminal offences) are to be available to the OFT. In any event, an EC investigation might conclude that the problem is a domestic one. The evidential procedures should be set out in specific guidance as to the conduct of investigations post domestic and EC reform, drawing on the guidance generated by the Police and Criminal Evidence Act 1984.

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[23] See 3.2.5, supra.
[24] 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.
[25] See 6.3.5, supra.
[26] See Chapter 4, supra.
[27] In re Medicaments and Related Classes of Goods (No. 4) (2001) The Times 7 August.

(6) Be transparent and fair, with cost effective, speedy decision making on terms and criteria readily understood

The OFT mantra[28] has meant that few formal decisions will actually be made. The recourse to informal advice has produced insufficient precedent. Unless greater illustrations of what they have learnt through informal advice is given, transparency will remain absent, causing doubt as to the OFT's work and the value to be placed on their decisions. A good source of precedent is being wasted. Few decisions and an ad hoc approach to the dissemination of information are no doubt the impetus for the White Paper calls for transparency to be paramount, but neither of the points arising from the lack of notifications is specifically addressed in that White Paper. The OFT must provide more information on the types of complaint and the sort of questions being posed informally. The OFT should publish a "Quarterly Competition Newsletter".

The introduction of Chapter I Prohibition commitments would ensure that a formal process exits, ready to deal with the likely increase in the demand for OFT advice resulting from the increased EC de minimis thresholds. This should be implemented by specific amendment to the Competition Act 1998.[29] Domestic commitments will also assist the OFT in dealing with agreements post devolution, for it is submitted that domestic notification should end (by specific amendment to the Competition Act 1998)[30]. Harmony in the application of how undertakings seek comfort under the Chapter I Prohibition and Article 81 is essential if the OFT is to avoid being deluged by notifications under the Chapter I Prohibition as a fail safe measure post devolution.

Also in line with EC reforms, there should be formalisation of complaints handling procedure, with a four month target (as the maximum period in which a decision is to be reached) adopted.[31]

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[28] See 3.2.6, supra. For whether this mantra can survive, see Chapter 5, infra.
[29] See 5.3.4, supra.
[30] See 5.3.6, supra.

There must be specific guidance on e-commerce published as part of the guidelines, explaining the issues raised in Chapter 6. Reliance on what has been said at international conferences is not a satisfactory way of educating, especially if codes of practice are to be developed as the way for delivering a light touch regime[32].

Transparency in decision making remains a fundamental aim of the Government, but the confusing message regarding the High Court's ability to entertain judicial review applications during the OFT investigation has not been answered. An appeal to the CCAT is not possible since it would hinder the effective application of the prohibition. The High Court has confirmed that it will stay competition actions where the matter is being investigated in parallel by the DGFT. However no issues have been brought by way of judicial review. The White Paper is silent on his point, so judicial review of the DGFT and CCAT proceedings remains a possibility. This should be formally addressed so that undertakings are made aware of the position before they incur any expense in bring an application before an unresponsive court. It is submitted that the role of the CCAT should be extended to deal with all disputes concerning Article 81(3) defences[33], and in doing so confirm that the CCAT assumes responsibility for all private actions in respect of competition matters.

(7) Be able to take urgent action to prevent further harm

If undertakings cannot obtain a remedy themselves they will expect the OFT to act to prevent further loss. The more that the OFT's power is invoked, the greater chance of public interest criteria being brought into play. This could be avoided by explicit confirmation that damages are available by way of breach of statutory duty, in the new Enterprise Bill.

[31] See 5.3.4, supra.
[32] See 6.3, supra.
[33] See 5.3.6, supra.

Further, in light of the EC's proposals for modernisation, the Government and OFT should vehemently defend the right for an interim measure at EC level to be judged at the lower Competition Act 1998 burden of proof.[34]

(8) Be less burdensome on those being regulated by it, ensuring consistency and certainty in the European and global arenas

Co-operation is a principle very much taken to the heart of the Act[35] in the way that other Member States' findings are recognised and non-EC procedures are selected where they have proved more successful[36]. It is right that co-operation continues to be built upon, since more and more undertakings will find that they operate over different jurisdictions. There is no point aiming for the perfect domestic law, if undertakings are only going to run into difficulties outside of the UK. The aspects of the EC system that are unacceptable[37] should therefore continue to be vehemently denounced before devolution is finalised, otherwise co-operation could work to the disadvantage of the future of our domestic regime[38]. However, the UK approach has fallen short of this mark. Despite the White Paper first "accepting" the EC modernisation proposals, it then seeks to distinguish the treatment of oligopolies. It finds that European reform is *not* decided on, despite the fact that a draft Regulation has been in circulation since September 2000, and Commissioner Monti's assertions that this *will* be in place in 2003. The future of good relations must be considered as being far from certain.[39] The UK's decision to press ahead with the reform of the Competition Act 1998 without waiting for the EC's reforms to be finalised is very short sighted and inward looking.

Adopting the best of what each can offer is possible (for example, the EC follow the UK in the latest leniency notice), and can deliver the best form of control. If this is what the UK are trying to achieve, by bull-dozing ahead with the imposition of new powers to investigate markets and criminal penalties, their time and energy would be better spent in constructive dialogue with the EC rather than

[34] See 5.3.7, supra.
[35] See 3.1.2, supra.
[36] See 3.2.6, supra.
[37] For example, see Powers and Privilege, 3.2.5, supra.
[38] See Chapter 5, infra.

implementing reforms that are on the whole premature, only serving to provide inconsistency, confusion and hinder the success of the Chapter I Prohibition. Progressing the debate on the formal harmonisation of procedures and sanctions[40] ensures that the UK is better placed to argue that the measures taken in designing the Chapter I Prohibition are the correct way forward[41]. Indeed, a unified Europe will provide a greater voice in the development of global co-operation.

Now that support for the GCF has been formalised, the issues raised by e-commerce in terms of finding and examining anti-competitive agreements make them the ideal candidates for consideration by the Forum[42]. The Government and OFT should aim to be key players in taking the debate forward, by adopting a positive approach as to the benefits of the Chapter I Prohibition.

In essence, by not tackling the devolution and e-commerce issues now, the Government is setting itself up for criticism and ridicule (in the same way as it ridiculed the Conservative Party for not dealing with the reform of the RTPA). Consequently, it is submitted that the Chapter I Prohibition even post "Enterprise Act", is not capable of being sustained. Even an increased profile for competition law and a drive to ensure that the regime works emerging from the principles set in the UK White Paper, are together insufficient. The Government and OFT must recognise that a market based test will curtail the future application of the Chapter I Prohibition. Resolving the problems under the Chapter I Prohibition is therefore of little consequence since the benefits will be short lived. They must co-operate on the EC and global stages to sell the virtues of the Chapter I Prohibition. Only if this is the course adopted, can it be ensured that even though the Chapter I Prohibition may not live on in its own right, its' benefits do pervade the future control of anti-competitive agreements.

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[39] See Chapter 5, infra.
[40] See 5.3.5, supra.
[41] See 5.3.8, supra.
[42] See 6.3.6 and 6.3.8, supra.

APPENDICES

APPENDIX I

Excerpts from the Competition Act 1998

2. (1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which-

(a) may affect trade within the United Kingdom, and

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.

(2) Subsection (1) applies, in particular, to agreements, decisions or practices which-

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(3) Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.

(4) Any agreement or decision which is prohibited by subsection (1) is void.

(5) A provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).

(6) Subsection (5) does not apply where the context otherwise requires.

(7) In this section "the United Kingdom" means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.

(8) The prohibition imposed by subsection (1) is referred to in this Act as "the Chapter I prohibition".

9. This section applies to any agreement which-

(a) contributes to-

(i) improving production or distribution, or

(ii) promoting technical or economic progress,

while allowing consumers a fair share of the resulting benefit; but

(b) does not-

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

10. (1) An agreement is exempt from the Chapter I prohibition if it is exempt from the Community prohibition-

(a) by virtue of a Regulation,

(b) because it has been given exemption by the Commission, or

(c) because it has been notified to the Commission under the appropriate opposition or objection procedure and-

(i) the time for opposing, or objecting to, the agreement has expired and the Commission has not opposed it; or

(ii) the Commission has opposed, or objected to, the agreement but has withdrawn its opposition or objection.

(2) An agreement is exempt from the Chapter I prohibition if it does not affect trade between Member States but otherwise falls within a category of agreement which is exempt from the Community prohibition by virtue of a Regulation.

(3) An exemption from the Chapter I prohibition under this section is referred to in this Part as a parallel exemption.

(4) A parallel exemption-

(a) takes effect on the date on which the relevant exemption from the Community prohibition takes effect or, in the case of a parallel exemption under subsection (2), would take effect if the agreement in question affected trade between Member States; and

(b) ceases to have effect-

(i) if the relevant exemption from the Community prohibition ceases to have effect; or

(ii) on being cancelled by virtue of subsection (5) or (7).

(5) In such circumstances and manner as may be specified in rules made under section 51, the Director may-

(a) impose conditions or obligations subject to which a parallel exemption is to have effect;

(b) vary or remove any such condition or obligation;

(c) impose one or more additional conditions or obligations;

(d) cancel the exemption.

(6) In such circumstances as may be specified in rules made under section 51, the date from which cancellation of an exemption is to take effect may be earlier than the date on which notice of cancellation is given.

(7) Breach of a condition imposed by the Director has the effect of cancelling the exemption.

(8) In exercising his powers under this section, the Director may require any person who is a party to the agreement in question to give him such information as he may require.

(9) For the purpose of this section references to an agreement being exempt from the Community prohibition are to be read as including references to the prohibition being inapplicable to the agreement by virtue of a Regulation or a decision by the Commission.

(10) In this section-

"the Community prohibition" means the prohibition contained in-

(a) paragraph 1 of Article 85;

(b) any corresponding provision replacing, or otherwise derived from, that provision;

(c) such other Regulation as the Secretary of State may by order specify; and

"Regulation" means a Regulation adopted by the Commission or by the Council.

(11) This section has effect in relation to the prohibition contained in paragraph 1 of Article 53 of the EEA Agreement (and the EFTA Surveillance Authority) as it has effect in relation to the Community prohibition (and the Commission) subject to any modifications which the Secretary of State may by order prescribe.

12. (1) Sections 13 and 14 provide for an agreement to be examined by the Director on the application of a party to the agreement who thinks that it may infringe the Chapter I prohibition.

(2) Schedule 5 provides for the procedure to be followed-

(a) by any person making such an application; and

(b) by the Director, in considering such an application.

(3) The Secretary of State may by regulations make provision as to the application of sections 13 to 16 and Schedule 5, with such modifications (if any) as may be prescribed, in cases where the Director-

(a) has given a direction withdrawing an exclusion; or

(b) is considering whether to give such a direction.

25. The Director may conduct an investigation if there are reasonable grounds for suspecting-

(a) that the Chapter I prohibition has been infringed; or

(b) that the Chapter II prohibition has been infringed.

26. (1) For the purposes of an investigation under section 25, the Director may require any person to produce to him a specified document, or to provide him with specified information, which he considers relates to any matter relevant to the investigation.

(2) The power conferred by subsection (1) is to be exercised by a notice in writing.

(3) A notice under subsection (2) must indicate-

(a) the subject matter and purpose of the investigation; and

(b) the nature of the offences created by sections 42 to 44.

(4) In subsection (1) "specified" means-

(a) specified, or described, in the notice; or

(b) falling within a category which is specified, or described, in the notice.

(5) The Director may also specify in the notice-

(a) the time and place at which any document is to be produced or any information is to be provided;

(b) the manner and form in which it is to be produced or provided.

(6) The power under this section to require a person to produce a document includes power-

(a) if the document is produced-

(i) to take copies of it or extracts from it;

(ii) to require him, or any person who is a present or past officer of his, or is or was at any time employed by him, to provide an explanation of the document;

(b) if the document is not produced, to require him to state, to the best of his knowledge and belief, where it is.

27. (1) Any officer of the Director who is authorised in writing by the Director to do so ("an investigating officer") may enter any premises in connection with an investigation under section 25.

(2) No investigating officer is to enter any premises in the exercise of his powers under this section unless he has given to the occupier of the premises a written notice which-

(a) gives at least two working days' notice of the intended entry;

(b) indicates the subject matter and purpose of the investigation; and

(c) indicates the nature of the offences created by sections 42 to 44.

(3) Subsection (2) does not apply-

(a) if the Director has a reasonable suspicion that the premises are, or have been, occupied by-

(i) a party to an agreement which he is investigating under section 25(a); or

(ii) an undertaking the conduct of which he is investigating under section 25(b); or

(b) if the investigating officer has taken all such steps as are reasonably practicable to give notice but has not been able to do so.

(4) In a case falling within subsection (3), the power of entry conferred by subsection (1) is to be exercised by the investigating officer on production of-

(a) evidence of his authorisation; and

(b) a document containing the information referred to in subsection (2)(b) and (c).

(5) An investigating officer entering any premises under this section may-

(a) take with him such equipment as appears to him to be necessary;

(b) require any person on the premises-

(i) to produce any document which he considers relates to any matter relevant to the investigation; and

(ii) if the document is produced, to provide an explanation of it;

(c) require any person to state, to the best of his knowledge and belief, where any such document is to be found;

(d) take copies of, or extracts from, any document which is produced;

(e) require any information which is held in a computer and is accessible from the premises and which the investigating officer considers relates to any matter relevant to the investigation, to be produced in a form-

(i) in which it can be taken away, and

(ii) in which it is visible and legible.

28. (1) On an application made by the Director to the court in accordance with rules of court, a judge may issue a warrant if he is satisfied that-

(a) there are reasonable grounds for suspecting that there are on any premises documents-

(i) the production of which has been required under section 26 or 27; and

(ii) which have not been produced as required;

(b) there are reasonable grounds for suspecting that-

(i) there are on any premises documents which the Director has power under section 26 to require to be produced; and

(ii) if the documents were required to be produced, they would not be produced but would be concealed, removed, tampered with or destroyed; or

(c) an investigating officer has attempted to enter premises in the exercise of his powers under section 27 but has been unable to do so and that there are reasonable grounds for suspecting that there are on the premises documents the production of which could have been required under that section.

(2) A warrant under this section shall authorise a named officer of the Director, and any other of his officers whom he has authorised in writing to accompany the named officer-

(a) to enter the premises specified in the warrant, using such force as is reasonably necessary for the purpose;

(b) to search the premises and take copies of, or extracts from, any document appearing to be of a kind in respect of which the application under subsection (1) was granted ("the relevant kind");

(c) to take possession of any documents appearing to be of the relevant kind if-

(i) such action appears to be necessary for preserving the documents or preventing interference with them; or

(ii) it is not reasonably practicable to take copies of the documents on the premises;

(d) to take any other steps which appear to be necessary for the purpose mentioned in paragraph (c)(i);

(e) to require any person to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of his knowledge and belief, where it may be found;

(f) to require any information which is held in a computer and is accessible from the premises and which the named officer considers relates to any matter relevant to the investigation, to be produced in a form-

(i) in which it can be taken away, and

(ii) in which it is visible and legible.

(3) If, in the case of a warrant under subsection (1)(b), the judge is satisfied that it is reasonable to suspect that there are also on the premises other documents relating to the investigation concerned, the warrant shall also authorise action mentioned in subsection (2) to be taken in relation to any such document.

(4) Any person entering premises by virtue of a warrant under this section may take with him such equipment as appears to him to be necessary.

(5) On leaving any premises which he has entered by virtue of a warrant under this section, the named officer must, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured as he found them.

(6) A warrant under this section continues in force until the end of the period of one month beginning with the day on which it is issued.

(7) Any document of which possession is taken under subsection (2)(c) may be retained for a period of three months.

29. (1) A warrant issued under section 28 must indicate-

(a) the subject matter and purpose of the investigation;

(b).the nature of the offences created by sections 42 to 44.

(2) The powers conferred by section 28 are to be exercised on production of a warrant issued under that section.

(3) If there is no one at the premises when the named officer proposes to execute such a warrant he must, before executing it-

(a) take such steps as are reasonable in all the circumstances to inform the occupier of the intended entry; and

(b) if the occupier is informed, afford him or his legal or other representative a reasonable opportunity to be present when the warrant is executed.

(4) If the named officer is unable to inform the occupier of the intended entry he must, when executing the warrant, leave a copy of it in a prominent place on the premises.

(5) In this section-

"named officer" means the officer named in the warrant; and

"occupier", in relation to any premises, means a person whom the named officer reasonably believes is the occupier of those premises.

42. (1) A person is guilty of an offence if he fails to comply with a requirement imposed on him under section 26, 27 or 28.

(2) If a person is charged with an offence under subsection (1) in respect of a requirement to produce a document, it is a defence for him to prove-

(a) that the document was not in his possession or under his control; and

(b) that it was not reasonably practicable for him to comply with the requirement.

(3) If a person is charged with an offence under subsection (1) in respect of a requirement-

(a) to provide information,

(b) to provide an explanation of a document, or

(c) to state where a document is to be found,

it is a defence for him to prove that he had a reasonable excuse for failing to comply with the requirement.

(4) Failure to comply with a requirement imposed under section 26 or 27 is not an offence if the person imposing the requirement has failed to act in accordance with that section.

(5) A person is guilty of an offence if he intentionally obstructs an officer acting in the exercise of his powers under section 27.

(6) A person guilty of an offence under subsection (1) or (5) is liable-

(a) on summary conviction, to a fine not exceeding the statutory maximum;

(b) on conviction on indictment, to a fine.

(7) A person who intentionally obstructs an officer in the exercise of his powers under a warrant issued under section 28 is guilty of an offence and liable-

(a) on summary conviction, to a fine not exceeding the statutory maximum;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.

43. (1) A person is guilty of an offence if, having been required to produce a document under section 26, 27 or 28-

(a) he intentionally or recklessly destroys or otherwise disposes of it, falsifies it or conceals it, or

(b) he causes or permits its destruction, disposal, falsification or concealment.

(2) A person guilty of an offence under subsection (1) is liable-

(a) on summary conviction, to a fine not exceeding the statutory maximum;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.

44. (1) If information is provided by a person to the Director in connection with any function of the Director under this Part, that person is guilty of an offence if-

(a) the information is false or misleading in a material particular, and

(b) he knows that it is or is reckless as to whether it is.

(2) A person who-

(a) provides any information to another person, knowing the information to be false or misleading in a material particular, or

(b) recklessly provides any information to another person which is false or misleading in a material particular,

knowing that the information is to be used for the purpose of providing information to the Director in connection with any of his functions under this Part, is guilty of an offence.

(3) A person guilty of an offence under this section is liable-

(a) on summary conviction, to a fine not exceeding the statutory maximum;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.

60. (1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom 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.

(2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between-

(a) the principles applied, and decision reached, by the court in determining that question; and

(b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.

(3) The court must, in addition, have regard to any relevant decision or statement of the Commission.

(4) Subsections (2) and (3) also apply to-

(a) the Director; and

(b) any person acting on behalf of the Director, in connection with any matter arising under this Part.

(5) In subsections (2) and (3), "court" means any court or tribunal.

(6) In subsections (2)(b) and (3), "decision" includes a decision as to-

(a) the interpretation of any provision of Community law;

(b) the civil liability of an undertaking for harm caused by its infringement of Community law.

APPENDIX II

Review of the cases decided under the RTPA

(i) The Pros

The RTPA did have its successes. Despite limits to the application of the Act being identified early on, it was not all doom and gloom for the Act, for it had foreseen some arguments that might be raised in order to avoid registration. A good example is Re Federation of Wholesalers and Multiple Bakers (Great Britain and Northern Ireland) Agreement[1] where the Federation contended that the recommendations as to the retail price of standard bread were not registrable, because its rules did not contain any powers enforcing recommendations[2]. The court held that where an association makes recommendations, section 6(7) introduced a "statutory fiction" whereby the Act applied as if the agreement contained a term by which each member agreed to comply with those recommendations. This was the obvious intention of the Act; to place recommendations on the same basis as contractual provisions.

[1] [1959] L.R. 1 R.P. p 387.
[2] Arguing that it could not therefore be said that its members had accepted any restriction for the purposes of the Act.

In Re British Basic Slag Ltd's Application and Re Colvilles Ltd's Application,[3] B Ltd, a common marketing organisation incorporated by the steel companies, applied for a declaration that the agreements (by which each member agreed to sell the whole of its fertiliser output to B Ltd and not to anyone else without B Ltd's consent and by which B Ltd agreed to buy as much of the members output as it could sell and to apportion its purchases from members in an equitable and reasonable manner) were not within section 6(1); the steel companies applied to cancel the registrations on the grounds that the agreements were not an "agreement or arrangement" within section 6(3). The court took a much more realistic view, compared to earlier cases[4], and held that firstly, by each agreement B Ltd deprived itself of the freedom of buying from non-members and of buying unequally from members. It had accepted restrictions within section 6(1) and each agreement was subject to registration.[5] Secondly, there was an "arrangement" within section 6(3) when the parties to it had communicated with each other in some way resulting in the expectation that each would act in a certain way[6]. Thus the companies were not entitled to have the registered agreement cancelled.[7]

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[3] [1962] L.R. 3 R.P. p 178.

[4] See 2.3.1.

[5] Re Blanket Manufacturers' Agreement ([1959] L.R. 1 R.P. p 208) distinguished.

[6] In Re Royal Institution of Chartered Surveyors' Application ([1985] I.C.R. 330.) the question of a multilateral agreement once again arose. The court found that the bye-laws and regulations of the Institution did constitute a registrable agreement. Each individual member had agreed these not only with the Institution, but also with each other member. The Institution was a body that *represented* those members – a meeting of the minds and thus there was a multilateral agreement by which members accepted obligations as to their fellow members (followed in Aberdeen Solicitors Property Centre Ltd v Director General of Fair Trading ((1996) The Times, 20 February) where the centre was found to be the "creature" of its users – although it concerned the supply of legal services and was thus exempt, prompting the use of the complex monopoly provisions of the FTA, demonstrating the reliance on these provisions by the competition authorities, where arguments based under agreement legislation fail; see 2.3.2 infra). Although the Institution was incorporated by the Crown, it did not enjoy Crown status nor exercise the functions of government and therefore it was not entitled to Crown immunity (thus identifying the limits to the "Crown exemption" identified in Re Telephone Apparatus Manufacturers' Application ([1962] L.R. 3 R.P. p 98) Here an agreement was made between the Postmaster General and eight telephonic apparatus manufacturers, the "Crown Agreement". However, the contractor who would get particular work for the Postmaster General was determined by a quota scheme contract known as the "TAM Agreement". At first instance the TAM Agreement was held to be registrable under section 9 since it was a restriction as to the supply of goods within section 6(1)(c). The court found that registration would not prejudice the Postmaster General, as he was not concerned with the workings of the selection of the contractor. However, on appeal ([1963] L.R. 3 R.P. p 462) the decision was reversed, as the Act had to be construed in such a way so as not to prejudice the interests of the Crown. Since the TAM Agreement had to be read together with the Crown Agreement in order to establish the "complete picture" as Upjohn LJ put it (at p 494), the TAM agreement was ordered to be removed from the Register. Although it was noted that had the Crown Agreement been made with a private person, it would have been registered.

[7] This decision was affirmed on appeal ([1963] L.R. 4 R.P. p 116); Re Austin Motor Co. Ltd's Agreement distinguished (see 2.3.1).

Linoleum Manufacturers' Association v Registrar of Restrictive Trading Agreements[8] held that an agreement to contribute to a "pool" by a levy on sales of three specified qualities of linoleum by the Association's members was subject to section 6(5)(a) as it was calculated by reference to the quantity of the goods *to be* supplied, and therefore registrable. However, due to the complex way in which the Act was drafted, on times questions of registration had the court grasping at straws, when the answer should have been relatively straight forward if common sense could have been applied and the circumstances looked at. In Re National Federation of Retail Newsagents' Booksellers' and Stationers Agreement (Nos.3&4)[9] there was much argument about whether the members had accepted a *general* restriction not to acquire or supply *any* newspaper or periodical in disregard of a boycott recommended by the Federation to the members. The RPC held that the members had not, the recommendation being in respect of the Daily Mirror. The Court of Appeal held that it was permissible to look at all three specific recommendations so that when viewed collectively the relevant class of goods to which the recommendation related was newspapers or periodicals. The House of Lords (upholding the Court of Appeal) held that on a true construction of section 6(7) the class of goods to which the recommendation related could extend to such wider class as the recommendation was intended to affect. Further, it was apparent from the terms of the letter containing the "Daily Mirror" recommendation (which was headed "Re terms of National Dailies") that the members were being asked to resist the erosion of margins on *all* national dailies and not just the Daily Mirror.

A rare judgement, in that the court looked at the intention behind the agreement rather than the strict legal form in determining what were restrictions it could look at for the purposes of the Act, is Re Association of British Travel Agents Ltd.'s Agreement[10]. This concerned the justification of restrictions accepted by the members of ABTA[11]. When the DGFT referred the agreement to the RPC, ABTA sought to justify the

[8] [1963] L.R. 4 R.P. p 156.
[9] [1969] L.R. 7 R.P. p 27 (No. 3); [1969] L.R. 7 R.P. p 75 (No. 4); [1970] L.R. 7 R.P. p320 (CA); [1972] L.R. 7 R.P. p 425 (HL).
[10] [1984] I.C.R. 12.
[11] A trade association comprised of over 2,000 member undertakings throughout England and Wales. The members accepted restrictions in respect of the way that they traded and followed a code of conduct laid down by ABTA. These regulated the types of holidays that members could sell, payment of commission, prices, the selling of holidays by a tour operator direct to the public, insurance, office requirements and conditions of employment. As a result the consumer was protected from financial loss should the tour operator they booked with default in payments to airlines and hotels.

restrictions under section 19(1)(b) of the 1976 Act as the restrictions conferred specific and substantial benefits on the public, but argued that the court had no jurisdiction to adjudicate on the purported staffing restrictions as a result of section 18(6) of the Act. The court held that although it had to rule on each restriction separately, a restriction should not be examined in isolation but in relation to the others, that is, against the "total backcloth of the circumstances of the case".[12] It found that some of the purported restrictions were not restrictions within the scope of the Act, such as the provisions for insurance. With regard to the staffing restrictions, these were matters relating to the terms and conditions of employment within the meaning of the Act, but section 18(6) did not require the court to disregard such staffing restrictions where they were part of a number or cluster of restrictions on the "manner of trading". Thus, as a result of the drafting of the restrictions, the *benefit* provided by section 18(6) was lost.[13] The court took a more lenient and practical view of the legislation. It ruled on the staffing restrictions, finding that although some qualification criteria were necessary, the standard required was too high and the restriction as to the number of staff to be employed was unnecessarily restrictive and contrary to the public interest.[14] Not all the restrictions fell within the gateway, but it did find that the codes of conduct and guidelines provided specific and substantial benefit to the consumer and had greatly improved the conduct of the trade. The financial safeguards also provided specific and substantial benefit, which was not unreasonable when balanced against the public interest.

Restrictions falling within the terms of the Act[15] had to be registered[16] with the Registrar of Restrictive Trading Agreements[17]. These agreements were placed on a public register. These restrictions would then have to be defended before the

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[12] op cit., pp 23 and 24.
[13] p 51.
[14] pp 44 and 51.
[15] Section 6 for goods, section 7 for information agreements as to goods, section 11 for services, section 12 for information agreements as to services, in the RTPA 1976. Vertical agreements were excluded through the operation of sections 9(3) (for goods) 10(2) (for services) and Schedule 3(2). Agreements and terms of agreements that were explicitly excluded from the ambit of the Act were summarised in A Review of Restrictive Trade Practices Policy Cmnd. 331, Annex D.
[16] The parties had to enter into the agreement before it could be registered, although informal advice could be obtained from the OFT. The Deregulation (Restrictive Trade Practices Act 1976)(Amendment)(Time Limits) Order 1996, SI 1996 No. 347, introduced a new section 27ZA which allowed the parties a three month window from execution to register their agreement. Until the agreement was registered, the restrictions could not be acted upon.
[17] Who later became the DGFT, by virtue of the FTA.

Restrictive Practices Court, against the presumption that they were not in the public interest[18], which the parties could only rebut using one or more of the gateways[19]. The gateways assessed the factual consequences of the agreement. Even if the parties were successful at this stage, the parties faced a further hurdle under the tailpiece, which enabled the court to condemn the restrictions should they find that the benefit was outweighed by the detriment caused to the public interest. This public interest test allowed economic justification to be assessed. If the factual criteria defined in the gateways were not met, the RPC did not have the opportunity to look at the economic consequences under the tailpiece. However, in all bar one case, where a gateway was penetrated the restriction was found to be in the public interest, indicating that in practice the factors to be taken into account were very much the same and what the court would focus on could not be predicted with certainty, allowing other considerations to be incorporated into competition policy[20]. However, very few cases penetrated the gateways, leading to an extensive abandonment of cartel agreements after the pro-competition interpretation adopted in early cases:

Gateway (a) – "reasonably necessary to protect the public against injury."

The cases in which this was pleaded involved restrictions in respect of retail outlets and distribution. In Re Chemist's Federation Agreement (No.2)[21] a number of restrictions, designed to prevent the sale of proprietary medicines to the public otherwise than by qualified retail chemists, had been imposed on the Federation's members. The original purpose of the restrictions was to protect chemists from competition by other traders. The Federation sought to justify the restrictions as reasonably necessary to protect the public against injury[22]. It was held that if the effect of the restrictions was in fact the avoidance of injury, it was immaterial that that was not their prime objective. However, the restriction was not reasonably necessary to protect the public within the

[18] Section 2(1) RTPA 1976.
[19] Sections 10 and 19 RTPA 1976.
[20] Argument put forward by Furse in his call for "...regulators to make the goals of competition regulation as transparent, and as open to examination, as is possible."(M Furse "The Role of Competition Policy: A Survey" (1996) 4 ECLR, 250, 258.
[21] [1958] L.R. 1 R.P. p 75.
[22] And also that their removal would deny specific and substantial benefit under gateway (b).

meaning of this gateway because the risk of injury was too slight to justify so wide a restriction[23].

This gateway was also put forward in defence of restrictions in Re Motor Vehicle Distribution Scheme Agreement[24] where an agreement which had been *drafted* to implement as far as possible the system of resale price maintenance which had existed prior to the introduction of the Act, failed[25].

Although this gateway was included in the Act, the protection of the public as consumers remained best served by being provided directly by the government imposing standards and restrictions on trade.[26] This is more likely to achieve comprehensive protection, than the ad hoc protection achieved by the decisions of an association influenced by other factors. Gateway (a) can be viewed as a fail-safe to ensure that protection existed where government had not yet had the opportunity to legislate[27], but as the number of cases demonstrates, "consumer protection"[28] was not high on the businesses' agenda.

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[23] Furthermore, removal of the restrictions would not deprive specific and substantial benefit within the meaning of gateway (b). Where the restrictions are found to be contrary to the public interest, the agreement was void in respect of those restrictions. However, the court found that an injunction did not automatically follow on from a declaration that a restriction was contrary to the public interest. The court would not expect the Federation to carry on as before and it allowed a reasonable time to put its affairs in order. Only if it did not do so, would an injunction be granted. This was very trusting of the court, particularly when one considers that the primary reason for the restriction being to prevent competition. It can be best explained by the fact that the court had not considered enough cases to see the effects of the time delay in proceedings and the lengths that undertakings would soon strive too in order to succeed in their anti-competitive practices.

[24] [1960] L.R. 2 R.P. p 173.

[25] It also failed under gateway (b). Similarly the argument failed in Re Tyre Trade Register Agreement / Re Staffordshire Motor Tyre Co. Ltd's Agreement ([1963] L.R. 3 R.P. p 404). As in Chemists, the court found that the restriction would satisfy gateway (a) if the *effect* was to prevent injury to the public *notwithstanding* that it was imposed for some other purpose - the history of such a restriction having no bearing. Originally the rules contained no reference to public safety, rather they imposed certain price and discount restrictions on registered traders, but these were abandoned after the enactment of the Act. However, the restriction that members were not to supply replacement tyres otherwise than to traders entered on the Tyre Trade Register was no guarantee of a good service. It was a buyers market and the service would continue without the register.

[26] Indeed, this is one aspect of the wider notion of "competition regulation" and the Government have provided for this in the form of trading standards, unfair contract terms, regulation of consumer credit by the OFT for example, as discussed in 2.1.3 supra.

[27] The problem caused through claims of protecting the public is still an issue under the Competition Act 1998 with its exclusion for professional rules noted in Report Stage 1, Competition Bill House of Lords, Columns 891 to 899, 9 February 1997, Lords Hansard, where it was said that "...the rules of a professional body are, to a large extent, directed towards the protection of the public." (Lord Howie of Troon, Column 894). However, the OFT's recent inquiry concludes that the majority of exclusions should be withdrawn; see Chapter 4.

[28] This line of defence was also argued (unsuccessfully) in a few cases under gateway (b).

Gateway (b) – "removal would deny specific and substantial[29] benefits or advantages"

The most litigated gateway of them all, with most cases concerning attempts to justify price restrictions[30]. Only a few cases succeeded; the shock waves having been sent out early on with Re Yarn Spinners Agreement[31]. Here an agreement between members of the Association provided inter alia for a minimum price scheme and bound its members not to sell yarn containing 85% or more cotton at less than the price fixed by the Association. This minimum price was as artificial figure designed to tide spinners over short periods of recession and to guard against cut-throat competition. The Association sought to justify the restrictions under gateways (b) and (e). However, the court found that the Association had not shown that the removal of the restriction would deny to the "shopping public"[32] any benefits[33].

[29] Specific and substantial both had to be satisfied if a restriction was going to pass this gateway. In Motor Vehicle Distribution Scheme the restrictions on the sale and distribution of motor cars in the UK, included amongst others a restriction on the provision of after sales services. The court found that it was doubtful whether there was any specific advantage to the public in obtaining after sales service from the local dealer, but in any event it was not substantial.

[30] It was not only agreements that fixed prices which tried to justify restrictions under gateway (b). In Re Doncaster and Retford Co-operative Societies' Agreement ([1960] L.R. 2 R.P. p 105) two retail co-operative societies trading in contiguous areas agreed not to trade in areas outside their boundaries nor accept members nor solicit customers from outside of those boundaries. The agreement was terminable by reasonable notice. The Societies argued there was specific and substantial benefit, namely the avoidance of overlapping services and prevention of the invasion of the others territory. Removal of the restrictions would deny services to sparsely populated areas. However, the court found that the risk of overlapping services was remote, but even if the risk was substantial, the fact that the agreement was terminable on reasonable notice gave the societies no protection against this risk. To have allowed a restrictive agreement to succeed because it was terminable on reasonable notice would have been dangerous, because in practice there may be no intention to terminate the agreement. Abrogation of the agreement would not deny services to sparsely populated areas, but even if it did, so few members would be affected thereby that it would not amount to a denial of benefit to the public. These restrictions were declared contrary to the public interest. The prevention of a price war has also been argued as providing specific and substantial benefit. In Re Associated Transformer Manufacturer's Agreement ([1961] L.R. 2 R.P. p 295) these were put forward as justification under gateway (b), as a price war would lead to a retrenchment on research and development, which in turn would lead to a reduction in quality. However, the court could find no evidence to support this contention and noted the more realistic view that no manufacturer would prejudice his good name in the matter of quality.

[31] [1959] L.R. 1 R.P. p 118.

[32] Shopping public here meant consumers, purchasers and users, but not the whole population, and is thus distinguished from the meaning given to "public" in the tailpiece, which included those who were either already competitors or new businesses trying to enter that market. This is just one example of the problems caused by the significant words not being defined in the legislation, leaving this for the court to interpret.

[33] Price stability cannot be looked at in isolation; one must also consider whether the loss of a free market is a detriment to the public generally. To find otherwise would have been contrary to the general presumptions embodied in the Act.

In Re Blanket Manufacturers' Agreement[34] there were recommendations, inter alia, as to the minimum price for "specified blankets" (being white, all wool, raised blankets) and minimum substance which were sought to be justified under (b). The court pointed out that whether the restrictions passed the test was a question of degree to be determined on the particular facts – the court was thus looking at the effect of the restriction. The benefits alleged to be derived from the minimum price were neither specific nor substantial, but the minimum substance recommendation did confer specific and substantial benefit upon the public (the shopping public) and this outweighed any detriment to the public (as a whole) in finding lightweight blankets at cheaper prices either not available, or not so readily available. However the court did require an undertaking from the association, on behalf of its members, that in accordance with the *actual practice* the specification recommendation would not be applied to cellular or merino blankets,[35] illustrating that the court was concerned with *intention* as to how the agreement was to operate rather than the *form*. This is a much more satisfactory and realistic basis for regulation.

This approach of assessing how the agreement operated in practice was followed in Re Water-Tube Boilermakers' Agreement[36]; Re Wholesale and Retail Bakers of Scotland Association's Agreement and Re Scottish Association of Master Bakers Agreement[37]; Re Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement[38]; Re Federation of British Carpet Manufacturers' Agreement[39], Re Phenol Producer's Agreement[40], Re British Paper and Board Makers' Association's Agreement[41] and Re Birmingham Association of Building Trades Employers' Agreement[42]. However, a blip occurred in the shape of Re Black Bolt and Nut Association's Agreement[43] where among the restrictions entered into, the prices at which the members could sell fastenings was fixed by reference to information built up from costings (although the restrictions contained no express provisions as to the basis

[34] [1959] L.R. 1 R.P. p 208.
[35] ibid p 257.
[36] [1959] L.R. 1 R.P. p 285.
[37] [1959] L.R. 1 R.P. p 347.
[38] [1959] L.R. 1 R.P. .p 387.
[39] [1959] L.R. 1 R.P. p 472. Also argued under gateway (f) (infra).
[40] [1960] L.R. 2 R.P. p 1.
[41] [1963] L.R. 4 R.P. p 1.
[42] [1963] L.R. 4 R.P. p 239.
[43] [1960] L.R. 2 R.P. p 50.

for fixing prices – a case of the court again looking at the effect or operation of the agreement[44]). There was evidence that despite the absence of competition, the industry was highly efficient, made exceptional technical progress and produced high quality fastenings. It was held that on a true construction of gateway (b) "the public as purchasers, consumers or users of any goods" meant the public viewed as a collective whole in any of the specified capacities, and whilst it would not be sufficient to show that only a small category of the public would be denied benefit or advantage by the removal of the restriction, likewise it was not fatal to the restriction if a small category would be receive no benefit or advantage by its continuance. The court found that the avoidance of the need to "go shopping" was a specific and substantial benefit and thus gateway (b) was satisfied. This has been criticised by commentators and distinguished in later cases[45]. However, if the court had not been satisfied with the economic effects of the prices fixed it may have found differently. That said, to emphasise the importance of avoiding the need to go shopping was an unwelcome indicator of what could be in the public interest.

The price restrictions in Re Cement Makers' Federation Agreement[46] succeeded under this gateway, but the court appears to have been influenced by the economic approach[47]

[44] The Registrar contended that to declare the restriction in the public interest would give "carte blanche" to the Association to fix future prices at whatever level it determined and thus there would be detriment to the public interest. However, the court had to look at the benefits *likely to result* from the operation of the restriction and could only base this on the past record and assurances given. If prices were unreasonably fixed in the future, then this would have been a material change in circumstances entitling the Registrar to apply to the court under section 22. The fact that (b) requires an assessment of benefit *now and in the future* was emphasised in Re Finance Houses Association Ltd.'s Agreement ([1965] L.R. 5 R.P. p 366).

[45] Ensuring supplies in sparsely populates areas was a reason put forward to justify restrictions in Re Wholesale Confectioners Alliance's Agreement ([1960] L.R. 2 R.P. p 135) where there had been a substantial increase in sales by manufacturers to large retailers in the confectionery market. The alliance of wholesalers also sought to justify the restrictions on prices as benefiting small retailers by avoiding the need for them to "shop around". But confectionery was a buyers market. The court was not satisfied that in a free market small retailers would be incapable of profitably comparing the differing prices and that time saved by the operation of the price schedules in order to avoid the need to shop around was not a substantial benefit or advantage. It distinguished Black Bolt and Nut as a "very special case" the circumstances of which were totally different from those in the present (p 163).

[46] [1960] L.R. 2 R.P. p 241.

[47] Justification on the basis of a costings formula was not always a sure way of succeeding – the court would look at the wider economic picture. In Re British Bottle Association's Agreement ([1961] L.R. 2 R.P. p 345) an agreement to fix the prices of glass bottles was based on periodic costings. Prices only altered in so far as increases or decreases in costs justified alterations. Overall prices were reasonable and in some cases yielded a low profit margin. The industry had made substantial progress and the bottles manufactured were of high quality. The Association pointed out the industry's special factors – it was a continuous process as furnaces had to operate continuously for economic production; seasonal fluctuations in demand; bottles could be stocked in anticipation of demand changes; quality was important to customers, the industry rejecting about 20% of bottles under its own inspection system;

and objective view taken by the Federation. The restrictions enabled the public to benefit from prices that were lower than they would have been under a free market (the market in this case was expanding[48]). The court found that this was a specific and substantial benefit within gateway (b) and there were no detriments outweighing this advantage.[49]

This gateway was also been used to justify barriers to entry into a market. In Re Newspaper Proprietors' Association Ltd.'s and National Federation of Retail Newsagents' Booksellers' and Stationers' Agreement[50] the Association and the Federation established a scheme to provide that London daily newspapers should only be sold from authorised places and all new entrants needed to apply for a permit to establish a selling point[51]. However, the court held that the market structure already

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there was a comparatively small number of large buyers and a large number of small buyers, and contended that under the free market there would be a price war leading to lower quality, the emergence of a few monopolistic groups and higher prices. However, the court found that there was unlikely to be a price war as a result of price competition – demand was increasing – and any price falls that did occur would not seriously prejudice the interest of its customers. This may have been a surprise following the earlier cases where there had been prices fixed on the basis of realistic costings, resulting in low profit margins. However, in Re Permanent Magnet Association's Agreement ([1962] L.R. 3 R.P. p 119) the prices fixed were reasonable despite the fact that "unscientific" costings were used. There existed a technical agreement by which the members shared research results, patents and know-how. This pooling of resources enabled the Association to keep in the forefront of advances and in some cases lead the field. It also prevented the inventor of a new material from charging high prices by exploiting what otherwise would have been a monopoly position. The words "resulting therefrom" in gateway (b) were held not to be limited to matters of physical causation, but covered the natural and probable consequences of the removal of a restriction. The technical agreement conferred specific and substantial benefits, and abrogation of the price agreement would induce abandonment of the technical agreement, thus denying the public specific and substantial benefits. The Association had made out its case under this gateway.

[48] Owing to the weight of cement, transport costs represented a high proportion of its total cost. The Federation fixed prices and to the "base price" added a delivery price that increased (on a reducing basis) for each 5 mile zone away from the cement works. This price structure induced members to sell to customers nearest to their works and to site their works in areas of greatest demand. The prices changed from time to time, but the Federation was influenced by independent advice and information. Although it was a sellers market, the industry operated on a modest profit margin with the average rate of profit on capital employed appreciably lower than that in manufacturing industry in general - under a free market prices would be higher. The industry operated efficiently.

[49] However, the aggregated rebates were found not to be in the public interest since they only applied to a privileged class of customer.

[50] [1961] L.R. 2 R.P. p 453.

[51] The Federation argued that there were specific and substantial benefits as without the agreement there would be a vast influx of new entrants, resulting in a fall in profits and as a consequence existing newsagents would be compelled to restrict their delivery services. The Association argued that the agreement conferred specific and substantial benefits on the public as without it, the Federation would devise some other form of control on entry to the trade, which would be more detrimental to the public as it would be more restrictive. It was probably not a good idea to use this as the basis of justifying one restrictive agreement as it is unlikely to endear one to the court. Perhaps it would have been better argued under gateway (c), but this would have required an independent agreement within the Association, rather than the collusion it had entered into with the Federation.

provided legitimate barriers to entry. Any influx of new undertakings would not be substantial because newsagency could not pay unless the newsagent built up a delivery service – a slow and difficult task for a new entrant – and wholesalers would not find it economic to supply new entrants unless they had very good prospects of expansion. The evidence suggested that if all the rejected applicants under the scheme had entered the trade, there would have been an increase of 1% of the total number of existing newsagents.

Further successfully defended price agreements were Re Standard Metal Window Group's Agreement[52], Re Net Book Agreement, 1957[53], Re Glazed and Floor Tile Home Trade Association's Agreement[54], Re British Iron and Steel Federation's

[52] [1962] L.R. 3 R.P. p 198. Members of the Group were dissatisfied with their profit margins, but were unable to raise prices because of internal competition within the industry. So they collaborated to improve efficiency and reduce costs. It was held that in the special circumstances of the industry, prices were lower than they would otherwise have been. If abrogated, exchange of technical information would cease and bearing in mind the competition with wood window frames and the industry structure, the probability was that a specific and substantial benefit to the public as purchasers and users would be lost. The agreement was declared not contrary to the public interest.

[53] [1962] L.R. 3 R.P. p 246. The Publishers Association, which represented virtually the whole publishing trade, agreed not to sell its "net books" to the public at less than their net prices (A net book was any book designated by its publisher as having a published or net price below which it could not be resold to the public. This case was decided prior to the Resale Prices Act 1968.). It was said that every aspect of the publishing trade was highly competitive and the agreement in no way inhibited competition. The court found that abrogation of the agreement would lead to fewer stockholders (those who were wholesale retailers that offered benefits to the public in the form the free service of finding and obtaining books required – described as an onerous service), higher prices, fewer and less varied books. These were all explicit and definable disadvantages of a serious nature, the avoidance of which, by agreement, conferred specific and substantial benefit on the public as purchasers or users. The association had made its case out under gateway (b) and the court declared the restrictions not contrary to the public interest. It was queried whether the agreement contained a registrable restriction if the parties could withdraw from the obligation it imposes at their own option and at any time they so please (ibid, p 298; this would have been for the High Court to decide under section 13, but the association by its pleadings admitted that its members accepted restrictions under the agreement within section 6(1)(b), that is, that books published by them as net books shall be supplied by them upon the conditions prescribed by the agreement). This makes no sense for in practice there may be no intention to ever withdraw from the agreement – hence the danger of looking at form rather than what the parties intend to do.

[54] [1963] L.R. 4 R.P. p 239. Gateway (b) was successfully argued in defence of restrictions setting minimum prices that discriminated against non-standard sized tiles (standardisation of tiles had been introduced in the war period to provide savings in manufacturing costs.). Without this price discrimination, it was contended that there would be a massive reduction in standardisation, resulting in higher costs and higher prices. The restriction was found to provide specific and substantial benefit in the form of lower overall prices and this more than outweighed the detriments of surcharges on some deliveries (which were illogical and arbitrary) and restrictions on the choices of tile. Standardisation thus proved to be a benefit to the public and the restriction was declared not contrary to the public interest. However the argument of avoiding the need to go shopping failed, as did the argument that the restriction was necessary for technical and commercial co-operation, as cessation would not deprive the public of any specific and substantial benefit.

Agreement and National Federation of Scrap Iron, Steel and Metal Merchants' Agreement[55] and Re National Sulphuric Acid Association's Agreement (No.2)[56].

The gateway was successfully penetrated in Re Distant Water Vessels Development Scheme[57] where members of the Distant Water Vessels Association sought to justify the general reserve price and special reserve price restrictions as providing specific and substantial benefit – without them, there would be a substantial decrease in the short term prices, causing revenue to fall, thus decreasing catching capacity and the number of fish caught, leading to higher overall long term prices. Since the court found no detriments arising from this scheme, those restrictions were declared not contrary to the public interest. An interesting feature of this case was that there were also arrangements regarding a quality control scheme. The Association sought to justify the restrictions in operation at Hull (which the court found provided a powerful incentive to the trawler crews to exercise proper care and thus benefit was conferred upon the public), but not the scheme that was in operation at Grimsby. This again supports the argument that quality control regarding public safety should be a matter for government and the public authorities rather than ad hoc restrictions by agreement. Yet in Re The Mallaig and North West Fishermen's Association's Agreement[58] restrictions in the form of quotas, closing of ports and limited weekend fishing failed to be defended under (b). The court found that since the Herring Industry Board had power to impose quotas, the Associations restrictions on quotas and the closing of ports could not be justified. Similarly, since the Secretary of State could prohibit fishing at weekends if necessary, the Associations action could not be justified. Thus, it can be seen that

[55] [1963] L.R. 4 R.P. p 299. Had there been no agreement, the prices in a free market would have been substantially higher. The detriments were found to be reasonable when balanced against the specific and substantial benefits of considerably lower prices for steel products.

[56] [1966] L.R. 6 R.P. p 210. It was held that the restriction provided specific and substantial benefit in that it lead to the availability of sulphur at lower overall prices than would have otherwise been the case. The Registrar applied to the court under section 22(1), as there had been a material change in circumstances in that Sulexco was no longer a preponderant supplier of sulphur to the UK market (see below). It had been pleaded in the first case (L.R. 4 R.P. p 169) but the restrictions had been successfully defended under gateway (d) without the court considering the arguments put forward under (b). Although requested to do so by the Registrar, the court expressed no views on the questions of law raised under (b) because it was undesirable to express obiter dicta on the construction of the Act. This was a pity for two reasons. Firstly, the Act had proved so confusing that any guidance would have been appreciated – although it is accepted that the result could have been conflicting guidance which would have done nothing but to add to the uncertainty. Secondly and more importantly, if the court had passed judgement on (b) it would have avoided the need for the second application, saving expense and court time.

[57] [1966] L.R. 6 R.P. p 242.

[58] [1969] L.R. 7 R.P. p 27.

certain bodies were authorised to take the measures necessary to secure specific and substantial benefit to the public – these being independent bodies making objective decisions rather than relying on the self interest motivations of association members. This does raise the question of what happens if that public body/authority fails to act or makes a bad decision – the members redress must be through other avenues, be it lobbying or judicial review, but these may be not be as swift as direct action within the trade. Hence, conflict is bound to arise.

Gateway (c) – "necessary to counteract the anti-competitive measures taken by others"

There is no authority on this gateway's scope or practical operation. It was pleaded in Re National Sulphuric Acid Association's Agreement,[59] but the court did not deal with it in its judgement. Either undertakings did not feel threatened by external activity so as to have to deal with this by way of their own restrictive arrangements, or they could not think of any justifiable reasons to penetrate this gateway.

Gateway (d) – "reasonably necessary to negotiate fair terms with a preponderant party"

This gateway was pleaded successfully in only one case[60], Re National Sulphuric Acid Association's Agreement[61] where it justified restrictions on price, sales and the establishment of a "sulphur pool" for the purchase and shipping of all imported elemental sulphur, as being reasonably necessary to enable the members to acquire sulphur on fair terms from Sulexco[62]. The phrase "fair terms" was regarded as requiring a commercial judgement, with no moral or ethical judgement necessary.[63] All restrictions in the agreement were declared not contrary to the public interest.

[59] op cit.
[60] It failed in Re Water-Tube Boilermakers' Agreement ([1959] L.R. 1 R.P. p 285); Re Associated Transformer Manufacturers' Agreement (1961] L.R. 2 R.P. p 295); and Re National Federation of Retail Newsagents' Booksellers' and Stationers' Agreement (No.3).
[61] [1963] L.R. 4 R.P. p 169.
[62] A US corporation established by the US mining companies to sell their sulphur – a preponderant supplier of sulphur.
[63] op cit., p 229.

Gateway (e) – "removal would have a serious and persistent adverse effect of unemployment"

The scope of this gateway was examined at an early stage in the life of the Act[64]. It was pleaded in Re Yarn Spinners Agreement[65] and although the restrictive agreement was held to pass this gateway, it fell at the tailpiece. Indeed, this is the only case in which an agreement penetrated a gateway, but floundered under the tailpiece. The general conclusion was that there would be a serious adverse effect on the level of unemployment, which would be persistent[66]. Notwithstanding this, the court took a pro-economic stance when considering the detriment to the public under the tailpiece. It was found to be in the public interest that labour and capital be employed as productively as possible. Excess capacity was a public detriment as it was a waste of national resources[67].

Gateway (f) – "protecting the export business"

The first case in which this was pleaded proved to be successful[68]. In Re Water-Tube Boilermakers Agreement[69] the arrangement penetrated this gateway because it was found that if it were abrogated there would be a reduction in foreign orders and, on the

[64] Following Yarn Spinners, the gateway was only pleaded on two occasions: In Re Motor Vehicle Distribution Scheme Agreement it was dropped as a justification for the restrictions and in Re British Jute Trade Federal Council's Agreements ([1963] L.R. 4 R.P. p 399) it was unsuccessful as the matter was one for which the Government "Jute Controller" was supervising – making the restrictive agreement unnecessary.[64]

[65] op cit.

[66] Spinning was a contracting industry and the minimum price scheme had impeded the process of high cost producers closing – a natural consequence under a free market. Removal of the scheme would accelerate mill closures, but the industry would still have capacity to meet demands of the home market and maintain, if not increase, exports. However, the spinning industry was concentrated in a small area, mostly in Lancashire, employing a large proportion of female and elderly workers whose chances of re-employment were said to be not good. The court had to consider a number of incalculable factors such as the percentage that would lose their jobs and the length of time to find re-employment.

[67] The court was well aware that the effect on the level of unemployment in the locality would be grave, but had the market "operated freely, or even if the minimum price had been set at a lower level, the excess capacity might have been got rid of gradually without serious disturbance of the labour market".[67] Thus the restrictions were declared contrary to the public interest.

[68] However, all following cases proved unsuccessful: Re Federation of British Carpet Manufacturers' Agreements (op cit.); Re Associated Transformer Manufacturers' Agreement (op cit.); Re Linoleum Manufacturers' Association's Agreement (op cit.); Re Permanent Magnet Association's Agreement (op cit.); Re Net Book Agreement 1957 (op cit.); and Re Locked Coil Ropemakers' Association's Agreement and Re Mining Rope Association's Agreement and Re Wire Rope Manufacturers' Association's Agreement ([1964] L.R. 5 R.P. p 146).

facts, this was likely to be substantial. When balanced against the tailpiece, the real detriment to be considered was that purchasers and users of boilers might have to pay more for boilers than they would otherwise do so, but this did not outweigh the national benefit resulting form the maintenance of exports. It was also noted in this case that the effect on the public as a purchaser of a unit of electricity would be infinitesimal.

Gateway (g) – "reasonable required to maintain any other accepted restriction"

This was an ancillary measure to justify such other restrictions as were necessary to support the primary restriction that had been approved by the court. In all the cases in which Gateway (g) was pleaded, and a restriction had passed a different gateway, the arguments for the ancillary restrictions proved successful[70]. In only one reference did (g) form the only gateway in issue; Re Black Bolt and Nut Association's Agreement (No.3)[71] concerned difficulties which the members experienced in operating their approved restriction without an ancillary restriction (as to the prices charged to large users), which had not been defended in the first case and accordingly had been declared contrary to the public interest. The members had entered into a new agreement and the Registrar applied to the court for an order restraining the members from giving effect to this new agreement because it was to the "like effect" as the large user restriction in the original agreement. Both the RPC and the Court of Appeal dismissed this application, so the Registrar referred the new agreement to the court. The Association defended the new ancillary restriction under gateway (g) because it was reasonably required for the maintenance of the ordinary user restriction that had already been found not contrary to the public interest. The court held that this restriction was "reasonably required" as it appeared that these words allow more latitude than that which would have been permissible if "necessary" or "reasonably necessary" had been employed in the Act.

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[69] op cit.

[70] For example, in Re Black Bolt and Nut Association's Agreement (op cit.) to support the agreement as to prices, the association agreed standard terms and conditions. The court, having approved the price restrictions under (b), found that such terms and conditions were reasonably required for the maintenance of those price restrictions. To remove them would reintroduce the need of purchasers to go shopping. Similarly, in Re Cement Makers' Federation Agreement (op cit.) it was found that restrictions in the standard terms of sale were reasonably required for the maintenance of the price restrictions that had been proved under gateway (b). It must be remembered that it is only those restrictions necessary to support an approved primary restriction that will pass gateway (g). Those that served no support, such as the prohibition on entering into contracts of more that a 12 month duration in this case, failed.

[71] [1965] L.R. 6 R.P. p 1.

The court found that without this restriction the price restrictions would be abandoned in a very short time.

Gateway (h) – "not affecting competition to any material degree."

This was introduced in 1968, but in practice "de minimis" agreements were later dealt with by the discretion exercised by the Registrar/Director General of Fair Trading. It was pleaded in Re Scottish Daily Newspaper Society's Agreement (No.2)[72] where a restriction relating to non-publication of daily morning newspapers until after a strike had been settled was successful on the ground that it did not restrict or discourage competition to any material degree. This gateway is best viewed as a safety measure to dispose of those restrictions which should never have been referred to the court. As there is only one other case in which this gateway was successfully pleaded,[73] it appears that the Office of Fair Trading successfully mastered the art of weeding out the restrictions of no economic significance.

In addition to the "effects" analysed by the gateways and tailpiece and the liberal interpretation (allowing an examination of effect) in ABTA[74], the Act provided for agreements to the like effect to be restrained. Re Black Bolt and Nut Association's Agreement (No.2)[75] concerned the courts jurisdiction (by virtue of Section 20(3)(b)) to make an order restraining the parties to a restrictive agreement, which had been found contrary to the public interest, from making another agreement to the "like effect". According to Diplock J[76]

> "the meaning of the expression "effect" in relation to an agreement may vary with the context in which it appears. Prima facie it means those acts which the parties to the agreement thereby agree that one or more of them shall do or refrain from doing, but it is capable in the appropriate context of a wider meaning and of embracing the remoter consequences, including the economic consequences of doing or refraining from doing those acts. In our view, both

[72] [1972] L.R. 7 R.P. p 401.
[73] Re Building Employers' Confederation's Application [1985] I.C.R. 167.
[74] op cit.
[75] [1960] L.R. 2 R.P. p 433
[76] ibid, p 442.

the immediate context of the subsection and the wider context of the Act require the word "effect" in section (b) of the subsection to be given its prima facie and narrower meaning".

This decision was appealed to the Court of Appeal[77] who found that this agreement was not to the like effect and as such the court had no jurisdiction to restrain the members from entering into it, except for new proceedings under section 20(1).[78] Excluding economic consequences by classing them a remoter consideration would devoid this section of any real blow.

However, a more satisfactory result was found in Re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd's Agreement[79]. The members entered into a notification scheme by which they sought to achieve the same purpose[80] as intended by the original agreement (which they had not defended before the RPC). The court found that the purpose to be achieved under the scheme was the same as that achieved under the original agreement and thus to the "like effect"[81]; it was condemned and each member company was fined £10,000 (a total of £80,000) and ordered to pay the Registrars costs. Although this case realised that anti competitive activity was not purely dependent upon the form of an agreement or arrangement, it again identified the problem with the wording used in the Act. The scheme was divided into two parts. The "permissive" part by which the parties could notify (but were under no obligation to do so) to the secretary the rates which they were going to quote to a fleet operator, which the members thought permissible, was found to be an arrangement. However, the compulsory part of the scheme by which the parties had to notify the secretary of the rates which they *had quoted* in the past did not contain a registrable restriction

[77] [1961] L.R. 3 R.P. p 43.
[78] Also Re Associated Transformer Manufacturers' Agreement (No. 2) ([1970]L.R. 7 R.P. p 202) where it was held that whether a new agreement was to the like effect as a previous agreement depended upon whether on the natural construction of its terms it was intended to operate in substantially the same way as the previous agreement (p 225).
[79] [1966] L.R. 6 R.P. p 49.
[80] The members had been advised by counsel that the scheme was permissible under the 1956 Act and a solicitor had been present at the meetings in order to prevent the members from talking about or otherwise doing something impermissible.
[81] Contempt of court for operating an agreement with the like effect as a previous one, was the finding in Re British Concrete Pipe Association's Agreement [1982] I.C.R. 182

within section 6(1) since it was not a restriction in respect of the prices *to be* charged, quoted or paid[82].

(ii) The Cons

Following the discouraging first case Re Austin Motor Co. Ltd's Agreement[83] followed by the problems over words "to be" highlighted in Re Blanket Manufactures' Agreement[84] and the problems of the strict wording for defining registration in issue in Re Doncaster and Retford Co-operative Societies' Agreement[85] and Re British Waste

[82] The way that the restrictions were worded, for example, use of the words "to be" caused many problems in bringing control to anti competitive agreements. See also Re Electrical Installations at the Exeter Hospital Agreement ([1970] L.R. 7 R.P. p 102) where it was argued by the contractors that a restriction not to offer to supply goods in respect of an invitation to tender until after a meeting of the contractors did not fall within section 6(1). The court found that this was a restriction on the true construction of section 6(1)(a) since it was an obligation not to quote a price until after discussions with others, that is, a restriction in respect of "the prices to be.....quoted" (p 122).

[83] [1957] L.R. 1 R.P. p 6. A motor car manufacturer replaced the system of multipartite agreements it made annually with its distributors and dealers (containing provisions which fell within section 6(1) of the Act and thus registrable), with a series of bipartite agreements. These new agreements contained substantially the same provisions as before, but now there was no connection between the distributors and dealers. The Company applied for a declaration (Under section 13(2) of the RTPA 1956), that the agreements were not registrable. The Registrar conceded that the agreements were exempt from registration by virtue of section 8(3), but contended that in light of history and past dealings, they did amount to mutual agreements or arrangements and were thus registrable. However, the court held that the agreements were not registrable. The agreements were clear and unambiguous and exempted by section 8(3). Almost immediately the purpose of the legislation was thwarted. By careful drafting the Company concerned "legitimately" achieved the same result, with the same restrictions on competition, as before. The basis of Austin was followed in Fisher v Director General of Fair Trading ([1982] I.C.R. 71 (CA)) which is more realistically and satisfactorily dealt with as an abuse of a dominant position (see below).

[84] [1959] L.R. 1 R.P. p 208. This concerned a number of provisions, some of which, it was agreed, were subject to registration (but argued to be not contrary to the public interest (see above)), but the registration of a particular resolution as passed by the BMA was in question (The resolution, accepted by the Associations' members as binding, read "No manufacturer shall agree to the breaking of any contract by reduction of price or other procedure. Should any attempt be made to break or vary the contract the manufacturer shall refuse to accept cancellation or variation and endeavour to obtain completion of the contract...If the manufacturer has good reason to agree a request for cancellation or registration of a contract he shall not so agree until approval is given by the reference committee."). The court held that as a matter of construction and giving the words used their natural and ordinary meaning, it had no jurisdiction to consider the resolution as it was not a restriction in respect of any of the matters set out in section 6(1) of the Act, which referred to the prices *to be* charged (This decision was upheld by the Court of Appeal ([1959] L.R. 1 R.P. p 271)). Here it was a restriction following the conclusion of the contract, but in *effect* it was still a restriction in that it prevented a substituted price being obtained under the contract. Even the court noted that if it had jurisdiction to consider the provision, it would have held it to be contrary to the public interest in that it was not beneficial to the public.

[85] [1960] L.R. 2 R.P. p 105; where there existed a restriction on the acceptance of members from outside of defined areas. Under the rules of the National Membership Scheme (to which both Societies belonged) a member who bought goods from a different society would receive the same dividend on his purchases as that paid to members of the selling society. The restriction was not a registrable restriction within the Act, since it did not affect the conditions on which or subject to which the goods were sold. The fact that a member did not have a voice in the society was nothing to do with the terms subject to which the goods were supplied.

Paper Association's Agreement[86] where there was an argument as to whether restrictions had been accepted for the purposes of sections 6(1)(b) and (c)[87]. It was held that the word "goods" in section 6(1)(c) meant "kinds of goods"; it was only concerned with restrictions on quantity or kinds of goods so a restriction on name or terminology did not relate to either of these and consequently subsection (c) did not apply. It was said that a restriction on nomenclature would be a restriction within subsection (b) if it prevented parties contracting otherwise than in accordance with the agreed definitions. In this case the parties could depart from the definitions used and the agreement was not therefore registrable. What the parties did in practice with this non-binding obligation was not an issue for the court. Surely it can be equated with a form of recommendation.[88] If the terms of the agreement had been restrictions within section 6(1), they would not have been justified under gateway (b) since there was no evidence put forward to suggest that abolition of the grades and the assumption that there would be an increase in costs, would in fact lead to higher prices.[89]

The inability to examine what the parties did intend to do in practice was of concern in Re Cadbury Schweppes Ltd. and J. Lyons & Co. Ltd.'s Agreement[90] Following the previous case[91], the applicants (Cadbury Schweppes "CS" and Lyons "L") decided to

[86] [1963] L.R. 4 R.P. p 29.

[87] There had been price restrictions, but these had been terminated prior to the hearing. The other alleged restrictions related to a schedule of descriptions itemising 47 grades of waste paper and that a reference to a grade would be used to incorporate that description into the contract.

[88] See Re Federation of Wholesalers and Multiple Bakers (Great Britain and Northern Ireland) Agreement op cit. See also Re Birmingham Association of Building Trades Employers' Agreement ([1963] L.R. 4 R.P. p 54) where it was held that recommendations which were specific within section 6(7) were within the Act and therefore fell to be registered. See also Re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd's Agreement supra.

[89] op cit., p 52.

[90] [1975] I.C.R. p 240.

[91] Registrar of Restrictive Trading Agreements v Schweppes Ltd. and Others (No. 2), [1971] L.R. 7 R.P. p 336. Following negotiations a draft agreement was submitted to counsel to ensure that it would be exempt from registration. Counsel advised that the agreement comprise a shareholders agreement (under which the two English companies established a sales/marketing company as a subsidiary of one of them for the sale of fruit concentrates that they produced), a supply agreement (under which they agreed to supply the sales company with the concentrates that it required, at fixed prices, and not to anyone else) and a user agreement (under which the sales company was granted certain trade marks). This was referred to as the "English Agreement" – a separate agreement was entered into with a Scottish company to ensure that the agreement would not be tripartite and thus registrable. This other agreement was made between the sales company and the Scottish company and was held to be not registrable since it was an agreement for the supply of goods within the meaning of section 7(2) with the only restriction accepted by the sales company relating to the price of goods supplied under the agreement. Thus no account was to be taken of that restriction (pp 375-376). The companies contended that the English agreement fell within sections 7(2) or 8(3) or 8(7) and was not registrable. The court found that did not fall within section 7(2) because the provision in section 8(9) "two or more persons being inter-connected bodies corporate...shall be treated as a single person" was concerned with the "counting of heads" to determine

terminate the registrable "English Agreements" and replace them with a new "1973 Agreement", designed to phase out over a period of eight years their mutual dependence on each other. The RPC held that it was not permissible in determining whether the 1973 Agreement was an agreement for the supply of goods, to consider the circumstances surrounding its formation or that its purposes were to extricate the parties from the difficulties[92] caused by the registration of the English Agreements[93]. This agreement was one that as counsel for the Registrar put it, a device that enabled the "parties to continue the pooling of their productive capacity in such a way as to restrict competition between them for a period of eight years".[94] The court held that there was no obligation for inferring that the positive obligation to purchase L's commitment by CS included a negative obligation within section 6(3) to limit its own production[95], hence the agreement was not registrable (positive obligations not being restrictions for the purposes of the Act, distinguishing the conclusion reached in Re Basic Slag[96]).

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the number of parties to the agreement and did not mean that the persons to which it related should be treated as one and the same person, so the proviso to section 7(2) applied in that there were two suppliers of goods (the two manufacturers) to the sales company and accordingly, removing the benefit of that section (pp 370-371). It was further held that the English agreement was not exempt under section 8(3) because it contained restrictions other than restrictions on the parties supplying goods in respect of the supply of goods of the same description or on the sale company in respect of the sale or acquisition for sale of other goods of the same description, in that it contained restrictions on the sales company in respect of trade marks. Neither did the agreement fall within section 8(7) since it contained restrictions other than those relating to goods bearing the trade marks. Although the supply agreement alone fell within section 8(3) and the user agreement alone fell within section 8(7), the "agreement" comprised both the supply agreement and the user agreement and was thus outside of both sub sections (3) and (7). Accordingly the English Agreement was registrable (pp 372-373).

[92] In respect of "agreements" to extricate parties from difficulties, see Topliss Showers, infra.

[93] The court referred to Pennyquick J. in Re Automatic Telephone ([1964] L.R. 5 R.P. p 1, p 21) who in interpreting the words "any agreement for such a licence or assignment" in section 8(4) did not think that "upon their natural meaning in the context, are apt to characterise an agreement not merely by reference to its terms, but also by reference to the purpose in the minds of the parties to it. If this was the intention, different words must, it seems to me, have been used."

[94] ibid, p 257.

[95] The fact that CS might produce less concentrate than they otherwise would have done had there been no agreement to purchase L's commitment did *not* raise an implication that, in the absence of an express term, a term should be implied into the written agreement limiting its production quantities so as not to compete with L's production. Where an agreement works as it is written, as counsel for the applicants argued, a term cannot be implied, although this does raise the danger of the parties putting something in writing, but operating the "agreement" in some other way - an unwritten agreement that the court may not enquire into on this. In this case there was much interest in the terms of a side letter that qualified CS's obligation to take up L's committed amount of concentrate or pay L in accordance with the 1973 Agreement should CS order less the L's commitment. One must wonder how this came to be in a side letter – was it simply down to last minute negotiations or perhaps it was introduced to try to ensure that the agreement would not be registrable. How CS and L actually operated this agreement in practice was not an issue under the legislation.

[96] See 2.2.2 (ii) supra.

Re Ravenseft Properties Ltd.'s Application[97] tested leases and their restrictive covenants following the inclusion of "services" in the RTPA[98]. It was found that a lease could contain a restrictive agreement relating to services and thus be within the ambit of the regulation *provided* there were some *trading nexus between* the parties alleged to have accepted the restrictions *and* the subject matter of the agreement. Thus residential tenancies and business leases, where the lessee was not carrying on the business of the supply of services, were excluded from the regulation[99] illustrating the limitation of the requirement that two parties[100] accept the restrictions and the cross over problem resulting from the wording of the legislation in respect of services and goods. Despite the fact that the definition of restriction included negative covenants, where a tenant first took possession of land under the terms of a lease containing negative covenants, that tenant gave up no freedom which he would otherwise have to trade on that land, that is, the negative covenants in the agreements (such as those preventing the making of alterations, assignment or sub-letting) were not restrictions for the purposes of section 6(3) of the RTPA 1956[101].

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[97] [1977] I.C.R. p 136.

[98] The applicant, a property company that provided certain services to its tenants such as maintenance, cleaning and porterage, selected certain leases and licences and put them before the court's scrutiny for a declaration (under section 13(2) of the 1956 Act) that they were not agreements that fell within the RTPA. The applicant was anxious as it had many such leases. This was the first time that the court had been called upon to apply the regulation to services. Mocatta J. found that the definition of services given by section 117 of the FTA could "hardly be said to be helpful to anyone seeking to arrive at a well-founded opinion on the construction and application of the statute" (p 140). This was described as a test case, as the applicants were nominees of the British Property Owners Association, which "had failed to arrive at an understanding of the provisions of the Act of 1973 which they could with any confidence consider to be well founded" (p 141). This provides a good example of the problems experienced by businesses in understanding the legislation. The evidence was put before the court by way of affidavit only, with the agreement of the parties, because of the urgency and importance of the decision.

[99] op cit., pp 143-144.

[100] Joint tenants were to be considered as separate persons unless carrying on business in partnership, in which case they would be treated as one person in accordance with section 43(2) of the 1976 Act.

[101] Mocatta J. concluded that it was "only in the most exceptional circumstances of collateral agreements or of a sale and lease back plus very special circumstances that restrictions contained in a lease could possibly fall within the ambit of the order made under the Act of 1973" (p 146). Support for this was found in the two earlier authorities that provided that only in very exceptional circumstances can the limitation of freedom of trade effected by covenants in a lease constitute restrictions fort the purposes of the statutory regulation. In Re Telephone Apparatus ([1963] L.R. 3 R.P. p 483, per Wilmer L.J.) it was said that the agreement "did not have the effect of closing any door that was previously open to the contractors; its effect was merely to open a door through which the selected contractor might pass". Similarly, in Esso Petroleum Co. Ltd. v Harper's Garage (Stourport) Ltd. ([1968] A.C. 269 (H.L.), decided under the restraint of trade doctrine as it was pre the FTA introduction of services) it was found that "[r]estraint of trade.....impl[ies] that a man contracts to give up some freedom which otherwise he would have had". In this case, prior to the entering into of the agreement, the respondents were entitled to use the land in any lawful way that they chose. Thus by making the agreement to restrict their right to sell petrol not supplied by the appellants at that site, they restricted a pre existing right.

The abuse of form and the exemptions continued in Re Agreements relating to the Supply of Diazo Copying Materials, Machines and Ancillary Equipment[102] and most notably, MD Foods plc (formerly Associated Dairies Ltd) v Baines and others[103]. At first instance it was held that the agreement was not registrable. The contrary conclusion was reached by the Court of Appeal,[104] who ordered an inquiry into the damages M had sustained by reason of D's injunction against him. Leave to appeal was granted[105]. In a unanimous decision, it was held that to attract the exemption of paragraph 2 of Schedule 3, an agreement had to be one under which no relevant restrictions were accepted beyond those falling in sub paragraphs (a) and (b) of that paragraph. However, M's obligation not to sell to D's customers milk supplied to him by D fell outside of (b) because it was a restriction accepted in respect of the *very*

[102] [1984] I.C.R. 429. The respondent company was the subject of a court order restraining it from giving effect to any other agreements in contravention of section 35(1) of the RTPA, which had been made following the discovery of an unregistered restrictive trade agreement (these had been discovered by a FTA complex monopoly investigation in 1977: Diazo Copying Materials HCP (1976-77) 165). It had now entered into a joint venture agreement relating to the design, manufacture and marketing of a highly specialised new photocopying machine, with provisions for sales in the United Kingdom. The DGFT argued that this was a territory restriction on the respondent not to sell the machine in countries other than the United Kingdom. The DGFT considered that this was in contempt of the previous court order, but the court dismissed the application, finding that the restriction related exclusively to the goods supplied under the agreement and as such was excluded by section 9(3). However, by concentrating on the written terms and not looking at the effect of a territory restriction and the reality, it may be that the court did not enquire enough as to the relationship of the parties in the joint venture, as if this could be classed more as a horizontal agreement – an agreement between persons by whom goods were supplied – section 9(4) would have removed the benefit of section 9(3).

[103] [1995] I.C.R 296 (Ch Div.); [1996] I.C.R 183 (CA); [1997] 1 All ER 833 (HL). Briefly, the respondent milkman ("M") entered into a five year milk supply agreement with the appellant dairy ("D"). By clause 4(1), M agreed to buy from D and D agreed to supply to him all the milk he needed for sale in his milk round business. The agreement contained mutual non-competition clauses, which lay at the heart of the issue: D agreed not to sell milk to any of M's customers and by clause 4(3), M undertook and agreed with D that "during the continuance of this Agreement (except with the prior consent of [D]) not to sell by way of retail to any customers of [D]" (p 835). In January 1992, M found that he could obtain milk more cheaply from a different source. When he did so, D issued proceedings for an injunction. M argued that the obligation to buy all his milk from D was void because the agreement had not been registered under the 1976 Act.

[104] Here, Schiemann LJ noted that section 9 drew a distinction between terms and restrictions and pointed out that the fact that different drafting may produce a situation in which the statute does not require the furnishing of particulars is *not* a potent argument, in the context of the RTPA, for applying that Act in an artificial way. A restrictive agreement should only be outside of the ambit of the Act if it was clearly outside of the Act altogether (pp 193-194).

[105] D contended that the agreement fell within the exemptions from registration in section 9(3) and paragraph 2 of Schedule 3 of the 1976 Act on the basis that under section 9(3), clause 4(3) was to be disregarded in determining whether the agreement should be registered since that clause was a "term which related exclusively to the goods supplied in pursuance of the agreement (thus no account was to be taken of it) and under paragraph 2 of Schedule 3, the Act did not apply if the only restrictions accepted by the parties were "(a) by the party supplying the goods, in respect of the supply of goods of the *same* description to other persons - D's obligation not to sell milk to M's customers fell within this paragraph; or (b) by the party acquiring the goods, in respect of the sale, or acquisition for sale, of other goods of the same description" - M's obligation to buy all his milk from D and not from elsewhere fell within this paragraph, and so did his obligation under clause 4(3) in so far as it related to milk not supplied by D.

goods acquired under the agreement – not a restriction in respect of the sale of *other goods of the same description*. By itself, paragraph 2 of Schedule 3 did not operate to exempt the agreement from registration. However, the effect of section 9(3) was that the restriction imposed by clause 4(3) had to be disregarded to the extent that it applied to milk supplied by D, with paragraph 2 of Schedule 3 applied on that footing, (in accordance with section 9(7), which provided that in determining whether an agreement was exempt from registration under Schedule 3 no account was to be taken of restrictions which were required to be ignored under section 9(3)). So to the extent that it applied to milk obtained elsewhere, clause 4(3) imposed a restriction which fell within sub-paragraph (b). Consequently the agreement was exempted from registration by the *joint effect* of section 9 and paragraph 2 of Schedule 3.

It was accepted that if the clause had been drafted differently "although having precisely the same ambit"[106] the agreement would not have been registrable. Lord Nicholls noted that this would have been so had the clause been drafted in two linguistically separable pieces and asked the question as to whether this difference in form made all the difference so far as registrability was concerned. Obviously it did not according to the House of Lords. A bit of a play on words by the court? The conclusion according to Lord Nicholls is that "There is no reason for supposing Parliament intended that the obligation to register should depend upon what is essentially an irrelevancy: the precise form in which a restriction is expressed, as distinct from its substance...there is no warrant for interpreting the Act as elevating form over substance when identifying the existence or scope of restrictions or when applying the statutory exemptions".[107] The court looked at the effect of the wording in the restriction in relation to the statute. It was manifestly unfair that they could not consider the economic effects of the restriction on the parties concerned, because as was noted earlier in the judgement, milk roundsmen were under increasingly severe competition from milk sales by shops and supermarkets. Any price increases by D to M would mean either M raising his prices and thus potentially losing customers – economic theory suggests that this would be so – or have his own profit margins eroded.

[106] p 836.
[107] p 840.

Agreements never intended by the parties to be anti-competitive or operate to that effect, could be caught up in the registration regime. Topliss Showers Ltd. v Gessey & Son Ltd. and Others[108] illustrates that the RTPA was in some respects far reaching, probably beyond what was originally envisaged. The unfortunate reality of this case was that the parties having been involved in an acrimonious breakdown of their business relationship, and having issued four writs, found that what they agreed as a "settlement" (a "Tomlin Order") was again the subject of adjudication by the court. As Neill J. noted, the costs of all the proceedings must have been enormous.[109] The terms of the settlement agreement, which included restrictions on supply and the prices to be charged, were repeatedly broken. Unexpectedly, the question arose as to whether those terms were unenforceable by virtue of section 35 of the RTPA 1976, for lack of registration; illegality being raised as a defence[110]. One of the terms of the settlement prevented a third party, Trumix,[111] from selling a particular mixer valve at less than the published prices of Topliss. It was held that this was a restriction accepted by Trumix under an arrangement[112] within section 6(1) of the 1976 Act. The court rejected the submission that the restriction was excluded by virtue of section 9(3) as being one which related exclusively to he goods supplied, since it found that that subsection was

[108] [1982] I.C.R. 501. This concerned the terms of a settlement agreement, and raised questions as to the limits on the exclusion of restrictions relating to the goods supplied and the acceptance of restrictions by an undertaking that was not a party to the terms of the settlement.
[109] ibid, p 504.
[110] The RTPA can be used a shield in proceedings brought by the other party to the agreement, as was seen in MD Foods plc (formerly Associated Dairies Ltd) v Baines and Others where the defendant argued that the restriction was void for non-registration. Likewise, in Vernon & Company (Pulp Products) limited v Universal Pulp Containers Limited ([1980] F.S.R. 179 (H.L.)) an agreement which restricted the ability to manufacture and sell products in competition was argued to be void by the defendant since it had not be registered (The defendant also argued that it was void as being a restraint of trade and that it was contrary to Article 81 of the Treaty of Rome. The plaintiff was claiming an injunction for breach of contract, breach of copyright and breach of confidence. Thus it will be noted that the RTPA is just one of a number of grounds that has been argued when parties did not adhere to their contracts). In Academy Sound & Vision Ltd. v WEA Records Ltd. ([1983] I.C.R. 586.) the RTPA was again used as a shield. The case involved a claim for breach of copyright and of an agreement restricting the manufacture and sales of records. The defendant denied breach of copyright or of the agreement, and alternatively claimed that the agreement was void for not having been registered. The plaintiff succeed on its application for summary judgement since the court found that although there had been an agreement accepted by two parties concerning the persons from whom the goods were to be supplied within the meaning of section 6(1)(f), it was an agreement "in respect of" (which is to have a wide scope of construction applied to it: p 594) the assignment of the copyright in the master recordings and thus it fell within the provisions of paragraph 5A of Schedule 3. Accordingly, the Act did not apply. Again though, the judge, Vinelott J. noted that the construction of the agreement and even more of the Act as amended was not "wholly free from difficulty" (p 594).
[111] A company incorporated by one of the defendants, Mr Belfield, to market the "Mark IV Mixer Valve" following the breakdown in relations between Topliss and Gessey Ltd.
[112] The court relied on the wide definition of arrangement in section 43 of the 1976 Act and the meeting of the minds criteria established in British Basic Slag, supra.

itself excluded by section 9(4). It was clear that both Topliss and Trumix had accepted restrictions not only between each of these companies and Gessey Ltd., but also as between themselves; and both Topliss and Trumix were persons to whom the goods were supplied in pursuance of the agreement, thus the requirements of section 9(4) were satisfied. The court found that the terms of the settlement were registrable, but reached that conclusion without enthusiasm because they found it "to be a very technical and artificial defence in the circumstances of the case where the relevant restrictions were accepted for such very short periods".[113] The court rejected the argument that since the defendants had accepted the benefits of the terms of the settlement they were estopped from relying on the RTPA in voiding the restrictions, and found that "[w]here registration is a statutory requirement imposed as a matter of public policy I do not see that it would be right for the court to allow a party to rely on an estoppel to avoid the consequences of non-registration."[114] Although the mischief that the legislation was aimed was successfully attacked in some cases, this case illustrates the RTPA was wholly inflexible with regard to the commercial realities.

[113] op cit., p 518.
[114] ibid.

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IV Bael "Procedural Rights and Issues and Modernization of EC Competition Law: Comments" Speech at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/10/00

M Bloom "Investigation and enforcement" Speech delivered at "The New Competition Act" The Hatton, London, 2/12/99

M Bloom, "The New UK Competition Act", Speech at the Fordham Corporate Law Institute, 27th Annual Conference on International Anti-trust Law, New York, 19/10/00

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

J Bridgeman Speech to the Air Transport Users' Council 9 June 1999 (http://www.OFT.Government.UK/html/rsearch/specific-arch/spe16-99.htm 15 June 1999)

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S Bright "Competition law aspects of e-commerce" Speech delivered to the BIICL Conference, London, 18/5/01

S Byers "A new era in competition" Speech delivered to the Social Market Foundation, 28/2/00, (www.dti.gov.uk/Minspeech/byers280200.htm as at 11/3/00)

PGH Collins "Retailer Buyer Power: Abusive Behaviour and Mergers/Acquisitions" Speech at the Fordham Corporate Law Institute, 27th Annual Conference on International Anti-trust Law, New York, 20/10/00

J Folguera "The Impact of the Commission's Modernization White Paper and Vertical Restraints Regulation on Member State Antitrust Laws" Speech at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/10/00

M Hutchings "Globalisation of Trading – Can Regulation Keep Pace?" Speech delivered to the BIICL Conference, London, 18/5/01

JI Klein "Time for a Global Competition Initiative?" Speech delivered a the EC Merger Control 10th Anniversary Conference, Brussels, 14/9/00

E Likkanen "Realising our vision of a global information society: from revolution to evolution" Speech delivered to the 3rd Annual Conference of the GBDe (Global Business Dialogue on e-commerce) in Tokyo, 14/9/01 (www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt.../386|0|RAPID&lg=EN as at 17/1/01)

E Liikanen "An enterprise Policy for SME's" Speech delivered to the BDI and DIHT Annual Meeting in Brussels, 29/5/00

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M Monti "Competition in a Social Market" Speech at the Conference on Reform of European Competition Law, Freiburg, 9 November 2000 ((2001) 1 Competition Policy Newsletter February, 2

M Monti "The EU views on a Global Competition Forum" Speech delivered to the ABA Meeting, Washington, 29/3/01 (Speech/01/147)

M 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

M Monti "The future for Competition Policy in the European Union" Speech/01/340, 9/7/01

M Monti, Key note address to the BIICL Conference, London, 18/5/1

M Monti "The main challenges for a new decade of EC Merger Control" Speech/00/311, 15/9/00

M Monti, "Who will be in the driver's seat" Forum Europe Conference, 11 May 2000 (Speech/00/177)

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A Robertson "Judicial Interpretation" Speech delivered at "The New Competition Act" The Hatton, London, 2/12/99

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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

A Schaub, "Vertical Restraints; Key points and Issues Under the New EC Block Exemption Regulation" Speech at the Fordham Corporate Law Institute Twenty-Seventh Annual Conference on International Antitrust Law and Policy, New York, 20/10/00

G Smith "Prohibition of anti-competitive agreements cartels and concerted practices" Speech delivered at "The New Competition Act" The Hatton, London, 2/12/99

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J Vickers "The OFT: Firm Goal, Evolving Role" Speech delivered to the Competition Law Association, 2/5/01

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