

UNIVERSITY OF SOUTHAMPTON

ABSTRACT

FACULTY OF LAW

Doctor of Philosophy

COMMERCIAL AGREEMENTS AND TRADE ASSOCIATION PRACTICES:
PRACTICE AND PROCEDURE IN EEC AND UK COMPETITION LAW.

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This study seeks to examine and chronicle the practice and procedure relating to commercial agreements and trade association practices in EEC and UK Competition laws. In particular emphasis is given to the informal solution of cases rather than the formal solution of cases by administrative or judicial decision. Statistics demonstrate that the vast majority of cases receive informal rather than formal treatment.

The work, and in particular Part II, is comparative considering individual agreements and practices from both the EEC and UK perspectives. With respect to the latter body of law evidence has been derived from cases entered on the Register of Restrictive Trade Practices and cases dealt with by various Government departments under other legislation. Very little of this material has been published.

SUPPORTING STATEMENT

COMMERCIAL AGREEMENTS AND TRADE ASSOCIATION PRACTICES: PRACTICE AND PROCEDURE IN EEC AND UK COMPETITION LAW

Context

Competition law has developed into an administrative discipline. In the late 1950's and early 1960's this was less the case. Indeed, with respect to United Kingdom law the Restrictive Practices Court led the way with its robust and stern approach towards cartels and it was only later that the Registrar of Restrictive Trading agreements and subsequently the Director General of Fair Trading (as the former position evolved into) found that their functions had become disassociated from the Court and had increasingly become associated with an informal administrative treatment of cases. A roughly similar description of events applies in EEC law with the European Court playing a secondary role to the Commission who, for 99% of cases, find that an informal solution to a case is the most efficient method of enforcement. Though contrasted with the Restrictive Practices Court, the European Court is, admittedly, considerably more dynamic. Nonetheless the fact remains that its utterances on competition law are few and far between and its role is essentially one of the periodic exposition of principle rather than the routine assessment of cases. The statistics given in Chapter 4 Section E demonstrate the prevalence of the informal solution. The statistics for the United Kingdom are elaborated upon in an appendix to this statement.

A number of important plus points derive from these statistics. First and foremost is the improvement in the efficiency of the enforcement machinery that an increased reliance on the informal solution implies. Whilst backlogs of unresolved cases might still exist they are nothing to those that would exist if all solutions were formal. There is clearly a valid public interest in cases being speedily brought to a conclusion; more rapid enforcement of the law necessarily means that the market is better protected from restrictive and anti-competitive behaviour. It also means that the relevant body of jurisprudence evolves more rapidly as the authorities gain more experience in the handling of these cases.

Furthermore, the informal approach means a more effective use of scarce public resources.

To counterbalance the above the minus points must be stated. First and foremost is the loss of the didactic effect that publication of formal decisions may exert (the "sunlight bleaches" principle). Businessmen and their advisers need guidance in a predictable form in order to be able to conduct their businesses and advise in an educated and legal manner. Use of the informal approach tends to obscure from public scrutiny the workings and policies of the authorities. In this respect the United Kingdom authorities, and in particular the Office of Fair Trading, are the worst offenders. The European Commission does disseminate a steady flow of relevant information and indeed has changed its procedures so as to formally publish details of some cases where comfort letters are to be issued. A comparison of the Annual Reports of the Commission and the Office of Fair Trading demonstrates the difference in transparency between the two authorities. The latter is quite content to disclose details of cases whose substance has already been published in a formal report; it is far less willing to make known its "everyday" policy towards different types of agreement or practice.

Methodology

The text of this study seeks to evaluate comparatively the workings of the antitrust authorities. This proved relatively easy with regard to the Commission but extremely difficult with regard to the United Kingdom authorities. In the end the majority of "leg work" was performed to illicit details of the United Kingdom position. The text is divided into two parts the first concerning procedure, the second concerning agreement types and practices. Part I concentrates on the United Kingdom mainly because it is more complex than the EEC procedure but also because it is apparently less well known than EEC procedure. The starting point for analysis of procedure has been that since nearly all cases are "negotiated" rather than "litigated" to a conclusion a study of procedure must focus upon the process of negotiation rather than litigation. Chapter 1 is a basic exposition of the statutory language of the Restrictive Trade Practices Act 1976. Chapter 2 turned out to be long and complex but necessary given that statistically the OFT have found that many otherwise restrictive agreements have been safe from review as a result of the myriad exceptions to the Act. Chapter 3 continues the pattern started in Chapters 1 and 2 by examining

those agreements and practices subject or vulnerable to review by the Office of Fair Trading under the Competition Act 1980. Chapter 4 was written following a number of lengthy discussions with senior OFT personnel. Lady Olive Wood was most helpful in this respect and gave me a candid exposition of procedure under Section 21(2) RTPA 1976. My discussions with her were followed up with discussions with Dr. Martin Howe and Ms. Nuala O'Flynn both of whom were also most helpful. Interestingly, their comments did not always tie in with those of Lady Wood. For "external" perspectives I contacted various city solicitors and also some companies and trade associations who had been involved in negotiations with the OFT. Some of my discussions with these parties were expressed to be confidential and I am not hence at liberty to disclose identities. The "internal" and "external" perspectives afforded me a very valuable insight into OFT workings. On occasion my comments in drafts of Chapters caused some concern within the OFT. An example of such a case was my comments in Chapter 3 Section E VI on making representations to the Secretary of State. My information had been based upon an actual case of such representations having been made and upon discussions I had with officials in the Department of Trade who had dealt with the representations and advised the Secretary of State. However, the OFT, it transpired, were unaware of the existence of these representations and they thus considered my comments to be "hypothetical and misconceived". They were worried that I should actually encourage parties to make representations thereby circumventing them; apparently they were unaware that such had already been attempted (unsuccessfully). The instance did highlight in my own mind the tension that exists between the respective roles of the OFT and the Secretary of State. Chapter 5 is a relatively straight forward account of judicial procedure though I have sought to play down the role of the "gateways" and play up the role of the Court as an enforcement body. This was due to reflect what appears clearly from the statistics to be accurate, viz., that the Restrictive Practices Court today plays a minimal role as thinker and policy maker but a significant role as a fist and enforcer. Chapters 6 and 7 are fairly standard accounts of EEC procedure though with a leaning towards the informal aspects of negotiation rather than the formal aspects of decision making. The IBM Settlement case is dealt with at some length to reflect my belief that this is a milestone in Commission policy. My conclusions on this case were derived following a day spent, shortly after the settlement was arrived at, discussing the settlement and its implications with the officials who were concerned with the case at the Commission.

Part II of the book examines actual types of commercial agreement and trade association practice. Much of the details with respect to United Kingdom law were obtained from an analysis of over 600 cases Registered on the register of Restrictive Trade Practices and on the Exempt Register. These were collected over a two and a half year period and involved innumerable visits to the registry. I was aided in my research here by financial grants from both the University of Southampton Research Fund and from the Continuing Education Research Fund set up by the Faculty of Law at Southampton University. These registered agreements proved to be a rich source of information. With many of the files it was quite clear how the OFT had responded. Where it was not clear how the OFT had responded I was often able to discover the relevant principles by subsequent discussion with OFT officials. My normal approach was to arrange a meeting with the OFT and prior to the meeting to send to them lists of the questions I wished to discuss. Invariably I included hypothetical examples based upon actual cases on the register. This enabled the OFT to discuss the principles without having to disclose actual details of cases. This circumvented the problem of their statutory obligation not to disclose actual details of registered cases.

Of the Chapters in Part II Chapters 9, 11 and 12 proved most difficult in terms of collection of data. Chapter 9 was difficult because it entailed discussions and correspondence with various trade associations about their practices; the wide variety of different type of informational exchange was surprising as were some of the problems they raised. Chapter 11 on terms and conditions entailed countless hours studying registered cases in UK law. It was a satisfying chapter to write however since it unearthed a great deal of new material that has not hitherto been generally appreciated. Chapter 12 likewise involved a great deal of "leg work". For this Chapter I spent a considerable amount of time discussing issues with the Department of Trade. First with the General Policy Division concerning Section 29 RTPA 1976 on agreements important to the national economy, and secondly with the Minerals and Metals Division discussing Section 406 Income and Corporation Taxes Act 1970 and Section 8 Industry Act 1972 with regard to rationalisation agreements.

Conclusion

The aim of this work was to chronicle in a comparative fashion the treatment of commercial agreements and trade association practices. "Chronicling" in this context meant discussing and describing the principles and official policies relating to the cases. However my approach, of necessity, meant that I did not have a wide remit to conduct detailed analysis or criticisms of particular cases or theories.

A "statement" in support of a Ph.D. is meant to assess the contribution of the work to research in the area. My objectives have primarily been to look at this area of law from the perspective of negotiation rather than litigation. This has entailed a concentration on principle rather than case law. With hindsight perhaps the main contribution of the work has been to expose the workings and policies of the United Kingdom authorities and in particular the material on the various registers. This is an under-chronicled and under-researched body of materials. My study used over 600 such cases; there are however ten times that number on the registers. Hopefully, my 600 are representative of current policy since I was careful to draw mainly from cases registered since 1980.

As stated earlier, the European Commission is a more transparent body and data collection was not a problem. By operating in a comparative manner I have sought to render comparison more accessible. It is striking that in many instances both the Commission and the OFT have formed similar views of problems. Though there are some notable differences which are primarily due to the structure of the United Kingdom legislation which restrains the OFT from undertaking wider policy analysis.

COMMERCIAL AGREEMENTS

AND

TRADE ASSOCIATION PRACTICES

PRACTICE AND PROCEDURE IN EEC AND UK
COMPETITION LAW

NICHOLAS GREEN.

PART I

PROCEDURE

CHAPTER 1 AGREEMENTS REGISTRABLE UNDER THE RTPA 1976

Section A:	Introduction.	1
Section B:	Agreements caught by the legislation.	2
Section C:	Goods restrictions which must be registered.	17
Section D:	Services restrictions which must be registered.	19
Section E:	Provisions in agreements which may be disregarded when determining whether the Act applies: Sections 9 and 18 RTPA 1976.	21
Section F:	Note on Information agreements.	33
Section G:	The impact on trade associations.	33
Section H:	Informal parallel behaviour between major firms: Complex monopolies.	35
Section I:	Check list for determining registrability.	37

CHAPTER 2 AGREEMENTS NOT REGISTRABLE UNDER THE RTPA 1976

Section A:	Introduction.	39
Section B:	Exemption for agreements important to the national economy under Section 29 RTPA 1976.	40
Section C:	Exemption for agreements holding down prices under Section 30 RTPA 1976.	50
Section D:	Exemption for wholesale co-operative societies under Section 32 RTPA 1976.	54
Section E:	Exemption for agricultural and forestry associations under Section 33 RTPA 1976.	54
Section F:	Exemption for agreements authorised under the European Coal and Steel Community Treaty - Section 34 RTPA 1976.	57
Section G:	Exemption for certain categories and types of service agreement under Schedule 1 RTPA 1976 and the Schedule to S.I. 1976 No. 98 The Restrictive Trade Practices (Services) Order 1976.	58

Section H:	Agreements for statutory purposes and rationalisation agreements under Schedule 3(1) RTPA 1976.	68
Section I:	Exemption for exclusive dealing agreements and exclusive purchase agreements under Schedule 3(2) and (7) RTPA 1976.	82
Section J:	Exemption for know-how agreements concerning goods and services under Schedule 3(3) and (8) RTPA 1976.	91
Section K:	Exemption for trade mark agreements under Schedule 3(4) RTPA 1976.	93
Section L:	Exemption for patent, registered design and copyright agreements under Schedule 3(5) and (5A) RTPA 1976.	96
Section M:	Exemption for agreements relating to the supply of goods and services where the agreement has overseas operation only under Schedule 3(6) and (9) RTPA 1976.	108
Section N:	Exemption for agreements involving the Crown.	109
Section O:	Exemption for restrictive leasehold agreements and other property law contracts.	110
Section P:	Exemption for agreements whose restrictions may be disregarded under Sections 9 and 18 RTPA 1976.	114

CHAPTER 3 ANTI-COMPETITIVE PRACTICES: PRACTICE AND PROCEDURE UNDER THE COMPETITION ACT 1980

Section A:	Introduction.	116
Section B:	Anti-competitive conduct - Summary of regulatory procedure.	117
Section C:	Anti-competitive practices - definitions and examples.	118
Section D:	Anti-competitive practices - exclusions from the Act.	127
Section E:	Anti-competitive practices - the investigation procedure.	131
Section F:	Investigation of public bodies.	156
Section G:	Investigation of prices of major public concern.	157
Section H:	Confidentiality in OFT and MMC Reports.	158

CHAPTER 4 REGISTRATION AND NEGOTIATION OF RESTRICTIVE
TRADING AGREEMENTS

Section A:	Introduction.	160
Section B:	Registration of agreements - procedure and practice.	161
Section C:	The register - problems with confidential information.	172
Section D:	Powers of the OFT to obtain information.	177
Section E:	The Section 21 RTPA 1976 procedure.	180
Section F:	Modification and abandonment of agreements.	185
Section G:	Negotiations under Section 21(2), dispensation from reference to the Court.	188

CHAPTER 5 COURT PROCEEDINGS IN UNITED KINGDOM LAW

Section A:	Introduction.	204
Section B:	Proceedings brought by the Director General against registered agreements.	205
Section C:	Defending restrictive agreements before the Restrictive Practices Court.	210
Section D:	Restraining orders under Section 35(3) RTPA 1976 - proceedings brought against unregistered agreements.	237
Section E:	Proceedings for contempt of court.	239
Section F:	Actions commenced for a declaration concerning the registrability of an agreement.	245
Section G:	Actions commenced by parties for a declaration that the agreement is registrable.	247
Section H:	Private actions for damages.	249
Section I:	Private actions for damages or an injunction on the basis of European law.	253
Section J:	Criminal law proceedings for conspiracy to defraud.	253
Section K:	Judicial review of decisions of the Director General of Fair Trading, the MMC and the Secretary of State.	254

CHAPTER 6 AGREEMENTS AND TRADE ASSOCIATION PRACTICES
CAUGHT BY EUROPEAN COMPETITION LAW

Section A:	Introduction.	258
Section B:	Forms of joint conduct caught by Article 85 EEC.	259
Section C:	Proving an effect on trade between the Member States.	268
Section D:	The object or effect of an agreement.	272
Section E:	"Preventing, restricting or distorting competition."	274
Section F:	Article 85(2): agreements automatically void.	277
Section G:	Agreements exempted under Article 85(3).	280
Section H:	Article 86 EEC: abuse of a dominant position.	281
Section I:	Overlap between EEC and UK law.	288
Section J:	Notification to the European Commission.	290
Section K:	Form A/B, the method of notification.	298
Section L:	Form C, complaints by third parties.	301

CHAPTER 7 GENERAL ENFORCEMENT AND NEGOTIATIONS WITH
THE COMMISSION

Section A:	Introduction.	304
Section B:	Survey of Commission procedure.	305
Section C:	The legal basis of formal negotiations.	318
Section D:	Formal enforcement in national courts.	327
Section E:	Negotiating informal settlements with the Commission.	331
Section F:	The "Opposition procedure".	341

PART II

COMMERCIAL AGREEMENTS AND TRADE ASSOCIATION PRACTICES

CHAPTER 8 PRICING PRACTICES AND RESTRICTIONS

Section A:	Introduction.	344
Section B:	Legal framework.	345
Section C:	Price fixing simpliciter.	348
Section D:	Discounts: aggregated rebates, loyalty rebates, turnover rebates etc.	358
Section E:	Price discrimination.	372
Section F:	Predatory pricing.	375
Section G:	Excessive pricing.	379
Section H:	Resale price maintenance.	384
Section I:	Equalisation of receipts schemes, profit pooling.	396
Section J:	Delivered pricing (base or parity point pricing).	401
Section K:	Cost calculation models.	406
Section L:	Renegotiation and variation (cost escalation) clauses.	411
Section M:	Collusive tendering.	417

CHAPTER 9 THE EXCHANGE AND DISSEMINATION OF INFORMATION

Section A:	Introduction.	423
Section B:	Legal framework.	425
Section C:	Price information.	433
Section D:	Detecting anti-competitive price exchanges .	439
Section E:	Contract terms and conditions.	440
Section F:	General market data.	441
Section G:	Refusal to disclose information.	447
Section H:	Specimen compliance scheme.	450

CHAPTER 10 DISTRIBUTION

Section A:	Introduction.	452
Section B:	Exclusive dealing agreements in general.	453
Section C:	Bloc-exemption for exclusive dealing: Regulation 83/83/EEC.	454
Section D:	Exclusive dealing agreements falling outside of the bloc-exemption.	477
Section E:	Exclusive dealing in UK law.	482
Section F:	Exclusive purchasing agreements in general.	486
Section G:	Bloc-exemption for exclusive purchasing: Regulation 84/83/EEC.	489
Section H:	Exclusive purchasing agreements falling outside of the bloc-exemption.	506
Section I:	Exclusive purchasing in UK law.	510
Section J:	Commercial agents.	514
Section K:	Franchise agreements.	517
Section L:	Selective distribution.	530
Section M:	Dealers refused supplies: complaints and remedies.	542

CHAPTER 11 TERMS AND CONDITIONS OF TRADE

Section A:	Introduction.	546
Section B:	Legal framework.	547
Section C:	Codes of Practice.	555
Section D:	Exclusion, limitation of liability and other financial penalty clauses.	557
Section E:	Credit and other terms of payment.	567
Section F:	Terms leading to market division.	571
Section G:	Sale of assets agreements and non-competition clauses.	575
Section H:	Premises and trading methods.	579
Section I:	Staffing restrictions.	584
Section J:	Advertising and trade fairs.	589

Section K:	Standards, quality control and descriptions.	597
Section L:	Customer and end-user restrictions.	601
Section M:	Tying clauses.	605

CHAPTER 12 JOINT VENTURES AND CO-OPERATION AGREEMENTS

Section A:	Introduction.	612
Section B:	Legal framework.	613
Section C:	Joint selling ventures.	627
Section D:	Joint purchasing.	633
Section E:	Joint research and development.	637
Section F:	Specialisation.	658
Section G:	Rationalisation agreements.	670
Section H:	Product standardisation.	691
Section I:	Joint carriage ventures.	696

CHAPTER 13 INTELLECTUAL PROPERTY LICENSING

Section A:	Introduction.	698
Section B:	Patent licensing in EEC law: general considerations.	698
Section C:	Bloc-exemption for patent licensing agreements: Regulation 2349/84/EEC.	702
Section D:	Patent licensing in UK law.	730
Section E:	Copyright licensing in EEC law.	738
Section F:	Copyright licensing in UK law.	740
Section G:	Trade mark licensing in EEC law.	746
Section H:	Trade mark licensing in UK law.	750
Section I:	Know-how licensing in EEC law.	750
Section J:	Know-how licensing in UK law.	753
Section K:	Licensing intellectual property to sub-contractors.	753

CHAPTER 14 TRADE ASSOCIATION MEMBERSHIP

Section A:	Introduction.	756
Section B:	Membership fees.	756
Section C:	Rules for membership.	759
Section D:	Inter-member exclusive dealing - closed systems.	762
Section E:	Guilt by membership.	765

SELECT BIBLIOGRAPHY

The bibliography below provides a selection of the major texts used throughout this work. Other more specialised articles and documents of relevance are referred to as appropriate in each chapter.

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CHAPTER 1

AGREEMENTS REGISTRABLE UNDER THE RTPA 1976

A. INTRODUCTION

In this chapter the agreements to which the Restrictive Trade Practices Act 1976 (RTPA 1976 hereafter) applies are examined. Analysis of agreements excluded from the Act may be found in Chapter 2.

The RTPA 1976 is extremely complex. Essentially it creates rules for 4 types of agreement:

- (i) Agreements concerning goods.
- (ii) Agreements concerning services.
- (iii) Information agreements concerning goods.
- (iv) Information agreements concerning services.

It should be stressed at the outset that these categories are completely separate from each other. At present only categories (i), (ii) and (iii) are actually controlled by law and even then numerous exceptions exist to each category. Category (iv) may at some future date become subject to the law but this could only be achieved by a statutory order issued by a competent minister.

The following matters are discussed in this Chapter.

Section B: Agreements caught by the legislation. Analysis of the width of Sections 6 and 11 RTPA 1976 being the provisions determining which restrictive goods and services agreements must be registered. A detailed analysis of the statutory wording is provided.

Section C: Goods agreements which must be registered (Section 6 RTPA 1976).

Section D: Services agreements which must be registered (Section 11 RTPA 1976).

Section E: Provisions in agreements which may be disregarded when determining whether the Act applies. (Sections 9 and 18 RTPA 1976).

Section F: Note on information agreements.

Section G: The impact upon trade associations.

Section H: Informal, parallel behaviour between major firms: "Complex monopolies".

Section I: Check list for determining registrability.

B. AGREEMENTS CAUGHT BY THE LEGISLATION

If the RTPA 1976 applies to an agreement then details of that agreement must be furnished to the Office of Fair Trading (OFT hereafter) who are then statutorily bound to register the agreement on the Register of Restrictive Trade Practices. All agreements registered must be referred to the Restrictive Practices Court (RPC or "the Court" hereafter) for assessment of whether the restrictions therein operate against the public interest in which case they are prohibited. However, the Director General of Fair Trading may, often following negotiations with the parties to the agreement, obtain a dispensation for the agreement from the Secretary of State which saves the agreement from reference to the Court. Such dispensations are given when the restrictions in the agreement in question are "insignificant". (This procedure is examined in Chapter 4).

I. Sections 6 and 11 RTPA 1976: Words and phrases defined

Section 6 brings goods agreements within the control procedure outlined above. Section 6 commences with the following:

"This Act applies to agreements (whenever made) between two or more persons carrying on business within the United Kingdom in the production or supply of goods, or in the application to goods of any process of manufacture, whether with or without other parties, being agreements under which restrictions are accepted by two or more parties in respect of any of the following matters -."

Section 6 follows with a list of restriction types to which the Act applies. Section 11 repeats, with minor differences, Section 6 but applies the Act to services agreements. The only significant difference is that services agreements are registrable with the OFT only to the extent that specific types of agreement have been expressly called up for registration by a statutory instrument issued by the Secretary of State. In 1976 the Minister enacted 1976 No. 98 Restrictive Trade Practices (Services) Order which prima facie brought under control all types of services agreement. The only excluded agreements are those listed in Schedule 1 to the Act (examined in Chapter 2). The relevant part of Section 11 provides that the Act applies to "... agreements (whenever made) which ... are agreements between two or more persons carrying on business within the United Kingdom in the supply of services brought under control by the order, or between two or more such persons together with one or more other parties ..." and are agreements containing restrictions listed in Section 11(2)(a)-(e).

Details of the types of restriction actually specified in Sections 6 and 11 are given later in the chapter. The following discussion elaborates upon the meaning of the various words and phrases in the portions of Sections 6 and 11 quoted above.

(i) "Agreements"

To be registrable parties must be in an "agreement". The term "agreement" is nowhere in the Act given a precise definition. This has led the Court of Appeal to conclude that the word must be given its ordinary and popular meaning.¹ The Oxford English Dictionary defines an agreement as: "A coming into accord; an arrangement between two or more persons as to a course of action; a mutual understanding; a covenant, or treaty." Of some help is Section 43(1) RPA 1976 according to which "agreement" includes "... any agreement or arrangement, whether or not it is intended to be enforceable (apart from any provision of this Act) by legal proceedings, and references in this Act to restrictions accepted or information provisions made under an agreement shall be construed accordingly". Hence the scope of the legislation covers not only agreements but also the vaguer concept of 'arrangements'. As a preliminary point it should be stressed that not all agreements or arrangements need be registered. It is only those containing restrictions caught by the Act which are subject to control. Thus, for example, a simple conveyance or lease is an agreement but since it would contain restrictions of a type covered by the Act only in exceptional circumstances is rarely registrable.²

Whilst the commercial concept of an 'agreement' is readily understandable, that of 'arrangement' is less certain and has given rise to much debate and litigation. Despite early cases which suggested a narrow meaning to the word³ subsequent case law has made it clear that a wide meaning is to be accorded the phrase. Thus, in British Basic Slag Ltd. Cross J. held that, "... all that is required to constitute an arrangement not enforceable in law is that the parties to it shall have communicated with one another in some way, and that as a result of that communication each has intentionally aroused in the other an expectation that he will act in a certain way."⁴ Lord Justice Diplock in the British Basic Slag case when on appeal affirmed the formulation of Cross J. in the lower court when he stated that an arrangement, "... involves mutuality in that each party, assuming he is a reasonable and conscientious man, would regard himself as being in some degree under a duty, whether moral or legal, to conduct himself in a particular way as the case may be, at any rate so long as the other party or parties conducted themselves in the way contemplated by the arrangement".⁵ The definitions given above, however, are somewhat imprecise and are in practice of limited value to businessmen seeking a predictable basis upon which to conduct relationships with other

businessmen. The following is a non-exhaustive list of examples of agreements or arrangements about which a reasonably fixed opinion may be expressed:

- (a) Formal agreements: formal, written agreements between two or more parties to accept restrictions listed in the Act are clearly caught by the Act. This would include the articles of association of an incorporated trade association which constitute an agreement between the shareholders. Restrictive clauses are rarely present in these articles of association, nonetheless, if a clause exists binding members to decisions of the board or of some other designated body the members will be in "agreement" as to decisions of that board or designated body: Sections 8(1) (for goods) and 16(2) (for services) RTPA 1976.
- (b) Trade association agreements: Agreements entered into by trade associations operate according to Section 8(1) RTPA 1976, "... as if the agreement were made between all persons who are members of the association or are represented on it by such members". If restrictions are contained in that agreement they operate "... as if the ... restriction or information provision ... were accepted or made by each of those persons". Thus, agreements between trade associations inter se are caught. (See Section G of this chapter for further details).
- (c) Trade association recommendations: Under Sections 8(2) and (3) (goods) and 16(3) and (4) (services) RTPA 1976, recommendations, whether implied or express, of a trade association to its members are registrable by virtue of a fictitious provision in the association's constitution whereby members agree to abide by the recommendation. Many trade association officials find difficulty in accepting that non-binding recommendations are registrable equally with mandatory rules, yet this is the clear consequence of Sections 8 and 16. It is premised upon the basis that recommendations can influence members behaviour to a significant degree and can lead to harmonised behaviour. The meaning of "recommendation" is not defined in the Act but may be construed to include, amongst others, express and implied recommendations, guidance notes, advice in the form of circulars, exhortations at association meeting as to the "wisest" course to follow etc. It is irrelevant, for purposes of registration, that the recommendation might not be followed.
- (d) Constitutions of Unincorporated associations: In the case of unincorporated associations the constitution, whether it consists of a brief enumeration of objectives or is a complex series of

documents, will comprise an agreement between the current members and, if it contains registrable restrictions, must be furnished to the OFT. Rarely however in practice are restrictions of any significance incorporated into such documents. Sections 8 and 16 discussed above apply to unincorporated associations as well as to incorporated associations; the definition of trade association in Section 43(1) includes both varieties.

- (e) Oral agreements: Oral agreements containing registrable restrictions are caught. So called "gentlemen's agreements" where the parties claim to be honour bound only are "arrangements" within the meaning of the Act and are accordingly registrable.
- (f) Collateral undertakings: Written contracts with ancillary or collateral, orally agreed, restrictive terms or an "understanding" between the parties to comply with certain restrictions are caught. In this case the combined agreement and arrangement would be registrable. Thus for example: X, Y and Z set up by a written agreement a joint buying pool which by the terms of the agreement allows the parties to purchase from the group or from other sources. However, they orally agree only to purchase from the pool thereby restricting their freedom to purchase from independent sources. In this case irrespective of whether the written agreement is on its own registrable the oral agreement certainly is. The OFT might view the written and oral agreement as one agreement containing written and oral terms.
- (g) Unilateral dissemination of price lists: If X unilaterally sends his price list to Y who subsequently reciprocates by forwarding his to X then an arrangement has almost certainly come into being despite the absence of formal communication between X and Y. An "arrangement" or understanding may be inferred from the conduct of the parties in such a case.⁶ If X and Y continue to exchange price lists upon the evolved understanding that each will refrain from undercutting the other then the parties are again almost certainly in a registrable arrangement. If the OFT suspect an unregistered arrangement but have no tangible proof thereof they may send an informal, inquiring letter asking the parties whether they have accepted registrable restrictions and requesting details of such arrangements or agreements if they exist.
- (h) Unilateral no-poaching: X with the hope of influencing Y's behaviour unilaterally refrains from selling in Y's primary marketing area; Y, on appreciating the fact, reciprocates by refraining from selling in X's primary marketing area. This is almost certainly another example of an arrangements which may be

inferred by the conduct of the parties. As with (g) supra there is no formal agreement. The binding factor is an understanding derived from conduct entailing an expectation about each others conduct or a moral obligation to refrain from selling in each others territories. As with (g) supra such an "arrangement" is almost certainly registrable. Should any form of communication between X and Y as to this conduct exist the case for registration will be even more compelling.

- (i) Arrangement through conduct of agents: If X sends to his solicitor or accountant or other agent a price list or other document expressing X's future corporate plans for transmission to the solicitor or accountant or other agent of Y, this would amount to an arrangement if Y in any way responds positively by accepting restrictions since X is attempting to induce Y to act in a particular manner listed in Section 6 RTPA 1976 and Y has indicated concurrence.⁷
- (j) Conduct in Oligopolistic markets: The raising of prices by firms in an oligopolistic market or in a market in which competitors monitor closely each others price moves and react accordingly by matching such price moves does not necessarily involve a registrable agreement. Although X might know or expect rivals to follow his price moves because of the particular market circumstances, there does not exist an arrangement between X and his rivals. X has simply assumed the role of price leader; the RTPA does not apply simply because rivals fall into line behind him. However, if there is any communication whatsoever, whether it consists of a discussion over a quiet drink or a simple "nod and a wink" at a trade association meeting, then this may well be sufficient to turn innocent price leadership into an "arrangement".⁸ During counsel's submissions in Galvanised Tank Manufacturers, Buckley J. commented: "There must surely be a difference between a price leader who says that he will increase his prices and then waits for other manufacturers to follow before he makes his increase effective, and one who puts up his price, irrespective of whether others follow and without waiting for them to do so."⁹
- (k) Professional bodies: In the case of professional bodies which are incorporated and which exercise a quasi-judicial function (for example with regard to licencing and the conduct and discipline of traders) members abiding by the rules of the

professional body are not generally in an arrangement with each other as to the terms on which they supply goods or services. An example would be the National Greyhound Racing Club which licences greyhound racecourse executives and trainers and performs disciplinary functions. The Court of Appeal has held, with respect to the inter relationship of licencees in this organisation: "There was here an independent party making rules and granting licences. There was no evidence of any meeting of minds of the licencees who provided services. There was no evidence of any obligation being undertaken by one licensee to another. It is impossible to find either a multilateral agreement or a multilateral arrangement."¹⁰ The following general rule may thus be assumed to apply:

"The mere fact that persons voluntarily engaged in activities whereby they become subject to a regime of rules is not in itself any manifestation of their will also to agree or arrange inter se to abide by those rules, so that any infraction of the rules carries with it a breach of at least a moral obligation undertaken by each of such persons towards all other persons bound by the rules. All that can be inferred from this commonplace situation, taken by itself, is that each such person binds himself to the rules vis-a-vis the rule-making body, and accepts whatever sanctions may be vested in the rule making body in the event of breach of the rules.

Of course, the position is different if the persons who engage in the restrictive practices in question do so under a regime of rules which they themselves have set up Admittedly even in such a situation, where the rules are made and imposed from outside, one could conceive of additional facts which might show that there was not merely an imposition of rules on the persons who are bound by them, but also an additional agreement or arrangement between those persons inter se to abide by the rules. For this to exist, however, there must be some further evidence of a manifestation of will on their part to this effect."¹¹

- (1) Negotiations: If X, Y and Z are in the process of negotiating an agreement which would contain restrictions of a type listed in Sections 6 or 11 RTPA 1976 there is no arrangement or agreement until the contract is concluded. If no agreement is ever reached but, subsequently, the parties adhere to goals and aims discussed during negotiation this will represent strong (if not compelling) evidence of an informal arrangement.¹²
- (m) Groups of agreements considered collectively: If X and Y conclude a series of agreements which individually are not registrable but together are registrable the OFT may take a collective view of the

contracts when determining registrability. It has been held that where contracts are made in expectation, and in the light, of each other then there is a subsisting arrangement interlinking the contracts together.¹³

The above list of examples is not exhaustive. If in doubt about registration the businessman who seeks a safe path to pursue may seek the view of the OFT. In such cases either informal guidance will be given or documents may be furnished to the OFT with the express proviso that the parties do not necessarily accept the registrability of the agreement or arrangement. For details of the registration process see Chapter 4. Independent legal advice can of course be taken if this is preferred.

(ii) Meaning of "Between Two or More Persons"

The word "persons" is not defined but its normal legal meaning of natural or legal persons must be assumed. Legal persons include companies, statutory undertakings and all other bodies endowed with legal personality by operation of law, for example cooperative societies.¹⁴ Section 43(2) RTPA 1976 provides that for the purposes of, inter alia, Sections 6 and 11 RTPA 1976, "... any two or more inter-connected bodies corporate, or any two or more individuals carrying on business in partnership with each other, shall be treated as a single person". Examples will be used to demonstrate the width of the phrase:

- (a) Partnerships comprising natural persons may be counted as one person: Section 43(2) above uses the word "individuals" which indicates that partnerships between companies must be treated as agreements between separate parties. This is logical since otherwise inter-company agreements would only have to be dressed up as partnerships to avoid registration. An agreement between Mr. A., Mr. B. and Mr. C. is a single person partnership, conversely an agreement between A. Ltd., B. Ltd., and C. Ltd. is a bipartite agreement. The statute indicates the status of an agreement between A. Ltd., Mr. B. and Mr. C. Such a situation could arise where a company enters an agreement with two consultants for a fixed period of time and rather than pay the consultants a fee enters a profit sharing scheme with them. Since there are de facto two sets of parties with A. Ltd., on the one hand, and Mr. B. and C. on

on the other this would be viewed as a registrable bi-partite agreement. It is conceivable that a situation could occur where A Ltd., Mr. B. and Mr. C. were in a permanent commercial and legal relationship with each other in which case there may exist de facto only one economic unit and accordingly it would be reasonable to treat them as one person. Such might be the case where a company has a permanent relationship with an external firm of lawyers or accountants whose sole client is the company. Such "parasitic" firms are known in continental Europe where legal privilege entailing confidentiality of documentary correspondence is only accorded to external legal advisers and not in-house lawyers. It is not totally improbable that certain companies in the UK who feel threatened by EEC antitrust law might externalise their legal departments following the controversial decision of the European Court of Justice in A.M. & S. v. Commission¹⁵ which held that certain external lawyer-client correspondence could be withheld from the Commission in inspections into possible competition law breaches of Articles 85 and 86 EEC pursuant to Article 14 of Regulation 17/62/EEC on Commission powers of investigation.¹⁶

- (b) Joint tenants: In Ravenseft Properties v. Director General of Fair Trading,¹⁷ Mocatta J. held that joint tenants were to be considered as separate persons unless carrying on business in partnership in which case, in accordance with Section 43(2) RTPA 1976, they are treated as one party. The relevance of this point primarily lies in the question of the registrability of leases. Most leases are outside the scope of the legislation; the question of registrability is discussed in Chapter 2 on agreements not subject to the legislation.
- (c) Inter connected bodies corporate are treated as single persons: Hence an agreement between a parent and a wholly owned subsidiary does not count as an agreement for the purposes of the Act since the agreement is between members of the same body. Section 43(1) defines "interconnected bodies corporate" as "... bodies corporate which are members of the same group, and for the purposes of this definition "group" means a body corporate and all other bodies corporate which are its subsidiaries". Subsidiaries are as defined in Section 736 Companies Act 1985 or in the case of an Industrial and Provident Society, Section 15 of the Friendly and

Industrial and Provident Societies Act 1968.¹⁸

Inter connected bodies corporate are NOT, however treated as being one and the same economic entity. Section 43 RTPA 1976 only concerns itself with counting heads and not with treating the persons to which it relates as one and the same persons. Thus if P is a foreign, non-resident, company with a subsidiary S in the UK then an agreement between S and Y, another resident UK company, is registrable. S and P are counted as one person resident in the UK. The alternative (and judicially rejected) interpretation would be that S and P are one and the same and that since P (as opposed to S) does not carry on business within the UK the agreement with Y is an agreement between a resident and a non-resident company and is hence excluded from the Act which requires ~~that at least two~~ parties be carrying on business within the UK.¹⁹

One commentator has suggested that in the following situation there is no registrable agreement: A and B are subsidiaries respectively of C and D; C and D agree that A and B shall not sell their goods for less than £X. C and D control A and B by power of shareholding alone since they are neither agents for A and B nor have they appointed directors to the boards of A and B. C and D do not supply goods. *Arguably* A and C cannot be regarded as one and the same person; neither can D and B. As C and D are not carrying on business in the supply of goods their agreement is not registrable - moreover A and B are not parties to the agreement.²⁰ It is suggested that not to register such an agreement would be dangerous and that the safest course is to register on a fail safe basis (see Chapter 4); the situation can equally be analysed as the controlling shareholder of A. Ltd. agreeing with the controlling shareholder of B that their companies will fix prices. It seems artificial to say that A and B have not agreed to fix prices simply because the meeting of minds arises through majority members and not directors or managers.

(iii) Meaning of "restrictions are accepted by two or more parties":

It is sometimes possible to draft agreements so that registrable restrictions are only accepted by one party. If this can be managed the agreement need not be registered since the Act

requires that restrictions be accepted by two or more parties. The government, in 1956, when the requirement of two parties accepting restrictions was first introduced into legislation, refused to extend the duty to register to agreements whereby only one of the parties accepted restrictions on the basis that to so extend would draw exclusive dealing contracts into the registration and control net and this was considered undesirable as a question of general policy.

For example, if X and Y enter an agreement under which X can sell wherever he pleases in the United Kingdom but Y may not sell in Wales which is X's main selling area then no registrable agreement exists - only one party has accepted restrictions. For example, if A, B and C sign a contract whereby A shall supply his services at a price higher than that of B and C but where B and C shall set prices independently and may supply the service at any price they wish then there is no registrable agreement. For example, if X, Y and Z enter a contract whereby X must not grant discounts of more than 5% but where Y and Z can arrange discounts as and when they please, then again, no registrable agreement arises since only one party accepts restrictions.

It is further important to appreciate that the provisions relating to goods in the Act are entirely separate from those relating to services. Thus in considering the registrability of an agreement parties must scrutinise their agreements twice. Once to see whether the Act applies by virtue of the goods restrictions and a second time to see whether the Act applies by virtue of the services agreements. A "mixed" agreement between a supplier of goods and a provider of services is hence outside the scope of the Act, there must be two or more goods suppliers or producers or two or more services providers . It follows that an agreement in which suppliers of goods accept restrictions relating exclusively to services is not registrable. Nor are agreements under which suppliers of services accept restrictions relating exclusively to goods. Thus, if X, Y and Z who are manufacturers of goods agree that they will only pay a haulier a specified mileage rate for the service of handling their goods this agreement falls outside of the legislation. (Though an agreement by hauliers over the mileage rate charges they will require for hauling the manufacturers goods is registrable as an agreement by services providers to fix price).²¹

Multi-sided agreements: In a multipartite agreement involving more than two parties the duty to register applies even though the condition of "two or more persons carrying on business within the United Kingdom" and the condition of restrictions which "are accepted by two or more parties" are satisfied by different firms:

X is an English manufacturer, Y is an English dealer, A is a Swedish manufacturer and B is a Swedish dealer. An agreement concluded between X, Y, A and B which contains restrictions between X and A for example, to fix prices, control output and share markets, is a registrable agreement. The condition of two parties is satisfied by X and Y - albeit that Y accepts no restrictions. Furthermore the restrictions are accepted by parties to an agreement in which there are two persons carrying on business within the United Kingdom, it does not matter that A is not a UK company. Lawyers advising on such an agreement might suggest that Y depart the agreement since this would render it non-registrable though where this is not practicable (as it probably will not be) the agreement should be registered. Registration is essentially a neutral process and does not imply the end of the agreement

(iv) Meaning of - "Carrying on business within the United Kingdom".

The statute defines neither 'business' nor "carrying on". The Court has considered the term business on a number of occasions and apparently considers that whether a body is carrying on business is a question of fact to be decided in each case. In one case a federation of trade associations which was not itself a party to the referred agreement - which was however between certain associations who held membership in the Federation - was held not to be carrying on business in the United Kingdom.²² However, in later cases the Court has held that trade associations may carry on business within the United Kingdom and that the term is not related exclusively to the types of business mentioned in Sections 6 and 11 RTPA 1976.²³ Hence the term "business" is construed widely and evidently *may include* general trade association activities.

A UK monopolist who is a party to an international market sharing agreement whereby foreign undertakings refrain from selling in the UK is not party to a registrable agreement since there are not two parties carrying on business within the UK. This is not to say of course that other provisions, for example, Articles 85 and 86 EEC will not apply. The carrying on business in the United Kingdom requirement is relevant also to joint ventures. An agreement between

an English company X and a French company Y to form a joint venture Co. - XY Ltd. - will not escape the legislation on the basis that only one party is carrying on business within the United Kingdom. This will be because, if XY Ltd. is incorporated in the United Kingdom, there will be two parties conducting business within the jurisdiction when that company comes into being (though not before). It might be advisable to incorporate XY Ltd. in France in order to avoid registration, though, if the commercial operations of XY Ltd. relate to the United Kingdom market the fact that it is incorporated abroad will not prevent it from being categorised as a party "carrying on" business in the United Kingdom. As was stated earlier the test of where business is being carried out is a factual one; though place of incorporation will in practice generally be compelling evidence of the place of business. Again, an agreement influencing trade between EEC Member States will be vulnerable to EEC competition law.

The precise meaning of "carrying on" is far from clear. The phrase is an important one for foreign companies with agencies in the United Kingdom. Section 43(4) RTPA 1976 provides that "... a person shall not be deemed to carry on a business within the United Kingdom by reason only of the fact that he is represented for the purposes of that business by an agent within the United Kingdom." 'Agent' may be given its usual legal meaning of one who has authority to bind in legal relations his principal to a third party. Hence simply by having a representative, commercial agent, or exclusive dealer in the UK, a foreign company is not necessarily carrying on business within the UK. Precisely when the agent stops being merely a representative and commences to do something more substantial on behalf of the foreign company so as to turn an 'agent' into a branch or subsidiary which carries on business on behalf of the parent is not clear. If the 'agent' produces or manufactures goods on behalf of his 'principal' this presumably goes beyond mere agency-like activities and begins to resemble 'carrying on business' activities since the dividing line is unclear, a rule of thumb might be that anything greater than merely negotiating, entering and concluding contracts on behalf of the principal (or anything necessarily ancillary to that) would amount to "carrying on" business within the United Kingdom. The European Commission, in 1962, issued a notice on distribution contracts with commercial agents, in which they listed factors which distinguished an independent trader from one who was in reality no more than an extension of his principal. UK law appears not to be dissimilar to the EEC law.²⁴

The relationship between principal and commercial agent is clearly analogous to that of principal and agent in the Section 43(4) context and, accordingly, the criteria stipulated by the Commission may be informative. If one applies the criteria of the notice to Section 43 the following conclusions emerge: a person who is simply an "agent" and who does not carry on business within the United Kingdom will accept none of the risks attached to the transaction in question (though he may assume the usual del-credere guarantees); he will not keep as his own property a considerable stock of the contract products; he will not maintain or ensure at his own expense a substantial service to customers free of charge; he will not determine contract prices or terms and conditions.

The above commentary on "agents" does not define the meaning of "carrying on". The test is essentially one of fact. In merchant businesses the place of sale is a telling factor,²⁵ in the case of provision of services the place at which the service is rendered will be an important feature. In cases unrelated to restrictive practices where the question has been discussed the place where the operations take place from which the profits arise has been a central factor.²⁶

An important question is whether a foreign parent company - X - with a subsidiary - Y - incorporated and trading in the UK is carrying on business in the United Kingdom. It is fundamental in United Kingdom company law that a company, once incorporated, has legal personality discreet from that of its promoter or incorporator.²⁷ Hence X and Y would be separate companies for purposes of English law; X would not carry on business within the UK but Y would. This rule is not to be confused with the provisions of Section 43(2) RTPA which, as noted above, render interconnected bodies corporate 'one person' for the purposes of the definition of agreement. Thus, a parent and subsidiary do not agree with each other, However, this does not mean they are one and the same economic entity. It should be stressed that different rules apply under EEC law which are dealt with in Chapter 6.

(v) "Restriction"

The word restriction is nowhere exactly defined though may safely be assumed to refer to restrictions of a type listed in Sections 6 and 11 RTPA 1976. Though under Section 43(1) RTPA 1976 restriction "includes a negative obligation, whether express or implied and whether

absolute or not". Thus a negatively framed agreement between X and Y not to undercut each other is as equally registrable as a positively framed agreement between X and Y to match each others prices.²⁸ To be registrable there does not have to be a proven harmful effect upon competition all that there need exist is an agreement containing restrictions listed by the Act. It should be appreciated that registrability turns on the form of an agreement and not its effect. The OFT will take the economic 'significance' of the restriction into consideration when the question of dispensation from the obligation to refer the restrictive agreement to the RPC is discussed. Section 21(2) RTPA 1976 (discussed in depth in Chapter 4) permits the Director General of Fair Trading to make representations to the Secretary of State for a direction that the agreement in question need not be referred to the RPC on the basis that a restriction therein is not 'significant'.

The restriction apparently must go further than is allowed by general law. If the parties agree to a restriction in respect of something that the law *forbids* then the restriction is not registrable. This is so even though the restrictive agreement contains sanctions.²⁹ Thus, for illustration, it would not be a registrable restriction for parties to agree, or a trade association to recommend to members: that goods should not be produced below a certain quality where that quality is prescribed by law; that contracts should not unreasonably exclude liability since that is the legal effect of the Unfair Contract Terms Act 1977; or, that goods should never be produced that are not of a merchantable quality since that is an obligation incumbent upon vendors by virtue of Sale of Goods legislation.

An unusual example from decided case law may be found in Telephone Apparatus Manufacturers Application.³⁰ In this case an agreement between the Postmaster General and eight manufacturer of telephone apparatus which allocated contract work between the manufacturers was deemed to be free from the duty to register, albeit that the agreement operated a market sharing system. The traditional and legally protected freedom to enter contracts without constraint enjoyed by the Crown is a liberty that the RTPA does not affect. Under general law therefore the restrictive agreement between the Crown and the manufacturers was free from registration. The Court of Appeal held that a second agreement entered into between all of the manufacturers

which simply regulated the conduct of the parties with respect to the first agreement with the Postmaster General was likewise free from the duty to register. Lord Justice Harman stated: "The ... agreement ... is merely a regulation of the method by which the eight contractors carry out their contractual obligations, and is exempt from registration along with the Crown agreement."³¹

Section 6(3) RTPA adds a gloss to the meaning of restriction, which in view of the currently accepted wide definition of "arrangement", is somewhat superfluous. It makes it clear that to be a registrable restriction the restraint on conduct need not be formal. Section 6(2)(a) and (b) provide that an agreement is nonetheless registrable even though it only: (a) confers privileges or benefits only upon such parties as comply with conditions as to any of such matters as are described in Section 6(1) RTPA 1976; or (b) imposes obligations upon parties who do not comply with such conditions. For example, if in a specialisation agreement X and Y agree that they will both refrain from selling at below a certain price they will supply each other with their own brand of product at a preferential rate neither have accepted a restriction not to sell at below a certain price though there would, nonetheless, be a strong inducement to so do. Section 6(3)(a) indicates that for the purposes of the Statute X and Y are presumed to have ~~accepted~~ restrictions as to the price of goods. A similar effect in respect of services agreements is brought about by virtue of Section 17(1) RTPA 1976.

An important issue which vexes some businessmen and advisers is whether restrictive covenants in commercial leases are registrable restrictions. Following Ravenseft Properties v. Director of General of Fair Trading³² most leases may be assumed to fall outside the scope of the legislation. However this is not an absolute rule and the registrability of leases and restrictive covenants contained therein is discussed in Section 0, Chapter 2.

C. SECTION 6 RTPA 1976: GOODS AGREEMENTS WHICH
MUST BE REGISTERED

It is necessary at this stage only to outline the types of restrictions which if incorporated in goods agreements render the agreement registrable. Detailed analysis of each restriction type is given in subsequent chapters and reference to those chapters should be made for further guidance.

Section 6(1)(a)-(f) RTPA 1976 requires the following types of restrictive goods agreement to be registered - Agreements containing:

- (a) restrictions in respect of "the prices to be charged, quoted or paid for goods supplied, offered or acquired, or for the application of any process of manufacture to goods." This provision is examined in Chapter 8. Price fixing agreements whether concluded between suppliers or purchasers are caught as are collusive tendering agreements.
- (b) restrictions in respect of "the prices to be recommended or suggested as the prices to be charged or quoted in respect of the resale of goods supplied." This provision supports Section 6(1)(a) and is also examined in Chapter 8.
- (c) restrictions in respect of "the terms or conditions on or subject to which goods are to be supplied or acquired or any such process as is to be applied to goods." This provision includes all of the myriad types of agreement covering terms and conditions of trade. These are examined in Chapter⁹.
- (d) restrictions relating to "the quantities or descriptions of goods to be produced, supplied or acquired." "Description" mean kinds of goods and hence restrictive agreements over quantities of goods or kinds of goods are registrable. Amongst others specialisation agreements, quota schemes, joint research and development agreements, joint selling and purchasing agreement, will fall under this provision. (Examined in chapter on Joint Ventures and Co-operation).
- (e) restrictions relating to "the processes of manufacture to be applied to any goods, or the quantities or descriptions of goods to which any such process is to be applied." In conjunction with (d) above collective agreements limiting production or processing are registrable.
- (f) restrictions relating to "the persons or classes of persons to, for or from whom, or the areas or places in or from which, goods are to be supplied or acquired, or any such process applied." Under Section 6(1)(f) market sharing agreements are caught as are collective boycotts by groups of persons of other parties.

Section 6(2) and (4) RTPA 1976 elaborate upon aspects of these restrictions and are examined separately below.

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such a scheme would have been a registrable "arrangement" in any event.

Fees paid by members of trade associations by way of bona fide subscription do not need to be registered. The last paragraph of Section 6(4) makes specific exemption for such payments. Payments other than by way of bona fide subscription may amount to registrable agreements between the member and the association.³³ See Chapter 14 Section B.

D. SECTION 11 RTPA 1976: SERVICES AGREEMENTS
WHICH MUST BE REGISTERED - S.I. 1976 No. 98,
THE "SERVICES ORDER"

Under the Act restrictive agreements relating to services are not automatically caught by the Act. Only those classes or categories of agreement that have been expressly made the subject of an Order of the Secretary of State - a 'calling up' order - need be registered. Moreover, the Secretary of State does not have carte blanche to call up for registration any service agreement he sees fit. Rather, he may call up for registration services agreements containing restrictions of a type listed in S.11(2)(a)-(e) RTPA 1976. A class of service described by a statutory instrument is called a 'designated service'. Accordingly the Secretary of State may call up for registration any of the following restrictive services agreements:

- (a) agreements concerning, "the charges to be made, quoted or paid for designated services supplied, offered or obtained." Price fixing agreements are thus registrable.
- (b) agreements concerning, "the terms or conditions on or subject to which designated services are to be supplied or obtained." Agreements concerning terms and conditions of trade are registrable.
- (c) agreements concerning, "the extent (if any) to which, or the scale (if any) on which, designated services are to be made available, supplied or obtained." Quota schemes for the provision of services fall under this provision.
- (d) agreements concerning, "the form or manner in which designated services are to be made available, supplied or obtained." The OFT view this as a wide provision which catches, inter alia, agreements involving restrictions on advertising. Section 6 for goods does not appear wide enough to catch advertising restrictions.
- (e) agreements concerning, "the persons or classes of persons for whom or from whom, or the areas or places in or from which, designated

services are to be made available or supplied or are to be obtained."

This provision is analogous to Section 6(1)(g) and (h).

In 1976 the Secretary of State issued an order - S.I. 1976 No. 98 - calling up for registration the classes of service agreement listed above. The Order however makes provision for a large number of exemptions. These are fully examined in Section G of Chapter 2 on agreements not subject to registration. However, in the explanatory note appended to the Order the categories of exemption are listed and it is convenient to at least repeat them here. Thus some service agreements in the following sectors may be exempted from registration: international sea transport services; carriage by air; road passenger transport; the raising of funds and making of loans by building societies; the exercise of financial control by the Treasury or the Bank of England; banking services in Northern Ireland; the provision of insurance services; Unit Trust schemes; and the implementation of decisions of the Panel on Take-Overs and Mergers.

The structure of control for services is clearly similar to that for goods agreements. The notion of "services" is defined so as to exclude all agreements relating to goods. Section 20 RTPA 1976 (definitions section for services) defines "services" as follows:

"'Services' -

(a) does not include the application to goods of any process of manufacture or any services rendered to an employer under a contract of employment (that is, a contract of service or of apprenticeship, whether it is express or implied, and, if it is express, whether it is oral or in writing) but those exceptions,

(b) includes agreements (whether professional or other) which for gain or reward are undertaken and performed for any matter other than the production or supply of goods,

and any reference to the supply of services or to supplying, obtaining or offering services or to making services available shall be construed accordingly,"

In addition to the exclusions in (a) above it is important to note that in all but the most exceptional case the grant of a lease is not the supply of a service. This was the principal ruling of the Queen's Bench Division in Ravenseft Properties Ltd. v. Director General of Fair Trading³⁴ and is concurred in by the OFT who have stated that they consider the Ravenseft decision to apply to the grant of licenses of

of proprietary interests also:

"The case is clear authority for the view that a landlord engaged in only letting property is not to be regarded as carrying on business in the supply of services within the meaning of the legislation. It would also appear from the case that only in extremely rare cases do the covenants in leases amount to the acceptance of restrictions within the meaning of the legislation.

It may be helpful to add that the Office has taken the view that the principles laid down in the judgment in this case are of general application to proprietary rights and the grant of an industrial property licence including e.g. a copyright licence does not constitute the supply of a service within the meaning of the legislation."³⁵

This clarifies the meaning of "service". The Ravenseft decision is of some importance and is examined in depth in Chapter 2 on non-registrable agreements.

Section 17 RTPA 1976 applies to all services agreements called up for registration. Section 17(1) has the same effect as Section 6(3) with respect to an agreement whereby benefits or privileges are conferred upon parties complying with conditions as to any restriction, or imposes obligations on those who do not (Section 6(3) is discussed supra in connection with the word 'restriction'). Such an agreement will be treated as an agreement under which parties accept restrictions in respect of those conditions.

Section 17(2) has the same effect as Section 6(4) in respect of quota schemes and general commentary on that goods section applies, *mutatis mutandis*, to services.

E. PROVISIONS TO BE DISREGARDED IN DETERMINING REGISTRABILITY. SECTIONS 9 and 18 RTPA 1976

When parties to agreements are deciding whether their agreements must be furnished to the OFT for registration they may disregard certain features of their agreement. Thus, if in an agreement between X and Y the restrictions accepted by Y are disregarable restrictions then the only restrictions left will be those accepted by X and the agreement will not be registrable because only one party, X, will have accepted registrable restrictions. Section 9 RTPA 1976 indicates provisions in goods agreements which may be disregarded; Section 18 does likewise for services agreements. These two provisions will be examined separately.

It should be noted at the outset that the RPC in a recent case adopted a very narrow view of a provision in these sections. In Association of British Travel Agents Ltd.'s Agreement, (ABTA)³⁶ Lincoln J. seemed to suggest that Sections 9 and 18 were intended only to exclude from the Act certain restrictions which were either innocuous or which, for well established political reasons, were considered to be inappropriate for such a regulatory system of control. Accordingly where it was claimed that a clearly anticompetitive restriction was exempt from control because of these provisions the Court made the assumption that Parliament had not intended to exempt the restriction from the Act:

"It is unthinkable that in Section 18(6) of the Act of 1976 Parliament intended to leave intact a restriction which appears, in the light of that evidence, to be harmful to the public interest ..."³⁷

It appears to be the case that argument over whether restrictions may be disregarded may occur not only at the time of the decision as to registrability but also during judicial analysis of the restriction.³⁸

I. Section 9 RTPA 1976 - Goods

(i) Section 9(1) and (2) - Coal and Steel Agreements:

Restrictive agreements in the coal and steel industry are subject to the provisions of the European Coal and Steel Community Treaty (ECSC). Articles 65 and 66 thereof provide competition rules which are applied by the European Commission. It is arguable that these provisions exclude the operation of national laws in the Member States, although some legal doubt hangs over this proposition since the precise interrelationship between EEC and national law in this field is uncertain. Section 9(1) and (2) provides that in deciding upon the registrability of an agreement no account is to be taken of restrictions relating to coal and steel between parties to which the ECSC Treaty applies. Parties to which the ECSC rules of competition apply are defined in Article 80 ECSC as "undertakings". An "undertaking", in this context, means "... any undertaking engaged in the coal or the steel industries ... and ... any undertaking or agency regularly engaged in distribution other than sale to domestic customers or small craft industries." In discussing the question of Community law and its overlap mention should be made of Section 34 RTPA 1976 which reads: "An agreement is exempt from registration under this Act so long as there is in force in relation

to that agreement an authorisation given for the purpose of any provision of the ECSC Treaty relating to restrictive trade practices." Thus an exempted agreement need not be registered nor can it be referred to the RPC. It follows that since the Act, technically, applies to it, it cannot be referred to the Monopolies and Mergers Commission under *monopolies* legislation since the RTPA 1976 is mutually exclusive of that legislation, though not of mergers legislation.

(ii) Section 9(3) - Terms relating exclusively to goods supplied:

Section 9(3) RTPA 1976 is an important provision and allows certain terms in agreements to be ignored when considering whether the agreement is registrable. Section 9(3) is subject to Section 9(4) and reference thereto should be made. Section 9(3) reads:

"In determining whether an agreement for the supply of goods or for the application of any process of manufacture to goods is an agreement to which the Act applies by virtue of this Part, no account shall be taken of any term which relates exclusively to the goods supplied, or to which the process is applied, in pursuance of the agreement."

This phrase has given rise to much speculation as to its scope. Its importance is that if an agreement can be fitted within its terms it is exempted from registration. It is clear that Section 9(3) exempts certain basic categories of agreement. Thus, many simple contracts for sale (or for processing) of goods and long term supply agreements need not be registered. A contract between X and Y whereby X agrees to supply Y with a specified amount of a certain product over the following year at a fixed price is a restrictive agreement under which X is restricted as to the amount he may acquire and the price he pays. It would ~~often~~ be ~~pointless~~ to require registration of such an agreement, thus, Section 9(3) provides an exemption. Similarly in an agreement whereby X - who lacks manufacturing capacity - entrusts the application of a process to Y (a competitor), Section 9(3) ~~may free~~ the agreement from registration because terms such as the price to be paid for the processing and the obligation on Y to undertake the processing may be ~~ignored~~.

The phrase "the application to goods of any process of manufacture" has been judicially described as "curious".³⁹ They apparently apply to processes such as rust proofing or plating and do not embrace the initial manufacture of the goods.⁴⁰

The word "term" can be problematic. A single term can contain two restrictions. Thus, if X and Y agree to jointly produce and

market a product exclusively through a joint venture company two restrictive obligations exist: (i) obligation to sell only through the joint company; and (ii) obligation to refuse to fulfil orders placed by third parties with the individual parties. Section 9(3) however does not operate to exclude restrictions from consideration, it operates to exclude "any term" which relates exclusively to the goods supplied or to which the process is supplied. What Section 9(3) thus provides is that one examines a term and if that term relates exclusively to the goods, then, irrespective of the number of restrictions inherent within it, that term may be ignored. This is not really a satisfactory answer since when one asks whether the term relates exclusively to the goods one arrives at the answer that in giving effect to the term (i.e. selling exclusively via the joint company) the parties must refuse to supply customers individually and this is a restriction caught by Section 6(f) RTPA 1976 (restrictions on persons or classes of persons to be supplied). One way around this apparently confused situation is to treat the word 'term' as equating to 'restriction'. In Diazo Copying Materials both counsel and court seem to have adopted this approach; the question that was asked was always - is this "restriction" one which relates exclusively to the goods supplied and not is this "term" one which relates exclusively to the goods supplied.⁴¹ The word "supply" has a wide meaning and is to be interpreted to include more than simply "sale". Thus, "supply" includes sale, lease and hire. Thus, agreements for the supply of goods can mean agreements for the sale, lease or hire of goods.⁴²

The word "agreement" is likewise to be widely construed. Agreement means, according to Section 43(1), "any agreement or arrangement, whether or not it is intended to be enforceable by legal proceedings." In Diazo Copying Materials, Warner J. thus stated: "So an unenforceable arrangement can be an 'agreement for the supply of goods' for the purposes of Section 9(3) and restrictions accepted under such an arrangement may fall to be left out of account by virtue of that subsection."⁴³ Thus, if X, Y and Z are rivals and develop an informal, unwritten understanding that they will supply each other in the event of any of them experiencing a shortfall in stocks then the vague arrangement is counted as an agreement and the moral obligation on each of them to supply each other in a crisis rather than take advantage of a competitors problems is an agreement for the supply of

goods and is exempt under Section 9(3).

From Diazo Copying Materials it is now clear that where there is a master agreement between two parties for the supply of goods by one to the other and where this is followed by specific individualised agreements implementing the master agreement, Section 9(3) can apply. Mr. Justice Warner held in respect of such situations: "Granted that such a 'master' agreement may take the form of an unenforceable arrangements, its implementation would, in most commercial situations, require that the parties should enter into individual contracts of sale (or of hire) in respect of the goods actually supplied in pursuance of it. To hold that in such a situation a restriction relating exclusively to the goods supplied may be left out of account by virtue of Section 9(3) if accepted under an implementing contract, but not if accepted under the 'master' agreement, would seem to us unwarranted by anything in the terms of the subsection or by its discernible purpose."⁴⁴

In Diazo Copying Materials two restrictions in a joint venture agreement were held to be exempted by Section 9(3) and accordingly are informative. The case concerned the production of photocopiers by HTL and MSL. Under an agreement HTL would produce photocopiers to MSL's order. MSL would market the product throughout the world but HTL would have a right to purchase back at a significant discount on the retail price such of the products as it required for sale in the United Kingdom or in any other territory where MSL was unable to exploit its exclusive right to market the product. In this agreement there were two important restrictions. First, a restriction on MSL requiring that company to supply HTL at a discount in such quantities as HTL should require. Secondly, a restriction on HTL in the areas in which he could sell since he could only market the product in the United Kingdom or abroad in areas that MSL had relinquished. With respect to the first restriction it was held that this was a restriction in an agreement for the supply of goods and that the restrictions as to the territories where HTL could sell were restrictions which related "... exclusively to the goods supplied."⁴⁵ The judgment of Warner J. certainly indicates a wide view of Section 9(3). It would have been possible for the Court in that case to have defined the restrictions imposed on HTL not to sell outside the UK not in terms of a restriction relating exclusively to the goods

supplied but in terms of a restriction relating to the territory in which the goods could be supplied. If this had been the case it is hard to see how Section 9(3) would have applied. However, on the basis of this judgment export restrictions in joint venture contracts are not registrable. Moreover, in terms of the drafting of such contracts it may be possible for various forms of market sharing between joint venture parties to be worded so as to conform with Section 9(3). Thus if X, Y and Z combine in order to manufacture a complex piece of technical equipment and seek to divide up the market between them as regards its sales the contract may be drafted to grant to X, Y and Z an "exclusive assignable and divisible right to sell use and exploit the subject product throughout the territory as defined and shall grant an exclusive assignable and divisible right to use and exploit the technical data made available to it pursuant to this agreement."⁴⁶ Although the wording simply gives to X, Y and Z exclusive territories it implies negative restrictions on X, Y and Z not to sell in each others territories. It seems probable that this conclusion applies only in the context of joint venture agreements whereby the parties jointly develop and produce a product and then individually sell it. An agreement between A, B and C who each produce different, competing goods to share the market geographically between them is expressly registrable under Section 6(f) RPA 1976 and would further not benefit from Section 9(3) as a result of Section 9(4) below.

It is a moot question whether the following benefits from Section 9(3): X entrusts the processing of his goods to Y and promises Y that he will not have another person process his goods. Is this restriction on not going elsewhere one relating "exclusively to the goods supplied or to which the process is supplied" or is it a restriction as to persons who may process the goods? If it is the former then it can be ignored when determining registration. If the restriction "not to go elsewhere" can not realistically be described as a term relating exclusively to the product or the process, such a restriction is in relation to the persons who may process X's goods and hence falls within Section 6(1)(f). The latter (narrower) view is probably correct though there is no judicial guidance on point.

Finally, in respect of Section 9(3) it may be commented that the wording is unclear. The original intention was simply to exclude from registration various, everyday supply contracts. However, the provision is drafted so loosely that potentially it provides an escape

route for a wide range of restrictive agreements.

(iii) Section 9(4) - Proviso to Section 9(3):

Section 9(4) reads:

"Where any such restrictions as are described in Section 6(1) above are accepted or any such information provisions as are described in section 7(1) above are made as between two or more persons by whom, or two or more persons to or from whom, goods are to be supplied, or the process applied, in pursuance of the agreement, subsection (3) above shall not apply to those restrictions or to those information provisions unless accepted or made in pursuance of a previous agreement -

(a) in respect of which particulars have been registered under this Act; or

(b) which is exempt from registration by virtue of an order under Section 29 (agreements important to the national economy) or Section 30 (agreements holding down prices)"

There are two aspects to Section 9(4) RTPA 1976. The first question concerns the interpretation of the words up to "unless" in the middle of the provision. The second question concerns the remainder of Section 9(4). The first part of the provision says that the exemption in Section 9(3) does not apply where restrictions are accepted between two persons who are at the same level of trade i.e. all suppliers, or all persons supplied. For the exemption in Section 9(3) to apply the restrictions which relate exclusively to the goods must be in agreements between parties at different levels of trade. Thus in Diazo Copying Materials⁴⁸ it was sufficient that MSL supplied HTL with photocopies for sale by HTL in the United Kingdom. There was no discussion of the fact that the territory restriction, which was held to be a restriction which related "exclusively to the goods supplied" (and hence excludable under Section 9(3)), was in an agreement between HTL and MSL in their capacity as suppliers i.e. it was arguably an agreement between persons at the same level of trade. In Topliss Showers Ltd. v. Gessey Neill J. stated: "It is clear that Section 9(4) only applies where the restrictions are accepted as between two or more persons who are either suppliers or persons supplied; in other words there have to be two or more persons in the

same class. Furthermore, the persons in that class have to be persons who supply or are supplied with goods 'in pursuance of the agreement.'⁴⁹ A number of general points derive from this statement. First a person who is a supplier is not necessarily a manufacturer, a supplier could be a wholesaler supplying to a retailer or even a manufacturer selling direct to a consumer. Secondly, a person supplied can be anyone down the chain of distribution from a provider of raw materials e.g. a manufacturer, wholesaler, retailer or consumer. Thirdly, the word agreement includes arrangement and hence need not be formal or written and may be based simply upon an honour binding understanding between two suppliers.

The second question relates to the second half of Section 9(4). This lays down the principle that a parent or master agreement which is registered or exempted from registration, covers and exempts any later affiliated or subordinate agreement made "in pursuance" of it. Thus, for example, if X, Y and Z agree to supply goods to certain distributors or certain standard terms and they duly register this agreement, then, if X subsequently enters an agreement with a distributor on the terms laid out in the main agreement this subsidiary agreement is not registrable. Alternatively, X, Y and Z form a restrictive joint venture company to provide expert consultancy services to international projects in the high-technology field and obtain exemption from registration under Section 29 RTPA because it is an agreement important to the national economy. When the parties actually enter into agreements to provide services such agreements are not registrable. (See Chapter 2 for analysis of Section 29).

(iv) Section 9(5) Agreements to abide by standards set by British Standards Institution (BSI) and Others:

Agreements between parties to abide by standards set by the BSI may be discounted in determining registrability. The BSI which is government sponsored sets standards following discussions with suppliers and consumers and such standards are presumed to be within the public interest. Section 9(5) accordingly allows the disregard, for registration purposes, of agreements between producers or suppliers to comply with, or between purchasers only to acquire goods complying with, "... (a) standards of dimension, design, quality or performance, or (b) arrangements as to the provision of information or advice to

purchasers, consumers or users." The proposition described above in connection with Section 9(3) RTPA 1976 that an implied negative obligation is inherent in a positive restrictive term is relevant here also. As with Section 9(3) such an implied negative term, since it is in reality the reverse side of the positive restriction term, may be treated as one and the same as the disregarable, positive, restrictive term. Thus, a restriction between producers, for example, to produce exclusively goods which accord to BSI standards is also an implied negative restriction not to manufacture goods below or differing from that standard. Alternatively an agreement between purchasers only to acquire goods according to BSI standards contains the implied negative restriction not to acquire goods differing from the standard. In both examples the positive restriction and the implied negative restriction are integral and inalienable ingredients of the same "term" and may thus be disregarded.

The leniency shown the BSI is extended to other trade associations or organization who set standards and whose standards have been approved by the Secretary of State in a statutory instrument. This form of dispensation has been exercised on a number of occasions. Thus for example standards concerning safety precautions for veterinary products drawn up following discussions between the Ministry of Agriculture, Fisheries and Food, the Ministry of Health and the representatives of professional and commercial organisations have been formally approved.⁵⁰ Approval has also been given to standards for safety precautions for pesticides.⁵¹

Agreements to abide by standards differing from those set by the BSI or other approved bodies are not exempt from registration. An agreement whereby an association sets a high product quality standard could be used to harm the sales of smaller, lesser producers who manufacture lower quality goods to satisfy the cheaper end of the market. Standard setting can clearly have a pronounced effect on the market and hence warrants control.

(v) Section 9(6) Industrial relations agreements:

In common with restrictive practices laws in other industrialised states restrictive agreements relating to labour and employment are excluded from control. Collective employer-employee agreements are hence beyond the pale of the legislation. Section 9(6) reads, in pertinent part, that in determining registrability, "... no account

shall be taken of any restriction or information provision which affects or otherwise relates to the workers to be employed or not employed by any person, or as to the remuneration, conditions of employment, hours of work or working conditions of such workers." As expressed above the Section is prima facie of considerable breadth: many commercial agreements can, and do, exert a secondary affect upon labour conditions and terms of pay. An agreement between X and Y to set up a joint venture company in another part of the country and concentrate their joint efforts there can mean that employment prospects at X and Y's existing factories may suffer as work is diverted to the joint venture. Thus, Section 9(6) must be construed narrowly so as to only exempt from registration those agreements specifically affecting or relating to the matters noted in Section 9(6). The joint venture agreement would be registrable and would not be exempted by Section 9(6). The RPC has accordingly held that an agreement between manufacturers to halt production in order to combat a strike is not exempt from registration even though the agreement was specifically to deal with labour problems and not to restrain competition between the parties. It is noteworthy that in that case the agreement was ultimately adjudged by the court not to restrain competition - the restrictions in question were very short lived.⁵²

Section 9(6) is expressed to cover agreements relating to the workers to be employed. Presumably an agreement between X and Y not to employ certain specified individuals is not registrable. Furthermore, an agreement between X and Y that they would only employ workers with a certain skill or qualification would not be registrable. Finally, an agreement between X and Y whereby each will employ different, and agreed upon, types of worker is not registerable.

"Worker" for the purposes of Section 9(6) is defined as "... a person who has entered into or works under a contract with an employer whether the contract be by way of manual labour, clerical work, or otherwise, be express or implied, oral or in writing, and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour."

For relevant judicial analysis of the industrial relations exemption see the commentary on Section 18(6) below. See also Chapter 11 Section I on staffing restrictions for discussion of Section 79 FTA 1973 which may be relevant in this area.

II. Section 18 RTPA 1976 - Services

(i) Section 18(1) - (4) terms relating exclusively to services supplied:

Section 18(2) - (4) provides in effect that no term relating exclusively to the services supplied shall be considered in determining registrability. Section 9(3) it will be recalled allows suppliers to impose certain restrictions on dealers (see Chapter 2, Section I). Section 18 permits the equivalent in relation to services. The 'equivalent' in the services context can be complex. Retailers may equate to agents who, rather than sell the suppliers goods to consumers, arrange contracts of service or for services between supplier and consumer. Restrictions imposed upon the authority of the agent to conclude contracts are apparently not registrable. Thus, if the supplier (the principal) prevents the agent from advertising his service in a form other than that prescribed by the supplier or if the supplier requires the agent to sell the service subject to certain price conditions stipulated by the supplier these are terms which relate exclusively to the service supplied and are accordingly not registrable. The principal in such cases is merely limiting his agents authority. It is thought that Section 18(2) will have very limited application; very few services (as opposed to goods) are sold by an agent to the consumer. More commonly the provider of services is the agent who operates as middleman between vendor and purchaser of goods e.g. an estate agent or auctioneer. The only notable suppliers of services who act through an agent are tour operators who sell through travel agents and insurance companies who may sell through brokers. Though often sales via agents are at law concluded between the principal and the customer.

The same proviso relating to agreements between persons at the same level of trade as is specified in Section 9(4) applies to services by virtue of Section 18(3). Thus the recommendations of a service supply association to its service supplier members of restrictive terms for adoption by agents would not be exempt from registration. In such cases the members who are all suppliers are deemed to have accepted inter-se the restriction in the recommendation.

(ii) Section 18(5) - Agreements to abide by Standards set by the BSI and others:

This provision follows, mutatis mutandis, Section 9(5) and reference may be made thereto for commentary.

(iii) Section 18(6) - Industrial relations agreements:

This provision follows, mutatis mutandis, Section 9(6) and reference may be made thereto for commentary. The provision has, however, been recently considered by the Court in Association of British Travel Agents Ltd. Agreement⁵³ (The ABTA Case). In that case ABTA had imposing varying staffing restrictions on tour operators and travel agents as preconditions of ABTA membership. For example ABTA required travel agent members to employ throughout the year at least two full time employees with certain specified training or practical experience. The Director General challenged this restriction on the obvious basis that it prevented travel agents who could not afford two full time employees from being a member of ABTA. Non-membership of ABTA entailed the serious consequence that tour operators who were ABTA members would not deal with the firm since they were bound only to deal with members. ABTA argued that the staffing requirement was exempt under Section 18(6) as relating to matters of employment and terms and conditions of employment. The RPC, in a judgment read by Lincoln J., adopted a very narrow view of the exception in Section 18(6). The Court was of the evident conclusion that the staffing requirements were against the public interest: "It is unthinkable that in Section 18(6) ... Parliament intended the Court to leave intact a restriction which appears, in the light of the evidence, to be harmful to the public interest, especially where it is a member of a family of restrictions, simply because it relates to certain aspects of employment."⁵⁴

Lincoln J. made it implicitly clear that Section 18(6) was intended primarily to exclude from the Act restriction contained in the terms and conditions of collective agreements. He thus added the important qualification to Section 18(6):

"... it does not enjoin the Court to disregard employment or staffing restrictions where they are a component of a cluster of restrictions all constituting a manner of trading."⁵⁵

In the case the staffing requirement was associated with premises requirements and financial soundness requirements. See Chapter 11 Section I.

F. THE REGISTRABILITY OF INFORMATION AGREEMENTS

In all of the provisions mentioned in this chapter when the notion of a restriction is mentioned reference is made to information provisions. This could give the impression that all agreements between parties to exchange information are registrable to the same extent as supply agreements. This is not so. Information agreements relating to goods are only registrable to the extent specified in SI 1969 No. 1842 which calls up for registration information agreements concerning certain prices and terms and conditions. Information agreements relating to services are not as of yet registrable. For detailed analysis of information agreements see Chapter 9.

G. TRADE ASSOCIATIONS AND REGISTRABILITY

Since the RTPA 1976 specifically draws within its enforcement net trade association-member relations it is worth clarifying precisely how the legislation achieves this goal. A trade association is defined in Section 43(1) RTPA 1976 to mean "... a body of persons (whether incorporated or not) which is formed for the purpose of furthering the trade interests of its members, or of persons represented by its members." This definition applies only for goods associations. Where services are concerned the definition is slightly different. Section 16(1) RTPA 1976 defines a service supply association as one, whether incorporated or otherwise ... whose membership consists wholly or mainly of persons ... who are either engaged in the supply of services brought under control by [an] order or are employed by or represent persons so engaged; and, its objects or activities include the promotion of the interests of persons engaged in the supply of those services who are either members affected by the order or are persons represented by such members." An association to which the Act applies need not comprise exclusively of services suppliers, it need only comprise "mainly" of such suppliers. "Mainly" presumably means more than half, though nowhere in the Act is guidance given on this. It is pertinent to note that the word "mainly" is linked to and follows the word "wholly" thereby implying that something rather more than 51% is what they look for.

Other than the definitions above the provisions of Sections 8 (goods) and 16 (services) operate in like fashion:

- (i) Under Sections 8(1) and 16(2) agreements made by trade associations are statutorily deemed to be agreements entered into by the members. Thus if an association concludes an agreement on behalf of its member with another association it is registrable; it cannot be argued that the members were not party to the agreement and the trade associations were not carrying on business. Thus an agreement between a supply association and a purchasing association is an agreement between the suppliers who belong to the association and the purchasers who belong to the association. An agreement concluded by a Federation of trade associations is treated as an agreement between the trade associations who belong to the Federation and, a fortiori, the individual members of that association. These provisions which deem trade association agreements to have been concluded by individual members are in practice largely irrelevant since almost all association constitutions provide that members authorise the association to enter agreements upon their behalf.
- (ii) Under Sections 8(2) and (3) (goods) and 16(3) and (4) (services) RTPA 1976 a term is implied into the constitutions of associations caught by the Act which provides that recommendations (whether express or implied) made to members by or on behalf of the association are deemed to have been accepted by members of the association. Thus association recommendations are registrable in so far as they relate to matters (restrictions) listed in Section 6 for goods and Section 11 for services of the RTPA 1976. The term deemed into the association's constitution is impliedly incorporated irrespective of any existing constitutional clause to the contrary. According to Section 8 and 16 the wording of the deemed clause would be as follows: "Each member, and any person represented on the association by any member, agrees to comply with those recommendations and with any subsequent recommendations made to them by or on behalf of the association as to the action to be taken by them in relation to the same class of goods or services or processes of manufacture and in respect of the same matters." The word 'recommendation' implies the existence of some form of active behaviour by the association. The association must, directly or indirectly, encourage some "specific" course of conduct. Thus, if a trade association circular simply said: "Our market research demonstrates that average costs have risen by 3%

over the last 3 months" this could not be taken as a recommendation. If however the association added to that circular the additional words "... and members should rethink their prices" then this will count as a recommendation.

Under these provisions members are deemed to be bound by the recommendation and by any subsequent recommendation in relating to "any particular class of goods or process of manufacture". This phrase is relevant since it effects the approach that is likely to be adopted by the OFT to a trade association recommendation. If an association suggests to its members in a circular that they refuse to supply X who runs a cheap retail outlet selling Hi-Fi equipment but heads the circular "Re Terms to Discount Shops in Electrical Business" then the recommendation may be viewed widely as a specific recommendation concerning the electrical business and not, more narrowly, as a recommendation concerning an individual Hi-Fi seller. The "particular class of goods" is electrical equipment not Hi-Fi. Clearly, the more widely framed the recommendation the more serious its restrictive effect. In framing recommendations association officials might consider ensuring that its terms are as narrow as possible.⁵⁶ Though it should be stressed that many registrable recommendations are highly desirable and registration should not necessarily be feared.

H. INFORMAL, PARALLEL BEHAVIOUR: COMPLEX MONOPOLIES

It will be appreciated that although the definition of an arrangement is wide there will be forms of parallel conduct between competing firms which fall short of being described as an arrangement and hence do not fall under the RTPA 1976. Such parallel conduct may be investigated under the Fair Trading Act 1973 which permits the Monopolies and Mergers Commission (MMC) to examine what are known as "complex monopolies". A complex monopoly exists under Sections 6 (goods) and 7 (services) FTA 1973 where at least 25% of the goods and/or services are supplied by or supplied to, two or more firms conducting their business in a parallel fashion with anticompetitive consequences. Though where this "parallelism" results from an agreement or arrangement **which** is registrable the MMC has no jurisdiction to examine the case which must be dealt with under the RTPA 1976.⁵⁷

Almost all parallel conduct can result in a complex monopoly. For example: X controls 16% of the market and sells at £10 per unit, Y controls 8% of the market, and likewise sells at £10 per unit in order not to lose trade to X. Z controls 10% of the market and after studying the pricing policies of X and Y decides to lower his prices from £10.50 per unit to £10 per unit in order not to lose sales to X and Y. In this example no agreement exists yet firms who between them control 34% of the total market act as if they had fixed prices together. In such a situation less powerful suppliers other than X, Y and Z would probably align their prices to the £10 per unit mark. The MMC have investigated complex monopolies in respect of parallel conduct other than simply price policy though pricing matters have **often been** in focus.⁵⁸ Other conduct examined has concerned restrictions on advertising⁵⁹, standard contractual terms⁶⁰, quality standardisation between products⁶¹, and no-poaching in respect of competitors customers.⁶²

A recent example concerned the exclusive purchasing arrangements operated by manufacturers and importers of spare parts for motor cars. The MMC concluded that 24 car manufacturers and importers together supplied about 37% of the UK market and that they should be required to exclude from their franchise agreements any clause requiring franchisees to buy car parts exclusively from them. The MMC commented that: "One of the likely effects on competition of exclusive buying requirements is that they may lead to a restriction of competition in that, if a supplier imposes exclusivity on any person, other suppliers and potential customers may be prevented from competing for that person's custom and part of the market may thus be closed to them."⁶³ Thus, despite the **absence** of an agreement between the manufacturers and the importers the fact that they all operated similar franchising agreements (and hence operated as if there were an agreement) resulted in the MMC recommending that the Government take action against the manufacturers and **importers**. Such action was taken in August 1982 with the enactment of the Restriction of Agreements (Manufacturers and Importers of Motor Cars) Order 1982⁶⁴ which prohibited manufacturers and importers requiring franchisees to take all or part of their requirements of spare parts from that single supplier. Exceptions were made in the case of parts to be provided under warranty and supplies of parties in pursuance of a recall campaign.

I. CHECKLIST FOR DETERMINING REGISTRABILITY

The following is an outline guide for determining whether an agreement falls within the duty to register under the RTPA 1976. This outline is not a substitute for a proper analysis of the language of the Act.

I. Goods Agreements

Questions

1. Is there an agreement or arrangement whether written or oral between the parties or a trade association agreement or recommendation? If there is then Question 2 should be considered.
2. Are two or more of the parties carrying on business within the UK in the supply of goods. If the answer is yes then Question 3 must be answered.
3. Does the agreement, arrangement or trade association agreement or recommendation contain restrictions listed in Section 6 RTPA 1976? If the answer is yes then Question 4 must be answered.
4. Does the agreement etc. contain any terms which may be "disregarded" by virtue of Section 9 RTPA 1976. When considering registration these terms may be ignored. Question 5 must be answered.
5. Do the restrictions that remain bind at least two parties? If the remaining restrictions bind only one party then the agreement is not registrable. An agreement is still registrable if parties accept different restrictions listed in Section 6 RTPA 1976.
6. If the agreement etc. has reached this stage it is prima facie registrable. The final question to ask is whether the agreement fits into one of the exempt categories of agreement specified in Schedule 3 RTPA 1976.

II. Services Agreements

Questions

1. Is there an agreement or arrangement whether written or oral between the parties or a service supply association agreement or recommendation? If there is Question 2 should be considered.
2. Are two or more of the parties carrying on business within the United Kingdom in the provision of services. If the answer is yes then Question 3 must be answered.
3. Is the agreement etc. taken outside of the scope of the duty to register by either Schedule 1 RTPA 1976 or by the Schedule to the services order

(see Section G of Chapter 2). If the agreement falls within these provisions it is not registrable. If the agreement is not exempt Question 4 must be considered.

4. Does the agreement etc. contain any restrictions listed in Article 3 of the services order (which lays down registrable restrictions and repeats the wording of Section 11 RTPA 1976 which may be referred to in the absence of the services order). If the agreement etc. contains registrable restrictions Question 5 must be considered.
5. Does the agreement etc. contain any restrictions which may be "disregarded" by virtue of Section 18 RTPA 1976. When considering registration these terms may be ignored. Question 6 must be answered.
6. Do the restrictions that remain bind at least two parties? If the remaining restrictions bind only one party then the agreement is not registrable. An agreement is still registrable if parties accept different restrictions listed in Section 6 RTPA 1976. If two or more parties accept restrictions Question 7 must be considered.
7. Does the agreement fit into one of the exempt categories of agreement specified in Schedule 3 RTPA 1976?

III. Information Agreements

Notes

1. Only information agreements concerning goods are registrable (services agreements have not as of yet been called up for registration).
2. Only those agreements containing restrictions of a type described in the Restrictive Trade Practices (Information Agreements) Order 1969 S.I. 1969 No. 1842 need be registered. For detailed analysis see Chapter 9.

IV. Summary

The above questions seek to outline the salient features of a registrable agreement. A summary of these features would be as follows:

- (i) There must be an agreement or trade association recommendation.
- (ii) There must be at least two parties trading within the UK.
- (iii) The agreement must contain restriction of a sort listed in the Act.
- (iv) The agreement must not be exempt for any reason.
- (v) The agreement must have at least two parties who accept restrictions that are not exempt and are registrable.

It should be noted that the various exemptions referred to above are discussed in Chapter 2.

FOOTNOTES

1. per Willmer LJ. in British Basic Slag Ltd.'s Application (1963) L.R. 4 R.P. 116 at pp. 145, 146, [1963] 1 W.L.R. 727 (C.A.).
2. See, Ravenseft Properties v. Director General of Fair Trading [1977] 1 All E.R. 47 (Q.B.D.) examined in detail in Section 0. of Chapter 2.
3. e.g. Re Austin Motor Co. Ltd.'s Agreement (1957) L.R. 1 R.P. 6 at p. 19: "It seems to me that an arrangement must at least connote an arrangement whereby the parties to it accept mutual rights and obligations." This dictum of Upjohn J. was construed by the Registrar of Restrictive Trading Agreements (the predecessor of the Director General of Fair Trading) narrowly as excluding informal gentlemen's agreements, (Second Report (1962) Cmd. 1603). Subsequent case law has viewed the Austin Motors definition with more of a liberal eye. See, in this respect British Basic Slag Ltd.'s Application (1962) L.R. 3 R.P. 178 at p. 197 (RPC) and Fisher v. Director General of Fair Trading [1982] 1 C.R. 71 at p. 78.
4. (1962) L.R. 3 R.P. 178 at p. 196.
5. (1963) L.R. 4 R.P. 116 at p. 154.
6. See, Mileage Conference Group of the Tyre Manufacturer's Conference Ltd.'s Agreement (1966) L.R. 6 R.P. 49, [1966] 1 W.L.R. 1137 (R.P.C.). See also, Schweppes Ltd. v. Registrar of Restrictive Trading Agreements (1964) L.R. 5 R.P. 103, [1965] 1 W.L.R. 157 (C.A.); and, Telephones (1964) L.R. 5 R.P. 135, [1965] 1 W.L.R. 174 (C.A.). In the two Court of Appeal cases it was held that the Registrar was entitled to request, from parties, documents pertaining to the circumstances surrounding the entering of the alleged agreements. This was allowed because the Registrar necessarily required evidence of whether mutual expectations had been aroused or gentleman's agreements concluded.
7. For an analogous tax case on the word arrangement in S.411 Income Tax Act 1952 see, Crossland v. Hawkins [1961] Ch. 537, [1961] 3 W.L.R. 202 (C.A.) c.f. Pogson (Inspector of Taxes) v. Lowe [1981] S.T.C. 400; and, Halifax Society v. Registry of Friendly Societies [1978] 1 W.L.R. 1544.
8. But see, British Basic Slag Ltd.'s Application (1963) L.R. 4 R.P. 116, where Counsel for the Company pointed out that the definition of "arrangement" given at first instance by Cross J. was wide enough to embrace innocent price leadership. For the reasons given in the text this is probably incorrect. Korah, Competition Law of Britain and the Common Market (1982) notes (at p. 110): "Price leadership does not amount to an "arrangement" unless the firms have communicated with each other, in words or conduct, before publishing a price change, and have not only led each other to expect certain action but have also done something to encourage the others to rely on it occurring."
9. (1965) L.R. 5 R.P. 315 at p. 338. See Chapter 8 for further details - section on 'The Oligopoly defence'.
10. See Fisher v. Director General of Fair Trading [1982] I.C.R. 71 at p. 80 per Waller LJ. Noted in Director General of Fair Trading Annual Report (1982) at pp. 35, 108, 109. (This case concerned services).

11. ibid., at p. 82 per Kerr LJ. See also Royal Institution of Chartered Surveyors Application [1985] I.C.R. 330 where there was held to be an agreement between the members inter se.
12. see Schweppes No. 2 (1971) L.R. 7 R.P. 336, [1971] 1 W.L.R. 1148 (Ch. d).
13. ibid.
14. e.g. Doncaster and Retford Co-operative Societies' Agreement (1960) L.R. 2 R.P. 105.
15. (Case 155/79) [1982] E.C.R. 1575, [1982] 2 C.M.L.R. 264 note: Ghandhi (1982) 7 E.L. Rev. 308; Boyd (1982) 7 E.L. Rev. 493; Joshua (1983) 8 E.L. Rev. 15; Forrester (1983) 20 C.M.L. Rev. 75; Faul1 (1983) 8 E.L. Rev. 411.
16. Regulation 17/62/EEC; J.O. 1962 204; O.J. 1959-62, 87 (came into force 13 March 1962).
17. [1977] 1 All E.R. 47 (Q.B.D.).
18. Section 154 C.A. 1948 provides that a company is a subsidiary of another if the parent is a member of the supposed subsidiary and controls the composition of its directorial board; or, holds more than half in nominal value of its equity share capital; or, is a subsidiary of any company which itself is a subsidiary. Under Section 154(2) C.A. 1948 the composition of a board of directors is deemed to be controlled by another company if that other company can, without the supposed subsidiaries or anybody else's consent or concurrence, remove the directors or at least the majority of directors.
19. See, Schweppes No. 2. (1971) L.R. 7 R.P. 336.
20. Cunningham, The Fair Trading Act 1973, (1974) p. 218.
21. This example was given in the Liesner Committee Review of Restrictive Trade Practices Policy (1979) Cmnd. 7512 para. 5.20. In the DGFT Annual Report (1973) p. 38 it is indicated that fee fixing agreements concerning road haulage were largely abandoned during 1976-77 freeing the OFT thereby from the obligation to take Court action.
22. see Wholesale Confectioners Alliance's Agreement (No. 2.) (1961) L.R. 2 R.P. 231 at p. 239.
23. see Newspaper Proprietors' Association Ltd.'s and National Federation of Retail Newsagents' Booksellers and Stationers Agreement (1961) L.R. 2 R.P. 435 at pp. 498, 499; and Japan Canned Food Exporters' Agreement (1971) L.R. 7 R.P. 474.
24. J.O. 1962 139/2921 (24 December 1962). for the EEC law, see OFT Investigation into British Telecommunications (Pricing Policy for the placing of Advertisements in Yellow Pages Directories) (10 October 1984) under the Competition Act 1980 at p. 44 para. 7.4.

25. See, Saccharin Corporation v. Chemische Werke Von Heyden A.G. [1911] 2 K.B. 516; Smidth v. Greenwood [1921] 3 K.B. 583; Firestone Tyre and Rubber Co. v. Lewellin [1957] 1 All E.R. 561; Dunlop Pneumatic Tyre Co. v. A.G. fur Motor [1902] 1 K.B. 342.
26. e.g. Smidth v. Greenwood [1921] 3 K.B. 583, at p. 593.
27. Salomon v. Salomon [1897] A.C. 22 (H.L.).
28. See for examples of restrictions judicially defined as "negative":
Mileage Conference Group of the Tyre Manufacturers Conference Ltd. (1966) L.R. 6 R.P. 49, [1966] 1 W.L.R. 1137 parties accepted mutual restriction not to tender at a price lower than the one circulated to them by their central coordinating office; Electrical Installations at the Exeter Hospital Agreement (1970) L.R. 7 R.P. 102, parties agreed not to tender in response to an invitation until after "discussions" with other interested parties.
29. see British Waste Paper Associations Agreement [1963] 1 W.L.R. 540 at p. 548 (RPC): "It is not a restriction within the Act of 1956 to impose by agreement a term which goes no further than is already provided by general statute" (per Megaw J.).
30. [1963] 1 W.L.R. 463; (1963) L.R. 3 R.P. 462.
31. [1963] 1 W.L.R. 463 at p. 478.
32. [1977] 1 All E.R. 47 (Q.B.D.).
33. This subscriptions to trade associations exemption was introduced into the legislation by Section 96 Fair Trading Act 1973. It was introduced to cope with the numerous agreements which were being furnished to the OFT for registration and which entailed the OFT wasting time in making individual representations to the Secretary of State for directions not to refer such innocuous agreements to the RPC under what is now Section 21(2) RTPA 1976.
34. [1977] 1 All E.R. 47 (Q.B.D.).
35. DGFT Annual Report 1976 p. 36.
36. [1984] I.C.R. 12 at p. 51 D (RPC).
37. *ibid.*, at pp. 48-51 esp. at pp. 50D-51F.
38. *ibid.*, at pp. 50, 51.
39. Vernon Pulp v. UPC [1980] F.S.R. 179.
40. *ibid.*, at p. 189 per Megarry V.C.
41. For a discussion of this question see, Cunningham, The Fair Trading Act 1973 (1974) p. 246. In Diazo Copying Materials [1984] I.C.R. 429 concerning a joint venture between MSL and HTL, clause 4(1) of the agreement stated: "MSL agrees to grant HTL a non-exclusive non-assignable and non-divisible right to make retail sales uses and other disposals of the subject products in the United Kingdom on terms no less favourable to HTL than those available to other distributors in the United Kingdom ... being in any event at an acquisition cost equal

- to the normal current United Kingdom retail price from time to time less distributors discount of at least 33% per cent. of such price." This clause was held to contain two restrictions: (1) an obligation on MSL to supply HTL at a discount price; and (2) a restriction on HTL not to sell the contract product outside the United Kingdom (though this restriction existed by the combined effect of Clause 4(1) and another clause). Both restrictions were assessed individually against Section 9(3). See, *ibid.*, at pp. 437-439.
42. *ibid.*, at p. 438E. See also the definition of "supply" in Section 43(1) RTPA 1976.
 43. *ibid.*, at p. 438F.
 44. *ibid.*, at pp. 438, 439.
 45. *ibid.*, at pp. 436-438.
 46. These were, *mutatis mutandis*, the words used by HTL and MSL in the Diazo Copying Materials case.
 47. In Diazo Copying Materials it is possible that the apparently liberal approach to Section 9(3) of the Court was, to an extent, conditioned by the fact that if the Court held that Section 9(3) did not exempt the restrictions they would have been forced to have held the defendant to be in contempt of court. HTL was in Court as a consequence of an application by the Director General for leave to issue writs of sequestration against HTL who alleged that the agreement between HTL and MSL was registrable and hence in breach of a Court order imposed against HTL not to enter into any other unregistered agreements. The Court was apparently of the view that HTL had not been wilful or deliberate in seeking to undermine the Court order and were thus perhaps loathe to find contempt of court. (See [1984] I.C.R. 429 at pp. 434H-436F which chronicles how the parties took legal advice as to registrability and finally notified the OFT when their legal advisers reconsidered their views upon registrability).
 48. [1984] I.C.R. 429.
 49. [1982] I.C.R. 501 at p. 517G. See also, Cadbury Schweppes and J. Lyons Agreement [1975] I.C.R. 246: X and Y agreed to supply goods to Z, a marketing subsidiary of X in order to achieve output quotas between them. Mr. Justice Stamp held: (a) X and Z did not constitute one person, they were separate legal entities; (b) the agreement between X and Y *prima facie* fell within Section 9(3); and (c), however, X and Y were both manufacturers i.e. at the same level of trade and Section 9(4) rendered inapplicable the sanctuary in Section 9(3) and thus rendered the Act generally applicable.
 50. See, Restrictive Practices (Approval of Arrangements) No. 1 Order 1969, S.I. 1969 No. 226 (24 February 1969) Schedule Article 1. See also Restrictive Trade Practices (Approval of Standards and Arrangements) Order 1983 S.I. 1983 No. 382 as amended by S.I. 1984 No. 1269 concerning standards of design, quality or performance and arrangements as to the provision of information or advice to consumers and purchasers or users contained in a scheme concerning tobacco products entitled "Tobacco Product Modification and Research".

51. *ibid*, Schedule, Article 2.
52. See Scottish Daily Newspaper Society's Agreement No. 1 (1971) L.R. 7 R.P. 379.
53. [1984] I.C.R. 12.
54. *ibid.*, at p. 51D.
55. *ibid.*, at p. 51E.
56. See, National Federation of Retail Newsagents, Booksellers & Stationers Agreement (No. 3 & 4) (1972) L.R. 7 R.P. 425; [1972] 1 W.L.R. 1162 (H.L.) noted, Cunningham, *op. cit.*, at pp. 251, 252; Korah, (1972) J.B.L. 326 at p. 329.
57. See Section 10(2) FTA 1973. See also Sections 54(5) FTA 1973 and Paragraph 8 of Schedule 3 FTA 1973.
58. See e.g. Ceramic Sanitaryware, Cmnd. 7327 (1978) concerning whether the parallel prices were reasonable in the context of the countervailing power of customers.
59. See for examples the investigation of the MMC into certain professions: Solicitors (1975-76) H.C. 557; Barristers (1975-76) H.C. 512; Accountants (1976) Cmnd. 6573.
60. e.g. Credit Card Franchising Services (1982) Cmnd. 8034.
61. Electrical Lamps No. 2 (1968-69) H.C. 4.
62. Films for Exhibition in Cinemas No. 2 (1983) Cmnd. 8858.
63. Car Parts (1982) H.C. 318.
64. S.I. 1982 No. 1146 (6 August 1982).

CHAPTER 2

AGREEMENTS NOT REGISTRABLE UNDER THE RTPA 1976

A. INTRODUCTION

The system of control as laid down in the RTPA 1976 for restrictive agreements is of great complexity. It is also selective; not all agreements are caught. In this Chapter agreements excluded from control whether by virtue of the RTPA 1976 or by other statutes will be discussed. The following is a summary of the content of this chapter and may be used as a guide to exemptions.

- Section B: Exemption for Agreements Important to the National Economy under Section 29 RTPA 1976.
- Section C: Exemption for Agreements holding down prices under Section 30 RTPA 1976.
- Section D: Exemption for Wholesale Cooperative Societies under Section 32 RTPA 1976.
- Section E: Exemption for Agricultural and Forestry Associations under Section 33 RTPA 1976.
- Section F: Exemptions for Agreement authorised under the European Steel and Coal Community Treaty - Section 34 RTPA 1976.
- Section G: Exemption for certain categories and types of service agreements under Schedule 1 RTPA 1976 and the Schedule to S.I. 1976 No. 98 The Restrictive Trade Practices (Services) Order 1976.
- Section H: Agreements for Statutory Purposes and Rationalisation Schemes under Schedule 3(1) RTPA 1976.
- Section I: Exemption for exclusive dealing agreements and exclusive service supply agreements under Schedule 3(2) and (7) RTPA 1976.
- Section J: Exemption for Know-How agreements concerning goods and services under Schedule 3(3) and (8) RTPA 1976.
- Section K: Exemption for trade marks agreements under Schedule 3(4) RTPA 1976.
- Section L: Exemption for Patent, Registered designs, and copyright agreements under Schedule 3(5) and (5A) RTPA 1976.
- Section M: Exemption for agreements relating to the supply of goods and services where the agreement has overseas operation only under Schedule 3(6) and (9) RTPA 1976.

- Section N: Exemption for agreements involving the Crown.
- Section O: Exemption for restrictive leasehold agreements and other property law contracts.
- Section P: Exemption for agreements whose restrictions may be disregarded under Sections 9 and 18 RTPA 1976.

These exemptions cover a wide variety of goods and services. Knowledge and understanding of these provisions therefore is important to parties wishing to avoid competition problems, or, to parties who wish to know how to modify existing registrable agreements so as to bring them within an exemption and render them non-registrable. Knowledge of these provisions is of course always relevant in negotiations with the OFT.

B. AGREEMENTS IMPORTANT TO THE NATIONAL ECONOMY-
SECTION 29 RTPA 1976

Potential exists for the Secretary of State to exempt from the RTPA certain goods or services agreements deemed to be important to the national economy. Power to grant this exemption lies under Section 29 RTPA 1976. This power can only be exercised in respect of an agreement submitted in draft form; the Department of Trade and Industry (DTI) which ~~administer~~ Section 29 has no power to grant exemption to an agreement that has already been concluded.¹ An agreement exempted need not be registered. Failure to obtain exemption entails registration and possible reference to the Court for evaluation. To obtain exemption parties to the draft agreement must persuade the DTI that it satisfies the conditions for exemption laid down in Section 29(2)(a)-(e). It is important to note that Section 29 is an exceptional provision applying to exceptional agreements. In appropriate circumstances parties subject to tight time constraints may negotiate exemption with the DTI in only a few weeks. The DTI give high priority to Section 29 cases and seek to expedite their passage through the Act. Occasionally, the OFT refer an agreement to the DTI for consideration though more usually parties make direct representation to the DTI.

I. The Conditions for Exemption - Section 29(2)

Parties to a proposed agreement must satisfy the DTI on a number of factors outlined in Section 29(2). The DTI view these criteria pragmatically whilst ensuring that they are properly complied with before exemption is granted. The criteria for exemption are examined below:

- (i) "(a) that the agreement is calculated to promote the carrying out of an industrial or commercial project or scheme of substantial importance to the economy."

A number of agreements have passed through Section 29; almost all of these successes have been since 1982. They have concerned specialisation agreements in the paper industry; research and development in the agricultural biotechnology field; sub-contracting of production and marketing of the System X telephone scheme; and, joint research, development and marketing of gas turbine powered generating sets. In a set of guidelines issued jointly by the DTI and the OFT on the operation of the Restrictive Trade Practices Act 1976 it is stated that examples of the sorts of industrial or commercial projects envisaged by Section 29 would be: specialisation and standardisation agreements, agreements concerning the creation of new capacity or significant new employment prospects, and joint ventures to create industrial units large enough to compete in world markets.² No definition is given of the meaning of "substantial importance to the national economy". The DTI adopt a fairly pragmatic view of what is in the interests of the national economy which is more sophisticated than simply some positive impact on the balance of trade so that enhancement of exports, although relevant, will not be the only criteria. An agreement with employment enhancement prospects should fit the definition; an agreement of wider political importance might also be justifiable, for example an agreement in respect of the channel tunnel which would help improve intra-EEC Community trade links. An agreement in a field of technological importance where the parties are engaged in international competition may be of importance to the national economy.

There is doubt as to the word "substantial" where this has arisen elsewhere in the RTPA 1976 the Court has refused to attach a specific meaning or value to the word preferring to avoid a "strictly quantitative or proportional assessment".³ The extent of the

importance of the agreement to the national economy may thus be taken as a matter for the submission of economic and statistic data showing such factors as: employment prospects; domestic and export potential; technological advances; spin-off effects for other products and markets; effect upon distribution patterns in the market etc.

- (ii) "(b) that its object or main object is to promote efficiency in a trade or industry or to create or improve productive capacity in an industry."

The agreement in question must have one or more of three objectives. First, it must promote efficiency; secondly, it must create productive capacity; and thirdly, it must improve productive capacity. It should be noted that these three objectives are not necessarily overlapping:

- Promotion of efficiency. A joint research and development venture in the high-technology field might promote efficiency.⁴
"Efficiency" is a vague term but economists would consider such factors as: (a) innovation which means basic investiveness and the ability to improve basic inventions; (b) production and entrepreneurial efficiency which implies the ability to manufacture at the correct output to obtain economies of scale, the ability to deploy an effective distribution system to facilitate market penetration, the ability to meet sudden changes in demand pattern; and (c) effective use of resources which includes full exploitation of management and expert skills, proper exploitation and licensing of intellectual property rights, and, optimal use of plant to meet consumer needs.
- Creation of Productive Capacity. This objective was satisfied in an agreement between Rolls-Royce and GEC concerning the joint production and marketing of gas turbine generating sets.⁵ Rolls-Royce are, of course experts, in gas-turbine engines; GEC have expertise in the manufacture of generating sets (a set of equipment powered by a Gas Turbine Drive, the principal function of which is to generate electricity). The parties agreed to form a joint venture company for the joint production and marketing of gas turbine driven electricity generating sets. Neither of the parties

separately would easily have been able to manufacture the product, however, jointly they could combine their complementary skills and create significant capacity. The generating set created can operate either in connection with or independent of ancillary equipment and thus has the ability to be used in many contexts. Thus, since it needs no connection to a national grid, it could be used on oil rigs or in other isolated areas.

The relevant "capacity" here is productive capacity. It is a point for debate whether, for example, an agreement to provide extra storage capacity for raw materials needed in production is an exemptable agreement.

- Improvement of Productive Capacity. Whilst a joint venture which combines complementary talents into the manufacture of a new product involves an element of creativity many agreements have as their objective simply the improvement of existing capacity. Thus, a specialisation agreement whereby X and Y are competitors but agree to concentrate their efforts on the research, development and marketing of different products. As a result of this agreement X and Y limit substantially the extent of competition between them. However they improve significantly their capacity in the product they have specialised in and, hopefully, they have also increased their product quality through the intensified effort. In one exempted agreement the parties entered a specialisation agreement for coated paper with the objective of avoiding duplication of capacity and wasting scale economics. The parties were anxious to increase capacity in order to meet the expected upturn in the demand for coated paper which would arise with the increased use of colour photograph.⁶ A draft agreement between British Telecommunications (BT), Plessey Telecommunications and Office Systems (P), and, GEC (G) concerning System X (the new BT telecommunication system) has also been cleared under Section 29. The electrical equipment needed for System X is manufactured by third parties for BT. Under this agreement P were to be main contractors and G principal sub-contractor. There was also provision for competitive tendering between P and G after a certain date. An express object of the agreement was "to achieve changes in the procurement and supply of System X to allow more effective production of equipment in higher volume at lower cost, with progressively improved features

and facilities. This objective would permit GEC and Plessey to achieve their aim of expansion of export activity."⁷

It appears to be the case that an agreement to increase existing capacity in order to meet expected or potential demand is as equally exemptable as an agreement to increase capacity to meet existing demand. The specialisation agreement case noted above certainly suggests this.

According to the wording of this exemption condition the objectives listed above do not have to be the sole aim of the agreement. An agreement may entertain other objects and still earn exemption so long as the objectives specified in the Statute are, at least, the "main" objects.

- (iii) "(c) that the object cannot be achieved or achieved within a reasonable time except by means of the agreement or of an agreement for similar purposes."

This requirement is a common one for the assessment of joint-ventures and simply means that restrictive agreements for beneficial ends should not be allowed if it is proven that the parties could achieve those ends individually without the artificial benefit of an agreement.⁸ It is thus incumbent on the parties to convince the DTI that an agreement is essential to success. This might entail showing that the parties do not have adequate capital to go it alone. Further, parties might show that they did not have adequate technology to act alone and that only in combination with another party could they succeed. Thus in the Rolls Royce - GEC agreement concerning gas turbine powered electricity generators an important element was the complementary nature of the respective companies expertise. Indeed, in the preamble to the actual agreement it is stated: "(A) each of GEC and RR possesses specialist expertise, which is technically complementary, in the development and construction of gas turbine powered equipment for the generation of electrical power, and they wish to establish a joint company to use that complementary expertise for applications above ten megawatts in unit output. (B) GEC and RR intend that such complementary expertise should encourage orderly technical research and development to establish a more effective product range than one which either GEC or RR acting separately could support." Similarly in the coated paper

specialisation agreement had the parties not agreed to concentrate their research, development and production on different types of paper then they might have failed to be in a position to take advantage of the upswing in demand for such paper which arose when colour photography became popular. In that case the object of the agreement was an increase in capacity; the agreement was the means to achieve it.

It appears clear that the word "object" refers to the three objects outlined in Section 29(2)(b) viz., promotion of efficiency, creation of productive capacity and, improvement of productive capacity.

Section 29(2)(c) provides another negotiating counter for the parties who may argue that whilst it is possible that they could achieve the objective individually the agreement is nonetheless necessary in order for the parties to achieve the object "within a reasonable time." Thus if X and Y combine in a joint venture company to increase their output capacity in the expectation of an imminent increase in demand they may argue that the agreement enables them to fully meet demand from the very moment it increases. It might have been that alone they would, over an extended period of time, have increased output to match demand. However, this would have entailed lost sales during the period in which they were expanding. Alternatively, X and Y could be manufacturers of high-technology products who need to combine and pool technical skill in order to be able to produce a patentable article before rivals abroad. Again, the same product could have been produced individually, given time. However, the agreement was necessary for there to be a realistic chance of winning the patent race.

In the final analysis the word "reasonable" depends on the circumstances of each case and will be a subject for discussion and negotiation with the DTI.

- (iv) "(d) that no restrictions are accepted or information provisions made under the agreement other than such as are reasonably necessary to achieve that object."

This lays down a rule of minimum restrictiveness. Similar rules, which require the parties to show that the restrictions in question are "indispensable" to success exist under Article 85(3) EEC (the exempting formula for agreements prohibited under Article 85(1) EEC).⁹

All that the parties must do under the Section is show that the restrictions are "reasonably necessary". Thus, parties need not show that in the absence of the restrictions the agreement would not have been entered by the parties. Parties need only show that the restrictions positively facilitate achievement of the objectives in question. Thus, for example, X and Y might argue that in the absence of a non-competition clause between them there would not have been a strong incentive on the parties to pool the know-how and technical information they need for effective joint production. Alternatively, X and Y might argue that in the absence of a specialisation agreement between them with both parties agreeing to concentrate production on different products (e.g. different types of coated paper)¹⁰ they would not be able to compete as effectively on the international market. Certainly they could have competed in the absence of the restriction but the restriction enables them to be better prepared for that market and facilitates its penetration.

It should be acceptable to argue about the utility of restriction both collectively and individually, i.e. the individual effect of each restriction and the collective effect of all the restrictions together.¹¹ Though, it should not be expected that the DTI will accept one repugnant restriction on the basis that the other surrounding restrictions are acceptable.

- (v) "(e) that the agreement is on balance expedient in the national interests."

Section 29(2)(e) is elaborated upon by Section 29(3) which provides that in considering the "national interest" the DTI "... shall take into account any effects which an agreement is likely to have on persons not parties thereto as purchasers, consumers or users of any relevant goods ..." or, as users of any relevant services. Section 29(3) is curious in that where the agreement concerns goods the DTI must consider its effects of purchasers, consumers or users, but, where the agreement concerns services only the interests of users are to be considered. Section 29(3) only says that these categories of vested interest must be considered, the section is by no means an exhaustive definition of Section 29(2)(e). The provision does not therefore exclude

other factors being taken into account when the national interest is being considered. Clearly it would be absurd to equate the "national interest" with the parochial interests of purchasers, consumers and users (but apparently not suppliers to the parties) of that product or service. The "national interest" as a concept is undefined. It is unclear whether, given the economic nature of Section 29, the national interest means the national economic interest or whether political and social factors may also be weighed in the balance. It is certainly arguable that "national interest" is far wider than "national economy" (the words used in the heading to Section 29) and that if the draftsman had intended "national interest" to mean the national economic interest then Section 29(2)(e) would have been reworded as simply "national economy". Section 29(2)(e) is, at base, a get out device for the government to avoid exempting an agreement that prima facie appears to justify exemption. It will be appreciated that the Secretary of State has an absolute discretion whether to grant exemption under the provision. This derives from the opening words of Section 29(1): "If it appears to the Secretary of State ... that the conditions ... are complied with ..."¹²

II. Types of Exemptable Agreement

The application of Section 29 to various types of agreement and the relevant cases will be discussed in subsequent chapters. Nonetheless a brief survey of possible agreement types may be given here for purposes of quick reference: joint production and marketing; joint research and development; specialisation agreements; exchange of assets agreements; exchange of know-how and information; patent pooling; and, product standardisation. The list is obviously non-exhaustive.¹³

III. Form and Extent of the Exemption

Exemption is made in the form of a statutory order made by the Secretary of State (though it will usually be signed on his behalf by a senior DTI civil servant).¹⁴ The exemption will be for a period specified in the order. This period may be extended by subsequent order. The time period, or extension thereof, will in any event only be for a period long enough to allow the parties to achieve their objective.

Accordingly, parties must be prepared for negotiations concerning the length of the exemption. An order may be revoked at any time after the expiry of one year from the issue of the first order.¹⁵ Such a revocation, however, may only be made where it appears:

"(a) that the object or main object of the agreement has not been or is not likely to be achieved, or that any other condition or exemption is no longer satisfied in respect of the agreement; or

(b) that the agreement is used for purposes other than those for which it was approved."¹⁶

Exemption may also be withdrawn if facts come to the attention of the DTI which, had they been available earlier, would have induced them to refuse exemption.¹⁷ In all cases of withdrawal of exemption 28 days' notice must be given to the parties.

Current DTI policy appears to be to grant five year exemptions which might not be considered a very long period.¹⁸ Though, in the very first case on Section 29 initial exemption was granted for six years and was later extended for four years more.¹⁹

All agreements may only become exempt after they have been laid before each House of Parliament together with the order proposed to be made exempting them from registration. All agreements are public documents and may be inspected at the register of restrictive trade practices compiled and supervised by the OFT. The agreements are placed on a public register entitled the Exempt Register.²⁰ Variations to agreements made by the parties do not require parliamentary approval, nor need they be placed on the register if the variation does not substantially affect the operation of the restrictions or information provisions accepted under the exempted agreement.²¹

IV. Section 29 Agreements and EEC Law

Any agreement definable as important to the national economy will be of substantial proportions. Almost inevitably the agreement will have export ramifications. It seems certain therefore that such an agreement will require the approval not only of the DTI but also of the European Commission. Parties submitting a draft to the DTI for approval must therefore consider notifying their agreement to the Commission. Indeed the DTI as a rule request the parties to "Clear the lines" with Brussels. It will be appreciated that an agreement that has approval under English law but which is unacceptable in European law will be of limited value,

this is a view held by the DTI. An agreement falling foul of Article 85(1) is void under Article 85(2) EEC. If a joint production venture seeks to sell in Europe then there is little point in seeking Section 29 clearance if European clearance under Article 85(3) is not forthcoming. Parties should thus ensure that they have the acceptance of the Commission to their agreement if it will have any sort of impact on European trade, a condition satisfied in the case of agreements providing for all but insignificant exports to Community countries. An agreement whose market is the United Kingdom only may, nonetheless, restrict inter-Member-State trade if it hinders the chances for other EEC companies to compete in the U.K. An agreement whose focus is exclusively outside of the EEC should be free from European Competition law. Where the agreement concerns non-EEC markets exclusively and has no impact on even the U.K. market then it should not even require Section 29 clearance being exempt from control under Schedule 3(6) and (9) RTPA 1976 (agreements with overseas operation).

Finally, the application of Article 85 EEC is something that should be discussed with the DTI. Under Article 5 EEC Member States are under a "duty of cooperation" to ensure that the fulfilment of Community objectives. Theoretically, European law should be taken into consideration under Section 29 RTPA 1976.²² In this respect the DTI does not require as a pre-condition of Section 29 exemption approval of the Commission. Exemption under Article 85(3) EEC can take many months or even years to obtain. Exemption under Section 29 can arise in a matter of only weeks. Obviously therefore the DTI cannot wait upon results of Commission deliberations.

V. Beneficial Agreements not large enough to gain Section 29 exemption

If parties to an agreement decide that the agreement is not of large enough proportions to stand a realistic chance of Section 29 exemption then details of that agreement must either be furnished to the OFT or modified to avoid registration.²³ If parties decide to register the agreement the OFT will have to assess the significance of the restrictions in it. Where the OFT are satisfied that the agreement has no significant restrictive consequences, it might well seek dispensation from reference to the RPC under Section 21(2) RTPA 1976. Details of this provision are given in Chapter 4.²⁴ Where the OFT identify "significant" restrictions in an agreement which render usage of the Section 21(2) procedure inappropriate parties face a defense of their agreement before the RPC if they will not modify it. In practice parties usually modify agreements so as to avoid a court hearing.

C. SECTION 30 RTPA 1976: AGREEMENTS HOLDING
PRICES DOWN

The Secretary of State and the Minister for Agriculture, Fisheries and Food may make orders of a fixed duration, approving agreements made at their request which relate exclusively to the prices or charges to be made in connection with transactions of any description and which are designed to either prevent or restrict increases or to secure reductions in prices. Such approved agreements are exempt from registration. An identical power is granted to those authorities in respect of any term included in an agreement at their request. In determining whether an agreement is to be registered terms so incorporated are to be disregarded. Approval orders may not be of more than 2 years in duration though they may subsequently be extended for further periods of 2 years maximum. Orders may be revoked without notice to the parties (contrast under Section 29) if it appears to the authority that the agreement is being used for non-approved purposes. As with Section 29 copies of the agreements must be made public. Confidential and/or secret information contained in contracts need not be made public. Parties should make submissions to the relevant authorities if they wish to have data held back from the public register.

It should be fully appreciated that the authorities cannot, ex post facto, approve agreements or terms. The agreement or term must be made at the authorities request. There is presumably, however, nothing to prevent parties from requesting the authorities to request them to enter an agreement or incorporate a term which keeps prices down. It has been common practice hitherto for price agreements to be concluded on the initiative of the government.

Section 30 is not used extensively today though prior to 1980 there were nearly 150 agreements approved by this procedure. Many of these cases concerned the Secretary of State for Prices and Consumer Protection in requesting trade associations to recommend restrictions on price increases for staple products over an often short period of time. Although the section has received little attention over recent years due to a reluctance on the part of Government to intervene so directly in price mechanisms it may well in the future enjoy a revival. A factor which influences its usage will be the rate of inflation since curbs on price rises would represent an unnecessary control whilst the annual rate of inflation is low. Clearly, inflation rates need not

rates need not always remain happily low and hence the potential for Section 30 Orders remains

(i) Case Study I: Bread Prices (1978)²⁵

During a Bakery workers strike in November 1978 the Secretary of State for Prices and Consumer Protection requested the National Association of Master Bakers, Confectioners and Caterers to recommend to its member that should the strike not end before the end of the month they restrict their prices for a period of 12 days or, if the strike ends before expiry of that period, until the strike ends. The trade association duly made the recommendation to members and exemption from registration under Section 30 was granted. It is interesting to note: (a) that the Section 30 exemption derived from the initiative of the Government and not the parties; (b) the very short period of time for which the exemption was to last; and (c), that the procedure was used as a means of strategically controlling prices during a strike.

(ii) Case Study II: Coffee Prices (1978)²⁶

This case, which concerned increases in coffee prices, was typical of many others. The Secretary of State requested retail trade organisations to recommend to members of the group that they restrict increases for specified categories of coffee during a six month period in 1977. Depending on size of retail outlet the permissible increases in gross margin were from up to 5% to up to 7½%. "Gross margin" meant the difference between the buying price and the selling price measured as a percentage of the selling price. The trade organisation proposed that its retailer members cooperate with the government. Thus, they recommended that members be prepared to show any relevant records to authorised officials in the event of a complaint. Members were asked to identify the special categories of price controlled products by use of the phrase "low margin" at the point of sale. There was a review of the scheme after six months and an agreement whereby if the Secretary of State considered renewing his request beyond the initial six months there would be consultations with the retail trade. The Department of Prices and Consumer Protection prepared a draft letter to be sent to members by the trade organisation. Similar schemes were effected at the same time by the Scottish Grocers Federations and other symbol groups (Mace and Spar).

(iii) Case Study III: Shoes²⁷

During 1978 and 1979 the Government sought to control shoe prices; they hence encouraged traders to accede to requests to voluntarily regulate price increases. The agreements in question, which were given Section 30 clearance, were between major shoe retailers (for example K Shoe Shops Limited accepted the regulation) who gave undertakings to freeze prices. Thus, for illustration, K Shoe Shops Ltd. agreed to restrict its prices so that in the 1978 and 1979 accounting periods its gross margin would not exceed its gross margin for its 1977 accounting period. "Gross margin" was defined by the Government to mean "the difference, expressed as a percentage of the value of sales, between the value of sales (excluding VAT) of all goods sold by retail by the company, and the cost (excluding VAT) to it of these goods." It is instructive to note that here the price control was based on a freeze in increases. This maintained the price differentials prevailing between brands and, accordingly, did not dramatically effect the competitive relationship between traders inter se.

(iv) Case Study IV: Selective Price Restraint Scheme 1976 and the Retail Consortium.²⁸

During 1976 the Government embarked upon an ambitious price restraint scheme whereby price increases of only 5% would be accepted by suppliers of a wide range of products to the scheme over a six month period. Following discussions the Retail Consortium agreed to recommend to its retail members that they freeze selling prices of products in the scheme unless the suppliers price was increased. Where supplier prices did increase more than 5% retailers were requested to keep their price increases to 5%. Retailers were further exhorted to refrain from altering price differentials between competitive products. Suppliers would be free from the obligation to restrain selling price to a retailer who distorted price differentials to the detriment of the suppliers product. One interesting aspect of this scheme was contained in paragraph 4(b) and (c) of the letter sent to a retail consortium. These read: "(b) if as a consequence of rising costs or falling volume the maintenance of the 5% limit on Scheme items would result in a significant reduction in a retailers over-all net profit margin he will be free to withdraw

one or more, or all, items from the Schemes as necessary; (c) the Government will be prepared to endorse a retailer's withdrawal in part or in whole from the Scheme, and to explain and defend it in public as necessary, if the retailer has been able to show to the satisfaction of the Government (who will consult the appropriate trade associations as necessary) that its action was necessary for the reasons above." The Government in fact undertook intensive media advertising of the Scheme to explain to the public the efforts being made by retailers and suppliers of staple foods. The Scheme, moreover, was introduced despite the fact that at the period profit margins of manufacturers, of services and of the distributive trades were at very low levels putting at risk both employment and investment prospects. The express purpose of the Scheme, according to the Government letter sent to the Retail Consortium, was to assist in the battle against the raging inflation then prevailing.

(v) Case Study V: Recommendations of CBI 1972²⁹

Under this Scheme the Secretary of State requested the CBI to propose to members that they should agree to certain terms for the prices to be charged for goods and services being terms designed to prevent or restrict price increases. As with other Section 30 cases on trade associations the recommendations to be made to members in implementation of the Scheme were exempted from registration. Members who complied with the Scheme signed an undertaking (specimens of which were provided by the Government for the purpose) to the effect that they undertook to do their utmost to: (a) avoid raising prices for products or services supplied in the United Kingdom; (b) to limit unavoidable price increases to 5% or less; (c) to time price increases to be at least twelve months distant from previous increases or where impossible at least eight months and at a maximum rate proportional to an annual rate of 5%; (d) where, exceptionally, larger increases were imperative to limit the weighted average of price changes over the whole range of products or services to 5% or less.

D. SECTION 32 RTPA 1976: WHOLESALE CO-OPERATIVE
SOCIETIES

Under Section 32 RTPA 1976 the Secretary of State may approve certain wholesale co-operative societies so that they are not treated as trade associations or services supply associations under the Act. The section is administered by the Department of Trade and Industry, General Policy Division. To be "approved" under this section the Society must satisfy the Department of Trade:

- "(a) that it carries on business in the production or supply of goods or in the supply of services or in the application to goods of any process of manufacture;
- (b) that its shares are wholly or mainly held by industrial and provident societies and
- (c) that those societies are retail societies or societies whose shares are wholly or mainly held by retail societies."³⁰

Once approved the Society is not treated under the Act as a trade/service supply association. Accordingly any recommendation, for example as to bargain offers, made by the Society to its members would not be registrable. This approval runs for a two year period which may on subsequent occasions be extended for further two year periods.³¹ The approval may, however, be withdrawn at any time by the Secretary of State in the case of any agreement or recommendation made by the Society that would, in the absence of this exempting approval, have rendered that agreement or recommendation registrable. However, such an approval will only be withdrawn if it appears to the Secretary of State that,

"the agreement or recommendation has such adverse effects on competition that it should not be precluded from being investigated by the Court under the provisions of this Act."³²

Once withdrawal of approval occurs the Society in question is subject to the normal rigours of the Act.³³

E. SECTION 33: AGRICULTURAL, FORESTRY AND FISHERIES
ASSOCIATIONS

I. Section 33 - Details

Under Section 33 RTPA 1976 the duty to register does not apply to agricultural, forestry and fisheries associations carrying out certain functions and exhibiting certain characteristics. The exemption applies

to associations, associations of associations (Federations), and, co-operative associations.³⁴

Association, and associations of associations, obtain exemption if they satisfy certain conditions.³⁵ Co-operative associations on the other hand need not satisfy the conditions to enjoy exemption.³⁶ The 'conditions' are laid out in Section 33(3) and may be summarised as follows:

- (a) the association is, or is deemed to be, registered under the Industrial and Provident Societies Acts 1965 to 1975 or, if a company within the meaning of the Companies Act 1948, contains in its constitution such provisions as may be prescribed by order of the Ministers with respect to numbers of members, numbers of shares held by members, profits distribution, voting rights or other matters;³⁷
- (b) at least 90% of the voting power is attached to shares held by persons occupying land used for agriculture and or forestry or by persons engaged in fishing;
- (c) the only business, or the principal business, carried on by the association is essentially concerned with the marketing or preparation for marketing of agricultural or forestry or fisheries produce produced or caught by members of the associations. The association may be concerned with the supply of goods to members required for the production of produce or the catching of fish or the performance of forestry tasks without losing exemption from the Act.

Associations and associations of associations which satisfy these conditions and co-operative associations are exempt from the legislation only to the extent laid down in Section 33(1). This provides that the Act does not apply to these bodies for the purposes of or in connection with the marketing or preparation for market of produce produced or caught by members, or, the supply by the association to the members of goods required in production or fishing, or, for the production or supply of produce or the catching or supply of fish by members themselves.

Clearly the exemption is very broad taking out of the scope of the legislation most agricultural or fisheries activities by associations, co-operative associations or their members. However, the relevant ministers may by statutory instrument withdraw this exemption from any class of agreement they see fit.³⁸

II. Other relevant statutory exemptions and provisions in agriculture

Whilst considering agricultural provisions a number of other statutory provisions warrant mention:

(i) Section 8 Plant Varieties and Seeds Act 1964³⁹

This provides that the RTPA 1976 does not apply - (a) to any licence granted by a holder of plant breeders rights or by any other person authorised to grant a licence in respect of such rights, (b) to any assignment of plant breeders rights or of the title to apply for the grant of such rights, or (c) to any agreement for such a licence or assignment. The licence, assignment or agreement so exempted is one under which restrictions are accepted only in respect of goods which are plants or parts of plants of the plant variety which is the subject of those plant breeders rights or will be the subject of them if granted. Consequently an agreement is only exempted if it relates exclusively to plant breeders rights. An agreement containing additional restrictions is not exempt. If additional restrictions are included then the whole of the agreement becomes registrable and not just the additional restrictive elements. This exemption follows the basic pattern of the general exemption for patents and registered designs and licenses, assignments and agreements relating thereto. Reference should be made to Section L of this chapter for analysis.

(ii) Section 45 Agriculture (Miscellaneous Provisions) Act 1968

This permits agricultural marketing Boards to notify their agreements to the appropriate Minister and to obtain exemption from the RTPA 1976 if the Minister does not object. Only certain agreements however are exempted in this way being agreements entered into by marketing boards in the exercise of their powers under SS. 20(1) and 36 of the Agricultural Marketing Act 1958. It is interesting to note that in S.20(2) of this Act powers exercised by the boards are, in some circumstances, subject to control by the Minister whose function it is to safeguard the public interest. Correspondingly, the Minister is statutorily required to consider the competition law aspects of the agreement and make appropriate directions to cure any harmful aspects of the agreement.

(iii) Section 9(11) Agriculture Act 1967 and Section 7(2) Agriculture Act 1970

These permit the relevant Minister to grant exemptions to agreements entered into by the Meat and Livestock Commission and the Eggs Authority. Agreements employing the exemption in Section 7(2) Agriculture Act 1970 must be submitted in draft to the relevant Minister before an exemption may be considered.

(iv) Schedule 1(3) Cereals Marketing Act 1965

This provision simply provides that the Home Grown Cereals Authority shall not be treated as a trade association for the purpose of the RTPA 1976.⁴⁰ Consequently recommendations of the Authority will not be registrable in the same way as recommendations of ordinary trade associations are.

F. SECTION 34 RTPA 1976: AUTHORISATIONS UNDER ECSC
TREATY: COAL AND STEEL AGREEMENTS

Section 34 RTPA 1976 reads, simply: "An agreement is exempt from registration under this Act so long as there is in force in relation to that agreement an authorisation given for the purpose of any provision of the ECSC Treaty relating to restrictive trade practices." Section 34 does not say that restrictive agreements authorised under the ECSC Treaty are excluded from the Act. It says rather that such agreements are caught by the Act but exempt from registration. This has important consequences. Since the agreement is caught by the RTPA 1976 it cannot be referred to the Monopolies and Mergers Commission under the monopoly provisions of the Fair Trading Act 1973 (see Section 10(2)). Though there is nothing in the FTA 1973 to preclude the merger provisions of the FTA. Thus, arguably a coal and steel agreement may be referred to the MMC under the merger provisions. Conduct relating to such an agreement might not technically be excluded from the Competition Act 1980. Section 2(2) of that Act only excludes from its ambit a course of conduct that is required or envisaged by a material provision of, or a material recommendation in, "... an agreement which is registered or subject to registration under the Restrictive Trade Practices Act 1976 ..."

Coal and steel agreements are also excluded from the RTPA 1976 by S.9(1) and (2) of the Act. These have already been discussed in the previous chapter (Section D) and reference thereto may be made for further details.

G. SERVICE AGREEMENTS EXEMPT FROM CONTROL

Details of exempt services agreements may be found in either the Schedule to the Restrictive Trade Practices (Services) Order 1976 S.I. 1976 No. 98, or, Schedule 1, Restrictive Trade Practices Act 1976. The OFT deal with a significant number of cases each year in which exemption under one of the above mentioned two instruments is under debate.⁴¹

I. Schedule 1, RTPA 1976 - Professional Services Exempt from Registration⁴²

The following types of services agreement fall outside of the RTPA 1976. It should be stressed that agreements entered into by such parties are not immune from challenge by the European Commission under EEC law if the agreement effects states between Member States of the Community.

(i) Legal Services

"Legal services (that is to say, the services of barristers, advocates or solicitors in their capacity as such." - Thus, an agreement between 3 local solicitors to fix conveyancing fees is not registrable. An agreement by solicitors to fix fees for acting as advisers on house and garden improvements would not be exempt since such activities could hardly be said to relate to the services of lawyers "in their capacity as such."

(ii) Medical Services

"Medical Services (that is to say the provision of medical or surgical advice or attendance and the performance of surgical operations)" - The words in brackets define what is meant by medical services. They appear to be widely drafted to include all form of advisory work, and all forms of surgery. The word attendance presumably implies attending to the needs of patients and this would include the provision of drugs and other forms of medical aid.

(iii) Dental Services

"Dental services (that is to say, any services falling within the practice of dentistry within the meaning of the Dentists Act 1957.)" The definition of the practice of dentistry in Section 33 of the Dentistry Act, whilst vague, is nonetheless broad: "... the practice

of dentistry shall be deemed to include the performance of any such operation and the giving of any such treatment, advice or attendance as is usually performed or given by dentists, and any person who performs any operation or gives any treatment, advice or attendance on or to any person as preparatory to or for the purpose of or in connection with the fitting, insertion or fixing of dentures, artificial teeth or other dental appliances shall be deemed to have practiced dentistry within the meaning of this Act." It is important to note that the enumeration of dental functions in Section 33 is expressed to be non-exhaustive: The practice of dentistry simply includes, amongst other things, those functions. Factual evidence given by experts would have to be submitted to the OFT to prove the ambit of a dentists functions if an agreement was entered into between dentists which concerned matters not mentioned in Section 33.

(iv) Ophthalmic Services

"Ophthalmic Services (that is to say, the testing of sight.)" - An agreement between opticians concerning the sale price of eye glass frames or contact lens not relating to the "testing" of sight is accordingly not exempt under the RTPA 1976.

(v) Veterinary Services

"Veterinary Services (that is to say, any services which constitute veterinary surgery within the meaning of the Veterinary Surgeons Act 1966.)" - Under Section 27 (interpretation) of the Veterinary Surgeons Act 1966, 'veterinary surgery' means: "the art and science of veterinary surgery and medicine and, without prejudice to the generality of the foregoing, shall be taken to include - (a) the diagnosis of diseases in, and injuries to, animals including tests performed on animals for diagnostic purposes; (b) the giving of advice based upon such diagnosis; (c) the medical or surgical treatment of animals; and (d) the performance of surgical operation on animals." The functions in (a) - (d) are only examples of a veterinary surgeons functions. Section 27 simply gives as a definition - "the art and science of veterinary surgery and medicine." Consequently, if an agreement in this profession does not clearly fit within the categories of (a) - (d) then it might be necessary to adduce expert evidence as to the precise scope of a veterinary surgeons functions.

(vi) Nursing Services

"The services of nurses". Schedule 1(6) is amended by Schedule 7(27) Nurses, Midwives and Health Visitors Act 1979. This Act repeals the Nurses Act 1957 and the Nurses and Midwives Act (Northern Ireland) 1970 and part repeals the Nurses (Scotland) Act 1957. These latter three are specifically mentioned in the unamended version of Schedule 1(6) RTPA 1976. No definition of nursing is given in the 1979 Act. However some assistance might be obtained by examining the rules for admission to the register of qualified Nurses. One thing is clear, the definition of "nurse" includes a person qualified in another Member State of the EEC as a nurse and who holds qualifications designated by the Secretary of State by order as having "Community equivalence" for purposes of registration (Section 11(3)(b) of the 1979 Act).

(vii) Midwives, Physiotherapists and Chiropodists

"The services of midwives, physiotherapists or chiropodists in their capacity as such." - The words "in their capacity as such" are used throughout the schedule. It will require factual expert evidence to be submitted to the OFT (or the court) in order that the ambit of these services be determined. It is doubtful (or at best a question for argument) whether the sale of accessories connected with those professions can be described as being within the services provided. Sales of accessories constitute the supply of goods and agreements in connection with such sales may be registrable.

(viii) Architects

"The services of architects in their capacity as such." Since no guidance is given as to interpretation nor any statute referred to for a definition the services of architect can only be determined in any case of doubt by the submission of relevant evidence.

(ix) Accountants and Auditors

"Accounting and auditing services (that is to say, the making or preparation of accounts or accounting records and the examination, verification and auditing of financial statements)." - This paragraph is problematic. The central question is whether the bracketed words define the meaning of "auditing services" or "accounting and auditing services." If the bracketed words define the latter then the exemption is narrow; if the former then it is wide. The bracketed words describe very narrow activities, accountants commonly advise on tax, financial policy, international trade, management policy, marketing and a plethora of other commercial functions. However the bracketed words refer only to book-keeping activities and not to

general non-book-keeping accountancy matters. It would seem the better view that the bracketed words limit only the meaning of "auditing services." Thus, an agreement between accountants as to fees to be charged for tax advisory services is not registrable. This conclusion however is not free from doubt.

(x) Patent Agents

"The services of patent agents (within the meaning of the Patents Act 1977), in their capacity as such." The Patents Act 1977, Section 130, defines a patent agent as, "a person carrying on for gain in the United Kingdom the business of acting as agent for other persons for the purpose of applying for or obtaining patents (other than European patents) in the United Kingdom or elsewhere or for the purpose of conducting proceedings in connection with such patents before the Comptroller." Thus agreements relating to applications for patents are exempt, the business of applying presumably involves the complex tasks undertaken in researching and preparing the formal application. Agreements concerning all subsequent activities presumably fall within the word "obtaining". It is immaterial that the agreement concerns a patent application for a territory other than the UK.

Schedule 5(7) Patents Act 1977 amends Schedule 1(1)) RTPA 1976 to add the following Schedule 10(A): "10A. The services of persons carrying on for gain in the United Kingdom the business of acting as agents or other representatives of other persons for the purpose of applying for or obtaining European patents or for the purpose of conducting proceedings in connection with such patents before the European Patent Office or the Comptroller and whose names appear on the European list (within the meaning of Section 84(7) of the Patents Act 1977) in their capacity as such persons."

(xi) Parliamentary Agents

"The services of parliamentary agents entered in the register in either House of Parliament as agents entitled to practice both in promoting and in opposing Bills, in their capacity as such parliamentary agents." Agreements concerning all peripheral matters relating to promotion or opposition may be assumed to be included those verbs. Thus an agreement between agents concerning the types of Bills they will promote or oppose (i.e. a form of specialisation or market-

sharing) will be exempt from registration.

(xii) Surveyors

"The services of surveyors (that is to say, of surveyors of land, of quantity surveyors, of surveyors of buildings or other structures and of surveyors of ships) in their capacity as such surveyors." This paragraph was cursorily examined by the Court in Royal Institution of Chartered Surveyors v. Director General of Fair Trading.⁴³ In that case the Royal Institute (RICS) published two booklets entitled 'The Rules of Conduct, Disciplinary Powers and Procedures', and, 'Professional Charges'. They also published sheets containing scales of charges. The documents formed, in the O.F.T.'s view, a registrable agreement and were duly registered. The OFT viewed the agreement as price fixing and referred the case to the RPC. The RICS applied to the Court to have the register rectified under Section 26(1) RTPA on the basis that the restrictions fell within Schedule 1 paragraph (xii) (above). The Director General sought a striking out order on the grounds that the notice of application and supporting affidavits disclosed no reasonable cause of action. The Court refused the striking out action and held that the claim of the RICS was not unarguable. The Director General had contended that members of the RICS provided services related to the sale and valuation of various types of personal property and that these valuation activities were not within the wording of the exemption. This was so even though such valuation activities were within the ordinary practice of the Chartered Surveyor. Mr. Justice Slade considered this to be an argument of some force, however, he refused to give a definitive ruling before full evidence as to the nature of a surveyors functions were submitted:

"We think it arguable that in many cases the question posed ... will not be capable of being answered without evidence as to the activities commonly carried on in the course of their work by persons who, according to the common parlance, fall within the relevant description. Similarly, we think it at least arguable (though we say no more than this) that the nature and extent of the meaning of the phrase 'in their capacity as such surveyors' can only be satisfactorily determined by admitting evidence of the activities commonly carried on in the course of their work by persons who, according to common parlance, fall within the broad description 'surveyor of land', 'quantity surveyor', or 'surveyor of land and buildings', as the case may be."

Although, as noted above, no definitive answer was given, it would appear to be the case that the words in brackets do limit the general words expressed outside the brackets. Thus, restrictive agreements relating to activities of surveyors relating to types of valuations not within the brackets are, it is submitted, registrable. This question is not entirely free from doubt given that Slade J. stated that the converse was at least arguable.

(xiii) Engineers and Technologists

"The services of professional engineers or technologists (that is to say, of persons practising or employed as consultants in the field of - (a) civil engineering; (b) mechanical, aeronautical, marine, electrical or electronic engineering; (c) mining, quarrying, soil analysis or other forms of mineralogy or geology; (d) agronomy, forestry, livestock rearing or ecology; (e) metallurgy, chemistry, biochemistry or physics; or (f) any other form of engineering or technology analogous to those mentioned in the preceding sub-paragraphs); in their capacity as such engineers or technologists." - This exemption is very wide since in addition to exempting agreements listed in the specific fields (a) - (e), it also excludes (in (f)) all fields of activity "analogous" to those listed in (a) - (e). Precisely what is an "analogous" field would have to be negotiated over with the OFT by reference to expert evidence.

(xiv) Education

"Services consisting of the provision - (a) of primary, secondary or further education within the meaning of the Education Act 1944, The Education (Scotland) Acts 1939 to 1971 or the Education and Libraries (Northern Ireland) Order 1972, or (b) of University or other higher education not falling within the preceding sub-paragraph."

(xv) Ministers of Religion

"The services of ministers of religion in their capacity as such ministers."

(xvi) General Points On Interpretation

The most problematic phrase in these exemptions is "in their capacity as such." Thus, when is an architect acting in his capacity as such. If an architect gives advice on the price at which to sell a car he is not acting in his capacity as an architect. But, if an architect advises on the valuation of a property this is much closer

to the line. Architects clearly do more than simply design buildings. The precise ambit of what an architect does therefore can only be tested by reference to expert evidence. This was a point accepted by Slade J. in the Institute of Chartered Surveyors case.⁴⁴

An interesting point to arise from the Surveyors case derives from the dictum of Slade J. that:

"We think it arguable that, if all the services to be supplied by members of the RICS in respect of which they accept restrictions are exempt services, the agreement does not become registrable merely because the members have agreed not to supply 'designated services' of a nature quite outside the ordinary course of their professional work."

This dictum concerns the following type of fact situation:

X, Y and Z are surveyors who enter a restrictive agreement exempt under Schedule 1 paragraph (xiii). They also agree not to provide advisory services relating to the sale and purchase of luxury holiday dwellings abroad. The Court in the dictum above simply said that it was arguable that such an ancillary restraint was exempt. This should not be seen as necessarily justifying non-registration? A total restriction on supplying a service at all is a registrable restriction under Section 11(2)(c) which requires registration of restrictions concerning "the extent (if any) to which, or the scale (if any) on which, designated services are to be made available, supplied or obtained."

On interpretation, it should be noted that the wording and style of the various exemptions differs and no common rules of construction can apply. The exemptions use various techniques, for example: limiting general words by reference to specific, bracketed words; limiting activities by reference to statutory provisions elsewhere; limiting activities by use of the words "in their capacity as such". Each provision must be examined individually and, where appropriate, expert evidence adduced to clarify its meaning.

II. Paras 2-10, Schedule to the Restrictive Trade Practices (Services) Order 1976 - S.I. 1976 No. 98.

This statutory instrument has the principal function of calling up for registration all services agreements excepting those laid down in the Schedule which itemises a number of activities that are not covered. These are as follows:

(i) International Carriage of Goods by Sea

Paragraph (2) exempts international carriage of goods by sea. A

number of agreement types are envisaged in this paragraph:

(a) agreements between operators only whereby the only restrictions accepted concern the service of the international carriage of goods or passengers by sea. Thus, no exemption exists if non-operators are also present, if the carriage is not international, or if restrictions exist in the agreement which are unrelated to the carriage itself;⁴⁵

(b) agreements between operators and clients of the operators services where the only restrictions are in respect of carriage services for goods; (c) agreements between operators of international sea transport services and one other person supplying services in respect of the operation of the international sea transport function where the restrictions accepted relate to the supply or acquisition of that other service e.g. agreement between carrier and stevedores whereby stevedore is exclusive operator of the carrier in a particular port. In this paragraph "international sea transport services" means the international carriage of passengers or goods wholly or partly by sea. Where the carriage is only partly by sea then it must be part of the same service as the non-maritime form of transport e.g. X organises complete carriage of goods by air, road and sea from location A to location B.

(ii) Carriage by air

Paragraph (3) exempts an agreement to which only air transport undertaking are party and in which the only restrictions relate to carriage by air. This wide exemption extends to agreements made between an air transport undertaking and its agent where the only restrictions accepted are in pursuance of the main agreement between the operators.⁴⁶ For example carrier X might agree with carrier Y the precise quantities of freight they should transport to Norway from the United Kingdom. In pursuance of this agreement X might instruct his agent to only accept a certain, lower than usual, volume of orders. The restriction in the carrier/agent agreement as to the volume of trade is thus in pursuance of the main carrier/carrier agreement⁴⁷ which contains restrictions in the form of quotas. Adherence by a UK operator to air-freight rates recommended by the International Air Transport Association or to a recommendation by that Association not to discount would be outside the scope of the RTPA 1976. As with other exemptions in the Schedule to the Order the exemptions exists by virtue of the international

nature of the excluded sector. Thus, it would hinder the competitiveness of the UK firms if they were subject to regulatory rules that their competitors were free from.

(iii) Carriage of Passengers by Road

Paragraph (4) exempts agreements between road passenger transport operators (e.g. bus services) and the only restrictions in the agreement relate to the provision of stage carriages and/or express carriages.⁴⁸

(iv) Agreements between the Government and Building Societies in respect of the raising of funds or the making of loans

Paragraph (5) of the Schedule exempts agreements between building societies and either or both of the Treasury or the Secretary of State which contain restrictions relating to fund raising or the making of loans. Also exempted are agreements between building societies inter se made in pursuance of a master agreement concluded with the government. The paragraph further exempts agreements between the building societies which contain restrictions as to the interest rates charged or to be charged for loans. Additionally inter-building Society agreements containing restrictions on interest rates paid or to be paid to shareholders or depositors are exempted. Deliberations by members of the Building Societies Association as to mortgage rates and interest rates for lenders are not forms of price fixing agreements subject to registration. There are further exemptions for building societies in Section 111 Housing Act 1980 and Section 28(1) of the Housing Defects Act 1984. These are discussed in Section H on agreements for statutory purposes.⁴⁹

(v) Governmental Control over the general monetary system

Paragraph (6) exempts agreements to which either or both of the Bank of England or the Treasury are party and which relates exclusively to the exercise of control by the Bank of England and/or the treasury over financial institutions or over the monetary system generally or to the conduct of the money markets, public sector debt instruments or foreign currencies. The obvious function of this paragraph is to ensure that the RTPA 1976 does not interfere in the implementation of government economic policy. However, where an agreement which controls the economic issues mentioned is not related "exclusively" to those issues but contains other matters in addition then, according to the paragraph, the agreement is subject to control.

(vi) Banking Agreements Concerning Ireland

Paragraph (7) exempts agreements between banks in which restrictions are accepted between the parties as to the supply of bank services in Northern Ireland or Northern Ireland and the Republic of Ireland. Thus an agreement between Lloyds and National Westminster, for example, to issue a limited number of personal loans each in those territories would not be registrable. Likewise an agreement not to open for service on Saturdays in those territories would not be registrable. However an agreement between Lloyds and National Westminster to the same effect as these two example agreements would be registrable if effected in England.

(vii) Agreements between Insurance Companies

Paragraph (8) exempts agreements between insurance companies which contain restrictions relating to the provision of insurance services. Thus, restrictive agreements as to premiums or as to poaching of other companies clients are not registrable. It should be noted however that the European Commission have taken a strict approach to premium fixing and other restrictions imposed in agreements between insurers.⁵⁰ Hence if the agreements in question is likely to effect trade between Member States the value of the exemption from the RTPA 1976 will be reduced since the threat of Article 85(1) remains.

(viii) Agreements between trustees or managers of unit trust schemes

Paragraph (9) exempts agreements between trustees or managers of unit trust funds authorised under the Prevention of Fraud (Investments) Act 1958 or of the Prevention of Fraud (Investments) Act (Northern Ireland) 1940 where the only restrictions found in the agreement relate to the management of, or sale and purchase of units of, authorised unit trust schemes. It should be noted that if the agreement in addition to containing exemptable restrictions (i.e. those relating to the management, sale and purchase of units) contains other restrictions then the whole agreement becomes registrable. The exemption in paragraph (9) exists in respect of agreements containing exempted restrictions only.

(ix) Implementation of decisions of the Panel on Take-overs and mergers, Compliance with the City Code on Take-over and mergers

Paragraph (10) exempts recommendations to comply with the

provisions of the City Code on Take-overs and Mergers and recommendations implementing a decision of the Panel on Take-overs and Mergers. For exemption to exist the trade association must be represented on the Panel on Take-overs and Mergers or be a member of an association that is so represented.⁵¹

H. SCHEDULE 3(1) - RATIONALISATION SCHEMES AND AGREEMENTS FOR STATUTORY PURPOSES

I. Rationalisation Schemes

Schedule 3(1) excludes the RTPA 1976 from any agreement expressly authorised by an enactment or by any scheme, order or other instrument made under an enactment. Furthermore, agreements constituting or forming part of a scheme certified by the Secretary of State under Chapter V of Part XIV of the Income and Corporation Taxes Act 1970 relating to schemes for rationalising industry are likewise excluded from the Act.

See Chapter 12 Section G for details. Such agreements seek to facilitate attempts by industry to rationalise production and thereby avoid the creation or maintenance of excess capacity during a recession: by agreement certain firms leave the market with compensation whilst remaining firms share the residual demand. This exemption for rationalisation schemes is in active use today. Nonetheless, rationalisation arrangements have been put into effect by major companies in old mature industries on an EEC wide basis and indeed have had their schemes accepted by the European Commission. It is debateable whether or not a rationalisation scheme could gain exemption under Section 29 RTPA 1976 (agreements important to the national economy) since, although the orderly reduction of capacity may be in the long-term best interests of the UK economy, for Section 29 to operate the parties to the agreement must prove that their scheme has as its object or main object the promotion of efficiency or the creation or improvement of productive capacity. A rationalisation agreement obviously does not improve or increase capacity. However, it may be argued that it promotes efficiency which is an alternative criterion to promotion of capacity. In a National Economic Development Office (NEDO) report in 1978 the example of man-made fibres was given as a possibility for Section 29 exemption. Man-made fibres is a declining industry in the UK and the EEC due to the effects of cheap imports. During 1978 it was estimated that less than 75% of EEC

capacity was being used. The NEDO report suggests that the restructuring and down grading of capacity that was necessary should have been undertaken by agreement which might have been exempted under Section 29.⁵²

If parties to a proposed rationalisation agreement decide against the Section 29 route then they must satisfy the conditions of Chapter V of the Income and Corporation Taxes Act 1970. Section 406 of that Act permits rationalisation schemes to be certified by the Secretary of State where the latter is satisfied:

- "(a) that the primary object of the scheme is the elimination of redundant works or machinery or plant from use in an industry in the United Kingdom; and
- (b) that the scheme is in the national interest and in the interest of the said industry as a whole; and
- (c) that such number of persons engaged in the said industry as are substantially representative of the industry are liable to pay contributions in furtherance of the primary object of the scheme by agreement between them and the body of persons carrying out the scheme."

Parties seeking exemption for their scheme will hence have to undertake negotiations within the Department of Trade and Industry on the three factors quoted above. In preparing arguments reference may be made to cases decided by the European Commission under Article 85(1) and (3) EEC where economic assessment of the pros and cons have been made.⁵³ Most cases under Section 406 have concerned rationalisation agreements in the steel industry.

II. Restrictive Agreements Expressly Authorised by an Enactment, Scheme or Order

In this part the following statutory provisions are examined:

- (i) Section 111, Housing Act 1980
- (ii) Section 20, Housing and Building Control Act 1984
- (iii) Section 28(1), Housing Defects Act 1984
- (iv) Section 7, Trustee Savings Bank Act 1981
- (v) Section 2, Home Purchase Assistance and Housing Corporation Guarantee Act 1978
- (vi) Section 1, Participation Agreements Act 1978
- (vii) Section 5, Energy Act 1976
- (viii) Section 11, Merchant Shipping (Liner Conferences) Act 1982.
- (ix) Restrictive Trade Practices (Stock Exchange) Act 1984
- (x) Section 14, Telecommunications Act 1984
- (xi) Restrictive Trade Practices Act 1977 (loan finance and credit facilities Agreements).

(i) Section 111, Housing Act 1980

The commercial realities of inner city property and housing generally dissuade building societies from lending on property in areas renowned to be run-down or declining. Section 111(1) provides that: "Local authorities and the Housing Corporation may, with the approval of the Secretary of State, enter into agreements with building societies lending on the security of house property whereby, in the event of default of the mortgagor, and in circumstances and subject to conditions specified in the agreements, an authority or the Corporation binds itself to indemnify the building society in respect of - (a) the whole or part of the mortgagor's outstanding indebtedness; and (b) any loss or expense falling on the building society in consequence of the mortgagor's default." The section thus permits local authorities and the Housing Corporation to enter into indemnity agreements to assist building societies and reduce the risk of unsafe mortgages for them. An indemnity agreement of this nature must obtain the approval of the Secretary of State which may be specific or general. General approvals will only be given by the Secretary of State following consultations with the Chief Registrar of Friendly Societies and such organisations representative of building societies and local authorities as the Secretary of State thinks expedient.

Section 111(8) excludes the RTPA 1976. It reads: "Sections 16(3) and (5) of the Restrictive Trade Practices Act 1976 (recommendations by service supply association to members) shall not apply to recommendations made to building societies about the making of agreements under this section, provided that the recommendations are made with the approval of the Secretary of State, which may be withdrawn at any time on one month's notice." Hence recommendations by the Building Societies Association to members about indemnity agreements are not registrable provided the approval of the Secretary of State is obtained.

(ii) Section 20, Housing and Building Control Act 1984

This Act follows on from Section 111 of the Housing Act 1980 (above) and extends the power to enter into indemnity agreements beyond simply building societies. The Section permits the Secretary of State to specify bodies or classes of body other than building societies with which local authorities and the Housing Corporation may enter into similar such indemnities. Indemnities may only be in respect of

conveyances or grants by certain specified bodies (listed in Sections 18 and 19) Section 20(7) repeats mutatis mutandis, the terms of Section 111(8) Housing Act 1980 cited above.

(iii) Section 28(1), Housing Defects Act 1984

Section 28(1) of the Act excludes certain agreements made between building societies from the RTPA 1976. It reads: "In determining for the purposes of the Restrictive Trade Practices Act 1976 whether an agreement between building societies is one to which that Act applies by virtue of an order made, or having effect as if made, under Section 11 of that Act, no account shall be taken of any term (whether or not subject to exceptions) by which the parties or any of them agree not to grant loans on the security of new houses unless they have been built by or at the direction of a person who is registered with, or has agreed to comply with standards of house building laid down or approved by, an appropriate body." An "appropriate body" is one concerned with the specification and control of standards of house building and which has as its chairman a person appointed by the Secretary of State and which promotes or administers schemes conferring rights in respect of defects in the condition of houses on persons having or acquiring interests in them. Under Section 28(3) the Director General must remove from the register all agreements exempted by this section. Section 28 has been used by the Building Societies Association in their negotiations with the OFT the "Model Rules for Permanent Building Societies" - (See No. S.15 Register of Restrictive Trade Practices).

(iv) Section 7, Trustee Savings Bank Act 1981

The Trustee Savings Bank Central Board (Central Board) plays an important role in the business of trustee savings banks. It is empowered, inter alia, to give directions of a general nature to the trustee savings banks as to the carrying on of their activities. It may also provide common services including for example, data processing services and the formation, management and operation of unit trusts. Further, it may give directions to the trustee savings banks as to the equipment and procedures to be adopted by them in the operation of banking services, the manner in which funds are to be raised, expended, allocated to reserve and invested and the rates of interest to be paid on deposits. Moreover, the Central Board may enter any transaction which they consider necessary to facilitate the exercise of their powers or the performance of their duties. In the absence of a saving provision the Central Board would be subject to a

continual registration burden since its directions would amount to recommendations of a services supply association. Section 7(6) of the Act accordingly excludes the Central Board from the definition of "services supply association". It reads: "Notwithstanding the provisions of this section, the Central Board shall not be taken as satisfying the conditions mentioned in paragraphs (a) and (b) of Section 16(1) of the Restrictive Trade Practices Act 1976 (services supply associations)." Thus, directions of the Central Board are not registrable as recommendations of an association and agreements entered into by the Central Board are not agreements to which the Act applies so long as they are agreements which in the opinion of the Central Board are necessary to facilitate the exercise of their duties.

(v) Section 2, Home Purchase Assistance and Housing Corporation Guarantee Act 1978

The Act authorises the use of public money to assist first-time purchasers of houses. It further increases the financial limit of the Housing Corporation's power to guarantee loans to housing associations. Section 1 of the Act empowers the Secretary of State to make advances to recognised lending institutions enabling them to assist first-time buyers of homes and sets out the conditions on which such assistance is to be given. According to Section 2(2) advances to lending Institutions shall be on terms settled by the Secretary of State with treasury consent and following consultations with lending and savings institutions or organisations representative of them. Recommendations made by organisations representative of these lending institutions to the member institutions themselves will of course be equivalent to recommendations by services supply associations. Section 2(5) of the Act excludes such recommendations from the ambit of the RTPA 1976. It reads: "Section 16(3) and (5) of the Restrictive Trade Practices Act 1976 (recommendations by services supply association to members) shall not apply to recommendations made to lending and savings institutions about the manner of implementing this Act, provided that the recommendations are made with the approval of the Secretary of State, which may be withdrawn at any time on one month's notice." It should be noted that this provides limited exemption. Not all recommendations are exempted, it is only those which relate to the manner of implementing the Act. Moreover, the recommendations are only

exempted from the RTPA if approval for them is obtained from the Secretary of State which, in any event, may be withdrawn at only one month's notice.

(vi) Section 1, Participation Agreements Act 1978

The substance of the whole Act is contained in Section 1. The purpose of the section is to enable the Secretary of State for Energy to exempt from the RTPA 1976 agreements providing for majority state participation in the disposition of United Kingdom offshore petroleum. The Act is perhaps unnecessary given that agreements entered into by the Crown are in any event exempt from the RTPA 1976 on the basis of Crown immunity (see Section N below). Furthermore, agreements subject to this Act might well be exemptable under Section 29 RTPA 1976 which excludes from the registration duty agreements important to the national economy. The Participation Agreements Act 1978 does, however, have the virtue of making certain the exemption. It is interesting to note that Section 29 RTPA 1976 only excludes agreements from registration it does not provide for total exclusion from the Act. The Participation Agreements Act excludes agreements covered by its terms altogether. The agreements so exempted are termed certified participation agreements.⁵⁴ A certified participation agreement is one between the Secretary of State, the British National Oil Corporation (BNOC) or a wholly owned subsidiary of the Corporation which is, or supplements, an agreement entered into with a view to securing participation by the Government or a body on its behalf (e.g. British Gas Corporation) or BNOC in activities connected with petroleum existing in its natural condition in strata in the United Kingdom or beneath waters which form part of the territorial sea adjacent to the United Kingdom or are in a designated area within the meaning of the Continental Shelf Act 1965.⁵⁵

Exemption is not provided for agreements relating to dealings by BNOC in any substance other than petroleum or petroleum products.⁵⁶

The Act has retroactive effect exempting certified participation agreements from the RTPA 1976.⁵⁷

In March 1985 the Government announced the abolition of BNOC. Nonetheless, the Act still has relevance in respect of participation agreements entered into by bodies other than BNOC and protects from the consequences of failure to register agreements involving BNOC during its lifetime.

(vii) Section 5, Energy Act 1976

This provision exempts certain restrictive agreements between petroleum suppliers from the RTPA 1976 when certain market or political circumstances arise. The Act generally makes provision with regard to resources in the UK and the use of energy. Much of the Act has now been repealed or amended but certain operative parts remain. Section 1 empowers the Secretary of State to make orders regulating the production, supply, acquisition and use of crude liquid petroleum, natural gas and petroleum products, electricity or other fuel substances whether solid, liquid or gaseous used as fuel. Section 2 empowers the Secretary of State to give directions to undertaking in respect of their production, supply or use of substances mentioned in Section 1. Section 3 provides that the Secretary of State shall only exercise the powers in Sections 1 and 2 after making an order in Council declaring that the powers are necessary either for the UK to meet its EEC obligations or its obligations as members of the International Energy Agency (a sub-body of the OECD) or its obligations as party to an International Energy Agreement to take emergency measures in connection with the reduction or threatened reduction of fuel supplies. The power may also be exercised where there exists or is imminent in the UK an actual or threatened emergency affecting fuel or electricity supplies rendering governmental control necessary.

Section 5 provides limited exemption from the RTPA 1976. To be so exempt agreements must satisfy various conditions: (i) it must be in writing and be between two or more persons carrying on business in the supply of petroleum, and, is made by them with the Secretary of State and each other, and, contains a power for the Secretary of State to terminate it on the ground that its continuance is no longer in the national interest; (ii) the agreement must contain no restrictions otherwise registrable under the RTPA 1976 other than restrictions mentioned in S.6(1)(a) to (c) RTPA 1976 viz., restrictions on prices and terms and conditions of sale; (iii) the agreement must relate exclusively to petroleum; (iv) the agreement must contain a clause stating that the restrictions contained within the contract are operative only during the currency of an Order in Council under Section 3 of the Act. Even in the absence of this provision such an agreement would almost certainly be exempt under the doctrine of

Crown immunity. Moreover, it would probably fall within the exemption provided by Section 29 RTPA 1976 - agreements of importance to the national economy.

Section 5(2) provides an additional exemption for agreements entered at a time when there is in force an Order in Council and which satisfy certain conditions laid down in Section 5(3) but which do not involve the Secretary of State. The conditions are: (i) that the agreements is made exclusively between persons carrying on business in the production or supply of petroleum and that at least two of the parties carry on business in the United Kingdom; (ii) that restrictions in the agreement relate only to matters listed in Section 6(1)(d), (e) and (f) RTPA 1976 (viz., restrictions on the quantities of goods to be supplied, to whom and for what purpose etc); and (iii), that the agreement is not to the like effect as another agreement made while the Order in Council is in force in respect of which exemption has been withdrawn unless none of the parties to the new agreement were parties to the old (now non-exempt) agreement or the Secretary of State has affirmed the new agreement. Agreements exempt in this matter may become re-subject to the RTPA upon written notice being given to the parties by the Secretary of State that the agreement is no longer necessary in the national interest having regard to the fuel emergency.⁵⁸ Where a subject ceases to be exempt it must be registered with the OFT. All of the normal statutory penalties and consequences result from non-registration.⁵⁹

(viii) Section 11, Merchant Shipping (Liner Conferences) Act 1982

This Act enables the United Kingdom to accede to the Geneva Convention on a Code of Conduct for Liner Conference 1974⁶⁰ negotiated under the aegis of the United Nations Conference on Trade and Development (UNCTAD), and, also abide by the requirements of Council Regulation 954/79/EEC⁶¹ which seeks to ensure that no discrimination arises between EEC shipping lines. Section 2(1) of the Act empowers the Secretary of State to make regulations to give effect to the Code. The code confers rights and duties on shippers, shipping conferences and their members. Conferences are under a general duty to police themselves but must notify the Secretary of State of disciplinary measures taken. Given that conferences comprise groups of shipping companies who combine to determine the conditions of trade competition law questions are bound to be raised. The policy of the

government, in line with that of other nations, is that the conferences should be exempt from orthodox antitrust control.

Section 11 of the Act provides that the RTPA 1976 and the common law doctrine of restraint of trade shall not apply to any restrictions on trade between states which are Contracting Parties to the Code and which are accepted within the framework of a conference.⁶²

Section 11(2)(a) to (c) outlines the exempted restrictions. These are: (a) restrictions in respect of the provision of international liner services accepted by the operators of such services under which an agreement to which two or more such operators are parties; (b) restrictions in respect of international liner services accepted by operators of such services or persons for whom such services are provided under an agreement to which one or more such operator(s) and one or more such person(s) are party; (c) restrictions in respect of the supply or acquisition of any service in connection with the operation of international liner services accepted by operators of such services or persons in the business of supplying such a service under an agreement to which one or more such operators and one such supplier are parties. Under Section 11(3) where a restriction relates in part only to matters mentioned in Section 11(2) the exemption is only in so far as the restrictions relate to those matters. Under Section 11(4) it is stated that it is immaterial for the purposes of Section 11(2) that there are additional parties to an agreement mentioned in Section 11(2) except that Section 11(2)(c) does not apply where the parties to an agreement include more than one such supplier as is mentioned in that paragraph. It is implicit from Section 11(5) that the Secretary of State may, if he sees fit, call up for registration and apply the RTPA 1976 to services agreements of categories mentioned in Section 11(2).

(ix) Section 1, Restrictive Trade Practices (Stock Exchange) Act 1984

Following intensive lobbying by the Stock Exchange of the Government between 1977 and 1983 the latter agreed to enact legislation exempting the former from an assessment of whether their rules were in the public interest which was to have commenced in January 1984 before the RPC.⁶³ The Stock Exchange had argued that the RPC was not an appropriate forum for objective reform of the Exchange. The explanatory

memorandum to the Bill explains that the Bill will result in a once only saving of about £500,000 in public expenditure on legal fees. The statute exempting the Stock Exchange from the RTPA 1976 is very brief. The substance is in Section 1. This excludes the RTPA 1976 from:

- "(a) any agreement between the members of the Stock Exchange for regulating the Exchange, its membership or the activities of its members; or
- (b) any agreement with respect to any of those matters between -
 - (i) The Stock Exchange; and
 - (ii) The Secretary of State, the Treasury or the Bank of England or any two of them."

The Act further required the Director General of Fair Trading to remove from the register of restrictive trade practices any particulars in respect of agreements covered by the Act.⁶⁴ Furthermore, all proceedings pending in respect of such agreements were abated. In point of fact prior to this Act the register contained very large numbers of files showing evidence of excess of 150 restrictive agreements.

The OFT had complained, in particular, of two issues: (i) the practice of fixing minimum commission rates for brokers; and (ii) the traditional separation in the Stock Exchange of the functions of broker and jobber.⁶⁵ With the latter having to stay on the market floor where they are permitted to deal only with brokers.

With respect to fixed commissions the OFT complained that this clearly eradicated the possibility of competition amongst brokers. They pointed out that other major exchanges, for instance in New York and Toronto, had already abolished fixed Commission rates. With respect to the two-tier system of separating the jobber and broker function the OFT complained that this duality made dealing more expensive for investors than it need otherwise be since both the brokers commission and the jobbers "turn" (i.e. the difference between buying and selling prices) had to be paid. As for complaints that abolition of the two-tier system would lead to conflicts of interest within firms acting on both broker and jobber and therefore for buyer and seller the OFT replied that inherent in the Stock Exchange system were, in their view far more acute situations of conflict and, moreover, that proper disclosure rules would solve problems of conflict which arose. Changes to Stock Exchange rules have now been negotiated with the Government on a more informal basis.

(x) Section 14, Telecommunications Act 1984

Under Section 13 of the Telecommunications Act 1984 the Director General of Telecommunications (DGT) may make to the Monopolies and Mergers Commission (MMC) a reference requiring the latter to investigate and report on whether any matters relating to the provision of telecommunication services or the supply of telecommunication equipment by a person authorised by a licence under Section 7 of the Act to run a telecommunications system operate, or may be expected to operate against the public interest. Moreover, the MMC is to consider whether adverse effects of such a licence may be remedied by modification to the conditions therein. Section 14 of the Act lays down rules for the making of a report by the MMC. Section 14(2) states: "Where, on a reference under this section, the Commission conclude that any person who is authorised by the licence to run a telecommunication system is a party to an agreement to which the Restrictive Trade Practices Act 1976 applies, the Commission, in making their report on that reference, shall exclude from their consideration the question whether the provisions of that agreement, in so far as they are provisions by virtue of which it is an agreement to which the Act applies, operate, or may be expected to operate, against the public interest"

Given that the DGT is the telecommunications equivalent to the Director General of Fair Trading in so far as competition is concerned a brief note on his position is warranted. From 1912 until 1982 telecommunications was a state run monopoly. Licenses were granted to other operators only in so far as their systems were for private use. The British Telecommunications Act 1981 opened the door to the licensing of competing suppliers to the public. However British Telecom (BT) enjoyed the right to be consulted prior to the licensing of a potential rival. The 1984 Act places BT on the same legal footing as any other potential provider of telecommunication services viz., it must be licensed in the same way as any other and derives its rights and powers from the license. The DGT is not a civil servant, he is the holder of a statutory position in the same

way as is the Director General of Fair Trading. The DGT presides over the Office of Telecommunications (OFTEC) which equates to the OFT and which is staffed by civil servants predominantly on secondment from the Department of Trade. Under the Act the DGT has functions related both to licensing and to general industry supervision. The 1984 Act transfers to the DGT the functions of the Director General of Fair Trading under Part III of the Fair Trading Act 1973 (courses of conduct detrimental to consumer interests), under the monopoly provisions of that Act and under the Competition Act 1980. These transfers of course relate only to telecommunications. Persons wishing to complain of anti-competitive conduct under the Competition Act must therefore complain to the DGT.

A brief summary of the licensing rules indicates the ambit of the Act. Section 7 imposes a duty on any person wishing to run a telecommunication service to obtain a license. It is an offence to run an unauthorised system or to run an authorised system in an unauthorised manner. The license may be imposed subject to conditions regulating every aspect of a company's operations. Conditions may be modified either by agreement between the licensee and the DGT or by the DGT following a reference to the MMC and a report by the latter finding that the activities of the licensee may be expected to operate against the public interest. There is no statutory power to revoke a license so that the only other method of review will be by revocation of the license as a whole which will depend upon provisions providing for revocation in the license itself. Contravention of a condition is not an offence but may result in the DGT issuing an enforcement order which may be final or provisional, (Section 16). Enforcement of the order is by proceedings for injunction in the High Court. Moreover any person suffering loss for another's failure to comply with an order may sue the licensee for damages.⁶⁶

(xi) Restrictive Trade Practices Act 1977 (loan finance and credit facilities agreements)

When service agreements were called up for registration by S.I. 1976 No. 98 (see Chapter 1 for analysis) it was quickly appreciated that certain finance agreements concerning both goods and services would have to be given specific exemption from the Act.

In the Annual Report for 1977 the OFT stated (at pp. 34, 35):

"During 1977 it was found that, because of the application of the ... legislation to commercial services, a large number of loan-financing agreements fell within the scope of the legislation in that they contained restrictions on the freedom of action of borrowers, lenders or guarantors which were accepted by at least two parties to such agreements. The purpose of these restrictions was not to restrict competition but to protect the security of loans and the ability of borrowers to repay. Accordingly the Restrictive Trade Practices Act 1977 made provision for the disregard of restrictions in such agreements with the object of removing them from the scope of the legislation under which restrictions are accepted only by overseas parties and which relate to activities outside the UK. In addition, the order-making power of the Secretary of State were extended so that if any harmful agreements had been exempted inadvertently they might be restored to control."

The RTPA 1977 effectively expands the category of restrictions to be disregarded when considering registration. As a result agreements, for instance, between banks and financial institutions for the provision of loan finance and credit facilities by way of consortium lending are exempt from the RTPA 1976.

Section 1(3) coupled to Part 1 of the Schedule of the Act adds a new Article 4 to the 1976 Services Order. This Order (S.I. 1976 No. 98) it will be recalled requires services agreements to be registered. The Schedule to the Order provides for exemptions from the duty to register. The RTPA 1977 thus provides a new exempt category of agreements. The following must be read in this light.

The new Article to the Order provides that if an agreement as to services contains certain "financing terms" as defined in the Article, no account shall be taken of any restriction in the agreement which is solely concerned with securing the loan or maintaining a persons ability to discharge it where considering the registrability of the agreement.

"Financing terms" means according to Article 4(1):

- "(a) the making or continuation of a loan;
- (b) the granting or continuation of any form of credit or of facilities for credit;
- (c) the supply of any property by way of lease or hire (with or without the option to acquire the ownership of the property);
- (d) the assumption of any liability in the event of a person's default; and
- (e) the granting of any right to resort to any property in the event of a person's default."

Thus, where an agreement contains "financing terms" no account is to be taken under Article 4(3) of restrictions whose "sole purpose" is one or both of the following:

- "(a) to maintain a persons ability to discharge any liability incurred by him under or in connection with the financing term; and
- (b) to protect a person against the consequences of another person's default in discharging such a liability."

The RTPA 1977 will not be needed very often. Usually in such arrangements restrictions are only imposed upon one party, the purchaser. Thus, a supplier of goods on extended credit terms might impose a restriction on purchasers that they do not resell the goods on higher-purchase or other credit terms. The restriction is only accepted by the purchaser and hence the agreement would not be registrable. Likewise restrictions imposed in Romalpa clauses might fall only on one party. Thus, a clause in an agreement for the sale of goods whereby the supplier retains title in the goods until such time as the goods have been paid for (the Romalpa clause) may also contain a restriction on the price the purchaser may resell at pending full payment for the goods.⁶⁷ This price restriction would fall only on one party thus the agreement would not be registrable. However, in both examples above, had the supplier accepted registrable restrictions the agreement would still have been exempt since the restrictions on the purchaser are exempt under the RTPA 1977.

If a trade association recommends adoption of loan finance security clauses such as are described above to its members for inclusion in contracts with purchasers then such a recommendation need not be registered. The recommendation would not be in respect of any matter described in Section 6 RTPA 1976 (i.e. registrable restrictions).

The 1977 Act might have some use in respect of complicated joint ventures. If a financial institution lends investment capital to a joint venture company - Joint Co. Ltd. - which has been set up and incorporated by A. Co., B. Co. and C. Co. and the finance company imposes a restriction in a collateral contract with A, B and C that they purchase all or a given percentage of their requirements from Joint Co. Ltd. then such a restriction would be exempt under the RTPA 1977. It need not matter that the restriction is drafted into

an agreement that is different from the actual loan agreement since the two agreements can be viewed as a single arrangement. Thus, since the finance company's object with the restriction is to ensure the profitability of Joint Co. Ltd. and, in turn, safeguard its own loan to Joint Co. Ltd. it should benefit from the exemption in Article 5(1) and (3).

Where there is an overseas element to the agreement Article 4(4) of the Schedule to the Services Order applies. This reads:

"If the financing terms relate to the doing of anything outside the United Kingdom by a person who neither resides nor carries on a business within the United Kingdom, no account shall be taken of any restriction which is accepted only - (a) by him; or (b) by one or more other such persons; or (c) by him and one or other such persons."

Thus, taking the Joint Co. Ltd. example above and imagining that Joint Co. Ltd. is incorporated outside the UK, that the finance institution is outside the UK; but that X, Y and Z are resident in the UK. If one further imagines that the finance company imposes restrictions on Joint Co. Ltd. with regard to terms and conditions of sale and credit, then, the overall arrangements would not be registrable. Any restrictions accepted by the finance house or by Joint Co. Ltd. would be exempt under Article 4(4) above. Restrictions accepted by X, Y and Z would be exempt under Article 4(1) and (3).

The Act has retroactive effect thus exempting agreements entered pre-1977.

I. EXCLUSIVE DEALING AND PURCHASING AGREEMENTS - SCHEDULE 3(2) and (7) RTPA 1976

(i) Interpretation

Exclusive dealing and purchasing agreements are examined in **Chapter 10** so that detailed discussion is unnecessary here. In this section the scope of the exemption afforded such agreements will be discussed. It should be noted that exclusive dealing contracts are subject to the Competition Act 1980 and, where one of the parties is a dominant concern, to the monopoly provisions of the Fair Trading Act 1973. Moreover, the European Court has held that simply because an exclusive dealing contract is made between parties who are situated in one Member State only does not necessarily mean that they avoid European competition law. An agreement between an English supplier and various exclusive dealers can

effect trade between the Member States by making it more difficult for continental exporters to obtain representation in the United Kingdom.⁶⁸

Schedule 3(2) reads:

"This Act does not apply to an agreement for the supply of goods between two persons, neither of whom is a trade association, being an agreement to which no other person is party and under which no such restrictions as are described in Section 6(1) above are accepted or no such information provisions as are described in Section 7(1) above are made other than restrictions accepted or provision made for the furnishing of information -

- (a) by the party supplying the goods, in respect of the supply of goods of the same description to other persons; or
- (b) by the party acquiring the goods, in respect of the sale, or acquisition for sale, of other goods of the same description."

Schedule 3(2) for goods has its counterpart in Schedule 3(7) for services which, although worded slightly differently, is to the same effect. This exemption permits two types of restrictions to exist:

- (a) restrictions on the supply of goods by supplier to dealer; and
- (b) restrictions on the dealer with regard to the holding for sale of additional goods competing with those of the supplier. In practice the following restrictions will be exempted:

- (i) that the supplier will not supply (or will limit supplies to) any other dealer within the territory granted to the dealer;
- (ii) that the dealer will not purchase for resale or sell goods that compete with those of the supplier.

The exemption does have a number of limitations (but see below for the effect of Section 9(3) RTPA 1976 on this Schedule). First, no exemption exists for agreements where both the parties are trade associations e.g. supply association X agrees with dealer association Y that members of X will only supply to members of Y. Such agreements are not necessarily bad but they must be registered with the OFT and negotiated over on an individual basis. Secondly, the phrase "... for the supply of ..." implies any agreement "... whereby one party agrees to supply goods [or services] to another, notwithstanding that it may contain agreement on other related or other related matters."⁶⁹ It should be noted that although the contract may cover other matters it may not contain other restrictions. If other restrictions are included it must be registered. Thirdly, only bi-lateral agreements are exempt, if more than two persons exist the agreement must be registered. "Person" includes inter-connected companies. Thus if X is a wholly-owned

subsidiary of Y and both X and Y acting as suppliers enter an exclusive dealing agreement with Z, as dealer, then this is treated as a bilateral agreement since X and Y are one person being inter-connected bodies corporate under Section 43(2) RTPA 1976.

The wording of the Schedule does not allow the supplier to prevent the dealer from manufacturing goods which compete with those of the supplier. However, this is rarely a problem since the dealer can be prevented from selling those goods and accordingly the incentive for him to manufacture is low.

Sections 9(3) and 18(2) RTPA 1976 permit the parties to ignore certain restrictions when determining registrability. Section 9(3) for goods permits the disregard of any term which relates "exclusively to the goods supplied." Section 18(2) for services permits disregard of any term which relates exclusively to the services supplied (for detailed analysis of Sections 9 and 18 RTPA see Chapter 1). Frequently exclusive dealing contracts contain restrictions which do relate exclusively to the goods or services supplied. Thus, for example, the following would appear to be exempt restrictions:

- (i) that the dealer will not sell the goods or provide the service outside of his allotted exclusive territory into the territory of another dealer;
- (ii) that the dealer will sell the goods in specified packages or under specified trade marks;
- (iii) that the dealer hold a specified quantity in stock of the contract product.

There has been only one reported decision in which Schedule 3(2) was at stake. In Vernon Company (Pulp Products) Limited v. Universal Pulp Containers Limited,⁷⁰ Vernon (V) were manufacturers of disposable bed pans made of treated paper pulp. The patent rights for these items had expired in 1976. The design and production drawings were owned by V and were copyright protected. Since 1964 V had sub-contracted part of its production to UPC and V had supplied UPC with the moulds for making the bed pans. In 1967 V installed a new vacuum moulding machine which increased production output fourfold. Subsequently, two of these machines were sold to UPC in order to increase their capacity in line with that of V. Under the oral agreement between V and UPC the latter was free to use the machines to produce other items which did not compete with the products they produced for V. V claimed that during the initial

stages of production they furnished UPC with related confidential advice and assistance. The oral agreement between the parties was formalised in 1971 and under the written agreement V appointed UPC as its sold sub-contractor and UPC agreed to supply V with a specified number of bed pans per week. The price of the supply of bed-pans by UPC to V was based upon the resale price by UPC. UPC agreed to only supply V and not to manufacture competing products during the currency of the agreement and for a period of two years subsequent to termination. This agreement ended in 1979 and V decided against renewal. They informed UPC who then indicated to V that they intended to tender for contracts to supply disposal bed pans to hospitals. V sought an interlocutory injunction restraining UPC from producing and selling disposal bed-pans which competed with those of V. UPC brought a cross-motion to restrain V from trying to enforce the clause of the contract which prevented them from supplying products which competed with V. The basis of this argument was that the agreement between V and UPC was a registrable one under the RTPA 1976 and since it was unregistered it was void and unenforceable and hence illegal for V to seek to enforce. V argued against this that the agreement was not registrable and was exempt by virtue of Schedule 3(2) RTPA 1976.⁷¹ McGarry V.C. refused to determine either of the parties claims at an interlocutory hearing on the basis that a full trial was needed for proper argument on the points.⁷²

The interesting point here is whether, for the purposes of Schedule 3(2), V could be said to have been supplying UPC with the contract goods viz., bed pans. In reality V simply subcontracted UPC to produce the goods for him. V did not supply UPC with bed pans, indeed, the reverse applied with UPC producing bed pans for supply to V. Schedule 3(2) envisages that there be a supply of goods between the parties. In this case the only supply of goods was by UPC to V but there was clearly no exclusive dealing arrangement in force with UPC as supplier and V as dealer; that would be a reversal of the true relationship between the parties. Consequently, it would seem therefore unlikely that Schedule 3(2) was relevant. If that conclusion is correct this case would fall to be decided on the basis of whether the restrictions were disregarable under Section 9(3) RTPA as relating exclusively to the goods supplied, or, upon the more basic ground that they did not fall within Section 6 RTPA. The Court gave no guidance on either of these matters.

See, Section L(V) below for details of agreements containing restrictions fitting into more than one exemption.

(ii) Clarification of meaning of "description" in Schedule 3(2)(b)

Schedule 3(2)(b) quoted and discussed above contains a latent ambiguity. It is intended at this point simply to clarify the ambiguity. The provision allows restrictions to be imposed upon a dealer in respect of the sale or acquisition for sale of other goods of the same "description". What are other goods of the same "description"? There are two alternative interpretations. First, goods of the same description are those which are of the same brand description, e.g. all washing machines made by X Co.; all clothes manufactured by Y using Y's trade mark. Secondly, it could additionally mean all goods of the same generic description e.g. all vacuum cleaners of whatever brand, all cutlery of whatever make. For the purposes of Schedule 3(2)(b) the latter interpretation is generally assumed to be correct. Businessmen will find comfort in that this is the wider of the two alternatives. Thus, Schedule 3(2)(b) allows the supplier to prohibit the dealer from carrying competing goods i.e. goods of the same generic description.

If this wider interpretation were not accepted Schedule 3(2) would have little value or significance. It would not allow suppliers to prevent their dealers from stocking and selling goods which compete the contract goods. A supplier is far less likely to give a dealer the boon of an exclusive territory if he knows that the dealer is promoting and selling goods which compete with his. This logic has been fully accepted by the European Commission who have exempted in Regulation 83/83/EEC exclusive dealing agreements containing no-dualling clauses from the prohibition in Article 85(1) (See Chapter 10 on distribution for details).

For a workable definition of what is meant by competing goods see Article 3 of Regulation 83/83/EEC (discussed in Chapter 10).

(ii) Mutual exclusive dealing: Whether excluded or not

Does Schedule 3(2) exclude mutual exclusive dealing. This covers the situation where X agrees to supply Y exclusively with kitchen knives

and Y agrees to supply X exclusively with pen-knives and other non-domestic cutting edges. X and Y are dealers for each other. Ostensibly such an agreement fits the criteria for exclusion: first, it is an agreement between two parties; secondly, neither party is a trade association; thirdly, the only restrictions are on the supplier(s) in respect of goods of the same description to other persons in the dealer's territory (Schedule 3(2)(a)). The question now arising is whether the exclusion lapses because X and Y are both suppliers and dealers. It is noteworthy that Schedule 3(2)(a) and (b) both use the singular phrase "the party" supplying, and, "the party" acquiring i.e. the Schedule seems to envisage only one of the parties as dealer and only one of the parties as supplier. To meet this argument it is pertinent that under the Interpretation Act 1978 Section 6(C), singular implies plural and vice versa.

Moreover, it is arguable that such an agreement may involve each supplier accepting restrictions in respect of goods that they do not supply. This would be the case where, in respect of the other party's goods, each party, for example, agrees not to sell goods which compete with those goods. Thus, X who takes Y's knives will not also take goods which compete with Y's knives. Is this excluded? The answer is unclear though, on the wording of the Schedule, there is no reason why restrictions accepted by one party should have to relate to the precise type of goods they supply.

There is clearly uncertainty over the registrability of such agreements. Where doubtful parties should register on a fail-safe basis (see Chapter 4). In terms of economic policy mutual exclusive dealing can be anti-competitive. If X makes Y his exclusive dealer and Y makes X his exclusive dealer where X and Y are rival manufacturers then the parties can effectively divide the market between them. X, in his own territory, will be able to control the sale of Y's goods; Y in his own territory may control the sale of X's goods. In EEC law mutual exclusive dealing is not exempt as are most exclusive dealing contracts. For details see Chapter 10.

(iv) Examples of exempt restrictions

It is implicit from the above that the combination of Section 9(3) and Schedule 3(2) provides a fairly wide exemption for exclusive dealing systems. The following are examples of restrictions commonly found which should benefit from the exemption.

(a) Exemption under Schedule 3(2)(a) (restrictions on supplier in respect of supply to persons other than the dealer):

- Supplier agrees to inform dealer of all sales made by the supplier to other dealers;
- supplier agrees to inform dealer of the price and other terms and conditions of sale relating to sales by the supplier to other persons or dealers;
- supplier agrees not to supply goods to other dealers or persons in the territory exclusively granted to the contract dealer;
- supplier agrees to supply persons other than dealer only to a specified extent e.g.: a fixed number or volume per annum; or only up to a fixed percentage of the total sales made by the dealer in the previous year;
- supplier agrees to supply dealers or persons other than exclusive dealer on specified terms and conditions only e.g. at a fixed price with a no-discount policy; on no-credit terms; on no-delivery, customer must collect terms. This enables the contract dealer to supply on more favourable terms than the supplier;
- supplier agrees not to actively market the contract goods but will satisfy unsolicited orders from persons other than the exclusive dealer.

(b) Exemption under Schedule 3(2)(b) (restrictions on dealer in respect of sale or purchase for resale of goods other than those supplied by contract dealer):

- dealer agrees to purchase contract goods only from contract supplier i.e. dealer agrees not to purchase the suppliers brand of goods from a person (e.g. a wholesaler) other than the supplier;
- dealer agrees to purchase a fixed percentage of his requirements from the contract supplier i.e. dealer restricts his purchases of other goods;
- dealer agrees to purchase and sell only goods of the brand manufactured or supplied by the contract supplier (i.e. a no

"dualling" clause whereby the dealer holds one brand only, common in motor industry for example);

- dealer agrees to purchase and sell only a fixed percentage of goods of a brand not manufactured or supplied by the supplier;
- dealer agrees not to sell goods of the description and brand manufactured by the contract supplier but that he acquires from another supplier through mail-order methods.

(c) Exemption under Section 9(3) RTPA 1976 (terms relating exclusively to goods supplied):

- dealer agrees to sell the contract goods under a specified trademark;
- dealer agrees to sell the contract goods packed and presented as specified by supplier;
- dealer agrees to advertise goods as specified by supplier;
- dealer agrees to maintain a sales network or stock of goods as specified by supplier;
- dealer agrees to provide after sales and guarantee services in respect of contract goods as specified by the supplier;
- dealer agrees not to sell contract goods by mail order methods.

(d) Section 9(6) RTPA 1976 (restrictions relating to workers to be employed). Reference should be made to Chapter 1 Section E for detailed analysis of this provision and the apparent judicial attitude towards it following the ABTA case:

- supplier requires dealer to employ only staff with X years experience in handling and marketing of the contract goods;
- supplier requires dealer to employ staff with specific qualifications which render them experienced in the contract goods.

(v) Overlapping exemptions and Drafting Problems: possible solutions

Many businessmen and legal advisers find difficulty in drafting distribution agreements so as to avoid the duty to register. A common difficulty concerns incorporating in a single clause restrictions exempt under both Section 9(3) and Schedule 3(2)(b). These provisions (see above) relate respectively to restrictions exclusively on the goods supplied, and, restrictions on dealers in respect of goods of the same description other than those supplied by the contract supplier. If a Schedule 3(2)(b) restriction on the dealer purchasing from a supplier other than the contract supplier is coupled, for example, to a

Section 9(3) restriction on the sale of the goods via mail-order methods then the clause will not relate exclusively to the goods supplied by the contract supplier (as required by Section 9(3)); the clause will relate also to goods supplied by other suppliers. A clause raising this problem might have the following shape:

"the dealer shall not sell goods of a description manufactured by the contract supplier through mail-order firms."

Thus if a dealer purchases goods of brand ABC from manufacturer/supplier Y but also purchases brand ABC goods from Z an independent wholesaler (who also obtains his supplies from Y) then Y cannot impose the above clause on the dealer since it will not relate exclusively to the goods supplied to the dealer by Y; it would also cover goods supplied to the dealer by Z. Accordingly the clause is not exempt under Section 9(3) or Schedule 3(2)(b); it goes beyond the strict ambit of both provisions. One solution is to separate out and draft separately all of the restrictions imposed on goods actually supplied by the contract supplier and all of the restrictions imposed on the dealer in respect of goods of the same description that he acquires from elsewhere. This however is a cumbersome method of drafting albeit a safe one. Another, and shorter solution, is to draft all of the Section 9(3) restrictions and then to include a clause altered appropriately to fit the circumstances such as the following which should satisfy Schedule 3(2)(b):

"All of the above clauses numbered ... to ... are deemed to be restated (mutatis mutandis) as separate and independent provisions and are deemed to apply to goods of the same description and/or brand acquired by the dealer from sources other than the contract supplier."

Alternatively, a clause following more precisely the wording of Schedule 3(2)(b):

"All of the above clauses numbered ... to ... are deemed to be restated (mutatis mutandis) as separate and independent provisions and are deemed to be accepted by the party acquiring the goods, in respect of the sale, or acquisition for sale, of other goods of the same description."

J. KNOW HOW AGREEMENTS CONCERNING GOODS AND SERVICES

- SCHEDULE 3(3) and (8) RTPA 1976

Schedule 3(3) and (8) exempts certain forms of know-how agreement. Schedule 3(3) for goods reads:

"This Act does not apply to an agreement between two persons (neither of whom is a trade association) for the exchange of information relating to the operation of processes of manufacture (whether patented or not) where - (a) no other person is party to the agreements; and (b) no such restrictions as are described in Section 6(1) above are accepted or no such information provisions as are described in Section 7(1) above are made under the agreement except in respect of the descriptions of goods to be produced by those processes or to which those processes are to be applied."

Schedule 3(8) with appropriate modifications provides the same for services. The only significant difference is in the wording of subparagraph (b) which reads: "(b) all such restrictions as are mentioned in Section 11(1)(b) above which are accepted under the agreement relate exclusively to the form or manner in which services incorporating those techniques or processes are to be made available or supplied."

Know-how or technical information of industrial relevance can take many forms, for example, research results, drawings and technical plans, formulae, techniques, commercial reports etc. When a person applies for a patent much of this valuable information will not need to be submitted unless it is central to the operation of the patent.⁷³ However, when a patentee licenses his patent to another person he will probably wish to include this know-how information. The licensee may be restrained from disclosing this information by a clause in the license or by the common law remedy of breach of confidence.⁷⁴ What is clear is that agreements concerning know-how are commercially valuable and that possessors of such information may wish to restrict its dissemination.

The exemption in Schedule 3(3) and (8) is narrow and its wording obscure. The following points will be relevant to interpretation:

- (i) There must be two parties only to the agreement. Though, under Section 43(2) RTPA 1976 any two or more interconnected bodies corporate may be treated as a single person. The same applies to two or more individuals carrying on business in partnership with each other.
- (ii) No exemption exists if any of the parties are trade associations.

- (iii) The exemption only applies where there is an agreement for the exchange of information. The exchange of information agreement must concern processes for the manufacture of goods or techniques or processes to be applied in the provision of services. Thus, exchange of information concerning for example product design or characteristics and innovative packing methods do not qualify for exemption since the agreement is not for the exchange of information on processes of manufacture. The concept of "processes of manufacture" (Schedule 3(3) goods) and "techniques or processes to be applied" (Schedule 3(8) services) are not defined in the Act. "Processes of manufacture" was discussed by the Court in Scottish Master Monumental Sculptors Association's Agreement⁷⁵ where guidance was drawn from the shorter Oxford dictionary. Accordingly a process of manufacture implied, for example, the processing or making by hand, physical labour or mechanical power, the working up into suitable forms for use. In the last analysis the concept was to be determined by reference to the facts of the case. A similar conclusion may be assumed to apply to "techniques or processes to be applied in the provision of" services. Thus, special dry-cleaning services of a laundry and dry cleaning firm might not represent a process but they almost certainly entail a technique to be applied in the provision of the service.
- (iv) There must be an "exchange of information" implying a two sided flow of information. Thus, if X licenses a patent to Y and also agrees on a dissemination of information to Y concerning know-how connected to the patent no exemption exists because there is no "exchange" of information. It would however appear to be fairly easy to overcome this problem. If in the know-how agreement between X and Y there is included a clause requiring Y to inform X of an improvement he makes to the patented invention this should be sufficient since the data being supplied by Y to X does concern the process of manufacture. It is relevant to note that according to the strict wording of the exemption in Schedule 3(3) and (8) all that is apparently necessary is for the agreement itself to provide for the exchange of information; there is nothing to say that in pursuance of the agreement information necessarily must be exchanged. Thus, if X agrees to provide Y with know how and includes a clause in the agreement requiring Y to notify X of improvements in the patented invention then the agreement

should be exempt even though Y makes no improvements to the invention and hence does not report back improvements to X. The important factor is that the agreement provides for the potential of a bi-lateral exchange of information.⁷⁶

- (v) The exemption will exist if all of the factors in (i) - (iv) above are satisfied and where the only restrictions contained in an agreement relating to goods are "in respect of the descriptions of goods to be produced by those processes or to which those processes are to be applied." Where the agreement concerns services the only acceptable restrictions are those which, "relate exclusively to the form or manner in which services incorporating those techniques or processes are to be made available or supplied."

The word "descriptions" in the goods exemption means "kinds".⁷⁷ Thus, where X agrees to disseminate know-how to Y, restrictions may be included in the agreement limiting the goods Y will make with the information or the goods that Y will subject to the process he has learned of by virtue of the information he has purchased from X.

Restrictions as to the price at which the products produced by Y may be sold or as to the terms of their supply are not restrictions as to description and, if included in the agreement, entail withdrawal of the exemption.

Exemption will not lie for an agreement which contains restrictions which would be exempt under more than one provision of Schedule 3. See, under Section L(V) below for details.

K. TRADE MARK AGREEMENTS - SCHEDULE 3(4) RTPA 1976

Schedule 3(4) deals with both certification trade marks and trade mark licenses. These will be dealt with separately.

I. Certification Trade Marks⁷⁸

Under Section 37 of the Trade Marks Act 1938 groups of manufacturers supplying goods of the same description may apply for a certification trade mark from the registrar of trade marks. To obtain such a mark the relevant goods must as a result of their, "origin, material, mode of manufacture, quality, accuracy or other characteristic" be distinguishable from other goods.⁷⁹ The proprietor of the mark cannot be a supplier so will generally be a trade association. Registration of the mark entitles

authorised users to proceed against non-authorised users. This right of action to protect against unauthorised use is recognised to give holders of the mark significant economic power. To curtail possible abuse of this power the usage and licensing of the mark are subject to regulation by the Fair Trading Division of the Department of Trade and Industry.

Accordingly Section 37(7) Trade Marks Act 1938 reads:

"There shall be deposited at the Patent Office in respect of every trade mark registered under this section regulations approved by the [Department of Trade] for governing the use of thereof, which shall include provisions as to cases in which the proprietor is to certify goods and to authorise the use of the trade mark and may contain any other provisions that the [Department of Trade] may require or permit to be inserted therein (including provisions conferring a right of appeal to the Registrar against any refusal of the proprietor to certify goods or to authorise the use of the trade mark in accordance with the regulations)...."

This regulatory system eliminates the possibility of anti-competitive abuse of the trade mark, it is hence logical that the RTPA 1976 should not interfere in this regulatory process.⁸⁰ This is achieved by Schedule 3(4) which exempts from the RTPA 1976 any agreement made in accordance with regulations approved by the Department of Trade. Thus licenses between the proprietor of the mark and a licensee are not registrable if they conform with the Department of Trade regulation and contain only restrictions which are permitted by the regulations. The inclusion of non-approved restrictions necessarily entails registration under the RTPA 1976.⁸¹

II. Ordinary Trade Mark Licenses: Registered User Agreements

Schedule 4(2) provides an exemption for licensing agreements between registered trade mark proprietors (other than a certification trade mark) and registered trade mark users.⁸² These registered user agreements, to gain exemption, must contain no registrable restrictions except in respect of: "(i) the descriptions of goods bearing the mark which are to be produced or supplied; or (ii) the processes of manufacture to be applied to such goods or to goods to which the mark is to be applied." Thus four types of restriction are envisaged:

- (i) restrictions concerning the kinds of goods bearing the trade mark which are to be produced;
- (ii) restrictions concerning the kinds of goods bearing the trade mark which are to be supplied;
- (iii) restrictions concerning the manufacturing processes to be applied to the goods bearing the trade mark; and,
- (iv) restrictions concerning the manufacturing process to be applied to

the goods to which the trade mark will be applied.

Thus a restriction on the proprietor not to use the trade mark on goods which competed with the registered user would be exempt as a restriction concerning the description of goods to be produced or supplied. For example, if a trade mark was registered covering goods made of high quality wool from a specific type of sheep from a specific locality then an agreement could exist between the proprietor of the mark who manufactures jumpers and the registered user who manufactures woollen gloves whereby the proprietor agrees not to use the mark on any gloves he decides to manufacture. Alternatively the registered user could agree not to supply goods bearing the trade mark which compete with the proprietor (e.g. jumpers).

As with other exemptions provided for in the Schedules the effect of Schedule 4(2) is non-cumulative. If the agreement contains restrictions which would be exempt under Schedule 4(2) and restrictions which would be exempt under another schedule, then, no exemption lies. Schedule 4(2) states, as do the other schedules, that exemption is granted only if all the restrictions contained in the agreement can be exempted under Schedule 4(2). The existence of any other restrictions in the agreement, even if exemptable under other schedules, renders the exemption in Schedule 4(2) inapplicable. The exemption does not apply in the case of unregistered trade marks or trade name licenses. This is a point which those advising on franchise law might bear in mind. Most franchise systems employ registered user agreements. A franchisor exploits the good will and reputation developed over a trade mark by licensing it to franchisees in different locations who offer goods using the trade mark. The franchisee will be subject to controls as to the quality and variety of the goods. Many restrictions in these contracts will be exempt under Section 9(3) RTPA as relating exclusively to the goods supplied. Where the franchise is based around a non-registered trade mark and so the agreement has to be notified to the OFT for registration on the register of restrictive trading practices then dispensation may be obtained under Section 21(2) RTPA following negotiations with the OFT (for details of negotiations see Chapter 4, for details on franchises see Chapter 10).

Finally, the important question of whether the grant of an intellectual property right can ever be legally viewed as a restriction and whether such a grant is the supply of goods or services arises. These questions are examined in depth in the section on patent licenses and reference should be made to Section L of this chapter for discussion.

See under Section L(V) below for details of agreements containing restrictions fitting into more than one exemption.

L. PATENTS, REGISTERED DESIGNED AND COPYRIGHT -
SCHEDULE 3(5) and SCHEDULE 3(5A)

Schedule 3(5) exempts agreements concerning patent rights and registered design; Schedule 3(5A), which was introduced by Section 30 Competition Act 1980, concerns exemption for copyright agreements. It should be noted at the outset that the Schedule does not provide exemption from the Competition Act 1980. The usual question that will be asked under that Act will concern the economic effects of a patent or copyright holders refusal to license.

I. Patents and Registered Designs - Schedule 3(5)(1)-(3)⁸³

Schedule 3(5) provides a broad exemption from the RTPA 1976. It is expressed to cover a wide range of agreements:

- (i) licenses granted by proprietors of patents;
 - (ii) licenses granted by proprietors of registered designs;
 - (iii) licenses granted by a licensee of a patent;
 - (iv) licenses granted by a licensee of a registered design;
 - (v) licenses granted by a person who has applied for a patent;
 - (vi) licenses granted by a person who has applied for a registration of a design;
 - (vii) assignments of patents;
 - (viii) assignments of registered designs;
 - (ix) assignments of the right to apply for a patent;
 - (x) assignment of the right to apply for the registration of a design;
 - (xi) an agreement for any such license or assignment as is mentioned above.
- Bare licenses imposing no restrictions do not require registration. Such an agreement simply allows the licensee to do what would otherwise be unlawful as a violation of the patentee's rights.

Schedule 3(5)(2) and (3) outlines the restrictions that may be incorporated into the licenses and assignments above and which will not threaten the exemption from registration under the RTPA 1976. Schedule 3(5)(2) sets out permissible restrictions in goods licenses, assignments and agreements. These are those in respect of:

- "(a) the invention to which the patent or application for a patent applies, or articles made by the use of that invention; or
- (b) articles in respect of which the design is or is proposed to be registered and to which it is applied."

For services licenses, assignments and agreements the permissible restrictions will all be,

"... in respect of the invention to which the patent or application for a patent relates."

Although, as will be seen, the exemption is very wide it only applies in agreements between two parties. Where there are three or more parties the exemption does not exist because Schedule 3(5)(4) - (8) provides that patent pools must be registered if at least two of the parties to the pool accept registrable restrictions. Patent pools are discussed below.

The notion of a restriction on the invention or the articles for which the design is registered is wide ranging. It covers, for example: (i) restrictions on price (each party agrees to charge a standard price); (ii) restrictions on the number of the product manufactured or the extent of the provision of the service; (iii) restrictions requiring use of the patented invention upon only certain kinds of article or in certain, specified forms of service; and (iv) restrictions on the areas the parties will sell the patented product in. An agreement becomes registrable if it contains restrictions not relating to the invention. Thus, tying restrictions whereby the licensee is required to take a non-patented product from the proprietor as a condition of being allowed to take the patented product is not a restriction relating to the invention.⁸⁴ Similarly, if in a license between a proprietor and a licensee there were additional restrictions relating to non-patented products or non-registered designs (e.g. relating to prices or markets in which they could be sold) then, again, the agreement would be registrable.⁸⁵

Provided that there are two parties only the exemption continues to apply where each has a patent or registered design which he cross-licenses to each other. Thus, in Automatic Telephone & Electric Co. Ltd.⁸⁶ two producers of traffic operated traffic lights held different patents in respect of that product. They agreed to cross-license each other on a royalty free basis and also to divide the United Kingdom into territories each party being restricted from selling outside his territory. The agreement further imposed restrictions on price. The case concerned the rights of the government to discovery of documents and not the patent licensing question. Nonetheless it appears that it was accepted that the

cross-licensing was prima facie exempt.

Although the question is not free from all doubt the exemption in Schedule 3(5) appears to lapse when the relevant patent expires. The wording of Schedule 3(5) does seem to imply that the license or assignment etc. relates to an existing patent or registered design.⁸⁷ Subsequent to expiry of the patent an agreement between a holder of a former patent and a licensee fixing prices or dividing markets will be registrable. Where an agreement concerns a number of different patents or registered designs then care must be taken to ensure that, prior to expiration of the patent or design, the agreement is modified. If it is not modified then the whole agreement will become registrable since it will now contain restrictions on non-exempt products as well as restrictions on exempt products and to obtain exemption under Schedule 3(5) there must be no restrictions in the agreement at all other than exempt ones.

II. Patent Pools and Registered Design Pools Schedule 5(4)-(8)

The exemption in Schedule 3(5)(1) - (3) does not exist for patent pools or registered design pools. Nor is there exemption for agreements, licenses or assignments made pursuant to the pool agreement. Under Schedule 3(5)(5) a "patent or design pooling agreement" means an agreement:

- "(a) to which the parties are or include at least three persons (in this and the following sub-paragraph the 'principal parties') each of whom has an interest in one or more patents or registered designs, and
- (b) by which each of the principal parties agrees, in respect of patents or registered designs in which he has an interest, or in respect of patents or registered designs in which he has or may during the currency of the agreement acquire an interest, to grant such an interest as is mentioned in sub-paragraph (6) below."

The grant of interests referred to in Schedule 3(5)(6) concern the grant:

- "(a) of an interest in one or more such patents or registered designs to one or more of the other principal parties, or to one or more of those parties and to other persons; or
- (b) of an interest in at least one such patent or registered design to a third person for the purpose of enabling that person to grant an interest in it to one or more of the other principal parties, or to one or more of those parties and to other persons."

Whilst the language of these provisions is verbose the message is clear. No exemption exists for owners of patents and registered designs who have pooled their respective rights by granting rights to each other or to one or more of the members of the pool. It makes no difference that the rights are granted indirectly. This might be the case where proprietors assign their rights to a trade association which then grants rights to the other members of the association. A set-up of this nature arose in Flushing Cistern Makers Ltd.'s Agreement where members of the association granted to the association royalty-free licenses under their patents. The association subsequently granted sub-licenses to other members. The pooling arrangement in this case would fall outside the exemption in Schedule 3(5) RTPA 1976.⁸⁸

A problem lies in deciding who is a "principal party" to use the wording of Schedule 5(5). Joint holders of patent rights, registered design rights, or licenses relating to patents or registered designs are to be treated as one party. Thus, if X, Y and Z jointly purchase rights in a patent and form a joint venture partnership to exploit the license then the grant by the proprietor is deemed to be to a single person and the license is treated as a bi-lateral agreement which may accordingly benefit from the exemption in Schedule 3(5)(1)-(3).⁸⁹ A patent pooling scheme or registered design pool between three or more subsidiaries of a single parent company counts as a patent pool between three independent principal parties and must be registered. This runs counter to the general policy of the RTPA 1976 which treats inter-connected companies as a single person. Indeed such is the case for the remainder of the Schedule 3 exemptions. However, Section 43(2)(a) RTPA 1976 expressly provides that this is not to be the case for Schedule 3(5), (4)-(8).

Exemption used to exist for patent pools up until 1973 when they were excluded from the exemption by Section 101 of the Fair Trading Act 1973. There is no reason to suppose that patent pools will not be appropriate for dispensation from reference to the court under Section 21(2) RTPA 1976. When such agreements were considered by the Court they seemed to adopt a liberal attitude. In Permanent Magnet Association's Agreement No. 1⁹⁰ a pooling of patents and technical data was in operation between the parties who also fixed prices. The Government contended that the pool which was accepted as beneficial could exist independently of the price-fixing. The Court was impressed sufficiently with the pooling arrangement to hold that it justified the price fixing on the basis that without it the pool would operate less efficiently. Accordingly the benefits to the public in terms

of the improved technical capacity of the industry and the better service thus provided to customers existed by virtue of the price restrictions in the agreements.⁹¹

Doubt exists over the general registrability of patent pools. These doubts are discussed in the section on the Ravenseft doctrine below. Reference should be made to that section before final decisions on registration are made or in preparing arguments for negotiations with the OFT.

III. Copyright Agreements Schedule 3(5A) RTPA 1976

Schedule 3(5A) was introduced into the RTPA 1976 by Section 30 Competition Act 1980 and exempts a wide range of copyright licencing agreements from registration. The provision exempts four types of agreement:

- licenses granted by the owner of copyright;
- sub-licenses granted by licensees of copyright;
- assignments of any copyright;
- agreements between parties for the assignment of any copyright.

This exemption is retroactive so that any agreement already registered may be taken off the register. Furthermore, it should follow that no private damages action may be taken against parties to an unregistered agreement under Section 35(2) RTPA 1976 (discussed in Chapter 5).

The restrictions that may be incorporated safely into agreements without invoking the duty to register fall within the category of restrictions described in the Act as being,

"in respect of the work or other subject matter in which the copyright subsists or will subsist."⁹²

Thus restrictions relating only to the subject matter of the copyright are allowed. Given the intensely competitive book and music industries it is considered that this exemption will not lead to significant competition problems.⁹³ In any event copyright licenses are subject to the Competition Act 1980 and the monopoly provisions of the Fair Trading Act 1973.⁹⁴ The sorts of exempted restrictions will be similar to those exempt for patent licences viz., restrictions on quantity produced, price, marketing territories, etc.

The schedule was examined judicially in Academy Sound & Vision v. WEA Records.⁹⁵ Under a written agreement WEA assigned the copyright in certain master recordings to Academy. The nub of the

agreement stipulated that WEA had a right for three months from the date of the agreement to sell its existing stocks of records made from the master recording in the UK and Eire. Additionally, Academy agreed during this period solely to manufacture records from the master and not therefore to sell them. For Academy this period was called the "inaction period". Academy sued WEA for allegedly selling a substantial number of records and cassettes after expiration of the three month period in breach of the copyright now belonging to Academy and in breach of the contract concluded between Academy and WEA. WEA argued, amongst other things, that the agreement was one to which the RTPA 1976 applied and that, since it had not been duly registered, the restrictions therein were void and unenforceable under Section 35 RTPA 1976. Thus, the restriction preventing sale after the three month period was unenforceable. It was argued by counsel for WEA that, "the phrase, 'in respect of the subject matter in which the copyright subsists' in its application to the present case covers only the assignment of the copyright in the master recordings and to matters directly related to that assignment, for instance matters relating to licenses and consultancy agreements in force, and does not cover the provisions dealing with copies made from the master recordings and in existence at the date of the agreement or to be made by Academy during the inaction period."⁹⁶ Mr. Justice Vinelott disagreed: "The phrase 'in respect of' is not one ... which should be narrowly construed. In other statutory context, including the Restrictive Trade Practices Act 1976 and its predecessor, a wide scope has been attributed to it. In the context of paragraph 5A, which was clearly designed to exclude from the Act of 1976 agreements relating to copyright protected by the Copyright Act itself, the legislative intention must, I think, have been to except provisions fairly incidental to an assignment of any copyright within the Copyright Act, including the disposal of copies made by the owner of the copyright in a sound recording."⁹⁷

Example: Software licensing restrictions

A common situation in which copyright restrictions are in question is the licensing of computer software. The type of restrictions actually incorporated will depend such factors as: (i) the degree of specialisation of the software; (ii) the nature of the market and whether sold in the High Street or by high technology, reputable companies; and (iii) the nature of the sale or licensing transaction since different considerations apply if the licensed product is mass-produced and sold in

computer stores or if the licensing agreement is individually negotiated and provides the licensor with an opportunity to enforce the restrictions. Given the above considerations the following may be included in software licensing agreements and RTPA 1976 problems still avoided; Restrictions on:

- use of the software only on designated computers;
- use of software in processing licensees data only thereby preventing use of the software on a time-share basis or on a consortium basis;
- use of the software at a designated physical location;
- use of the software on any computer system which can be accessed by remote controls;
- copying of the software for anything but adoption and archival purposes;
- reverse engineering in order to determine the contents of the software;
- modification of the software;
- assignment or transfer of the license without prior written authorisation of the licensor such authorisation not to be unreasonably withheld;
- sublicensing of the software to third parties;
- use of any proprietary information contained in the software.

All of these restrictions may be defined as restrictions in "respect of the work or other subject-matter in which the copyright subsists or will subsist" and should hence fall within the exemption of the exemption.

IV. The Ravenscroft Doctrine: Licensing Agreements may not be restrictive

The schedules concerning know-how, trade marks, patents and copyright all concern the grant of rights by a proprietor to a licensee. Thus a patent holder may license a person to exploit the patent subject to certain conditions and restrictions. The owner of proprietary information may license a person to use that know-how for certain uses only and not others. A fundamental question arises: when a proprietor licenses a right to a licensee subject to limitation imposed upon the right has the licensee accepted restrictions? The licensee starts with no rights to the intellectual property rights; if he sought to manufacture a product patented by the proprietor the latter could obtain an injunction to prevent that violation of his patent and damages. Similar conclusions hold true for other rights such as copyright or trade marks. Thus, when the licensee is granted a license, albeit a license subject to limitations, he is still gaining rights; the limitations do not take away anything he had before he entered the contract they solely define the boundaries of his rights. It may thus be asked whether any limited license of a proprietorial

right imposes a restriction on the licensee. The answer to this question differs in UK law and EEC law.

(i) Position in UK law

The accepted position in UK law is that a limitation or restriction imposed on the licensee by virtue of the proprietary right itself is not a registrable restriction. Thus, a restriction of a patent licensee derives from the patent itself and not from a restriction existing purely by virtue of the agreement. For example: X is the patentee of a process for strengthening glass and he uses this patent to manufacture especially strong glass for industrial use in factories. X licenses Y to use the patent but Under the license Y may only manufacture strengthened glass for greenhouses. This restriction on Y derives from the patent itself. If Y breaches the license X can sue him for infringement of his patent rights; Y has no right to use the process for anything other than greenhouses and X need not rely on breach of the agreement to enforce the restriction. In the Court of Appeal in Automatic Telephone and Electric Co. Ltd. Willmer LJ. elucidated upon this principle. He stated that the agreements in question: "in the picturesque phrase used by [counsel] did not have the effect of closing any door which was previously open to the contractors; its effect was merely to open a door through which the selected contractor might pass."⁹⁸ This principle has been accepted by the House of Lords in restraint of trade cases. In Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport),⁹⁹ Lord Reid stated: "A person buying or leasing land had no previous right to be there at all, let alone trade there, and, when he takes possession of that land subject to a negative restrictive covenant, he gives up no right or freedom which he previously had."¹⁰⁰ The most important confirmation of the principle in the context of the restrictive trade practices legislation arose in Ravenseft Properties v. Director General of Fair Trading¹⁰¹ where the question was asked, "to what extent can a covenant in a lease properly be said to involve restrictions for the purposes of the relevant Acts?"¹⁰² The answer of the Court was based upon the two authorities cited above and was that, "only in very exceptional cases can the limitation of freedom of trade effected by covenants in a lease constitute restrictions for the purposes of the relevant Act."¹⁰³ Equally

important to this question was the conclusion of the court that the supply of a lease by a landlord did not amount to the provision of a service for the purposes of the RTP legislation. The provisions of services implied "doing things for people".¹⁰⁴ Simply granting a lease was not doing something for the tenant. Subsequent to Ravenseft the OFT issued the following statement:

"It may be helpful to add that the Office has taken the view that the principles laid down in the judgment in this case are of general application to proprietary rights and the grant of an industrial property license including e.g. a copyright license does not constitute the supply of a service within the meaning of the legislation."¹⁰⁵

Thus, proprietary licenses do not restrict the licensee in the opinion of the OFT. If this is so the holder of the right can accept any restrictions he pleases and still avoid registering the agreement since only one person will be accepting registrable restrictions (in accepting the restrictions the holder clearly limits his freedom to exploit the right as he wishes).

The OFT further accept that the grant of a license is not the supply of services.

There is a third argument which suggests that such licensing agreements are not registrable. A restriction in an agreement which merely restrains the parties from doing something they are already bound not to do in general law cannot be a restriction for RTPA 1976 purposes.¹⁰⁶ Thus, a trade association which recommends members to refrain from exempting themselves from liability for death or personal injury caused by their breach of contract or negligence in contracts with customers is not a restriction since Section 2(1) Unfair Contract Terms Act 1977 already prohibits such clauses.¹⁰⁷ Thus, a person is prohibited at law from infringing another persons patent rights. If a patent license defines, through limitations imposed on the licensee, the latter's legal right to use the patent, then an action by the holder to enforce the licensing agreement and prevent its breach is an action to enforce the general law i.e. his general legal right to prevent patent infringements.

The arguments given above suggest that the Schedule exemptions serve no purpose. Though it should be added that since the Act expressly exempts certain licenses does this not imply that it intended non-exempt agreements to be registered? These arguments suggest that the extent of the application of the RTPA 1976 to

intellectual property licenses is uncertain.¹⁰⁸ In view of these doubts the following practical consequences should be considered:

- (i) the OFT will adopt a sympathetic approach to intellectual property licenses;
- (ii) parties should notify agreements to the OFT that do not fall within the exemptions including with the notified documents a letter expressing the view that the parties do not consider the agreements to be registrable for the reasons given above but that they are nonetheless notifying the OFT of the agreement on a precautionary "fair-safe" basis;¹⁰⁹
- (iii) notification protects the parties from the dramatic consequences of Section 35(1) RTPA 1976 which renders void and unenforceable unregistered agreements;¹¹⁰
- (iv) notification protects against any third party who considers himself to have suffered damage from the agreement and who could, in the absence, of notification bring a private damages action under Section 35(2)RTPA 1976 against the parties for failure to register a registrable agreement.
- (v) The OFT might not register the agreement. Alternatively, if they do register the agreement it may be treated leniently and given Section 21(2) RTPA 1976 dispensation from the Court.¹¹¹

An important point to consider is whether it is possible for both proprietor of the right and the licensee to accept restrictions which are registrable even given the cases discussed above. The answer is that certain cross-licensing agreements entail registrable restrictions being accepted by both parties. If X grants to Y an exclusive license to use his patented process for strengthening glass but limits Y's license to use in respect of glass for greenhouses then Y has not - on the Ravenseft principle - accepted restrictions. X however has accepted a restriction not to use his process in connection with glass for greenhouses (i.e. this derives from the exclusivity clause granted to Y). If Y now grants to X an exclusive license in connection with a different patent for glass and limits X to use of this process for industrial purposes then X is not restricted under the agreement but Y is since he has accepted a restriction on the use of his patent for industrial purposes. In this

agreement both X and Y have accepted restrictions. Both of these restrictions relate exclusively to the invention itself and hence are exempt under Schedule 3(5) and the cross-licensing agreement need not be registered. This example shows that the Schedule 3 exemptions do have a use and do not totally overlap and conflict with the Ravenseft principle.¹¹² Finally, it may be asked whether the Ravenseft principle effects patent pools? The discussion on cross-licensing suggests that patent pools may fall outside the Ravenseft principle. Thus, a patent holder licenses two licensees who are limited as to permissible uses of the patent. Neither licensee therefore accept restrictions. However, the licensees agree to grant back to the holder exclusive licenses of improvement patents they come to own. In such a case both licensees have accepted restrictions since neither may use the improvement patents they own. The agreement between the three parties thus contains two parties who accept registrable restrictions. Where, in a patent pool, more than one holder of a patent right limits his freedom in any way then the agreement falls outside of Ravenseft. Restrictions on the licensees can be ignored; it is restrictions on holders that must be counted since these are not exempt under the Ravenseft principle.

(ii) Position in EEC Law

The position of the European Commission and of the Court of Justice has been that limitations on licensees are restrictive of competition and do infringe Article 85(1) EEC.¹¹³ The Commission has issued a block-exemption for patent licenses laying down their policy towards certain types of clause.¹¹⁴ This is discussed in Chapter 13 Section C. Where an agreement between two UK parties has an international element to it such that it is likely to effect trade between the Member States of the EEC then the agreement must comply with EEC policy and reference to the Regulation is essential.

V. Position where agreement overlaps two different exemptions in Schedule 3

An agreement which has restrictions which are exempted by more than one provision of Schedule 3 is not exempt from the Act. The exemptions in Schedule 3 are mutually exclusive of each other. Thus if in an exclusive dealing agreement there are restrictions that would enable it to be exempt under Schedule 3(2) and also restrictions that would fit with Schedule 3(4) (for example imposing restrictions on the dealer as to the types of

goods the Suppliers trade mark may be affixed to) then no exemption exists.¹¹⁵ The exemptions in Schedule 3 each say that to earn exemption the agreement in question must contain no restrictions "other than", or "except in respect of", restrictions permitted by that specific provision.

This rule does have the effect of limiting the value of the exemptions. Parties to agreements have a number of options: (a) redraft the agreement to ensure that the only restrictions fit within one provision of the schedule; (b) redraft the agreement so as to fit the restrictions into one of the wider exemptions. For example, it is common practice in cases where a holder of patent rights wishes to license that patent to a licensee and also license relevant know-how to him to fit all of the restrictions in one agreement exempt under Schedule 3(5) (patents). Thus, X licenses a patent to Y and concludes in the agreement provision for the transfer of know-how concerning the patent to Y which contains restrictions on use of the know-how. It is arguable that the know-how restriction can be equally well described as an information provision in respect of the invention to which the patent relates. If this is so then it fits under Schedule 3(5) along with the basic grant of the patent license. In such a case know-how and patent license restrictions may be drafted so as to fit within one exemption; (c) draft more than one agreement and ensure that each individual agreement is exempt. The difficulty with this approach is that the OFT will probably view the agreements as part of a larger single arrangement and hence non-exempt.

In cases where an agreement unavoidably contains restrictions exempt under more than one provision the best course is to notify the agreement to the OFT with an accompanying letter stating that (if the agreement contains only intellectual property restrictions) the parties do not consider the agreement to impose restrictions according to the Ravenseft principle. If the OFT do decide to register it dispensation under Section 21(2) may well be available (see Chapter 4).

M. AGREEMENTS WITH OVERSEAS OPERATION ONLY -
SCHEDULE 3(6) AND (9)

Schedule 3(6) and (9) exclude from the RTPA 1976 agreements and trade association recommendations whose restrictions relate exclusively to:

- (i) the supply of goods by export outside the UK;
- (ii) the production of goods outside the UK;
- (iii) the application of any process of manufacture to goods outside the UK;
- (iv) the acquisition of goods to be delivered outside the UK and not imported into the UK for home use;
- (v) the supply of goods to be delivered outside the United Kingdom otherwise than by export from the United Kingdom;
- (vi) the supply of services to persons outside the UK;
- (vii) the supply of services in relation to property of any description (whether movable or immovable) outside of the UK.

Schedule 3(6) and (9) thus provides a broad exemption for agreements relating to the supply, acquisition and production and processing of goods for export. Exemption is also provided for the supply of services. The word export is not defined in the Act. Presumably it simply implies the transfer of goods or services across frontiers for consideration. It will be a question of fact in each case whether this occurs. An agreement whereby a UK company purchases supplies in the UK on behalf of subsidiaries or branches abroad is almost certainly an export sale. Concerning acquisition of goods exemption applies where goods are obtained domestically for delivery abroad. Where the goods are imported into the UK for re-export in the same state the exemption remains. If the goods are imported into the UK and some of them are used in the UK and some are re-exported then no exemption will lie.

Thus, agreements between exporters under which, for example, the parties fix the prices or share the export market geographically or by quota will be exempt. Agreements between firms whose operations are overseas concerning buying prices are likewise free from registration so long as the relevant goods are to be made or processed outside the UK. It does not matter in such a case that the goods are, at a later date, imported into the UK.

Under Section 25 RTPA 1976 parties to export agreements exempt under the Act must be notified to the OFT. However, in practice many firms do

not bother and the OFT have no powers to enforce compliance.

Although export agreements need not be registered they may be referred to the MMC under the monopoly provisions. The MMC adopt something of a patriotic view of such cartels however. In a Report on the supply and export of Wire Rope and Fibre Rope and Cordage¹¹⁶ the MMC noted that whilst price-fixing tends towards higher home prices and the reduction of incentives between firms to be efficient such detriments were less acute where the export market was concerned. The view adopted apparently favours the UK balance of payments over the consumers welfare abroad. Such a view would of course be entirely unacceptable to the European Commission. Where an export agreement focuses attentions on Community markets then clearance must be obtained from the Commission. Failure to obtain clearance or exemption can result in the Commission holding the agreement to be void and fining the parties.

If an export agreement contains restrictions affecting the domestic market as well as the export market it becomes registrable in normal manner. To fit within the exemption all restrictions must relate exclusively to the foreign market. See Section L(V) above for details of agreements containing restrictions fitting into more than one exemption.

N. CROWN AGREEMENTS

Acts of Parliament are presumed not to bind the Crown in the absence of express provision or necessary implication.¹¹⁷ This long-standing rule of statutory interpretation is independent of the royal prerogative. Where, as is frequently the case, it is necessary that the Crown be bound then each statute will make the necessary provision. If an Act is silent, however, and there is no necessary implication to the contrary, then the Crown and its numerous agents and servants are exempt.

The RTPA accordingly does not bind the Crown, its agents or servants. An agreement with the Crown is not therefore an agreement whereby restrictions are accepted by two parties. Thus in Telephone Apparatus Manufacturers Application¹¹⁸ an otherwise restrictive agreement between telephone producers and the Postmaster General was no subject to registration. Crown immunity can have wider implications. In the Telephone case cited above manufacturers of telephones entered into agreements inter se setting out a machinery for satisfying their contractual duties to the

Postmaster General. Under the agreement with the Crown (in the form of the Postmaster General) the manufacturers were to supply telephones. The agreement between the manufacturers inter-se was designed to share out this work on a quota basis. The Court of Appeal held that this secondary agreement was not registrable since it was necessary in order to implement the agreement with the Crown. Registration and assessment of the agreement by the RPC would have harmed the interests of the Postmaster General.

Simply because an institution is incorporated by the Crown exercising prerogative powers and its powers are subject to the control of the Queen in Council and the Privy Council does not mean that the institution itself enjoys Crown privilege.¹¹⁹

The Crown, conversely, is not excluded from employing the RTPA against third parties. In 1978 the Post Office retrieved £9m in settlement from suppliers of cables to them who had clandestinely colluded to fix tender prices. These collusive tendering agreements came to light as a result of enquiries arising from Monopolies and Mergers Commission investigations into insulated wires and cables.¹²⁰ In 1975 the Director General successfully applied to the RPC for injunctions against the parties further restraining them from giving effect to other like agreements. Under Section 35(2) RTPA 1976 private individuals may sue in damages, for breach of a statutory duty, any person who has failed to register their agreement in due time. The Post Office successfully used this provision as the major bargaining counter against the cable producers in settling out of court for, as stated above, £9m.

O. RESTRICTIVE COVENANTS IN LEASES AND OTHER PROPERTY AGREEMENTS: THE RAVENSEFT DOCTRINE

The decision of the Court in Ravenseft Properties v. Director General of Fair Trading¹²¹ indicates that only in exceptional cases will restrictive covenants in leases constitute restrictions for the purposes of the RTPA 1976. In that case the plaintiffs applied to the Court for a declaration that certain restrictive covenants in commercial property leases were not registrable. The plaintiffs owned and managed a very large number of properties in the UK. When services agreements were brought under control in 1976 it was feared that commercial leases would fall to be registered if they incorporated restrictive covenants. Mr. Justice Mocatta commented at the outset of the case: "If as a result of the [legislation] leases are brought under control ... this would clearly be a very serious matter for the applicants and for other companies in a

comparable position in that the applicants may well have current hundreds if not thousands of leases and ... each of these would have to be examined in order to make certain whether or not there was an obligation under the ... Act ... to register such leases as agreements between two or more persons carrying on business within the United Kingdom in the supply of services brought under control by the [legislation]."¹²² The types of restrictive covenant being examined by the court were varied. They included covenants on the lessee:

- not to effect alterations to the premises;
- to use the property exclusively for the restricted purposes laid down in the lease;
- not to assign, transfer, underlet or part with or share the possession or occupation of the premises or any part thereof;
- to insure against risks specified in the lease with an insurer nominated by the lessor.

In one case where the lessee was a limited company the lessor further required the managing director and owner to provide a surety that his company would abide by the restrictions in the lease.¹²³

I. Basis of the Ravensft Doctrine

The Court held that in none of the leases in question were the restrictive covenants registrable. The principles used by the Court to arrive at this conclusion are of importance to anyone considering the registrability of a restrictive property agreement:

- (i) The provision of services entails "doing things for people".¹²⁴

Thus, where a lessor was only involved in letting property he was not carrying on a business in the provision of services. However, this is not an absolute rule. If the landlord provides services in connection with the property he lets then he may be in the business of providing services. Cleaning and portering services provided by the landlord would fit into this category.¹²⁵

- (ii) Restrictive covenants in a lease do not amount to restrictions on the tenant. The principles behind this conclusion were discussed in Section L of this chapter in respect of intellectual property licenses. Lord Reid in Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. stated: "A person buying or leasing land had no previous right to be there at all, let alone to trade there, and, when he takes possession of the land subject to a negative restrictive covenant, he gives up no right or freedom which he previously had."¹²⁶ Thus a tenant subject to a restrictive covenant



gives up no freedom, since he had none to start with, and hence cannot be subject to a restriction.

- (iii) There must be a trading nexus between the lessor and lessee. Mr. Justice Mocatta stated: "a lease ... would only fall within the scope of the Act if there were some trading nexus between the parties alleged to have accepted restrictions and the subject-matter of the agreement."¹²⁷ The formula given by Mocatta J. is far from clear. Its object is to exclude from consideration agreements between providers of services where there is no commercial link between them. Thus a landlord who leases commercial property to a travel agent and who provides cleaning services for the travel agent on the premises can hardly be said to have a "trading nexus" together. They certainly do not compete with each other. The commercial link or nexus in question will almost certainly be one of competition of some degree between the parties. The OFT are unlikely to be interested in an agreement in which the parties are not in a position to effect competition.¹²⁸

II. Conditions for determining Registrability

It follows from the Ravenseft decision that for a lease or other property agreement to be registrable the following conditions must be satisfied:

- (i) There must be two parties carrying on business within the United Kingdom. Thus, leases of residential homes are outside the scope of the Act.
- (ii) Both parties (i.e. lessor and lessee) must be providers of services albeit that the services may be different.
- (iii) There must be a trading nexus between the services in question.
- (iv) The lease must contain restrictions on both parties that fall within Section 11 (2)(a)-(e) RTPA 1976. These restrictions must derive from the agreement itself and not from the right of occupation, restrictive covenants in a lease limiting the lessees use of the premises are not restrictions since the limitations derive from the right of occupation. Most likely the restrictions will relate to a limitation on the lessees activities which have no bearing on how he uses the demised property.

III. Agreement Likely to be Registrable

The Court held in Ravenseft that, "it is only 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" legislation.¹²⁹

(i) Collateral Agreements

The Court gave an example of a lease involving agreements which might be registrable:

A lessor carries on business in both Brighton and Eastbourne in separate premises in those towns as a travel agent; in other words he provides services to the public. He then leases the Eastbourne premises to two joint tenants each of whom enters into a collateral undertaking not to open up a travel agency business in Brighton. The landlord, by letting the premises be previously used as a travel agency will be giving up that business in Eastbourne. In such a case there would be a sufficient nexus between the subject matter of the leases and the restrictions entered into which would be in respect of services.

Essentially such an agreement would be a no-poaching or market sharing agreement. Though, in the example above there would probably not be any serious effect on competition since there may be many other travel agents in the area to exert competitive pressures on the landlord and the lessees.

(ii) Sale and Lease back Agreements

The Court intimated that sale and lease back arrangements when coupled to other circumstances might be registrable.¹³¹ A common sale and lease back situation concerns the tied house pub or tied petrol filling station. In a typical sale and lease back X sells the fee-simple in land to Y subject to a leasehold interest; Y purchases the property subject to the lease which is to be granted to X. The sale to Y of the property and the lease back to X all occur within one transaction. Thus, X through the conveyance, has translated his freehold interest into a leasehold interest. The sale and lease back arrangement involves X in giving up rights he held before the contract. It does not therefore satisfy the Esso Petroleum test. Lord Denning M.R. in a later case explained why: "We should hold that when a person takes possession of premises under a lease, not having been in possession, previously; and on

taking possession, he enters into a restrictive covenant tying him to take all his supplies from the lessor, prima facie, the tie is valid. It is not an unreasonable restraint of trade."¹³² Since X has been in possession prior to his obtaining the leasehold interest he has given up freedom and accepted a restriction. Thus, in a sale and lease back one party will accept restrictions on use. However, to be registrable there must still exist all of the other conditions for registrability noted above. Thus the other party must also accept registrable restrictions. In sale and lease backs there is invariably a trading nexus between the parties e.g. petrol company and filling station owner; Brewery and publican. These two examples concern suppliers of goods though there is no reason why a restrictive sale and lease back agreement between providers of services is not registrable. Indeed the example given by Mocatta J. in Ravenseft (above) concerns services. It appears to be the case that such agreements are safe from registration so long as the only person accepting restrictions in the party whose freehold has been turned into a leasehold i.e. the original owner.¹³³

IV. Competition Act 1980: Overlap

Finally, it should be noted that although many agreements may be outside the scope of the RTPA 1976 they may still be caught by the Competition Act 1980. Thus, a powerful property company who controls competition in a locality by restricting the numbers of commercial tenants of a particular class he leases to might be conducting an anti-competitive course of conduct. If one company owns all or a large part of the leasehold property in a particular area and leases to only one butcher and one travel agent and one greengrocer etc. then, since other traders of the same class can only compete if they can purchase the freehold of a property in the area, the effect of the landlord's selective approach may be to preclude competition in the locality. For the landlord of course it might be possible to justify a higher rent by being able to grant his tenants a cushion from competitors.

P. AGREEMENTS WITH DISREGARDABLE RESTRICTIONS

In Chapter 1, Sections 9 and 18 RTPA 1976 were discussed. When assessing whether an agreement is registrable or not certain terms in the agreement may be disregarded. In negotiations with the OFT or in mounting

a defence before the court the irrelevance of such terms may also be asserted. These disregarable terms cover: coal and steel agreements; agreements relating exclusively to the goods supplied; agreements concerning standards; agreements concerning industrial relations. Reference to Chapter 1 should be made for further details.

FOOTNOTES

1. The precise division of the DTI which is responsible for Section 29 is the GP Division: Department of Trade and Industry, GP Division, Room 647, 1 Victoria Street, London, SW1H 0ET.
2. Guidelines on the operation of the Restrictive Trade Practices Act 1976 (1984, DTI and OFT). This document may be obtained free of charge from the DTI at the address given *ibid*.
3. Net Book Agreement No. 1 (1962) L.R. 3 R.P. 246 at p. 310; [1962] 1 W.L.R. 1347.
4. e.g. Exempt Register No. 149 Agreement Concerning Research and Development into agricultural biotechnology. See, In Black Bolt and Nut Association's Agreement (1960) L.R. 2 R.P. 50 where Mr. Justice Diplock (as he then was) when commenting on an agreement which entailed the fixing of prices, pointed out the value of the exchange of technical data and know-how between the parties and accepted that this exchange improved the efficiency of smaller firms. Moreover, he considered that the beneficial cooperation which took place could only have occurred in the absence of price competition: "It is only human nature to be more reluctant to impart 'know-how' to a competitor who may use it to undercut one's own prices and take away one's own customers than to a competitor who can only use it to benefit himself and his product." There seems no reason why, had a Section 29 provision been available, such a case might not have passed under it. Though, for criticism of the case, see Yamey, (1961) 24 M.L.R. 488.
5. Exempted Register No. 148, Agreement between Rolls Royce Limited, The General Electric Company PLC and Latheronic Limited (June 1984).
6. See e.g. Exempt Register No. 2 Specialisation agreement between Bowater Paper Corporation and Reed Paper Group Limited (1969), agreement terminated December 1977.
7. Exempt Register No. 147 Agreement between British Telecommunications, Plessey Telecommunications & Office Systems Ltd. and The General Electricity Company PLC. (October 1982). See also No. 4036 Register of Restrictive Trade Practices, agreement between GEC and Standard Telephone and Cable concerning a joint supply arrangement to the Post Office of digital line and multiplex systems equipment. The agreement gained Section 21(2) exemption.
8. See e.g. Thirteenth Commission Competition Report (1983) para. 55; Sixth Commission Competition Report (1976) paras. 53-59; fourth Commission Competition Report (1974) paras. 37-42.
9. See e.g. (Case 61/80) Co-operative Stremzel v. Commission (Case 61/80) [1981] E.C.R. 851. See also, Transocean Marine Paint [1967] C.M.L.R. D9; [1974] 1 C.M.L.R. D11; [1975] 2 C.M.L.R. D75; [1980] C.M.L.R. 694.
10. e.g. Exempt Register No. 2 Specialisation agreement between Bowater Paper Corporation and Reed Paper Group Limited (1969), agreement terminated 1977.

11. c.f. A.B.T.A.'s Agreement [1984] I.C.R. 12 at p. 24D "We propose to consider and test the restrictions not only in relation to each other but also against the total backcloth of the circumstances of the case."
12. Emphasis not in original.
13. See, NEDO, Competition Policy (with research annex by Alan Hughes: Competition Policy and Economic Performance in the UK) (1978) pp. 34-36 for examples; OFT and DTI publication, Guidelines on the Operation of the Restrictive Trade Practices Act 1976. (1984) para.6; Leisner Committee, A Review of Restrictive Trade Practices Policy (1979) Cmnd. 7512 pp. 46, 47.
14. Section 29(4) RTPA 1976.
15. Section 29(5) RTPA 1976.
16. Section 29(5)(a) and (b) RTPA 1976.
17. Section 29(5) RTPA 1976.
18. As in Exempted Register No. 147 (1982) (System X); Exempted Register No. 148 (1984) (gas turbine powered generating sets); Exempted Register No. 149 (1984) (agricultural biotechnology). For fuller details see supra.
19. Exempted Register No. 2 (specialisation agreement for coated paper) - exemption given in 1969, extension given in 1975 for a further four years. The agreement was terminated by the parties in 1977.
20. Section 29(6) RTPA 1976.
21. Section 29(7) RTPA 1976.
22. The authority for this could be Section 29(2)(e) which requires the DTI to consider whether the agreement, on balance, is expedient to the national interest. It is certainly arguable that the national interest must be compatible with the European Community interest.
23. The problem of beneficial agreements that are too substantial to benefit from Section 21(2) RTPA 1976 but too small to fit within Section 29 RTPA 1976 was noted by the Liesner Committee, A Review of Restrictive Trade Practices Policy (1979) Cmnd. 7512 at paras. 5.44 - 5.46. They concluded that the word "substantial" should be withdrawn from Section 29(2)(a). The Government did not amend Section 29 to implement this recommendation.
24. See, No. 4036 Register of Restrictive Trade Practices, Agreement between GEC and Standard Telephone and Cable concerning a joint supply arrangement to the Post Office of digital line and multiplex systems equipment. The agreement was given Section 21(2) clearance although, in 1982, the draft agreement between GEC, Plessey and BT concerning System X was given Section 29 clearance.
25. Exempt Register No. 146, National Association of Master Bakers, Confectioners and Caterers. (Bread Prices) (1978).

26. Exempt Register No. 144, Retail Margins on Coffee (1977).
27. Exempt Register No. 145 Shoes (1978).
28. Exempt Register No. 105, Selective Price Restraint Scheme (1976). For other interesting Examples see, Exempt Register No. 56 exemption by the Minister of Technology for Early Warning Systems (1969); Exempt Register No. 65, exemption by Ministry of Agriculture Fisheries and Food for Beer prices (1969).
29. Exempt Register No. 67: Recommendations of CBI (1972).
30. Section 32(1)(a)-(c) RTPA 1976. An industrial and provident society is a society registered or deemed to be registered under the Industrial and Provident Societies Act 1965 to 1975 or under the Industrial and Provident Societies Act (Northern Ireland) 1969 - Section 32(7) RTPA 1976. A "retail society" means a society which carried on business in the sale by retail of goods for the domestic or personal use of individuals dealing with the Society, or in the provision of services for such individuals.
31. Section 32(3), (4) RTPA 1976.
32. Section 43(4)(b) RTPA 1976.
33. Section 32(6) RTPA 1976.
34. Section 33 re-enacts mutatis mutandis Section 1(2) Agricultura and Forestry Associations Act 1962. The provisions for fisheries were added by Section 44 Agriculture (Miscellaneous Provisions) Act 1968.
35. Section 33(2)(a) and (b).
36. Section 33(2)(c).
37. For the detailed rules concerning implementation of Section 33(3)(a) see Article 4 of Agricultural and Forestry Association Order 1982 S.I. 1982 No. 569. See also Article 7, Banking Act 1979 and Exempt transactions Regulations 1983 No. 1865 concerning deposits of money made by prospective members in order to qualify for membership of the association.
38. Section 33(4). This power has been exercised in respect of the order described above. S.I. 1982 No. 569 contains 6 articles concerning: citation and commencement - article 1; revocation - article 2; interpretation - article 3; provisions to be contained in the memorandum or articles of association - article 4; application of Section 33(1) RTPA 1976 i.e. types of agreement that are exempt - article 5; amount of business to be done with members by certain associations if the exemption in Section 33(1) is to remain - article 6.
39. The 1964 Act refers to the RTPA 1956. Schedule 5 para. 3 RTPA 1976 amends reference to the 1956 Act to reference to the RTPA 1976.
40. Amended from RTPA 1956 by Schedule 5 para. 4 RTPA 1976.

41. DGFT Annual Report (1983) p.43.
42. See for a critical view of the professions, MMC Report on the General Effect on the Public Interest of certain restrictive practices in so far as they prevail in relation to the supply of professional services, (1970) Cmnd. 4463.
43. (Unreported March, 1981) noted briefly at [1981] Com. L.R. 112. For an explanation of why the OFT sought to adopt a strict attitude see, MMC Report on the Supply of Surveyors Services with Reference to Scale Fees (1977) H.C. 5. The MMC criticised the adoption of ad valorem scales on the basis that they were not related to costs. Interestingly, the Royal Institute of Chartered Surveyors were unable, in view of the disparate work carried on, to describe the functions of a surveyor accurately.
44. If an architect agreed with another architect to fix prices for quantity surveying services they sought to provide then (irrespective of any question of professional qualification) the agreement would presumably not be exempt from registration on the basis that, although quantity surveying agreements were exempt when concluded by surveyors, the architects were not surveyors and hence it was not an agreement they entered into in their capacity as architects. As a rule it would seem to be the case that an agreement entered into between an exempt category of service provider (e.g. an engineer) concerning subject matter exempt in another category (e.g. patent agents) is not exempt. See generally, MMC Report on the Supply of Architect Services with Reference to Scale Fees (1977) H.C. 4.
45. An example of an exempt agreement would be agreement between carriers X, Y and Z whereby they will concentrate for 70% of their trade on certain agreed lines and routes thereby limiting the extent to which they competed with each other. A non-exempt agreement would be between shipowners and tugowners concerning standard terms and conditions for the provision of tug-services in and out of UK ports. This agreement is not exclusively between carriers, it is not international, nor are any restrictions contained in the standard terms and conditions directly related to the carriers job of transportation. See, for an example of a registrable agreement along these lines No.S161 Register of Restrictive Trade Practices British - Tugowners Association Standard terms and conditions (1984).
46. Para. 2(2) but International charter flights are subject to the C.A. 1980: S.I. 1984 No. 1919.
47. "Air transport undertaking" is defined in accordance with the Air Navigation Order 1974 S.I. 1974/1114 (1974 II, p. 4057).
48. The terms "stage carriage" and "express carriage" are defined in Sections 117 and 118 Road Traffic Act 1960.
49. "Building Society" means a society incorporated under the Building Societies Act 1962 or any enactment repealed by that Act (and includes a Northern Ireland Society defined in Section 134 of the Building Societies Act 1962) - para. 5(4) of the Schedule.
50. e.g. Re Nuovo Cegam [1984] 2 C.M.L.R. 484; and Fire Insurance D O.J. 1985 L35/20 (7 Feb. 1985).

51. An undertaking given by a firm to the Director General following an adverse monopoly or mergers investigation by the MMC is not an agreement in the wide sense of the word in Section 43 RTPA 1976 - Section 29 Competition Act 1980. The same applies to undertakings negotiated under Sections 4 and 9 Competition Act 1980, again Section 29 makes this clear. Section 29(2) applies its effect retroactively.
52. NEDO, Competition Policy (1978) at pp. 14, 15. In the guidelines issued jointly by the OFT and the Department of Trade and Industry, Guidelines on the Operation of the Restrictive Trade Practices Act 1976 (September 1984) rationalisation schemes are not mentioned in the brief section on Section 29 though the details given of Section 29 in those guidelines is only a cursory summary of the section. Interestingly, the Liesner Committee, op.cit., at para. 3.6 seems to accept that the NEDO report might be acceptable as regards rationalisation. A restructuring scheme for the ten biggest European Companies in the synthetic fibres sector aimed at closing down parts of their capacity (or average 18%) by certain dates was approved in 1984 by the Commission. See Commission Competition Report 1983 para. 59. See also, O.J. 1983 C314 (19.11.83) for a summary of the agreement, and [1985] 1 C.M.L.R. 787 for Commission decision.
53. See, Thirteenth Commission Competition Report (1983) paras. 56-61; and Twelfth Commission Competition Report (1982) paras. 38-41 for details of the Commission philosophy on restructuring and rationalisation.
54. "Agreement" is, by virtue of Section 1(6) given the same meaning as it has in the RTPA 1976.
55. The extension of the exemption to petroleum existing in its natural conditions in strata in the United Kingdom is achieved by Section 31; Continental Shelf Act 1965. The definition of "participation agreement" is the same as that in ss.2(1)(e) and 20 Petroleum and Submarine Pipe-lines Act 1974.
56. Section 1(3) Participation Agreements Act 1978.
57. Section 1(2). When the Act was introduced the Government gave an undertaking that the Secretary of State would consult with and take the advice of the Department of Prices and consumer protection which was, at that time, partly responsible for the administration of competition policy. Today consultation would presumably be had with, and the advice taken of, the Department of Trade and Industry and the OFT (See, Official Report, Standing Committee A, November 29, 1977: C.28).
58. Section 5(5).
59. Section 6.
60. See the Schedule to the Act for the text of the code. For Commencement Order see S.I. 1985 No. 406; For implementation of the Liner Code see S.I. 1985 No. 406.
61. O.J. 1979 L 121/11.

62. c.f. Mogul Steamship v. McGregor Dow [1892] A.C. 25.
63. See Mr. Fraser M.P., H.C. Standing Committee B, Competition Bill (30 October 1979) p.19 col. 1: "One should not believe that those who finance political parties which ostensibly believe in competition do not engage in anti-competitive practices themselves. One golden rule that I learnt as a Minister was that everybody who came to see me in my office believed very strongly in competition provided it did not apply to them. People are fond of urging the virtues of competition provided they are excepted. I am sure the right hon. lady has met representatives of the Stock Exchange since she became a Minister, and they have no doubt urged upon her the argument that competition is excellent for the rest of the world and the rest of the country but ought not to apply to the Stock Exchange." It is believed that the OFT had spent approximately £1m on legal fees preparing their case.
64. Section 1(3) of the Act specifies in more detail the ambit of Section 1(1)(a). The subsection says that Section 1(1)(a) applies, in particular to "... the Deed of Settlement of The Stock Exchange (and any instrument varying or replacing that Deed), the rules, regulations and usages of The Stock Exchange as for the time being in force and any recommendations of the Council of the Stock Exchange which, apart from this section, would be treated as binding on members of the Exchange by virtue of Section 16 of the [RTPA 1976]." For hotly contested parliamentary debate upon this Act, see Hansard: H.C. Vol. 47, col. 1011; Vol. 49, cols. 184 and 905; Vol. 52 col. 932; H.L. Vol. 445, col. 805; Vol. 446, cols. 356 and 374; Vol. 447, col. 340.
65. See, DGFT Annual Reports for 1979 and 1982 at pp. 45 and 33 respectively. See also the implicitly critical statement concerning the government intervention by the Director General in the DGFT Annual Report(1982) pp. 9, 10.
66. Compare this with Section 35(2) RTPA 1976. This provision was presumably introduced by the Government in order to give a cause of action to a plaintiff such as Mercury Communications who were forced to commence proceedings alleging the inducement of a breach of contract as the means to have the Post Office Engineering Union lift its 'blacking' of the inter connection between BT and Mercury. Under Section 18(6) trade unions have no immunity from such civil actions.
67. See Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd. [1976] 1 W.L.R. 676 (C.A.). See generally on the 1977 Act, (1978) Law Soc. Gaz. (5 April 1978) for a comment on the legislative history; and Hansard H.L. Vol. 384, col. 1042 and H.C. Vol. 933, col. 1589 for parliamentary history.
68. See, (Case 23/67) Brasserie de Haecht v. Wilkin (No. 1) [1967] E.C.R. 407; and, (Case 47/76) De Norre v. Concordia [1977] E.C.R. 65
69. Schweppes v. Registrar of Restrictive Trading Agreements No. 2 (1971) L.R. 7 R.P. 336 at p. 375 per Stamp J. [1971] 1 W.L.R. 1148 (Ch.d.).
70. [1980] F.S.R. 179 (Ch. d.).

71. The parties notified their agreement to the OFT in November 1979 but, so it was alleged, only as a precautionary measure. The OFT contended that the agreement was registrable (see, *ibid.*, at p.186).
72. This refusal was made on the basis of the principle in American Cyanamid v. Ethicon Limited [1975] A.C. 396 at p. 407 per Lord Diplock.
73. Section 14(3) Patents Act 1977.
74. See, Cornish, Intellectual property: Patents, Copyright, Trade Marks and Allied Rights (1981) Ch. 8.
75. (1965) L.R. 5 R.P. 437 at p. 463, but see, for a narrower view of the concept of "manufacture" in a different context, Commissioners of Customs and Excise v. Savoy Hotel [1966] 1 W.L.R. 948 at pp. 952, 953.
76. But see Korah, Competition Law of Britain and the Common Market (1981) p. 120 who doubts this conclusion though gives no reasons for such doubts
77. See, British Waste Paper Association's Agreement [1963] L.R. 4 R.P.29 at p. 50; and also, British Furniture Manufacturers Federated Association's Agreement [1966] L.R. 6 R.P. 185.
78. Cornish, *op. cit.*, at pp. 621-624.
79. For examples see, "Stilton" T.M. [1967] R.P.C. 173; Union Nationale Inter-Syndicate's Application [1922] 2 Ch. 653 (C.A.). Most certification marks today are used in connection with specific qualities such as technical and safety standards or composition. The B.S.I. "Kite Mark" is a well known example.
80. The Department of Trade are chiefly concerned to ensure that the mark is not used as an unjustified barrier to market entry by potential competitors. Thus, the Department lays importance upon allowing any person to use the certification mark whose products have the same characteristics as those certified. See Schedule 1(1)(5) Trade Marks Act 1938. For further details See the Mathys Report, (1974 Cmnd. 5601) para. 192.
81. A restriction in an agreement between the proprietor of such a license and a licensee requiring the latter to employ the mark only in respect of goods conforming to the certificate is not registrable. Neither is an agreement whereby the parties agree to incorporate such a clause in contracts with third parties. Both restrictions simply permit what the law already requires. In terms of the RTPA the rule is that there is no registrable restrictions if the alleged restriction simply requires a party to do what he is already bound to do by law - British Waste Paper Associations Agreement (1963) L.R. 4 R.P. 29; [1963] 1 W.L.R. 540.
82. Section 28 Trade Marks Act 1938 which makes provision for registered users. For details of the procedure for registering trade marks and user rights see Cornish, *op. cit.*, Ch. 16; Blanco White and Jacobs, *Kerly on Trade Marks*, (1972).

83. For licensing of plant breeders rights see Section 8 Plant Varieties and Seeds Act 1964. This section is similar to Schedule 5 and provides exemption for such agreements. The provision is noted at Section E of this chapter.
84. But see, Section 44 Patents Act 1977 which seeks to prevent such tying clauses and hence makes registration under the RTPA 1976 somewhat hollow. See, Huntoon v. Kolynos (1930) 47 R.P.C. 403.
85. See, Flushing Cistern Makers Ltd.'s Agreement [1973] I.C.R. 654 where price restrictions were imposed in licenses covering both patented products and registered designs and non-patented or registered products - it was accepted that no exemption applied.
86. (1964) L.R. 5 R.P. 1; (1965) L.R. 5 R.P. 135 (C.A.). For an interesting sequel to the case when the firms in question were fined for offences relating to registration see DPP v. Automatic Telephone & Electric Co. Ltd. (1968) 112 S.J. 109.
87. This is the implication that may be drawn from the critical comment of the court in Flushing Cistern Makers Ltd.'s Agreement [1973] I.C.R. 654 at p. 658 that: "In some cases agreed prices continued to be issued despite the expiration of patents or copyrights relating to them." In terms of the common law doctrine of restraint of trade a restraint on the licensee on competing with the patent holder after expiration of the patent may well be an unreasonable restraint of trade: Mouchel v. William Cubitt (1907) 24 R.P.C. 194.
88. That case was decided prior to entry into force of the Fair Trading Act 1973 when patent pools could still obtain exemption under Section 8 RTPA 1956. The withdrawal of the exemption for patent pools derives from Section 101 Fair Trading Act 1973 which inserted a Section 8A into the RTPA 1976. Section 8A became Schedule 5 (4) - (8) RTPA 1976. The Flushing Cistern case turned not on the existence of a pool but on the existence of restrictions in the sub-licenses granted by the association concerning products that were not covered by patent or registered design i.e., the sub-licenses contained both exempt and non-exempt restrictions.
89. Schedule 5(8) RTPA 1976.
90. (1962) L.R. 3 R.P. 119 at p. 168.
91. See MMC Report on the Supply of Electric Lamps (1951) H.C. 287 where the MMC were critical of the patent pooling activities of a trade association but were not forced to scrutinise every aspect of the case since the parties voluntarily modified their agreement by granting licenses to non-members and by refraining from fixing the prices under which non-patented articles could be sold.
92. It was suggested by counsel in, Academy Sound & Vision v. WEA Records [1983] I.C.R. 586 at pp. 593, 594 that the word "work" referred to an original work within the meaning of Part I of the Copyright Act 1956 and the phrase "other subject matter" referred to sound recordings, films, broadcasts etc. which are subject to distinct copyright under Part II et seq. of the same Act. Vinelott J., as per the quote cited in the text, considered this to be too narrow a construction (ibid., at p. 594C). See also No. 2514 Register of Restrictive Trade Practices, Publishers Association, (1976).

93. See, Merkin and Williams, Competition Law: Antitrust Policy in the United Kingdom and the EEC (1984) p. 342 et seq.
94. See, Investigation into Ford Motor Company (OFT March 1984) refusal to grant copyright licences and see the report of the MMC Cmdd 9437 (February 1985) pp. 36, 37. See also Investigation into BBC and ITV - publication of programme information (OFT December 1984) - All of these concerned the Competition Act 1980.
95. [1983] I.C.R. 586 (Ch. d.).
96. *ibid.*, at p. 594
97. *ibid.*
98. (1963) L.R. 3 R.P. 462 at p. 483.
99. [1967] 1 All E.R. 699 at pp. 707, 714, 719, 724, 725; [1968] A.C. 269 at pp. 298, 309, 316, 325. Followed in Cleveland Petroleum v. Dartstone [1969] 1 All E.R. 201 [1969] 1 W.L.R. 116 (C.A.) [1969] 1 W.L.R. 116.
100. *ibid.*, at pp. 707, 708; and, [1968] A.C. at p. 298.
101. [1977] 1 All E.R. 47 (Q.B.D.).
102. *ibid.*, at p. 53(g), (h).
103. *ibid.*
104. *ibid.*, at p. 53(C).
105. DGFT Annual Report (1976) p. 36.
106. See e.g. British Waste Paper Association's Agreement (1963) L.R. 4 R.P. 29.
107. Any trade association recommendation allowing or encouraging a clause prohibited by the Unfair Contract Terms Act 1977 would not obtain Section 21(2) dispensation from reference to the court.
108. See, Korah, (1977) J.B.L. 79n. 19; Korah, Competition Law of Britain and the Common Market (1982) pp. 126, 127; Cunningham, The Fair Trading Act 1973, (1974) pp. 257, 258.
109. For discussion of precautionary notification see Chapter 4 where the "fail-safe" practice is discussed.
110. Thus notification will prevent one party to the agreement subsequently trying to escape obligations under the agreement by arguing that the agreement should have been registered and that accordingly it is void and unenforceable under Section 35(1) RTPA. See e.g. Academy Sound & Vision v. WEA Records [1983] I.C.R. 586 (Ch. d.).
111. See e.g. No. 5044, Register of Restrictive Trade Practices, Agreement between Croda International and Manox Limited under which the parties shared know-how and other technology for the production of pigments used in the UK in the manufacture of printing inks, paints and cosmetics. Section 21(2) dispensation was given.

112. For another hypothetical example see, Cunningham, op. cit., at pp. 257, 258.
113. See (Case 258/78) LC Nungesser KG and Eisele v. EC Commission - (the Maize Seed case) [1982] E.C.R. 2015; [1983] C.M.L.R. 278.
114. Reg. 2349/84/EEC, O.J. 1984 L219/15 on the application of Article 85(3) of the Treaty to certain categories of patent licensing agreements.
115. See e.g. Schweppes v. Registrar of Restrictive Trading Agreements No. 2 (1970-71) L.R. 7 R.P. 336; [1971] 1 W.L.R. 1148 per Stamp J.
116. MMC Report H.C. 2 (November 1973).
117. See e.g. Province of Bombay v. Municipal Corporation of Bombay [1974] A.C. 58; Attorney General for Ceylon v. A.D. Silva [1953] A.C. 461; Madras Electric Supply Co. Ltd. v. Boarland [1955] A.C. 667; China Ocean Shipping Co. v. South Australia (1979) 27 A.L.R.1. See generally, Wade, Administrative Law (1982) p. 715 et seq.; Hogg, Liability of the Crown (1971) Ch. 7.
118. (1963) L.R. 3 R.P. 462.
119. e.g. Royal Institution of Chartered Surveyors Application [1985] I.C.R. 330 applying Dickson v. Pharmaceutical Society of Great Britain [1970] A.C. 403.
120. c.f. Agreement Relating to Tenders for the Supply of Telephone Cables (20 Nov. 1975) unreported, noted in some detail in DGFT Annual Report (1975) p.91. For the actual agreements see Nos. 3850, 3851, 3852, Register of Restrictive Trade Practices.
121. [1977] 1 All E.R. 47 (Q.B.D.).
122. *ibid.*, at p. 49.
123. *ibid.*, at p. 55(d)(e): "There is nothing in the Acts to convert a guarantor's obligations to pay the creditor on default by the principal debtor into a restriction. On the other hand there is in cl. 6(2) of this underlease an exceptional provision containing a covenant by the surety with the lessor that, if the lessee should go into liquidation and the liquidator should disclaim the underlease, the lessor might, within three months after any such disclaimer in writing, require the surety to accept an underlease of the premises for a term equivalent to the residue of the original term had there been no disclaimer, at the same rent and subject to the like covenants and conditions as were reserved by and contained in the underlease. This covenant by the surety would, however, not come into play until after the original lessee was in liquidation." This situation, held Mocatta J., was covered by the Esso Petroleum rule. The fact that it came into operation only after the original lessee was in liquidation was also apparently relevant.
124. *ibid.*, at p. 53C.
125. *ibid.*

126. [1967] 1 All E.R. 699 at p. 707; [1968] A.C. 269 at p. 298. See also Automatic Telephone and Electric Co. Ltd.'s Application (1963) L.R. 3 R.P. 462 at p. 483; [1963] 2 All E.R. 302 at p. 307; Cleveland Petroleum Co. Ltd. v. Dartstone Ltd. [1969] 1 All E.R. 201 at p. 203; [1969] 1 W.L.R. 116 at p. 119. Both cases were cited with approval on this point in Ravenseft. But see, Stephens v. Gulf Oil Canada Ltd. (1974) 45 D.L.R. 161 per Henry J.
127. [1977] 1 All E.R. 47 at p. 53. There is no legal justification for this trading nexus rule in the Act. It seems to have been adopted as a result of various concerns expressed by Counsel for the OFT: "The Director did not wish to argue, however, that in the case where both the lessor and the lessee provided services this was a state of fact sufficient to require the lease to be registered. If that were the case, there would be extraordinary anomalies between leases granted to a tenant who was going to provide a service on the premises, such as using the premises for the purposes of a betting shop, and a tenant who was going to use the premises for the purposes of selling greengroceries." (*ibid.*, at p. 53(e)(f)). Rather curiously the "nexus" spoken of by Mocatta J. was expressed to be between the parties, on the one hand, and the subject matter of the lease, on the other hand. Precisely what is envisaged in this nexus is unclear. The subject matter of the lease is the estate demised by the lessor and it is accordingly difficult to imagine what trading nexus could exist between parties and estate. The most logical interpretation of this dictum is the one given in the text i.e. a commercial trading link between the parties themselves which is in some way affected by the agreement between them.
128. In terms of policy if the lessor and lessee are direct rivals then the agreement may have anti-competitive effects. If the lessor and lessee are supplier and customer then, again, the agreement can effect competition. In this latter case competition is not effected between the parties themselves since they do not compete; competition may be effected in the lessee's market if the lease gives the lessee some advantage over his rivals.
129. [1977] 1 All E.R. 47 at p. 55(j).
130. c.f. *ibid.*, at pp. 54, 55.
131. *ibid.*, at p. 55(j). See generally Treitel, The Law of Contract (1983) pp. 358-360.
132. Cleveland Petroleum Co. Ltd. v. Dartstone Ltd. [1969] 1 All E.R. 201 at p. 203; [1969] 1 W.L.R. 116 at p. 119. (emphasis not in original)
133. Assignment and lease back agreements might also be registrable. Such agreements are common in local authority land development schemes: A local authority wishes a plot of land developed, it leases the land on a 999 year lease to a property developer. The developer in order to obtain finance enters into a lease and lease back agreement with an Investment company or other financial institution. Under this agreement the developer assigns or transfers for consideration the 999 year lease to the Investment company who leases back the property for a smaller period (e.g. 99 years). The developer now pays the Investment company a rent based upon and variable with certain factors

(e.g. the expected profits of the developer). This assignment and lease back is intended to operate as a mortgage substitute: the developer assigns for a large consideration (the loan) he pays rent on the lease he takes (the repayment). Clearly under this agreement there are two parties providing services in the UK. There is a trading nexus between the parties in that they both have a financial interest in the development venture. The developer gives up a freedom he previously enjoyed. In such situations care must be taken to ensure that any restrictions entered are all accepted by the developer. If all the restrictions are heaped on one side then there are not two parties accepting restrictions and registration is avoided. Whilst the OFT have no real interest in seeing such agreements the danger is Section 35(1) RTPA 1976 which renders void unregistered, registrable agreements.

CHAPTER 3

ANTI-COMPETITIVE CONDUCT: PRACTICE AND PROCEDURE
UNDER THE COMPETITION ACT 1980

A. INTRODUCTION

The RTPA 1976 applies only to agreements and trade association practices; it excludes practices by individual firms which might be anti-competitive or agreements where (often due to the economic power of one side) only one party accepts restrictions. The monopoly control provisions of the Fair Trading Act 1973 do focus on this behaviour but only where performed by "monopoly" firms (monopoly here meaning control of 25% of the market).¹ In the gap not covered by these two pieces of legislation the Competition Act 1980 operates. Indeed, it also significantly overlaps with the monopoly provisions as will be demonstrated. The Competition Act 1980 developed out of, *intra alia*, the Liesner Committee Report, Review of Restrictive Trade Practices Policy (1979) Cmnd. 7512 which highlighted the need for legislation to stop the gap and to provide a more rapid and less cumbersome machinery for the analysis of the conduct of economically powerful single firms.²

The 1980 Competition Act provides for three regulatory procedures: (1) Under Sections 2-10 whereby the Director General may investigate and subsequently refer to the MMC anti-competitive practices; (2) Under Sections 11 and 12 whereby the Secretary of State may refer certain public undertakings to the MMC for "efficiency audits" concerning costs, general efficiency and abuses of monopoly power; and (3) under Section 13 whereby the Secretary of State may require the Director General to investigate any price specified to be "of major public concern".

It is with the first of these three procedures that this chapter is concerned. However, a brief overview of procedures (2) and (3) is given at the end of the chapter.

The following may be found in this chapter:

Section B: Anti-Competitive conduct: Summary of Regulatory Procedure.

In this section an overview of procedure under the Competition Act 1980 is given.

Section C: Anti-Competitive Practices: Definitions, examples. In this section a detailed analysis of statutory wording is given.

Section D: Anti-Competitive Practices: Exclusions from the Act. This section examines the scope of the exemptions from the 1980 Act.

Section E: Anti-Competitive Practices: The Investigation Procedure. This section gives a detailed analysis of law and practice relating to the procedural steps as outlined in Section B above.

- Section F: Investigation of Public Bodies: Brief overview of provisions in Act empowering OFT to investigate public bodies.
- Section G: Investigation of Prices of Major Public Concern: Brief overview of provisions in Act empowering OFT to investigate prices in the market.
- Section H: Confidentiality in OFT and MMC Reports: Brief analysis of provisions covering confidentiality of information.

B. "ANTI-COMPETITIVE CONDUCT": SUMMARY OF
REGULATORY PROCEDURE

It is useful at this early stage to provide a sketch of the regulatory system.³ The details are examined later. It suffices therefore to list the main stages of the procedure:

- Stage 1: Complaints to the OFT of "anti-competitive conduct". Complaints may be made by competitors, customers or others.
- Stage 2: Informal Preliminary Investigation. The OFT investigate conduct informally to see whether a quick solution may be found and to verify certain facts. Parties may negotiate the giving of assurances to the OFT at this stage.
- Stage 3: Formal Preliminary Investigation. This is the first statutorily envisaged part of the procedure and entails detailed investigations by the OFT into the complained of conduct to determine whether the conduct is anti-competitive.
- Stage 4: Report. The OFT publish a reasoned report at the conclusion of their investigation which stipulates whether further formal action is needed.
- Stage 5: The OFT may accept undertakings from complained of parties as a negotiated solution to the problem.
- Stage 6: The "Competition Reference". The OFT may refer the case to the MMC for further analysis by way of reinvestigation.
- Stage 7: Monopolies and Mergers Commission Investigation. The MMC investigate and report within six months on the allegedly anti-competitive conduct and its compatibility with the public interest.
- Stage 8: Post-MMC Undertakings. Following an adverse report the OFT may again accept appropriate undertakings. Alternatively, in certain situations, the Secretary of State can wield wide powers of statutory order against the person whose conduct is complained of.

C. ANTI-COMPETITIVE PRACTICES: DEFINITIONS, EXAMPLES

Section 2(1) CA 1980 reads:

"... a person engages in an anti-competitive practice if, in the course of business, that person pursues a course of conduct, of itself or when taken together with a course of conduct pursued by persons associated with him, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the United Kingdom or any part of it or the supply of services in the United Kingdom or any part of it."

The following seeks to explain the meaning of certain key words and phrases in Section 2(1). That provision is central to the Competition Act 1980 since only "anti-competitive conduct" so defined is subject to the regulatory procedure in Sections 2-10 of the Act.

I. "Business"

"Business" is defined in Section 33(2) CA 1980 as "... a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge."⁴ This definition is non-definitive, it simply provides that "business" includes certain things. The proviso words "otherwise than free of charge" are hard to construe. On ordinary rules of statutory interpretation the meaning of words and phrases may be gleaned by reference to surrounding words and phrases. Accordingly "business" excludes activities not carried on for profit, gain or reward. However, many non-profit making bodies are intimately connected with the commercial world and may exercise considerable economic power e.g. trade associations. It is likely therefore that the word business will be construed widely and the proviso words construed narrowly. Thus, a non-profit making body who is intimately connected with a market and who therefore (albeit indirectly) influences others profits should be considered to be in "business". This interpretation is in line with the analogous judgment of the House of Lords in Town Investment Ltd. v. Department of the Environment⁵ which concerned the Counter Inflation (Business Rents) Order 1972. This instrument (as with the Competition Act 1980) was designed as a counter-inflationary measure. Relevantly, therefore, the House of Lords construed "business" by reference to the mischief of the Order and, by so doing, held the activities of a non-profit making body (in casu a government department) to be business activities within the meaning of the Order.⁶

In the Committee stage of the Competition Bill it was pointed out that an investment policy could be viewed as a policy "in the course of business" which restricted competition. The Minister for Consumer Affairs gave an assurance that the Act was not intended to be used to investigate investment planning. Ministerial assurances, of course, do not bind the OFT but may be taken as a reasonable indication of the latter's position.

II. "Course of Conduct"

This term implies continuity or repetitiveness. Single, isolated or unconnected acts would not fall within the Act. The MMC, and hence presumably the OFT take a liberal view of the phrase and construe it so as to catch a wide range of anti-competitive behaviour. A course of conduct might include repetition of the same act. It might also include a series of different acts which have an economic connection (e.g. they are performed in the same market). It is an equivocal question whether a firm X who has interests in various markets and who perpetrates isolated, anti-competitive acts in each separate market is performing a "course of conduct" or is simply performing a series of unconnected acts. It is certainly arguable that a policy of perpetrating, disparate anti-competitive acts is a course of conduct designed to improve by anti-competitive means that persons general standing in the market. The phrase presumably includes the behaviour of one person who pursues several courses of conduct, these can all be investigated simultaneously provided they are all specified in the statutory notices.⁷

The Secretary of State may exclude by order under Section 2(3) and (4) CA 1980 categories of practice from the definition of "course of conduct". The exclusion may refer to specific practices or to particular categories of circumstance. This power has already been exercised. The Anti-Competitive Practices (Exclusion) Order 1980 excludes specific categories of activity from control. The Competition (Exclusion of Bus Operators) Order 1980 does likewise. Excluded categories of conduct are examined later in this chapter in Section D.

A course of conduct subject to investigation may be past, present or future. Past practices are included so as to prevent companies escaping control by suspending a practice as soon as they become aware of OFT interest. Furthermore, many practices may be seasonable and hence periodic.

III. "Restricting, distorting or preventing competition"

By stark contrast to the RTPA 1976 which regulates agreements of a specified form, the Competition Act regulates practices and conduct which

exert a particular, anti-competitive effect. These words are prefaced by "... has or intended or is likely to have the effect of" Thus, it is clear that the OFT may intervene pre-emptively to prevent economic harm, during the currency of a practice to curtail it, or, subsequent to the end of a practice to cure it. The words restrict, distort or prevent are not necessarily substitutes of each other. An exclusive dealing contract, for example, can restrict competition between supplier and dealer (e.g. no poaching by supplier on dealers territory; no own-production by dealer) but because such agreements may increase penetration of a market and reduce capital entry barriers (since the supplier need not own his own retail outlet) they may increase competition generally in the market rather than prevent it.

It is important to appreciate that whether a practice has anti-competitive effects will depend largely upon the nature of the market. The OFT have commented:

"whether or not a firm's practice is anti-competitive will depend, to a large extent, upon the market position of that firm. The Act is not directed specifically at firms in dominant market positions. However, it is more likely that a firm can restrict, distort or prevent competition if it has some degree of market power. Where a firm is only one among a host of small traders in a market, it is unlikely that it will be able to engage in an anti-competitive practice since, if it attempts to impose restrictive terms on its customers, all that will happen is that it will lose business to its competitors. It follows that, though the Act does not require a monopoly situation to be identified, an important consideration in assessing whether a practice is anti-competitive is the extent to which the firm responsible enjoys market power, whether on a local or national level."⁹

Thus, for example, if X with 4% of the market shares refuses to supply a customer that customer may obtain goods elsewhere. If Y with 75% of the market refuses to supply that customer then he may find it more difficult to obtain alternative supplies since Y might be dominant in his ... locality. In the latter case Y's market power might render his conduct anti-competitive.

This statement implies a de minimis rule whereby ostensibly repugnant practices turn out to be innocuous when the extent of relevant competition affected is measured. The OFT have adhered to this de minimis principle. Thus in British Railways Board, Allocation of Facilities on Motorail¹⁰ the OFT examined allegedly serious discriminatory conduct by BRB who operate a system called Motorail which is a facility available to private passengers wishing to use train services and take a car with them. BRB decided to

restrict the use of Motorail to private passengers so, accordingly, refused to make the facility available to companies (e.g. parcel carriers and motor-car dealers) who wished to use the facility for commercial purposes. The OFT concluded that this refusal to supply the service was reasonable given that BRB wished to reserve the facility for non-commercial usage. The interesting point for current purposes concerns BRB's practice of refusing absolutely to grant access to Motorail to companies expressing a desire to use the service on a regular basis whereas companies seeking irregular use of the service were not inevitably barred from its use. The OFT accepted that there was discrimination here. They also noted that, "BRB's policy of refusing access to Motorail to companies carrying parcels for reward (a policy applied in fact only to those companies which had indicated that they wished to use Motorail regularly) was linked to its perception of the competition offered by such companies to its Red Star Parcels service. In making this link, BRB was intending to restrict competition with Red Star".¹¹ Despite the finding that there was prima facie, anti-competitive conduct, they concluded that the conduct had an insignificant effect upon competition in the market. This was because: (a) there was a number of alternative competition modes of inter-city transport for commercial goods and parcels including alternative facilities offered by BRB; (b) the space available on Motorail would, in any event, have been far too small in overall terms to have had any effect on the parcel carrying market; and (c) the incidence of use of Motorail by commercial carriers was too small for the restricting of access to the service to have had an appreciable effect on the market.

A second case on de minimis, again involving the British Railways Board, concerned British Railways Board,¹² (Facilities for Car Hire and Advertising of Self-Drive Vehicle Hire at Railway Stations). In this case the OFT apparently applied a test of substantiality i.e. did the practices in question affect competition substantially. BRB granted an exclusive right in respect of the provision of self-drive car hire facilities to Godfrey Davis Ltd. and its subsidiary Godfrey Davis (Car Hire) Limited. The OFT decided that this was potentially anti-competitive since it precluded other car-hire firms operating in Railway stations. The second course of conduct examined by the OFT concerned advertising. BRB restricted car-hire advertising in railway stations so as to cushion Godfrey Davis Ltd. from advertising competition at those locations. This course of conduct was also prima facie considered anti-competitive. However, with respect to both courses of conduct the OFT found that the practices had but

small significance in the market. With regard to the exclusive franchise the OFT concluded that the total amount of business diverted to Godfrey Davis Ltd. was very small in proportion to the total car hire market. With regard to the advertising restriction the OFT found that there was little demand for railway station sites for strategic advertising. Further, the restriction could not cushion Godfrey Davis from external advertising. Consequently, the restriction had minimal effect upon competition; the effect of either practice on competition was not "substantial".¹³ It is clear from the facts of this case that "substantial" means anything more than insignificant.¹⁴

It is further important to know precisely where the effects of a course of conduct may be felt since a practice which operates only locally may be as anti-competitive as one operating nationally (hence the words - "in the United Kingdom or any part of it.") In this context the OFT have stated:

"An essential step in identifying an anti-competitive practice is to locate the market in which competition might be affected. The effects of the practice may influence competition at several different levels where a firm is using an anti-competitive practice as a device for improving its own market position at the expense of others, the effect of the practice will be felt in the market in which the firm is operating. But, less obviously, an anti-competitive practice may also have effects on markets which are only partly related to, or even wholly divorced from, the firm's main market. Thus, a cosmetic manufacturer's practice may influence competition between cosmetic retailers; or a finance house may influence the vehicle market by tying leasing facilities to a certain make of car. The competition affected may be at any of the different stages of the production and distribution of goods, as well as in the different stages of the supply or securing of services. Buying power as well as selling power can have anti-competitive effects."¹⁵

The OFT has already, in a number of investigations, examined conduct effecting only a very localised market. In Scottish and Universal Newspapers Ltd., SUNL, a newspaper company, set up a free newspaper called the Lanarkshire World which they used to restrict the amount of advertising revenue available to rivals by giving away large amounts of advertising space free of charge over an unreasonable period of time. The company also imposed a condition on advertisers in the Lanarkshire World that they would not advertise in any other free newspaper in the region. The existence of the Lanarkshire World, the cheapness of advertising space therein and the condition attached to advertising in the paper were all part of a policy designed to harm a rival free newspaper called the Hamilton and Motherwell People. Indeed, this predatory conduct included SUNL in selling its

advertising space at a level below the marginal cost of production and distribution. The OFT concluded that the conduct was anti-competitive. What is of interest is the fact that the investigation focused upon a small market within which SUNL was dominant. The OFT defined in their report the goods and services market as local newspaper advertising and the geographical market as the Lanarkshire region of Scotland which included the District Council area of Motherwell and Hamilton and adjacent parts of the old county of Lanark. Within that area providing the services in question were accordingly only a limited number of firms; of these SUNL was dominant.¹⁶ It is thus clear that the OFT may, and will, define a market quite narrowly such that an individual firm, insignificant against the setting of the national market, is dominant on its own "patch".

IV. "Of itself or when taken together with a course of conduct pursued by persons associated with him"

An investigation may delve into a single course of conduct or it may cast its net far wider examining a series of courses of conduct pursued by associated persons. A course of conduct pursued by a single person may not be anti-competitive; however the same conduct when viewed in the context of the behaviour of an associated person may be anti-competitive. For the OFT to "aggregate" two separate courses of conduct they must be "associated": (a) one must be a corporate body of which the other directly or indirectly has control, either alone or with other members of a group of interconnected bodies corporate of which he is a member; or (b) both are corporate bodies of which one and the same person or group of persons directly or indirectly has control.

For the purposes of the definition of "anti-competitive practice" a person or group of persons able directly or indirectly to control or materially influence the policies of a company can be treated as having control of it, even though they do not have a controlling interest in it.

"Person" includes bodies whether incorporated or otherwise, partnerships and individuals. Thus both "horizontal" and "vertical" association is caught. "Horizontal" association includes associations between parties at the same level of distribution. It would comprise further the situation whereby the behaviour of two rival and unconnected firms have their behaviour coordinated by a third party, for example a trade associations. "Vertical"

association includes the case where the company controls another which is at a different level of distribution (e.g. wholesaler-retailer).

V. Anti-competitive conduct

The Act refrains from defining "anti-competitive conduct" and hence any conduct whatsoever that has an undesirable effect on competition may fit the definition. In each case the economic circumstances will have to be assessed before a conclusion may be arrived at. To be anti-competitive the behaviour in question does not have to amount to "misconduct" in the sense of unlawful behaviour; lawful behaviour may be anti-competitive because of the circumstances surrounding that behaviour.¹⁷

It is impossible to give an exhaustive list of possible anti-competitive practices. The following are examples of practices which may be anti-competitive in certain circumstances: (1) price discrimination; (2) predatory pricing; (3) vertical price control practices; (4) transfer pricing; (5) delivered or base-point prices; (6) aggregated rebates; (7) exclusive dealing; (8) exclusive purchasing (requirements contracts); (9) tie-in sales; (10) full-line forcing; (11) rental only contracts; (12) discriminatory selection of dealers; (13) unfair advertising; (14) unfair franchise practices; (15) no-dualling obligations; (16) refusals to deal (17) selective supply; (18) discriminatory licensing or refusals to license. The OFT have found, to date, that the preponderant number of complaints have concerned anti-competitive clauses in contracts between supplier and customer with the latter being the complainant. Though a significant number of complaints have been brought by one competitor against another. Interestingly many complaints have been found by the OFT to concern three broad sections of the economy: newspapers and advertising; the media; and building societies.

On an economic note it is very important to understand the difference between conduct that harms other parties because it is anti-competitive and conduct that harms other parties because it is economically efficient. A vigorous and innovative firm may deter new firms from entering the market not because it consciously seeks to exclude new firms but simply because new firms are scared of competing. Indeed, the pioneer firm in a market may enjoy scale economies and technological advances that leave subsequent entrants floundering in its wake. Whilst the ill-fortune of these followers can be attributed to the efficiency of the pioneer it cannot be attributed to anti-competitive behaviour by the pioneer. The MMC have confirmed this obvious distinction between efficiency and anti-competitiveness in general

reports under the Fair Trading Act 1973.¹⁸ They have also reaffirmed the principle in respect of the Competition Act 1980. In Sheffield Newspapers they stated:

"It is a feature of competition that it may lead to the failure and disappearance of an unsuccessful competitor. Nevertheless, to fail in competition is not the same thing as to be excluded from competing because competition is restricted, distorted or prevented."¹⁹

The concept of anti-competitive conduct is an economic one; it contains no element of public interest within it. Thus, arguments to the effect that a practice is not anti-competitive because it has a beneficial effect upon employment or because it allows the perpetrator to compete effectively in the international markets are not relevant to a determination of anti-competitiveness. Such arguments relate to the public interest and can only be made before the MMC itself. The OFT are statutorily prohibited from considering such considerations. Nonetheless, it does seem that certain economic elements in the assessment of anti-competitive effect are also relevant to the public interest. The most important would appear to be that agreements that prima facie appear restrictive may not be when the extent of their effect is considered. This 'de minimis' argument has been accepted by the OFT as relevant and the relevant cases have already been discussed in connection with the words "restricting, distorting or preventing competition" above.

Another important factor to note is that conduct that may be economically "disruptive" is not necessarily anti-competitive. An action taken as a legitimate response to a commercial situation may well cause damage to competitors; it is not, simply by virtue of that damage, anti-competitive. In British Telecommunications (Pricing Policy for the Placing of Advertisements in Yellow Pages Directories) 10 October 1984, the OFT examined the policy of British Telecommunications (BT) in suddenly withdrawing a discount they had hitherto granted to advertising agents who placed adverts in Yellow Pages on behalf of advertisers. The agents complained, amongst other things, that the refusal to grant a discount overnight forced them to raise their prices to advertisers. The OFT on this point recognised that BT's action was disruptive however given certain other circumstances they were able to conclude that the action was commercially justified and was not anti-competitive

VI. "Services"²⁰

The supply or securing of services does not include services provided under a contract of employment. "Services" does include: (1) the undertaking and performance for gain or reward of engagements (whether professional or other) for any matter other than the supply of goods. Clearly the performance of a service with respect to (rather than in the supply of) goods is a service; thus plant valuation, quality control services, and, engineering consultancy services, inter alia, are included. (2) The rendering of services to order. (3) The provision of services by making them available to potential users. (4) The making of arrangements for a person to put or keep on land a caravan, other than arrangements by which a person may occupy the caravan as his only or main residence.²¹ (5) The provision of car parking facilities.²² The need to expressly provide for car parking and caravan sites is thought to be due to doubts as to the extent to which the granting of leases is subject to control as a supply of services following Ravenseft v. Director General of Fair Trading.²³ However, it seems likely following that decision that certain abusive practices by commercial landlords may be anti-competitive. (See Chapter 2 Section 0). It should not therefore be assumed that leasing practices are immune from investigation. Nor should this assumption be made about the licensing of intellectual property rights despite the statement made by the OFT in 1976 that they do not consider the grant of intellectual property rights to constitute the supply of services.²⁴ Indeed, the OFT have investigated, and concluded to be an anti-competitive practice, the refusal by Ford Motors to license other persons to manufacture or sell in the UK any replacement Ford motor body part. Ford claimed to be entitled to prohibit such manufacture or sale by virtue of the copyright subsisting in the drawings of body parts registered under the Registered Designs Act 1949. This practice, stated the OFT, enabled Ford Motors to control the spare parts market and also "... control the supply of replacement body parts to the garage trade through its dealer network, and ... this would be likely to have effects on the ability of independent factors to compete with that network for the distribution and supply of replacement body parts for Ford vehicles, and on the ability of the independent repairers to compete with that network for repair of Ford vehicles".²⁵ The OFT's view was confirmed by the MMC.²⁶ The licensing of patent rights moreover is recognised as being prone to investigation as an anti-competitive practice by Section 14 CA 1980.

VII. "Goods"

This includes, inter alia, buildings and other structures, ships, aircraft and hovercraft.²⁷ The word supply as in "supply of goods" includes, inter alia, supply by way of sale, lease, hire, hire-purchase and construction. The supply of electricity is of service and not of goods.

D. ANTI-COMPETITIVE PRACTICES: EXCLUSIONS FROM THE ACT

As with the RTPA 1976 various exclusions from control are listed in the Act. These exclusions are now contained in the Anti-Competitive Practices (Exclusion) Order 1980. Further excluded are courses of conduct required or envisaged by agreements subject to registration under the RTPA 1976. This exclusion derives from Section 2(2) CA 1980. Both of these categories of exclusion are described in this section.

I. Anti-Competitive Practices (Exclusion) Order 1980²⁸

Under Article 2 of the Order two categories of conduct are excluded from the Act. These are, first, conduct listed in Schedule 1 to the Order, and, secondly, conduct pursued by persons defined in Article 2(b) to the Order. These will be examined in turn:

(i) Sched. 1(1) - Export contracts

Conduct comprising of the incorporation in contracts for the supply of goods of conditions which relate exclusively to the supply of those goods outside of the UK is excluded from control. Moreover, the refusal to supply goods except on those terms is also excluded. Where the export market is the EEC businessmen should assume that the European Commission *may* be interested under Articles 85 or 86 EEC if it is considered that the conduct in question affects inter state trade.

(ii) Sched. 1(2) - Transport Acts Agreements and conduct

Any course of conduct required or envisaged by agreements made between bus operators and local authorities under Section 24 of the Transport Act 1968 or Sections 1 to 3 of the Transport Act 1978 are excluded. The former provision establishes the National Bus Company and the Scottish Transport Group and imposes duties (not enforceable by individuals) on the bodies to coordinate passenger transport services. The latter provisions empower local authorities to enter agreements with carriers with respect to financing and facilities. Thus, for example, local authority bus subsidies are not anti-competitive

practices even though the buses might as a result sell their services below cost thereby competitively affecting road and rail services.

(iii) Sched. 1(3) - International Sea Transport

Any course of conduct pursued by an operator of international sea transport services in relation to such services. This includes the acquisition of any goods or any other services in connection with the operation of the international sea transport services. The exclusion extends further to any person securing international sea transport services. Similar exclusions to these for liner conference agreements exists under Section 11 Merchant Shipping (Liner Conferences) Act 1982 which excludes operation of the RTPA 1976 (see Chapter 2).

(iv) Sched. 1(4) - Aviation

Any course of conduct pursued by an air-transport undertaking or required or envisaged by a restriction accepted under an agreement described in paragraph 3(2) of the Schedule to the RTPA (Services) Order 1976²⁹ being a course of conduct pursued solely in respect of international carriage by air. However, Schedule 1(4) has now been amended by the Anti-competitive Practices (Exclusions) (Amendment) Order 1984 S.I. 1984 No. 1919 which amends the Exclusion Order so to bring international charter flights within the Act. An international charter flight is defined as "... a flight on which the whole capacity of the aircraft is available for purchase by one or more charterers for his or their own use or for resale." (The same now applies under the FTA 1973 under S.I. 1984 No. 1887 in respect of domestic and international charter flights.)

(v) Sched. 1(5) - Building Societies

Any course of conduct required or envisaged by an agreement entered into between the Treasury and the Building Societies concerning the raising of funds or the making of loans is excluded from control.

(vi) Sched. 1(6) - Bank of England and Treasury

Any course of conduct required or envisaged by an agreement described in paragraph 6 of the 1976 Services Order to which the Bank of England or the Treasury, or both, are parties, and which relates exclusively to their control over financial institutions, over the money market generally, or to the conduct of markets in money, in public sector debt instruments or in foreign currencies, is excluded from control.

(vii) Sched. 1(7) - Agricultural and Forestry Associations

Any course of conduct pursued by a member of an Agricultural and forestry association or of a fishery association as defined in Section 33 RTPA 1976 (for Commentary see Chapter 2) or pursued by such

an association and being required or envisaged by an agreement described in that section, not being an agreement between the association and someone who is a member neither of the association nor of a constituent association.

(viii) Sched. 1(8) - Parish and Community Councils

Any course of conduct pursued by a parish or Community Council within the meaning of the Local Government Act 1972 or the Local Government (Scotland) Act 1973 respectively is excluded.

(ix) Article 2 Exceptions - Exclusions based on size

This excludes from control persons of below a certain size measures by reference to specified, quantitative criteria. Thus, a course of conduct is not within control if pursued by a person:

(i) whose relevant annual turnover in the United Kingdom is less than £5m; and (ii) who enjoys less than one quarter of a relevant market; and (iii) who is not a member of a group of inter-connected bodies corporate which has an aggregate annual turnover in the United Kingdom of £5m or more or which enjoys one quarter or more of a relevant market. For the purposes of these criteria Schedule 2 to the Order assists with certain elaborations. First, "turnover in the United Kingdom" means the total amount charged for the supply of goods and services in the United Kingdom during that period in the ordinary course of a person's business after deduction of: trade discounts, rebates and other allowances; Value Added Tax and other taxes directly related to turnover; and any amount charged for any supply where both the person supplying the goods or services and the person to whom they were supplied were members of one and the same group of inter-connected bodies corporate at the time of supply. Turnover periods are generally 12 months.³⁰ A person's share of a market for purposes of calculating a quarter may be described in terms of value, cost, price or by quantity.³¹ In determining this market share no account is taken of transactions concluded between members of one and the same group of inter-connected bodies corporate at the time of supply.³² Where the "person" is in a group then the £5m and the quarter market share requirements apply to the whole group.³³

With respect to the quantitative requirements above it must be stressed that for the exclusion from the Act to apply all of the criteria must be satisfied. Thus a firm must have a turnover of under £5m and possess less than a one quarter market share. A firm with a turnover of £2.5m but who possesses 42% of the market is not therefore

excluded; such a firm is a big fish in a small pond and accordingly is not exempt .

Finally, where local authorities are concerned there are no exclusions based quantitatively upon turnover or market share. Such factors are very clearly inadequate as reflections of their economic power and influence. Local authorities are subject to control in so far as their conduct amounts to a "course of business".

II. Courses of Conduct Caught by RTPA 1976

Section 2(2) CA 1980 states that a course of conduct required or envisaged by a "material" provision in a registrable agreement under the RTPA 1976 is not to be regarded as an anti-competitive practice under the CA 1980. The same applies to "material" recommendations of trade associations. Section 2(2) thus makes the CA 1980 and the RTPA 1976 mutually exclusive. The word 'material' used in Section 2(2) CA 1980 simply means that the provision of the agreement or the trade association recommendation which requires or envisages the course of conduct under the spotlight is one to which the RTPA 1976 applies. Thus, if a trade association recommended that its members refuse to deal with categories of firms not meeting certain credit worthiness criteria, or adopt a particular course of discriminatory pricing or employ a very strict exclusion of liability clause in standard form contracts with customers, then such collective conduct and all those who pursue it are regulated under the RTPA 1976 and not the CA 1980. A course of conduct complained of by a single unhappy purchaser in pursuance of the trade association recommendation, will only relate to the conduct of one supplier implying that investigation of the single supplier's behaviour by the OFT under the CA 1980 is called for. However, the course of conduct emanates from a registrable trade association recommendation. Accordingly, the complained of course of conduct is not subject to the CA 1980. This defining of boundaries between the CA 1980 and the RTPA 1976 is logical. The conduct described in the above example is common to all the trade association members; the RTPA 1976 focuses upon the collective nature of the practice and the OFT can use their powers under that Act to enjoin the behaviour of all participant firms. This leads to more effective regulation than under the CA 1980 which allows the OFT to investigate only those firms named in the notice; it militates against the collective analysis of conduct.

Agreements that are excluded from the RTPA 1976 (see Chapter 2) may nonetheless fall within the CA 1980. Thus exclusive dealing contracts are

reviewable under that Act as are exclusive purchasing agreements, exchanges of know-how and patent or other intellectual property licensing practices etc. In investigations under the CA 1980 the examination and analysis of the OFT will be different from that under the RTPA 1976. Thus, whereas under the RTPA 1976 the OFT will assess the collective effect of an agreement on competition (i.e. both parties will be investigated) under the CA 1980 the OFT will be examining the conduct of the single party whose conduct has been complained of. If the parties who are being investigated under the CA 1980 can establish that they have an agreement that is registrable under the RTPA 1976 then the OFT have no jurisdiction under the CA 1980 though they may of course take action under the RTPA 1976.

E. ANTI-COMPETITIVE PRACTICES: THE INVESTIGATION PROCEDURE

At the beginning of this Chapter eight stages were identified as relevant in an anti-competitive practice investigation. These will now be discussed in greater depth.

I. Stage I: Complaints to the OFT

The OFT rely for information of anti-competitive conduct upon inter alia the financial press, upon evidence obtained via economic analysis and research undertaken in-house, and upon complaints made by competitors or customers who feel threatened by another's behaviour. Most investigations commence using data obtained through a complaint. Complaints may be made in any form either orally or in writing. If requested and where this is compatible with the rights of the complained of party the OFT will keep the identity of the complainant confidential.³⁴ Alternatively, a complainant may prepare a brief for submission to the OFT outlining their grievance. There are no rules governing the form of a complaint. The following is a suggested outline structure for a complaint based upon the sort of information the OFT might need to know: (i) the relationship of the complainant to the person pursuing the alleged anti-competitive conduct, the OFT will want to know whether the complainant is a supplier, purchaser or rival etc. of the complained of person. This enables them to assess the legal and economic relevance of the data furnished to them in the complaint. (ii) the nature of the complained of conduct, whether it is a selling or buying practice, whether it entails control over vertical prices, discrimination, predation and any evidence to support the complaint,

for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars etc. (iii) the alleged anti-competitive effects specifying in as much detail as possible how the practice has affected trade. This might entail statistical evidence showing trends in price, market share, turnover, profit levels, other factors in price formation, data demonstrating that the complained of conduct is curbing entry to the market or is deterring the investment or development plans of existing firms. The practice might for example be shown to have necessitated the shedding of labour or specialised personnel. The more acute the evidence of unfair economic consequence the more likely it is that OFT action will be forthcoming. The OFT obtain nearly 1,000 general complaints per annum and have not the resources to investigate every complaint in great depth; they obviously will investigate most thoroughly those which appear to be most economically serious. (iv) the market share of the complainant and an estimate (since accurate data might not be available to the complainant) of the market share of the complained of persons. The greater the market share of the complained of person the more serious the potential anti-competitive consequences. (v) the duration of the conduct in terms of the length of time that it was in operation or the number of times the complained of conduct was repeated. It appears to be the case that single, isolated acts are not reviewable by the OFT some element of continuity or repetition being required by the Act. In practical terms the longer the duration or the greater the number of times the complained of conduct has been repeated, the more likely there is to be an anti-competitive effect. (vi) whether the conduct complained of is carried on in conjunction with any other person and if so what the relationship is between the parties. The OFT must expressly name parties to be formally investigated in special published notices, hence the identity of all parties alleged to be acting anti-competitively should be furnished. (vii) general details of the geographical market, the products or services in question, and customer profiles. Whilst the complainant will be familiar with his market such cannot be reasonably expected of the OFT. Accordingly, background information concerning the product, its substitutes, method of pricing, the extent and nature of competition, the extent of overseas competition etc. is of value. A considerable amount of background information may be needed by the OFT before they can make a considered judgment of the facts.

Whilst some businessmen may be wary of such an extensive approach to

a complaint it should not be overlooked that in commercial litigation it is a salutary rule that the party who has the first opportunity to lay the factual and legal ground can predispose the judge to use their interpretation of events as the framework for further analysis. As an alternative businessmen may persuade their trade association to make the complaint. This would be appropriate, for example, where a major supplier was using coercive selling tactics against a number of smaller purchasers who could utilise the collective muscle power a trade association possesses to present a complaint to the OFT. Complaints may of course be made by the legal advisers of the complainant. Other methods of complaint may be via a local MP or as a result of lobbying the Secretary of State who may request the OFT to investigate. Neither has a legal right to demand an investigation but it is hardly likely that the OFT would not, at least, consider such a request seriously.

The threat of a complaint may per se be an effective weapon as some firms are beginning to realise. In November 1984, for example, Horizon Holidays let it be known publically through the press that they were suspicious of the prices Enterprise Holidays - a subsidiary of British Airways - were possibly going to charge for 1984 summer holidays. Horizon were concerned that the prices would be artificially low as a result of subsidisation from profits earned elsewhere by British Airways. Through such subsidy Enterprise Holidays would be able to undercut rivals, such as Horizon. The latter thought this would amount to predatory pricing so notified the press that they would complain to the OFT should Enterprise Holidays prices be significantly lower than their own when they were finally published. The threat of a complaint was here used by Horizon pre-emptively to forestall and warn off what they considered might be anti-competitive conduct. It will be appreciated that the OFT may investigate conduct that is likely to be anti-competitive; they need not wait for harm to occur before acting. The policy is one of prevention is better than cure.

II. Stage 2: Informal Preliminary Investigation

Prior to the formal commencement of the Competition Act procedure the OFT undertake preliminary inquiries. Such inquiries are not necessarily confined to anti-competitive practices; the OFT might decide, following an inquiry, that the conduct complained of is most appropriately dealt with under the RTPA 1976 or under the monopoly provisions of the Fair Trading Act 1973.

Many complaints are found by the OFT to have no real substance. For example there are the "disgruntled or sacked employee" cases where an employee or ex-employee complains (sometimes anonymously) of his firm or ex-firm. Such complaints are invariably groundless. In many situations the OFT are in something of an adjudicatory position between a complainant and a complained of. Care is always taken in such cases to give both sides the opportunity to be fully heard and to submit their arguments. This routinely-entails contacting the complained of party first to gauge that persons reactions. It should be appreciated that at this informal stage the OFT have no power to demand information or to expedite matters and there can therefore result considerable delays whilst parties seek legal advice, ponder their responses, or, simply stall for time. Some informal investigations can proceed for up to 12 months because of such delays.

The OFT receive up to 1,000 general complaints each year, the informal procedure thus provides an expedient means for the OFT to assess the practice. The OFT view this informal procedure as an opportunity to test the water:

"The object of these inquiries is to check that there is evidence to support the complaint, to give the firm complained about the chance to give its side of the story, and to obtain more information so that the Director General can have a better understanding of the complaint and its surrounding circumstances. Many complaints prove on further examination to include matters which are not the Director General's responsibility, but if further action is appropriate, the Director General will have to decide which of his powers to use. In the case of a possible anti-competitive practice, it may also be necessary to find out whether or not the firm or practice complained of is exempt from the legislation."³⁵

During this informal stage the OFT often manage to obtain "assurances" from parties to complained of practices that they will terminate the conduct or otherwise 'cure' the ill. The informal inquiry is thus something of a carrot and stick: Parties who provide assurances to the OFT save themselves the expense, time and general inconvenience of a formal OFT investigation which might ultimately develop into a MMC inquiry. Thus for instance ICI relinquished a practice of requiring customers to take their entire requirements of soda ash from them at this pre-formal stage. Other examples of assurances obtained at this pre-formal stage are given in the discussion of negotiation of undertakings in stage 5. Where the OFT consider further investigation necessary a team of investigators will be appointed to undertake a detailed inquiry. This team may be different

from that which conducted the informal preliminary inquiry. Though, some specialist economists and accountants may be involved at both stages.

A word of caution is appropriate for complainants coupled to a tentative pointer as to lobbying potential for complained of persons. It is believed in some industries that certain companies have been able to exploit their influence with government departments they are familiar with in order to limit their vulnerability to an OFT investigation. For example, in 1983 a number of small companies complained to the OFT about the supply and cost of peripheral computer equipment (such as extra terminals and problems over long-term maintenance contracts) supplied by ICL, the main British computer manufacturer. ICL agreed, following OFT pressure, to make some changes in its supply policy, but within the computer industry and press it was widely considered that the ICL modifications were accepted by the OFT under pressure from the Department of Trade and Industry who were concerned that ICL should not be restrained from competing vigorously on the international market. It was also argued that since the Government's policy of favouring ICL in its own procurement of computers had to end to comply with EEC rules on Government procurements then ICL would have to compete more effectively abroad to maintain its profit margins. This meant that domestic investigations into ICL conduct could prejudice chances abroad. It has been true in the past that the Secretary of State for Trade and Industry has intervened in OFT decisions and has, on certain exceptional occasion disregarded OFT advice or reversed their policies. This has not to date occurred under the CA 1980.³⁶

III. Stage 3: Formal Preliminary Investigation

(i) Form of Investigation

The formal preliminary investigation commences at the conclusion of informal inquiries. It is initiated by notice of the investigation given by the OFT both to the Secretary of State and to the person whose behaviour is complained of. This notice also indicates the matters to be investigated, the person(s) concerned and the goods or services to which the investigation relates.³⁷ The OFT publish these notices so as to inform other interested third parties of the pending investigation.³⁸ The OFT team will include one official who keeps in regular contact with the parties. The Act does not impose any time limits upon the OFT in the conduct of their investigation. However it does require the OFT

to "... proceed with the investigation as expeditiously as possible."³⁹ It is implicit that investigations will be of significantly shorter duration than monopoly investigations though they can in practice still last for many months(*parties may employ delay tactics*). Section 3(5) of the Act empowers the Secretary of State to direct the Director General to terminate the investigation.⁴⁰ However, this power is only exercisable in the first two weeks of an investigation and even where it is positively exercised it does not preclude the OFT proceeding with a subsequent investigation into the same or predominantly the same case at a later date. A direction from the Secretary of State is not therefore a cushion to protect against future OFT attentions though one might suppose that it would have some deterrent effect. Furthermore, the Government has undertaken to use this power in exceptional circumstances only for example where the case is already being investigated by the Department of Trade in some other connection or by the OFT in connection with another matter. Section 3(5) does however provide a limited potential for would-be lobbyists of the Secretary of State.

To assist them in their inquiry the OFT may require any person to disclose any documents specified in the notice which are under that persons control and relate to matters under investigation.⁴¹ The OFT may further compel disclosure of estimates, returns or other information as may be specified in the notice. Failure to properly disclose is a criminal offence. The OFT may specify further the form in which such data is to be furnished.⁴² The OFT may not compel production of data that could not be compelled in civil proceedings before the High Court.⁴³ The normal rules as to legal privilege for documents are thus incorporated. It is arguable that investigated parties may refuse to deliver up documents that may expose them to penalties. The House of Lords has, at least, gone this far in respect of Articles 85 and 86 EEC when fines may be imposed.⁴⁴ Fines however are not an option under the CA 1980.

The OFT may terminate an investigation at any time prior to its conclusion. Notice of termination must be given to the parties and published in the usual manner. Termination, however, must be with the consent of the Secretary of State. Where the OFT are investigating a practice which is also the subject of a European Commission investigation liaison between the authorities may be necessary.

Although no formal statutory exchange of data between the authorities is provided for the OFT do keep lines open with the Commission. In cases of overlap the OFT, usually, make way for the Commission though this is not inevitable.

(ii) Submitting Economic Arguments to the OFT

During a formal OFT investigation the parties (both complainant and complained of) *may* be in close contact with the OFT. During this period the complained of party to seek to persuade the OFT that its conduct is not anti-competitive. Many companies however concentrate on trying to convince the OFT that their conduct is not against the public interest. They might suggest that their conduct is simply a response to the conduct of competitors; that the practice is justified by reference to criteria in other legislation; that it enhances innovation; that it facilitates export penetration; or that it is accepted as legitimate by other competitors and customers.⁴⁵ It should be stressed that arguments of this nature are of no concern to the OFT since under Section 3(1) CA 1980 the OFT have jurisdiction only to establish whether a person has been or is pursuing a course of conduct that may be described as "anti-competitive". The place for arguments over the public interest is before the MMC. In their report in Sheffield Newspapers⁴⁶ the MMC thus stated:

"The scheme of the Act is that if the Director General of Fair Trading decides that a course of conduct constitutes an anti-competitive practice, he may refer it to the Commission. If he does, the Commission in turn, have to decide, independently, whether the course of conduct is an anti-competitive practice. If they do, they then have to go on to decide whether the practice operates, or may be expected to operate, against the public interest. In deciding that question the Commission, by virtue of Section 7(6), exercise the discretion conferred by Section 84 of the Fair Trading Act. That discretion is amply wide enough to allow the Commission to consider questions - to the extent that it thinks them relevant in the particular circumstances - of the fairness or unfairness of the practice or any party's need to resort to it in order to defend his legal rights. In our judgment the intention is clear, that the Director General is to be concerned only with the question whether the course of conduct restricts, distorts or prevents competition, not with any other question of the character of the conduct. The further question whether the conduct operates, or may be expected to operate, against the public interest arises only at the subsequent stage of a reference to the Commission."⁴⁷

Nonetheless, as has already been explained, the concept of "anti-competitive conduct" and that of the "public interest", are not entirely mutually exclusive. Thus, the OFT do consider whether the complained of conduct has a significant or substantial effect upon

competition. They have thus concluded in certain cases that although the course of conduct is ostensibly anti-competitive there is no justification for a reference to the MMC since the conduct does not exert an acute enough effect on the market.⁴⁸

In discussions and negotiations with the OFT parties should be prepared to submit evidence on economic factors relating exclusively to the complained of conduct and its effects. Thus, evidence as to the product market and geographical market will be important. As regards product market parties will wish to show that their product or service is subject to competition from a wide range of similar goods and services or substitutes which are to some degree in competition; thus where the complained of party manufactures beer it may be arguable that cheap wine is a competing product.⁴⁹ If the product in question is apples then the product market might be pears, other hard fruits, and some soft fruits.⁵⁰ In Scottish and Universal Newspapers the OFT defined the product market in an investigation into newspaper company advertising practices as: daily papers; local radio; posters; cinema; direct mail; directories and prestel. The wider a complained of party can define the product market the less significant will become his conduct. The principle is that of the little fish in a big pond. A complainant on the other hand will base his evidence on the narrowest product market in order to suggest that the complained of party is in reality a big fish in a small pond.

As regards geographical market exactly the same principle applies. The complained of party will suggest that the geographical market is wide; the complainant will suggest that it is narrow. To prove that the market is wide a party will seek to show that there are no substantial barriers to entry deterring firms from joining the market and competing. Such a party will also seek to show that rival suppliers can get their products or services to the location where the complained of party sells or provides services without difficulty. This will entail in goods cases showing that there are readily available and economic forms of transport. The complainant will by contrast seek to show that the geographical market is small, that there is no effective competition outside of the local market and that the potential for penetration by outsiders is small.

The OFT have conducted a number of investigations into the practices of newspaper companies. In each the geographical market has been important although the arguments of parties in such investigations

have sometimes tended to ignore the importance of market definition. How does one decide whether a newspaper in Wolverhampton, for example, competes with one in Birmingham which is only 20-30 miles away? One essential factor will be the location of readers. This will primarily be determined by the extent to which the paper views itself as a local paper covering local news and containing local advertising. Thus, a local newspaper may not be subject to strong competitive pressures from Birmingham newspapers.

In the final analysis the OFT have their own teams of economists who are experienced in this form of market analysis. Parties, in making representations over such factors, must thus remain realistic if their submissions are to remain credible.

IV. Stage 4: Report

(i) Content of Report

Under Section 3(10) the OFT are obliged, as soon as is practicable following completion of an inquiry, to publish a reasoned report stating whether in their opinion any course of conduct described in the report constituted or constitutes an anti-competitive practice and, if so, specifying the person(s) concerned and the relevant goods and/or services, and, stating with reasons whether a reference to the MMC is considered appropriate. The OFT have published about four reports per year to date. These generally provide excellent accounts of the machinery of an industry and of the relationships between its participants. The legal conclusions are invariably not so detailed but look like a factual economic analysis of the effects on competition. Not all complaints laid before the OFT end in a report; the OFT are not obliged to commence investigatory proceedings in a given case. Section 3(1) CA 1980 simply says: "If it appears to the Director that any person has been or is pursuing a course of conduct which may amount to an anti-competitive practice, the Director may ... carry out an investigation". The section grants a power to investigate; it does not impose a duty. The complainants' written brief discussed above might be useful in this context since if the OFT is ready armed with accurate and relevant data they are more likely to react: the complainant may have done some of the spade work so that the task of the OFT is eased. However, given the very large number of complaints received by the OFT per annum not all will be fully investigated. The

reports may be very detailed and contain information on: the background to the industry (the companies, the goods or services, the technology involved, the legal or regulatory context); market participants; demand and supply; price levels; relationships between major parties; effect of the allegedly anti-competitive practices upon the market; legal conclusions; and conclusions as to further action arrived at by the Director General. In some reports detailed appendices are included showing the methodology and results (where possible) of the OFT's inquiries. Thus, in Arthur Sanderson & Sons Limited⁵¹ concerning the selective distribution criteria of the company for determining whether to supply fabrics to retail outlets and whether those criteria amounted to anti-competitive practices, the OFT sent a questionnaire to 347 of Sanderson's class A stockist outlets and to 159 outlets classed as new accounts. The response rate was 197 replies from Class A stockists and 41 replies from new accounts. The questionnaire sought data on selling prices and levels of mark-up of different types of retail outlet for different fabrics. Data received from the stockists was treated as strictly confidential and was aggregated. The data collected enabled the OFT to decide that price competition was not the central ingredient of competition in this market and that standards of service and quality and variety of stock were more important. A report might conclude that the practice is not anti-competitive but may still be critical of the conduct examined. Thus, in Thames Television Limited⁵² the Director General denied that the advertising practice whereby Thames granted favourable terms and conditions to persons committing or agreeing to commit specified proportions of advertising revenue on T.V. advertising time in London, was anti-competitive. However, the Director General added: "A practice which is not anti-competitive in terms of the Competition Act may nevertheless be discriminatory. The TTV share-deal system clearly discriminates between advertisers and between agencies.... In the course of this investigation my office has become aware of a number of similar schemes operated by other television contractors, although it has not conducted formal investigations under the Competition Act into the practices of any contractors other than TTV. This report draws attention ... to the duty of the Independent Broadcasting Authority to secure compliance with certain statutory rules as to advertisements, including a rule against 'unreasonable discrimination either against or

in favour of any particular advertiser and a rule about the publication by contractors of their charges. The Authority has hitherto refrained from pronouncing on the principle of share-deal schemes I propose to bring this report to the attention of the Authority, so that it may consider whether further action is necessary in context of its general duty under Section 8 of the Broadcasting Act 1981".⁵³

(ii) The exclusion of Public Interest arguments

It should be stressed that in reporting, the function of the OFT is to decide whether a course of conduct amounts prima facie to an anti-competitive conduct. It is not empowered, as has already been explained, to appraise that conduct against the public interest. If a conclusion is reached that the conduct is anti-competitive, and satisfactory undertakings cannot be obtained, then the OFT may refer the practice to the MMC for reinvestigation and for assessment of its compatibility with the public interest. Many firms put public-interest arguments to the OFT although in their reports the OFT go to lengths to state that they make no judgment vis-a-vis the public interest. They will, on occasion, however, incorporate in the appendix to the report a statement concerning the public interest arguments put to them by the person whose conduct is being scrutinised.⁵⁴ Parties being scrutinised might consider requesting the OFT to include such a statement in their Report on the basis that since the Report will be published widely it allows the parties to have their views heard on this important subject. Moreover, submitting public interest arguments to the OFT (albeit for no legal purpose) may have the practical effect of making the OFT more likely to accept compromise undertakings following their report if the OFT entertain a degree of sympathy for the investigated party. In practice however the OFT discourage such submissions.

Businessmen being investigated by the OFT frequently complain that it is unjust and inequitable for the OFT to investigate them and not their competitors who use similar practices. They complain further that a condemnation or prohibitive order made against them preventing them from pursuing the alleged conduct can lead to their rivals benefiting from their inability to compete effectively. This was asserted in the Scottish and Universal Newspapers Limited⁵⁵ case where the company investigated asserted that it was unjust and against the public interest for them to be restricted in the steps they could take to run their business when such restrictions were not imposed upon competitors

thereby offering them a commercial advantage. A similar complaint was made by the investigated company in Arthur Sanderson & Sons Limited.⁵⁶ The OFT reject this argument (which in any event is a public interest argument); any correctly made decision to investigate inevitably disadvantages the investigated party. It will be recalled that the jurisdiction of the OFT is to simply assess whether prima facie an anti-competitive practice exists or not. Consequently, arguments that an investigation is unfair because it singles out the investigated firm is an argument to be reserved for the MMC. However, even there it is not an argument with much hope of success. Such a complaint might have the effect of inducing the OFT to take action against other persons pursuing similar conduct. Those other persons cannot be added to an inquiry by the OFT or the MMC unless they have been specified in the original notice of investigation or competition reference.

Finally, the factual content in a report (not the legal conclusions) is usually disclosed to the parties prior to publication. This enables them to ensure the accuracy of the facts. A copy of the full report is forwarded to the parties shortly (24 hours) prior to formal publications thereby enabling them to consider the implications of a report and have prepared a public comment where necessary. It should be noted that companies who are likely to proceed to full MMC investigation may request the OFT to include a statement of their public interest arguments in the OFT Report.

V. Stage 5: Negotiation of Undertakings: Informal Assurances and Formal Undertakings

(i) Informal Assurances

The Act provides only for "undertakings" to be given by parties following a formal investigation and an OFT report. However, many cases are dealt with prior to this during the informal investigation (stage I) on the basis of "assurances" given the OFT by parties to the complained of conduct. In Permutit-Boby Limited's Spare Parts Policy⁵⁷ the OFT persuaded PBL, specialists in water treatment equipment, to modify their spare-parts supply policy. Complaints had been received from independent service companies who had been refused supplies of spare

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parts direct from PBL; this denied them the chance to compete on equal terms with PBL's own service engineers for repair and servicing work. Following OFT pressure PBL agreed to supply spare parts to all prospective customers for a 12 month trial period. In lieu of this the OFT agreed not to commence a formal investigation. In Boosey & Hawkes PLC franchise agreements⁵⁸ Boosey & Hawkes who are manufacturers, importers and distributors of musical instruments amended their franchise agreements. The amendment consisted of deletion of a clause in the agreement designed to prevent a franchised dealer from obtaining foreign made musical instruments which competed with those of Boosey & Hawkes. The OFT agreed to halt inquiries following this amendment by the company. In Halifax Building Society and Property Insurance⁵⁹ the Halifax Building Society agreed, following discussions with the OFT, to no longer insist on its borrowers taking out property insurance through the Society. Subject to certain new conditions borrowers were thereafter able to arrange their own property insurance. Under the new arrangement accepted by the OFT where the borrower wishes to arrange own insurance the Society's administrative costs would be borne by the borrower; these include a small charge for contingency insurance to complain against the possibility of any breakdown in the independent insurance arrangements. Following this development the Director General wrote to other building societies which continued to tie mortgages to insurance agency services requesting them to say what changes they proposed to make in the light of the Halifax relaxation. In Wadham Stringer⁶⁰ the company agreed to reinstate credit and discount facilities to Mr. Merson, a car dealer, following discussions with the OFT. Mr. Merson operated a business importing left-hand drive British made cars from the continent for conversion to left hand drive. He complained to the OFT that Wadham Stringer had withdrawn credit and discount facilities for the supply of necessary parts on the ground that Mr. Merson was undercutting their own retail trade. Following OFT pressure Wadham Stringer reinstated credit and discount facilities and assured the OFT that this had not been company policy but was unilateral action taken by a local branch manager. In a published notice the Director General stated:

"This case was resolved in under four weeks. It is therefore a good example of how, in certain circumstances, the Competition Act can work quickly, effectively and without the costs and burden of a full, formal investigation."

In Scottish Milk Marketing Board's Cattle Breeding Service⁶¹ the OFT

intervened following a complaint about the dominant position of the SMMB and its pricing policy for delivery of semen to farms and provision of an artificial insemination service. Following discussions the SMMB: (a) assured the OFT that its cattle breeding services are not subsidised out of revenues from other activities and that it does not therefore gain an unfair advantage in those parts of this market where private companies compete; (b) changed the accounting and pricing policy of its cattle breeding services division to ensure that administrative costs are more closely related to activities which will enable the prices charged for different services to reflect more accurately underlying costs; (c) discontinued the practice of charging a higher insemination service fee for using bought-in rather than SMMB-supplied semen, in order to avoid discrimination against private bull breeders; (d) reduced the handling charge for delivery of bought-in semen to farms from 50p. to 30p. and the handling charge for the artificial insemination service using bought-in semen from £1.50 to £1.10. This had the effect of relating the fee for delivery and use of bought-in semen more closely to its handling costs, plus a small contribution to overheads. This case demonstrates clearly the value of informal OFT intervention. The case could easily, given the economic position of SMMB, have led to reference to the MMC under either the Competition Act or the monopoly provisions of the Fair Trading Act.

(ii) Formal Undertakings

Following a formal report by the OFT stating that an MMC investigation is appropriate the OFT will consider written representations given to them by persons specified in the report as conducting anti-competitive behaviour. Note that the onus is on the parties to proffer undertakings. The written representations shall contain proposals as to what should be done to cure or mitigate the anti-competitive conduct specified in the report.⁶² Any such representation may include an undertaking by which the person agrees to be bound for a period specified in the representations.⁶³ The OFT are not obliged to accept undertakings offered to them; if they do accept however they will notify the parties concerned.⁶⁴ Where undertakings are accepted the OFT arrange for them to be published usually in the form

of an announcement in the news media and in 'British Business' (formerly Trade and Industry)⁶⁵.

(iii) The Scope for negotiations

The scope for negotiation of undertakings will depend upon the number of options existing that may cure the complained of conduct of its anti-competitive effects. Parties should thus consider the OFT report carefully and draw up a list of possible options ranging from the most extreme option (usually total abrogation of the practice) to less extreme options (involving modification of the practice). Parties must be realistic in this; the OFT will expect the parties to suggest effective curative measures though there may be scope for negotiation over some of the finer detail. Thus in an OFT report complaining that a party has operated a below-cost selling predatory campaign the OFT may seek an undertaking from the party that it will not sell below cost. In such a case discussions may well occur over the precise meaning of marginal cost. In a case involving discriminatory discounts there may be scope for negotiation over when a discount is discriminatory and when it is justified as a response to competitive and other ordinary commercial pressures.

An interesting example of an undertaking given by a firm in order to avoid reference to the MMC is that given by Scottish and Universal Newspapers Ltd. (SUNL) following an OFT report concluding that SUNL were predatory pricing in respect of advertising space in one of their newspapers (the Lanarkshire World).⁶⁶ The undertakings finally given contained built in provision enabling the OFT to monitor the future conduct of the parties. Essentially the undertaking accepted by the OFT required SUNL:

- not to supply or offer to supply advertising space in the Lanarkshire World free of charge to any person. This undertaking did not prohibit SUNL from publishing free of charge details of the publishing activities of SUNL itself or corrections to any advertisement which had previously appeared in Lanarkshire World free of charge;
- not to supply or offer to supply any advertising space in Lanarkshire World upon condition that that person does not acquire or offer to acquire advertising space in any competing publication;
- not to supply or offer to supply any advertising space in Lanarkshire World to any person on a charge which does not equal or exceed that part of the marginal cost of producing and distributing the Lanarkshire World attributable to that advertising space.

The OFT had SUNL incorporate in the undertaking various monitoring provisions entitling the OFT to call on SUNL to furnish information on: (i) size, content and circulation of Lanarkshire World; (ii) costs incurred in production and circulation; (iii) charges made for the supply of advertising space in the paper; and (iv) revenue attributed to the paper. The undertakings were stated to be effective for a five year period.⁶⁷

(iv) Variations and release of undertakings

Where circumstances change the OFT may release the person from the undertakings or, conversely, draft a new undertaking to take account of the changes.⁶⁸ In such cases the OFT must notify the persons concerned of the release or the changes stating the nature of the changed circumstances.⁶⁹ Parties subject to undertakings should thus discuss with the OFT what the latter consider to represent a change of circumstances likely to lead to release from or variation of undertakings. Thereafter parties should be ready to make suitable representations to the OFT in respect of release. The OFT, in monitoring undertakings will also notify persons whom they consider are failing to comply with the undertaking. Failure to comply with either an undertaking per se or a variation thereof can lead to full MMC investigation.⁷⁰

Under Section 5(3) no reference may be made to the MMC within a period of four weeks commencing from either the date of the report or the date of the notice, whichever is relevant. Nor may a reference be made to the MMC more than eight weeks after those dates. It is during this short period of eight weeks from date of report or notice until the last date for the making of a reference that the OFT will seek undertakings. This relatively short period imposes pressure upon firms to give an immediate undertaking. The eight week period may be extended for a further four weeks by the Secretary of State if the latter considers it necessary in order to allow the OFT to continue negotiating undertakings. An extension can only result from a representation by the OFT; the Secretary of State cannot extend the period unilaterally. There is hence no scope for lobbying the Secretary of State⁷¹ though a request to the OFT to have the period extended is of course feasible. If no reference is made within the specified period or extension thereof the inquiry lapses. Upon the evidence of the negotiation or undertakings in Monopoly cases this is a very tight time schedule, firms will need to respond rapidly and with conviction.⁷² For other forms of lobbying see under stage 6 below.

VI. Stage 6: The "Competition Reference."

(i) Form of the Reference

Following publication of a report, and within the specified time limits, the OFT may make a "competition reference" to the MMC. There are three situations in which such references may be made: (1) where, following publication of a report by the OFT which states that a reference is appropriate the OFT have ~~not~~ accepted satisfactory undertakings from the relevant parties - this is termed a "report reference";⁷³ (2) where the OFT have given notice under Section 4(4)(c) to a person who has hitherto given undertakings but who has subsequently failed to carry out those undertakings - a reference here is termed a "notice reference";⁷⁴ (3) where the OFT have given notice under Section 4(5) to a person who has hitherto given undertakings but who, in the opinion of the OFT taking into account changing circumstance, should now accept new, varied or extended undertakings, and where such persons refuse to accept the new, varied or extended undertakings - this also is termed a "notice reference".⁷⁵

(ii) Informal representations to the Secretary of State

Following an adverse OFT report parties will have to decide whether to negotiate undertakings or whether to stand by their public interest arguments and seek to defend the practices before the MMC. At this **stage** *an* opportunity for making representations to the Secretary of State exists. Under Section 7(2) CA 1980 the Secretary of State may, before the end of a two week period commencing with the day on which he receives a copy of the competition reference sent to him by the Director General of Fair Trading, direct the MMC not to proceed with a reference. The Secretary of State may also, within the same time constraints, direct the MMC not to proceed with a variation to a competition reference made by the Director General. The period of two weeks sounds very brief. In practice the scope for *submissions* is longer since the competition reference may not be made until after four weeks following the publication date of the OFT report. Thus, *representations may be made* for six weeks from the date of the report. The scope for such *submissions* will vary from case to case. Some parties have *argued* on the basis of evidence to be found in Hansard of Parliamentary debate on the Competition Bill and have *suggested* that, according to the Ministerial statements made at the time, certain practices were outside the scope

of the Act. This has been the case, for example, with respect to the licensing of copyright. Parliamentary statements differed as to whether such licensing practices could be regulated under the Act. Parties therefore considered that the Secretary of State might feel constrained to follow the statements of earlier Ministers and succumb to their requests to stop a reference to the MMC. Such attempts have to date uniformly failed. The Secretary of State **apparently considers that** he is not bound by parliamentary statements; that the scope of the power of review under Section 2(1) CA 1980 is unlimited; and that the proper place for an effective and thorough examination of the merits is the MMC itself. As a result although the possibility of successful submissions is not ruled out current practice is to refrain from interfering with OFT decisions to refer cases to the MMC. If submissions are to succeed **they** will almost certainly be on the basis that a reference to the MMC is against the public interest. The Secretary of State and supporting DTI staff will not wish to second guess economic decisions made by the OFT who are in much the better position to assess the market. However public interest arguments are outside the scope of the OFT remit so that this objection does not apply where such arguments are in question. Though, as suggested above, even with public interest arguments the Secretary of State will be of the view that the MMC is a more appropriate forum for their exposition since that body has the personnel and experience to weigh up in an effective manner public interest arguments. Moreover, the Secretary of State is inclined to point out that he is not bound to follow MMC recommendation made in a report at the conclusion of proceedings.

It should be stressed that any representations made to the Secretary of State are outside of the formal procedure as envisaged by the CA 1980.

VII. Stage 7: Monopolies and Mergers Commission. Investigation and Report

(i) Duty of the MMC

Few investigations ever reach this stage since many companies prefer to give undertakings rather than devote resources to further battle.

The scope of the remit for the MMC is determined by the "competition reference". In the reference the OFT specify: the person(s) to be investigated; the goods and services concerned; and, the course of conduct to be investigated.⁷⁶ The OFT may not refer persons, goods and services, or conduct not outlined in the report.⁷⁷ Conversely, it is not obliged to refer for investigation every person or piece of conduct mentioned in the report.⁷⁸ In effect the reference must be related to the report but may exclude matters contained therein. Thus, for example, if a satisfactory undertaking is obtained from X out of a group of associated persons then X and his behaviour need not be referred. Alternatively X might give undertakings in respect of one activity but not in respect of another; in such a case only the latter act might be referred. Though the Director might decide to refer a practice to the MMC even though it has been abandoned on the basis that it may be resumed at a future date.⁷⁹ Simply because an undertaking has been given to the OFT this does not necessarily entail escape from investigation by the MMC; the OFT can make a reference covering a situation about which unfulfilled or unsatisfactory undertakings have been given.⁸⁰ Thus, X cannot simply give an undertaking to avoid reference to the MMC if he has no intention of complying with it since, as described under Stage 6, a competition reference may derive from a breached undertaking.

The duty of the MMC is to, "investigate and report" on:
"(a) whether any person subject to the reference was at any time during the period of twelve months ending on the date of the reference pursuing, in relation to goods or services specified in the reference, a course of conduct so specified or any other course of conduct which appears to be similar in form and effect to the one so specified; and (b) whether, by pursuing any such course of conduct, a person subject to the reference was at any time during that period engaging in an anti-competitive practice; and (c) whether, if any person was so engaging in an anti-competitive practice, the practice operated or might be expected to operate against the public interest."⁸¹ The public

interest is defined by Section 84 Fair Trading Act 1973. This provision is quoted below.

The OFT ~~may (but in practice don't)~~ influence proceedings before the MMC since they may, at any time, by notice to the MMC, restrict the scope of the latter's investigation by excluding from the investigation: some or all of the activities of the person subject to the reference; any goods or services specified in the reference; or, any course of conduct specified in the reference. On the receipt of such a notice the MMC shall discontinue their investigation on those matters and shall make no reference to them in their report.⁸² This power of control exercisable by the OFT is subject to veto powers held by the Secretary of State.⁸³ Where the OFT exercise their power of control over the MMC a copy of the variation reference shall be sent to the Secretary of State. The Secretary of State may, within a two week period commencing from the date on which he receives notice of the variation, direct the MMC not to proceed with the particular investigation. Alternatively, the Secretary of State may direct the MMC to ignore the variation to the reference made by the OFT.

(ii) MMC Procedure

The rules for MMC proceedings are essentially the same as those under the Fair Trading Act 1973 ~~for mergers~~⁸⁴. Thus, the time-limit for a report is six months beginning on the date of the reference though the period can be extended by a further three months at the discretion of the Secretary of State on receiving representations from the MMC.

On the basis that a case takes six months from complaint to OFT report; two months thereafter before the competition reference; and a six further months for the MMC to investigate and report, a fifteen month period can elapse prior to a final report. The period may, even then, be longer where post MMC undertakings have to be negotiated or decided. By contrast, as the Wadham Stringer case discussed under stage V reveals, an informal solution may arise in under four weeks.

As noted above the actual procedure before the MMC is the same as that for ordinary references under the Fair Trading Act 1973. The MMC determines its own procedure.⁸⁵ In practice the MMC are inquisitorial and not adversarial. They avoid confrontations between the parties preferring rather to invite oral and written submission from the parties, and other interested persons in private hearings which are not open to the public. The OFT generally meet with the MMC at an early stage in order for the former to present their views. Though the OFT report will constitute detailed submissions outlining the latter's position so the need for other

submissions may not be great. The MMC take efforts to independently collect empirical and other data. Thus the MMC might employ consultant market research organisations or bodies such as the Consumers Association to undertake empirical spade work on its behalf. The MMC usually devote about five staff to CA 1980 investigations though back up teams of lawyers, economists, accountants and other civil servants within the MMC administration may be involved in analysis of evidence. Accountancy investigations into pricing have been common in monopoly reference and may well become so in CA 1980 investigations.

(iii) Submissions by parties

The MMC may specify the nature of the information they require from the parties who thus may be asked for submissions relating to the following matters and questions:

- (a) whether the parties agree with the factual analysis as described in the OFT report;
- (b) whether the parties agree that the course of conduct specified in the OFT report has been carried on;
- (c) whether there are any additional facts that the parties wish to be taken into account;
- (d) whether the parties agree that the course of conduct specified constitutes an anti-competitive practice;
- (e) what is the view of the parties as to the effects of the course of conduct specified in the reference on the public interest?

(iv) The Public Interest: Section 84 Fair Trading Act 1973

By the time parties arrive before the MMC they will be familiar with the arguments concerning the anti-competitive practice. However, arguments concerning the public interest will be less familiar. Such arguments may take any form the parties please. Though the MMC usually identify the matters they are interested in. Section 84 reads as follows:

"In determining for any purposes to which this section applies whether any particular matter operates, or may be expected to operate, against the public interest, the Commission shall take into account all matters which appear to them in the particular circumstances to be relevant and, among other things, shall have regard to the desirability -

- (a) of maintaining and promoting effective competition between persons supplying goods and services in the United Kingdom;
- (b) of promoting the interests of consumers, purchasers and other users of goods and services in the United Kingdom in respect of the prices charged for them and in respect of their quality and the variety of goods and services supplied;
- (c) of promoting, through competition, the reduction of costs and the development and use of new techniques and new products, and of facilitating the entry of new competitors

- (d) of maintaining and promoting the balanced distribution of industry and employment in the United Kingdom; and
- (e) of maintaining and promoting competitive activity in markets outside the United Kingdom on the part of producers of goods, and of suppliers of goods and services, in the United Kingdom."

The factors in Section 84(1)(a)-(e) are only examples of particular circumstances the MMC must consider. Parties may present any other arguments they so desire. In the investigation into Sheffield Newspapers⁸⁶ the MMC appeared to accept that in their style and economic philosophy Section 2(1) CA 1980 (definition of anti-competitive practice) and Article 85(1) EEC were similar. They rejected however an argument, based upon the similarity between Article 86 EEC (abuse of a dominant position) and Section 2(1), that the latter provision could only be operative against parties who had "misconducted" themselves. The MMC replied that whilst Article 86 EEC may involve misconduct Section 2(1) certainly did not. The importance of this point lies not in the misconduct argument but in the relevance of EEC law as a guide to the MMC investigations. Article 8 EEC is broad enough to catch agreements whereby suppliers enter agreements with dealers or other purchasers and which contain anti-competitive and restrictive clauses. Much of the work of the OFT under the CA 1980 concerns restrictive clauses in contracts between persons at different distributional levels. Consequently the two provisions are similar. Given this fact the MMC seemed prepared to accept that had Article 85 EEC cases been cited to them which were relevant to the analysis then the MMC would have considered them:

"By contrast, the wording of the opening part of Article 85 does seem to us to reflect a concept very similar to that embodied in Section 2(1) of the Competition Act, and if SNL had been able to point to decisions of the European Court interpreting Article 85(1) in the restricted sense contended for, we might have had to consider to what extent the similarity of language should incline us towards a like interpretation."⁸⁷

In the light of this statement parties may seek support for their arguments from EEC decisions on competition. Decisions of the European Commission as well as judgment of the European Court should be relevant in this respect.

(v) Pre-Publication Inspection of the Report

As with the OFT reports companies concerned are given an opportunity to verify the factual part of the report thereby enabling them to comment on its factual content. Under Section 17(2) CA 1980 the Secretary of State must give at least 24 hours notice of formal publication to those named in the reference.

VIII. Stage 8: Post-MMC Undertakings and Orders

(i) Procedure and Undertakings, Section 10 CA 1980

In the event of an adverse report of the MMC a number of options arise. The MMC, in their report, must consider what action (if any) should be taken for the purpose of remedying or preventing the adverse effects of that practice.⁸⁸ Moreover, they may, recommend suitable curative action.⁸⁹ Following this adverse report the Secretary of State may, by notice in writing, request the Director to seek to obtain from the person(s) concerned an undertaking to, "... take or refrain from taking any action with a view to remedying or preventing those adverse effects".⁹⁰ Thus the OFT may seek positive (i.e. obligation to act - e.g. restore trading links or supplies) or negative (i.e. obligation not to act - e.g. refrain from selling below cost or discriminating between customers) undertakings. Despite use of the non-mandatory word "request" to describe the Secretary of State's communication to the Director General the latter is under a duty to seek undertakings.⁹¹

Where the OFT fail to obtain a satisfactory undertaking they may advise the Secretary of State about the appropriate action to take. The Secretary of State must take account of this advice when considering whether or not to make a formal order against the party in question under the order making powers in Section 10 CA 1980. If such an order is made it may take a number of forms: (a) It may be prohibitive enjoining a person engaging in an anti-competitive practice specified in the MMC report or any other practice which is similar in form and effect; (b) alternatively or additionally, the order might involve the exercise of any of the powers specified in Part I of Schedule 8 of the Fair Trading Act 1973. These are very wide ranging and can render unlawful the performance of behaviour reported as anti-competitive by the MMC. The wide order making powers in (a) may only be exercised in a number of situations. These are: where the person concerned has refused to give the OFT an undertaking following an adverse MMC report in pursuance of a request by the latter; or, where the OFT were not requested to seek an undertaking and the Secretary of State thought it appropriate to proceed immediately with an order; or where the OFT notify the Secretary of State that an undertaking given to them following an adverse MMC report is not or has not been fulfilled.⁹²

(ii) The Order

The relevant order powers referred to in Part I of Schedule 8 to the Fair Trading Act 1973 include the power to:

- make it unlawful to make or perform any agreement;
- require the termination of any agreement;
- make it unlawful for a person to withhold supplies of goods or services from any specified firm or person;
- make it unlawful to require, as a condition of supplying goods or services, the buying of other goods, or any payment for services other than the goods or services supplied;
- make it unlawful to discriminate between persons or firms on the prices charged for goods or services;
- make it unlawful to give any preference in the supply of goods or services;
- make it unlawful to charge prices for goods or services differing from those in any published list;
- require publication of price lists;
- regulate prices to be charged for any goods or services;
- make it unlawful to notify recommended or suggested prices to persons supplying goods or services; and,
- prohibit or restrict the acquisition of a business or the assets of another business.

Before the Secretary of State makes an order he must publish a notice expressing his intention so to do and containing information on the content of the order. The notice must, according to Section 10(4) afford at least a 30 day period to enable written representations to be made before that period. This period thus allows parties to submit arguments to the Minister commenting upon the effects the proposed order may have upon the market and their trade. An order will be exercised by statutory instrument which may be annulled by a vote in either House of Parliament.

(iii) Limits on the Order Making Power

One important point arises from the MMC Report on Ford Motor Company Limited published in 1985 where the MMC concluded that Ford's policy of refusing to license its copyright in replacement body parts was anti-competitive. However, they also noted, when considering available remedies, that "The ability to make an order for the grant of

a license is not among the limited powers exercisable by the Secretary of State following a report of the Commission on a competition reference ⁹³ The MMC concluded that no adequate remedy existed in cases of refusal to license copyright and they suggested changes and modifications in existing law.⁹⁴ A party who wishes to complain about another party's refusal to license may, in view of the inadequacies of the UK remedies available, consider complaining to the Commission in addition to complaining to the OFT. European competition law, to be sure, takes a more robust view of the problem than does UK law and, provided the practice affects inter-state trade, complainants might find that a more satisfactory outcome derives from Brussels than from London. (See Chapter 13 Section F).

F. INVESTIGATION OF PUBLIC BODIES

Whilst the competition reference and preceding investigation of anti-competitive practices is the central part of the Act, also provided for is a machinery for the investigation of public authorities. The OFT do not have an involvement in this procedure. Under Sections 11 and 12 CA 1980 the Secretary of State may refer for investigation to the MMC any question relating to: (a) the efficiency and costs of; (b) the service provided by; or (c) possible abuse of a monopoly situation by, public bodies. A public body is defined in Section 11(3) CA 1980 as any body corporate which supplies goods or services by way of business, the affairs of which are managed by its members and the members of which hold office as such by virtue of their appointment to that or another office by a Minister under any enactment. This mechanism for investigating and scrutinising the performance of nationalised industries and other public bodies is of course additional to existing controls of public accountability and responsibilities to Parliament through the agencies of Ministerial and Select Committee control. Well over a dozen references have been made to date under this procedure. The MMC must report on any questions referred to them but they are excluded from commenting on the appropriateness of any financial obligations or guidance as to financial objectives given under statute (or in any other enactment) by a Minister; the MMC may, however, comment upon the way such objectives are being achieved. Nor can the MMC report on whether a course of conduct registrable under the RTPA 1976 is contrary to the public interest.

Following an adverse MMC report which concludes that the body has operated against the public interest the Secretary of State shall give a copy of the report to the Minister(s) responsible for that body. The relevant Minister(s) may, thereafter, require the body to submit proposals outlining how they would remedy or prevent the adverse results specified. Following an adverse report the Secretary of State may exercise any of the order making powers contained in Schedule 8 of the Fair Trading Act 1973. Those powers do not however extend to exercising the power in paragraph 10 thereof: This is the power to regulate the prices to be charged for any goods or services.

The Secretary of State may under Section 11(4) CA 1980 exclude by order various persons from control. This power has been exercised once to date. In the Competition (Exclusion of Bus Operators) Order 1980⁹⁵ the Secretary of State excluded from the risk of reference to the MMC any person whose annual turnover from the provision of bus services is less than £1m. This exclusion does not apply if the annual turnover of the bus service provider and any other associated person(s) is £1m or more. A persons annual turnover means the total of the amounts received during the 12 months ending on the last day of the period in respect of which returns have most recently been made under Section 157 of the Road Traffic Act 1960. The amounts to be counted are those in respect of the carriage of passengers in the course of the provision of bus services by the carrier in question. When the carrier is a local authority the relevant turnover amount is the greater of either the total cost of providing the service or the total amount determined by reference for the test of non-local authority carriers.

G. INVESTIGATION OF PRICES OF 'MAJOR PUBLIC CONCERN'

The Government in Section 1 CA 1980 abolished the Price Commission. This body played an important role in the regulation of prices. The power to so regulate, following abolition of the Commission, transferred to the Secretary of State who may order the OFT to undertake ad hoc investigations into particular prices of public concern. This power is now contained in Section 13 CA 1980. In deciding whether a price is one of major public concern the Secretary of State is required to consider if: (1) the provision or acquisition of the good or service is of general economic importance, or (2) whether consumers are significantly affected directly or indirectly by the price. The Secretary of State must specify a time period in which the

DGFT will make a report. The report must contain the OFT's findings of fact in addition to other observations the OFT wish to bring to the attention of the Secretary of State. The report must be published. No penalties attach to this investigatory power. Nonetheless, it should be borne in mind that evidence of pursual of an anti-competitive course of conduct must be found or evidence of monopoly abuse may emerge. In such cases further investigation might result.

H. CONFIDENTIALITY IN OFT AND MMC REPORTS

Section 16(1) CA 1980 imposes a duty of confidentiality on the OFT and the MMC. It provides that in reporting both bodies shall "have regard to the need for excluding, so far as that is practicable -

- (a) any matter which relates to the private affairs of an individual, where the publication of that matter would or might, in the opinion of the Commission or the Director, as the case may be, seriously and prejudicially affect the interests of that individual, and
- (b) any matter which relates specifically to the affairs of a body of persons, whether corporate or unincorporate, where publication of that matter would or might, in the opinion of the Commission or the Director, as the case may be, seriously and prejudicially affect the interests of that body, unless in the opinion of the Commission or the Director, as the case may be, the inclusion of that matter relating specifically to that body is necessary for the purposes of the report."

It will be by no means easy to challenge the reasonableness of the inclusion in a report of material an individual or firm would prefer was kept confidential. The discretion accorded both the OFT and MMC here is very wide. They may even include information seriously and prejudicially affecting a firm if they consider it necessary for purposes of the report. Though presumably the duty to consider excluding information deleterious to the position of an individual is of a higher standard than where the information does not relate to an individual.

Finally, and importantly, absolute privilege attaches to any report of the OFT or the MMC who are therefore completely safeguarded from actions for defamation. This derives from Section 16(2).

Section 17 CA 1980, relevant only to MMC reports, provides further that the Secretary of State may exclude material from the MMC report as laid before parliament and as published. This power of exclusion will be exercised where the Secretary of State considers that disclosure of certain information would seriously and prejudicially affect the private affairs and interests of an individual or whether the same harm would occur to other firms or legal persons. The Secretary of State has an overriding obligation to exclude matters from the report where publication would be against the public interest.

It follows from the above that a *certain* scope arises in respect of material to be incorporated in a report. Representations may be made to the OFT in respect of their reports and to the Secretary of State in respect of MMC reports. To succeed with such representations parties must marshal their evidence and arguments so as to convince the Director General or Secretary of State that serious and prejudicial harm would follow from disclosure. Individuals must establish likewise though the tenor of the Act implies that they will receive a more sympathetic hearing. It is, however, clear that such arguments will succeed only in exceptional cases.

FOOTNOTES

1. S.6 Fair Trading Act 1973.
2. See, Liesner Reports: Cmnd. 7198 Annex B paras. 9-17; and, Review of Restrictive Trade Practices Policy Cmnd. 7512 Ch. 7. See also, Cunningham and Tinnion, The Competition Act 1980 (1980); Merkin and Williams (1980) 43 M.L.R. 429. A useful summary of the Act may also be found in, The Competition Act 1980 C.B.I. (April 1980); An interesting interview with the Director General is to be found in Sunday Times, Business News, April 6th 1980; Kay and Sharpe (1982) Fiscal Studies 191 for an account of some of the economic issues.
3. Throughout this chapter where statutory reference is made to the Director General of Fair Trading reference in the text is to the OFT since in practice it is officials at that office who undertake the tasks entrusted to the Director General. It is usually only where wider public issue points arise that the Director General personally takes a part in a case.
4. S.33(2) CA 1980 applies the definition in S.137(2) Fair Trading Act 1973.
5. [1978] A.C. 359 at pp. 383H-384B, 401B-D, 402E-H, 403A.
6. However there is an implication to be taken from S.2(8) CA 1980 that the narrow view prevails. This provision requires that in considering the conduct of local authorities the Section is construed as if the words "in the course of business" were omitted. Thus the Act applies to local authorities even though they may not be conducting business. Section 2(8) seems to imply that the words "in the course of business" exclude the activities of local authorities who are administrators not traders. However it is arguable that S.2(8) was merely making it clear in an equivocal section that local authorities were not excluded from the Act. This latter interpretation is, it is submitted, the preferable one in terms of policy and likely OFT application in the light of an uncertain Section 2(1).
7. See, Anti-Competitive Practices, A guide to the provisions of the Competition Act 1980, OFT publication (1982) p. 23.
8. In MMC Report into Ford Motor Company Limited Cmnd. (February 1985) the MMC stated: "We do not accept Ford's argument that a practice cannot be found to be anti-competitive unless it is shown that stopping it would increase competition. It is sufficient that stopping the practice would provide an opportunity for competition." (ibid., at p. 37 para. 6.25).
9. Anti-Competitive Practices, A Guide to the Provisions of the Competition Act 1980 op. cit., at p. 7. In a lecture given by the Director General of Fair Trading in October 1979 (The Shell Lecture) the Director General commented: "The Bill does not require me or the Commission to establish that a monopoly situation exists but I would emphasise that it is unlikely that a firm's practice could be considered anti-competitive unless it has significant market power."
10. 9 February 1983. See also British Telecommunications (Pricing Policy for placing of advertisements in Yellow Pages) 10 October 1984.
11. ibid., at p. 30.
12. 18 May 1983.

13. *ibid.*, at p. 40. See Sheffield Newspapers (October 1981) OFT Report of Investigation under S.3 CA 1980 (tying discounts considered by OFT to be too small to be significant: Sheffield Newspaper required estate agents to advertise for 48 weeks prior to being granted a 5% discount) noted, Lawson, (1983) NLJ 908. See also British Telecommunications (Pricing Policy for the placing of advertisements in Yellow Pages Directories) (10 October 1984) tying of advertising space to advertising agency services too limited in its exclusionary effects on other advertising agents.
14. A similar meaning is given to "substantial" in EEC law. See, (Case 19/77) Miller International Shallplatten GmbH v. Commission [1978] E.C.R. 131, [1978] 2 C.M.L.R. 334; (Case 108/82) AEG Telefunken v. Commission [1983] E.C.R. 3151. These cases indicate *inter alia* that a firm with only 5% of the market may be considered a "significant firm", all depends on the case facts.
15. Anti-Competitive Practices, A Guide to the Provisions of the Competition Act 1980 op. cit., at p.7.
16. 11 January 1983. See also, Essex County Newspapers Limited 14 July 1983.
17. MMC Report, Sheffield Newspapers Ltd. (1982) Cmnd. 8664 para. 7.8: "The operation of Section 2(1) cannot be limited to illegal conduct, for clearly the Act is intended to make possible control of conduct which, unless prohibited by the exercise of powers under this Act, is perfectly legal. It is true that the section refers only to conduct restricting, distorting or preventing competition, but to interpret 'conduct' as meaning 'misconduct' in the sense of conduct producing that effect is to reduce the definition to a tautology."
18. e.g. MMC Report into the Supply of Metal Containers (1970) H.C. 6 where the MMC considered whether the discounts offered by Metal Box were over and above those justified by cost economies; MMC Report on the Supply and Processing of Colour Film (1966) H.C. 1 where the MMC stated (at para. 260) that a monopoly can benefit the public if it can effectively exploit scale economies and which leads to cost savings which are passed on to the consumer. They accepted that this can strengthen the dominance of the monopoly but added that so long as the benefits of the monopoly were passed on to consumers it was justified; see also MMC Report on the Supply of primary batteries (1974) H.C. 1 para. 429.
19. MMC Report, Sheffield Newspapers Ltd. (1982) Cmnd. 8664 para. 7.13.
20. Defined as per S.137(3), (4) Fair Trading Act 1973.
21. S.23 CA 1980. For definition of caravan see S.29(1) Caravan Sites and Control of Development Act 1960. Holiday caravan sites are expressly subject to control by both the CA 1980 and the Fair Trading Act 1972 by this provision.
22. S.2(7) CA 1980. This brings car parking under the control of the Act but it remains excluded from the 1973 Fair Trading Act. Thus, "parking practices" cannot be reviewed as abuses of monopoly power but can be as anti-competitive practices.
23. [1977] 1 All E.R. 47 (Q.B.D.).

24. DGFT Report (1976) at p. 36.
25. Ford Motor Company: Licensing for the Manufacture or Sale of Replacement Body Parts (21 March 1984) at p. 41 para. 8.17. See, also, British Broadcasting and Independent Television Publications Ltd.: Publication of Programme Information (13 December 1984).
26. MMC Report, Ford Motor Company (February 1985) Cmnd. 9437 pp. 34-37 paras. 6.14 - 6.26.
27. Defined by Section 137(3), (4) Fair Trading Act 1973.
28. S.I. 1980 No. 979 came into operation 12 August 1980.
29. S.I. 1976 No. 98.
30. But c.f. Sched. 2(2)(b) for determining turnover where the relevant period is less than 12 months. This states: "Where the relevant period does not equal twelve months, the amount which bears the same proportion to the turnover in the United Kingdom of that person during that period as twelve months does to that period," is to be considered.
31. Sched. 2(3).
32. *ibid.*
33. Sched. 2(5), (6).
34. S.19(1) CA 1980 which forbids disclosure of information obtained during the CA 1980 procedure without the complaint's consent. This is subject to S.19(2) which provides exceptions where disclosure is necessary for the performance of other statutory obligations.
35. Anti-Competitive Practices, A guide to the provisions of the Competition Act 1980 (1982) p.14. See also DGFT Report (1980) p.43.
36. See for commentary and examples, Green, Crisis in the Monopolies and Mergers Commission: Anderson Strathclyde and other Recent Developments (1983) B.L. Rev. 303.
37. S.3(2)(a) CA 1980. Notices usually take the form of advertisements in newspapers and journals, inviting comments and evidence from interested parties. There are no specific rules about the placement of such notices. The OFT, in practice, advertise the notice in the national press and in the press in the location of the complained of conduct and/or the trade press of the firms in question. Thus, for example, in W.M. Still Service Limited Investigation (22 July 1982) notices were placed in the Financial Times, Daily Telegraph, London Gazette, Caterer and Hotelkeeper, and, Staff and Welfare Caterer. In Essex County Newspapers Limited Investigation (14 July 1983) notices appeared in the London Gazette, Financial Times, Retail Newsagent, Estates Times, Essex County Standard, Colchester Express. In Thames Television Limited Investigation (3 February 1984) notices were circulated in the Financial Times, UK press Gazette, Campaign, Marketing, and, Marketing Week.

38. S.3(2)(b) CA 1980. Many traders are 'interested' as revealed by response rates to questionnaires sent out by the OFT during investigations. In Raleigh (21 February 1981) 170 firms, individuals, trade bodies or associations responded to a questionnaire; In Arthur Sanderson 27 August 1981 256 persons replied to questionnaires out of 506 firms selling Sanderson goods invited to respond.
39. S.3(4) CA 1980. See H.C. Comm. Rep. Deb. 27 Nov. 1979 Col. 462 statement of minister on time periods for investigation.
40. Directions given under S.3(5) CA 1980 must be published in accordance with S.3(6) CA 1980.
41. S.3(7)(a) CA 1980. See statement of Under Secretary of State for Trade, H.C. Comm. Rep. Deb. 27 November 1979 col. 430: "Nothing can be done under the sub-sections of Clause 3 unless it is done with a view to establishing: 'that a person is pursuing a course of conduct, which does amount to such a practice'".
42. S.3(7)(b) CA 1980. In an interview given by Sir Gordon Borrie, Director General of Fair Trading, to the Sunday Times, April 6th 1980, it was stated:
Q: "The Confederation of British Industry secured an amendment in the Act laying down that the OFT must give its reasons before making a reference to the Monopolies Commission. Will this be a limiting factor from the start?
A: "It's not a fishing expedition. I'm not entitled to go rampaging round the place. I've got to specify what I'm looking for, the kind of anti-competitive practice that appears to me to exist."
43. S. (7) CA 1980. See s. (8) which applies S.85(5)-(8) Fair Trading Act 1973 (enforcement provisions relating to production of documents) which renders failure to comply or the provision of false information a criminal offence punishable by fine or summary conviction. A court may make any order it sees fit to cure the infringement.
44. See Rio Tinto Zinc v. Westinghouse [1978] A.C. 547 (H.L.) construing Section 14, Civil Evidence Act 1968.
45. This particular public interest point was rejected by the MMC in Sheffield Newspapers Ltd. (1982) Cmnd. 8664 para. 7.11.
46. *ibid.*
47. *ibid.*, at p.56 para. 7.9.
48. See e.g., British Railways Board, Allocation of Facilities on Motorail (9 February 1983); and, British Railways Board, Facilities for Car Hire and Advertising of Self-Drive Vehicle Hire at Railway Stations (18 May 1983).
49. See Commission v. U.K. (Case 170/78) [1983] 3 C.M.L.R. 512 in which the European Court of Justice held that Beer and imported cheap, still white wine were competing products so that for the UK to maintain a large tax differential between the two products gave beer a competitive advantage over the imported wine which was protectionist in effect and was in breach of Article 95 EEC (prohibiting discriminatory taxation).

50. See e.g. (Case 22/76) United Brands Continental BV v. Commission [1978] E.C.R. 207; [1978] 1 C.M.L.R. 429 noted Baden Fuller (1979) 4 E.L. Rev. 423; Korah (1980) 17 C.M.L. Rev. 395; Bishop (1981) 44 M.L.R. 282; Zanon (1982) 31 I.C.L.Q. 36, where the European court considered that branded bananas could be a relevant product market.
51. Arthur Sanderson & Sons Limited (27 August 1981).
52. Thames Television Limited (3 February 1984).
53. *ibid.*, at p. 80.
54. e.g. T.I. Ralieggh Industries Limited (27 February 1981) at p. 35; Arthur Sanderson & Sons Limited (27 August 1981) at p. 52; London Electricity Board (29 April 1982) at p. 59; Scottish and Universal Newspapers Limited (11 January 1983) at p. 45.
55. (11 January 1983) - alleged price predation, conduct established, reference made to MMC.
56. (27 August 1981) - alleged abuse of selective distribution criteria - conduct found to be legitimate, no reference to MMC made.
57. 14 February 1983, DGFT Report (1983) p. 106.
58. 1 September 1983, DGFT Report (1983) p. 107. See also Kango Wolf Power Tools DGFT Annual Report 1984 p. 108 who agreed not to prevent its dealers from supply goods which competed with the Kango "task force" range of goods following informal OFT discussions.
59. 15 June 1982, DGFT Report (1982) p. 102. For detailed analysis of related cases and their context see Chapter 11 Section M III on the Building Societies Association case.
60. 11 August 1982, DGFT Report (1982) pp. 102, 103.
61. 1 December 1982, DGFT Report (1982) p. 103.
62. S.4(1) CA 1980.
63. S.4(2) CA 1980.
64. S.4(3) CA 1980.
65. S.4(4)(a) CA 1980.
66. Scottish and Universal Newspapers Limited (11 January 1983).
67. A copy of the undertaking is given in (1983) 11 British Business p. 58. The wording used in the text to this note is a reasonable copy of the precise wording used.
68. S.4(4)(b) CA 1980.
69. S.4(5) CA 1980.
70. S.4(4)(c) and S.5(1)(b) CA 1980.
71. S.5(4) CA 1980.

72. See Section 29 CA 1980 which exempts from the RTPA 1976 undertakings given under Section 88 Fair Trading Act 1973 in consequence of an adverse MMC report following a monopoly or merger reference or a competition reference under the CA 1980. This section clears up doubts that such undertakings fell within the broad definition of agreement in Section 43(1) RTPA 1976. The Section is retroactive.
73. S.5(1)(a) CA 1980.
74. S.5(1)(b) and S.5(2)(b) CA 1980.
75. S.5(1)(c) and S.5(2)(b) CA 1980.
76. S.6(1) CA 1980. Though the MMC may investigate conduct not mentioned in the reference if it appears to them to be similar in form and effect to those specified - S.6(5)(a) CA 1980.
77. S.6(2) CA 1980.
78. *ibid.*
79. As in WM Still & Sons Limited (22 July 1982) at p. 38.
80. S.5(1) CA 1980 and S.4(4)(c) CA 1980.
81. S.6(5) CA 1980.
82. S.6(6) CA 1980.
83. S.7(2) CA 1980.
84. S.7(6) CA 1980 which provides that Sections 70 (time limits for report on merger reference), 84 (public interest) and 85 (attendance of witnesses and production of documents) of the Fair Trading Act 1973 and Part II of that Act (performance of functions of the Commission) shall apply.
85. Section 81(2) Fair Trading Act 1973. Under Section 81(3) the Secretary of State may give general guidance on the conduct of proceedings. However, to date, no such guidance has been given.
86. MMC Report Sheffield Newspapers Limited (1983) Cmnd. 8664.
87. *ibid.*, at para. 7.12.
88. S.8(4)(a) CA 1980.
89. S.8(4)(b) CA 1980.
90. S.9(1) CA 1980.
91. S.9(2)(b) CA 1980.
92. S.10(3) CA 1980.
93. MMC Report, Ford Motor Company Limited (February 1985) Cmnd. 9437 pp. 41-46 and paras. 6.52 - 6.73.
94. *ibid* at p. 45.
95. S.I. 1980 No. 980 (came into force on 12 August 1980).

CHAPTER 4

REGISTRATION AND NEGOTIATION OF RESTRICTIVE TRADING AGREEMENTS

A. INTRODUCTION

In this chapter the procedures that must be followed in order to register and negotiate an agreement will be discussed. The emphasis of this chapter lies with explaining the procedural and legal basis of negotiations under the Act. The following subjects are discussed.

- Section B: Registration of agreements: Procedure and Practice - This section examines: the duty to register, consequences of non-registration, provisional validity, details of the registration process, variation of agreements, time limits, strategy in event of failure to register, the fail-safe.
- Section C: The register: problems with confidential information - This section examines: the contents of the register, protecting confidential and secret information.
- Section D: Powers of the OFT to obtain information - This section examines: OFT notices sent to parties requesting information, when a notice may be issued, examination of parties on oath before the court, failure to furnish correct information and penalties.
- Section E: The Section 21 RTPA 1976 procedure: negotiations with the OFT - This section examines: the legal context of negotiations with the OFT, statistics showing trends in negotiations, the relationship with EEC law.
- Section F: Modification and abandonment of agreements: options available to parties - This section examines: the termination and abandonment of agreements; the termination, registration and novation of agreements; agreements filetted of all registrable restrictions; effluxion of time and expired agreements.
- Section G: Negotiations under Section 21(2): Dispensation from reference to the court - This section examines the criteria employed by the OFT in conducting negotiations with parties. In particular the section discusses: the relevance or otherwise of public interest arguments, the de minimis rule for small scale agreements, the notion of "reasonableness" and the Unfair Contract Terms Act 1977,

the tests of discrimination and unfairness, the meaning of a material effect on competition, whether the OFT assess the whole agreement or simply the restrictions in the agreement, OFT procedure for evaluation of agreements, amount of time needed to exhaust the Section 21(2) procedure.

B. REGISTRATION OF AGREEMENTS: PROCEDURE AND PRACTICE¹

I. The duty to register: consequences of non-registration, Provisional validity

Agreements and association recommendations caught by the Act must be registered.² Details must be furnished to the OFT prior to commencement of the agreement through, strictly speaking, details may be registered within a three month period from the date the agreement was made. This time period permits parties who were hitherto unaware of the registration duty to comply. Furnishing details of agreements to the OFT is in many respects a neutral process; it does not in any way signify the end of the agreement. Once furnished a lengthy process of negotiation and discussion with the OFT commences.

Failure to register in due time results in all of the restrictions in the agreement becoming void and unenforceable.³ Moreover, it is unlawful (though not a criminal offence) to give effect to, enforce or purport to enforce the restrictions in an unregistered agreement.⁴ Parties might decide to informally continue the agreement but in the event of dispute the agreement cannot be enforced in a court of law or arbitration. Furthermore, if the OFT discover the agreement and consider that the parties have avoided registration they may well seek an injunctive order of the Court against the parties (see Chapter 5)⁵. Breach of such a court order is contempt of court for which the court may impose heavy fines.⁶

Proper registration of the agreement gives the parties a right to enforce the agreement until such time as the court declares it against the public interest and enjoins its continuance. In British Concrete Pipe Association's Agreement,⁷ in 1983, the Master of the Rolls stated:

"... price fixing is not inherently bad - it can be justified in some circumstances - and accordingly the restrictive practices legislation provides that, so long as you do not do it secretly and you register your agreement, you may go on with the

agreement unless and until the Court has examined it and has come to the conclusion that it is not one of the exceptional agreements which should be permitted"⁸

Thus registered agreements enjoy a "provisional validity" until such time as they are judicially condemned. However, it is not certain what effect this judgment will have on two earlier cases in which courts were unwilling to enforce registered agreements pending a decision of the RPC, indeed, there was a clear inclination to pre-empt the RPC's decision. In Daily Mirror Newspapers v. Gardner⁹, Lord Denning M.R. stated of a trade association recommendation to boycott the Daily Mirror newspaper:

"Prima facie, therefore, the recommendation is unlawful. No doubt the final decision will rest with the Restrictive Practices Court. But I think that it comes within the purview of this court also. If the federation makes a recommendation which is unlawful, as being prohibited by the Restrictive Trade Practices Act, I think it ranks as 'unlawful means'. As such, this court can intervene [by injunction] to stop it."¹⁰

An agreement duly registered certainly enjoys provisional validity of some description. It is arguable following British Concrete Pipe that the validity is absolute until the RPC decides otherwise. However doubts remain in the light of conflicting decisions suggesting that ordinary courts may issue injunctions to prevent behaviour that appears to have little chance of success before the RPC.

Failure to register also leaves a company vulnerable to the "disenchanted employee" problem. It has been held that an employee who discloses to a newspaper the fact that his company is operating an unregistered agreement and provides supporting documentary evidence of that fact to the newspaper may not be in breach of his duty to protect the confidential nature of his employers business secrets. The Court of Appeal in Initial Services v. Putterill¹¹ held that the duty of confidentiality was subject to exceptions where the disclosure was justified in the public interest e.g. in cases of crime or fraud, disclosure of the fact of non-registration may well be in the public interest and it apparently does not matter that disclosure is not made to the relevant authorities.

(i) Payment of Money under Void Agreements

In so far as a restriction in a contract is void it cannot pass title to goods or property. The remainder of the agreement is of course valid and title may accordingly pass under the residual terms. In practice this is rarely a problem since few restrictions pass title to goods or property. However, money sometimes is paid over under a

restriction in an agreement

Example: X belongs to a group of firms operating a profit pooling cartel under which each firm is assigned a sales territory and those fortunate enough to be assigned a lucrative territory pay part of their profits into a central fund for distribution to firms in less valuable territories. X sells in a lucrative territory and pays £5,000 into the "pool" at the end of the year. The agreement is void under Section 35(1) RTPA. Can X recover the money paid under the agreement?

Example: X (producer) and Y (wholesaler) agree to mutually purchase all of their requirements from each other. Under the agreement X pays Y a 7% rebate at the end of each year if, during that year, Y has purchased 100% of his requirement from X. This rebate clause is restrictive and is not exempt under Schedule 3(2) hence the whole agreement is registrable. X pays a 7% rebate of £5,000 to Y. Can he recover it under the void contract?

The answer to both examples is that X will probably be unable to recover the money paid. Money paid or property transferred under an illegal contract is irrecoverable.¹² Though where goods are sold under an illegal contract property in them can in some circumstances pass notwithstanding the illegality.¹³ However, when money has been paid under a void contract (as opposed to an illegal one) the basic assumption made by the law is that money may be recovered.¹⁴ The difference in law between a void contract and an illegal one is a question of both complexity and obscurity.¹⁵ These rules are by no means absolute; the precise result depends on the ground of illegality in each case.¹⁶

Two factors in the RTPA 1976 situation suggest that the Court may refuse actions to reclaim money. First, X cannot plead the 'illegality' of the restriction since he was a party to it. Though whether this rule applies in the RTPA 1976 context is open to question.¹⁷ Secondly, restitution of money paid is only possible where the party paying did so as a result of a mistake of fact. Where the mistake is one of law (i.e. as to registrability) then restitution may not be claimed.¹⁸

(ii) Vulnerability to Private Damages Actions

Under Section 35(2) RTPA 1976 any third person who suffers damage as a consequence of an unregistered agreement may sue those parties for damages in the common law tort of breach of a statutory duty. Thus a local authority could sue building contractors who supply to it under a collusive tendering arrangement.¹⁹

II. Details of Registration Process: Documents, Common Form Agreements

Under Section 24 RTPA 1976 the names and addresses of parties to the agreement must be furnished to the OFT.²⁰ Further the terms of the whole agreement must be furnished and not just the restrictions in the agreement. Two copies (at least one of which is signed) of the terms of any written agreement must be sent to the OFT.²¹ Where the agreement or part of it is not in writing two copies of a written memorandum (signed by the person furnishing details of the agreement) setting out the relevant terms of the oral agreement must be sent to the OFT.²² Where a person enters multiple agreements (described as 'common-form agreements') which are all subject to registration and which are identical except for the identity of the other party or the date then it is sufficient to register one copy of the agreement and, in respect of the others, to send to the OFT two copies of a memorandum (at least one of which is signed by the person furnishing the details) which: (a) refers to the agreement of which the particulars are being or have been furnished; (b) indicates the dates of the other agreements and the names and addresses of the parties thereto; and (c) states that those agreements are otherwise identical to the agreement of which particulars are being or have been furnished.²³

Where the agreement in question is a trade association recommendation then the documents that will have to be furnished may be numerous. Under Sections 8 and 16 RTPA 1976 restrictive agreements may emerge in a number of forms:

- (i) Where an association enters an agreement with another person or association the members and persons represented on the association are deemed to be parties to the main agreement and are deemed to accept its restrictions. Particulars of the names and addresses of the members and persons represented by members must therefore be furnished (except when they exceed 100 when a statement of that fact suffices). The whole of the terms must also be furnished.
- (ii) An agreement can come about by virtue of the constitution, memorandum and articles of association, rules, regulations, bye-laws and resolutions of the association or a sub-committee of the association. Details to be furnished in such cases may be numerous. Parties must furnish the documents comprising the relevant restrictions and any further documents by virtue of which the restrictions arose. Thus, where the restrictive agreement is a schedule of fees or charges to be complied with by a group of members and the schedule has been

calculated by a sub-committee of the association whose authority derives from the articles of association or other constitutional document then the following would have to be furnished: names of the members of the group; the schedule of charges or fees, the articles or other constitutional document of the association; and a list of all the members of the association (if it does not exceed 100). If the sub-committee was constituted by resolutions then these would also have to be furnished. Other resolutions not affecting any restriction or merely varying the membership of the sub-committee without altering its functions would not be required.

- (iii) Where a trade association makes specific recommendations about registrable matters the recommendation must be registered. In such a case the documents to be furnished are: the constitution of the association; a list of all members whether or not the recommendation was made to them (unless they exceed 100); and, copies of the recommendations issued to members.

The actual recommendation will usually be in the form of a circular in which case the circular must be furnished. Further, any extracts from minutes of meetings authorising the recommendation should be furnished.

An indication of the problems faced by the OFT when confronted with documents is given in the 1976 Annual Report of the Director General where the difficulties encountered following the calling up for registration of service agreements led to the following commentary (at p. 36):

"The first task of the Division is to enter registrable services agreements in the public register of restrictive trading agreements. This calls for careful examination of the documents, in a number of cases copious and complex, which have been submitted in order to determine whether the agreement is in fact registrable. In some cases it proved possible to establish this by prima facie examination which disclosed the acceptance of at least one restriction and in these cases the agreement can be entered in the register pending a full examination of all the restrictions which is, of course, necessary at a later stage. In other cases this did not prove a practicable way to proceed and often further discussion and correspondence with the parties was required. It frequently involves as much time and effort, if not more, to determine that a particular agreement is not registrable as to reach a conclusion that it is. The indications are that between one fifth and one third of the agreements initially furnished may turn out not to be registrable."

III. Variation and Termination of Agreement

Section 24(2)(b) requires that details of variations and determinations of agreements must be furnished to the OFT. This duty applies only to variations whereby: (a) a further restriction to which the Act applies is accepted by one or more of the parties; (b) a restriction ceases to have effect; (c) the application of an existing restriction is extended or reduced as regards the areas or places or the classes of persons, goods, processes of manufacture or service to which it relates; or (d) so far as restrictions are accepted as to the terms or conditions on which goods are to be supplied or acquired or any process of manufacture is to be applied to goods or any designated service is to be supplied or obtained, the terms or conditions are varied.²⁴

Parties to varied agreements must furnish to the OFT two copies (at least one of which is signed) of any written instrument which either terminates or varies (as above) the agreement.²⁵ Where the variation or determination is decided upon orally by the parties then two copies of a memorandum (at least one of which is signed) laying down the complete details of the termination or variation must be furnished.²⁶

The furnishing of variations poses a constant headache for the OFT. Many variations to trade association recommendations, are innocuous. For example, if an association recommends to its members the adoption of improvement in production techniques, or recommends that certain cost adjustment formulae be incorporated in contracts or recommends that standard form contracts be adopted, then these may well, after due consideration, earn exemption under Section 21(2) RTPA 1976 from reference to the Court. However, the OFT will often not be in a position to make a proper Section 21(2) assessment if there is a steady flow of variations to the recommendation. They can never be certain that having obtained a Section 21(2) dispensation for a recommendation or agreement a variation will not be furnished which causes them to reconsider the dispensation. Trade association officials might thus bear in mind when considering non-essential variations that they must be furnished and that this could reduce the chances of the Section 21(2) procedure being used in their favour. Lack of a Section 21(2) dispensation need not prove fatal. The OFT may simply leave recommendations or agreements on the register and justify non-reference to the Court on the basis that given the steady flow of variations they are not in a position to properly assess it and that they are accordingly waiting and monitoring developments.

IV. Time limits for Registration

The various time limits for registration are given in Schedule 2(5) RTPA 1976. Compliance with these time limits is essential if the drastic legal consequences of non-registration are to be avoided. The following table sets out the various time periods. The table is adapted and expanded from Schedule 2(5).

AGREEMENT TYPE	PERIOD FOR REGISTRATION
1. Agreements and recommendations: Any agreement or recommendation to which the Act applies made on or after 25th November 1968 other than agreement types listed in 2-11 below.	Before the date on which any restriction takes effect and in any case within 3 months from the day the agreement was made.
2. Approved agreements: Agreements approved by statutory instrument under Section 29 (agreements important to the national economy) or Section 30 (agreement holding down prices) RTPA 1976 which become registrable due to expiration or revocation of the order.	Within one month from the day on which the agreement becomes subject to the Act - See Sections B and C of Chapter 2 for details of Sections 29 and 30 RTPA 1976.
3. Standards: Agreements approved by statutory instrument under Section 9(5) RTPA 1976 (agreements to comply with standards set by the BSI or other approved bodies) where such approval has been revoked.	Within one month from the day on which the agreement becomes subject to the Act - See Chapter 1 for details of Section 9(5).
4. Information Agreements: Information agreements as to goods (under Section 7 RTPA 1976) which were in force before entry into force of a statutory instrument calling information agreements up for registration. Such an order came into force on the 1 February 1970 (S.I. 1969 1842, Information Agreements Relating to Goods).	Within three months from the day on which the agreement becomes so subject. In the case of S.I. 1969 1842 registration should have been effected by 30 April 1970. An information agreement entered into today would have three months in which to register - See Chapter 9 for details.

AGREEMENT TYPE	PERIOD OF REGISTRATION
5. Services Agreements: Services agreements only became registrable under Section 11 RTPA 1976 after 22 March 1976 (S.I. 1976 No. 98, The Restrictive Trade Practices (Services) Order 1976). Agreements made before that date became subject to the Act on that date.	Within three months from the day on which the agreements became subject to the Act. Thus, services agreements should have been registered by 21 June 1976. Any service agreement entered into today has three months in which to register.
6. Information Agreements as to services: Information agreements as to services may be called up for registration under Section 12 RTPA 1976 by express statutory instrument. No such instrument has as of yet been made. When such an order is made the agreements will have to be registered - See Chapter 9 for details.	Within three months of the day on which the information agreements become subject to the Act. This is calculated as three months from coming into force of the statutory instrument. Such agreements are currently not registrable - See Chapter 9 for details.
7. Variations: Agreements, <u>whenever made</u>, which become subject to registration by virtue of a variation to the agreement made on or after 25 November 1968 (see Nos. 10 and 11 below).	Within three months of the date on which the agreement became registrable.
8. Wholesale Co-operative Societies: Wholesale Co-operative Societies may obtain approval from the Secretary of State and once approved need not be treated as trade associations. Accordingly they need not register agreements and recommendations. If this approval expires or is withdrawn then the Society becomes subject to the Act and must register relevant agreements and recommendations.	Within three months from the day on which the agreement becomes so subject (See Section D of Chapter 2).

AGREEMENT TYPE	PERIOD OF REGISTRATION
9. Agreements which were subject to registration on 25 November 1968 of which details had not been furnished to the OFT.	Within 3 months of 25 November 1968 i.e. 25 February 1969.
10. Variations adding to or extending restrictions: Where a variation is made to an agreement on or after 25 November 1968 (irrespective of when the main agreement was made) which extends or adds to the restrictions made under the main agreement it must be registered.	Within three months from the day on which the variation is made.
11. Other variations and Determinations: Any other variation of an agreement and the determination of an agreement.	Within three months of the variation or determination.

V. Extensions of Time for Registration

If parties to an agreement require additional time in order to register their agreement they may apply in writing to the OFT for an extension.²⁷ Such an application will only be considered if it is made within the normal period for registration (see table above). The OFT may not grant an extension if the application is made outside of the period. In making an application parties must: (a) identify the agreement to which the application relates. This would entail, at least, giving the names and addresses of parties and a summary of the contents of the agreement; (b) indicate the amount of time requested; and (c) state why it is impracticable to furnish particulars within the statutory required period.²⁸ A common reason for not being able to furnish details on time is that the parties have only just discovered that the Act applies and the end of the registration period is imminent. Another reason might be that the agreement or part of it is oral and the parties are having difficulties in agreeing upon what should be included in the written memorandum of the oral terms.

VI. Strategy in respect of failure to register

Parties who fail to register their agreements in proper time will find that the tenor of negotiations with the OFT depend upon the latter's view of the parties' reasons for failing to register. Non-registration can be the result of: wilful avoidance of the law; a misconceived belief that the agreement was exempt from registration (perhaps after having taken legal advice); or simply, unawareness of the need to register. Many businessmen who are party to relatively small-scale agreements are oblivious to the obligation to register which the RTPA 1976 imposes on them. This is hardly surprising in view of the quite extraordinary complexity of the Act and its exemptions. Accordingly, how the OFT respond will largely depend upon such factors as: the explanations for non-registration given by the parties; the period of time during which the agreement has been unlawfully unregistered; the seriousness of the restrictions in question (if it is a price-fixing or market sharing agreement a strict attitude may be expected); the likelihood of the restrictions being continued with by the parties if the OFT do not seek a prohibitive order from the Court etc. The onus in such cases is on the parties to persuade the OFT that the failure to register is not a wilful or serious breach of the Act.

If the OFT adopt a lenient view then they may adopt the procedure laid down in Section 21(1) RTPA 1976. This empowers the OFT to refrain from taking Court action where an agreement that has been registered has been determined or where all of the restrictions in an agreement have been determined. To benefit from this procedure parties should: (a) terminate the agreement altogether; (b) register an agreement on the same terms as the old with the OFT; (c) re-adopt the new agreement with OFT approval. The OFT will advise parties to pursue this course where they are satisfied that the parties acted innocently and where the agreement in question appears not to be unduly restrictive. Where trade associations are concerned the OFT often send a letter to the senior officer of the association which incorporates suitable wording for a circular that may be sent round to members explaining the situation.²⁹

If the OFT consider the failure to notify to be wilful they might demand immediate termination of the agreement if they consider this adequate to prevent its future continuation. If, however, they consider that the parties may seek to revive the agreement informally or if they consider the agreement unacceptably restrictive they may seek an injunctive order of the Court prohibiting the agreement and any other unregistered agreement.

VII. Submitting Agreements in Draft

The OFT are always willing to examine draft agreements and to discuss their registrability.³⁰ Parties might consider this approach before submitting documents on a fail-safe basis (see below) since by entering informal discussions prior to submission of documents on a formal basis parties will be able to ascertain the OFT attitude to their agreement and will be in a stronger position to decide upon the best registration strategy. It might be possible in the event of agreements about which doubt exists as to the applicability of the Act to persuade the OFT of the non-registrability of the agreement. Details of exempt agreements are given in Chapter 2. Often legal advisers to parties seek advice on a point concerning registration from the OFT in an anonymous manner. This avoids the identities of the parties becoming known to the OFT where the parties consider that eventuality undesirable.

VIII. Registration of Dubious Agreements: The Fail Safe Method

As the discussion of registrable agreements in Chapter 1 demonstrates the criteria for registration are exceptionally complex. Likewise the criteria for determining whether restrictions in a clause are disregardable, or exempt, or whether the parties to an agreement are exempt, or whether the agreement is exempt because it concerns a particular activity, are equally of some complexity. There may certainly exist reasonable doubt in many instances. The obvious difficulty for parties to such agreements is that failure to register can lead to disastrous consequences. The agreement will be void and unenforceable, the parties vulnerable to damages suits by third parties, and the OFT might decide to seek a Court order prohibiting the agreement. Conversely, the parties might decide that in their opinion the agreement is not registrable and that even if it is the chances of detection by the OFT slim. Parties must weigh pros and cons and assess risks in coming to a decision.

One course of action that is commonly used is to notify the agreement on a fail safe basis. Under this procedure parties furnish details of their agreement to the OFT but accompany the documents with a letter expressly reserving the right of the parties to argue at a later date that the agreement is exempt. Alternatively, the parties might include in the letter reasoned submissions indicating why they consider the agreement non-registrable.

If the OFT accept that the agreement is exempt it will not be placed on the register. If it is considered to be registrable it will be placed on the register and negotiations commenced as to whether it can be given Section 21(2) dispensation. If the parties consider the agreement non-registrable and either seek a definitive ruling on the question or wish to challenge the view of the OFT that the agreement is registrable they may apply to the Court for a declaration under Section 26(2) RTPA 1976 that the agreement is exempt from registration. Conversely, the OFT may likewise apply for an order that the agreement is registrable. Given that the time-periods allowed for registration are very short (3 months maximum) parties will have to make such an application quickly. In Ravenseft v. Director of General Fair Trading³¹ the applicants, with the co-operation of the OFT, applied for a declaration and because of the imminence of the end of the registration period, obtained a hearing and judgment within just a few weeks. The OFT agreed, since this was a test case on a very important point of law, to shorten proceedings, to submit evidence by way of affidavit only, and to accept the judgment of the Court as if it were a final hearing.

Under Section 26(1) any person aggrieved may apply to the Court for an order to have the register rectified by variation or removal of details placed on the register. This course of action is of course only feasible following registration by the OFT.³² In such a case the OFT may respond with an application for an order striking out the application on the grounds inter alia that the notice of application and the supporting affidavit disclose no reasonable cause of action and that the claim is an abuse of court procedure.³³ The Court has power to hear a striking out action in this context.³⁴

C. THE REGISTER: PROBLEMS WITH CONFIDENTIAL INFORMATION

The OFT are legally bound to place on a public register all agreements caught by the Act.³⁵ The register is kept at Room 517 Chancery House, 53 Chancery Lane, London WC2A 1SP.³⁶ It is open for inspection between 10 a.m. and 4.30 p.m. on Mondays to Fridays. There is a small fee for inspection of files. Copies will be made for parties on payment of a photocopying fee. The register is a treasure trove of information. Many businessmen and legal advisers are unaware of the potential value of the registered information. For example a businessman who wished to set up a franchise

operation in the furniture business might find a selection of contract precedents registered which provide him with valuable information about setting up a franchise network. He will also be able to find out about any other restrictive agreements operated in the furniture industry. This may provide him with useful information about competitors and their agreements. Lawyers may find that agreements given dispensation under Section 21(2) RTPA 1976 are useful guides and precedents. Brief details of the agreement and the registration number are given of all cases granted Section 21(2) dispensation in the Annual Report of the DGFT. This provides a useful catalogue of precedents. the DGFT report however does not list cases that have been resolved by termination of the restriction, termination of the agreement itself, or, expiration of the agreement through effluxion of time.

An additional source of information may be found in British Business (the weekly journal of the DTI) who publish a quarterly update of agreements registered. From this source one can discover the registry number of the agreement (if given the register number OFT staff can locate an agreement within minutes) the subject matter of the agreement, the outcome of the negotiations with the OFT, and the month and year the negotiations reached a conclusion. Various symbols are used on the index to the register kept at the OFT. These symbols are: (i) "B" - indicating that a Section 21(2) dispensation has been given; (ii) "D" indicating that the agreement has been determined by the parties other than by effluxion of time; and (iii) "F" indicating that the agreement has been modified so as to bring it outside the scope of the legislation. Thus for example on the index one would find:

"S186 optical dispensing services D 11/82"

This would indicate that a services agreement is registered as 186 on the register, it concerns optical dispensing services and was determined by the parties in November 1982.

I. Contents of the Register

The OFT will place on the register copies of the documents sent to them.³⁷ They will also place on the register copies of documents or other information obtained by them following the sending of a statutory notice issued under Section 36 RTPA 1976 which requires the parties to furnish details of agreements subject to the Act. This notice may be sent to parties who have registered their agreement in order to illicit further information or to parties the OFT have reasonable cause to believe are

party to an unregistered agreement. In extreme cases the OFT may apply to the Court to have a person attend before the Court and give evidence on oath concerning the matters of which the OFT have given notice to him under Section 36. Any documents or information deriving from this hearing may be registered.³⁸

The OFT may also register any documents or information furnished to the OFT by the parties and which they consider it appropriate to include in the register. Often the memorandum and articles of association of trade associations are included on the register; correspondence between trade associations and members incorporating a recommendation, newspaper or journal articles where they refer to the parties and the agreement, minutes of association meetings etc. may also be placed on the register. However, Section 8(2) of S.I. 1984 No. 392 (Registration of Restrictive Trading Agreements Regulations) states that the OFT need not include on the register:

"... any details as to parties or other persons, prices, terms or other matters as are material for the purpose only of defining the particular application from time to time of a continuing restriction accepted under an agreement of which particulars are entered or filed in the register, being details which the Director considers it unnecessary to enter or file therein."

Section 8(2) is of limited application since it only applies to information which has the sole purpose of defining a restriction. The OFT view this provision as an administrative tool designed to prevent the register becoming swamped. Thus, if X and Y enter an agreement whereby X will provide a service to Y's customers as contained on a customer list then the agreement and the customer list will be registered. If the agreement also provides that Y will keep the customer list up to date then the OFT may refrain from registering a stream of amendments and changes to the list.

II. The Special Section

The OFT also maintain a "special section" to the register. Details placed upon this register are not available for public inspection. The contents of the special section are at the discretion of the Secretary of State. Under Section 23(3) (a) and (b) RTPA 1976 the special section may contain:

- (i) any information subject to registration that in the Secretary of State's opinion it would not be in the public interest to have made public;

- (ii) any information subject to registration concerning any secret process of manufacturing goods or providing services;
- (iii) any information subject to registration concerning the presence, absence or situation of any mineral or other deposits;
- (iv) any other similar information to (ii) and (iii) above subject to registration that in the Secretary of State's opinion would substantially damage the legitimate business interests of any person if it were made public.

III. Protecting Confidential and Secret Information

The presumption concerning registration is full disclosure of documents. Parties enjoy no right to withhold confidential or commercially sensitive data even though the data might bear no relevance to the restrictions in the agreement. Registration thus exposes the possibility of firms being able to examine confidential documents of their rivals. The "special section" of the register provides some comfort, however, to qualify for exemption from the ordinary register parties must persuade the Secretary of State that publication of the information would either harm the public interest, or, would substantially damage legitimate business interests. If successful in this the agreement may be placed on a special section of the register which is not open to public inspection

(i) Scope of Special Section

The scope of the special section is limited to information the publication of which may be contrary to the public interest or information of a specified nature the publication of which may substantially damage legitimate business interests. Section 23(3) RTPA 1976 speaks of secret processes of manufacture; the whereabouts of any mineral deposits; and any other similar matters. There is nowhere in the RTPA 1976 a definition of what is meant by a "process of manufacture". In Scottish Master Monumental Sculptor's Association Agreement³⁹ the Court, when asking the question - what is a process of manufacture, commented: "In a sense the answer to this question must be a matter of impression and of fact. In the Shorter Oxford Dictionary the substantive 'manufacture' is given primary meanings of 'the action or process of making by hand' and 'the making of articles or materials by physical labour or mechanical power' and, as a verb, 'to work up (material) into forms suitable for use.' The meaning of any process for providing services should be given an equally wide

construction. Thus mathematical formulae or computer software might fall within this category. The meaning of the whereabouts of mineral deposits should be fairly clear. The phrase "any other similar matter" is construed by the DTI to mean "any other similar matter" to secret processes or mineral deposits i.e. the words preceding it. This interpretation is in line with the "ejusdem generis" rule of interpretation which provides that general words in a sentence are construed by reference to specific terms preceding them.

It follows that ordinary commercially sensitive data can not be placed on the special section. The DTI receive approximately thirty requests per annum under this provision. Nearly three quarters of the requests are rejected because the parties seek to have placed on the special section of the register ordinary commercial data. In only a handful of cases therefore each year do the parties succeed.

The phrase "information the publication of which would ... be contrary to the public interest" does not provide a wide scope for the parties. Agreements relating to defence matters or international commercial relations might fall within this category.⁴⁰

(ii) Procedure

The procedure for claiming exemption is that parties must submit a memorandum to the OFT indicating the particulars of the information that they wish placed on the special section. Moreover, they must lay out their reasons for seeking inclusion in the special section. With respect to specific pieces of information parties should bear in mind that included on the ordinary register may be copies of agreements and minutes of meetings referring to the agreement. Thus, for example, an agreement between X and Y concerning mineral rights might be referred to in the minutes of a board meeting. Since implications flowing from the minutes may give important information it may, not unreasonably, be considered as confidential. With regard to reasons, parties should seek to demonstrate not only how the information is commercially sensitive but also how it affects a 'legitimate' business interest of the parties.

One other possibility arises which might be of use to parties. Section 8(2) of S.I. 1984 No. 392 (discussed above) allows the OFT to refrain from registering information which simply defines the application of a restriction. As noted above the scope of this provision is limited and the OFT view it as an administrative convenience. However, it might be argued that commercially sensitive

data that is superfluous to the restrictions in question need not be registered. Parties might consider drafting a memorandum for submission to the OFT outlining which information is superfluous to the restriction and how it is commercially sensitive.

Memorandums seeking to justify exemption from the ordinary register are made to the OFT who will consider the memorandum and give their advice on it to the Secretary of State who will then, with the assistance of his staff at the DTI, decide how best to exercise his discretion. The DTI often go back to the parties for clarification of their submissions.

D. POWERS OF THE OFT TO OBTAIN INFORMATION

I. OFT Notices

Where the OFT have "reasonable cause to believe" that a person is or may be party to a registrable agreement they may give to the relevant persons a notice requiring them to notify the OFT whether they are party to a registrable agreement and, if they are party to such an agreement, to furnish such particulars of the agreement as are specified in the notice. The notice invariably specifies a time limit for compliance.⁴¹ Where the person suspected of being party to an agreement is a trade association notice may be given either to the association generally, or to the secretary, manager or other similar officer of the association.⁴² Notices may be sent to parties to services or goods export agreements.⁴³ These are exempt from the Act but, nonetheless, must be registered with the OFT.⁴⁴

The OFT may also issue a notice to a person who has furnished information to the OFT for registration purposes. The notice will specify such extra information as the OFT considers "expedient" in connection with registration. A notice may also be sent to a person who is party to an agreement the details of which have been furnished by someone else. Thus, if X, Y and Z are in an agreement the details of which are furnished by X the OFT may issue notices to Y and Z requiring them to furnish information.⁴⁵

II. When a notice may be issued: "reasonable cause", OFT Practice

The OFT may only issue a notice when they have "reasonable cause" to believe that an agreement is being operated. This means that the OFT cannot issue a statutory notice in response to a hunch. The OFT may send out a

notice where they have reasonable cause to suspect that a registrable agreement might exist. In that sense, the OFT do have authority to issue notices in response to strong suspicions.

The "reasonable cause" requirement causes problems for the OFT who, in some circumstances, may believe that an agreement exists but have virtually no evidence to prove it. This is sometimes the case where the OFT observe unexpected patterns of corporate behaviour. For example X, Y and Z might, after a period of intense price competition, suddenly harmonize their prices to an unexpected degree. The OFT, as observers of this conduct, may suspect collusion as the cause of the harmonization. In such a case it is hard to argue that they have "reasonable cause" to believe that an agreement exists. It is possible that the price co-ordination emerged through natural market forces i.e. the companies became more consciously sensitive to each others pricing patterns. In "observed conduct" cases such as this the OFT will probably not issue a statutory notice. Rather, they may send an informal letter to the parties asking them whether they are party to a registrable agreement and reminding them of the duty to register and the consequences of non-compliance. Such a letter invariably proves effective; it indicates to the parties that their activities are being scrutinised and that continuation with an unregistered, clandestine, agreement would be futile.

The OFT take seriously the "reasonable cause" condition and rely on the informal approach extensively. Thus, where they receive an anonymous letter (presumed to be from a disgruntled businessman) which says:

"Meeting - Widget Manufacturers Association - July 5th -
Cafe Royal - topic - prices",

the OFT are more likely to send an informal letter than a statutory notice. Such an anonymous complaint could of course be "sour grapes" and the OFT are usually cautious in such matters.

III. Examination on Oath before the Court

Under Section 37 RTPA 1976 the OFT may, where they have issued a notice under Section 36 RTPA 1976 (see above), apply to the Court for an order that a person specified in a notice, attend before the Court to give evidence under oath. Such a person may be represented by a solicitor or by counsel who may put to him such questions as the Court allows for the purpose of enabling him to explain or qualify any answers given by him. Notes of the examination are taken and are read over and signed by the person under

examination. These notes may be used in evidence against him. The Court may require such a person to disclose any documents or other particulars in his possession or control as may be specified in the notice. Where the notice specifies a company as the person to be examined a Court order may be made requiring the attendance of any director, manager, secretary or other officer of the company or person likely to have relevant knowledge.⁴⁶

For the purposes of the section unincorporated trade associations are treated as companies (i.e. as if they were incorporated).⁴⁷ Information that is privileged because it is a communication between a person examined and his legal adviser may not be required to be disclosed by the Court.⁴⁸

Refusal to comply with a Court order brings the person refusing into contempt of court. The giving of incorrect information to the Court may be perjury which is a criminal offence.

IV. Failure to furnish Correct Information: Penalties

If any person knowingly or recklessly furnishes false information or wilfully alters, suppresses or destroys any relevant document they may commit a criminal offence. If found guilty they may be liable on summary conviction to gaol for up to 3 months and/or a fine of up to £100. If convicted on indictment such a person may face gaol for up to 2 years or to a fine or both.⁴⁹ In DPP v. Automatic Telephone & Electric Co.⁵⁰ two companies were fined £500 and had to pay costs between them of 750 guineas.

Periodic daily fines may be imposed after a conviction up until such time as the documents have been properly furnished.⁵¹

Where the OFT issue a notice to any person under Section 36 RTPA 1976 (see above) failure to comply constitutes a criminal offence for which offenders may be liable on summary conviction to a fine of up to £100.⁵²

Where an offence under Section 37 has been committed by a company, directors, managers, the secretary or any other relevant person acting for the company may also be liable to a fine where the offence has been committed with their consent or connivance or is attributed to their neglect.⁵³

The Automatic Telephone case noted above reveals the dangers inherent in failure to monitor junior management. In 1959 a major agreement between the parties involving, inter alia, market sharing and price fixing was abandoned leaving an agreement involving simply the exchange of patents which was not registrable. In 1962 certain middle management, unbeknown to senior management, exchanged price lists and acted to fix price levels. The

parties were prosecuted upon the basis that they had suppressed information when registering their agreements. Thus, the actions of the middle management superceded the good faith of the senior management in abandoning the earlier restrictive agreement.

E. THE SECTION 21 RTPA 1976 PROCEDURE:
NEGOTIATIONS WITH THE OFT

I. Legal Context

Section 21 is, in practical terms, the very heart of the RTPA 1976. Many businessmen and lawyers however when considering this area of the law view the Restrictive Practices Court to be its central pillar. This is a misconception since only a minute percentage of registered cases (under 1%) reach the Court. In virtually every case a result is reached as a consequence of discussions between the parties and the OFT and not as a consequence of judicial decision.

Accordingly Section 21 RTPA 1976 is given below in full:

- "(1) The Director may refrain from taking proceedings before the Court -
 - (a) in respect of an agreement if and for so long as he thinks it appropriate so to do having regard to the operation of any directly applicable Community provision and to the purpose and effect of any authorisation or exemption granted in relation to such a provision;
 - (b) where an agreement -
 - (i) of which particulars are entered or filed in the register pursuant to this Act has been determined (whether by effluxion of time or otherwise); or
 - (ii) has been so determined in respect of all restrictions accepted or information provisions made under that agreement.
- (2) If it appears to the Secretary of State, upon the Director's representation, that the restrictions accepted or information provisions made under an agreement of which particulars are so entered or filed are not of such significance as to call for investigation by the Court, the Secretary of State may give directions discharging the Director from taking proceedings in the Court in respect of that agreement during the continuance in force of the directions.
- (3) The Secretary of State may at any time upon the Director's representation withdraw any directions given by him under subsection (2) above if satisfied that there has been a material change of circumstances since the directions were given."

Thus in three situations the presumption expressed in Section 1(2) RTPA 1976 that all registered agreements will be referred to the Court may be rebutted. In practice reference to the Court is generally reserved for those cases where the OFT wish to enforce the ban on unregistered agreements with an injunctive order or where a registered agreement exhibits clearly objectionable characteristics (for example, price fixing or collusive tendering). In the latter case they may refer agreements to the Court even though the parties have either terminated all the restrictions or abandoned the agreement altogether.⁵³

The three situations mentioned above are:

- (i) where the OFT make a representation to the Secretary of State under Section 21(2) and the latter directs the OFT not to refer the agreement to the Court;
- (ii) where, before any proceedings have begun, the parties have terminated the agreement or it has expired or, though it continues in force, all the registrable restrictions have been eliminated or have ceased to have effect (these are called 'determined agreements'); and,
- (iii) where the OFT consider it appropriate to refrain from proceedings as a result of directly applicable EEC law. Thus an agreement exempt under Article 85(3) EEC or an applicable bloc-exemption may well be (and inevitably are) spared a reference to the Court.

II.. Relevant Statistics: Enforcement trends

The figures below demonstrate that of the agreements registered approximately two thirds are terminated or have their restrictions filleted by the parties. Only about 10% of cases are modified so as to become suitable for a representation to the Secretary of State under Section 21(2) for a direction not to refer. Between 30-60 agreements would receive Section 21(2) dispensation in an average year.⁵⁴ The OFT adopt as their basic position the view that reference to the Court is unnecessary. Although the statistics show that there have been a large number of Court hearings (over 600) in less than 60 of these have the parties actually disputed the merits of the agreement in full trial. The vast majority of the cases concern enforcement actions by the OFT for injunctions in undisputed proceedings.

The figures given below are based on the total number of agreements registered during the specified year.

GOODS AGREEMENTS

Date	Total Number of agreements registered as at that year	Total number of agreements terminated or where restrictions filleted ⁵⁵	Total number of Section 21(2) cases	Total number of Court hearings
1976	3150	2800	180	403
1977	3320	2892	187	400
1978	3678	3089	202	407
1979	3810	3193	224	639 ⁵⁶
1980	3873	3211	269	641
1981	3940	3231	302	647
1982	4005	3258	314	448
1983	4132	3269	327	648
1984	4215	3292	367	664

SERVICES AGREEMENTS

Date	Total Number of agreements registered since 1976	Total number of agreements terminated since 1976	Total number of agreements where restrictions filleted since 1976	Total Number of Section 21(2) cases	Total number of Court hearings
1976	102 ⁵⁷	-	-	-	0
1977	205	-	-	-	0
1978	321	-	-	-	1
1979	435	-	-	-	2
1980	495	55	32	66	5
1981	686	94	35	82	5
1982	775	118	39	100	5
1983	946	230	42	113	6
1984	984	280	50	144	7

III. The application of EEC rules: Partial Safety for Parties

Many businesses have obtained exemption for their agreements under EEC law. This might be because they have received a formal exemption decision under Article 85(3) EEC,⁵⁸ or because the Commission has sent them a "comfort letter" saying that as things stand the Commission see no grounds for taking further action, or because the Commission have issued to them a "negative clearance" which is a statement to the effect that on the facts available to the Commission they do not consider the parties agreement to fall within Article 85(1) EEC. Alternatively, parties may have drafted their agreement so as to ensure that it complies with the terms of a so called "bloc-exemption". These enactments provide parties with an automatic exemption from the ban on restrictive agreement in Article 85(1). Further details of these exemptions may be found in Chapters 6 and 7. The importance in UK terms is that the OFT may refrain from referring an agreement to the Court

which benefits from EEC exemption. However, falling within the scope of an EEC exemption, does not guarantee smooth passage under UK rules. An agreement may not be within the EEC net if it does not "affect trade between Member States". Such might be the case with an agreement between two purely UK parties which has no international repercussions. Thus, even though an agreement is not subject to Article 85 EEC it will of course remain subject to the RTPA 1976. The parties may find it of no avail to present to the OFT a negative clearance in which the Commission state that there are no grounds for applying Article 85. Further, there might be exceptional cases where a restrictive agreement has beneficial effects on the EEC market and accordingly the Commission grant an exemption under Article 85(3) EEC but harmful effects on the UK market. In such a case the OFT would intervene. The OFT and the Commission in Brussels keep reasonably close contact and invariably exemption from the EEC Commission is honoured by the OFT.

The Restrictive Practices Court may, under Section 5 RTPA 1976, decline or postpone application of its powers under the Act if it sees fit having regard to EEC law. It is under no obligation to do so however.⁵⁹

An agreement exempted under EEC law must still be registered under the RTPA 1976.

F. MODIFICATION AND ABANDONMENT OF AGREEMENTS:
OPTIONS AVAILABLE TO PARTIES

Under Section 21(1)(b) the OFT may refrain from referring an agreement to the Court in four situations:

I. Termination and abandonment

Parties to unregistered agreements that have been operated clandestinely invariably terminate and abandon agreement once light is thrown upon them. In such cases the OFT, in response to the underhand method of their operation, may refer such agreements to the Court for an order under Section 35(3) RTPA 1976 restraining the parties from continuing with the agreement or any other unregistered agreement. References to the Court are usually justified, not on the grounds that the restrictions are unduly serious (though often they are for otherwise they would have been registered) but on the basis that the parties blatantly ignored the registration laws. In some cases, where the OFT are satisfied that the parties will not seek to continue with the agreements in the absence of a Court order, they might refrain from referring the agreement.

Where an agreement has been registered but the OFT indicate that its restrictions are unacceptable parties have little option but to terminate and abandon or face a full-scale battle to defend the agreement before the Court. Invariably parties choose to abandon. Agreements which for example seek to set prices, share markets, fix methods of trading in a rigid manner, tender for contracts on an agreed basis or impose unreasonable exclusion or limitation clauses in contracts with consumers will rarely be acceptable and will have to be modified or, more likely, abandoned, if a reference to the Court is to be avoided.⁶⁰ Parties thus face the dilemma of deciding upon a course of action involving modification or abandonment if an agreement cannot be considered for a Section 21(2) exemption (see below). Negotiations over whether modification or outright abandonment would thus occur after the OFT have decided that a Section 21(2) exemption is inappropriate. In cases of agreements containing restrictions of the type noted above the OFT will discard the Section 21(2) option almost immediately. Where the OFT take a strict line on a registered restriction, for example because it seeks to set prices or fees, reference to the Court is not as likely as it would be in respect of an unregistered agreement.⁶¹ If parties can persuade the OFT of their firm intention not to revive the agreement the OFT may yet decide not to refer. Parties should consider positively giving such assurances.

If they are referred to the Court and an order is made against them such an order can hang like an administrative mill-stone around the necks of responsible directors and managers of the firms subject to the order. Breach of the order, however innocuous or unintentional, results in the parties being in contempt of Court with the serious repercussions that entails. Thus, a Court order places a burdensome administrative onus on parties to institute monitoring and compliance systems to avoid contempts.

II. Termination, registration and Novation

As has already been discussed (c.f. Section B,V above) where parties have unwittingly entered and failed to register a relatively innocuous restrictive agreement an escape route does exist which enables them to avoid the drastic consequences of non-registration. Parties must immediately terminate the agreement thus allowing the OFT to exercise their discretion not to refer determined agreements to the Court. Subsequently, they must fully furnish the details of the agreement to the OFT for registration, and finally, they must create an entirely new agreement on the terms of the old. It is not enough simply to reactivate the old agreement since this would be to simply revive an unlawful, unregistered agreement. It is, legally speaking, a wiser course to novate the old agreement; that is to say, to create a new agreement on the terms of the old. This involves re-signing and re-dating the contract. Parties who wish to adopt this course should ensure that OFT advice and opinion is sought.

III. Agreement Filleted of all registrable restrictions

Many businessmen decide that rather than conduct lengthy negotiations with the OFT about registrable restrictions they will fillet out of their agreement all of the restrictions that bring it within the Act. In this respect three broad categories of agreement are to be found: (a) agreements where the restrictions are the central part of the agreement, they are its *raison d'etre*. In such cases filleting of restrictions berefts the agreement of all utility and parties must decide how important the agreement is to them and whether it is worth arguing over with the OFT; (b) agreements containing restrictions that are peripheral to the central purpose of the agreement. Often trade associations recommend to their members that they adopt a standard form contract in their dealings with consumers. Such contracts may contain a substantial number of restrictions.

If the OFT object to any of the restrictions the parties should consider seriously how valuable that particular restriction is to their business and whether it is worth defending in Court. Indeed, before entering into negotiations with the OFT parties should undertake a searching inventory and evaluation of the utility of every registrable restriction in the agreement. Further, they should have in their minds an idea of the relative value of each restriction to their trade. This will enable parties to know how far to go in making concessions or in agreeing to modifications. In the Association of British Travel Agents⁶² case, for example, ABTA refused, in the face of OFT opposition, to terminate its collective exclusive dealing arrangement whereby travel agents who were ABTA members could only deal with tour operators who were ABTA members and vice versa. ABTA decided to defend this agreement before the Court and, although it was ordered to relinquish certain other restrictions, the Court accepted ABTA's public interest arguments concerning this collective exclusive dealing agreement which ABTA had termed the "stabilizer"; (c) agreements where the restrictions exist for historical reasons and have little or no bearing on the contract. In a number of cases parties include, as a matter of tradition, certain restrictions in contracts. The OFT when confronted with such clauses encourage the parties to assess the worth of the restriction and fillet them where possible. Many trade associations have taken the opportunity to reassess their standard form contracts and modify them so as to either avoid registration altogether or render them suitable to a Section 21(2) direction.⁶³

During 1978-1980 various service supply associations of media owners undertook detailed reviews of marketing practices. In particular they reconsidered the methods of payment of commission to advertising agencies, and further, they reviewed the criteria employed in deciding whether or not to recognise a particular agency. The associations had accepted a number of restrictions as to the agencies to whom, and the terms on which, commission and credit should be given. In January 1979 the Newspaper Publishers Association and the Newspaper Society recommended to members revised rules whereby each member company would grant credit to listed advertising agencies who satisfied certain basic financial criteria. Recommendations concerning the competence or experience of agencies were dropped following OFT pressure. Moreover, no recommendations would in future be made as to commission and members would be free to offer credit to non-listed agencies. In the annual report for 1980 the OFT commented: "The modified agreements

involve major changes and the Director General will need to have experience of the working of any new scheme and its effects before he can come to a final conclusion as to the significance of the remaining restrictions."⁶⁴

Companies undertaking revisions and reviews of existing practices may submit draft variations of registered agreements to the OFT for the latter's opinion. In such cases the OFT, in accordance with standard practice, will usually seek the views of concerned third parties before making any assessment of the significance of the restrictions.⁶⁵

IV. Effluxion of time: Expired agreements

Many agreements lapse because they have run their allotted contractual time and have no further relevance. A typical example of such cases are sale of assets agreements. where a business is sold the agreement for the sale of assets may sometimes be registrable. For example, a parent company may sell off a subsidiary under a contract which requires the former parent not to engage for a stipulated period of time in any business which would compete with that of the subsidiary which was sold. Such an agreement is registrable if the subsidiary also accepts restrictions. The agreement may last for a year or perhaps longer, however, it will be for a fixed term.

G. NEGOTIATIONS UNDER SECTION 21(2): DISPENSATION FROM REFERENCE TO THE COURT

Parties to agreements may obtain dispensation from reference to the Court. Section 21(2) RTPA 1976 empowers the OFT to make representations to the Secretary of State for the latter to direct the OFT to refrain from referring an agreement to the Court. The OFT may only make such a representation upon the basis that the restrictions "... are not of such significance as to call for investigation by the Court ..." A central question therefore is what is meant by "significance". Other important issues for businessmen and advisers to note are the stages that Section 21(2) cases will progress through.

I. The relevance of public interest arguments

The concept of "significance" is by no means an easy one to define. In 1975 the OFT publically stated: "Broadly speaking the criteria now adopted in deciding whether or not a representation can be made is whether the agreement appears capable of causing detriment of the kind which the Court might take into account if the agreement came before it. Thus a primary consideration is whether the agreement is likely to reduce competition between those affected in any material respect which would be disadvantageous to consumers or customers or whether it is likely to produce discriminatory or other unfair results." There is an implication in this statement⁶⁶ that the OFT undertake a preliminary assessment of the public interest. This derives from the words in the statement that they assess restrictions for "detriment of the kind which the Court might take into account if the agreement came before it". Such an implication is wrong and misleading. The word "detriment" is a key word in Court proceedings to assess restrictive agreement. A restrictive agreement referred to the Court must satisfy various public interest criteria laid down in the RTPA 1976 (in Section 10(1)(a)-(h) for goods and Section 19(1)(a)(h) for services). If an agreement satisfies these criteria (known as the gateways, see Chapter 5 Section C) it must also pass muster under what is known as the "balancing tail piece" test. Under this test of restrictive agreements (which is laid out at the end of Sections 10(1) and 19(1) RTPA 1976) parties must prove that the public interests points in their favour outweigh "... any detriment to the public or to persons not parties to the agreement ...". This rather oblique reference to detriment not surprisingly gave rise to some confusion amongst businessmen and lawyers. Accordingly, more recent OFT statements have clarified the use of the word. Thus, in 1979, the OFT stated:

"Previous reports have explained the use of Section 21(2) of the Act and the powers and responsibilities of the Director General in relation to those of the Court, but experience has shown that there is still room for misunderstanding and the following points bear repeating.

The office forms a considered view of the significance of restrictions. They may be significant because, for example, they limit supplier's freedom to make their own decisions about prices, charges or methods of trading. Any restriction which appears capable of causing detriments either to consumers or to other traders as a consequence, for example, of a reduction in competition or because it has discriminatory or unfair results, is in principle a matter of significance. It is then up to the parties to

decide whether they wish to defend any such restriction before the Court, to modify it, or to abandon it. If any restriction is to be defended, the whole of the agreement must be referred to the Court. In considering the question of significance, the Office needs to take into account the views of interested parties and users of the services. Most associations continue to show considerable willingness to co-operate in reducing the constraints on their members and in achieving more equitable and reasonable agreements. In several cases they have welcomed the opportunity to review long-standing provisions which are no longer apposite."⁶⁷

Thus the OFT focus their analysis on the economic consequences of a restriction especially as they affect third parties. Indeed economists play a major role in the evaluation of restrictions. The OFT are very aware that the scheme of UK competition law is against allowing an administrative body such as the OFT the right to decide upon public policy matters. Such a scheme is repeated in the Competition Act 1980 which allows the OFT to investigate anti-competitive courses of conduct pursued by individual firms but which does not allow them scope to consider whether anti-competitive conduct is justified on wider grounds of public policy. In the case of the Competition Act 1980 the Monopolies and Mergers Commission is the forum for public interest arguments; in the case of the RTPA 1976, the Restrictive Practices Court is the forum for such debate. The OFT have publically accepted this limitation upon their discretion under Section 21(2):

"It is not always appreciated that the Director General's concern is with the question whether or not a restriction is of significance for the Court; if it is, he must refer it, if it is not, he may make a representation to the Secretary of State. Wider considerations of the public interest which may justify a restriction are for the Court only to decide and the legislation specifies various grounds ('gateways') on which the parties to an agreement may argue that the restrictions in it are not on balance against the public interest."⁶⁸

It follows from this that in negotiating with the OFT the sorts of matters laid down in Sections 10(1) and 19(1) RTPA 1976 (the 'gateways') are immaterial. This at least is the tenor of the statements made by the OFT and is largely correct. Thus arguments to the effect that the restriction: is needed: to protect the public against injury; to prevent serious unemployment; or, to maintain export earnings, will be rejected by the OFT. However, some of the gateways do apply economic criteria of a nature that would be relevant in determining "significance". In particular, Sections 10(1)(h) and 19(1)(h) provide that restrictive agreements might be acceptable where they do not "directly or indirectly restrict or discourage competition to any material degree". This applies a de minimis rule to

restrictions such that where they have no significant effect upon competition they may be acceptable. Obviously, the word "significance" in Section 21(2) can, inter alia, imply the same, that the restriction has only a minimal effect on competition. The Liesner Committee, Review of Restrictive Trade Practices Policy in 1979 expressly recognised the relationship between Section 21(2) and Sections 10(1)(h) and 19(1)(h) RTPA 1976 when they stated of those sections: "one possible application would be to challenge before the Court the Director General of Fair Trading's refusal to make a Section 21(2) representation to the Secretary of State, or the latter's refusal to discharge the Director General of Fair Trading from taking an insignificant agreement before the Court."⁶⁹

From the above it is clear that the concept of significance (or insignificance) is essentially an economic concept. It does not embrace broad public policy considerations but does appear to include public policy considerations where these are narrowly grounded in economic principle and relate specifically to the parties own circumstances. Therefore, simply because a negotiating factor under Section 21(2) has a counterpart in the "gateways" in Sections 10 and 19 RTPA 1976 does not mean that it is excluded from submission to the OFT in respect of Section 21(2) negotiations. Nonetheless it should be clearly understood that whilst parties may submit economic arguments the OFT will frequently reject them if they consider them to have a public interest grounding.

II. De Minimis: small scale agreements

Agreements whose economic effect is marginal may be exempted as noted above upon a de minimis basis i.e. that they are too small to be worth bothering about. A small scale agreement may be quantified in a number of ways though the principal method is market share of the parties. If the parties to an agreement together control only a small percentage of the market then restrictions in an agreement between them will have little if any impact on competition. If, for instance, the parties sought to standardise credit terms and customers disliked those terms the result would simply be that those customers would go elsewhere. Market share can be measured in terms of turnover of the parties against total turnover; value of sales made by the parties against total amount of sales made in the market (or purchases since these two figures will equate); total volume of sales by the parties against total volume of sales in the market (or total

market consumption). In seeking to establish that an agreement is of minor importance parties may well decide to submit relevant statistics where these are available.

In seeking to persuade the OFT that an agreement is of minor importance parties must carefully define their geographical market. An agreement that is insubstantial in a national framework may certainly be substantial in a local framework. The factor of geographical market is discussed in Section F below.

III. Reasonableness, "significance" and the Unfair Contract Terms Act 1977

The OFT hold that restrictions that injure the consumers interests are significant:

"... the recommendation of standard terms and conditions by an association is not regarded as necessarily having a significant effect on competition but, to ensure there is no likely detriment, the terms should be fair and reasonable to all concerned, not likely to mislead those who will use them, and not unnecessarily exclude variation to meet special circumstances and requirements. The benefit to customer of having standard conditions must be balanced against any detriment to them of being deprived of the freedom to secure more favourable terms than those likely to result from the restrictions imposed by them. In general mandatory standard terms and conditions are not regarded as suitable for Section 21(2) since they are not variable to meet special circumstances. In all cases the recommended terms and conditions are looked at clause by clause."⁷⁰

Trade associations registering recommended standard form contracts often encounter the criticism that the terms of the agreement are not fair and reasonable. The OFT apply the broad test of reasonableness laid down in the Unfair Contract Terms Act 1977. That Act prohibits absolutely some types of contract clause but, in the main, renders exclusion and limitation of liability clauses valid only if "reasonable". The Act provides no precise definition of the meaning of 'reasonable' however it does provide some detailed guidelines for use. The OFT justify application of this Act on the basis that an "unreasonable" restriction cannot be insignificant. Moreover, an agreement that is unreasonable will, when referred to the Court, (no Section 21(2) dispensation being available) be struck down under the balancing tailpiece even if it managed to pass through the public interest gateways. The balancing tailpiece provides that for an agreement to be acceptable it must be established that a restriction "... is not unreasonable having regard to the balance between those [public interest]

circumstances and any detriment to the public or to persons not parties to the agreements ..." Thus, the Court must itself apply a test of reasonableness.

What is and what is not a reasonable clause is a matter for debate (see Chapter 11 on terms and conditions of trade). Where standard form contracts are concerned reference should be made to the Unfair Contract Terms Act 1977 and to cases on the meaning of "reasonableness" under that Act. The OFT consider that the Act is difficult to enforce and litigate and therefore they seek to ensure that trade associations in drafting standard form contracts do not exploit any superior bargaining strength they possess. Where parties are of equal or roughly equal strength and a standard form contract has been freely negotiated the OFT are more likely to adopt a laissez - faire attitude on the basis that a clause freely agreed upon will only in exceptional circumstances be unfair.

In British Bottle Association's Agreement the Court condemned an exclusion of liability clause in a standard form contract used by members of the British Bottle Association. This strict approach was adopted even though the clause was rarely if ever enforced against purchasers of bottles:

"No purchaser, who gave evidence and who was asked the question, was aware of the existence of this clause as a part of his contract for the purchase of bottles. We would only say this: we would have had no hesitation whatever in declaring this restriction to be against the public interest, even if all the other restrictions had been in the public interest."⁷¹

A number of points may be extracted from the decision in British Bottle Association which may be cited as justification for the OFT approach. First, simply because a purchaser under a standard form contract is a company rather than an ultimate consumer does not necessarily mean that a restrictive clause will be presumed to be freely agreed to. Secondly, restrictive clauses that exist for historical reasons alone and are not commonly applied in practice should be reviewed and where possible removed.⁷² Thirdly, the Court adopts a strict approach to limitation and exclusion clauses thereby justifying an equally vigorous approach by the OFT. (For further details see Chapter 11).

IV. Discrimination, unfairness

The OFT have consistently repeated the view that an agreement which leads to discriminatory or unfair consequences is significant and no Section 21(2) representation may be made in its respect. A not uncommon example derives from "approved lists" whereby an association recommend to

their members that they only deal with either firms approved by the association or who satisfy certain criteria. Approval systems per se are not necessarily objectionable so long as the criteria employed for granting approved status are fair and non-discriminatory. Thus approval by reference to commercially justifiable standards of financial liquidity or creditworthiness may be permissible. However, where an association recommends quality or competence criteria discriminatory results may well result. The OFT contend for example that for a trade association to deter its members from dealing with customers who do not meet quality standards is to unfairly prejudice firms who serve the lower end of the market. Further, it denies consumers the choice of buying cheaper, lower quality goods or services.⁷³

Likewise if an association recommends that members provide better discounts to members of a purchasers organisation than to independents this discriminates against independents vis-a-vis competing aligned firms. A common problem that might lead to discriminatory or unfair results is the maintenance of credit lists where associations or groups of companies operate credit assessment schemes under which the creditworthiness of customers is assessed and members of the scheme advised accordingly. If the scheme runs on anything other than totally objective data it runs a risk of unfairly labelling a person a bad credit risk. The criteria adopted for assessment will be carefully scrutinised by the OFT.⁷⁴

V. Material effect on Competition

Materiality is in reality a form of de minimis rule (see above).

Any agreement having a material effect upon competition cannot be treated as insignificant. In 1979 the OFT threatened to apply to the Court for an interim order under Section 3 RTPA 1976 against London Weekend Television Limited (LWT) and the Football League. The latter granted LWT exclusive rights to televise football matches played under the League's jurisdiction for a three year period commencing 1 July 1979. This agreement superceded arrangements existing between the League, the BBC and the independent companies. The OFT complained that this would reduce choice for consumers and limit coverage. The agreement was exclusionary in that the BBC were effectively precluded from covering football. In response to such pressures the parties abandoned the agreement and entered a new one which brought in the BBC. The OFT have to deal with literally hundreds of

of sports coverage agreements of this nature. The longer the period of exclusivity the more likely it is that the OFT will view the agreement as restrictive of competition.⁷⁵ The size of the parties and the length of the exclusivity period meant that the effects of the agreement would inevitably be material.

Choice is an essential ingredient in competition; hence the standardisation of contract terms between suppliers can reduce an important part of that competition. There are certainly benefits for supplier and consumer to be derived from standard form contracts. Nonetheless, the OFT adopt a thorough clause by clause approach to standard form contracts recommended by associations. The standardisation, for example, of credit periods can eradicate an important factor that customers looked to when choosing between firms. Similarly the harmonisation of even mundane clauses can, in extremis, be relevant. Though usually the harmonisation of non-essential contract matters is suitable on a de minimis basis (see above) for Section 21(2) representation. For example in the Association of Domestic Laundry and Cleaning Services Code of Practice (drawn up with OFT assistance) guideline 10 for implementing the code states: "Members accept liability for loss or damage arising out of fire or burglary even when they are not negligent (when the customer has no insurance himself) - ... Members are therefore strongly recommended to check that their insurance cover is adequate to indemnify them (i.e. Members) in such circumstances." Members of the association thus refrain from exempting liability even though they might legally be entitled when it is "reasonable" to do so under the Unfair Contract Terms Act 1977. This is thus a freedom members have relinquished. It is possible that in the absence of the code some laundry firms might have legally excluded liability and passed on the savings they made (from not being liable) in insurance costs to the consumer in the form of lower charges. Thus the standardised term might marginally effect competition. The OFT, nonetheless, obtained Section 21(2) dispensation for the code, there being no material effect on competition.⁷⁶

VI. Section 21(2) applies to restriction not agreement

In handling a registered agreement the OFT assess only the restrictions in the agreement they do not evaluate the agreement as a whole. In 1980 the OFT publically stated: "It is important to note that it is not the significance of the agreement as a whole which has to be considered, but that

of the restrictions in it. Agreements significant in themselves, but in which all the restrictions are insignificant, are acceptable for a representation." For example in 1980, Section 21(2) dispensation was given to an agreement between two large conglomerate corporations to set up a joint venture company to produce starch and gluten. The two parents - Read International Ltd. and Rank Hovis McDougal - agreed not to compete with the joint venture company and Rank Hovis McDougal agreed to supply the company's requirements of wheat flour. These restrictions were agreed in the context of a venture between two very substantial companies and involving large sums of money. However, they were insignificant in their effect upon competition because of the limited extent to which the two companies competed with each other.⁷⁷

Thus, it is not the turnover of the parties that is relevant. Nor is it the monetary value of the contract. The principal question is whether the restrictions in the agreement are significant. Any other conclusion would, of course, be commercially unrealistic since otherwise agreements between large companies would always be unsuitable for Section 21(2) representation and would either have to be modified or referred to the Court.

VII. OFT procedure for evaluation of Agreements

(i) Prima facie examination to determine registrability

On receipt of an agreement the OFT must determine whether it is registrable. The mere fact that parties have furnished it is not of course relevant given that many parties furnish documents on a fail-safe basis when uncertain of its registrability. In complex agreements, for example, standard form contracts recommended by service supply associations involving financial restrictions, the OFT might adopt a "prima-facie examination" approach whereby they examine the agreement to check whether the minimum requirements for registrability are satisfied leaving aside other matters for future considerations. This approach was common during the period 1976-1978 when services agreements were being furnished in large numbers following the calling up order of 1976 requiring services agreements to be registered.⁷⁸

Nearly 600 agreements were furnished to the OFT between the commencement of the order and the end of 1976.⁷⁹ Sometimes the

registrability of an agreement cannot be dealt with on this basis, and in such circumstances, negotiations by correspondence and discussion must occur over a lengthy time period in order to determine whether the Act applies.⁸⁰ For instance an agreement fixing the fees to be charged by two firms of mapping and ocean surveillance consultants might well be exempt from the Act under Schedule 1 RTPA 1976 which exempts from the Act professional services. Schedule 1(13) excludes the services of professional engineers and technologists from the Act. The provision gives a long elaboration of categories of engineer and technologist. Whether the fee-fixing agreement described above fell within the exemption would depend upon factual information defining the scope of mapping and ocean surveillance activities. The OFT might ultimately decide that, on the facts, the agreement was exempt as relating to "... mining, quarrying, soil analysis or other forms of mineralogy or geology" (Schedule 1(13)(c)) or "mechanical, aeronautical, marine, electrical or electronic engineering" (Schedule 1(13)(b)). The OFT have commented: "It frequently involves as much time and effort, if not more, to determine that a particular agreement is not registrable as to reach a conclusion that it is."⁸¹

(ii) Worst restrictions first

When services agreement first became registrable the OFT adopted a selective approach to agreements tackling the most blatant and obviously significant restrictions first leaving others until time allowed a more detailed examination. According to the OFT this approach achieved the abandonment of major restrictions in many agreements albeit that some lesser restrictions remained to be negotiated over.⁸² Given that certain categories of agreement are as yet unregistrable, principally services information agreements (see Chapter 9), it is possible that this approach will be redeployed if a sudden flush of such agreements were to become registrable by virtue of an Order of the Secretary of State.

(iii) Negotiations and Third Parties submissions

It will be recalled that when considering any "detriment" that results from a restriction the OFT look to the consequences for consumers and other third parties. The OFT request these parties to submit their comments. There are no rules as to who may submit comments though the OFT give weight to the comments of those who are,

or may be, affected by the restrictions. Thus, the views of customers and consumers are important or users where services are concerned. Collecting this information can be a lengthy process spanning many months. Interested parties may present their submissions to the OFT at a meeting. Where the person submitting information to the OFT so desires confidentiality may be secured. Some third-parties are clearly concerned that in submitting information to the OFT they are damaging their commercial relations with the parties to the agreement, or even inviting retaliatory action.

When the OFT consult third parties they sometimes discover that third parties have already been influential in the shape of the agreement. In such cases what at first sight might have appeared unduly restrictive may turn out to be perfectly acceptable to third parties. For illustration, in Tug Owners Association Standard Towage Conditions the OFT examined a variation of a standard form contract used by providers of towage services which sought to exclude liability for every type of imaginable liability however caused. The contract operates in the context of agreements between tug-owners and owners of ships which are to be towed in and out of port. Ostensibly the clauses are patently unreasonable throwing all of the risk onto ship-owners. Section 21(2) dispensation was given in 1984 following the submissions of third parties. The British Maritime Law Association (BMLA) wrote to the OFT stating that they had already examined the agreement and given their approval. They noted further that membership of the BMLA included: General Council of British Shipping; British Tugowners Association; Lloyds of London; and the P. & I. Clubs (shipping insurers). The major insurers of shipping - the P. & I. Clubs - also wrote individually to the OFT explaining how the exclusion clauses were not unreasonable when viewed in the overall context of insurance which counterbalanced the benefits and burdens of the exclusion clauses.⁸³

(iv) Negotiating Modifications to Agreements

The options open to parties once agreements have been registered have already been discussed. Essentially, parties may: terminate and abandon the agreement; fillet the agreement of all the registrable terms; fillet the agreement of such terms as render it unsuitable for representation; refuse to negotiate modifications and seek to defend the agreement before the Court. The OFT are involved in approximately

100-150 agreements at any one time. Negotiations can take many months to complete, well over one year can sometimes elapse before a result is reached. The OFT refuse to redraft agreements for parties. They will make known their objections to a restriction but then it falls to parties to suggest amendments which will overcome OFT objections.

In terms of actual procedure, the OFT notify the parties of their initial identification of restrictions giving them a preliminary view of their restrictions. After they have consulted third parties they will give the parties a more detailed, considered view of the restrictions.⁸⁴

(v) Representation by the OFT to the Secretary of State

When the OFT is satisfied that an agreement is suitable for a representation they will draft a representation for submission to the Secretary of State. The representation is not simply a letter requesting a direction to refrain from taking court proceedings. It usually takes the form of a detailed analysis of the legal and economic considerations which make the agreement suitable for representation. It has been very loosely described as a "mini-MMC report". Thus depending on circumstances the submission may contain details of such factors as:

- (a) the parties and their backgrounds for example their size, market-share, turnover etc.;
- (b) why the agreement is registrable;
- (c) the history of negotiations with the company, what the agreement as registered was and how extensive the subsequent modifications;
- (d) why the agreement as it stands is acceptable and what the economic consequences and characteristics of the agreement are;
- (e) the identities of third parties and what their views were including OFT appraisal of these views;
- (f) the nature of the geographical and product market.

The length and detail of the representation varies. Easier cases, for example sale of asset cases, require relatively short reports. Complex cases, for example concerning standard form contracts drafted by services supply associations, may require detailed, lengthy reports. Both lawyers and economists play a part in preparation of these reports.

Parties have no right to inspect the representation.

(vi) Directions given by the Secretary of State-

If the OFT representation is accepted by the Secretary of State the Director General will be notified that he need not refer the restrictive agreement to the Restrictive Practices Court. In practice staff at the Department of Trade and Industry (DTI) review the representations. Only very rarely do they query a representation made by the OFT. Occasionally a request for further data is made or an enquiry as to the views of a third party that does not seem to have been consulted is made.

If the Secretary of State accepts that restrictions in an agreement are not of significance he is not bound to give a direction discharging the Director General from commencing proceedings. Section 21(2) merely states that if it appears to the Secretary of State that a restriction is not of significance he "may" direct the Director General to refrain from taking court proceedings. There might be delicate circumstances relevant to the agreement known to the Secretary of State which convince him that a full examination of the case by the Court is desirable. Consultation by the DTI with other governmental departments is sometimes made. Thus the views of the Treasury or the Ministry of Agriculture Food and Fisheries may for example be illicit.

(vii) Post-direction Monitoring by the OFT: Section 21(3)

Once a direction has been given to the OFT permitting them to refrain from referring an agreement to the Court the OFT may at any time apply to the Secretary of State under Section 21(3) RTPA 1976 for the directions given by him to be withdrawn. The criteria for such a withdrawal is that there has been, "... a material change of circumstances" since the directions were given. Certainly a direction by the Secretary of State for withdrawal of a direction would be subject to judicial review under Section 31 of the Supreme Court Act 1981 and Rules of the Supreme Court, Order 53 on the basis that there was not a "material change of circumstances" justifying withdrawal of a direction. Such an action has never been commenced. However, the Court has heard actions on the meaning of the words "... prima facie evidence of a material change in the relevant circumstances" under Section 4(4) RTPA 1976. This permits the parties to apply to the Court to be relieved from a previous Court order made against them. To succeed they must establish "prima facie evidence of a material

change in the relevant circumstances". In Cement Makers Federation Agreement No. 2⁸⁵ the Court accepted the arguments of counsel for the Director General that this phrase meant that the applicant had to show that by reason of new facts there was a prima facie change in an essential part of the reasoning by which the Court had come to its previous conclusions. If this applies to Section 21(3) then the Secretary of State may only withdraw a direction where satisfied that a material change in circumstances has arisen such as to effect an essential part of the reasoning which led him to grant the application made by the OFT. When comparing Section 4(4) with Section 21(3) two differences should be borne in mind. First, the words from Section 4(4) noted above apply to applications by parties to the Court for a variation of an order, they do not relate to the making of the decision by the Court. Section 21(3) conversely uses the words to refer to the actual making of the decision to withdraw directions.⁸⁶ Secondly, the evidentiary burden appears different in both sections. In Section 4(4) the parties may act by making an application where they have "prima facie evidence". In Section 21(3) the Secretary of State may act by withdrawing a direction only where "satisfied" that a material change in circumstances has occurred. The latter appears to be the stricter burden of proof of the two provisions. Nonetheless, these differences alone should not be sufficient to alter the conclusion above concerning the Cement Makers case.

There is little doubt but that the Secretary of State may also review a direction and withdraw it where there is evidence of fraud or misrepresentation by the parties, for instance in furnishing inaccurate data or documents for registration.⁸⁷ However, it is less clear whether a direction can be revoked where the Secretary of State made an error in granting a direction or where there is a material error in the representation of the OFT which persuaded the Secretary of State to grant the direction. Is discovery of such an error by the authorities a material change in circumstances justifying withdrawal of the direction? Under normal circumstances Section 21(3) would be used in respect of the behaviour of the firms themselves. For example, an agreement given a Section 21(2) direction on de minimis grounds may become significant because one of the parties is taken over and its economic power overnight increases dramatically changing it from a minor to a major participant in the market. It might also be used where for political (e.g. EEC) reasons the market structure changes.⁸⁸

In administrative law a decision by a competent authority once made is irrevocable.⁸⁹ However, many powers conferred by statute are subject to ancillary powers to entertain fresh proceedings and make a different decision. An example would be planning applications which may be varied at any time if a fresh application is made. Often the power to review expressly includes cases of mistake.⁹⁰ Even where express powers are not conferred it has been strongly argued that statutory tribunals have inherent jurisdiction to set aside judgments obtained by fraud and to review decisions where facts subsequently discovered reveal a miscarriage of justice.⁹¹ Case law on whether mistake justifies vitiating a previous decision is scant. One fairly recent judgment suggests that the power to review on grounds of mistake does exist. In Rootkin v. Kent C.C.⁹² the local authority agreed to pay the travel costs to school of a girl who the authorities believed lived more than three miles away from school. The authority thus considered themselves under a statutory duty to pay. When they subsequently discovered that the girl lived within a three mile radius of school they sought to withhold payment. The Court of Appeal held that the first decision was not irrevocable and that the decision was not taken in the exercise of any power to determine a legal right and hence could not affect the duty to exercise the discretion when the true facts materialised.

Although, Section 21(3) seems only to envisage withdrawal of a direction in practice it has been used to obtain variations of directions as well. The OFT have stated:

"The work also involves examining variations to agreements already subject to directions, so as to decide whether or not it is necessary to seek the withdrawal of the directions on the ground that there has been a material change of circumstances since the directions were given. So far it has not been necessary to seek the withdrawal of directions on any varied agreement, but it has been necessary to seek amendments to some in order to allow the directions to stand."⁹³

(viii) Time

The negotiation of registered agreement is not a rapid process. The briefest and easiest of cases (for example codes of practice drafted with OFT assistance under the Fair Trading Act 1973) may take six months from furnishing of documents to granting of Section 21(2) directions. The period of time between OFT representation and

Secretary of State grant of direction being approximately two to three months.

A more typical agreement may take between one and two years to reach a result. An exceptionally difficult case may take up to three years. The causes of these delays are diverse. Though an agreement furnished to the OFT is at least safe from the dramatic consequences of failure to register in Section 35 RTPA 1976 (restrictions void; parties vulnerable to damages actions by affected third parties; if discovered by OFT reference to Court for injunctive order likely). Moreover, once furnished the agreement may continue until a final decision on it has been reached by the Court itself. It is thus not necessarily always in the parties best interests to expedite the process. The incentive to stall is the greater if parties are aware that the agreement is likely to be unacceptable to the OFT. In complex cases delay tactics are not the only problem. The OFT have to undertake detailed market analysis;⁹⁴ collect information from interested third parties; and of course negotiate modifications to agreements with the parties.

FOOTNOTES

1. The rules for registration are set down in S.I. 1984 No. 392 Registration of Restrictive Trading Agreements Regulations 1984.
2. Section 24 RTPA 1976 elaborated upon by Schedule 2 RTPA 1976 Furnishing of particulars of Agreements.
3. Section 35(1)(a) RTPA 1976.
4. Section 35(1)(b) RTPA 1976.
5. Section 35(3) RTPA 1976.
6. See Section E of Chapter 5.
7. [1983] I.C.R. 215.
8. *ibid.*, at p. 218.
9. [1968] 2 Q.B. 762 (C.A.) followed in Brekkes v. Cattel (1970) L.R. 7 R.P. 150 at p. 167 per Pennycuik V.C.
10. *ibid.*, at pp. 782, 783. See per Davies L.J. at p. 784 and per Russell L.J. at p. 785. Counsel for the defendants apparently argued that the agreement could not be unlawful until found to be so by the RPC (*ibid.*, at pp. 776, 777).
11. [1967] 3 W.L.R. 1032; [1968] 1 Q.B. 396: Newspaper informed by laundry manager who has resigned that his ex-company and others were conspiring to fix the price of laundry services. See also B.S.C. v. Granada Television [1981] A.C. 1096; [1968] 1 All E.R. 417; [1980] 3 W.L.R. 774.
12. See e.g. Scott v. Brown [1892] 2 Q.B. 724; Edler v. Auerbach [1950] 1 K.B. 359 c.f. Shaw v. Shaw [1965] 1 W.L.R. 537. See generally, Grodecki, 71 L.Q.R. 254; Higgins, 25 M.L.R. 598.
13. Simpson v. Nichols (1838) 3 M & W 240; Scarfe v. Morgan (1838) 4 M & W 270 at p. 281; Elder v. Kelly [1919] 2 K.B. 179; Singh v. Ali [1960] A.C. 167.
14. e.g. Re London County Commercial Reinsurance Office [1922] 2 Ch. 67; Bran White v. Worster Works Finance Ltd. [1969] 1 A.C. 552; South Western Mineral Water Company v. Ashmore [1967] 1 W.L.R. 1110.
15. See Treitel, *The Law of Contract* (1983) pp. 791 (money paid under a void contract), 370-380 (money paid under contract void for incapacity), 395-397 (money paid under contract void for illegality).
16. *ibid.*, at p. 791.
17. Cases exist where a party to an unregistered agreement has been allowed to plead the illegality of the contract as a means of escaping its obligations: Topliss Showers v. Gessey [1982] I.C.R. 501. This argument has been pleaded in other cases also, see, Vernon v. Universal Pulp Containers [1980] F.S.R. 179; Academy Sound & Vision v. WEA Records [1983] I.C.R. 589. For Commentary see Chapter 5 Section G.

18. See, Cunningham, The Fair Trading Act 1973, (1974) p. 298.
19. See Chapter 5 Section H for details.
20. Section 2(3) S.I. 1984 No. 392, Registration of Restrictive Trading Agreement Regulations: "Where the documents sent out or delivered ... do not disclose the name and address of any person party to the agreement, there shall also be sent or delivered therewith two copies of a document indicating that person's name and address: Provided that this paragraph shall not require the name or address of any of them to be provided if their number exceeds 100 and there is sent or delivered with the documents sent or delivered ... two copies of a document indicating their number or their approximate number."
21. Section 2(2)(a) S.I. 1984 No. 392.
22. Section 2(2)(b) S.I. 1984 No. 392. When documents are being furnished to the OFT they must accompany the documents with a Certificate (available from the OFT entitled Form RTP(C)) signed by the person furnishing the documents which declares that to the best of the signatory's knowledge proper details have been furnished. All documents have to be listed on the certificate. (Section 7 S.I. 1984 No. 392).
23. Section 4(1)(a) - (c) S.I. 1984 No. 392.
24. Section 5(a) - (d) S.I. 1984 No. 392.
25. Section 6(2)(a) S.I. 1984 No. 392. See Section 3 of the Order for details of registration of agreement that have become newly registrable as a result of the commencement of either an order concerning goods information agreements or an order concerning services generally and which agreements have been varied before the end of 3 months following commencement of the relevant order.
26. Section 6(2)(b) S.I. 1984 No. 392.
27. Section 35(1) RTPA 1976.
28. Section 12(2)(a) - (c) S.I. 1984 No. 392.
29. See e.g. No. 5892 Register of Restrictive Trade Practices, Master Photographers Association. The association issued standard terms and conditions for the supply of photographic services to the public at weddings. The Secretary of the Association, when informed by the OFT that the standard terms and conditions were registrable sent a letter to the members of the association which stated: "Dear Members, that quasi quango dedicated to the permanent employment of unnecessary civil servants primed by parliament to make complicated as much of nothing as possible (the Office of Fair Trading) have advised me that our Model Release Form is not legal because we did not tell them first! So we withdraw it today, tell them tomorrow and use it again, unchanged, the next day. To think we pay good taxes for such laws! Yours sincerely - Secretary." The Association were apparently unsympathetic to the lenient attitude of the OFT. See also, No. 3769 Register of Restrictive Trade Practices, Soap and Detergent Industry Association. The Association sought to obtain an undertaking from its members to abstain from the use of siliceous materials and hard ionics

.... contd.

29. continued -

on health and environmental grounds. They appreciated that a general ban on 'hard' ionics would cause practical difficulties, extra cost and process problems. For some users of the materials 'hard' ionics cause foaming in sewage works and water courses; siliceous materials when used in the manufacture of scouring products could cause health hazards for workers. Clearly bans on the use of these ingredients could have economic repercussions, especially for firms who would find it expensive to adapt to non-use of them. The undertakings were not registered. The Association was advised that it was registrable and at a Council meeting it was decided to transform the undertaking into a trade association recommendation on the basis that it would be more likely to earn Section 21(2) dispensation. The recommendation was sent to members on 6th March 1973. On 20th March 1973 the Council had to revoke the recommendation, submit it to the OFT, and then reissue it.

30. Informal consultation with the OFT was advised by the Court in, Flushing Cistern Makers Agreement [1973] I.C.R. 654 at p. 662.
31. [1977] 1 All E.R. 47 Mocatta J.
32. This approach was employed in Royal Institution of Chartered Surveyors v. Director General of Fair Trading (1981) unreported, noted [1981] Com. L.R. 112.
33. *ibid.*
34. *ibid.* See Section 9(3) Restrictive Practices Court Act 1976 which endows the RPC with powers of jurisdiction equivalent to those of the High Court (or the Court of Session in Scotland or the High Court of Northern Ireland). See also RSC Ord. 18 r.9.
35. Section 1(2) RTPA 1976.
36. This is not the registration address for agreements. The address to which agreements for registration must be sent is: The Office of Fair Trading (RTP Registration), Field House, Bream's Buildings, London, EC4 1PR.
37. Section 8 S.I. 1984 No. 392.
38. Section 37 RTPA 1976. Under Section 37(2) notes of the examination must be taken and shall be read over and signed by the person being examined. They may thereafter be used in evidence against that person. The Court may require that person to disclose any documents or other information in his possession or control specified in the notice given by the Director. Confidential information protected by legal privilege may not be required to be disclosed e.g. communications between party to agreement and legal adviser.
39. (1965) L.R. 5 R.P. 437 at p. 463.
40. In Aluminium Imports from Eastern Europe O.J. 1985 L92/1 at p. 98 para. 10.2 the Commission note in respect of British corporate involvement in an international aluminium agreement that the UK Government directed the Registrar of Restrictive Trading Practices (as he then was) to place details of the agreement on the special section of the Register in 1969

41. Section 36(1) and (2) RTPA 1976. In 1983 the OFT sent 20 notices, in 1984 they sent 7 such notices - DGFT Annual Reports (1983) and (1984) at p. 31 and p. 33 respectively.
42. Section 36(4) RTPA 1976.
43. Section 36(5) and (6) RTPA 1976.
44. Schedule 3(6) and (9) RTPA 1976 excludes from operation of the Act goods and services agreements which have exclusively overseas operation. These agreements are, however, registrable under Section 25 RTPA 1976.
45. Section 36(3) RTPA 1976. These notices can have spectacular results. In 1978 the OFT unearthed 199 agreements in which 111 companies concerned mainly with the supply of construction materials such as hot rolled asphalt, coated macadam, surface dressing chippings, coated stone, sand, gravel and limestone had "unwritten understandings" with each other.
46. Section 37(3) RTPA 1976. The power to compel the appearance of other relevant persons was introduced by the Fair Trading Act 1973 as a response to the case of Registrar of Restrictive Trading Agreements v. W.H. Smiths (1968) L.R. 6 R.P. 532 where the Court refused to compel attendance of a local branch manager. The Court said that local branch managers were not managers in the sense of the Act.
47. Section 37(5) RTPA 1976.
48. Section 37(6) RTPA 1976.
49. Section 38 RTPA 1976.
50. (1968) 112 S.J. 109.
51. Section 38(4) RTPA 1976.
52. Section 38(1) RTPA 1976.
53. Section 38(6) RTPA 1976. Where the director operates in relation to a nationalised company whose affairs are managed by its members, 'director' means a member of the company - Section 38(7) RTPA 1976.
54. See e.g. No. S1083 Register of Restrictive Trade Practices, Society of Motor Manufacturers and Traders (SMMT) (1984). OFT refrained from taking proceedings against the SMMT trade fair rules on the basis that the Commission granted Article 85(3) exemption - see SMMT O.J. 1983 L376/1. The OFT did not give Section 21(2) exemption but simply closed the file on the basis of Section 21(1)(a) RTPA 1976.
55. Statistics compiled from data given in successive DGFT annual reports and from information provided courtesy of the OFT. For a review of statistics on registration in earlier cases see, Liesner Committee, Review of Restrictive Trading Agreement 1979 Cmnd. 7512 p. 19. The Liesner Committee explained why there was such a discrepancy between Section 21(2) cases and determined or filleted cases: "But most of the agreements on the register have been ended voluntarily. Some agreements have lapsed and not been renewed but most have either been varied to remove the restrictions which brought them within the scope of the Act or have been abandoned. This process of variation or abandonment occurred on a substantial scale following the second Court case (Yarn Spinners in January 1959). As a result of the decision in this case many parties to registered agreements concluded that as they had little prospect of success before the Court there was no point in incurring the substantial expenses involved in a contested case." (Ibid., at p. 20).

56. The numbers given in the column are minimum numbers since some Section 21(2) directions relate to more than one agreement. A direction might, for example, refer to a common form agreement (see Section 4 S.I. 1984 No. 392 for definition) or a series of interconnected agreements.
57. The huge discrepancy between 1978 and 1979 is accounted for the hearing of nearly 200 identical (or almost identical) applications for injunctive orders against ready mix cement.
58. Although 102 cases were registered the OFT dealt with 584 cases furnished for consideration, many on a fail safe basis. Many of these agreements were furnished on a precautionary basis and were later discovered not to be registrable. Eventually, when the initial flood of services agreements slowed, the OFT estimated that though 630 cases were furnished only about 50% were exempt.
59. In Mallaig and North-west Fishermans Association (No. 2) Unreported noted DGFT Annual Report 1975 pp. 90, 91 the RPC released parties to a price-fixing agreement from a previous prohibitive order. This was done because the parties wished to fix minimum prices in accordance with EEC Regulation 2142/70/EEC on the common organization of a market in fish products. Regulations are directly applicable in Member States and take precedence over contradictory national law. The Court viewed this as a "material change" in the circumstances of the case justifying release from the order.
60. See DGFT Annual Report (1979) p. 45.
61. References in respect of registered agreements are made under Section 1(2) RTPA 1976 and Court orders are made under Section 2(2) RTPA 1976. For discussion see Chapter 5.
62. [1984] I.C.R. 12.
63. See e.g. DGFT Annual Report (1979) p. 42.
64. DGFT Annual Report (1980) p. 44. Other service supply associations followed suit in 1980, for example, the Periodical Publishers Association, the Scottish Daily Newspapers Society, the Association of Independent Radio Contractors, and, the Independent Television Companies Association. In 1984 the OFT undertook a detailed investigation into the practices of British Telecommunications pricing policy for the placing of advertisement in Yellow Pages Directories, under the Competition Act 1980. The conclusion was that there was no anti-competitive practice in operation. See, OFT Report, 10 October 1984.
65. DGFT Annual Report (1979) p. 43.
66. DGFT Annual Report (1973) p. 35. An almost identical definition was given in the 1975 Report (at p. 49) except that the word "disadvantageous" in the 1973 statement inexplicitly changed to "advantageous". This discrepancy must have been an error.
67. DGFT Annual Report (1979) p. 45.

68. DGFT Annual Report (1977) p. 38.
69. Cmnd. 7512, annex D(10).
70. *ibid.*, at Annex C(4) and DGFT Annual Report (1980) p. 51.
71. [1961] 1 W.L.R. 760 at p. 792.
72. Given that the Act contains a presumption that restrictions are against the public interest one that has no practical effect or value must necessarily succumb to the presumption. If no arguments may be argued for its retention then it should be filleted.
73. See e.g. the approved advertising agency systems operated by the various associations of media owners. DGFT Annual Report (1979) p.44.
74. See e.g. No. 3669, Restrictive Trade Practices Register, Agreement between members of Aberdeen Fish Salesmen Association Ltd. - Section 21(2) dispensation given.
75. DGFT Annual Report (1979) p. 46.
76. No. S.12, Register of Restrictive Trade Practices. See also, S.572 and S.13, Register of Restrictive Trade Practices, Agreement between St. Crispins Boot Trade Association and Members of the National Association of Shoe Repair Factories concerning a code of practice for shoe repairs. Members are made aware that the council of the association recommends both the Code and the guide to the code to members. The code contains a clause by which members refrain from limiting their legal liability for the repairs they carry out.
77. No. 3785, Register of Restrictive Trade Practices.
78. Restrictive Trade Practices (Services) Order 1976 S.I. 1976 No. 98.
79. DGFT Annual Report (1976) p. 36.
80. *ibid.*
81. *ibid.* Initial estimates in 1976/77 of agreements furnished but found not to be registrable suggested that up to one third of furnished agreements were outside of the Act. Later estimates suggested that nearly half of all furnished agreements were not registrable. The percentage of agreements furnished but not registrable has dropped dramatically over recent years as parties have become more experienced in the application of the RTPA 1976 to services.
82. DGFT Annual Report (1977) p. 37.
83. No. S161, Register of Restrictive Trade Practices, British Tugowners Association, Standard Towage Conditions. (Section 21(2) dispensation given in 1984).
84. DGFT Annual Report(1978) p. 42.
85. [1974] I.C.R. 445, noted DGFT Annual Report (1973) pp. 68-70. See also, Mallaig and North-west Fishermans Association No. 2 (unreported), noted DGFT Annual Report (1975) pp. 90, 91.

86. Under Section 4(1) RTPA 1976 the Court may discharge or vary a previous order where it "appears to the Court to be proper at the time of the hearing" to do so. The Court is thus apparently not bound by any evidentiary burden.
87. See e.g. Lazarus Estates Ltd. v. Beasley [1956] 1 Q.B. 702 at p. 712 per Lord Denning M.R.: "No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything." See also, R. v. Home Secretary Ex. P. Zamir [1980] A.C. 930.
88. See Mallaig and North-west Fishermans Association No. 2 (unreported), noted DGFT Annual Report (1975) pp. 90, 91 - Common Agricultural Policy of EEC required parties to do things they were prohibited from doing by a court order. Court accordingly changed its order under Section 4 RTPA 1976.
89. See, Wade, Administrative law (5th ed., 1982) pp. 225, 226. For cases see: Gould v. Bacup Local Board (1881) 50 L.J.M.C. 44 - local authority unable to change its policy when it has already informed affected parties by notice that it intended to rely upon a different policy. Wade (ibid., at p. 227) comments on this case: "Although the Court said that the authority's notice would estop it, the true ground of decision was probably that the election, once formally made, was a legal act which there was no power to undo."; Livingstone v. Westminster Corpn. [1904] 2 K.B. 109; Battelley v. Finsbury Borough Council (1958) 56 L.G.R. 165; Employment and Immigration Commission v. Macdonald Tobacco Inc. (1981) 121 D.L.R. (3d) 546.
90. See Wade, op. cit., at p. 226.
91. See, R.S.C. Ord. 20 r.11; Hip Foong Hong v. H. Neotia & Co. [1918] A.C. 888 (P.C.), and see Wade op. cit., at p. 226.
92. [1981] 1 W.L.R. 1186 (C.A.).
93. DGFT Annual Report (1979) p. 47.
94. In one case the OFT had to look through piles of telephone books in order to be able to compile lists of growers of an agricultural product. This exercise was necessary in order to be able to assess how great the competition was to the parties to the agreement. This would indicate to them how much market power the parties possessed. See No. 4336, Register of Restrictive Trade Practices, Banbury Marketing Services, mushrooms.

CHAPTER 5

COURT PROCEEDINGS IN UNITED KINGDOM LAW

A: INTRODUCTION: CONTENTS OF CHAPTER

In this chapter proceedings before the United Kingdom Courts will be examined. The following summarises the contents of the chapter.

Section B: Proceedings brought by the Director General against registered agreements.

Section C: Defending restrictive agreements before the Restrictive Practices Court.

Section D: Restraining orders under Section 35(3) RTPA 1976: Proceedings commenced by the Director General against unregistered agreements.

Section E: Proceedings for contempt of Court against parties to agreements who breach Court Orders.

Section F: Actions commenced by parties or the Director General for a declaration concerning the registrability of an agreement.

Section G: Action by Parties to an agreement for a declaration that the agreement is registrable: Using the consequences of failure to register.

Section H: Private actions for damages: Failure to register agreements; resale price maintenance; breach of Competition Act Ministerial Orders.

Section I: Private actions for damages or an injunction on the basis of European law.

Section J: Criminal law proceedings for conspiracy to defraud.

Section K: Judicial review of decisions of the Director General of Fair Trading, the MMC and the Secretary of State.

B. PROCEEDINGS BROUGHT BY THE DIRECTOR GENERAL
AGAINST REGISTERED AGREEMENTS

I. Persons Subject to Court Orders

If parties to a registered agreement cannot arrive at a satisfactory, negotiated conclusion with the OFT the latter may refer the agreement to the Restrictive Practices Court for assessment of its compatibility with the public interest.¹ In practice very few such agreements are referred the vast majority of cases being negotiated to a conclusion. Any restriction or information provision that is declared to be against the public interest is void; the agreement itself in which the restrictions exist remains valid.² If the Director General so decides he may further apply to the Court for the Court to make a restraining order against the parties. On such an application the Court has a discretion whether or not to make an order.³ Orders may be made against: the parties to the agreement who carry on business within the United Kingdom; any trade association of which any party is a member; and, any person acting on behalf of such association.⁴ When an order is made it may be for all or any of the purposes listed in Section 2(2)(a) - (c) RTPA 1976. Thus, the Court may make an order restraining the relevant persons:

- "(a) from giving effect to, or enforcing or purporting to enforce, the agreement in respect of those restrictions or those information provisions;
- (b) from making any other agreement (whether with the same parties or with other parties) to the like effect; or
- (c) where such an agreement as is mentioned in paragraph (b) above has already been made, from giving effect to that agreement or enforcing or purporting to enforce it."⁵

Where an order is made against a member of a trade association the order may include provisions for restraining the association and its agents from "procuring or assisting" that person to do anything which would entail a contravention of the Order.⁶ Where the association has made a recommendation to its members which is subject to the legislation there is deemed to be a "term" (the deeming term) in the constitution of that association providing that all members to whom the recommendation is made will abide by it and by any other recommendations on the same matter.⁷ Any order made against an association could, for this reason, be made against its members as well. However, the necessity for this is negated by Section 2(5) which allows the Court to make an order against the association restraining it from making any recommendation to which the

deeming term would apply. Thus, if the Court had condemned a price recommendation the order against the association would be in respect of subsequent recommendations on price. Section 2(4) however does not apply to future recommendations on different subject matter. Thus, the same association could lawfully make recommendations concerning standard terms and conditions or a code of practice etc.⁸ It should be noted that the powers of the Court are not affected by determination of the agreement effected after commencement of proceedings. Where, subsequent to commencement, the agreement is varied the Court may deal with the original agreement or the agreement as varied or both as it sees fit.⁹

II. Nature of the Court Order: Orders against the original agreement

The Court does not necessarily impose an injunction on the parties. It is usually prepared to accept an undertaking from those concerned that they will not proceed with the condemned conduct. The Court is perhaps a little more liberal here than with unregistered agreements. This is understandable since an unregistered agreement is void and it is unlawful to seek to enforce it whereas registered agreements may be continued with up until an adverse Court declaration. It will be a question for argument in Court whether an undertaking is accepted or formal injunction made. Breach of either is contempt of Court and punishable as such. The order (whether it incorporates an injunction or an undertaking) will restrain the parties from continuing with the original agreement. If parties should breach the order through ignorance and where no "wilful defiance"¹⁰ is present the Court has, in the past, taken a lenient view of the contempt. "Lenient" has meant imposition of a small fine and an order that the contemnor (the defendant alleged to be in contempt of Court) pay the costs of the Director General on a common fund basis.¹¹ Practical problems may arise where a trade association gives an undertaking to terminate restrictive recommendations. Thus, if the order restrains the association from recommending a standard profit margin of $7\frac{1}{2}\%$ would a member of the association be in contempt if he continued to add a $7\frac{1}{2}\%$ margin subsequent to the order on the basis that it was the commercially realistic figure? Would the Court react differently if the margin was changed just slightly to $7\frac{1}{4}\%$? It would seem commercially naive for the Court to hold such a member to be in contempt. Provided that the member sets his prices without reference to any other party and by reference to market forces

then it is unlikely he could be said to have entered an "agreement" to the like effect as the original agreement.

III. Nature of the Court Order: Agreements to the "like effect"

In addition to restraining continuance of the original agreement the order will also restrain agreements "to the like effect". Parties may not, in order to circumvent the Court order, abandon the condemned agreement and start again with a similar but nonetheless new and different agreement. In certain early cases the Court, in deciding whether the parties had entered an agreement to "like effect", concentrated on the form of the new agreement to see if it adopted a similar machinery to the old, condemned agreements. The question asked was: "Do the parties by the new agreement agree that one or more of them shall do or refrain from doing acts like those which it was agreed should be done or not done by those provisions of that other agreement which contained restrictions declared to be contrary to the public interest?"¹² Where the original agreement has been scrutinised by the Court and a detailed analysis undertaken of the restrictions declared contrary to the public interest it will be relatively straightforward for the parties (and a subsequent Court hearing a contempt action) to work out what a "like" agreement would be. However, in many past cases where the Court rejected arguments put to it concerning the advantages of the agreement for the public interest it did not give detailed reasons. In such cases deciding what is to the "like effect" is more difficult since little Court guidance in the form of analysis is at hand. Furthermore, since today the vast majority of cases before the Court concern undefended agreements which are referred by the Director General simply as an enforcement mechanism to ensure against their continuance, no analysis of the restrictions occurs. Few businessmen today bother to defend price-fixing agreements for example yet OFT policy with many such cases is to refer them to the Court for a restraining order. In the most recent pronouncement on the meaning of "like effect", British Concrete Pipes Association Agreement,¹³ the Court adopted a test of the like effect which incorporated economic evidence. Thus, an agreement which had a different mechanism and form to the first agreement but which achieved the same purpose and commercial effect as the first might now be an agreement of "like effect" to the first. If the Court made an order restraining X, Y and Z from formally fixing prices it could well be contempt of Court for those parties to simply exchange price lists. In both cases the aim is to

control prices yet in both the mechanism by which that object is achieved may be very different. The British Concrete Pipes case suggests that this wider "economic effects" based test is now accepted by both the Restrictive Practices Court and the Court of Appeal. In the case the question was whether an informal oral arrangement was to "like effect" as a formal collusive tendering and price-fixing agreement abandoned voluntarily in 1959 and in respect of which undertakings had been given to the Court in 1965. The informal oral arrangement again allocated tenders between the parties but this time by a different mechanism and in respect of a narrower range of products than was the case in the first agreement. The Court nonetheless held that the 1974 agreement was to the "like effect" as the earlier versions and the parties were accordingly fined for contempt of Court. The OFT view this decision as a useful weapon in attacking parties who seek to circumvent Court orders.

The meaning of "like effect" is, in view of this contradictory case law, unclear. This is unfortunate given the serious consequences of breach of an order. The following is a tentative summary of the cases and may be used as guidance: (a) where the machinery of the second agreement is substantially similar to that of the first then the second agreement is to the "like effect" as the first;¹⁴ (b) where the first agreement is formal and written and the alleged breach of Court order is an oral arrangement the differences in form do not preclude a finding of contempt by the Court;¹⁵ (c) where the second agreement is in a form similar to the first but is in scope narrower the second agreement it may still be of "like effect" to the first;¹⁶ and (d) where the second agreement is in a completely different form to the first but achieves a similar commercial purpose and effect then it is likely that the second agreement is of "like effect" to the first.¹⁷

IV. Interim Orders

Where the Director General has applied to the Court for an order in respect of a registered agreement he may also apply for an interim order in respect of specified restrictions at any time before the Court has made its order whether that time is before or after the making of a declaration by the Court.¹⁸ For such an application to succeed the Director must prove on a balance of probabilities, "that the operation of the restrictions or information provisions, during the period likely to elapse before an order can be made ... is likely to cause material detriment to the public

or a section of the public generally, or to a particular person who is not a party to the agreement"¹⁹ The Director General must of course satisfy the Court in addition that the restrictions and information provisions in question "could not reasonably be expected to be shown to fall within" any of the gateways in Sections 10 (goods) and 19 (services) RTPA 1976. The interim order is exactly the same in nature as a final order made by the Court at the close of proceedings.²⁰ Such an order ceases to have effect when: (a) the period specified by the Court for its duration elapses; (b) an event occurs which according to the terms of the order triggers the termination of the order; (c) the Court declares that the restrictions or information provisions are not incompatible with the public interest; and, (d), the Court makes a declaration that all the restrictions and information provisions are contrary to the public interest and makes a final order giving effect to that declaration.²¹ In 1979 an agreement was made between London Weekend Television (LWT) and the Football League granting to LWT the exclusive right to televise league matches for a 3 year period commencing 1 July 1979. This agreement superceded agreements between the League, the BBC, and other independent television companies. The OFT contended that this would have reduced consumer choice and coverage of television football. They informed the parties that they would seek an interim order against the agreement. In view of this the parties abandoned the agreement and entered a new one which included the BBC.

V. Variations to the Agreement and Court Orders

The Court has jurisdiction to make a declaration in respect of variations to agreements submitted after the reference to it by the Director General.²² Court Orders do not come into effect for 21 days following the expiration of the period within which any party to that case may appeal the declaration.²³ During that 21 day period parties to the agreement or to the proceedings may submit a revised agreement or a draft thereof to the Court which may then declare on the compatibility of the revision or draft with the public interest. The details of the variation must be notified to the OFT under Section 24(2) RTPA 1976 before the Court can approve them.²⁴ If the variation entails a new agreement it must be duly registered. The Court may, if an application is made to it within 21 days, suspend its declaration and order for a further six months.²⁵ By this procedure parties

to agreements declared to be against the public interest by the Court, may have them saved by revising them to fillet out the parts considered objectionable by the Court.

VI. Variations of the Court's Decision

The Court may under Section 4 RTPA 1976, upon application, discharge any previous declaration or order or substitute in its place a new declaration or order. Applications may be made by the Director General for the OFT or by any person who is (or was at the time of the previous court case) subject to or entitled to the benefit of the restrictions in question (i.e. the parties to the agreement or persons benefiting from the agreement). Before an application may be made to the Court for a variation leave of the Court must first be obtained. In order to obtain this permission to commence an application the Court must be satisfied under Section 4(4) that there is "... prima facie evidence of a material change in the relevant circumstances". In Cement Makers' Federation Agreement No. 2²⁶ the Director General sought to have the previous declaration of the Court which declared that a price-fixing agreement operated by the Cement Makers' Federation was not contrary the public interest, discharged. The application failed but, nonetheless, the Court accepted, the Director General's argument that the phrase 'prima facie evidence of a material change in the relevant circumstances' meant that he had to show that by reason of new facts there was prima facie change in an essential part of the reasoning by which the Court had come to its previous conclusion.²⁷

This section has no effect in respect of interim orders of the Court issued under Section 3 RTPA 1976.

C. DEFENDING RESTRICTIVE AGREEMENTS BEFORE THE RESTRICTIVE PRACTICES COURT

I. Introduction²⁸

Very few disputed agreements are heard before the Restrictive Practices Court (RPC or 'the Court' hereafter). Indeed, only a minute proportion of cases registered have proceeded to litigation despite Section 1(2)(c) RTPA 1976 which impresses on the Director General of Fair Trading the duty to take proceedings before the RPC in respect of registered agreements. In stark

contrast to the small number of litigated cases in excess of 8000 agreements have been actually registered. In reality the Court plays a strictly limited role in the appraisal and development of competition law policy. In practise the main function of the Court over recent years has been as a hammer wielded by the OFT against parties to unlawfully, unregistered agreements. Nonetheless in terms of the structure of the RTPA 1976 the Court sits centre stage and accordingly it must be given due weight.

Basically, a party who decides to go to full trial in order to defend an agreement will have to convince the Court, on a balance of probabilities, that the restrictions defended are of positive advantage to the public interest. To achieve this highly difficult task (very few agreements have been accepted by the RPC to be in the public interest) parties must:

- (a) satisfy the Court that the restrictions confer public interest advantages of the sort specified in the "gateways". These are factors laid out in Sections 10 (for goods agreements) and 19 (for services agreements) RTPA 1976; and
- (b) satisfy the Court that the restrictions are not unreasonable having regard to the balance between the benefits they confer and any detriments that result from them.

The criteria in Section 10 for goods and 19 for services RTPA 1976 are very similar. In this section they will generally be dealt with together. In determining whether it is worth defending a restriction before the Court parties thereto should bear in mind the strict approach traditionally adopted by the Court; the very considerable expense involved in defending an agreement given the protracted nature of the hearing; and the waste of senior managerial time sitting in Court. Having stated the position somewhat pessimistically in a recent, fully litigated, case under the gateways the Court upheld a mutual exclusive dealing arrangement whereby if a firm joined the Association of British Travel Agents (ABTA) as a tour operator member it was constrained only to deal with travel agent members and vice versa.²⁹ Whilst ABTA's rules were struck down in other respects they were at least relieved to have this mutual exclusive dealing arrangement officially preserved. It is known that the OFT were unhappy about the precedent the case might set though the case can easily be confined to its particular facts.³⁰ Thus, whilst defending agreements is certainly risky it is not entirely a venture forlorn of hope.

It should be noted at the outset that inherent in Sections 10 and 19

RTPA 1976 is a presumption that restrictions are against the public interest unless proven otherwise. It will hence never suffice merely to show that a restriction is neutral vis-a-vis the public interest since that will not be sufficient to rebut the negative presumption. Parties to restrictions must prove positive benefits; that is no easy task.

In this section each "gateway" will be examined separately. In discussion reference will be made to the goods gateways in Section 10 RTPA 1976. This does not effect the meaning of the services gateways in Section 19 since that provision repeats, mutatis mutandis, the language of Section 10 RTPA 1976.

II. Sections 10(1)(a) and 19(1)(a): Protection of Public against Injury

The first gateway - goods version - reads:

"that the restriction or information provision is reasonably necessary, having regard to the character of the goods to which it applies, to protect the public interest against injury (whether to persons or to premises) in connection with the consumption, installation or use of those goods."³¹

This gateway is concerned with the protection of persons or premises, not goods or services. Arguments must be structured accordingly. An agreement between suppliers to supply their goods in special packaging needed to protect the goods from damage could not therefore be justified under this gateway. The burden of proof is to show that the restriction is "reasonably necessary": It need not be shown therefore that the restriction is the sole or optimum means of protecting the persons or premises in question.

The scope for use of this gateway is very limited. This is partly because the Government passes specific legislation to safeguard health and property from dangerous goods.³² The gateway is, in any event, buttressed by Sections 9(5) and 18(5) RTPA 1976 which, as noted in Chapter 1, exclude from control restrictions adopted on the basis of British Standards Institute safety standards. In no case to date has gateways (a) been successfully pleaded. The test for success is that laid down by Devlin J. in Chemists Federation No. 2³³: "whether a reasonable and prudent man who is concerned to protect the public against injury would enforce this restriction if he could. He would not do so unless he was satisfied, first, that the restriction afforded an adequate protection and, secondly, that the risk of injury was sufficiently great to warrant it."³⁴

It is quite clear from decided cases that the gateway cannot be used as a justification for restricting retail outlets. Thus an agreement limiting supplies through retail outlets employing qualified pharmacists is unacceptable since the Court take the view that it is for the Government and not private trade associations to take such decisions.³⁵ Nor will it be justifiable, on grounds of person and premises protection, to restrict outlets for tyre sales on the basis of skill and expertise of retailers.³⁶

III. Sections 10(1)(b) and 19(1)(b): Restrictions Confer Public Benefits and Advantages

This gateway goods version - reads:

"that the removal of the restriction or information provision would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction or information provision itself or of any arrangements or operations resulting therefrom."³⁷

Gateway (b), in view of its generality, is the most important of the gateways and it is pleaded in almost every case. Parties to the agreement must prove specific and substantial benefits to purchasers consumers and users. The Court has been inconsistent in its interpretation of the words "specific" and "substantial".³⁸ Indeed, the Court has expressly refrained from attempting "strictly quantitative or proportional assessment" of the word "substantial".³⁹ It is clearly a case for argument in every case. A similar conclusion applies to the word "specific". In the cases the Court has variously described specific benefits as being "definable and of special character" or as being "explicit and definable".⁴⁰ Thus parties would not succeed in proving a "specific" benefit for example if they merely expounded general fears about price wars, or the threat of external competition or about consequences for quality of product or service.

Parties must establish causation between the restrictions and the benefits elaborated upon to the Court. Thus these benefits, to use the statutory language, must be enjoyed "by virtue of the restriction itself" or of "any arrangements or operations resulting" from the restriction.

The phrase "arrangements or operations resulting" has received consideration from the Court. In Permanent Magnet Association's Agreement (No. 1)⁴¹ the Court's conclusions lead to the following proposition: If X and Y operate a restrictive agreement and by virtue of, but collateral to,

that agreement they are able to make significant joint research and development advances then the RPC may hold that the benefits of the R & D exist by virtue of the restrictive price agreement. The question asked by the Court is not whether the joint and beneficial R & D could theoretically exist in the absence of the restrictive agreement but whether the R & D would continue in anything like its present form and efficacy.⁴² The Court will essentially ask whether the benefits are the "natural and probable consequences" of the continuance of the restrictions.⁴³

Causation may be difficult to establish where the benefits alleged to result from the restrictions in dispute may arguably derive from an alternative source. Thus, in Finance Houses Association Ltd. Agreement⁴⁴ a hire-purchase code advocating the systematic use of reasonable deposits was considered unnecessary to achieve benefits where it was clear that experience taught traders to ensure that reasonable deposits were taken and that there was danger in requiring overly low deposits or no deposit at all.

Parties must clearly demonstrate that the restrictions lead to positive benefits. There must be a significant element of gain involved. It is not adequate to merely prove no detriment; if a restriction is neutral in its effects then the presumption against it is not overcome. Equally, parties must show more than that the restriction is merely "reasonable and fair".⁴⁵

Where goods agreements are concerned the restrictions in question must benefit "the public" as purchasers, consumers or users of any goods. It suffices that any of the three classes of beneficiary gain; it is unnecessary to prove benefit to all three, though, of course, the more the better. It does not suffice to show benefit to a small proportion of purchasers or consumers or users. It seems likely, however, that the Court will at least entertain benefit that flows to a majority of a class.⁴⁶ Although the point is not wholly unarguable⁴⁷ it seems most likely that the parties to the agreement must be excluded from consideration when assessing benefits; the parties in this case do not count as the public.⁴⁸ Where services are concerned Section 19(1)(b) RTPA 1976 is slightly different from Section 10(1)(b), this is due in part to an amendment to Section 19(1)(b) introduced by Section 28 Competition Act 1980. The relevant part of the amended version thus reads (new words are underlined): "That the removal of the restriction or information provision would deny to the public as users of any services, or as vendors purchasers, consumers or users of any goods or other property in relation to which any services are supplied, other

specific and substantial benefits" It is notable that the interests of vendors of goods has been added. Moreover the words "or other property" recognise that some providers of services carry out their activities in relation to various forms of intangible property, for example, copyright, leases or securities. These examples are goods within the meaning of Section 43(1) RTPA 1976.

Over thirty cases have been pleaded solely or in part upon the basis of this gateway. About ten have succeeded to some degree or other. From these cases may be gleaned some indications of judicial policy. Though, almost all the cases are of some vintage and it cannot be automatically assumed that the present Court would adopt a similar position. The following are factors for consideration:

(i) Price Stability

Whether the restriction keeps prices stable. The very early case of Yarn Spinners Agreement⁴⁹ strongly suggests that the maintenance of price stability per se is not, as a rule, considered a benefit. This presumption has invariably been followed in other cases.⁵⁰ Though, it is not inconceivable that price stability might be accepted. In British Bottle Association's Agreement it was thus stated: "On the evidence in the present case, we do not find any special circumstances which warrant the conclusion that price stabilisation confers a particular benefit sufficiently great to outweigh the loss of a free market."⁵¹

(ii) Quality

To date the Court has not accepted that price wars are against the public interest because they encourage traders who seek to compete to reduce costs by lowering quality.⁵² Quality is generally accepted as one of the inherent variables in an open market.⁵³ Indeed the addition of newer, cheaper and lower quality goods or services onto a market where old varieties remain adds to consumer choice.

(iii) Investment

The argument that expected lower profits brought about by abrogation of a restrictive agreement would lead to a decline in investment, research and development and general expansion has not been accepted by the Court.⁵⁴ Even if one can prove that the restrictions sustains R & D one must prove further that absence of the restriction would deprive the public to a substantial extent of the benefits of the R & D.⁵⁵

(iv) Level of Stocks

In some cases the Court has accepted that there will be a risk attached to the holding of reasonable stocks inherent in fluctuating, non-controlled prices.⁵⁶ However, such recognition of the existence of the problem is unlikely to prevail over the presumption that levels of stocks will not fall to inadequate levels of a price fixing agreement is abrogated.⁵⁷

(v) Abrogation of Restriction likely to lead to mergers

The Court has not been very impressed with arguments to the effect that in the absence of close co-operation firms will substitute co-operation for mergers and correspondingly market concentration levels will suffer.⁵⁸ Such arguments might carry greater weight today given that empirical research on industries examined by the Court has suggested that parties to condemned restrictive agreements have often merged as the alternative means of ensuring legal co-operation.⁵⁹

(vi) Advice

The argument that abrogation of a restriction would lead to less advice for consumers was rejected in Locked Coil Ropemaker's Association's Agreement.⁶⁰

(vii) Keeps Prices Down

Arguments indicating that the restriction curbs the upward tendency of prices have found favour. This argument is particularly relevant in the case of joint purchasing groups where collective economic power can be used to obtain quantity discounts from major suppliers.⁶¹ In decided cases fixed minimum prices have been accepted as leading to lower prices on the basis that the minimum price is a reasonable one and that if the trader accepted below that level the profit margins would be seriously hurt with a knock on effect on investment, R & D, maintenance of capacity etc.⁶² Further, where the price fixed is set at a level that is significantly lower than that which would prevail in unrestricted circumstances then a price restriction might succeed.⁶³

(viii) Restrictions necessary for Consumer Protection

In A.B.T.A.'s Agreement⁶⁴ a system of enforced guarantee funds, reserve funds, insurance and financial scrutiny was accepted as necessary to protect the in excess of one million consumers of holidays who could fall victim to disasters brought about by the collapse of travel agents.

(ix) Obviates necessity of "shopping around"

In the famous decision in Black Bolt and Nut Association's Agreement⁶⁵ the Court accepted that fixed prices enabled parties to supply each other with varieties of the product not produced by the other. This enabled purchasers to obtain all of his requirements from one supplier thus saving "shopping time" which was very expensive and time consuming where there were in excess of 3,000 standardised varieties of nuts and bolts on the market. The "shopping" argument has been rejected in other cases.⁶⁶

(x) Maintenance of Retail Outlets

The ready availability of a service or good is of benefit to the consumer. A restriction requiring retailers to employ over a specified number of staff or possess a certain minimum display space may be construed as an attempt to exclude smaller traders. Conversely, resale price maintenance for "net books" prevents larger stores undercutting smaller booksellers thereby squeezing them from the market.⁶⁷

It should be clear to parties to agreements that no hard and fast rule applies to possible justifications under gateway (b); all will turn upon the economic background to each case. Nor does it necessarily follow that a decision arrived at in 1963 for instance will indicate the philosophy of the Court over twenty years later. The Court in the most recent case law has adopted a strict approach to the gateways. In A.B.T.A.'s Agreement, the Court stated: "... we can see no justification in going outside the ambit of the provisions themselves, except (and then with caution) to obtain guidance from other decisions of this Court involving the application of the same provisions to different facts. In giving weight to the various factors and in making the value judgments and balancing assessments required under the section the Court must keep the onus of proof and the deeming provision well in mind."⁶⁸

In the same case the Court indicated that not only should restrictions be scrutinised separately but that they should also be examined collectively against the "total backcloth of the circumstances of the case".⁶⁹

(xi) Checklist of Benefits and Advantages

In summary to gateway (b) a checklist of possible benefits or advantages may be drawn up. This list is for guidance only; it is not exhaustive. It should be clear that ultimately whether a restriction is

advantageous depends upon surrounding economic circumstances.

(a) Joint Production or Provision of Service

- standardisation of product/service enabling cost savings to be realised and the public to select between products more effectively;
- specialisation of product/service leading to greater research and development and ultimately improved quality;
- improvement in production techniques or plant and machinery; facilitated modes of provision of service (e.g. improved information retrieval, "automatic cash dispensers etc.);
- more efficient utilisation of peripheral techniques and by-products;
- more efficient distribution of work so as to ensure appropriate capacities to satisfy demand.

(b) Joint Selling

- transport economies of scale which may be passed on to the consumer;
- unification of selling/marketing departments and staff; joint advertising again enabling cost savings to be made;
- greater capacity and more capable infrastructure for export purposes;
- lower distribution costs with fewer middlemen.

(c) Joint Purchasing

- cheaper credit and bulk/quantity discounts which can be passed on to the consumers;
- greater security of supply for purchasers and in turn their customers;
- unification of buying departments and staff enabling cost savings to be made and passed on;
- greater opportunity for comparison and selection facilitating more efficient purchasing practices and better service to the consumer;
- standardisation of materials.

(d) Knowledge of Market

- opportunity for exchanges of data and opinion on market data;
- exchange of data on costings does not enable parties to predict each others prices but permits cost comparisons to be made and allows firms to pinpoint relative weaknesses and strengths in their own structures;

- joint collection and dissemination of trade statistics;
- joint promotion of scientific and technical research.

IV. Sections 10(1)(c) and 19(1)(c): Defensive Measures and Self-Protection Cartels

Sections 10(1)(c) and 19(1)(c) RTPA 1976 represent the third gateway. This allows for arguments on the basis that the restrictions are necessary to counteract the monopoly power of another person. This gateway reads:

"that the restriction or information provision is reasonably necessary to counteract measures taken by any one person not party to the agreement with a view to preventing or restricting competition in or in relation to the trade or business in which the persons party thereto are engaged."⁷⁰

This gateway must be read conjunctively with Section 10(2)(b) and 19(2)(b) which read: "references to any one person include references to any two or more persons being interconnected bodies corporate or individuals carrying on business in partnership with each other". For the meaning of "interconnected bodies corporate" see Section 43(1) RTPA 1976; for discussion see Chapter 1.

The gateway has never received proper judicial analysis though it has been pleaded in argument.⁷¹ The reasons for its lack of uptake are that: (a) gateway (d) substantially overlaps it and is wider in ambit and therefore easier to establish; and (b) the OFT may wield extensive powers against dominant concerns acting anti-competitively such that those subject to such anti-competitive conduct are more likely to complain to the OFT rather than combine in a defensive cartel.

To pass through gateway (c) the agreement in question cannot be in response to a non-abusive monopoly competitor; the monopoly concern must be taking measures designed at preventing or restricting competition. It follows that the existence of dominance is not justification per se for a cartel of remaining firms. This reveals another difficulty inherent in gateway (c). The parties to the agreement must prove, as a pre-condition of their own success, abusive behaviour by another (Though there is no requirement that they prove the monopolists behaviour was, successful in restraining competition.). One need only ponder for a second the lengths the OFT and MMC go to in order to investigate and establish monopolistic abuse to envisage the difficulties surrounding gateway (c). A monopolist's low prices might simply reflect efficiency based upon a proper appreciation of demand rather than predation; where and when efficiency shades into

aggression is very difficult to determine. The following might be suitable gateway (c) cases:

- firms purchase in a joint buying group in order to combine purchasing muscle and force better terms from a dominant supplier. It must be shown, however, that the supplier was abusing his power;
- where an incorporated trade association (which is therefore "one person") takes restrictive measures or recommends restrictive action to its members (for example the operation of a stop list or black book or some other boycotting device). A trade union registered as such would not count as "one person".⁷²
- X, a vertically integrated outsider manufacturing widgets is also dominant in the supply of the raw materials needed for widget production. X supplies the raw materials to competitors on discriminatory terms and in this manner influences the widget market to its advantage. An analogous case was found by the MMC in their report on man-made cellulosic fibres in respect of the behaviour of Courtaulds.⁷³ Presumably rival widget manufacturers (or competitors of Courtaulds who were being discriminated against) could have formed a defense cartel.
- X, Y and Z are dominant, oligopoly purchasers who act upon a recognition of their interdependence. X occasionally does acts designed to encourage the interdependence between the three firms. Suppliers join together in a joint selling agency on the basis of the behaviour of X who is seeking to cement the interdependence of the purchasers.⁷⁴
- X is a foreign, dominant supplier of an important raw material. Purchasers join in a buying pool to combine their purchasing power and wield it against the anti-competitive conduct of X. There is no reason why X should be a person situated in the United Kingdom.⁷⁵
- A dominant property owning company in a locality controls closely the number of butchers he allows to lease its properties. This conduct enables the property company to grant local monopolies to butchers and charge exorbitant rents as quid pro quo. Other butchers in the wider region who wish to sell in the locality could perhaps use gateway (c).

V. Sections 10(1)(d) and 19(1)(d): Countervailing Power Cartels or agreements⁷⁶

Gateway (d) reads (for goods):

"that the restriction or information provision is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who, either alone or in combination with any other such person, controls a preponderant part of the market for such goods."

The notion of "countervailing power" has been defined to describe the scenario whereby: "... private economic power is held in check by the countervailing power of those who are subject to it. The first begets the second The fact that the seller enjoys a measure of monopoly power, and is reaping a measure of monopoly return as a result means that there is an inducement to those firms from whom he buys or those to whom he sells to develop the power with which they can defend themselves against exploitation."⁷⁷ Gateway (d) recognises the validity of countervailing power. The overlap with gateway (c) will be immediately appreciated: both gateways concern the protection of the parties to the agreement from outside economic power.

This gateway has proven complex in practice. Five cases have sought passage through it; only one successfully. The gateway essentially covers two situations:

- (a) where the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring such goods; and,
- (b) where the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to any person not party to the agreement and not carrying on such a trade or business of acquiring or supplying such goods who, either alone or in combination with any other such person, controls a preponderant part of the market for such goods.

Gateway (d) divides into two for a specific reason. Part (a) is restricted to parties combining in a registrable agreement to control a preponderant seller or buyer. Part (b) envisages parties combining in a registrable agreement to negotiate fair terms from a cartel which is not

registrable because the cartel is not made between persons carrying on business in the production supply or processing of goods as required by Section 6(1) RTPA 1976. Gateway (d) would not be appropriate for permitting a registrable agreement to exist as a countervailing power to another registrable agreement since that would be to condone cartels setting up at different levels of trade in the market justifying their existence by reference to each other.

Before examining the two varieties of situation envisaged in gateway (d) it is necessary to consider some of the problems of language in the provision.

The agreement in question must respond to a person or cartel which "... controls a preponderant part" of the trade or business or market. A number of points may be made of this phrase.

First, it is necessary to define the market. A supplier might be preponderant in the supply of mushrooms but will certainly not be so in the market for the supply of vegetables; a purchaser may be preponderant in that it acquires 68% of a specific type of steel wire supplied but is certainly not preponderant in the general market for the steel wire. In Locked Coil Ropemakers' Association's Agreement⁷⁸ the parties to the challenged agreement asserted that the National Coal Board (NCB) was a preponderant buyer of class 1 mining ropes since they accounted for over 80% of purchases. The question was whether class 1 mining ropes were the relevant market or whether other stranded wire ropes generally were the market. The test, stated the Court, was whether any division or fragmentation was "commercially sensible". Whether a division is commercially sensible will turn on differences between the products. This will entail an examination of inter alia the: size, appearance, method of production and use of the product; the nature of machinery and equipment used, the nature and concentration level of sellers market; and the nature and concentration level of buyers market. In Locked Coil Ropemakers the parties argued that the price restrictions they operated for class 1 mining ropes were necessary, they contended the same, however, for other classes of mining rope since, they argued, if restrictions were removed on the other classes of rope the NCB would switch their purchases to these. The Court (employing additional evidence) construed this assertion to imply that the same machinery could produce different classes of rope and that the ropes were largely substitutable for each other. Accordingly it was not "commercially sensible" to isolate class 1 mining ropes from other classes of mining rope.

Secondly, it is necessary to define the appropriate territorial market of the preponderant firm. A supplier of a product might be preponderant amongst UK firms but might not be so when compared with other world wide suppliers who could supply the UK market with ease and at prices acceptable to UK purchasers. In deciding the extent of control foreign markets must be considered.⁷⁹

Thirdly, it has been intimated by the Court of Appeal (in the unsatisfactory context however for purposes of proper legal argument of an application for an interim injunction) that for gateway (d) to apply the preponderant party must deal direct with the parties to the agreement.⁸⁰ If correct a preponderant supplier could organise to trade via an intermediary and thereby negate the justification for purchasers to set up a joint buying agreement. However, it is not certain what effect the argument that the purchasers would (regardless of the intermediaries) de facto, have to negotiate with the supplier would have on this proposition. If you negotiate direct with the preponderant party do you by definition deal directly with it?⁸¹

Fourthly, the word "controls" implies present tense. However in deciding whether a restriction is "reasonably necessary" the Court will look also to the likely future situation; it would not be "reasonably necessary" for parties to form a cartel if the power of the preponderant party was a temporary phenomena.

Fifthly, in terms of market share percentages there is no threshold for preponderance. In National Sulphuric Acid Association the Court stated: "... while the relative size of the part is clearly important, we do not accept that respondents have necessarily to show that it exceeds 50%. It is a question to be decided in the light of all relevant circumstances."⁸²

The word "negotiate" deserves brief mention. The Court has given it a very wide meaning. It does not simply connote face to face meetings or bundles of correspondence it even includes, for example, suppliers putting in tenders at uneconomic prices.⁸³

The phrase "reasonably necessary" appears in a number of gateways. It has already been alluded to above in connection with the word "control". It appears to be true, from the cases, that whilst a countervailing restrictive agreement may be "reasonably necessary" to negotiate fair terms from a preponderant party which is not abusing its power⁸⁴ it will nonetheless be easier to prove reasonable necessity where the preponderant party is acting unfairly.⁸⁵

Finally, on terminology, "fair terms". The Court has been equivocal in its approach to the phrase. A number of tests exist which are apparently treated as alternatives. Thus "fair terms" are definable as terms upon which an efficient producer can make and sell his goods at a reasonable profit to a preponderant purchaser.⁸⁶ An alternative test describes "fair" not in relation to one efficient party's reasonable costs but more widely in relation to general market circumstances. Thus, "fair terms" - again in the context of a preponderant buyer - would be terms that would prevail if there were other buyers in the market who would negotiate with the supplier in order that the latter obtained reasonable profits and the former a reasonable purchase price.⁸⁷ The two formulations are not contradictory. In a recession an efficient supplier might reasonably be forced to cut his prices to earn only marginal profits which, under the circumstances, would be counted as "fair". Likewise, it might not be possible to find out what the suppliers costs really are to determine whether or not his prices are reasonable. This might for example be because the supplier is a foreign company. In such a case the second test is easier to apply i.e. what are fair terms by comparison to other actual or potential suppliers? This was the case in National Sulphuric Acid where the preponderant supplier was SULEXCO a giant American export cartel. The Court stated: "A suitable initial approach, in the present case, is to apply the test: Are the prices which the buyers would have had to pay, in the absence of the restriction, likely to be substantially higher than the prices which they would have had to pay in market conditions which are similar, except that there is no one supplier controlling a preponderant part of the trade or business."⁸⁸

In summary "fair terms" in the preponderant buyer case may imply: (a) sellers earning "fair" profits; (b) the attainment of equality of treatment as between buyers; (c) the prevention of unfair profits being earned by the preponderant buyer; and (d) the attainment of a selling price that would prevail in the absence of the preponderant buyer.⁸⁹ Where preponderant seller cases are at stake the converse implications apply.

Ultimately on this gateway attention will be returned to the two varieties of countervailing power agreement envisaged by the terms of gateway (d). The first variety of agreement is where the parties combine to counter the power of a single person who controls a preponderant part of either the "trade" of acquiring or selling those goods or the "business" of supplying those goods (i.e. from their production or manufacture). The countervailing agreement here is not set against another agreement that would

be registrable and hence subject to control under the RTPA 1976. The preponderant party though may be prone to investigation as a monopoly under the Fair Trading Act 1973. However, it has not been held by the Court that the preponderant party must abuse its power before a gateway (d) case arises hence a countervailing power agreement blessed under gateway (d) may simply be a means of artificially creating a more equitable supply/purchase balance of bargaining power, it being accepted that free market forces have failed to achieve this balance.

The second variety of agreement envisages an agreement set against a preponderant purchaser or group of purchasers who together are preponderant. In this variety of case the preponderant concern(s) are not involved in the trade or business that the parties to the countervailing agreement are. This fact differentiates the case from first variety cases. For example: turkey farmers in a region agree to a minimum sale price for their turkeys; together the farmers are preponderant purchasers. This agreement is blessed under gateway (b) or is given clearance by the OFT under Section 21(2) RTPA 1976. Because the farmers accept lower profits they cannot pay suppliers of poultry feed high prices. The feed suppliers enter a joint selling agreement to negotiate fairer prices from the turkey farmers. Neither farmers nor feed suppliers are in the same market though farmers together control a preponderant part of the feed supply market.

VI. Sections 10(1)(e) and 19(1)(e): Serious and Adverse effect on Unemployment in an area

This gateway - for goods - reads:

"that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction or information provision would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together, in which a substantial proportion of the trade or industry to which the agreement relates is situated."

It will be appreciated that the gateway relates to the general level of unemployment in an area, not to unemployment levels in the specific trade or industry in question. One must therefore effectively prove that abrogation of the restriction would be likely to create unemployment in the specific trade or industry and that displaced workers would be unlikely to be redeployed in the area. The sole agreement to pass through this gateway was in Yarn Spinners Agreement.⁹⁰ In that case it had been almost impossible

to estimate the amount of unemployment in the relevant Lancashire areas as at the date of the hearing although rough estimates were made of 4% (there was full employment elsewhere). In the absence of the price restrictions it was estimated that unemployment would rise to about 6%. The Court accepted therefore that gateway (e) was satisfied. The case was lost however on other grounds. The gateway was not passed through in British Jute Trade Federal Council's Agreements.⁹¹ The jute industry was centred in Dundee, an area of high unemployment. The industry and locality was protected by the Jute Controller - an official - who regulated the influx of cheap imports. The parties argued that their agreements were necessary to support the activities of the Jute Controller. The Court rejected this argument holding that the Jute Controller could operate effectively without the agreements. To succeed under this gateway the unemployment must be both serious and persistent. Moreover, it must be proven that a substantial proportion of the trade or industry to which the agreement relates is situate in the areas in issue. This suggests that the gateway may be pertinent to those industries which are for historical or other reasons localised: shipbuilding; mining; automobile industry; textiles etc.

The Liesner Committee in their Review of Restrictive Trade Practices Policy in 1979⁹² commented on the economics problems of this gateway:

"As to the wording of the gateway from an economic stand point a restriction may well lead to higher employment in a limited area or for a short period, but result in lower employment in the industry affected over a wider geographical area or a longer time span. Moreover, account should properly be taken of the indirect effect which a change in employment in one industry has on employment in the service and other industries. It is hard to quantify these various influences and even more difficult to weigh up their relative importance as additional jobs may be more important in one area than in another or at different moments in time. However, to the extent that an agreement may be said to have a harmful effect on employment elsewhere (for example, by its effects on suppliers, purchasers or competitors), this would be a detriment which could in principle be considered in the tailpiece. It is admittedly not possible to argue wider employment benefits of a restriction under this gateway, but it appears that such benefits would normally be associated with other advantages like reduced costs which could be argued under gateway (b)."

VII. Sections 10(1)(f) and 19(1)(f): Exports and the balance of payments

Gateway (f) - goods version - reads:

"That having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction or information provision would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry."

This gateway assists export boosters, not import preventers. The clause must be seen in the light of jurisprudence on export agreements under Article 85 EEC. The RPC must apply Article 85 EEC and hence will have to modify its interpretation of gateway (f) accordingly where exports to the EEC are concerned. It should be noted that agreements solely concerned with exports are outside the scope of the RTPA 1976 and hence not registrable, though they are notifiable to the OFT.⁹³ No sanctions flow from non-notification.

The parties must prove that abrogation of their agreement would cause a "substantial" decline or reduction in export trade. This decline or reduction may be quantified in terms of "volume" or "earnings". Thus factors such as quantity or value would be relevant to "volume". "Earnings" is less clear, factors such as gross foreign exchange receipts would appear to be relevant.⁹⁴ The Court has also stated that "earnings" means "turnover".⁹⁵ There is little clear judicial guidance on the meaning of "substantial". In Water-tube Boiler Makers the Court stated that the loss of one overseas contract could represent a substantial reduction in exports. Thus, loss of the sale of a major engineering contract in the Middle East could entail loss of vast revenues; the solitary nature of the contract is irrelevant. The Gateway itself provides two tests: (a) substantial by reference to the whole export business of the United Kingdom; and (b), substantial by comparison to the whole business (domestic and foreign) of the trade or industry in question. These two tests are somewhat idiosyncratic. A reduction of export earnings satisfying (a) (i.e. substantial by reference to the whole UK export business) would have to be of astronomical proportions. By contrast a reduction of export earnings satisfying (b) (i.e. substantial by comparison to the business of the trade in question) could be relatively small. Indeed for a small industry only a comparatively small decline would quickly be countable as substantial. Nonetheless gateway (f) treats both tests the same. This effectively means that test (a) is otiose.

The gateway is, in practical terms, of little relevance. Only one case has ever successfully passed through it, though it has been pleaded in seven reported cases. In the one successful case, Water-tube Boilermakers, parties agreed to hold a preliminary meeting every time an export inquiry was received. There would be a detailed exchange of information at the meeting of technical and commercial issues relating to the inquiry. A member of the association would be selected for the order though weight was accorded to the customers preference. The aim of the agreement was to ensure that the order came to the United Kingdom. The Court accepted that removal of the restriction was likely to result in a decline in foreign orders. In all of the other cases arguments under gateway (f) have been rejected. Thus the Court has generally rejected the argument that abrogation of a price restriction would result in an overall decline in quality and a corresponding fall-off in foreign orders.⁹⁶ Nor has it accepted the argument that termination of a price restriction in the domestic market would lead to a decline in technical collaboration which would have the result of a loss of exports. The Court in such cases points out that if technical collaboration is perceived as beneficial it will not fall with the restriction.⁹⁷ Generally, the Court rejects the argument that abrogation of a domestic restriction will harm exports where the restriction in question is primarily focused upon the home market.⁹⁸ The difference with Water-tube Boilermakers was that the domestic restrictions were an integral element in securing foreign orders and not, as in other cases, simply an ancillary support to the search for such orders. At base the Court has not been convinced of the causative link between domestic restraint and foreign order.⁹⁹

VIII. Sections 10(1)(g) and 19(1)(g): Restriction required to support other acceptable Restriction

Gateway (g) - goods provision - reads:

"that the restriction or information provision is reasonably required for purposes connected with the maintenance of any other restriction accepted or information provision made by the parties, whether under the same agreement or under any other agreement between them, being a restriction or information provision which is found by the Court not to be contrary to the public interest upon grounds other than those specified in this paragraph, or has been so found in previous proceedings before the Court."

The gateway is useful to obtain a blessing for minor or ancillary restrictions which are necessary to the operation of a restriction which has

been accepted by the Court. The nexus between ancillary restriction and main, already accepted restriction is one of reasonable requirement. Thus it need not be shown that the main restriction is inoperative without the supporting restriction; it suffices to show that the ancillary restriction improves the operation of the main restriction. Thus, in Cement Makers Federation Agreement¹⁰⁰ a price restriction has been accepted under gateway (b). The issue now was whether an ancillary restriction could attach itself to the main restriction and pass through gateway (g). The ancillary restriction was to the effect that if orders for cement were made a substantial period of time in advance they had to be concluded at the price prevailing on the day of dispatch. This restriction was accepted on the basis that in its absence cement users would make advance orders at fixed prices and reap a cost advantage when the cement was delivered at a future date due to the effects of inflation on cement prices. The Liesner Committee commented on this gateway: "Although it has been pleaded successfully on seven occasions it has not given much difficulty partly because so few restrictions have got through the main gateways."¹⁰¹

IX. Sections 10(1)(h) and 19(1)(h): De Minimis, Minimal effect upon Competition

Gateway (h) - goods provision - reads:

"that the restriction or information provision does not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry and is not likely to do so."

This gateway was designed specifically for information agreements and was introduced by the RTPA 1968 for that purpose though, it has never to date been used for information agreements. The first case under this gateway was Scottish Daily Newspapers (No. 2).¹⁰² Publishers agreed not to publish newspapers pending the end of an unofficial strike. This agreement was registrable. The Court condoned it under gateway (h) on the basis that it was intended as a means of ending the strike and restoring competition between the publishers. Given its transitory nature the Court accepted that it would have no effect on competition.

Gateway (h) uses the words 'any relevant trade or industry'. Presumably a restrictive agreement in the market for apples which has little effect upon that market but which has an appreciable effect in the market for pears would not be condoned under gateway (h). It will be noted that the gateway speaks of "any" relevant market and not "the" relevant market. Thus since pears are

a substitute product for apples the pear market is presumably a relevant market. From an economic common-sense point of view it is unlikely given the strict approach of the Court and the presumption against restrictions that the statute seems to imply that a restriction, innocuous in the parties own market but harmful in another market would be acceptable.

The words "trade or industry" are used frequently throughout the gateways. Trade may be taken to mean buying and reselling; industry may be taken to mean manufacture and supply. In the services context the words mean essentially the same with appropriate modifications.

It should be noted further that the parties must prove a negative effect i.e. that no "material" restrictions on competition derive from the agreement in question.

The Liesner Committee noted one possible use of this gateway: "However, one possible application would be to challenge before the Court the Director General of Fair Trading's refusal to make a Section 21(2) representation to the Secretary of State, or the latter's refusal to discharge the Director General of Fair Trading from taking an insignificant agreement before the Court."¹⁰³

X. The Balancing Tailpiece

In both Sections 10 and 19 RTPA 1976 there exists what has become known as the "balancing tailpiece". The goods version reads:

"... and is further satisfied (in any such case) that the restriction or information provision is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction or the information provision."

The words "purchasers", "consumers" and "users" include persons purchasing, consuming or using for the purpose, or in the course, of trade or business or for public purposes. References to any one person includes reference to any two or more persons being interconnected bodies corporate or individuals carrying on business in partnership with each other.¹⁰⁴

When the case concerns services the balancing tailpiece is slightly different; the elaboration of who is meant by the "public" or "persons not parties to the agreement" includes: "... users of services supplied by such parties, or persons engaged or seeking to become engaged in any business of

supplying such services or of making available or supplying similar services, or being vendors, purchasers, consumers or users of goods or other property in relation to which any such services or similar services are supplied"¹⁰⁵ The relevance of differences between the goods and services version is discussed below.

Under the "tailpiece" the Court must perform two tasks: (i) determine whether any detriments to the public or to non-parties exist; and (ii), if such detriments exist whether they are outweighed by the benefits which the Court has found to exist under the gateways.

The Director General, through his Counsel, must assert the existence of detriments. These detriments must "result or be likely to result from the" restrictions.¹⁰⁶ Though it is clear that the onus of proof lies also with the parties to attempt to prove that the benefits from the restrictions outweigh the detriments following therefrom.¹⁰⁷

(i) "The Public": Meaning

As stated above the Court must balance the benefits of the restriction against the detriments to the "public or to persons not party to the agreement". For this balancing process the Court must have a clear perception of which vested interests are included within the concept of public. For instance the phrase "the public" could include: consumers; purchasers; users; competitors or potential competitors to the parties; the parties themselves; and, suppliers of different goods (e.g. raw materials or components) to the parties. The concept of the public is, however, not this wide. In discussion of gateway (b) (goods) it was noted that the term "the public" used there was qualified by the wording following it: "... as purchasers, consumers or users"¹⁰⁸ If this also applies in the tailpiece detriments experienced by either the parties themselves or suppliers to the parties are to be discounted in the balancing process. Whilst this would be right and proper in the case of the parties themselves it is not so in the case of suppliers to the parties: detriments inherent in restrictions can certainly effect suppliers harmfully. The important question thus arises: Are the interests of suppliers to the parties to be taken into account when balancing the pros and cons of restrictions in agreements? Whether the term "the public" does include the interests of suppliers to the parties is unclear from the wording of the tailpiece. This is because it is unclear whether the qualifying words in brackets in both Sections 10 and 19 apply to the word "public"

or only to the phrase "persons not party to the agreement". There is no judicial analysis of this potentially important question though certain cases hint in an unsatisfactory fashion at one solution or the other. In British Iron and Steel Federation's Agreement¹⁰⁹ it was held that the interests of scrap creators were relevant to the balancing process. The scrap creators were suppliers to the parties to the restrictive agreement and would not therefore have fallen within the categories of persons described in the brackets (i.e. purchasers, consumers, users, competitors or potential competitors). A fortiori, scrap dealers must have been counted as part of "the public" which, therefore, may be assumed to include suppliers to the parties. This is, it is submitted, correct and sound in terms of policy. Thus the concept of "the public" for tailpiece purpose includes any vested interest adjudged by the Court to be worthy of consideration. The phrase "persons not party to the agreement" is construed more narrowly by reference to the words in brackets.¹¹⁰

This conclusion is partly supported and partly contradicted by an amendment to Section 19 RTPA 1976 (services) introduced by Section 28 Competition Act 1980. This section seeks to add "vendors" or services to the categories of persons whose interests are to be taken into account in the tailpiece. Thus since a supplier of services to parties to a restrictive agreement is a "vendor" of services such a persons interests are relevant to the balancing process.¹¹¹ Thus, parties to an agreement may plead before the Court that suppliers to them and other vendors of services may receive benefits as a result of their agreement. A number of important points must however be raised. First, why was not a similar amendment made to Section 10 for goods? Does this failure to amend Section 10 imply that the drafters of the 1980 Competition Act considered that the interests of suppliers to the parties and other vendors of goods were irrelevant to the tailpiece process? Alternatively in the light of case law (e.g. British Iron and Steel Federation Case) on Section 10, did the drafters of the 1980 Act consider that Section 10 already embraced the interests of suppliers to the parties and other vendors of goods?

Given the analysis of the tailpiece above the latter interpretation is, it is submitted, the better one. Section 28 Competition Act 1980 equates the phrase "the public" with the categories of interests indicated in the brackets. The section states of Section 19

Page 233 was not
included in
the bound thesis.

RTPA 1976 that it "... provides amongst other things that there is a presumption that a restriction or information provision is against the public interest unless the Court is satisfied the removal of it would deny benefits to the public as purchasers, consumers or users of any goods." It is strongly submitted that this equation of "the public" with the bracketed categories of person is not to be taken seriously. This is simply an instance of careless drafting. The words seek to summarise an important part of the tailpiece but in so doing fail to mention the important phrase "... or to persons not parties to the agreement" This phrase, as a quick glance at the precise wording of Section 19 will reveal, is inserted between the phrase "the public" and the bracketed interests. In the text above it has been suggested that the bracketed interests qualify the phrase "or to persons not parties to the agreement" and not "the public". It is thus very unhelpful and confusing for the draftsman to ignore these important words in the summary given in Section 28 Competition Act 1980. Accordingly, little weight should be attached to the equation between "the public" and the bracketed interests.

(ii) The Tailpiece and 'Detriment'

The tailpiece, in practice, does not appear to be an undue obstacle to surmount where the Court has already accepted that the restriction passes through the gateways. The only case in which restrictions which passed through gateways were found to falter at the tailpiece hurdle was Yarn Spinners Agreement where gateway (e) on unemployment was passed through. However, the Court condemned the price fixing agreement on the basis that it would result in: slight increases in the price of cotton goods; a decline in export orders; and a squandering of national resources due to the maintenance of excess capacity. In all other cases success under the gateways has involved continued success with the tailpiece even though the Court has accepted that detriments do flow from the restrictions. In such cases the following have been held to amount to detriments: (i) abolition of the availability of cheaper varieties or grades of the product;¹¹² (ii) the existence of higher prices for a minority of purchasers in the context of reasonable prices for the majority of purchasers;¹¹³ (iii) the existence of "delivered" prices;¹¹⁴ (iv) temporary withdrawal of product from a market due to exceptional circumstances;¹¹⁵ (v) creation of an obstacle to new forms, and innovative means of supply, of services;¹¹⁶ (vi) creation of entry barriers.¹¹⁷ In all of these

cases, however, the detriments have been considered to have been outweighed by the advantages.

Where the Court has found detriments but has accepted that the counterbalancing advantages are more important it has, on one recent occasion, made suggestions as to how the detriments could be abated or reduced without prejudice to the beneficial aspects of the restrictions. In A.B.T.A.'s Agreement the Court suggested improvements to various trade association procedures and further suggested the 'guiding principle' that in the exercise of its powers over tour operator and travel agency services A.B.T.A. should "... at all times regard the interest of the consumer as the paramount consideration".¹¹⁸

(iii) Whether One Unacceptable restriction negates an otherwise Acceptable Standard Form Contract

One serious problem that was solved by the Court in the A.B.T.A. case was the distinction between restriction and restrictions in standard form contracts (SFC's). The OFT had hitherto construed the law as being that restrictions expressed in SFC's had to be viewed collectively as a single restriction rather than a catalogue of separate restrictions. If this was so then if a Court found one restriction in an SFC, or a selection of restrictions out of a greater number, to be against the public interest then the whole SFC fell. This concerned the OFT who were worried that this would leave a serious vacuum in the structural framework of how trade was conducted in the market in question; if a commonly used SFC were suddenly held to be unlawful this would cause great confusion for business who had hitherto relied upon the SFC. Moreover, the OFT were concerned at the "hammer to crack a nut" nature of this approach. The existence of one or two black clauses in a SFC does not necessarily render an otherwise acceptable SFC detrimental, harmful and positively against the public interest. The problem of the OFT apparently lay in Sections 8(2)(a) and (b) (goods), and, 16(3)(a) and (b) (services) RTPA 1976. These provide effectively that where a trade association recommends to its members use of a SFC then the constitutional documents of the association are deemed to contain clauses providing that members are bound to comply with the SFC. Following a statement in British Bottle Association's Agreements the OFT were led to believe that the Court viewed restrictions in SFC's conjunctively, as a single restriction,

on the basis of the singular nature of the deemed restriction in the trade association constitution requiring members to abide by the SFC.¹¹⁹ However, it is clear following the A.B.T.A. case that a more flexible approach is being taken by the Court. There the Court analysed all of the restrictions separately against the setting of the gateways. It then held that certain restrictions were unlawful. With these restrictions out of consideration it proceeded to weigh in the scales of the balancing tailpiece those restrictions which had passed through the gateways. In effect certain restrictions of an unacceptable nature were excluded from the balancing tailpiece. This, of course, meant that there were fewer detriments placed in the scales and, accordingly, less to be set against the positive aspects of the restrictions.

The basic approach of the Court is thus an individualised one, examining restrictions separately. However, the Court in A.B.T.A. also made it clear that it would additionally examine the restrictions in relation to each other and the "total backcloth of the circumstances of the case".

The A.B.T.A. case has given the OFT greater confidence in the approach of the Restrictive Practices Court to SFC's. Hitherto they had been aware of the dangers of referring such a contract to the Court. Now they may be encouraged to refer more such SFC's for appraisal against the public interest.

XI. Variations to agreements approved by the Restrictive Practices Court: Minor variations orders

Where the RPC approves an order it may do so within defined terms. Parties will be bound to execute their agreements according to defined limits. However, it may well be the case that in the light of experience of the operation of the agreement or of fluctuation in economic and commercial circumstances, the parties will seek to vary their agreement. Prima facie variations will have to be registered and referred to the RPC. The OFT would have no jurisdiction to condone the variations given that they relate to agreements containing significant restrictions albeit that the restrictions have been accepted as in the public interest by the RPC. This conclusion is of course most unsatisfactory, the variation might be innocuous or per se trivial yet can only come into force following an appearance in Court. This

problem has been avoided by the RPC in recent cases. In Building Employers Confederation's Application¹²⁰ the RPC held that a rule whereby members of the Confederation were required to offer to customers a building guarantee insurance scheme when offering building services was in the public interest and passed through the gateways. Customers had the option of hiring the builders services with or without ancillary insurance. The Court issued an order approving the scheme and included in the order a provision allowing "such variations (if any) as the Director shall in writing approve". The RPC added that the OFT (on behalf of the Director) could only approve restrictions that were not significant i.e. they could use their powers under Section 21(2) RTPA 1976. Presumably, though it is not stated expressly in the judgment and the form of the actual Court order seems to indicate otherwise, the OFT must obtain the consent of the Secretary of State to variations in accordance with the normal Section 21(2) procedure (see Chapter 4). Where variations are significant they must be approved by the RPC. Though the legislation does not expressly provide for the OFT to approve variations the RPC has accepted that the power is implicit within Section 4(1) RTPA 1976 which permits the RPC to discharge or vary previous Court orders. It is probably more accurate to say that the power of the OFT is implicit in Section 21(2) RTPA 1976.

D. RESTRAINING ORDERS UNDER SECTION 35(3) RTPA 1976:
PROCEEDING COMMENCED BY THE DIRECTOR GENERAL AGAINST
UNREGISTERED AGREEMENTS

Under Section 35(3) the Director General may apply to the Court for an order restraining all or any of the persons listed in Section 35(4) from, "... giving effect to, or enforcing or purporting to enforce - (a) the agreement in respect of any restrictions or information provisions; (b) other agreements in contravention of [Section 35(1)] ...". Proceedings of this nature are common when contrasted with other types of proceeding. In the history of the Court over 600 cases have been heard of which a high percentage have been in respect of restraining orders for unregistered agreements. The OFT do not go to Court in respect of every unregistered agreement; the policy is to seek an order only in respect of those

agreements which the OFT consider will recur without such an order.¹²¹

An order of the Court may be made against persons mentioned in Section 35(4):

"(a) any person party to the agreement who carried on business within the United Kingdom; (b) a trade association or a service supply association of which any such person is a member; or (c) any person acting on behalf of any such association."

Parties rarely contest such actions since no public interest arguments may be raised;¹²² parties are sometimes represented in Court in order for counsel to apologise to the Court for the non-registration it being hoped by this to persuade the Court of the repentant mood of the parties and placate the OFT. The one practical reason for being represented in Court is to persuade the Court as to the type of remedy or order to be made. In this respect a number of options exist:

- (i) the Court may accept undertakings from the parties as an alternative to the Court issuing an injunction. An undertaking has the same effect as an order and breach thereof is a serious contempt of Court.¹²³ Though, undertakings offered to the Court in lieu of an injunction will not necessarily be accepted by the Court.¹²⁴
- (ii) Injunctive orders may be made against the agreement in question.
- (iii) Injunctive orders may be made against both the agreement in question and any future unregistered agreement. Whether or not the Court will order such a wide injunction depends on a number of factors: (a), whether the parties were aware of the duty to register; (b) whether the parties were aware that their agreement in particular was subject to registration; (c) whether the parties had taken steps to discover whether their agreement was registrable;¹²⁵ (d) the duration of the agreement prior to discovery by the OFT;¹²⁶ (e) the seriousness of the agreement in terms of its anti-competitive consequences.¹²⁷

If the Court decides to make an injunctive order and include prohibitions against both the agreement in question and any future unregistered agreements then the parties must take great care. The prohibition against future agreements extends to all agreements whether similar or not to the first agreement. Thus, if X and Y are brought to Court for price fixing and a wide order is made then the entering into of even an innocuous registrable agreement entails the parties in a serious contempt of Court if the agreement is not registered (see next Section for details). An important recent case on this is Diazo Copying Materials.¹²⁸ In 1978 HTL was enjoined under Section 35(3)(a) and (b) (i.e. a wide order) following disclosure of an unregistered price fixing agreement. In 1983 the Director General sought

leave to issue writs of sequestration of the property and assets of HTL for alleged contempt of Court. It was contended that HTL had entered a subsequent, registrable agreement. Fortunately for HTL the Court held that the clause in question was exempted from registration by Section 9(3) RTPA 1976.

In practice the Court appears willing to accept undertakings in lieu of injunctions.

E. PROCEEDINGS FOR CONTEMPT OF COURT AGAINST
PARTIES TO AGREEMENTS WHO BREACH COURT ORDERS¹²⁹

I. Legal Context

It should now be clear that failure to comply with an undertaking given to the Court or an injunction involves the wrongdoer in a contempt of Court. Over recent years the Court has adopted a stricter approach to defendants accused of contempt of court. Thus in Galvanized Tank Manufacturers' Association Agreement the Court stated:

"... We wish to give warning to others who have been made subject to injunctions in respect of condemned price-fixing agreements. It is abundantly apparent from all that has emerged in the course of this motion that those who, having been placed under an injunction or having given an undertaking such as here, thereafter exchange information of their intentions such as prices, or partake in discussions, formal or informal, with their competitors on such matters, may be in real peril of finding themselves in the position in which these companies now are: that is of having passed easily and quickly from that which may be legitimate into actions which constitute a grave contempt."¹³⁰

This strict line was confirmed recently in British Concrete Pipe Agreement¹³¹ where the Court stressed further that:

"We think it right to record at this point in this judgment that the Court has been troubled by the lack of action hitherto taken against individuals, such as directors of companies, where their companies have committed contempt. We appreciate that there may well be difficulties in taking action, such as proceedings for aiding and abetting or for committal, against directors as well as proceedings for contempt against their companies. Separate representation may be necessary and the co-operation of directors with the Director General in unearthing agreements or arrangements made in breach of undertakings given to the Court or which should have been registered under the provisions of the Act is often of great value and should not be lightly jeopardised. But we desire, nevertheless, to draw attention to the warning on this topic of possible proceedings against individuals which would not necessarily be solely financial, given by this Court in ... Galvanised Tank"¹³²

II. The Conduct that is Forbidden: Meaning of "... giving effect to, or enforcing or purporting to enforce"

In both Sections 2(2) and 35(3) RTPA 1976 on restraining orders against registered agreements declared contrary the public interest and unregistered agreements that are void and unenforceable as a result of the failure to register respectively, the words "... giving effect to, or enforcing or purporting to enforce ..." appear. These words will form the active part of any injunctive order or undertaking; they describe actions or categories of conduct that the parties are prohibited from doing. An understanding of their implications is thus important. In Diazo Copying Materials¹³³ questions as to their meanings were raised. Two theories were proposed: (a) that for the defendant to have given effect to or enforced or purported to enforce an agreement in breach of the order it would have to be proven beyond reasonable doubt that the restriction caused the defendant not to do what he otherwise would have done;¹³⁴ and (b) that for the defendant to have given effect to, or enforced or purported to enforce an agreement in breach of a Court order it would have to be proven "... that the existence of the restriction played a part in determining [the] traders conduct."¹³⁵ The difference between (a) and (b) is one of degree. Under (a) the Director General must establish that the restriction was the dominant or even exclusive factor in determining the defendants conduct. Under (b) the Director, in order to establish contempt, need only show that the restriction "played a part" in influencing the defendants conduct. Clearly, the burden of proof is more onerous on the Director General in (a) than it is in respect of (b). Unfortunately, in Diazo Copying Materials, Warner J. refrained from deciding which burden of proof was the correct one, though a tentative preference appears to have been given to (b).¹³⁶ This is probably correct. As was critically pointed out by Counsel for the Director in respect of alternative (a): "Where a trader is restrained by an order of the Court from giving effect to a restriction requiring him not to do that which, as a matter of commercial policy, he has no wish to do it cannot be incumbent on the Director General in such a case, before he can prove a breach of the order, to prove that the trader's conduct would have been different in the absence of the restriction. It must be enough for him to show that the existence of the restriction played a part in determining that conduct. Here it was enough that, on at least two occasions, Mr. Musto had rejected export enquiries expressly on the ground that HTL did not have 'the export rights'."¹³⁷ Moreover, both

Sections 2(2) and 35(3) base liability upon the defendant "purporting to enforce" an agreement. The word "purporting" implies that a defendant can be in contempt for endeavouring but failing to enforce an agreement i.e. non enforcement can represent breach of an order. Thus, so long as the defendant reveals by his conduct an intention to enforce the agreement it would seem that he may be liable for contempt. In such a case the defendants actual conduct was not affected by the restriction. This conclusion is clearly more consonant with alternative (b) than it is with alternative (a).

III. General Nature of Contempt Actions¹³⁸

Disobedience to the judgment or order of a Court or breach of an undertaking given to a Court is a civil contempt. It is not a criminal offence but nonetheless is punishable by a fine or imprisonment under the inherent jurisdiction of the Court. Alternatively an injunction may be made against the contemnor (the defendant in a contempt action). An additional remedy which is exclusive to civil contempt is a writ of sequestration under which the contemnors property is placed temporarily in the hands of the sequestrators who manage the property and receive rents and profits from it until such time as the contempt is purged, i.e. terminated. The OFT have shown themselves ready to pursue such drastic steps. In Diazo Copying Materials¹³⁹ the defendant had been involved in an unregistered agreement which, when unearthed by the OFT, was referred to the Court under Section 35(3) RTPA 1976. The Court issued an order restraining the company from giving effect to or enforcing or purporting to enforce any other unregistered agreements. Subsequently, the OFT discovered what appeared to be an unregistered agreement being operated. Accordingly, they issued a notice of motion in 1983 applying to the Court for: (a) a writ or writs of sequestration of the property and assets of the defendant company for its failure to comply with the order; (b) any other order as might seem just to the Court by way of punishment of the company; and (c) costs.¹⁴⁰ The action failed since it was ultimately decided that the unregistered agreement alleged to be the breach of the Court order was in fact excluded from the duty to register. Nonetheless, the moral of the case in terms of OFT attitude is clear.

Although imprisonment of a director or other officer is a possibility,¹⁴¹ and in this context one considered feasible by the Restrictive Practices Court as the Concret Pipes decision noted above reveals, it is only ordered

where the Court considers it necessary in order to ensure compliance with the order.¹⁴² Deliberate flouting of the Court order however is likely to entail the risk of imprisonment.¹⁴³

IV. Factors for Presentation to the Court: Mitigation

In contempt proceedings the remedy decided upon by the Court will very largely depend upon the mitigating circumstances pleaded on the defendants behalf. It is not possible to catalogue exhaustively the points that may be pleaded. However a few of the arguments that have been recited to the Court in the past may be briefly rehearsed here: (i) that the parties took and acted upon legal advice whether from solicitors or from counsel - the Court has accepted this as grounds for mitigation;¹⁴⁴ (ii) that the infringement of the Court order was "not an act of wilful defiance" - the Court has accepted as a mitigating factor that the contempt was committed by a subordinate member of the company in ignorance of express instructions to the contrary by his superior who mistakenly considered the subordinate to be aware of the strictures of the Court order;¹⁴⁵ (iii) that the contemnor is sincerely apologetic - humble apologies make little impression on the Court who appear to view such repentance in terms of "crocodile tears";¹⁴⁶ (iv) that the Company genuinely took steps to avoid the contempt by institution of a monitoring system - the Court has accepted that if a contemnor seeks legal advice as to how to avoid breaching the order and acts upon that advice by instituting an administrative monitoring system in his company then there may be grounds for mitigation. However, in British Concrete Pipes the Court still fined Redland Pipes £100,000 for contempt despite its having taken legal advice and having set up a monitoring system. The basis for the fine was apparently that the Company should not have allowed an administrative breakdown in control to occur;¹⁴⁷ (v) that the company infringed the order through necessity as a result of dire economic difficulties caused by the state of the market - the Court rejected this in British Concrete Pipes;¹⁴⁸ (vi) that the managers of the company were unaware of the infringements and took rapid curative measures to end the infringements once they were discovered - one of the parties to the contempt in British Concrete Pipes apparently got a reduction in fine on this basis from £100,000 (being the sum another large party was fined) to £75,000;¹⁴⁹ (vii) that there was a long duration in time between the order and the entering of the agreements held to be in breach of that order - length of

time might be relevant but in British Concrete Pipes the parties were admonished for not setting up an adequate monitoring system to ensure long-term compliance;¹⁵⁰ (viii) that the contemnor is a small company with very limited financial resources - the Court certainly considered this relevant in British Concrete Pipes fining certain small concerns only £5,000 whereas larger firms were fined up to £100,000; (ix) that the contempt was committed by a low ranking employee - although a company may not be liable for the contempt committed by a very junior employee the Court may condemn the failure by senior managers, who should have known better, to institute a proper system of supervision.

V. Monitoring Systems: Avoiding Contempt

The Court has stressed the importance of a proper corporate, administrative system designed to ensure continued compliance with a Court order. This they have done bearing in mind that compliance is a long-term process:

"Not only would memories become dim with the passage of time but, to anyone who paused to think, the staff changes and possible reconstruction of companies likely to occur with the passing of the years made it essential for a system to be adopted so that the important limits to the freedom of the companies to enter into restrictive agreements with their competitors as well as the undertaking given to the Court should be continuously borne in mind and not forgotten and ignored. The directors and upper echelons of executives of the companies must have had well in mind a number of statutory obligations that had to be observed, such as the Factory Act and statutory provisions relating to quarrying, as well as the common law duties owed by an employer to his employee. Obligations under the Restrictive Trade Practices Acts should, perhaps, by reason of their comparative novelty, have been more actively borne in mind and observed by management and how much more so when the respondent companies had each of them been proceeded against in this Court and had given solemn undertakings not to enter into fresh agreements to the like effect as those declared contrary to the public interest and void in respect of the restrictions they imposed."¹⁵¹

In order to minimise the risk of contempt proceedings the following points might be relevant: (i) Parties subject to an order might request detailed legal advice on precisely what is entailed by the order. Those giving advice should bear in mind (and advise accordingly) the broad concept of "arrangement" - the pursual of an informal, oral arrangement between the parties is as much a contempt as is pursual of a formal, written agreement where that second arrangement achieves similar commercial and economic goals

as the first agreement subject to the Court order; (ii) parties might, following such legal advice, prepare circulars and memorandum setting out in non-technical language categories of conduct to be avoided e.g. discussions with rivals over prices or discount levels, discussions with rivals over selling areas, exchanges of price lists with other competitors, meetings with personnel from other competitors, etc.; (iii) these circulars and memorandum might be distributed to all directors and officers of the company who know the substance of the undertakings given to the Court or order made against it;¹⁵² (iv) distribution should also be made to third-parties who know of the order and who might be responsible for assisting or advising the persons bound to infringe the order, company accountants are a prime example;¹⁵³ (v) copies of the circulars and memorandums should periodically be re-distributed as a reminder to those involved; (vi) a thorough review of all current marketing practices and existing contractual arrangements should be undertaken to ensure that no registrable agreements are being operated without senior management being aware of their existence, all unregistered agreements discovered should be terminated immediately and details registered with the OFT;¹⁵⁴ (vii) a competent person might be placed in charge of company auditing to ensure that infringements, especially of price related restrictions, are not taking place; (viii) trade associations might circulate to all members details of all undertakings given and injunctions made by members since the inception of the legislation which first came into force in 1957, the associations might accompany these circulars with warnings as to the dangers of assisting those who breach the Court order; (ix) where a company is taken over by or takes over another company the new parent or subsidiary should be made cognizant of the obligations imposed by the Court order; (x) all new senior management who join the company should likewise be made aware of the Court order.

VI. Contempt and Mergers, Take-Overs and Transference of Obligations

In the first contempt case brought against the British Concrete Pipe Association the Court requested that the Director General commence proceedings against British Steel who had not been made defendants in the first case.¹⁵⁵ During 1969 the Iron and Steel Act came into being which provided for the transfer of property from private steel companies. Pursuant to the Steel Companies (Vesting) Order 1970 which vested all the "property, rights, liabilities and obligations" of scheduled companies in

the British Steel Corporation, Stanton and Staveley Ltd. (S.S.) became part of the Corporation. S.S. had given an undertaking to the Court in 1965, the RPC held, and the decision was affirmed by the Court of Appeal, that the duties and responsibilities arising for S.S. out of the Court order were transferred to the British Steel Corporation. Accordingly, the British Steel Corporation were responsible for infringements of the order made by S.S. They were fined £50,000 for this contempt.

The case is a salutary warning to companies who are taking over, or have been taken over by other companies. Sir John Donaldson M.R. in the Court of Appeal stated, in respect of the vesting:

"The sixth point is that under this legislation construed as the Director General would have it construed and the court below has construed it, it would be possible for the corporation to be in breach of the undertaking inadvertently. That no doubt is right. Where the corporation is taking over a whole host of companies, they may not - they ought to, but they may not - be aware of what undertakings have been given. There cannot be all that number of undertakings given by steel companies to the Court, but it is just possible that the corporation might not know about them. If they did not know about an undertaking, that would go to penalty and no doubt full effect would be given to any such excuse."¹⁵⁶

The importance of an offeror company or new parent taking proper inventory of undertakings and other obligations to the Court owed by the acquired concern is thus clear.

F. ACTIONS COMMENCED BY PARTIES OR THE DIRECTOR
GENERAL FOR A DECLARATION ON THE REGISTRABILITY
OF AN AGREEMENT

Under Section 26 RPA 1976 the RPC has power to declare that an agreement is not one to which the Act applies. This procedure may be useful where the parties are in need of a test case declaration on the application of the law or where a dispute as to registrability arises between the parties and the OFT. The section envisages a number of possibilities.

I. Rectification of Register

Section 26(1) reads: "The Court may, on the application of any person aggrieved, order the register to be rectified by the variation or removal of particulars included in the register in respect of any agreement."

The aggrieved party must apply to the Court, the application will be for either total removal of the agreement from the register, or, variation of the register¹⁵⁷ (see next section).

II. Declaration of Registrability

Section 26(2) RTPA 1976 reads: "The Court may, on the application of - (a) any person party to an agreement; or (b) the Director, in respect of an agreement of which particulars have been furnished to him under this Act; declare whether or not the agreement is one to which this Act applies, and if so whether or not it is subject to registration under this Act." This provision is of some significance. Its obvious function is to allow either the OFT or the parties themselves to seek guidance on complex legal questions of registrability. In one notable case a very large property group brought such an action as a test case to determine whether leases and restrictive covenants contained therein were ever registrable.¹⁵⁸ The question arose as a result of the Restrictive Trade Practices (Services) Order 1976 which subjected service agreements to registration. The applicants owned and managed a large number of properties in the United Kingdom. Mr. Justice Mocatta commented in judgment: "If, as a result of the statutory instrument I have mentioned, leases are brought under the control of the 1956 Act, this would clearly be a very serious matter for the applicants may well have current hundred if not thousands of leases and the result of the order would be that each of these would have to be examined in order to make certain whether or not there was an obligation under the ... Act ... to register"¹⁵⁹ In the event the applicants brought the action as nominees of the British Property Owners Association. The applicant agreed to an abridgment of normal procedure with the OFT in order to expedite the proceedings since time was of the essence. The final legal date for registration was the 22nd June 1976; the notice of application was issued on the 10th June 1976; the hearing of arguments occurred on the 16th, 17th and 18th June. It will be appreciated that failure to register in time would have rendered restrictions in the agreement null and void under Section 35(1) RTPA 1976. Thus, to speed up proceedings the OFT agreed that the hearing of the case should be treated as a final hearing and that the only evidence before the Court would be by the affidavit that had been filed on behalf of the applicants.

The second importance of Section 26(2) is that parties to agreements may escape obligations under those agreements by seeking a declaration of

the registrability of that agreement. If successful in the application the agreement will be null and void and attempts to enforce it unlawful. This tactic has been used in a number of important cases and is examined in section G of this chapter.

G. ACTION BY PARTIES TO AN AGREEMENT FOR A
DECLARATION THAT THE AGREEMENT IS REGISTRABLE:
USING THE CONSEQUENCES OF FAILURE TO REGISTER

Failure to register an agreement in due time, according to Section 35(1) RTPA 1976, renders the agreement void in respect of all restrictions accepted or information provisions made thereunder, and, it becomes unlawful for any party to the agreement who carries on business in the UK to give effect to, or enforce or purport to enforce, the agreement in respect of any such restrictions or information provisions. However, innocuous agreements are not infrequently continued in ignorance of their registrability. In a number of recent cases parties to agreements have sought declarations that their agreements are registrable. A declaration to that effect entails the agreement becoming null and void. This enables the party to escape what they now consider onerous obligations under the contract. Alternatively, in an agreement between X and Y whereby X sues Y for breach of Contract, Y may plead in defence that the agreement has not been registered in due time and is null and void.

The clearest example of this strategic use of the RTPA 1976 as a defense is Topliss Showers Ltd. v. Gessey.¹⁶⁰ The facts may be summarised as follows. Prior to 1976 G. Ltd. and T. Ltd. were jointly owned and managed. Following share sales, in 1976 and 1977 the two companies fell to separate ownership. However G remained as a manufacturer of Mark IV valves and T remained as the marketers of the valves produced by G. Following a dispute between G and T it became clear that a complete parting of the ways was inevitable. Accordingly G incorporated X Ltd. to market the valves for it. In early 1979 a Tomlin Order was made between the solicitors to the parties in order to settle the proceedings which had been commenced by T against G.¹⁶¹ Under the terms of this settlement the following, inter alia, were agreed upon: (i) G would sell Mark IV valves only to T until July 31, 1979; (ii) G would sell the valves to T until December 31, 1979 if such valves were available; (iii) G would not supply such valves to anybody other than T and X between August 1 and December 31, 1979;

(iv) G would sell the valves to T at prices fixed by the parties; (v) G would supply X with the valves at prices which were not less than those charged to T; (vi) X would not sell or offer for sale the valves at prices less than the published price of T and would not offer discounts which were more favourable than those offered by T; (vii) G would not stockpile the valves. The terms of this settlement were not registered with the OFT. Nonetheless, had they been it is almost certain that they would have been given dispensation under the Section 21(2) RTPA 1976 procedure (discussed in Chapter 4). The settlement was between two small companies and was of a very transient nature. The agreement was in reality between two companies who were by the settlement easing their way to full competition with each other.

Subsequent to this settlement T commenced an action against G and X claiming damages and injunctive relief for alleged breaches of the Settlement. G and X denied these allegations and, in the alternative, argued that even were the allegations true the settlement was not registered and hence was void and unenforceable. Neill J. held that, irrespective of any finding on breach, the settlement was registrable and the consequences in Section 35 applicable. He added however: "I reach this conclusion without enthusiasm because it seems to me 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."¹⁶²

The defense of non-registration has been raised in other cases. Thus in Academy Sound & Vision v. WEA Records¹⁶³ an agreement was signed between an assignor of copyright in certain master recordings and the plaintiff assignee. Under this agreement the assignor had a limited period of three months in which to commercially dispose of his stock of records made from the master recording. After the three month period had expired the plaintiff had the exclusive right of sale. The plaintiffs brought an action against the assignor alleging that the latter continued to sell records even after the three month period. The assignor denied breaching the agreement and, alternatively, claimed that the agreement was void and unenforceable for want of registration. The argument, however, failed on the ground that the agreement was excluded from the RTPA 1976 by virtue of paragraph 5A of Schedule 3 to the RTPA 1976 which excludes from registration agreements in respect of the assignment in, inter alia, master recordings.¹⁶⁴

The action of pleading the illegality of one's own agreement exists also at common law in the tort of restraint of trade.¹⁶⁵

H. PRIVATE ACTIONS FOR DAMAGES: FAILURE TO
REGISTER AGREEMENTS, RESALE PRICE MAINTENANCE,
BREACH OF COMPETITION ACT MINISTERIAL ORDERS

I. Legal Context

Section 35(1) RTPA 1976 reads: "If particulars of an agreement which is subject to registration under this Act are not duly furnished within the time required by Section 24 above, or within such further time as the Director may, upon application made within that time, allow - (a) the agreement is void in respect of all restrictions accepted or information provisions made thereunder; and (b) it is unlawful for any person party to the agreement who carries on business within the United Kingdom to give effect to, or enforce or purport to enforce, the agreement in respect of any such restrictions or information provisions." Section 35(2) RTPA 1976 creates private law consequences for continuing the operation of an unregistered agreement:

"No criminal proceedings lie against any person on account of a contravention of subsection (1)(b) above; but the obligation to comply with that paragraph is a duty owed to any person who may be affected by a contravention of it and any breach of that duty is actionable accordingly subject to the defences and other incidents applying to actions for breach of statutory duty."

A similar cause of action is provided for under Section 25(2) Resale Prices Act 1976 against persons unlawfully imposing individual or collective resale price maintenance.

Actions for breach of statutory duty should be commenced in the High Court (or County Court where the sums claims justify the action). In such proceedings reliance may be placed upon findings of fact and law made in proceedings before the RPC brought by the Director General under Section 35(3) RTPA 1976.¹⁶⁶ The damages would be to compensate persons for any loss suffered as a consequence of the operation of an unregistered agreement. Thus, for illustration, a local authority could sue a ring of collusive tenderers of building materials for the difference in price between the uncompetitive, fixed price and the price that would have prevailed in the absence of the collusion. To date no formal proceedings have ever been taken under this section. The problem is apparently one of assessing the correct quantum of damages. In a consultative document issued by the Department of Trade in 1980 the following comment was made: "The sanction of civil damages alone reduces the deterrent since civil litigation is known to be time consuming, expensive and uncertain. It can often be difficult to assess damages (what would the price have been in the absence

of collusion), and the purchaser may not wish to exacerbate relations with a long standing supplier with whom he may well wish to continue to deal."¹⁶⁷

Nonetheless it is possible that private actions could arise. In the Sunday Times on December 9, 1984 in an article entitled: "Revealed: the secret cartel behind boxing" a report of a cartel amongst leading promoters of boxing matches was revealed. According to the article the four leading promoters were to secretly share profits from their boxing enterprises without informing their boxers who, it was alleged, might have been receiving a smaller percentage of the fees than they might otherwise have received. One can imagine analogous cases involving theatrical, artistic or sporting promoters who enter secret restrictive agreements which lead to their artists and athletes being underpaid. Presumably, these artists and athletes could bring an action for damages based upon the earnings they consider they have lost. Though to constitute an "agreement" under the RTPA 1976 the parties involved must not be in partnership because under Section 43(2) RTPA 1976 "two or more individuals carrying on business in partnership with each other, shall be treated as a single person". Hence if three promoters were in partnership together they would represent a single person and could not enter an agreement with each other. If one promoter or manager has incorporated a private company to deal with his business affairs then there may exist an agreement between the company and the individuals. If the RTPA 1976 does not apply no private damages action can lie under Section 35. Though a complaint to the OFT under the Competition Act 1980 is feasible. The parties to the agreement could also be sued for damages on the basis of Article 85(1) EEC (see Chapter 7 Section D) if the agreement in any way had an EEC trade element to it e.g. the promoter or manager organised events elsewhere in the EEC and the agreement covered events outside the UK or foreign managers and promoters were hindered in their attempts to set up events in the UK because of the agreement in question.

II. Negotiated Settlements

These difficulties have however resulted in actions under Section 35(2) being settled out of Court. At least two such actions are known of. In the early 1970's certain Area Health Authorities recovered damages from electrical and mechanical contractors who were alleged to have colluded to fix tenders and prices. In 1978 the Post Office negotiated a settlement of

£9m from parties to an unregistered agreement among cable manufacturers. This latter instance was the climax of a series of proceedings brought by the OFT against manufacturers of telephone cables. Prior to 1952 suppliers of insulated electric wires and cable operated a collusive tendering scheme with regard to orders from purchasers including the Post Office. When the scheme was discovered during an early MMC investigation the suppliers agreed to terminate it.¹⁶⁸ In 1974 the MMC was asked to undertake a new investigation of the supply of insulated electric wires and cables.¹⁶⁹ During this investigation they unearthed a collusive tendering scheme that had been operated since 1965 and which had concerned sales to the Post Office of approximately £400m-£500m.¹⁷⁰ As a result of this discovery the OFT referred the agreement to the RPC along with another collusive tendering agreement concerning the supply of switchboard and other internal telephone cables to the Post Office. With respect to the first scheme the suppliers collectively controlled almost all of the market, with regard to the second agreement the parties were not the only suppliers. The OFT successfully proceeded under Section 35(3) RTPA 1976.¹⁷¹ The RPC ordered that each of the companies concerned should be restrained from giving effect to the agreements or any other agreement contravening Section 35(1) RTPA 1976. Following this hearing the parties gave undertakings to the Post Office to supply on a competitive basis in future and in March 1977 the RPC agreed on an application by the parties for the proceedings to be stood over indefinitely on the basis that the agreements were no longer in operation. The Post Office then decided to commence legal action for damages against the suppliers. A major difficulty for the Post Office was the lack of information upon which they could assess the suppliers profits. In the face of resistance by the suppliers to the Post Office's requests to inspect their books the latter placed an embargo on future placement of orders with these firms. The embargo lasted almost one year until the suppliers succumbed to the request. The Post Office and their accountants examined the suppliers books for evidence of overcharging. Upon the evidence unearthed the Post Office, after performing some detailed calculations, negotiated a settlement under which the Post Office was reimbursed by way of a £9m rebate on the price paid for the supply and installation of telephone cable during the period concerned. Subsequently the Post Office retained the right to inspect the suppliers books to ensure that all bids were based upon competitive tendering.¹⁷² The strength of the Post Office's case will have been much strengthened by the proceedings before the Court since as noted earlier facts disclosed therein may be relied upon in the civil suit.

It will be noted that in claiming damages the plaintiff is subject to the usual constraints. He must make a reasonable attempt to mitigate his

damage and ensure that his damages are not due to his own negligence or other failings. The usual defences for breach of statutory duty exist for the defendant.¹⁷³

III. Quantifying Damages

Quantifying the damages is very difficult in these cases. The correct way to commence viewing this question is to calculate a competitively set market price for the goods as at the date(s) and place(s) of delivery and to determine the difference (if any) between that price and the price actually charged.¹⁷⁴ In sale of goods cases the price that could have been obtained on resale by the buyer is generally irrelevant. This is understandable in competition law cases on the basis that if the buyer pays an inflated price and then resells at a normal profit margin the price he sells at will also be a supra-competitive inflated price and not reflective of market value.¹⁷⁵ Where the market price and actual price have de facto been the same Courts have awarded nominal damages.¹⁷⁶ If there is no prevailing market price by which to contrast the actual price or no near-equivalent product to base a comparison on then the question is more difficult.¹⁷⁷ This might be the case where the parties to the agreement control all of the market and there is no market outside of those parties, for example, where the purchaser is a national (statutory) monopoly so that the only supplies are to that purchaser. This indeed was essentially the case in the Post Office dispute. There are two solutions to this problem. First, the plaintiff can make an estimate of the defendants costs, add a reasonable profit margin and use the resulting price as the benchmark against which to measure the actual price. However, this method implies that the plaintiff is in a position to assess the defendants costs which in practice is rarely the case. Such an approach however might prove a starting point for negotiations or for discussions as to damages in Court. The second solution is to simply request the Court to assess damages. In a classic decision in International trade law - Kewi Tek Chao v. British Traders and Shippers Ltd.¹⁷⁸ Devlin J., when requested by the plaintiffs to assess damages where no market existed for the purposes of comparison, created what was effectively a notional market value to work with;¹⁷⁹ difficulties of quantification were not permitted to hinder proper recovery.¹⁸⁰

IV. Breach of an Order made under the Competition Act 1980

The Secretary of State has power under the Competition Act 1980 to issue statutory orders against firms who, following an adverse MMC report, steadfastly refuse to give suitable undertakings in negotiations with the OFT. The powers of the Secretary of State are the same as those granted by the Fair Trading Act 1973 in respect of monopoly and merger cases. Accordingly, the consequences of breach of an order are the same. Section 93(1) Fair Trading Act 1973 provides that breach of an order is not a criminal offence. Section 93(2) reads: "Nothing in the preceding subsection shall limit any right of any person to bring civil proceedings in respect of any contravention or apprehended contravention of such an order, and (with prejudice to the generality of the preceding words) compliance with any such order shall be enforceable by civil proceedings by the Crown for an injunction or interdict or for any other appropriate relief." This civil right does not extend to breaches of formal undertakings given to the Government.¹⁸¹ Locus standi is not covered by Section 93 though presumably any person or firm or trade association who can prove damage may bring an action. The Act is silent as to the nature of the cause of action though by analogy to Section 35(2) RTPA 1976 and Section 25(3) Resale Prices Act 1976 the action is probably for breach of a statutory duty.

I. PRIVATE ACTIONS FOR DAMAGES OR AN INJUNCTION ON THE BASIS OF EUROPEAN LAW

It is now clear that private actions may be brought against undertakings who are in breach of European Competition law. This remedy is examined in Chapter 7 on agreements and practices subject to European law.

J. CRIMINAL LAW PROCEEDINGS FOR CONSPIRACY TO DEFRAUD

It seems almost certain that certain types of agreement may be prosecuted as common law conspiracies to defraud by the Director of public prosecutions. In practice the only agreements fitting this description will be certain collusive tendering agreements. Details are given in Chapter 8

K. JUDICIAL REVIEW OF THE DIRECTOR GENERAL OF FAIR
TRADING, THE MMC AND THE SECRETARY OF STATE

I. Legal Context of Action for Judicial Review

Considerable discretionary powers are exercised by the DGFT, the MMC and the Secretary of State. Decisions made by these agencies are subject to review by the Courts at the instance of an aggrieved party.¹⁸² Redress is by way of the process of judicial review under Order 53 R.S.C. and Section 31 Supreme Court Act 1981. The latter lays down basic procedures whilst the former elaborates upon the detail. Actions for judicial review may be based upon, inter alia, the following grounds: (i) That the rules of natural justice have been breached thereby invalidating any decision adopted pursuant to the breach. Two aspects of natural justice are pertinent here. First, if a person deciding a case has a personal interest in the outcome that decision may be invalidated.¹⁸³ Secondly, if a person or firm or association that may be deleteriously affected by a decision is not given a chance to state their side of the case either orally or by written submissions then the decision taken in breach of the right of hearing may be invalidated. In practice the OFT in their procedures go to considerable lengths to enable all interested parties to make their views known; (ii) That the decision taken is ultra vires being one that the agency in question has no authority to take. Such might be the case where the person making the decision takes into account an improper consideration. For example, the Director General in deciding whether or not a practice is anticompetitive under the Competition Act can not consider public interest arguments concerning the social benefits of the investigated practice. The assessment of public interest arguments is purely for the MMC. Similarly, if the Secretary of State granted dispensation for proceedings before the RPC for a registrable agreement on the basis that his brothers company was a party to the agreement such a decision could be invalidated on the ground that it was made taking into account an improper consideration; (iii) That the person or agency deciding a case has to follow certain objective criteria laid down by statute and that these criteria have been ignored or that they have not been fulfilled. This ground of review will rarely be relevant in the competition context since most of the criteria laid down in the legislation entails a significant degree of subjective discretion. For instance in Section 29 RTPA 1976 (on exemption from registration of agreements important to the national economy) criteria are laid down in Section 29(2)(a)-(e) that if met qualify an agreement for exemption. However, irrespective of

of any discretion contained in the criteria themselves, Section 29(1) is prefaced with the words: "If it appears to the Secretary of State ... that the conditions set out in subsection (2) below are complied with" Thus all is in the eye of the beholder; everything depends upon the appearance as viewed by the Secretary of State. The width of the discretion thus conferred renders the criteria in Section 29(2)(a)-(e) difficult to subject to the process of judicial review.

II. Informal Investigations into firm's behaviour

The OFT undertake many informal investigations each year into corporate conduct primarily following a complaint by a third party. Depending upon the conclusions reached the OFT may take action, inter alia, under either the RTPA 1976 or the Competition Act 1980. However, this informal process has no statutory basis and is intended solely to put the OFT into a position whereby they can decide how best to exercise their discretionary powers if they are to be exercised at all. An analogous situation exists in respect of Department of Trade Inspectors who may be appointed to conduct investigations into the affairs of certain companies.¹⁸⁴ The investigations of these inspectors are not judicial; they are not even quasi-judicial. The inspectors simply investigate and report.¹⁸⁵ The inspectors have been held by the Court of Appeal to be "masters of their own procedure" ¹⁸⁶ subject only to a duty to act fairly and to give everyone whom they intend to criticise in their report an opportunity to answer what is alleged against them. Such a person has no right however to cross-examine witnesses or see transcripts.¹⁸⁷ The OFT are hence presumably under a legal duty to act fairly entailing giving those with a proper interest a right to make their views known.¹⁸⁸ In this respect the OFT do take steps to guarantee these minimum standards of fairness.

A similar conclusion may be arrived in respect of the informal procedure followed by the OFT in investigating registered agreements for an assessment of whether restrictions contained in the agreement are of an insignificant enough nature to warrant an application to the Secretary of State under Section 21(2) RTPA 1976. Again, the OFT take pains to ensure that all parties to such informal inquiries are treated fairly.

III. Decisions to Investigate Anti-Competitive Practices by the Director General

The decision to undertake a formal investigation into the possible existence of an anti-competitive practice by the OFT is a discretionary decision under Section 3(1) Competition Act 1980. This for all practical purposes renders the decision to investigate free from review by the Courts. The Act provides no criteria whatsoever for regulating when and in which circumstances an investigation may occur. Similarly, a complainant who wishes to force the OFT to commence an investigation will probably have no joy since the Act lays down no criteria against which a refusal to investigate may be measured.

IV. The Conduct of Formal Investigations

Following the decision of the House of Lords in Hoffman-la-Roche v. Secretary of State for Trade and Industry¹⁸⁹ it is clear that the conduct of investigations by the MMC are subject to the rules and requirements of natural justice. Moreover, that infringement of these requirements renders the report of the MMC or any operative part thereof voidable at the discretion of the Court. In addition, until such time as an MMC Report is avoided by a Court the Secretary of State may proceed to enforce its findings in normal fashion. Where an MMC report is struck down by a Court then any order issued by the Secretary of State is susceptible to the same fate.¹⁹⁰

The Fair Trading Act 1973 sets out procedural rules and standards and, provided these are complied with, few opportunities for challenge will arise. Nonetheless, simply because they are complied with does not necessarily imply absolute compatibility with the rules of natural justice.¹⁹¹

The OFT, in the conduct of investigations into anti-competitive practices will also be subject to the rules of natural justice albeit that the Act is silent on all rules of procedure for this investigation. In practice the OFT follows exacting rules to ensure fairness. They are acutely aware that in many instances they stand in between a complainant and a complained off and are expected to act as advocate, jury and judge. Accordingly all sides to a case are given ample opportunity to present their case. The report of the Director General following an investigation is subject to judicial review in the same way as is the report of the MMC.¹⁹² If a Court were to strike down the conclusions of the OFT in a report signed by the Director General this, it is submitted, would have no bearing upon a

subsequent hearing and decision of the MMC. The OFT investigation simply decides whether the practice is anti-competitive it does not consider the public interest; the MMC operate by way of complete re-investigation of whether the conduct is anti-competitive and do assess the public interest. There is accordingly no necessary point of correlation between the two procedures.

V. Decisions of the Secretary of State

The Secretary of State decides upon the action to be taken following an MMC report. He is not bound to follow the conclusions of the MMC though he must actively take their recommendations into account.¹⁹³ In respect of decisions made under Section 21(2) RTPA 1976 the Secretary enjoys a discretion whether or not to grant an application made by the OFT seeking dispensation from the RPC for a registered agreement. This discretion is exercisable when it appears to the Secretary of State that restrictions in an agreement are not significant. Even where the Secretary finds that restrictions are insignificant Section 21(2) still gives him a discretion to refuse dispensation. Accordingly, unless it can be proven that the decision of the Secretary of State took into account improper considerations (which may be impossible given that the Act is absolutely silent as to what amounts to an improper consideration) judicial review of the decision appears a forlorn hope.

FOOTNOTES

1. Section 1(2)(c) and (3) RTPA 1976. This jurisdiction is subject to paragraphs 6(2) and 9(2) of Schedule 3 RTPA 1976 relating to agreements for supplying goods and services with overseas operation, see Cunningham, The Fair Trading Act 1973, Chapter 16, for a detailed analysis of the statutory language.
2. Section 2(1) RTPA 1976. The consequences of an agreement being declared void are discussed in Chapter 4 and reference thereto should be made for details. Many agreements are valueless to the parties once the restrictions have been struck down. A declaration is not a coercive judgment and refusal by a party to comply with its terms does not amount to a contempt of court: Webster v. Southwark LBC [1983] Q.B. 678.
3. Section 2(2) RTPA 1976.
4. Section 2(3) RTPA 1976. The words, "... any person acting on behalf of ..." were introduced into the law by Section 104(1) Fair Trading Act 1973, where a trade association is unincorporated it has no legal personality or existence separate from that of its members. However, since the order can be made against "any person acting on behalf of" the trade association this includes, inter alia, the personnel and officers of the association.
5. Section 2(2)(c) RTPA 1976 was introduced by Section 104(1) Fair Trading Act 1973 to prevent parties to agreements from entering new agreements prior to the Court's order, registering it with the OFT and thereby circumventing the order.
6. Section 2(4) RTPA 1976 Thus, for example: A Court order restrains X, Y and Z from fixing prices. The order may also restrain the trade association of X, Y and Z from requiring from them statistical data which could be used, when exchanged through the agency of the association, to lead to price uniformity between X, Y and Z. However, the Court will not make an order against a foreign trade association which does not carry on any business in the United Kingdom: Japan Canned Food Exporters' Association's Agreement (1971) L.R. 7 R.P. 474 at p. 481.
7. See Sections 8 and 16 RTPA 1976.
8. See, for examples, National Federation of Retail Newsagents Agreement Nos. 3 and 4 [1972] 1 W.L.R. 1162; (1972) L.R. 7 R.P. 425 noted by Korah, (1972) J.B.L. 326 at p. 329; National Federation of Retail Newsagents Agreement No. 5 [1973] I.C.R. 649 at p. 653.
9. Section 2(6) RTPA 1976.
10. See, e.g. National Federation Electrical Association's Agreement (1961) L.R. 2 R.P. 447 at p. 452 per Diplock J.
11. *ibid.* See also, Garage Equipment Association Agreement (1964) L.R. 4 R.P. 491.

12. Black Bolt and Nut Association's Agreements (1961) L.R. 3 R.P. 433 at p. 442; [1962] 1 W.L.R. 75. On the word "like" the Court stated: "How like is like? The word 'like' is imprecise. At one extreme it can be said that the earth is like an orange; at the other that one pea is like the other proverbial pea in the pod. To say that one thing is 'like' another means no more than that the one thing bears to the other a resemblance relevant to the comparison sought to be made" (ibid., at p. 443). See, British Concrete Pipe Association's Agreement [1982] I.C.R. 183 at p. 188E per Mocatta J.: "... 'to the like effect' has a different meaning from 'to the same effect'. 'Like' does not mean 'the same' or 'identical with';" the nearest synonym is 'similar'."
13. [1981] I.C.R. 421 (R.P.C.) noted Korah, (1980) 77 Law Soc. Gaz. 961; and [1983] I.C.R. 215 (C.A.) affirming judgment in R.P.C.
14. See, Galvanised Tank Manufacturers Association Agreement (1965) L.R. 5 R.P. 315 at p. 345.
15. Black Bolt and Nut Association's Agreement No. 2 (1961) L.R. 2 R.P. 433 (R.P.C.); (1961) L.R. 3 R.P. 43; [1962] 1 W.L.R. 75 (C.A.); Associated Transformer Manufacturer's Agreement [1970] 1 W.L.R. 1589; [1970] L.R. 7 R.P. 202.
16. British Concrete Pipe Association [1981] I.C.R. 421 (R.P.C.); aff. [1983] I.C.R. 215 (C.A.); Mileage Conference Group of the Tyre Manufacturers Conference Ltd. Agreement [1966] 1 W.L.R. 1137; (1966) L.R. 6 R.P. 49.
17. British Concrete Pipe Association, supra.
18. Section 3(1) RTPA 1976.
19. Section 3(3)(c) RTPA 1976.
20. Section 3(4) RTPA 1976.
21. Section 3(6) RTPA 1976.
22. Section 2(6) RTPA 1976.
23. Section 25 Competition Act 1980. Where such an appeal is brought the declaration does not become effective until 21 days after the date on which the appeal has been finally determined or withdrawn. See e.g. Association of British Travel Agents No. 2 [1985] I.C.R. 122.
24. Section 26(2) C.A. 1980.
25. Section 26(4) C.A. 1980. The period may be further extended on two subsequent occasions for periods of 3 months each at the discretion of the Court. Under Section 26(5) an extension may be made in respect of some but not all of the restrictions and information provisions. A Section 26 order was made following the hearing of Association of British Travel Agents [1984] I.C.R. 12. Section 26 orders will probably be common in the future.
26. [1974] I.C.R. 445. The earlier case is reported at (1961) L.R. 2 R.P. 241; [1961] 1 W.L.R. 581 (R.P.C.) noted Gould (1961) 24 M.L.R. 632. See DGFT Annual Report (1973-74) pp. 68-70. For an analysis of the cement industry and how the price-fixing agreement currently operates, see, Times, June 16 1983, article entitled, Cement Cartel resists a shake-up. See also Building Employers Confederation's Application [1985] I.C.R. 167; and National Association of Scaffolding Contractors Agreement (1979) (Unreported) No. 644 Register of Restrictive Trade Practices, for a copy of the Court Order.

27. In Mallaig and Northwest Fishermen's Association (No. 2) (unreported) noted DGFT Annual Report (1975) pp. 90, 91 the Court allowed a variation of a previous Court order. In 1970 the Court condemned a restrictive agreement relating to the fishing and landing of herring and the minimum prices thereof ((1970) L.R. 7 R.P. 178). Following accession to the EEC UK fishermen accepted Regulation 2142/70/EEC which provided for the establishment of a common organisation of the market in fishery products involving pricing and trading rules. The regulation envisaged that fishermen would form trade associations for promotion of their industries. Accordingly the Scottish Fisheries Organisation (SFO) and the Aberdeen Fish Producers Organisation (AFPO) came into being and commenced, in accordance with EEC rules, to organise minimum prices and production and marketing rules. The parties considered that these rules were to some extent "to the like effect" as rules prohibited by the 1970 Court order. They accordingly sought a release from the orders. They applied to the Court on the basis that the accession of the UK to the EEC constituted a "material change in circumstances". The OFT accepted this argument and did not oppose the application. The Court released the parties from the previous order to the extent necessary to enable them to comply with EEC rules.
28. For general analysis of the Court, its procedure, and case law, see: Cunningham, The Fair Trading Act 1973 (1974); Korah, Competition Law of Britain and the Common Market, (1982); Merkin & Williams, Competition Law: Antitrust Policy in the United Kingdom and the EEC. (1984); Stevens & Yamey, The Restrictive Practices Court: A study of the Judicial Process and Economic Policy (1965); Swan, O'Brien, Maunders and Howe, Competition in British Industry (1974); Allen, Monopoly and Restrictive Practices (1968); Brock, The Control Restrictive Practices from 1956 (1966); Liesner Committee, Review of Restrictive Trade Practices Policy (1979) Cmnd. 7512 Annex D.
29. See Association of British Travel Agents Ltd. [1984] I.C.R. 12.
30. Though note there is no formal rule of precedent in cases before the R.P.C.; each case turns on its own special facts.
31. The gateway was introduced to implement para. 240(a) of the MMC General Report on Collective Discrimination (1955) Cmnd. 9504.
32. See, Stevens & Yamey, The Restrictive Practices Court (1965) p. 57; Brock, The Control of Restrictive Practices from 1956 (1966) p. 51.
33. (1958) L.R. 1 R.P. 75.
34. *ibid.*, at p. 106.
35. *ibid.*
36. See, Tyre Trade Register Agreement (1963) L.R. 3 R.P. 404; and, Motor Vehicle Distribution Scheme Agreement (1961) L.R. 2 R.P. 173.
37. The provision apparently derives from MMC General Report on Collective Discrimination, *op. cit.*, at para. 240(C).
38. Brock, *op. cit.*, at p. 52; Korah, *op. cit.*, at pp. 162, 163.
39. See Net Books Agreement (No. 1) (1962) L.R. 3 R.P. 246 at p. 309.

40. See Permanent Magnet Association's Agreement - No. 1 (1962) L.R. 3 R.P. 119 at p. 164; and Net Book Agreement (No. 1) (1962) L.R. 3 R.P. 246 at p. 310, respectively.
41. *ibid.* See Association of British Travel Agents [1984] I.C.R. 12 at p. 46D: "If [the restrictions] were to be removed, the compulsive force of this sanction would decline and the benefits of the safeguards would be lost."
42. *ibid.*, at p. 168.
43. *ibid.*
44. (1965) L.R. 5 R.P. 366; [1965] 1 W.L.R. 1419. See also, Birmingham Association of Building Trades Employers' Agreement (1963) L.R. 4 R.P. 54; Mallaig and North West Fishermens Agreement (1970) L.R. 7 R.P. 178.
45. See Blanket Manufacturers Agreement (1959) L.R. 1 R.P. 208 at p. 255 (R.P.C.); (1959) L.R. 1 R.P. 271 (C.A.).
46. See Black Bolt and Nut Association's Agreement (1960) L.R. 2 R.P. 50 (R.P.C. accepted that if two-thirds of the class were benefited this would suffice).
47. See National Sulphuric Acid Association's Agreement (No. 1) (1963) L.R. 4 R.P. 169; British Iron and Steel Federation and National Federation of Scrap Iron etc. (1964) L.R. 4 R.P. 299. In both cases the question was left unanswered.
48. See British Waste Paper Association's Agreement (1963) L.R. 4 R.P. 29.
49. (1959) L.R. 1 R.P. 118 at p. 189.
50. See e.g. Wholesale and Retail Bakers of Scotland Association's Agreement (1959) L.R. 1 R.P. 347 at p. 376; and, Federation of Carpet Manufacturers (1960) L.R. 1 R.P. 472 at p. 541.
51. [1961] 1 W.L.R. 760 at p. 789; (1961) L.R. 2 R.P. 345.
52. See British Bottle Association's Agreement *ibid.*; Re Linoleum Manufacturer's Association [1961] 1 W.L.R. 986; (1961) L.R. 2 R.P. 395.
53. See MMC Report on the Process of Calico Printing (1954) H.C.P. 140.
54. See British Heavy Steelmakers Agreement (1964) L.R. 5 R.P. 33.
55. See e.g. Re Associated Transformer Manufacturers Agreement (No. 1) [1961] 1 W.L.R. 660; (1961) L.R. 2 R.P. 295.
56. See British Bottle Association's Agreement, *ibid.*; and Re Linoleum Manufacturer's Association, *ibid.*
57. See Net Book Agreement (No. 1) [1962] 1 W.L.R. 1347 (1962) L.R. 3 R.P. 246.
58. See Yarn Spinners Agreement [1959] 1 W.L.R. 154; (1959) L.R. 1 R.P. 118; British Bottle Association's Agreement, *ibid.*

59. See Heath, Restrictive Practices and After, *The Manchester School* 29 (1961) pp. 173-202; Swann, O'Brien, Maunders and Howe, *Competition in British Industry* (1974) pp. 172-178: "One of the most noticeable features of many of the industries studied in detail has been the decline in the number of firms producing particular products. Not all of this decline was due to mergers (other factors were at work such as the dropping of lines of production and total cessation of trading) but mergers were undeniably a major factor." (*ibid.*, at p. 172).
60. (1965) L.R. 5 R.P. 146.
61. See National Sulphuric Acid Association No. 2 [1963] 1 W.L.R. 848; (1963) L.R. 4 R.P. 169. The agreement was, following amendments, exempted from Article 85(1) by means of Article 85(3) EEC by the Commission in 1980, [1980] 3 C.M.L.R. 429.
62. See Glazed and Floor Tile Home Trade Association's Agreement (1964) L.R. 4 R.P. 239; Distant Water Vessels Development Scheme [1967] 1 W.L.R. 203; (1966) L.R. 6 R.P. 242; Standard Metal Window Group's Agreement [1962] 1 W.L.R. 1020; (1962) L.R. 3 R.P. 198. For classic statements on the dangers of an overlow prices in common law restraint cases see Commonwealth of Australia v. Adelaide Steamship Co. [1913] A.C. 781 at p. 809 per Lord Parker; and Hare v. L.N.W.Ry. (1861) 2 J. & H. 80 per Page Wood V.C.
63. See Cement Makers Federation Agreement [1961] 1 W.L.R. 581; (1961) L.R. 2 R.P. 241.
64. [1984] I.C.R. 12 at p. 48. See also Building Employers Conferderation's Application [1985] I.C.R. 167.
65. [1960] 1 W.L.R. 884; (1960) L.R. 2 R.P. 50.
66. See Wholesale Confectioners' Alliance Agreement (No. 1) (1960) L.R. 2 R.P. 135; Glazed and Floor Tile Home Trade Association's Agreement (1964) L.R. 4 R.P. 239.
67. See Net Book Agreement (No. 1) [1962] 1 W.L.R. 1347; (1962) L.R. 3 R.P. 246.
68. [1984] I.C.R. 12 at p. 23.
69. *ibid.*, at p. 24.
70. This gateway derives from the MMC General Report on Collective Discrimination, *op. cit.*, at para. 240(d) which states: "Where the arrangement is a necessary means of enabling smaller concerns to compete effectively with a very large concern in that trade which is itself resorting to restrictive practices." Such cartels are known on the continent as "syndicates de défense industrielle" or "schutzkartelle". For an American example, see, Lorrain Journal v. U.S. (1951) 342 U.S. 143.
71. See National Sulphuric Acid Association's Agreement [1963] 1 W.L.R. 848; (1963) L.R. 4 R.P. 169 though it was not discussed by the Court who permitted the agreement to subsist on the basis of gateways (d) and (g) instance and later, gateways (b) and (g).

72. See, Wilberforce, Campbell & Elles, Restrictive Trade Practices and Monopolies (1956) pp. 395, 396.
73. MMC Report, Supply of Man Made Cellulosic Fibres, H.C. No. 120 (April, 1968). It was argued in National Sulphuric Acid (ibid.) that the gateway operated only against a monopolist operating at a different level of trade though there is no reason why this should necessarily be so. In the UK a monopolist need only control 25% of the market.
74. The reverse situation arose in MMC Report, Supply of Infant Milk Foods, H.C. No. 319 (February, 1967). Cow & Gate had, for more than forty years, sold baby milk through qualified retail chemists only. They sold through grocers only where suitable chemists were unavailable. Presumably retail grocers could have employed gateway- (c) to counter this behaviour.
75. This was the case in National Sulphuric Acid where the monopolist was the American giant SULEXCO. That case however was finally decided under other gateways.
76. The theory of "countervailing power" is well established. Its leading exponent is J.K. Galbraith, American Capitalism, (1970).
77. ibid., at p. 125. See also MMC Report, Supply of Metal Containers H.C. No. 6 (July, 1970) at p. 312: "... the bargaining power of customers is an important factor; and this, in turn, depends on, amongst other things, the customer's ability to make his own cans and competition from other independent can makers. Metal Box itself agrees that it makes great efforts to persuade customers not to make their own cans" In MMC Report, Supply and Exports of Cigarette Filter Rods H.C. No. 35 (July 1969) The dominance in the market of the producer of cigarette filter rods (83% of total UK production) could not be abused because the customers, the cigarette companies, were powerful enough to manufacture the rods themselves should the supplier prove unsatisfactory. See also, MMC Report, Supply of Flat Glass H.C. No. 83 (February 1968). According to the MMC Report, Supply of Chemical Fertilisers H.C. 128 (1959-1960) p. 19 a departmental committee of the Ministry of Munitions set up in 1917 recommended the formation of a comprehensive association of acid producers to cooperate in solving post-war supply difficulties. The National Sulphuric Acid Association was accordingly formed in 1919.
78. [1965] 1 W.L.R. 121; (1964) L.R. 5 R.P. 146.
79. See, Associated Transformer Manufacturers' Agreement [1970] 1 W.L.R. 1589; (1970) L.R. 7 R.P. 202; National Sulphuric Acid Association's Agreement [1963] 1 W.L.R. 848; (1963) L.R. 4 R.P. 169.
80. Daily Mirror Newspapers Ltd. v. Gardner [1968] 2 W.L.R. 1239 (C.A.).
81. See Water-Tube Boilermakers' Agreement [1959] 1 W.L.R. 1118; (1959) L.R. 1 R.P. 285.

82. (1963) L.R. 4 R.P. 169 at p. 227. See also, Water-Tube Boilermakers' Agreement [1959] L.R. 1 R.P. 285 at p. 339; National Federation of Retail Newsagents (No. 3) (1969) L.R. 7 R.P. 27 at p. 74. Market shares that have been held to connote preponderance have been: 100% in Water-Tube Boilermakers *ibid.*; 75% in Associated Transformers *ibid.*; 49% in National Sulphuric Acid *ibid.* However, 38% was inadequate in Locked Rope Coilmakers *ibid.*; and 41% in National Federation of Retail Newsagents (No. 3) *ibid.*, was inadequate. On these figures the definition of monopoly in Section 6 of the Fair Trading Act 1973 which is 25% of the market apparently does not equate to "preponderance" in gateway (d).
83. See Water-Tube Boilermakers Agreement [1959] 1 W.L.R. 1118; (1959) L.R. 1 R.P. 285 at pp. 340, 341.
84. *ibid.*
85. See e.g. Associated Transformer Manufacturers' Agreement (No. 1) [1961] 1 W.L.R. 660; (1961) L.R. 2 R.P. 295 at p. 342. For commentary see Cunningham, *op. cit.*, at pp. 333, 334.
86. See Water-Tube Boilermakers Agreement [1959] 1 W.L.R. 1118; (1959) L.R. 1 R.P. 285.
87. See Associated Transformer Manufacturers' Agreement (No. 1) (1961) 1 W.L.R. 660; (1961) L.R. 2 R.P. 295.
88. [1963] 1 W.L.R. 848; (1963) L.R. 4 R.P. 169 at p. 228. This test was applied in Locked Coil Ropemakers' Association's Agreement [1965] 1 W.L.R. 121; (1964) L.R. 5 R.P. 146.
89. See, Stevens and Yamey, *The Restrictive Practices Court: A Study of the Judicial Process and Economic Policy* (1965) p. 58.
90. See Yarn Spinners Agreement [1959] 1 W.L.R. 154; [1959] L.R. 1 R.P. 118.
91. (1964) L.R. 4 R.P. 399.
92. Cmd. 7512 Annex D7 at p. 111.
93. Section 25 RTPA 1976 and Schedule 3 paras. 6 and 9 (agreements as to goods or services with overseas operation).
94. Water-Tube Boilermakers' Agreement [1959] 1 W.L.R. 1118; (1959) L.R. 1 R.P. 285 criticised by Cunningham, *op. cit.*, at p. 346, and see comments by Korah, *op. cit.*, at p. 173.
95. Associated Transformer Manufacturers' Agreement (1961) L.R. 2 R.P. 295; [1961] 1 W.L.R. 660..
96. See, Water-Tube Boilermakers' Agreement (1959) L.R. 1 R.P. 285, [1959] 1 W.L.R. 118. In this case the Court felt unable to accurately quantify the extent of the loss in earnings. It did agree that abrogation of the restriction would lead to a sharp cut in prices. Furthermore, since the size of individual boilers was increasing a loss of a single export contract could amount to a substantial reduction in earnings from exports for the industry.

97. Permanent Magnet Association's Agreement (1961) L.R. 2 R.P. 395; [1962] 1 W.L.R. 781.
98. See Federation of British Carpet Manufacturers Agreement [1960] 1 W.L.R. 356; (1959) L.R. 1 R.P. 472.
99. See, Associated Transformer Manufacturers' Agreement [1961] 1 W.L.R. 660; (1961) L.R. 2 R.P. 295; Locked Coil Ropemakers Association Agreement [1965] 1 W.L.R. 121; (1964) L.R. 5 R.P. 146; See also, Linoleum Manufacturers Association's Agreement [1961] 1 W.L.R. 986; (1961) L.R. 2 R.P. 395; Permanent Magnet Association's Agreement [1962] 1 W.L.R. 781; (1961) L.R. 2 R.P. 395; Net Books Agreement [1962] 1 W.L.R. 1347; (1962) L.R. 3 R.P. 246.
100. [1961] 1 W.L.R. 581; (1961) L.R. 2 R.P. 241. See also for examples of successful passage through gateway (g): Black Bolt and Nut Association's Agreement No. 1 [1960] 1 W.L.R. 884; (1960) L.R. 2 R.P. 50; National Sulphuric Acid Association's Agreement [1963] 1 W.L.R. 848; (1963) L.R. 4 R.P. 169; Permanent Magnet Association's Agreement [1962] 1 W.L.R. 781; (1962) L.R. 3 R.P. 119; British Iron and Steel Federation's Agreement (1964) L.R. 4 R.P. 299.
101. Liesner Committee, op. cit., at Annex D at p. 112.
102. (1972) L.R. 7 R.P. 401. See also Building Employers Confederation's Application [1985] I.C.R. 167 at pp. 171, 172.
103. Liesner Committee, op. cit., at p. 112.
104. Section 10(2) RTPA 1976.
105. Section 19(2) RTPA 1976.
106. See Association of British Travel Agents [1984] I.C.R. 12 at p. 46F.
107. See Black Bolt and Nut Association's Agreement [1960] 1 W.L.R. 884; (1960) L.R. 2 R.P. 50.
108. The same qualification to the concept of "the public" appears in the Resale Prices Act 1976.
109. (1964) L.R. 4 R.P. 299 noted Yamey (1963) 26 M.L.R. 185.
110. Cunningham, The Fair Trading Act 1973, (1974) appears to think otherwise, at pp. 354, 355. Korah, Competition Law of Britain and the Common Market (1982), in a more considered discussion, suggests that the opposite view holds true, at pp. 178, 179. As stated in the text the current author likewise prefers this view. Another case which supports the view that the interests of suppliers are relevant is Yarn Spinners Agreement [1959] 1 W.L.R. 154; (1959) L.R. 1 R.P. 118 where the Court took into account the waste of national resources entailed by the preservation of excess capacity. This factor obviously falls outside of the bracketed, sectorial interests and assumes that such factors are relevant to "the public". Korah, op. cit., at p. 178 states, in a general fashion: "On the other hand it is very doubtful whether the Court should attempt to consider what the effect of increasing prices in one industry will be on the economy as a whole, as the Court attempted to do in Yarn Spinners (1959). The waste of resources in that industry was the relatively small

110. continued

number of strong young men who might have migrated to other regions to take jobs, the old men and married women (most of whom would have left the labour market), and the mills themselves - which did not seem at that time to have any other use, though they have since been used to breed broiler chickens. The value of these 'wasted resources' to the economy in their 'next best use' does not seem very great." Doubts as to the appropriateness of the Court as an assessor of micro and macro economic policy were expressed by Lord Kilmuir, the Lord Chancellor, during the second reading of the RTPA Bill in 1956: "A difficulty is felt that under the Bill the Government are placing on the Court a task which will take judges outside the ordinary field of judicial activity and involve them in applying economic and value judgments in which they are not trained. I am most anxious to make it clear that I have given careful consideration to this point and I have come to the conclusion that the questions at issue are not inappropriate for judicial determination within the framework laid down in the Bill." (H.L. Deb. June 26, 1956 Col. 18). Finally it is pertinent to note that one case does imply the narrow construction of "the public": Water-Tube Boilermakers' Agreement (1959) L.R. 1 R.P. 285. The recent decision in A.B.T.A. [1984] I.C.R. 12 at p. 46E is equivocal on this point.

111. Section 28 Competition Act 1980 also adds "vendors" to S.19(1)(b) RTPA 1976 (services) where "the public" is equated to users, vendors, purchasers, consumers or users of any goods or other property.
112. See Blanket Manufacturers' Agreement [1959] 1 W.L.R. 442; (1959) L.R. 1 R.P. 208; Glazed and Floor Tile Home Trade Association's Agreement (1964) L.R. 4 R.P. 239.
113. See Permanent Magnet Association's Agreement [1962] 1 W.L.R. 781; (1962) L.R. 3 R.P. 119.
114. See Standard Metal Window Group's Agreement [1962] 1 W.L.R. 1020; (1962) L.R. 3 R.P. 198.
115. See Scottish Daily Newspaper Society's Agreement No. 1 (1971) L.R. 7 R.P. 379.
116. See Association of British Travel Agents [1984] I.C.R. 12 at p. 47.
117. *ibid.*
118. *ibid.*, at p. 47G.
119. [1961] 1 W.L.R. 760; (1961) L.R. 2 R.P. 345. The Court, at the end of its judgment, chose to examine a clause in a standard form contract which sought to exempt absolutely liability for third party claims. The Court examined the circumstances of this clause and commented - "We would only say this: we should have had no hesitation whatever in declaring this restriction to be against the public interest, even if all the other restrictions had been in the public interest." Whilst there is a degree of ambivalence about this statement it appears to imply that had one clause in the SFC been struck down then all other clauses and restrictions held in the public interest would likewise have fallen. ([1961] 1 W.L.R. 760 at p. 792).

120. [1985] I.C.R. 167 at pp. 172, 173. See also National Association of Scaffolding Contractors (1979) (unreported) No. 644 Register of Restrictive Trade Practices where a similar order was made.
121. e.g. Action brought by OFT against Atlantic Steam Navigation (Townsend Thoresen) and Sealink in connection with prices quoted and charged for passenger carriage during 1982 on two Scotland to Northern Ireland lines. The agreement was discovered by the OFT following complaints about parallel prices. (British Business, 21 January 1984 p. 81). See also Report of Registrar of Restrictive Trading Agreements 1969 (Cmd. 4303, 1970) p. 2. See DGFT Annual Report 1979 at pp. 46 and 104-106, where it is noted that during 1979, Section 35(3) orders were made against parties forbidding them from giving effect to 172 agreements concerning the supply of ready made concrete or road surfacing materials.
122. See Agreements Relating to the Supply of Bread [1977] I.C.R. 946 at p. 950g: "... it really is not any answer to say that the restrictions contained in a particular agreement are not very onerous, or to say that the duration of the agreement is not a very long one, or to say that there is only one agreement; because the failure complained of is the failure to register; and that, as it seems to us, is the salient point of this application."
123. See, Mileage Conference Group of the Tyre Manufacturers' Conference's Agreement [1966] 1 W.L.R. 1137; (1966) L.R. 6 R.P. 49; and, Milburn v. Newton Colliery Ltd. (1908) 5.2 S.J. 317; Northern Counties Securities Ltd. v. Jackson and Steeple [1974] 1 W.L.R. 1133 at p. 1143.
124. See, Aluminium Manufacturers' Agreement (1968) L.R. 6 R.P. 510.
125. Agreements Relating to the Supply of Bread [1977] I.C.R. 946 at p. 951F.
126. Flushing Cistern Maker's Agreement [1973] I.C.R. 654 at p. 661. See also, Aluminium Manufacturers Agreement (1968) L.R. 6 R.P. 510; Electrical Installations at the Exeter Hospital Agreement (1970) L.R. 7 R.P. 102.
127. *ibid.*, at p. 661E: "Something is seriously wrong if Mr. Powell and other Chairmen of Shires Ltd. can permit the company to operate a restrictive price ring of the kind disclosed by the documents over a period of a dozen years after the Act of 1956 came into operation." And later (at p. 661F): "This constitutes a grave and persistent dereliction of the duty of responsible company officers so to direct and manage the company's affairs as to comply with the restrictive practices legislation" - per Cumming-Bruce J.
128. [1984] I.C.R. 429 (R.P.C.).
129. See, Korah, Contempt of the Restrictive Practices Court (1980) Law Soc. Gaz. 961; Cunningham, op. cit., at pp. 362-373.
130. (1965) L.R. 5 R.P. 315 at p. 345.
131. [1982] I.C.R. 182.
132. *ibid.*, at pp. 194, 195. See OFT Press Release (Feb. 21 1985) Somerville Nails Ltd. fined £100,000 for contempt. The Company breached an undertaking given to the RPC and sought to fix prices and discounts.
133. [1984] I.C.R. 429.

134. For use of the phrase "beyond reasonable doubt" see, Re Bramblevale Ltd. [1970] Ch. 128.
135. [1984] I.C.R. 429 at p. 444.
136. *ibid.*, at pp. 444, 445.
137. *ibid.*, at p. 444 per Warner J. recounting the argument of counsel.
138. See generally, Miller, Contempt of Court (1976)
139. [1984] I.C.R. 429.
140. See generally R.S.C. Ord. 45 r.5. Costs may be awarded on a common fund basis: A.G. v. Walthamstow U.D.C. (1895) 11 T.L.R. 533; Stancomb v. Trowbridge [1910] 2 Ch. 190. This may be sufficient punishment for minor breaches of an order: G.C.T. Management v. Laurie Marsh Group Ltd. [1973] R.P.C. 432.
141. See e.g. Danchevsky v. Danchevsky [1975] Fam. 17 (C.A.) which involved matrimonial proceedings. The Court of Appeal held that imprisonment of the contemnor was inappropriate since there was available a reasonable alternative means of securing obedience to the Court order.
142. Newspaper Proprietors Association and National Federation of Retail Newsagents (1961) L.R. 2 R.P. 453 at p. 499; Garage Equipment Association's Agreement (1964) L.R. 4 R.P. 491 at p. 505.
143. Newspaper Proprietors Association and National Federation of Retail Newsagents (1961) L.R. 2 R.P. 453 at pp. 499, 500; Mileage Conference Group of the Tyre Manufacturers Conference Agreement (1966) L.R. 6 R.P. 49 at p. 114.
144. See, Mileage Conference Group of the Tyre Manufacturers Conference Agreement (1966) L.R. 6 R.P. 49 at p. 106 and at p. 114.
145. British Concrete Pipe Association [1982] I.C.R. 183 at pp. 195, 196. Though generally it is no answer to say that the act was not contumacious in the sense that there was no direct intention to disobey, only those acts which are casual or accidental or unintentional will be excluded from constituting a breach. See Heatons Transport v. T.G.W.U. [1973] A.C. 15 approving per Warrington J. in Stancomb v. Trowbridge (*supra*). See further, British Concrete Pipe Association (the B.S.C. Case) [1983] I.C.R. 215 at pp. 219, 220.
146. But see, Garage Equipment Association's Agreement (1964) L.R. 4 R.P. 491 at p. 504.
147. British Concrete Pipe Association [1981] I.C.R. 183 at p. 195.
148. *ibid.*, at p. 197.
149. *ibid.*, at p. 194.
150. *ibid.*, at pp. 197, 198.
151. *ibid.*, at p. 194.

152. See R.S.C. Ord. 45 r.5(1) which provides that writs of sequestration made in respect of contempt procedures against companies may be made against "any director or other officer". Those in charge at the time of the order thus stand in grave risk. The situation is unclear in so far as those directors or managers are concerned once they have ceased to be directors or managers of that company. The same query applies to their replacements though in their case when they become aware of the Court order and fail to take steps to ensure compliance with it there seems to be a strong case to suggest that they are at risk. See, Miller, op. cit., at pp. 247-253; Korah, op. cit., at p. 961.
153. Third parties may be liable for aiding and abetting another to breach an order. In British Concrete Pipe Agreement [1982] I.C.R. 182 at pp. 198, 199, Mocatta J. stated: "There is no doubt that if the appropriate evidence is available against a person as to his aiding and abetting a party who has given an undertaking to this Court to act in breach of that undertaking, the Court has jurisdiction to require contempt proceedings to be taken against such persons." For cases on point see Elliot v. Klinger [1967] 1 W.L.R. 1165; Seaward v. Paterson [1897] 1 Ch. 545. To be liable a third party would have to actively be a part of any breach and be aware of the Court order and its substance. It would presumably not be necessary for the third party to know of its precise terms.
154. See, Flushing Cistern Makers Ltd's Agreement [1973] I.C.R. 654 at p. 659.
155. [1981] I.C.R. 421 (R.P.C.); [1983] I.C.R. 215 (C.A.).
156. [1983] I.C.R. 215 at p. 220. Interesting problems arose in that case because of the fact that the transfer of control was by statute. The Court of Appeal left it as an open question whether it would be contempt of court by the acquiring company where the acquired company was in breach of its undertaking on the day the statutory transfer took place: "... you might have had an automatic contempt of court by operation of law." (ibid., at p. 220C per Sir John Donaldson M.R.).
157. See e.g. Royal Institution of Chartered Surveyors v. Director General of Fair Trading (1981) unreported noted [1981] Com. L.R. 112.
158. Ravenseft Properties v. Director General of Fair Trading [1977] 1 All E.R. 47.
159. ibid., at p. 49.
160. [1982] I.C.R. 501 (Q.B.D.) noted, Whish, (1983) B.L. Rev. 102.
161. On Tomlin orders, See, Supreme Court Practice (1982) Vol. 2 paras. 2014 and 2014A.
162. [1982] I.C.R. 501 at p. 518.
163. [1983] I.C.R. 586.
164. ibid., at pp. 593, 594. See, for other cases, on the defence of non-registration Vernon v. Universal Pulp Containers [1980] F.S.R. 179; Fisher v. Director General of Fair Trading [1982] I.C.R. 71; Unit Marketing v. Christenson (1984) unreported non-competition arrangement concluded as part of a sale of customer lists void and unenforceable for a non-registration. However void clauses did not affect debt created by remainder of the sale agreement.

165. See e.g. Joseph Evans v. Heathcote [1918] 1 K.B. 418 (price fixing and profit pooling agreement held to be in restraint of trade and thus void and unenforceable.); and, for a more recent (unsuccessful) example Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Limited [1985] 1 W.L.R. 173 (C.A.) (garage owners sought to escape exclusive purchasing tie in a solus agreement entered with Total Oil who had given substantial financial aid and assistance to garage owners. Court of Appeal held tie to be valid and reasonable and not in restraint of trade).
166. Section 35(7) RTPA 1976.
167. Collusive Tendering: A Consultative Document, Department of Trade (30 July 1980) para. 11.
168. MMC Report on the Supply of Insulated Electric Wires and Cables Cmnd. 209 (1952) especially at pp. 43, 44 paras. 150, 151.
169. Reference made in July 1974, Report not made until 1979; MMC Report into Supply of Electric Wires and Cables, H.C. 243 (1979), See, Times (7 March 1975) Monopolies Panel Study; Times (15 March 1975), Cable Suppliers register agreements. Accountancy Age (14 March 1975); Financial Times (27 March 1975) Cartels: What Britain approves Europe may reject.
170. See No. 3850 Register of Restrictive Trade Practices, Agreement between BICC Ltd., Pirelli General Cable Works Ltd., Standard Telephone and Cables Ltd., and Telephone Cables Ltd. Another agreement existed between these parties (No. 3852 Register of Restrictive Trade Practices) relating to the supply and installation of cable to users other than the Post Office. The aim of this agreement was to fix selling prices at above the level of sales to the Post Office and to operate a preferred tenderer scheme. In practice this agreement had little effect on the parties behaviour.
171. See No. 3851 Register of Restrictive Trade Practices, Agreement between AEI Cables, Pirelli General Cables Works, Standard Telephone and Cables, and, Telephone Cables Ltd. See also DGFT Report (1975) at p. 91 for details of the case. The case was heard under Section 7(1)(3)(a) and (b) RTPA 1968 which equate to Section 35(1), (2) and (3) RTPA 1976. See Financial Times (21 November 1975) Cable Agreement too restrictive, says P.O.; Guardian (22 November 1975) Post Office calls for Cable Profits; Times (21 November 1975) Court ban on Cable Makers price rings.
172. See Post Office Press Releases: (January 7 1976), Cable Contracts; (June 12 1978) Cable companies agree to pay back £9m.
173. See, Winfield & Jolowicz on Tort (1984) Ch. 7; Halsbury's Laws of England (3rd ed.,) Vol. 36 pp. 49 et seq.; Clerk & Lindsell on Torts (15th ed.,) paras. 13-01 et seq.
174. See Elbinger Actien Gesellschaft v. Armstrong (1874) L.R. 9 Q.B. 473 at p. 476: "It is, no doubt, quite settled that, on a contract to supply goods of a particular sort which at the time of the breach can be obtained in the market, the measure of the damages is the difference between the contract price and the market price at the time of the breach. Where from the nature of the article, there is no market in which it can be obtained, this rule is not applicable; but it would be very unjust if, in such cases, the damages would be nominal". See also, Bridge v. Wain 1 Stark 504; Borries v. Hutchinson 18 C.B. (N.S.) 445 at p. 465. See further Vol. II Chitty on Contracts (1983) pp. 1154-1156 para. 4338; See also, Section 51 Sale of Goods Act 1979; McGregor on Damages (1980) pp. 440-449 paras. 613-628 and on the concept of 'market value' at pp. 440, 441 paras. 613-615.
175. See, e.g. Cox v. Walker (1835) 6 A. & E. 523n, noted in McGregor, op. cit., at p. 451 para. 633.

176. e.g. Erie County Natural Gas and Fuel Co. Ltd. v. Carroll [1911] A.C. 105 at pp. 117, 118 (P.C.); Charter v. Sullivan [1957] 2 Q.B. 117.
177. Chitty, op. cit., at p. 1146 para. 4329. In the USA plaintiffs generally seek guidance from prices in the nearest substitute or comparable market. See e.g. Ohio Valley Electric v. General Electric (1965) Trade Cas. (CCH) para. 71,458. See also Timberlake, Federal Treble Damage Anti-trust Acts (1965); Parker, Measuring Damages in Federal Treble Damage Actions, (1972) The Antitrust Bulletin 17 pp. 497-517; Kuhlman and Johnson, Estimating damages on highway construction contracts (1984) The Antitrust Bulletin 719-738
178. [1954] 2 Q.B. 459 (Q.B.D.).
179. ibid., at pp. 498, 499.
180. Elbinger Actien Gesellschaft v. Armstrong (1874) L.R. 9 Q.B. 473 at p. 476. In Germany an interesting approach to determining damages has occurred. In one case involving over 2,000 building firms engaged in collusive tendering the Federal Cartel Office (FCO) imposed fines in excess of DM 35m. The fines were calculated by reference to extra profits that were presumed to have been made by the firms. Thus the FCO assumed that the excess profits amounted to 2% of the turnover subject to the prohibited agreements (Hermann & Jones, Fair Trading in Europe(1977) pp. 167, 168).
181. It would appear to be the case that shareholders of either the infringing company or of companies connected thereto do not have an action against the controllers of infringing company under Section 75 Companies Act 1980 for a remedy for unfair prejudice: I.C.I., Re Carrington Viyella plc (unreported 3 February 1973) (Ch. d.) judgment printed (1983) 1 BCC 98,951.
182. See Wade, Administrative Law (1982) passim; de Smith, Judicial Review of Administrative Action (1980).
183. See MMC Report into the merger between Charter Consolidated-Anderson Strathclyde, Cmnd. 8771 (1982), and, R. v. Secretary of State for Trade Ex Parte Anderson Strathclyde [1983] 2 All E.R. 233 at p. 237 the Minister possessed a shareholding in the offeror company to a take-over bid. The MMC concluded against the take-over and the Minister, because of his personal interest in the decision, delegated responsibility for it to a junior minister. The junior minister did not follow the MMC's conclusions and permitted the take-over to proceed. For an analysis of the controversy over this case see Green, Crisis in the Monopolies and Mergers Commission: Anderson Strathclyde and other Recent Developments (1983) B.L. Rev. 303.
184. See, Gower, Principles of Modern Company Law (1979) pp. 672-681.
185. Re Pergamon Press Ltd. [1970] 3 W.L.R. 792 at p. 797 per Lord Denning M.R. decision approved in Paul Wallis Furnell v. Whangarei High Schools Board [1973] 2 W.L.R. 93 (P.C.).
186. ibid., at p. 798.
187. ibid.
188. ibid. See also, Maxwell v. Department of Trade and Industry [1974] Q.B. 523 (C.A.); Norwest Holst v. Secretary of State for Trade [1978] Ch. 201 (C.A.).
189. [1974] 2 All E.R. 1128.

190. *ibid.*, at p. 1153 per Lord Cross, and at p. 1159 per Lord Diplock.
191. This is apparently the opinion of the Director General himself: "It has been suggested during the debates that I ... might act unreasonably in conducting an investigation, might dream up something in my bath that there was no ground for - and the company goes for investigation. Well, if I act in a grossly unreasonable way it can be challenged in the Courts. And my office would lose its credibility if it kept coming up with reports which showed that the investigation was not worthwhile or, alternatively, I was repeatedly slapped down by the Monopolies Commission." (Sunday Times, April 6 1980, 'Facing up to Fair Trade').
192. See generally Calvin v. Carr [1980] A.C. 574.
193. R. v. Secretary of State for Trade Ex Parte Anderson Strathclyde [1983] 2 All E.R. 233 at p. 242.

CHAPTER 6

AGREEMENTS AND TRADE ASSOCIATION PRACTICES
CAUGHT BY EUROPEAN COMPETITION LAW

A. INTRODUCTION

In this chapter commercial agreements and trade association practices which fall within the EEC competition rules are discussed. The Chapter follows the pattern given below:

- Section B: Forms of joint conduct caught by Article 85 EEC. A detailed discussion of the wording of Article 85 is given.
- Section C: Proving an effect on trade between the Member States. This section discusses an essential requirement that must be proven before Article 85 applies.
- Section D: The object or effect of an agreement. This section examines the Commission's approach to the questions of the motive of parties and the economic effect of agreements.
- Section E: "Preventing, restricting or distorting competition". This section looks at the meaning of these key words in Article 85 which elaborate upon the notions of object or effect.
- Section F: Article 85(2): agreements automatically void. Agreements caught by Article 85(1) are void without more ado under Article 85(2). The consequences of this provision are examined.
- Section G: Agreements exempted under Article 85(3). This section notes the existence of the exemption provision. Detailed analysis of Article 85(3) is left until Chapter 7.
- Section H: Article 86 EEC: abuse of a dominant position. This section examines Article 86 EEC and shows how it may be used to regulate restrictive behaviour by dominant firms.
- Section I: Overlap between EEC and UK law. Analysis of interrelationship between EEC and UK jurisdictions.
- Section J: Notification to the European Commission. This section weighs the advantages of notifying the existence and details of an agreement to the Commission. Certain exemptions from the need to notify are discussed.

Section K: Form A/B, the method of notification. The Commission issue a form which it is obligatory for use in notifying agreements.

Section L: Form C, complaints by third parties. Discussion of how to make a complaint about another's behaviour to the Commission.

B. FORMS OF JOINT CONDUCT CAUGHT BY ARTICLE 85 EEC

The crucial point to understand when considering whether an agreement falls within EEC law is that Article 85(1) is drafted so as to catch all forms of inter-firm arrangement, however informal. It also includes all forms of trade association recommendation. It is thus impossible to draft an agreement so as to exclude Article 85(1) EEC. The following categories of inter-firm arrangement fall within Article 85 EEC. The enumeration below is non-exhaustive. The meaning of certain other key words in Article 85 EEC is also given.

I. "Agreements between undertakings"

The concept of an "agreement" is extraordinarily wide. An agreement can be between any number of parties above one. Not all of the parties need accept restrictions it being sufficient if only one party accepts restrictions (unlike UK law). The agreement need not be formal, it can be simply an informal understanding between firms.¹ Likewise "gentlemen's agreements", "breakfast agreements" and "honour only agreements" are equally caught within Article 85 EEC.² If X declares to Y that he will unilaterally refrain from selling in Y's primary marketing area or will refrain from undercutting Y then this is an "agreement" albeit that Y is passive and gives nothing to X in return for these promises.³ Agreements between trade associations are agreements caught by Article 85.⁴ Likewise, private understandings, perhaps developed informally at association meetings, are "agreements" for Article 85 purposes.⁵ A series of connected agreements may be treated as a single agreement if the connecting feature suggests an overall or master design.⁶ The constitutional documents of an association may amount to an agreement.⁷

The name given to an agreement is immaterial. Indeed, attempts to

describe sets of trading rules formally as "Fair Trading Rules" ~~may be~~ viewed as suspicious by the Commission.⁸

It matters not whether an agreement is between parties at the same or at different levels of distribution. Thus, price fixing agreements between rival manufacturers are caught so are exclusive distribution systems involving agreements between suppliers and dealers.⁹ Nor does it matter that an agreement is no longer in existence and has been abandoned; that it might be revived is justification enough for Commission intervention.¹⁰ The fact that an existing agreement upon which breach of Article 85 is founded was entered prior to the coming into force of the Treaty of Rome is immaterial.¹¹

A conveyance of property or other transfer constitutes an agreement. In Sirena the assignment of a trade mark was held to constitute an agreement.¹² The same rule applies in the United Kingdom.¹³

Agreements between members of the same group of companies are prima facie not agreements under Article 85(1) EEC. Thus an agreement between a parent and subsidiary is not within Article 85 EEC. Nor is an agreement between subsidiaries of the same parent company within Article 85 EEC. This important proviso to Article 85 is discussed fully below.

II. Meaning of Undertaking

Article 85 catches "agreements between undertakings" (see above). It further catches decisions by associations of undertakings. What is an "undertaking"? The notion of "undertaking" is very wide and includes almost all types of economic enterprise, firm or company, etc.¹⁴ Article 85 assumes an undertaking to be capable of concluding agreements. An undertaking can attack decisions of the Commission under Article 173 EEC (judicial review of binding decisions). Constituents of an undertaking (plants, branch offices, works divisions etc.) are not undertakings in their own right. Public or nationalised companies are undertakings in the same way as are private undertakings.¹⁵ Thus a state monopoly or association is an undertaking;¹⁶ a local authority may also be an undertaking.¹⁶ Though, where private companies are as a matter of fact instruments of governmental policy rather than independent commercial operators they may fall to be regulated by the Commission under Articles 30 or 34 EEC prohibiting quota restrictions or other non-tariff barriers to imports or exports respectively (see below for details). The essential point is that the legal form of an undertaking is irrelevant.¹⁷ Thus it makes no

difference that the undertaking is incorporated or unincorporated, nor does it matter that the undertaking is non-profit making.¹⁸ Indeed even natural persons can be undertakings. Thus in RAI/UNITEL¹⁹ an artiste was held to be an undertaking. Article 85 EEC applies for example to sports and theatrical agents and their clients. If a number of leading boxing promoters join forces across Europe to fix the prices at which they would provide promotion services to boxers and their managers then this would fall within Article 85 EEC.²⁰

An enterprise will be active in business and commerce. This means that the undertaking will be involved in the production, manufacture, wholesale, retailing or other exchange of goods or services. Again, the legal form of the commercial activity is not relevant it is the very fact of commercial activity which transforms a person conducting an activity into an undertaking for the purpose of Article 85. In essence the word "undertaking" is a functional one. The precise degree and extent of commercial activity required to bring an activity within Article 85 EEC is a matter for argument and negotiation with the Commission in each case. Thus, a person who holds a single antiques market for charity does not become an undertaking, however, if such were organized on a regular basis the element of continuity might lead the Commission to conclude that the organizers were "undertakings" for Article 85 purposes. That the concept of "undertaking" may be a question of degree is shown by the fact that a shareholder in a company is not per se an undertaking but that he may become one if his degree of involvement extends beyond mere administration of his shareholding into administration of the company.²¹

A foreign, semi-statutory company the staff of which are governmentally appointed and which has as its main task the export of its goods is an undertaking since it is involved in commercial activity.²²

III. Decisions by associations of Undertakings

As with other phrases in Article 85 a wide interpretation is accorded here. An "association of undertakings" usually refers to a trade association but can equally refer to some other organisation which is not labelled an association as such. Thus organizations can be derived from memorandum and articles of association (as with the usual trade association) or from deeds of partnership or charters etc. A "decision" implies some binding effect. However under Article 85(1) EEC the word is construed more widely. Thus, where a trade association issues to members non-binding recommendations

which as a rule are complied with then the Commission treat the recommendations as decisions under Article 85(1) EEC.²³ It would thus be true to say that any exhortation, encouragement, recommendation or other statement whether made orally or in writing may be a decision if it either is accepted by the members or is intended to be accepted by the members. The "recommendation" need not even be direct, it could simply be in the veiled form of a circular to members which states that: "the association staff have undertaken research into costs and have discovered that on average members are paying 2.3% more for ingredients than they were 6 weeks ago." If members responded by raising prices 2.3% the Commission might construe the circular as a decision if it suspected that there ~~was~~ an understanding between members to the effect that they should respond to the implications in the circular. If the Commission consider that the response of members is less formal they ~~may~~ describe it as a concerted practice.

The decision need not necessarily be made by the association. An individual who has authority to act on behalf of the association, for example, its chief executive, may make a decision which is subject to Article 85.

A decision laying down minimum prices taken by a governmental authority is not a decision under Article 85(1); though a decision laying down minimum prices taken by a private association is within the Article. An association decision remains within Article 85 EEC even though a Governmental authority may extend its ambit beyond the trade associations membership to other undertakings.²⁴

IV. Whether a group of companies is a single undertaking

Considerable debate has occurred as to whether a group of companies is to be considered as a single or a multi-partite entity. The Court has laid down the general framework for analysis as follows:

"Article 85 does not apply to agreements or concerted practices between undertakings belonging to the same group in the form of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary does not have real autonomy in determining its line of conduct on the market and if the agreements or practices have the aim of establishing an internal distribution of tasks between the undertakings."²⁵

It is thus clear that the Court and Commission will treat as a single entity a group where the component subsidiaries have no real independence and form an integral part with the parent. The simple fact that the

subsidiaries are in law separate legal persons from the parent is immaterial.²⁶ This contrasts with the UK legal position whereby a parent is considered to be a separate legal entity altogether from its subsidiary.²⁷ The fact that a corporate group may be considered a single entity has two very important consequences.

First, the behaviour of a subsidiary may be attributed to its parent so that the latter incurs liability also under competition rules. In Dyestuffs the European Court stated: "The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company. Such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company In view of the unity of the group thus formed, the actions of the subsidiaries may in certain circumstances be attributed to the parent company."²⁸ Thus a foreign parent company may be subject to EEC law if its subsidiaries or agency's that are dependent on it are found to be in breach of that law.²⁹ However, there is no automatic presumption that a parent is liable for the acts of its subsidiaries.³⁰ It is accepted that a subsidiary may diverge from a pursuance of its parents wishes.³¹

Secondly, Article 85(1) does not apply to relationships between parent and subsidiaries if the relationship is close enough for the undertakings to be treated as a single economic unit. In such a case there can be no "agreement" between the undertakings. For Article 85(1) to be excluded the subsidiary ~~should~~ not enjoy any real autonomy of action. If a parent wholly owns a subsidiary, may appoint the members of its board, may direct its marketing behaviour and ensure compliance with its directions, then it is a single entity with the parent.³² A lesser degree of control over a subsidiary than that mentioned above may still lead to the conclusion that parent and subsidiary are as one. The parent need not own all of the shares of the subsidiary; control over a company may of course be exercised with only 51% of its shareholding.³³ Indeed with some companies de facto control may exist with under 50%. In each case it will be a question of fact.³⁴

The view of the European Court is that Article 85 EEC is excluded because the subsidiary lacks economic independence. The test is hence one of degree of economic dependency. Article 85 EEC is excluded only where the parents influence and control are in fact exerted so that the mere

existence of the potential for control by parent of subsidiary does not exclude Article 85 EEC.³⁵ This rule is perhaps surprising given that many parent companies give their subsidiaries a relatively free rein but nonetheless retain ultimate control. Moreover, a subsidiary may be controlled by myriad means other than directives and instructions. Accordingly, there should be scope for the argument that between a parent and subsidiary there is but limited scope for Article 85 to intervene even where the parent exerts only a limited amount of control. It seems paradoxical to state that the more a parent dominates a subsidiary and eliminates competition between them the less the scope for Article 85 whereas the more a parent protects competition between itself and its subsidiary the greater the scope for intervention by Article 85 EEC.³⁶

How does one determine whether a subsidiary is dependent or not? A number of guidelines may be used:

(i) Permanence

The control of the parent must be permanent if it is only temporary then the subsidiary may be said to retain independence.³⁷ The fortuitous existence of majority control at a general meeting would be temporary control and hence inadequate to exclude Article 85.³⁸

(ii) Profits

If the parent takes the profit of the subsidiary this will point to control.

(iii) Appointment of Board

If the parent can appoint a majority of the subsidiaries board this will indicate control.³⁹

(iv) Investment

If the parent can direct the way the subsidiary invests its money this may indicate control.

(v) Use of Assets

If the parent may use for its own benefit the assets of the subsidiary this indicates control.

(vi) Long term contracts

If company X enters an agreement with Y whereby X will control Y for a duration of, say, 30 years then this might suffice to make Y dependent on X. The Commission require that one undertaking is irreversibly incorporated into another though this irreversibility may derive from a long-term agreement which establishes that the aim of

the agreement is to alter the shape and structure of the undertaking rather than restrict competition.⁴⁰

Finally, it is now clear that in a joint venture between X and Y to set up a jointly owned company - ABC - the fact that X holds 50% of the shares in ABC does not mean that X and ABC are one entity. Thus a parent can enter an agreement subject to Article 85 EEC with a joint venture company it half-owns.⁴¹

V. Concerted Practices

A concerted practice is an extraordinary wide concept; it catches everything that the other criteria in Article 85 EEC exclude.⁴² However it is not without its own limitation. A 'concerted practice' has two elements: (a) concert; and (b), a practice. Both elements must exist before Article 85(1) applies.⁴³

(i) Meaning of 'Concert'

Very loose forms of consensus amount to concerted practices. There is no need to prove a legally binding transaction; even a vague "gentlemen's agreement" or "breakfast agreement" is not a necessity. The Commission look for some consensus or meeting of minds between the parties. If X sees his rival Y in a bar and says to him, "costs are escalating I shall have to raise prices by 3% on the beginning of next month", then, if Y responds by pushing his prices up 3%, a concerted practice will have arisen. The statement of X will have been the catalyst which triggers off a consensus with Y viz., that both should raise prices with effect from the beginning of next month.

(ii) Parallel Conduct and Concerted Practices

Mere parallel action is not a concerted practice.⁴⁴ If, in the above example, X had unilaterally raised prices by 3% and Y, without any prompting from X, followed suit then there is no concerted practice between X and Y. They have taken parallel commercial decisions without communicating in any way. It follows that if firms, as a consequence of observing the behaviour of rivals, follow the price leader, then they have not entered a concerted practice. What is known as "conscious parallelism" is not caught by Article 85 EEC. It is a normal ingredient of competition, especially in oligopolistic markets where a few large firms dominate, for participants in the market to observe and monitor each other, to calculate and predict each others

future behaviour, and to adjust and adapt to meet the conduct of rival firms. For this natural market occurrence to be considered a "concerted practice" there must be some *minimal* form of inter-firm communication which acts to cement the mutual interdependence which has arisen naturally. The form of this communication is immaterial. The Commission are vigilant to ensure that oligopolistic markets do not become anti-competitive. There is little the Commission can do about parallel behaviour arising naturally, though, they adopt a very strict approach to any attempts by firms to foster the parallelism artificially. In Dyestuffs the European Court stated:

"Although a parallelism of behaviour cannot by itself be identified with a concerted practice, it is nevertheless liable to constitute a strong indication of such a practice when it leads to conditions of the market, having regard to the nature of the products, the importance of the enterprises and the volume of the said market. Such is the case especially where the parallel behaviour is such as to permit the parties to seek price equilibrium at a different level from that which would have resulted from competition, and to crystallise the status quo to the detriment of effective freedom of movement of the products in the Common Market and free choice by consumers of their suppliers."⁴⁵

Firms in oligopolistic markets where conscious parallelism is either existent or a possibility must thus take stringent compliance measure to ensure that a concerted practice does not arise. Middle management must know clearly how they may and may not respond to rivals. The Commission, it should not be overlooked, may impose very severe fines on companies breaching competition rules. The problem is that natural marketing behaviour may appear as if it derived from a concerted practice. Thus, firms may harmonise prices through matching each others price policies or forego marketing or selling in each others primary marketing areas. In the absence of some minimal communication such behaviour is lawful.

(iii) Proving Concerted Behaviour

How do the Commission prove concert? As the quote from Dyestuffs above shows they need not establish the very existence of inter-firm communication. It suffices to show that the surrounding circumstances point the way to the existence of some communication. These surrounding circumstances must be viewed collectively and the characteristics of the market taken into account.⁴⁶ The following may be pointers to the existence of a concerted practice:

- unilateral declarations of policy by a company (whether made

- privately to a rival or publically via the media is immaterial) the important point is that a "message" has been broadcast.
- that the time period between a declaration of intent as to future policy and the implementation of that policy is long enough to enable competitors to consider their positions and respond.
 - that the behaviour of the parties is unnatural when compared to the expected patterns of behaviour in the market. If after five years of intense price competition a sudden uniformity of price develops then the Commission may suspect the existence of concert. If, for example, a rigid market sharing exists in a situation where competition could be expected then an inference of concert will be taken and arguments that the market sharing is the direct consequence of heavy transport and freight costs *may* be rejected.⁴⁷

When negotiating with the Commission it is imperative to understand what is meant by natural and unnatural market conditions. Parties may seek to present expert evidence on this matter. Indeed the European Court has heard expert evidence on this question in the past.⁴⁸

Once a concerted practice has been established the Commission is legally entitled to assume that it continues in existence until such time as it is demonstrated to have been ended by the parties.⁴⁹ This presumption of continuance is very relevant when the question of extent of fines is being considered by the Commission.

VI. Public bodies, Quangos and Article 85

(i) Public and Private distinction

Public and nationalised companies and other commercial organizations backed by government cause problems in antitrust law. Article 85 is essentially a private law provision which is unsuitable for the regulation of governmental behaviour. Other public law provisions of the Treaty of Rome are however tailor-made to deal with public interference in the market, viz., Articles 30 and 34 EEC on quantitative restrictions on imports and exports and measures having equivalent effect. These provisions prohibit government behaviour which directly or indirectly, actually or potentially inhibits or hinders trade between the Member States so that all non-tariff barriers to trade are caught.⁵⁰ Where a private body whose commercial conduct restricts inter-state trade is subject to government influence there is potential for both the public and private provisions of the treaty

to operate. The practical application of public law provisions of the Treaty to different types of commercial agreement and trade association practice is examined in later chapters and need not be duplicated here.

(ii) Areas of Overlap

However, a few of the salient rules may be noted here. Nationalised companies are subject to Articles 85 and 86 EEC.⁵¹ If government subsidises these companies that subsidy, far from being treated as an ordinary injection of capital, will be viewed as a state aid subject to scrutiny and control by the Commission under Article 92 and 93 EEC. However, where a privately incorporated body is, de facto, simply an extension of government then it seems to fall outside of Articles 85 and 86 and becomes subject to the public law provisions of the Treaty of Rome. Thus, in Buy Irish Campaign: Commission v. Ireland⁵² the Irish government incorporated a body called the Irish Goods Council (IGC) which was to advertise and promote Irish goods at the expense of imports. The IGC thus sought to incite consumers to discriminate against foreign products. Despite the fact of its private status the IGC was viewed as an arm of Government and the Irish Government was held by the European Court to have infringed Article 30 EEC. Similarly in Van Luipen the European Court was required to rule on the compatibility with Article 34 EEC of a national rule requiring that exporters belong to a trade association as a pre-condition of being allowed to export their goods. The Court stated, of this compulsory affiliation rule:

"It is contrary to the freedom of commercial transactions for national legislation to make the exportation of the product in question conditional on the exporters being affiliated to a public body or a body approved by an official authority."⁵³

Both cases noted above concerned actions against Governments yet the conduct complained of in each could have been perpetrated by purely private bodies. Could Article 85 apply in such cases? The policy of the Commission on this is now fairly clear. Following the Buy Irish case a number of Parliamentary questions were asked of the Commission. One such question noted that Marks & Spencers, British Airways and Debenhams were jointly intending to urge British families to "Buy British". The Commission responded: "So long as a campaign of the kind described ... is conducted entirely by industry,

independently of the State, it does not contravene Community rules on the free movement of goods (Articles 30 to 36 of the EEC Treaty)."⁵⁴ In a later Parliamentary question on substantially the same issue the Commission added that, "where a buy national campaign grew out of an agreement between undertakings, a decision by an association of undertakings or a concerted practice then the competition rules in Articles 85 or 86 might apply."⁵⁵

Whether Articles 85 or 86 apply will, in the final analysis, depend upon the degree of governmental involvement. In some cases on Article 85 a surprisingly high degree of government involvement has existed yet Article 85 has still been held to apply. Thus in AROW v. BNIC⁵⁶ a statutory backed national cognac industry trade association called 'Bureau National Interprofessionnel du Cognac' (BNIC) was held to contravene Article 85 because of certain retail price maintenance schemes operated by it. Article 85 applied despite the association being under the direct supervision of a government commissioner and despite the board of BNIC being appointed by the government. In their decision the Commission stressed some of the private elements in BNIC's make up and rather played down the public control elements. It thus seems that where an organization is a mix of public and private ingredients then Article 85 EEC may apply. Where the organization is dominated by government then Article 85 is excluded and public provisions, for example Articles 30 and 34 EEC, may apply. Where the Commission wish to impose a fine they must rely upon Articles 85 or 86, they have no competence under other provisions to impose pecuniary sanctions.

C. PROVING AN EFFECT ON TRADE BETWEEN THE MEMBER STATES

Article 85 applies where an agreement "... may affect trade between Member States". These words are designed to distinguish the application of national from Community law.⁵⁷ An agreement not affecting inter-state trade is of no interest to the Community but may well be of interest to the authorities (e.g. the OFT) in the Member State where the parties are situate. Despite their apparent simplicity these words have given rise to a considerable volume of case law. The constituents of the phrase will be considered separately.

I. "May affect": Meaning

The Commission does not have to establish an existing effect on trade between the Member States, it is adequate to establish only that it "may" have such an effect. The Court has stated that: "... it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Members States".⁵⁸ Trade is affected when the restrictions in the agreement cause the pattern of trade to change. There will be an effect on trade if: the level of trade decreases; the level of trade increases; the direction and movement of trade changes albeit that the volume of trade remains static. The Commission's policy is that trade should flow along naturally developed routes which derive from the free play of market forces. A restrictive agreement which affects these forces is subject to review under Article 85. The following are examples of agreements which may affect inter-state trade:

(i) Price equalisation in Joint Selling agency

Agency pays its participants the same price whether its goods are exported elsewhere in the EEC or are sold on the domestic market. This would affect trade because it reduces the incentive on individual members to export individually since the export price they receive through the joint selling agency will be greater than they could obtain by their own efforts.⁵⁹

(ii) Aggregated rebate schemes

Scheme whereby customers are given rebates depending upon their total purchases from the group discourages customers from purchasing from suppliers elsewhere in the EEC.⁶⁰

(iii) Joint Purchasing agencies

Agency purchases on behalf of its members. It requires members to take a certain percentage of their purchases through the agency. To the extent that members are committed they are excluded from purchasing from other suppliers in the EEC.⁶¹

(iv) Distribution Agreement prohibiting dealer from selling outside of his defined territory

Such clauses always affect trade between the states since the dealers ability to sell elsewhere in the EEC is curtailed.⁶²

Distribution agreement whereby dealers are prohibited from selling to

customers who are situated in another Member State affect trade because the freedom of the customer to purchase in the EEC is limited as is the freedom of the dealer to sell.

(v) Agreements between undertakings in the same Member State

Agreements between undertakings affect inter-state trade if they regulate sales in such a manner as to influence trade coming into or out of their state. Thus an agreement between X, Y and Z in the UK to maintain identical export prices affects the price of those goods abroad.⁶³ An agreement between X, Y and Z not to supply foreign wholesalers where UK wholesalers exist affects the trade of foreign wholesalers.⁶⁴ An agreement not to sell directly to consumers abroad obviously affects trade.⁶⁵ An agreement between a supplier in the UK and a number of exclusive dealers in the UK may affect inter-state trade if foreign suppliers are hindered in obtaining effective dealers to distribute their goods for them. This will be the case if efficient dealers are scarce and the UK supplier has tied them up in his distribution network and contractually precluded them from selling another suppliers goods.⁶⁶

(vi) Exclusive Patent licenses

An exclusive patent license can affect inter-state trade since no-one other than the licensee can produce the patented product and this may reduce export potential.

(vii) Trade Fairs

A trade association organises trade fairs for the advertising of its members products; members may not show at fairs other than those organised by the association. This affects trade because the ability of members to advertise abroad through foreign trade fairs may be prejudiced.⁶⁷

II. "Trade": Meaning

"Trade" includes all forms of commercial exchange. The concept of trade is to be construed widely. Products covered by the ECSC Treaty however are not subject to EEC competition rules (i.e. coal and steel). Likewise special rules apply to: civil aviation, shipping, road transport, rail transport and inland waterways.⁶⁸ Other products and services are caught by the competition rules. Agricultural produce are caught despite their being special rules for agriculture.⁶⁹

III. "Between Member States": Meaning

The relevant geographical territories are those comprising the European Economic Community. The ambit of these rules may also extend to territories belonging to Member States which have been expressly incorporated by declaration or protocol or other EEC legislation.⁷⁰ The rules may also apply by virtue of agreement between the Community and third countries.

IV. De Minimis: Insignificant agreements

An agreement is not within Article 85 if its affect on inter-state trade is insignificant. The Commission expect an appreciable affect to be established before Article 85 becomes relevant.⁷¹ One must examine how the market would have developed in the absence of the restrictive agreement. If the agreement has any influence, whether advantageous or harmful, then an effect has occurred. The balancing of advantages and disadvantages takes place under Article 85(3)⁷² (for analysis of Article 85(3) see Chapter 7).

(i) Examples

Market share is important, a market share of only 0.6% may be assumed to be insignificant even where the distribution agreement in question contains clauses that would normally be challenged (e.g. absolute territorial protection).⁷³ In SOCEMAS a purchasing association with only 10% of the market was found not to have a significant effect on the suppliers market position.⁷⁴ However, the Commission has found that where market shares of 8.7% and 5.9% were proven a perceptible effect on trade could occur.⁷⁵ A Commission notice on minor agreements refers to a 5% market share coupled to a maximum turnover level. (see below).

Other than market share such factors as extraordinarily high customs or other charges may swamp the perceptible effects of an agreement.⁷⁶ Equally the cost of freight and carriage to distant markets may render the influence of the parties negligible in an overall context.⁷⁷ Though freight is a factor the Commission treat with a degree of caution.⁷⁸

(ii) Commission notice on Minor Agreements⁷⁹

This notice is not legally binding, it is simply an indication of Commission thinking in 1977. If in doubt as to its applicability parties may always notify their agreements on Form A/B (discussed below).

Parties justifiably relying on the notice whose agreement is subsequently challenged by the Commission will almost certainly be protected from fines. The notice applies a quantitative test of market share and turnover. The notice suggests that agreements fall outside of Article 85(1) if:

- "- the products which are the subject of the agreement and other products of the participating undertakings considered by consumers to be similar by reason of their characteristics, price or use do not represent in a substantial part of the common market more than 5% of the total market for such products, and
- the aggregate annual turnover of the participating undertaking does not exceed 50 million units of account."

On deciding upon who is a "participant" all subsidiaries and other undertakings in which a primary participant holds directly or indirectly more than 25% of the capital are to be considered ⁸⁰

The calculation of market share may be difficult since that depends upon a definition of the "market". The test is one of consumer preference i.e. which products are considered to be similar by the consumer by reference to the qualities, use or price of the goods or services. Although the notice gives equal weight to market share and turnover in practice the former will be of greatest relevance.

D. THE OBJECT OR EFFECT OF AN AGREEMENT

Article 85 prohibits agreements which have "as their object or effect the prevention, restriction or distortion of competition within the Common Market". It is important to appreciate that an agreement need not actually restrain competition for Article 85 to apply; an agreement which merely has a restrictive objective is enough irrespective of the agreements capacity to attain that object. Indeed Article 85 may apply to an agreement that has been formally abandoned by the parties but whose effects "linger" on.⁸¹

In assessing an agreement the Commission will consider:

- what the objective of the agreement is by reference to its terms and taking into consideration the economic context of the agreement; or,
- if no anti-competitive object is ascertainable whether the agreement as a matter of fact perceptibly restricts competition. This is determined by reference to the competition that would exist in the absence of the

restriction taking account of the economic context.⁸² In examining effect the Commission will consider other participants in the market, other suppliers to and customers of the parties and, of course, consumers.

I. Approach of Commission

The Commission thus adopt a pragmatic view of an agreement assessing: the size of the parties, their market share, the nature of the agreement, the economic context, the nature of the product, the relationship of the agreement in question to other similar agreements adopted by those parties or even by other parties etc. With this data the Commission can make an appraisal of the object and effect of an agreement.⁸³

When considering the object of an agreement the Commission need not take into consideration the value of ancillary objects or goals. Thus the Court has held that an agreement infringed Article 85 even though it had the ancillary objective of safeguarding public health and minimising the cost of conformity checks.⁸⁴ Arguments of this nature, whilst not relevant to the economic analysis in Article 85(1) may be relevant in the analysis under Article 85(3) (see Chapter 7).

Psychology plays a significant role in competition. Thus, an agreement with a restrictive objective but not proven mal-effects may be caught. The Court has spoken of an "optical and psychological climate" which stifles competition.⁸⁵ The Commission adopt a similar philosophy contending that the power to exercise a restriction can lead to parties adjusting and altering their conduct away from the norm.⁸⁶ Thus if X and Y agree not to sell in each others primary marketing area but do not take steps to implement the agreement they might still restrict competition between them because they might refrain from intensifying their sales in each others area for fear of retaliation and an ensuing price war. The mere existence of the agreement may be a psychologic cause for the maintenance of a status quo.

Again, with regard to mental attitude the Commission when considering the object of an agreement do not view the mental state of the parties as conclusive. If the Commission decides that an agreement between X and Y could not, given the economic context, possibly harm competition then they will not apply Article 85 to it even though they might be aware of the parties intentions to restrict competition. "Object" is determined by objective analysis of facts not by subjective assessment of mental state. Obviously, if the Commission discover an anti-competitive design then this will encourage them to take a closer look at an agreement or practice.

A similar disregard for mental state applies with regard to proving the restrictive effect of an agreement. An agreement can fortuitously and unintentionally restrict competition, the parties may not even be aware they have restricted competition, yet the effect is undeniable and Article 85 may apply. However, there are some indications that effects that are wholly unforeseeable and remote are to be excluded from consideration. The test of foresight is objective viz., what would an outsider foresee, and not subjective viz., what would the parties foresee.⁸⁷ Thus: X and Y enter a joint R & D venture in the UK and in order to purchase a required input commodity that is not always readily available, they agree to pay high prices to their suppliers. An Italian producer complains that he is going out of business because he cannot obtain supplies of input commodities at reasonable prices due to the "inflationary" willingness of the UK producers to pay higher prices. This has he claims pushed the general price up of the input commodity. Such a consequence might be viewed as unforeseeable and the restrictive effect excluded by the Commission from their considerations. Cases benefiting from this rule are very rare in practice.

E. PREVENTING, RESTRICTING OF DISTORTING COMPETITION

I. Prevent, restrict, distort

These terms describe the object or effect of an agreement. Article 85 states: "... which have as their object or effect the prevention, restriction or distortion of competition within the Common Market". The meaning of prevent competition is obvious: if X prohibits his exclusive dealer Y from selling outside of his contract territory then Y is prevented from competing outside of that area; if X and Y in the UK agree not to supply any wholesaler in France other than at a mutually agreed price then price competition is prevented between X and Y. Likewise the word restriction is clear: if X and Y agree not to increase their marketing efforts in each others primary marketing area then competition between them is restricted. The meaning of 'distortion' is less clear. If a trade association requires its members to impose a surcharge on the price of lower quality goods then customers might switch their purchases away from the lower quality goods to higher quality products. This would distort competition between lower and higher quality goods.⁸⁸

In practical terms the three terms ensure that an agreement which has either a negative, positive or distortive impact on the market is subject to Article 85. The volume of competition may hence be reduced, increased or merely forced to change direction.

II. Competition: notion of "Workable Competition"

The Treaty of Rome does not define "competition" which is perhaps surprising given that it is at the very heart of the economic principles underlying the EEC. However, it is not surprising when one considers that the concept of "competition" is the subject of enormous economic debate and that a precise definition is therefore impossible.

The Commission, in common with all competition law authorities, operate with a concept of "workable competition". This notion is to be distinguished from "perfect competition" and "monopoly". Perfect competition describes a market where there are an adequate number of firms such that no individual can affect the overall market price. Monopoly describes the market of one firm who may act in terms of pricing and other decisions without reference to any competitive pressures. Neither "perfect competition" nor "monopoly" are feasible as models of competition, both are extremes which rarely exist in practice. "Workable competition" is the economists compromise; it lays down criteria that may reasonably be sought by a competition authority and preaches a relatively pragmatic approach to evaluation of agreements. The most important tenets of "workable competition" are:

- (i) that access to markets is not hindered by artificial entry barriers;
- (ii) that changes in supply and demand may be reflected in the prices of the relevant goods and services;
- (iii) that production and ~~output~~ should not be artificially restrained so as to negate their ~~link~~ with demand;
- (iv) that freedom of action is not unreasonably curtailed;
- (v) that the choice of suppliers, purchasers and consumers remains unrestricted.

These limited objectives do not aim to achieve perfect competition in markets they seek only to ensure that undertakings compete with each and do not attain economic power through uncompetitive devices. Each case will depend upon its facts and upon an analysis of the market.

One very important point is that Article 85 catches agreements between undertakings and does not attach only to agreements between competitors. A

supplier and his exclusive dealer are not competitors yet their agreement may be subject to Article 85. Such an agreement though not between rivals may affect competition in the suppliers market (if other suppliers cannot obtain suitable dealers due to exclusivity requirements) and competition in dealers market (if rival dealers cannot obtain supplies from a supplier who is contractually bound to supply the one dealer only in that area).

III. Unworthy Competition

Article 85 and the Commission interpretation of "competition" do not extend to all forms of competition. There is no breach of Article 85 if competition that is unworthy of protection is restricted. The Commission judge whether the competition in question is worthy of protection not the parties. So that if X, Y and Z draft an agreement entitled "Fair Trade rules" and in the agreement proceed to restrict competition between them the Commission will not refrain from intervening.⁸⁹

Sometimes the boundary line between fair and unfair competition is unclear. Thus, it may be a defense to a charge of exchanging price information with a competitor that one of the parties only exchanged the data in order to verify or disprove the claim of a customer that the other supplier was offering better terms. Thus, exchange of price information may be justified if absolutely necessary to overcome the problem of "buyers tales".⁹⁰

The fair/unfair boundary is unclear where rivals seek to undercut each other to such an extent that they sell at below cost in order to squeeze the other from the market. Discounting is an integral component of competition but when suppliers sell at below cost with the systematic aim of destroying a rival the Commission may view this as unfair predatory pricing.⁹¹ Conversely, selling below cost is not always unfair where it is designed as a competitive device to "shake up" a foreign market or to get a toe hold in a new market.⁹²

In arguing with the Commission that the agreement seeks only to restrain and prevent unfair competition the burden of proof is upon the parties. It seems that they must establish that there are serious doubts about the fairness or legality of the competition. In practice this is a high burden to overcome.⁹³

F. ARTICLE 85(2): AGREEMENTS AUTOMATICALLY VOID

Article 85(2) states: "Any agreements or decisions prohibited pursuant to this Article shall be automatically void". Article 85(2) only mentions agreements and decisions it omits to refer to concerted practices. This is because a concerted practice is a set of factual circumstances which plainly cannot be rendered void, these circumstances do not create legal relations which may be avoided. An agreement void under Article 85(2) is without legal effect and no consequences flow in civil law from its breach. Further it may not be enforced against a third party.⁹⁴ Article 85(2) has prospective and retroactive effect.⁹⁵ Essentially the effects sought by the parties from the agreement do not materialise. There are two limitations on this strict position.

I. Void in Part Only

The nullity envisaged in Article 85(2) does not automatically embrace the whole agreement. Only such clauses as infringe Article 85(1) are automatically void.⁹⁶ A whole agreement becomes void only if the offending clauses cannot be separated from the contract.⁹⁷ In examining an agreement or decision the Commission must determine whether the restrictions are severable. This is done by objectively considering all of the surrounding circumstances of the case. The Commission does not consider the subjective views of the parties. This process is essential when the Commission consider the remedy to be applied: is the whole agreement void or are the offending clauses only void? If the clauses are severable then the Commission must confine its decision to the void clauses only.

If an agreement is being disputed before the national court the test of severance is a question of national not community law. In the UK the Court will, first, extract the offending clauses, and secondly, examine the residue to assess whether it,

"... could be said to fail for lack of consideration or any other ground, or whether the contract could be so changed in its character as not to be the sort of contract that the parties intended to enter into at all."⁹⁸

Thus, an agreement can fail because the consideration for the contract is contained in a void and unenforceable clause. Alternatively the agreement can fail because, without the void clauses the parties would not have entered the agreement at all.

It is clear that a restrictive clause can be held to be partially void:

X wishes to sell his business to Y and includes in the contract of sale a clause whereby X will not enter into a competing business with Y for a period of 12 years after the sale. The Commission treat the non-competition clause as unduly restrictive and decide that a lesser period of 4 years is adequate to ensure the transfer to Y of the full commercial value of the business. In this case the non-competition clause has been modified by the Commission's decision and not struck down outright.⁹⁹

II. "Old" and accession agreements: "Provisional Validity"

The Court has held that a national court may not apply Article 85(2) to "old" agreements.¹⁰⁰ An "old" agreement is one that was already in existence at 13 March 1962 being the date when the enforcement machinery for Article 85 and 86 came into existence.¹⁰¹ These "old" agreements are "safe" until the Commission takes a decision in respect of them so long as they were notified to the Commission in due time or are exempt from the need to notify.¹⁰² "Safe" in this regard means that, pending a Commission decision, such agreements are valid and enforceable. A Commission decision that an agreement infringes Article 85(1) and is not exempt under Article 85(3) nullifies the provisional validity and brings Article 85(2) into play.

Accession agreements are treated in the same way. An "accession agreement" is one which falls within Article 85(1) due to the accession to the EEC of the Member State(s) in which the parties are situate and in which the agreement operates. Thus for the UK, Eire and Denmark the accession date was 1 January 1973; for Greece, 1 January 1981; and for Spain and Portugal, 1 January 1986.

One very important proviso to the above must be made. In Lancome¹⁰³ the European Court limited the provisional validity granted to notified "old" agreements. The Court held that once the Commission had informed parties that it was unlikely to exempt their agreement then provisional validity would end. Traditionally, validity is withdrawn by a formal decision condemning the agreement. However, now it seems that an informal letter from a senior Commission official achieves the same effect. This decision is of great administrative use to the Commission officials for whom drafting a formal decision is a time consuming job. Indeed over recent years the Commission has issued only a handful (approximately 10) formal decisions per annum.

The Court further made it clear in Lancome that the attachment of provisional validity to old agreements was justified by reference to the exclusive power of the Commission to issue formal exemptions. Once it

became clear that the Commission did not intend to issue a formal decision or take further action on an agreement and that they were "closing the file" then the Court saw no reason to prolong the life of the provisional validity. The decision has caused some disquiet to businessmen who seek to negotiate a result with the Commission in respect of an agreement. When they finally achieve consensus on the necessary amendments and objectionable clauses are removed the Commission may send them a "confort letter" informing them that the file has been closed and giving the reasons. Having thus danced to the Commission's tune the provisional validity of their agreement is removed. The Court has provided some solace only in that it has indicated that national courts should take the Commission's view that the agreement is not now in breach of Article 85 into account. National courts are not however bound by comfort letters. Some legal advisers view Lancome as imposing a penalty on notification and negotiation and even advise parties not to notify.

III. "New" Agreements

The category of "old" agreements (above) is, excepting accession agreement, limited. The vast majority of cases to which EEC rules apply have been entered into since the coming into force of the enforcement machinery in 1962. These agreements may be termed "new" agreements. Such agreements do not enjoy provisional validity merely because they have been notified to the Commission. If parties desire to enter restrictive agreements they do so at their own risk. The Court has thus stated:

"Whilst the principle of legal certainty requires that, in applying the prohibitions of Article 85, the sometimes considerable delays by the Commission in exercising its powers should be taken into account, this cannot, however, absolve the [national] court from the obligation of deciding on the claims of interested parties who invoke the automatic nullity.

In such a case it devolves on the Court to judge ... whether there is cause to suspend proceedings in order to allow the parties to obtain the Commission's standpoint, unless it establishes either that the agreement does not have any perceptible effect on competition or trade between Member States or that there is no doubt that the agreement is incompatible with Article 85."¹⁰⁴

One may ask what the value of notifying an agreement to the Commission is if this doesn't give any form of legal protection. The answer is that notification is an important factor in the Commission's decision to fine an undertaking. Notification in most cases means that if the Commission arrive at an adverse decision they will not fine the parties. This is not

an absolute rule and parties who notified a price-fixing agreement in the hope that it would take two years for the Commission to issue a negative decision in which time the cartel would have achieved its restrictive objective would almost certain be fined. Moreover, in such a flagrant case a swift Commission response may be expected.

The pros and cons of notification are discussed below under Section J.

IV. The Consequences of Article 85(2) in National Courts: "Euro-defences".

The fact that parts of a restrictive agreement are void under Article 85(2) has been used in the UK Courts as a defense by parties who, when sued for breach of contract, counter by asserting the nullity of the contract in question. Using EEC law in this fashion has become known as pleading the "Euro-defence". Actions of this ilk usually arise in one of two ways. First, in intellectual property cases where a proprietor seeks an interlocutory injunction to prevent licensees¹⁰⁵ and other persons¹⁰⁶ from infringing his rights it is now commonplace for the defendant to claim that the agreement or part of it is caught by Article 85(1) and void under Article 85(2). The UK Courts have generally looked asance at Euro-defences perceiving them as generally unmeritorious.¹⁰⁷ Consequently, following the line laid down by the House of Lords in American Cyanamid v. Ethicon¹⁰⁸ on the use of discretion in interlocutory injunction proceedings, Courts have been content to leave Euro-defences until full trial of the issues rather than examine them at the interim stage. Frequently, parties pleading Euro-defences have not pursued them at full trial. Secondly, Euro-defences have been in issue in cases where the plaintiff has applied to the Court to have a defense struck out on the grounds that it is unarguable and without any foundation. Courts have generally adopted the view that a Euro-defence is at least arguable and should not be peremptorily struck out.¹⁰⁹

G. AGREEMENTS EXEMPTED UNDER ARTICLE 85(3)

Article 85(3) lays down criteria which, if satisfied by an agreement caught by Article 85, can lead to an exemption being granted to parties to a restrictive agreement by the Commission. The provision lays down detailed criteria and it is by reference to these that parties must base their arguments when negotiating with the Commission. Article 85(3) is examined in Chapter 7 and discussion of the provision may be delayed until then.

It is pertinent however to note at this stage that certain types of restrictive agreement are deemed to automatically obtain exemption if their terms conform to rules laid down in certain regulations. The regulations in question concern: exclusive dealing agreements; exclusive purchasing agreements; selective distribution in the motor industry; specialisation agreements; patent licenses; and, research and development agreements.

A regulation granted automatic exemption in this fashion is termed a "bloc-exemption" and simply indicates that certain types of agreement obtain exemption en block. An agreement fitting within the rules laid down in a bloc-exemption need not notify their agreement to the Commission though they may do so if unsure of its compatibility with the bloc-exemption. The bloc-exemptions with which businessmen must contend are discussed in depth in later chapters.

H. ARTICLE 86 EEC: ABUSE OF A DOMINANT POSITION

I. Definition

The vast majority of cases dealt with by the Commission fall under Article 85. However, a few are dealt with under Article 86. This reads:

"Any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making 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."

Article 86 is aimed at the unilateral behaviour of economically dominant undertakings who employ their dominance in an abusive manner. In a contractual sense this might be because a dominant supplier forces unfair terms and conditions upon a weaker customer who has little or no bargaining power. Article 86 may also be employed against two or more dominant suppliers who collectively exploit their economic power. The provision does,

in this context, speak of, "Any abuse by one or more undertakings" However, the concept of joint abuse is not one which finds real favour with the Commission who prefer to use the concept of a "concerted practice" in Article 85 as a means of challenging loosely formed collective behaviour. Statutory monopolists are bound by Article 86.¹¹⁰

A brief analysis of Article 86 is given below.

II. Article 86 EEC: Difference between dominance and abuse

At the outset it should be understood that the mere possession of dominance is not prohibited, it is only the abuse of that dominance that is forbidden. Article 86 enumerates examples of such abuse in sub-paragraphs (a) - (d). These are: the imposition of unfair prices; the limiting of production, markets or technical development; discrimination in relations with other trading parties; and tying products or services together. This list is non-exhaustive.

III. Meaning of "dominance"

Dominance usually manifests itself as an ability to act independently on the market without having to consider competitive pressures:

"The dominant position referred to in this Article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers."¹¹¹

A firm with a very high market share may be presumed to be dominant.¹¹² Thus, the possessor of 80% of a market is almost certainly dominant, whether company X with 50% of the market is likewise dominant is less clear and will depend upon an analysis of the economic context. For example X might be subject to intense competition from two competitors Y and Z with 18% and 23% of the market respectively. Any abuse by X, for instance by excessively high pricing, will simply lead to Y and Z taking up X's dissatisfied customers. Conversely if X held only 40% of the market and the next largest competitor held only 2% (i.e. the market had one giant and a plethora of small firms) then it is arguable that X is dominant. It should be evident that "dominance" is not necessarily synonymous with success. A dominant undertaking may have bad years where it makes a loss. This fact does not mean that the undertaking is not dominant though if the undertaking in question continues to do badly this might be evidence that there are competitive pressures on it in the form of other firms and this

might imply a limitation on its dominance.

In determining whether or not a large, ostensibly powerful undertaking is legally 'dominant' the Commission may examine a number of factors:

(i) Entry Barriers

The existence of entry barriers. These operate to cushion the dominant undertaking from potential competitors who might enter the market to challenge that undertaking's superiority and steal away its market share. Entry barriers might derive from the undertaking's own behaviour, for example, if the undertaking owns a major part of the market for an input products into its own manufacturing process.¹¹³ Alternatively entry barriers might derive from governmental restrictions on entry to the market.¹¹⁴

(ii) Exit Barriers

The existence of exit barriers. These can discourage entry if potential competitors realise that once in the market they will be effectively barred from exit because of the general lack of a market for excess plant and equipment. If a firm wishes to take a risk it is less likely to do so in a market where failure involves abandoning expensive plant and machinery. The entry barrier is thus the increased risk as posed by the threat of the existing firms coupled to the lack of a market for assets.

(iii) Expansion Barriers

The existence of expansion barriers. If supplier X has an extensive network of exclusive dealers across the EEC and, because, X has already incorporated all of the best dealers into his network there is a shortage of effective dealers to distribute new or other suppliers goods then not only is this an entry barrier for prospective suppliers but it can be an expansion barrier to existing firms who may wish to expand output but are concerned that they will not be able to achieve effective and rigorous market penetration through dealership networks. X might feel secure in his dominant position, because most of the most effective dealers are tied up in his network and contractually prohibited from holding other suppliers products.

(iv) Vertical Integration

The degree of vertical integration of the undertaking. If X is alleged to be a dominant manufacturer it might be relevant that he owns his own resources for making the product and that he owns his own distribution and retail outlets, i.e. there is full integration from

production of raw materials to sale of the finished product to the consumer. This gives X an advantage over less integrated manufacturers who may be subject to greater uncertainties in the markets for raw materials and in the efficiency of a distribution and transport system.¹¹⁵

(v) Technical Knowledge

The degree of technical knowledge enjoyed by the undertaking. Thus, IBM who devote approximately \$3 billion per annum to research and development enjoy enormous advantages over competitors because of the sheer vastness of their R & D capacity.¹¹⁶

(vi) Marketing and Advertising Capacity

The success of an undertaking's advertising in creating consumer preferences. A dominant concern may enjoy greater advertising revenues to devote to creating consumer loyalty. Thus in United Brands the dominant undertaking was able to persuade consumers to pay between 30% and 40% more for bananas branded with the "Chiquita" mark than for unbranded bananas although the price difference appeared not to have been objectively justified.¹¹⁷

(vii) Relative market shares

The market share of the dominant concern in comparison to other competitors. This point, which is of considerable importance, is discussed above.

(viii) Other Political Factors and Time

The existence of any extraneous political factors. In BP v. Commission¹¹⁸ the existence of the 1973 oil crisis engendered by the OPEC boycott of Western States gave the oil companies temporary political and economic significance out of all proportion to their everyday power. This factor alone was enough to give BP "dominance" on the Dutch market for the currency of the crisis despite the fact that BP held only 10% of the EEC market for the relevant product. The case shows, inter alia, that dominance can be temporary.

IV. The importance of defining the geographical market

In determining dominance a central question is market definition. The nub of this enquiry is whether the undertaking in question is: a small fish in a big pond, a big fish in a small pond, or even, a big fish in a big pond.

British Telecommunications may be dominant in the UK but it is probably not dominant in the overall EEC telecommunications market where it competes with other nationalised authorities.¹¹⁹ Accordingly delineation of market area is an important function undertaken by the Commission. Transport costs may be important in deciding this question: X might sell in Northern Member States but not in Southern Member States because, given the bulky nature of the product, the freight costs are too great to render Southern sales profitable. The geographical market need not be the whole of the EEC. Article 86 speaks of abuse, "within the Common Market or in a substantial part of it." The meaning of "substantial part" has caused some debate in cases before the European Court. In BRT v. SABAM the Advocate General stated: "What is essential is the quantitative assessment of the market in relation to the whole of the market, that is to say, its relative economic importance. For this purpose one must consider above all the density of the population, the level of its resources and the extent of its purchasing power."¹²⁰ On this basis, Belgium, has been accepted by the Advocate General and Court to be a substantial part of the Common Market. Likewise Southern Germany has been held to be a "substantial part".¹²¹ However, in a more recent decision the opinion has been expressed that "substantial part" should not be analysed narrowly but should be seen as a de minimis requirement i.e. all but the smallest areas are substantial parts of the EEC. In BP v. Commission Advocate General Warner thus stated:

"There is ... a danger in focusing attention exclusively on percentages. The opposite of 'substantial' is 'negligible' and what may seem negligible when looked at in terms of a percentage may seem otherwise when looked at in absolute terms. The population of Luxembourg is, I believe, about 0.23% of the Whole Community. I would, however, shrink from saying that one who had a monopoly or near monopoly of the Luxembourg market for a particular product was exempt from the application of Article 86."¹²²

On this basis the Commission may define a market in narrow geographical terms thereby swelling the economic importance of the undertaking whose behaviour is challenged. One caveat to this is that in BP v. Commission the Court held that BP - the defendants - were not in breach of Article 86 EEC so did not confirm or disapprove of the views of the Advocate General. Though, the tenor of their analysis is that they were not materially in disagreement.

In construing the word "substantial part" the distinction between an area or location and an activity should be borne in mind. Advocate General

Warner in Pigs and Bacon Commission v. McCarren¹²³ adopted the position that a specific flow or current of trade, for example the export of Irish bacon to the UK did not comprise a "part" of the Common Market within the meaning of Article 86. In Felixstowe Docks and Railways Board v. British Transport Docks Board¹²⁴ the High Court denied that the Humberside ports comprised a "substantial part" of the Common Market.

V. The importance of defining the Product Market

Similar problems of identification exist when considering product market. X might be dominant in the supply of music cassettes but is subject to competition from producers of records and compact discs. The product market is thus wider than just music cassettes. Y might be dominant in the supply of peaches but peaches may be in competition with other soft fruit or even all fruit. The greater the degree of competition from other similar or competing products the less the opportunity for an undertaking to exploit his power over a single product.¹²⁵ If Y pushed the price of peaches up too high then consumers would simply switch to alternative fruits.

In a dispute with the Commission the undertaking investigated will always define the product market widely in order to suggest that he is a small fish in a big pond. The Commission may adopt a narrower view to establish that the undertaking is a big fish in a small pond. In the IBM Settlement¹²⁶ IBM argued with the Commission that the relevant product market was all electronic goods since all manufacturers of integrated circuits could potentially produce computers and that they were hence competitors in a huge market. The Commission, conversely, decided that the product market was main-frame computers in which IBM held 70% of the world market. Although the case never proceeded to a formal decision or Court proceedings the question of product market was an important bone of contention during negotiations.

There are a number of ways in which a product market may be defined:

(i) Product description

The product market is delineated by an objective analysis of products which are of a similar description. Thus in United Brands the Court took into account the fact that, "The banana has certain characteristics, appearance, taste, softness, seedlessness, easy handling, a constant level of production which enable it to satisfy the constant needs of an important section of the population consisting of the very young, the old and the sick." As a result of these characteristics

and coupled to other factors the Court concluded that bananas could represent a discreet market. An analysis of product market based solely upon product characteristics is inadequate. Details of the competitive conditions and the structure of supply and demand must also be taken into account.¹²⁷

(ii) Consumer Demand

Statistics on consumer preferences may show relationships between products that an objective analysis of a products characteristic might not reveal, the link between two products being subjectively fixed in the consumers mind by advertising. Thus, an objective product characteristics analysis (i.e. do these two products have sufficiently similar traits such as to make them potential substitutes) may be inadequate. The extent of consumer preference will always be relevant.

(iii) Price

A product that has similar characteristics to another product may nonetheless not be in competition with it because of relative prices. Thus caviar may be similar to fish past in constituents but, irrespective of other differences, the relative prices of the products means that they are not substitutes for each other. A pencil and a gold fountain pen are both writing instruments and hence theoretical substitutes but the price differential means that if X wishes to buy a functional writing instrument he will pay a nominal price for a pencil and, if this were unavailable, would not under normal circumstances purchase a luxury fountain pen as a substitute.

VI. The concept of "abuse"

As noted above the existence of dominance in an undertaking attracts no legal consequences, it is abuse of that dominance which results in application of Article 86. The question the Commission will ask themselves, according to the Court of Justice, is whether the dominant undertaking, "... has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition".¹²⁸ In another case the Court added that abuse of dominance "... has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".¹²⁹ It is not intended to

elaborate at length upon "abuse" here. In subsequent chapters the application of Article 86 to specific trade association practices and commercial agreements is examined at length.

One point to note is that an abuse is only within Article 86 if it affects trade between Member States. As with Article 85 the requirement of an effect on trade between Member States is designed to differentiate the application of Community and national law. A practice that affects only the national market is for national authorities to challenge; it is only where restrictions on trade between Member States may be established that Article 86 applies.¹³⁰

I. OVERLAP BETWEEN EEC AND UK LAW

A number of practical points are relevant to an undertaking of the boundaries between EEC and UK law.

I. "May affect trade between Member States": Overlapping jurisdiction

The words "may affect trade between Member States" have already been examined in the context of Article 85 and 86 (see above). In essence the words differentiate those parochial agreements that are the province of the national authorities and those agreements in which the Commission also has an interest. Though there are many agreements that the OFT deal with under the RTPA that are large enough to be of interest to the Commission. An agreement entered by UK parties alone can still affect inter-state trade even if the agreement is expressed to apply to the UK alone. This is because such an agreement may hinder exporters abroad from selling in the UK. A good example of such cases may be found under Section 29 RTPA 1976 which empowers the Secretary of State to exempt from registration under the RTPA 1976 agreements of substantial importance to the national economy. The section is administered by the Department of Trade and Industry (DTI) in London who advise the Secretary of State. The DTI always request parties who submit draft agreements for approval to "clear the lines" with the Commission since an agreement of substantial importance to the national economy will inevitably have repercussions on the EEC market. The DTI also take the view that there is a conflict between Section 29 procedure and Articles 85 and 86 procedure. Section 29 agreements are usually dealt with by the DTI as high priority matters and a decision granting exemption

may arise in only a few weeks. The negotiation procedure with the Commission can last months or even years. Consequently the DTI will grant a Section 29 exemption even though no positive blessing has been received from Brussels.¹³¹

The Section 29 procedure and cases are examined in detail in Chapter 2.

Where a clash between EEC law and UK law occurs, for example, with the EEC granting an exemption under Article 85(3) and the UK authorities seeking to strike down an agreement, EEC law should take precedence.¹³² The OFT are sensitive to the potential for conflict which however in practice rarely arises. However, provision exists under the RTPA 1976 for resolution of the conflict. Section 21(1)(a) RTPA 1976 empowers the Director General to refrain from taking proceedings before the Restrictive Practices Court in so far as he considers it appropriate to so refrain having regard to directly applicable EEC legislation. Where an English Court is (as opposed to the OFT) examining an agreement under Article 85(1) it has no authority to apply the exemption criteria in Article 85(3), that is the exclusive prerogative of the Commission. The national court may, however, suspend proceedings in order to allow the parties to obtain the Commission's opinion.¹³³ Where the national court has ascertained the opinion of the Commission it is unlikely to derogate from that opinion unless extraordinary circumstances prevail. If a formal decision is issued by the Commission exempting an agreement under Article 85(3) then the national court may feel itself bound by that decision by the doctrine of the primacy of Community law to respect the exemption. The English remedy of issue estoppel may apply here. This traditionally applies between parties to previous litigation whereby one party estops the other from pursuing a course of conduct contradictory to the initial judgment.

II. The direct effect of Article 85 and 86 EEC: Eurochallenges

Article 85 and 86 EEC have direct effect i.e. they may be pleaded by private parties before national courts.¹³⁴ Actions based upon breach of directly effective EEC law are becoming increasingly common with parties also settling out of court on the basis of Articles 85 and 86. Details are given in Chapter 7.

J. NOTIFICATION TO THE EUROPEAN COMMISSION

Under the RTPA 1976 parties entering restrictive agreements must furnish details of their agreements to the OFT for registration. No equivalent duty exists in EEC law though there are strong incentives to notify an agreement to the Commission. Some of the practical issues are discussed below.¹³⁵

I. Form of Notification

Agreements are notified to the Commission on Form A/B. Details of this form and its contents are given in ensuing sections.

II. Types of Notification

The main purpose of notifying an agreement to the Commission is to obtain a "negative clearance" (a ruling that the agreement is not within Article 85(1)) or to obtain an exemption under Article 85(3) on the basis that although the agreement is caught by Article 85(1) it satisfies the criteria for exemption in Article 85(3) EEC. Form A/B is used for both types of notification. "Notification" is a loose term describing the furnishing of copies of the agreement and of certain other information to the Commission.

(i) Notification to Obtain a Negative Clearance

Under Regulation 17/62/EEC, the main regulation laying down competition procedure, the Commission has power to, "certify that, on the basis of the facts in its possession, there are no grounds under Article 85(1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or practice".¹³⁶ This certification that Article 85 or 86 are inapplicable is the negative clearance. A decision of the Commission granting this clearance will state why there are no grounds for Article 85 or 86 being applicable. Form A/B must be used where negative clearance is sought for an agreement to which Article 85 might apply.¹³⁷ Form A/B need not be used for cases possibly falling under Article 86 though use of Form A/B making changes as appropriate is often viewed as a useful method of notification.¹³⁸ In any event applications for negative clearance in respect of Article 86 must contain a full exposition of the relevant facts including an account of the practices in question and of the markets in question. Parties should be liberal in furnishing data;

the Commission decide to grant negative clearance on the basis of facts in their possession and these largely depend on the information given by the parties. Facts should be accurate. Fines may be imposed for furnishing intentionally or negligently erroneous or misleading data.¹³⁹

In negative clearance cases where the Commission intend to grant a favourable decision they will publish in the Official Journal a summary of the relevant application and will invite interested third parties to submit their comments. A time period of not less than a month is given for these comments to be made. This publication is required to safeguard the confidentially legitimate business secrets of the parties. Often in the notice the Commission express that they intend to adopt a favourable attitude to the application.

(ii) Notification to Obtain an Exemption

Parties may notify their agreement on the basis that although it falls within Article 85(1) it may be suitable for exemption under Article 85(3) (discussed in Chapter 7). This procedure is not the same as an application for negative clearance. In that case the application is to establish the non-applicability of competition rules, in the case of an application for an exemption the parties may accept that Article 85(1) applies to their agreement but contend that it is suitable for exemption under Article 85(3). A decision granting exemption cannot be made by the Commission unless the agreement has been notified by the parties.¹⁴⁰ The fact that an agreement obtains exemption under Article 85(3) does not necessarily exclude the possibility of Article 86 applying though, in practice this is unlikely.¹⁴¹ Parties need not apply for an exemption if they can fit their agreement within the terms of a bloc-exemption. These are regulations which lay down criteria which if met by an agreement entitle the parties to assume that exemption under Article 85(3) applies to their agreement. Moreover, parties to agreements need not notify their agreement if it is of a type specified in Article 4(2) of Regulation 17/62/EEC. This exempts certain specified agreements from notification.

These categories of exempt agreements are discussed below.

III. Why notify: Main Practical Benefits

(i) Exemption under Article 85(3)

Exemption under Article 85(3) is unobtainable unless an agreement has been notified.

(ii) Protection in National Courts

National courts must respect an exemption granted under Article 85(3) and such a cartel may be enforced before national courts without fear of the other side pleading a "defence" i.e. that they are not bound by the agreement because it is caught by Article 85(1) and hence void under Article 85(2) EEC. An agreement that has not been notified is not secure from Article 85(1), a national court can not grant exemption under Article 85(3) and may thus be forced to strike down an agreement under Article 85(2). However, the Court may decide to suspend the hearing to enable the parties to obtain the Commission's opinion though it is not bound to adopt this course of action.

(iii) Negative Clearance

Notification enables the parties to seek a Commission negative clearance decision that their agreement is not within Article 85 or 86 EEC.

(iv) Fines

Under Article 15(5) of Regulation 17/62/EEC fines may not be imposed on parties to agreements notified to the Commission in respect of conduct operative from the date of the notification to the date of a decision in respect of Article 85(3). Immunity from fine does not exist for the period prior to notification nor does it apply to any activity not strictly defined in the notification documents. A mere application for negative clearance however affords no immunity from fines. Most parties couple their application for negative clearance with one for Article 85(3) exemption in order to get around this difficulty. Joint applications are envisaged in form A/B.

(v) Establishing Credability with the Commission

If parties notify their agreement to the Commission they have the advantage of having demonstrated openness and good faith. As such they are more likely to have their version of the facts and assessment of the market accepted. If it becomes clear that parties are only notified because they have heard that the Commission are "on to them" or that

a rival or customer has complained to the Commission the latter may be unlikely to accept at face value the parties version of events when it is notified.

(v) Old Agreements

In the case of an "old" agreement(~~section F above~~) duly notified to the Commission provisional validity exist. Moreover, the Commission may under Article 7 of Regulation 17/62/EEC, validate an old agreement that has been modified to fit within Article 85(3). This provision provides an incentive for old cartels and agreements not qualifying for exemption to modify to obtain exemption. If they modify the Commission may grant exemption with retroactive effect i.e. during the period they were not notified in.¹⁴² As time marches on this provision has decreasing relevance as "old" agreements become scarcer.¹⁴³ A Commission decision under this provision does not prejudice the interests of third parties or affect pending legal actions.¹⁴⁴

(vi) Accession Agreements

It is believed that the same principles as apply to old agreements apply to accession agreements i.e. agreements which become subject to competition rules as a result of accession of a State to the EEC.

IV. Agreements Exempt from Notification under Article 4(2) of Regulation 17/62/EEC

Article 4(2) of Regulation 17/62/EEC exempts from the need to notify four categories of agreement because they are considered less disruptive to competition. An agreement exempt is only free from the duty to notify, it is not free from the prohibition in Article 85(1). To obtain exemption under Article 85(3) parties must still notify the agreement. Though, of course if the agreement fits within a bloc-exemption it need not be notified and Article 85(3) exemption may be assumed. One may ask what benefit Article 4 of Regulation 17/62/EEC confers. The answer is immunity from fine; Article 4 covers types of agreement generally considered to be innocuous. Non-notification is hence not viewed as serious. Should the Commission subsequently decide that the agreement is restrictive it will refrain from imposing fines. The parties may, if they wish, notify the agreement to the Commission who will probably deal with the matter by means of a comfort letter. Four categories of agreement fall within Article 4(2). These may essentially be summarised as:

(i) purely domestic agreements; (ii) certain restrictions on price

accepted by only one party; (iii) certain intellectual property agreements; and (iv) certain small scale joint ventures.

(i) Purely Domestic Agreements

Article 4(2)(1) exempts from notification agreements, decisions and concerted practices where:

"enterprises of only one Member State take part and the agreements, decisions or practices relate neither to imports nor to exports between Member States."

The test here is legal domicile of the undertaking and not the location of management even though the latter is the nerve centre of the company. The Court has held that an agreement which operates locally in a Member State does not relate to imports or exports even though the contract goods are imported. Thus if X in the UK is an importer of German radios and appoints Y to be his local dealer in a small area of the UK then the agreement is exempt from notification since it has only local operation; it is immaterial that the product is imported.¹⁴⁵ The exemption and benefit of Article 4(2) may not be obtained simply by a foreign parent delegating the negotiation and conclusion of contracts in a Member State to local agents or subsidiaries there. Thus, if X a large UK parent instructs its subsidiary Y in France to enter a series of local agreements then Article 4(2) affords no sanctuary. The agreements will be treated as if it were entered by X and not Y.¹⁴⁶

x Article 4(2)(1) has been useful in the past in respect of patent licenses between two undertakings in Member States. To be exempt the license must not contain any export restrictions or other disincentives.¹⁴⁷

Where in doubt parties may well decide to notify their agreement as a precautionary measure. Indeed Form A/B makes special provision for parties to express the fact that notification is viewed by them as a precautionary measure (see below).

(ii) Certain Restrictions on Price accepted by only One Party

Article 4(2)(2)(a) exempts from notification agreements etc. where:

"not more than two undertakings are party thereto, and the agreements only ... restrict the freedom of one party to the contract in determining the prices or conditions of business upon which the goods which he has obtained from the other party to the contract may be resold"

Vertical fixing of resale prices and terms and conditions of trade are exempt from notification. Though it should be noted that resale price maintenance is regulated in the United Kingdom by the Resale Prices

Act 1976. Under Article 4(2)(2)(a) only agreements setting resale prices and terms concerning goods which one party purchases from the other are excepted from notification. This exception does not apply to services though there is no logical reason for the distinction. To be exempt the agreement must relate to the fixing of resale prices or conditions exclusively. If additional restrictions exist in the agreement e.g. non-competition clauses, restrictions of customer clauses, restrictions on market in which goods may be sold clauses, then no exemption lies.

The agreement must be between two persons only and the restrictions accepted by one party only.¹⁴⁸ It matters not that the parties are incorporated and domiciled in different Member States. Under this Article a single supplier may impose identical restrictions on all its customers (dealers) and exemption remains. Thus, if supplier X enters ten different agreements with wholesalers which fix resale prices this system comprises simply ten separate agreements of two parties. One does not view the agreements collectively.¹⁴⁹

(iii) Certain Intellectual Property Agreements

Article 4(2)(2)(b) reads that agreements are exempt from notification where:

"not more than two undertakings are party thereto, and the agreements only impose restrictions on the exercise of the rights of the assignee or user of industrial property rights - in particular patents, utility models, designs or trade marks - or of the person entitled under a contract to the assignment, or grant, or the right to use a method of manufacture or knowledge relating to the use and to the application of industrial processes."

This section applies to: patents, utility models, designs, trade marks, and other intellectual property rights, for example, copyright¹⁵⁰ and know-how. It is generally considered that this exemption has very limited application.

Article 4(2)(2)(b) only applies to exempt restrictions on the exercise of the "rights" of the intellectual property. The following terms and restrictions applicable to a licensor (party granting the license) would not fall within the sanctuary of the article since that provision applies only to the use of the intellectual property by a licensee or assignee¹⁵¹

- restriction on licensor not to grant any other license i.e. licensor grants licensee an exclusive license;

- restriction on licensor not to grant additional licenses to third parties without original licensee's consent;
- obligation on licensor to protect licensees territory;
- restriction on licensor requiring him to refrain from producing or selling competing products (i.e. non-competition clauses);
- restriction on licensor requiring him to refrain from undercutting licensee's price or requiring him to sell at a fixed price.

Article 4(2)(2)(b) only exempts from notification restraints upon the licensees or assignees behaviour (i.e. not the original holder of the right). The only restrictions benefiting are those which relate exclusively to the rights of the licensee, user or assignee to "use a method of manufacture or knowledge relating to the use and to the application of industrial processes". This is a narrow exemption. The following have been held not to be exempt:

- no-challenge clauses;¹⁵²
- exclusive purchasing requirement on licensee with respect to products not covered by the patent;
- obligation on licensee to calculate royalties by reference to selling price of completed product produced in accordance with a patent;
- obligation on licensee to affix notices about the license on the finished product;¹⁵³
- obligation on licensee to acknowledge trade marks not relevant to the license.

It is generally advised that no great reliance should be placed on this exemption. The Commission have taken a narrow view of it.¹⁵⁴ Reference to Commission decisions on the licensing and assignment of intellectual property rights should be made and to the bloc-exemption on patent licensing.¹⁵⁵ See Chapter 13 for details.

(iv) Certain Joint Ventures: Standards and Types

Under Article 4(3)(a) certain joint ventures are exempt from notification. These include agreements which have as their sole object:

"the development or uniform application of standards or types."¹⁵⁶

The word "standards" usually refers to parts of specific products whereas "types" applies to whole products or aggregates of products. This distinction is not absolute, the European DIN (industrial) standards

include not only parts but also whole products. The distinction in practice may be discarded since agreements relating to specific product parts and to whole products may be exempt; *though* only agreements relating to development or application may be exempt. Thus, an agreement between X and Y to charge a certain price for products of a certain standard is not exempt. The subject matter of the agreement *is* irrelevant, it can relate to shape, colour, size, form, design, technical levels, components etc. The number and domicile of the participants to the agreement is also irrelevant.¹⁵⁷

The following comments apply also to (v) (joint research and development) and (vi) (specialisation) below. To be exempt the agreement must have the sole object specified in the Article. This is a serious limiting factor; the existence of any other objective in an agreement negates application of the exemption. Both R & D and specialisation agreements have specific bloc-exemptions devoted to them thus rendering the Article 4 exemption somewhat redundant. Both bloc-exemptions are discussed in the Chapter on joint ventures and co-operation to which reference may be made. In terms of overlap between these "sole object" provisions an agreement between X and Y which has specialisation and R & D features exempt under the respective parts of the Article will not be free from notification since the Article only exempts an agreement which has as its main object one of the objects laid down in Article 4(3)(a)-(c). See Chapter 12 for details.

(v) Certain Joint Ventures: Research and Development

Agreements having as their sole object, "joint research and development are exempt from notification under Article 4(3)(b). The agreement must thus not incorporate any restrictions on production or sale or general distribution since these do not relate solely to the R & D. The number of participants and their domicile is irrelevant. See Chapter 12 for further details.

(vi) Certain Joint Ventures: Specialisation Agreements

Certain specialisation agreements are exempt from notification under Article 4(3)(c) of Regulation 17/62/EEC. To earn exemption the agreement must satisfy certain quantitative criteria. The Article excludes agreements having as their sole object:

"Specialisation in the manufacture of products, including agreements necessary for the achievement thereof;

- where the products which are the object of specialisation do not, in a substantial part of the Common Market, represent more than 15 per cent of the volume of business done in identical products or those considered by the consumers to be similar by reason of their characteristics, price and use, and
- where the total annual turnover of the participating undertakings does not exceed 200 million units of account."

Specialisation agreements are discussed in the chapter on joint ventures and co-operation to which reference may be made.

The exemption in the Article applies where the agreement concerns specialisation alone. The existence of any other restrictions unrelated to specialisation renders the exemption inapplicable. The Article only applies to products; no exemption exists for services. Agreement "necessary" for the achievement of the specialisation agreement are exempt from notification e.g. repair and after-sales service agreements and other collateral guarantees. The number and domicile of participants is irrelevant.

K. FORM A/B: METHOD OF NOTIFICATION

I. Relevance of Form A/B

Use of Form A/B is considered an obligatory condition of a proper notification by the European Court who justify their strict line on the necessity of easing the administrative burden of the Commission.¹⁵⁸ If X and Y notify on Form A/B a restrictive agreement, for example, a standard form contract, and then at a later date amend the standard form contract in a material fashion, the new amended standard form contract must also be notified on Form A/B. Parties must not assume that they can obtain Article 85(3) exemption for an amendment simply by sending a copy of the amended agreement to the Commission.¹⁵⁹ Furthermore, even if the Commission, when discussing an amendment with the parties, employ in correspondence the reference number assigned to the original agreement, this does not imply that the Commission will consider the amendment in conjunction with the original agreement. Use of reference numbers is simply an administrative convenience.¹⁶⁰ If at all in doubt about variations and amendments parties should notify the changes on Form A/B.

II. Contents of Form A/B

Form A/B¹⁶¹ must be completed in conjunction with any additional information required by the Commission. In summary the Commission require details of the following:

(i) Identity of parties

Full details, including name, address, telephone, telex and telefax numbers and brief descriptions of the parties should be given. For partnerships, sole traders or any other unincorporated body details of the proprietors or owners should be given.

(ii) Purpose of application/notification

Parties must signify whether they are requesting negative clearance and/or exemption. They must also state whether they are seeking to employ the opposition procedure as laid down in various bloc-exemptions (e.g. on R & D, specialisation and patent licensing).

(iii) Brief description of arrangement or behaviour

Parties should give a summary of the arrangement or behaviour noting its nature, purpose, date(s), and duration.

(iv) Market

Parties should give details of the nature of the goods or services affected by the arrangement or behaviour. Where known the customs code of the goods or services according to the Brussels nomenclature should be given. A brief description of market structure is also required. For this parties should give information: sellers, buyers, geographical extent, global turnover, extent or degree of competition, ease of entry and level of entry barriers, number of substitute products. Where studies of the market are known of parties may refer to them.

(v) Fuller details of the party or parties

The information under this heading should elaborate upon that given in (iii) above. Where any of the parties form part of a group details of the name and address of the ultimate parent company should be given. A group relationship exists where a firm: owns more than 50% of the assets or capital; or, has power to exercise more than 50% of the voting rights; or, has power to appoint more than 50% of the board(s); or, has the right to manage the affairs of another. The Commission also request a brief description of the business of the group (e.g. 'motor vehicle manufacturer', 'computer service bureau', 'conglomerate') and, if

possible, a copy of the last set of group accounts. Additionally, the Commission require data on: the name and address of any other company in the group competing in a market affected by the arrangements or in any related market; the most recently available total turnover of each of the parties and, where relevant, the group; the turnover and market share of each party in the goods or services affected by the arrangements in each Member State in the Community and worldwide for each of the last three years and its forecast turnover and market share in the future; any substantial interest falling short of control (between 25 and 50%) in another company competing in a market affected by the arrangements.

(vi) Further details of the arrangements

Where the arrangements are reduced in whole or in part to writing, details should be given and 11 copies of the text notified to the Commission, though technical data may be omitted provided reference to the omitted data is included. The Commission further require details of relevant restrictions e.g. adherence to price and terms conditions; limitations or control over production, distribution, technical development or investment; sharing of markets or supply sources; restrictions on purchasing or reselling freedom; application of discriminatory terms; tying clauses. Also required are details of the Member States and third countries affected. Failure to fully itemise the restrictions in the agreement for the Commission's benefit does not prejudice the notification provided that the details given are at least reasonably indicative.¹⁶²

(vii) Reasons for negative clearance

Parties should give the Commission details of which parts of the arrangement or behaviour raise questions of compatibility with competition rules. Parties should also explain why they consider Articles 85(1) and/or 86 EEC inapplicable.

(viii) Reasons for exemption under Article 85(3)

Parties should also explain why they consider their agreement suitable for exemption stressing the factors outlined in Article 85(3).

(ix) Other information

Parties should also give details of other proceedings or informal contacts with the Commission or other national authorities or courts concerning the current or related arrangements. In addition any other information the parties consider helpful in allowing the Commission to

appreciate whether any restrictions exist or whether, if they do exist, they may have other beneficial aspects. Parties should also state whether they intend to produce further supporting facts or arguments not yet available and, if so, on which points. Finally, parties should give an indication of the urgency of the requirement for a decision.

(x) Provisional validity

Parties should ensure the accuracy of the details they notify. The Commission may impose financial penalties for the intentional or negligent notification to them of incorrect or misleading information.¹⁶³ Once notified an agreement enjoys provisional validity pending a Commission decision. However, this protection only applies to agreements which fall within the limits of the activity described in the notification.¹⁶⁴

L. COMPLAINTS BY THIRD PARTIES: FORM C

The making of a complaint is a valid and legitimate aspect of commercial practice. The Commission have developed a form - Form C - for use by complainants. Use of Form C (unlike Form A/B) is non-obligatory, a complaint may be made by simple letter. A complaint may even be made anonymously though in such cases the Commission feel under no obligation to follow up the complaint; though of course they may well do so. Complaints may be made in respect of Article 85 or 86 EEC.

I. Form of Complaint

(i) Details of complaints

Complainants must provide identification material which is similar to that needed in Form A/B. Details of the alleged infringement should be given setting out the facts which make up the alleged infringement. The Commission further require information on the extent to which trade between Member States may be affected.

(ii) Existence of legitimate interest

To submit a complaint a legitimate interest must be established. This is not a difficult requirement. Indeed, if a person with only a purely theoretical interest in a case were to submit a complaint and it had clear validity then the Commission would most likely respond. A complainant may be a natural person, a company, an association, a trade

union, a consumer association.¹⁶⁵ A legitimate interest exists if the complainant will or might suffer prejudice from the complained of parties conduct. Thus, customers, rivals, suppliers etc. are covered. Even parties to an agreement itself may complain.¹⁶⁶ A complaint under Form C may only be made in respect of the competition rules in Articles 85 or 86 EEC in respect of other matters e.g. agriculture complaints would be made to directorates of the Commission other than that responsible for competition.

(iii) Evidence

The Commission requires information concerning persons able to testify to the facts set out in the complaint and concerning persons affected by the alleged breach. A complainant should send all relevant documentary evidence, for example, texts of agreements, minutes of negotiations and meetings, terms of transactions, business documents and circulars. Any pertinent statistics may be submitted e.g. in respect of price trends, terms of transactions, terms of supply or sale etc. Any technical data pertaining to production or sale etc. is of value to the Commission. The complainant might also name experts able to supply this information.

The Commission will be interested in all approaches made and all steps taken prior to the complaint with a view to terminating the infringement. Thus results of proceedings commenced before national authorities or complaints thereto may be furnished.

Copies of Form C may be obtained from the Commission's Information Offices in each Member State and also outside the EEC. In London forms may be obtained from: 8 Storey's Gate, London SW1P 3AT. Tel: 2228122. There are also offices in Belfast, Cardiff and Edinburgh.

(iv) Time

The processing of a case can span six months to three years and more. Where a complainant can establish the need for rapid Commission action the process may be expedited.¹⁶⁷ There exists the possibility for the Commission to take a decision ordering interim measures. Complainants should indicate in the complaint whether they wish the Commission to consider this option.

(v) Refusal by Commission to follow up a complaint

The Commission may refuse to pursue a complaint where there appears to be "insufficient grounds" for initiating the procedure for establishing the existence of a breach of the rules.¹⁶⁸ Where the Commission reject

the complaint they must inform the complainant of their reasons and allow the latter to submit any further comments in writing.¹⁶⁹ If the complainant submits fresh facts the file may of course be reopened.¹⁷⁰ Commission practice at the end of the procedure is to notify the complainant by a formal letter.¹⁷¹ Such a letter is an "act" of an institution of the Community and hence may be made the subject to judicial review proceedings before the Court under Article 173 EEC i.e. the complainant may appeal to the Court.

It has not yet been definitively established whether a complainant has a right to demand a decision from the Commission on the matter irrespective of whether the latter's practice is to issue a letter which may be the basis of an appeal to the Court. It has been cogently argued that since the Court has expressed concern for the legitimate rights of a complainant these cannot be effectively safeguarded if the latter is not entitled to a decision or other "act" of the Commission.¹⁷²

(vi) Absolute privilege for documents submitted in a complaint: Confidentiality

It has been established by the Court of Appeal in the UK that documents submitted in the course of a complaint to the Commission may not be used as the basis for a libel action in the English Courts.¹⁷³

Complainants may submit their views to the Commission in confidence. They should make sure the Commission is aware of the need for this though they are not obliged to justify their request. The Commission treats confidential complaints that they wish to follow up as "own initiative complaints".¹⁷⁴ Confidential complaints and supporting documents will not be made available to the complained of party.

FOOTNOTES

1. e.g. National Panasonic (UK) Limited [1983] 1 C.M.L.R. 497. Agreement consisted of internal memoranda, a telex message and some correspondence.
2. e.g. Quinine Cartel [1969] C.M.L.R. D41; [1970] E.C.R. 661.
3. e.g. Franco-Japanese Ball-Bearings Agreement [1975] 1 C.M.L.R. D 8.
4. NAVEWA-ANSEAU [1982] 2 C.M.L.R. 193; Sorema v. High Authority (Case 67/63) [1964] E.C.R. 151 (case under the European Coal and Steel Treaty); Frubo v. Commission (Case 71/74) [1975] E.C.R. 563; [1975] 2 C.M.L.R. 123; Central Heating [1972] C.M.L.R. D130. Thus mutual or reciprocal exclusive dealing agreements whereby the members of one association agree only to trade with the members of another trade association (thereby putting a premium on association membership) is also an agreement subject to Article 85 EEC.
5. e.g. SSI [1982] 3 C.M.L.R. 702 at p. 741 para. 106: "An understanding between associations of undertakings may constitute an agreement within the meaning of Article 85(1) even if its terms have not been set down in a written document signed by the parties."
6. e.g. Italian Cast Glass O.J. 1983 L 383/19.
7. SOCEMAS [1968] C.M.L.R. D28. Though similar documents have also been described as a "decision" - ASPA [1970] C.M.L.R. D25.
8. European Glass Manufacturers [1974] 2 C.M.L.R. D50; IFTRA Rules for Producers of Virgin Aluminium [1975] 2 C.M.L.R. D20.
9. e.g. Consten and Grundig v. Commission (Cases 56 and 58/64) [1966] E.C.R. 299; [1966] C.M.L.R. 418. There are literally thousands of agreements between parties at different distributional levels which have been reviewed by the Commission under Article 85 EEC. Indeed approximately 20-30% of the Commission's case load has in the past concerned distribution schemes.
10. e.g. IFTRA rules for Producers of Virgin Aluminium [1975] 2 C.M.L.R. D20. See also Sirena v. Eda [1971] C.M.L.R. 260 where the assignment of a trade mark in 1937 was held to constitute an agreement for the purposes of Article 85 when the Treaty of Rome became operative some twenty years later.
11. See Sirena (supra).
12. Supra, see also, Re Advocaat [1974] 2 C.M.L.R. D79; and, Remington Rand trade mark Bull E.C. 3/69 No. 40.
13. See Ravenseft v. Director General of Fair Trading [1977] 1 All E.R. 47 (Q.B.D.). Though for other reasons it is considered to fall outside of the RTPA 1976, see Chapter 2.
14. The legal form of an undertaking is irrelevant - GEMA I [1971] C.M.L.R. D35.

15. This has long been orthodox Commission thinking. See Commission answers to W.Q. No. 48 O.J. 1963 2234; and, W.Q. No. 149 O.J. 1968 C109/5. See also W.Q. 1152/82 O.J. 1982 C339/15 where the Commission stated: "The Commission has already indicated on a number of occasions that not only nationalized firms, as regards their own conduct, but also the Member States, as regards their conduct towards such firms, are entirely subject to the provisions of the EEC Treaty, including those concerning freedom of competition. As far as Community law is concerned, the position of nationalized firms is therefore no different from that of private firms."
16. General Motors v. Commission (Case 26/75) [1975] E.C.R. 1367. - Private company given statutory monopoly right in respect of a service to be provided to car importer an undertaking under Article 86 EEC. However, see AROW v. BNIC [1982] 2 C.M.L.R. 240 at pp. 254, 255: A Government Commissioner who notifies to a trade association under statutory authority a minimum price for the sale of its members goods is not an undertaking under Article 85(1) EEC.
17. GEMA I [1971] C.M.L.R. D35.
18. See e.g. GVL [1982] 1 C.M.L.R. 221. A non-profit making performing rights society was held to be an undertaking under Article 86 EEC on abuse of a dominant position. The Society did take a small percentage of the royalties it collected to defray its administrative overheads.
19. [1978] 3 C.M.L.R. 306.
20. In West Germany the cartel rules have been applied to boxers (see BKA May 3, 1961; BB, 1961, 657). In the United Kingdom an agreement between boxing promoters came to light in December 1984 which revealed that leading promoters had a clandestine agreement to share profits from promotions which was kept secret from the boxers themselves.
21. See e.g. Reuter/BASF [1976] 2 C.M.L.R. D44; and, IOIP v. Beyrard [1976] 1 C.M.L.R. D14.
22. Cafeteros de Colombia [1983] 1 C.M.L.R. 703.
23. IAZ International Belgium SA and Others v. Commission (cases 96-102, 104-105, 108 and 110/82) [1984] 3 C.M.L.R. 276 at para. 20 of the judgments; FRUBO (Case 71/74) [1975] E.C.R. 580(E C J) (for Commission decision see [1974] 2 C.M.L.R. D89); Vereeniging Van Cementhandeleren [1973] C.M.L.R. D16.
24. AROW v. BNIC [1983] 2 C.M.L.R. 240.
25. Centrafarm BV and de Peijper v. Winthrop BV (Case 16/74) [1974] 2 C.M.L.R. 480; [1974] E.C.R. 1183 at para. 32 of judgment.
26. See e.g. AEG-Telefunken v. Commission (Case 107/82) [1983] E.C.R. 3751 at p 3199
27. See, Salomon v. Salomon [1897] A.C. 22 and, see also, Section 154 Companies Act 1948. See Mann (1973) 22 I.C.L.Q. 35 at p. 48 for commentary on this aspect. See also Section 43(2) RTPA 1976 which overcomes this problem and states that for purposes of UK competition law "any two or more interconnected bodies corporate, or any two or more individuals carrying on business in partnership with each other, shall be treated as a single person."

28. [1972] C.M.L.R. 577; [1972] E.C.R. 619 at paras. 132-135 of the judgment. See also, Peroxygen Cartel [1985] 1 C.M.L.R. 481 at para. 49 - the present owner of an undertaking which infringed Article 85 before the present owner acquired control is nonetheless responsible for the subsidiary if, after it obtained control, it adopted the policies and objectives of the subsidiary.
29. See e.g. Cafeteros de Colombia [1983] 1 C.M.L.R. 703; Johnson & Johnson [1981] 2 C.M.L.R. 287.
30. But c.f. Moet et Chandon (London) Ltd. [1982] 2 C.M.L.R. 166 where the Commission held the parent responsible for the behaviour of its subsidiaries and fined the parent accordingly.
31. See e.g. BMW Belgium v. Commission (Cases 32 and 36 82/78) [1980] 1 C.M.L.R. 370; [1979] E.C.R. 2435 at para. 24 of the judgment: "... the band of economic dependence existing between a parent company and a subsidiary does not preclude a divergence in conduct or even a divergence of interests between the two companies."
32. See Christiani & Nielsen [1969] C.M.L.R. D36; Kodak [1970] C.M.L.R. D19; Continental Can (Case 6/72) [1973] E.C.R. 215; Beguelin v. Import Export and Marbach [1972] C.M.L.R. 81 [1971] E.C.R. 949. See also Article 4 of Regulation 83/83/EEC O.J. 1983 L 173/1 (see Chapter 10, Section C).
33. Re Zoja/ICI [1973] C.M.L.R. D50 Commission decision.
34. But c.f. Langenscheidt/Hachette [1982] 1 C.M.L.R. 181 an agreement between an undertaking and its 50% owned joint venture company was an agreement within Article 85(1) EEC; See also, Remington Rand trade mark Bull E.C. 3/69 Nos. 40, 41; Scott Paper O.J. 1968 C110/2.
35. The requirement of de facto control is found in a number of well established authorities. See e.g. Kodak [1970] C.M.L.R. D19; Geigy (Case 52/69) [1972] E.C.R. 787; Continental Can (Case 6/72) [1973] E.C.R. 215 at p. 242; Centrafarm/Sterling Drug (Case 15/74) [1974] E.C.R. 1147 at p. 1168.
36. One can imagine the illogical situation whereby a parent who leaves its wholly owned subsidiary to determine its own policy suddenly requires the subsidiary to refrain from competing with the parent in a specified territory. Article 85 EEC might apply to such a situation. However, in order to exclude Article 85 EEC the parent adopts a policy of reorganisation and total control of the subsidiary such that it becomes simply an economic arm of the parent. Article 85 is excluded when competition is eradicated most completely. One would assume that if Article 85 does not apply to the more extreme situation it likewise does not apply to the lesser situation.
37. See Zoja/ICI [1973] C.M.L.R. D50 (Commission decision).
38. Thus if X with 30% of the shares in Y by chance was in the majority at a general meeting and used the majority to vote Y into a restrictive agreement with X then Article 85 would still apply.
39. See e.g. European Sugar Cartel (Cases 40-48, 50, 54-56, 111, 113, 114/73) [1976] 1 C.M.L.R. 295; [1975] E.C.R. 1163 at p. 1196.

40. See, Chevron Oil Europe [1975] 1 C.M.L.R. D68; Bayer/Gist Brocades [1976] 1 C.M.L.R. D98. An agreement of duration 5 years is inadequate to indicate an aim of restructuring: De Laval Stork [1977] 2 C.M.L.R. D69.
41. See, Langenscheidt/Hachette [1982] 1 C.M.L.R. 181.
42. See Re Dyestuffs [1969] C.M.L.R. D23; on appeal, ICI v. Commission (Case 48/69) [1972] E.C.R. 619; [1972] C.M.L.R. 557 at p. 622: "If Article 85 distinguishes the concept of 'concerted practice' from that of 'agreements between enterprises' or 'decisions by associations of enterprises', this is done with the object of bringing under the prohibitions of this Article a form of co-ordination between enterprises which, without going so far as to amount to an agreement properly so called, knowingly substitutes a practical co-operation between them for the risks of competition. By its very nature, then, the concerted practice does not combine all the elements of an agreements, but may, inter alia, result from a co-ordination which becomes apparent from the behaviour of the participants." This definition is very similar to the definition of "arrangement" in Section 43 RTPA 1976 discussed in Chapter 1.
43. European Sugar Industry (Cases 40-48, 50, 54-56, 111, 113, 114/73). [1976] 1 C.M.L.R. 295; [1975] E.C.R. 1663 at pp. 1993 and 2035.
44. See e.g. the various dyestuffs judgments of the European Court: BASF (Case 49/69) [1972] E.C.R. 713; Bayer (Case 51/69) [1972] E.C.R. 745; Geigy (Case 53/69) [1972] E.C.R. 845; Francolo (Case 54/69) [1972] E.C.R. 851; Cassella (Case 55/69) [1972] E.C.R. 887; Hoechst (Case 56/69) [1972] E.C.R. 927; ACNA (Case 57/69) [1972] E.C.R. 933.
45. [1972] C.M.L.R. 557 at p. 622 para. 66. The definition was essentially confirmed in European Sugar Industry (supra) at paras. 173 and 174 of the judgment. The European Court has, more recently, affirmed the position it adopted in Dyestuffs and Sugar: Zuchner v. Bayerische Vereinsbank (Case 172/80) [1982] 1 C.M.L.R. 313; [1981] E.C.R. 2021. For the Commission's practical application of these principles see Hasselblad [1982] 2 C.M.L.R. 233 at paras. 42-51 of the decision; SSI [1982] 3 C.M.L.R. 702 at paras. 123-130; Rolled Zinc [1983] 2 C.M.L.R. 285 at paras. BI and II.
46. ICI v. Commission (Case 48/69) [1972] E.C.R. 619 at p. 659; BP Kemi-DDSF [1979] 3 C.M.L.R. 684. C.R.A.M. v. Commission (Cases 29 and 30/83) [1985] 1 C.M.L.R. 688 at para. 10 of the judgment.
47. e.g. Musique Diffusion Francaise S.A. v. Commission (Pioneer) (Cases 100-103/80) [1983] 3 C.M.L.R. 221; see also Fertiliser Bull E.C. 1/77 No. 2119.
48. e.g. European Sugar Industry (Cases 40-48, 50, 54-56, 111, 113, 114/73) [1976] 1 C.M.L.R. 295 [1975] E.C.R. 1663.
49. Hasselblad GB v. Commission (Case 86/82) [1984] 1 C.M.L.R. 559 per Advocate General Slynn.

50. See Procureur Du Roi v. Dassonville (Case 8/74) [1974] 2 C.M.L.R. 436, [1974] E.C.R. 837 at p. 852 which defines a measure having equivalent effect to a quantitative restriction in these extraordinarily wide terms.
51. Public-owned companies and companies granted exclusive rights by Government are no less subject to Articles 85 and 86 by virtue of their Governmental involvement - Article 90 EEC. See W.Q. No. 2097/82 O.J. 1983 C219/1 (1 February 1983) where the Commission state: "The fact that a corporation is publically owned does not of itself mean that the state is involved in every activity in which the corporation takes part." See also W.Q. No. 1152/82 O.J. 1982 C339/15 (22 September 1982) The Milk Marketing Board is in UK law a public body (See, R. v. Milk Marketing Board Ex Parte North (1934) 50 T.L.R. 559) but has been held to be subject to Article 86 EEC by the Court of Appeal: An Bord Bainne v. Milk Marketing Board [1984] 1 C.M.L.R. 519; [1984] 2 C.M.L.R. 584 (C.A.).
52. (Case 249/81) [1983] 2 C.M.L.R. 104, [1982] E.C.R. 4005.
53. (Case 29/82) [1983] 2 C.M.L.R. 681 at p. 692 para. 9. See also Vriend (Case 94/79) [1980] 3 C.M.L.R. 473; [1980] E.C.R. 327.
54. W.Q. No. 1081/82 O.J. 1982 C331/11 (22 August 1982).
55. W.Q. No. 2097/82 O.J. 1982 C219/1 (1 February 1983). It is known that in 1982/3 the CBI were considering a "Buy British Campaign".
56. [1982] 2 C.M.L.R. 240. The Commission fined BNIC 160,000 ECU (approximately £99,000). The desire to punish BNIC meant that the Commission had to use Articles 85 and 86 and treat BNIC as a private body since the Commission may not fine Member States and their agencies under Article 30-36 EEC. They may only refer Governments to the Court for a declaration that the Member State has failed to fulfil an obligation under the Treaty. (See Article 169 EEC for this procedure).
57. See Consten & Grunding v. Commission (Case 56 and 58/64) [1966] C.M.L.R. 418, [1966] E.C.R. 299 at pp. 322 and 389; Hugin v. Commission (Case 22/78) [1979] 2 C.M.L.R. 345, [1979] E.C.R. 1869 at para. 17 of the judgment. See also, Frubo v. Commission (Case 71/74) [1975] 2 C.M.L.R. 123 [1975] E.C.R. 563 at para. 38 of the judgment; La Technique Minière v. Maschinenbau Ulm GmbH (Case 56/65) [1966] C.M.L.R. 357; [1966] E.C.R. 235.
58. Consten & Grunding v. Commission (supra); See also Stremsel-Kleursefabriek v. Commission (Case 61/80) [1982] 1 C.M.L.R. 240; [1981] E.C.R. 851 at para. 14 of judgment which repeats the Consten & Grunding formulation. The fact that the Court speaks in terms of probability presumably derives from the French text of the Treaty of Rome which uses the phrase "susceptible d'affecter" instead of "may".
59. Re Comptoir Francais de L'Azote [1968] C.M.L.R. D57; Comptoir Belge de L'Azote (Cobelaz) [1968] C.M.L.R. D68; Cimbel [1973] C.M.L.R. D167; Fine Papers [1972] C.M.L.R. D94.
60. e.g. German Ceramic Tiles [1971] C.M.L.R. D6; Gas Water Heaters [1973] C.M.L.R. D231; Groupement des Fabricants de Papier Peints de Belgique v. Commission (Case 73/74) [1976] 1 C.M.L.R. 589 [1975] E.C.R. 1491.

61. e.g. National Sulphuric Acid [1980] 3 C.M.L.R. 429.
62. e.g. Miller International Schallplatten GmbH v. Commission (Case 19/77) [1978] 2 C.M.L.R. 334; [1978] E.C.R. 131 at para. 7 of the judgment. An export ban to a non-EEC state may affect inter-state trade if without the restriction there is a reasonable probability that the goods would be re-imported. See decisions of Commission in: SABA [1976] 1 C.M.L.R. D6; Junghans [1977] 1 C.M.L.R. D82; Campari [1978] 2 C.M.L.R. 397. The effect might particularly occur where the export ban is to EFTA countries which enjoy free trade rights with the EEC.
63. e.g. Junghans [1977] 1 C.M.L.R. D82.
64. *ibid.*
65. Deutsche Philips [1973] C.M.L.R. D241.
66. e.g. Brasserie de Haecht SA v. Wilkin (No. 1) (Case 23/67) [1968] C.M.L.R. 26; [1967] E.C.R. 407; See also Deutsche Castrol [1983] 3 C.M.L.R. 165 at para. 6 of the decision
67. e.g. Cematax [1973] C.M.L.R. D135.
68. Articles 74-84 EEC. See Kerse, Antitrust Procedure (1981) pp. 17-20.
69. European Sugar Cartel [1973] C.M.L.R. D65 Commission decision; See Second Competition Report (1973) paras. 58 and 65.
70. For a more detailed though now slightly dated exposition see Barounos, Hall and James, EEC Antitrust law (1975) pp. 28-30.
71. Volk v. Vervaecke (Case 5/69) [1969] C.M.L.R. 273; [1969] E.C.R. 295.
72. See e.g. Machines Outils [1968] C.M.L.R. D23; Dunlop/Pirelli O.J. 1969 L323/21 (24 Dec. 1969); SAFCO [1972] C.M.L.R. D83 - parties argued that agreement served to open up and increase penetration of a market.
73. Voelk v. Vervaecke (Case 5/69) [1969] C.M.L.R. 273; [1969] E.C.R. 295. See also, Société anonyme Cadillon v. Hoss (Case 1/71) [1971] C.M.L.R. 420; [1971] E.C.R. 351.
74. [1968] C.M.L.R. D28. In Societe de Vente de Ciments et Betons De L'est S.A. v. Kerpen & Kerpen (Case 319/82) [1985] 1 C.M.L.R. 511 the Court held that where the quantity of goods in question represented more than 10% of French exports to Germany of those goods de minimis could not be claimed as a defense.
75. White Lead [1979] 1 C.M.L.R. 464 (Commission decision).
76. Grossfillex-Fillistorf [1964] C.M.L.R. 237.
77. Raymond/Nagoya [1972] C.M.L.R. D45; AEG/Rieckermann [1968] C.M.L.R. D78.
78. See, European Sugar Agreement [1973] C.M.L.R. D65 (Commission decision).

79. See O.J. 1977 C313/3 (December 29, 1977) replacing O.J. 1970 C64/1 (May 27, 1970).
80. *ibid.*
81. See e.g. EMI Records Ltd. v. CBS United Kingdom Ltd. (Case 51/75) [1976] 2 C.M.L.R. 235, [1976] E.C.R. 811 at para. 30 of the judgment.
82. See e.g. Lancôme v. Etos (Case 99/79) [1981] 2 C.M.L.R. 164, [1980] E.C.R. 2511 at para. 24 of the judgment.
83. See e.g. De Norre v. Concordia (Case 47/76) [1977] 1 C.M.L.R. 378, [1977] E.C.R. 65. The Court has employed this broad analysis approach in respect of requirements contracts in tied house situations.
84. See e.g. NAVEWA-ANSEAU [1982] 2 C.M.L.R. 193.
85. Miller Schallplatten v. Commission (Case 19/77) [1978] 2 C.M.L.R. 334, [1978] E.C.R. 131 at p. 148.
86. FEDETAB [1978] 3 C.M.L.R. 524 (Commission decision) where the Commission contend that the threat of some disadvantage is likely to result in significant effects.
87. See, Pabst & Richarz - BNIA [1976] 2 C.M.L.R. D63.
88. See e.g. GISA [1973] C.M.L.R. D125; See also German Ceramic Tiles [1971] C.M.L.R. D6.
89. e.g. IFTRA rules for Producers of Virgin Aluminium [1975] 2 C.M.L.R. D20. IFTRA stood for International Fair Trade Practices Rules Administration. See also European Glass Manufacturers [1974] 2 C.M.L.R. D50 which also concerned IFTRA.
90. See Chapter 9 on information agreements for details.
91. European Glass Manufacturers [1974] 2 C.M.L.R. D51.
92. IFTRA rules for Producers of Virgin Aluminium [1975] 2 C.M.L.R. D20 at paras. 21-23.
93. See, Sirdar/Phildar [1975] 1 C.M.L.R. D93; Penneys [1978] 2 C.M.L.R. 100.
94. Beguelin Import v. G.L. Import Export (Case 22/71) [1972] C.M.L.R. 81; [1971] E.C.R. 949 at p. 962.
95. Brasserie de Haecht SA v. Wilkin (No. 2) (Case 48/72) [1973] C.M.L.R. 287; [1973] E.C.R. 77 at para. 27 of judgment.
96. Consten & Grundig v. Commission (Case 58/64) [1966] C.M.L.R. 418 [1966] E.C.R. 299 at p. 392; Societe de Vente de Ciments et Betons De L'est S.A. v. Kerpen & Kerpen (Case 319/82) [1985] 1 C.M.L.R. 511.
97. La Technique Miniere v. Maschinenbau Ulm GmbH (Case 56/65) [1966] C.M.L.R. 357; [1966] E.C.R. 235 at p. 250: "The automatic nullity in question applies only to those elements of the agreement which are subject to the prohibition or to the agreement as a whole if those elements do not appear severable which are not affected by the prohibition, since they do not involve the application of the Treaty's fall outside the Community law."

98. Chemidus Wavin Ltd. v. Societ  pour la Transformation et L'Exploitation des Resines Industrielles SA [1977] F.S.R. 181, [1978] 3 C.M.L.R. 514 at p. 519 per Buckley L.J. (Court of Appeal).
99. See e.g. Nutricia/Zuid Hollandse Conservefabriek O.J. 1983 L 376/22.
100. Brasserie de Haecht SA v. Wilkin No. 2 (Case 48/72) [1973] E.C.R. 77; [1973] C.M.L.R. 287; Etablissements A de Bloos v. Bouyer (Case 59/77) [1978] 1 C.M.L.R. 511 [1977] E.C.R. 2539.
101. See Regulation 17/62 EEC O.J. Spec. Ed. 1959-62, 87.
102. *ibid*, Article 4(2) for exempt agreements.
103. Lancome v. Etos (Case 99/79) [1981] 2 C.M.L.R. 164; [1980] E.C.R. 2511. See Korah, (1981) 3 Northwestern Journal of International Law and Business for analysis.
104. Brasserie de Haecht SA v. Wilkin No. 2. (Case 48/72) [1973] C.M.L.R. 287; [1973] E.C.R. 77.
105. See e.g. Dymond v. Britton [1976] F.S.R. 330 where the Court felt unable (regretfully) to grant summary judgment to the plaintiff patentee due to the existence of a Eurodefence by the defendant licensee which was at least an arguable defence if no stronger. See also Chemidus Wavin v. Societe pour la Transformation des Resines [1977] F.S.R. 181; [1978] 3 C.M.L.R. 514 where a French licensee refused to pay royalties on sale. In defense of an action by the patentee for recovery of these payments the licensee pleaded the Eurodefence that the minimum royalty payments clause in the license was contrary to Article 85(1) EEC and hence was void under Article 85(2) EEC. The Court of Appeal rejected this assertion. With respect to a non-competition clause in the license the Court accepted that it could be within Article 85(1) but refused to strike down the agreement on that account alone. Rather, they severed the offending clause from the remainder of the agreement. Judgment was given to the patentee.
106. e.g. British Leyland v. TI Silencers [1981] F.S.R.213; Dow Chemical v. Spense Bryon (1981) unreported.
107. See e.g. British Leyland v. Armstrong Patents [1983] F.S.R. 50; Hoover v. George Hulme [1982] F.S.R. 565; Netlon v. Bridport Gurundy [1979] F.S.R. 530; Edbro v. Epha (1981) unreported.
108. [1975] A.C. 391.
109. British Leyland v. TI Silencers (No. 2) [1981] F.S.R. 213; Lansing & Bagnall v. Buccaneer Lift Parts (1982) unreported, C.A.
110. British Telecommunications (case 41/83)[1985] 2 C.M.L.R.368
111. United Brands v. Commission (Case 27/76) [1978] 1 C.M.L.R. 429 [1978] E.C.R. 207 at paras. 65 and 66 of the judgment. For examples, see: Michelin (Case 322/81) [1985] 1 C.M.L.R. 282; GVL [1982] 1 C.M.L.R. 221; British Telecommunications [1983] 1 C.M.L.R. 457.

112. Hoffman La Roche v. Commission (Case 85/76) [1979] 3 C.M.L.R. 211, [1979] E.C.R. 461.
113. e.g. ICI and Commercial Solvents v. Commission (Case 6 and 7/73) [1974] C.M.L.R. 309; [1974] E.C.R. 223 where commercial solvents enjoyed what was virtually a world monopoly in the manufacture and sale of a chemical needed in the manufacture of an anti-tuberculosis drug. Commercial solvents was also active in the market for this drug. Its power over the input product gave it very significant economic power over the drug. The existence of such power over an input product could thus be exploited to exclude competitors in the product made from that input.
114. e.g. General Motors v. Commission (Case 26/75) [1976] 1 C.M.L.R. 589, [1975] E.C.R. 1367 where a statutorily granted monopoly to issue conformity licenses on imported vehicles meant that the possessor of the statutory right was protected from competition by the statutory monopoly which operated as an absolute entry barrier. See also Derek Merson v. British Leyland [1984] 3 C.M.L.R. 92 at p. 98 para. 25.
115. e.g. United Brands v. Commission (Case 27/76) [1978] 1 C.M.L.R. 429; [1978] E.C.R. 207. In Michelin (Case 322/81) [1985] 1 C.M.L.R. 282 at paras. 55-58, the Court of Justice stressed that the advantages an undertaking might enjoy as a result of being within a group of companies operating throughout Europe and even the world can enhance a dominant position. In particular the Court pointed out the R & D potential membership to a group entailed and the existence of strong distribution networks.
116. See IBM Settlement [1984] 3 C.M.L.R. 147. See also Sunday Times 17 February 1985, p. 65 article entitled "Big, Blue and Booming" - IBM reported to have spent \$15 billion on R & D between 1980-1985.
117. United Brands (supra).
118. BP v. Commission (Case 77/77) [1978] 3 C.M.L.R. 174; [1978] E.C.R. 1513. See Michelin (Case 322/81) [1985] 1 C.M.L.R. 282 at para. 59; temporary lack of profitability in a company does not necessarily negate the fact of an undertakings dominance.
119. See British Telecommunications [1983] 1 C.M.L.R. 457 at para. 26 of the decision: "British Telecommunications has a statutory monopoly, under the Telecommunications Act 1981, for the running of telecommunication systems throughout the United Kingdom and the Isle of Man. British Telecommunications therefore holds a dominant position in the United Kingdom, which constitutes a substantial part of the Common Market, for the provision of telex and telephone systems."
120. BRT v. SABAM (Case 127/73) [1974] 2 C.M.L.R. 238, [1974] E.C.R. 313 at p. 324.
121. European Sugar Cartel (Suiker Unie) (Cases 40-48, 50, 56, 111, 113 and 114/73) [1976] 1 C.M.L.R. 295, [1975] E.C.R. 1663.
122. BP v. Commission (Case 77/77) [1978] 3 C.M.L.R. 174, [1978] E.C.R. 1513 at p. 1521.

123. (Case 177/78) [1979] 3 C.M.L.R. 389; [1979] E.C.R. 2161.
124. [1976] 2 C.M.L.R. 665.
125. Michelin (Case 322/81) [1985] C.M.L.R. 282 at para. 48 of judgment:
"... although the existence of a competitive relationship between two products does not presuppose complete interchangeability for a specific purpose, it is not a precondition for a finding that a dominant position exists in the case of a given product that there should be a complete absence of competition from other partially interchangeable products so long as such competition does not affect the undertakings ability to influence appreciably the conditions in which that competition may be exercised or at any rate to conduct itself to a large extent without having to take account of that competition and without suffering any adverse effects as a result of its attitude."
126. [1984] 3 C.M.L.R. 147. Only the text of the undertaking given to the Commission by IBM and certain supporting documents are given.
127. Michelin (Case 322/81) [1985] C.M.L.R. 282 at para. 37 of the judgment.
128. United Brands v. Commission (Case 27/76) [1978] 1 C.M.L.R. 429; [1978] E.C.R. 207 at para. 249 of the judgment.
129. Hoffman La Roche & Co. AG v. Commission (Case 85/76) [1979] 3 C.M.L.R. 211; [1979] E.C.R. 461 at para. 91 of the judgment.
130. See generally, Vogelenzang, Abuse of a Dominant Position in Article 86: the problem of causality and some applications, (1976) 13 C.M.L.Rev 61; Siragusa, The Application of Article 86 to the pricing policy of dominant companies: discriminatory and unfair prices (1979) 16 C.M.L.Rev 179; Korah, Interpretation and Application of Article 86 of the Treaty of Rome: Abuse of a Dominant Position within the Common Market (1978) 53 Notre Dame Lawyer 768.
131. This "don't wait" approach would appear to be in line with the thinking of the European Court. See Brasserie de Haecht v. Wilkins II (Case 48/72) [1973] E.C.R. 77 at p. 87 para. 11 of the judgment.
132. See Walt Wilhelm v. Bundeskartellamt (Case 13/68) [1969] C.M.L.R. 100; [1969] E.C.R. 1.
133. See Brasserie de Haecht v. Wilkins II supra.
134. See BRT v. SABAM (Case 127/73) [1974] 2 C.M.L.R. 258, [1974] E.C.R. 51.
135. For a more detailed account of procedure in EEC competition law cases see Kerse, EEC Antitrust Procedure (1981) (plus supplement to text 1984). This comprehensive text examines EEC competition procedure in an exhaustive and readable fashion. Businessmen seeking a nuts and bolts account of EEC competition law procedure may refer to this work for guidance.
136. Regulation 17/62/EEC, Article 2.
137. Regulation 27/62/EEC Article 4(1).

138. *ibid.*, Article 4(4).
139. Regulation 17/62/EEC Article 15(1)(a).
140. *ibid.*, Article 4(1) see Salonia v. Poidomani (Case 126/80) [1982] 1 C.M.L.R. 64; [1981] E.C.R. 1563 at paras. 28-31 of the judgment.
141. United Brands v. Commission (Case 27/76) [1978] 1 C.M.L.R. 429; [1978] E.C.R. 207 at paras. 291, 292 of the judgment; Hoffman La Roche & Co. AG v. Commission (Case 85/76) [1979] 3 C.M.L.R. 211; [1979] E.C.R. 461 at para. 116.
142. There is no right to require the Commission to grant retroactive exemption: e.g. ASPA [1970] C.M.L.R. D25; SUPEXIE [1971] C.M.L.R. D1; CEMATAX [1973] C.M.L.R. D135; Davidson Rubber [1972] C.M.L.R. D52; Fine Paper [1972] C.M.L.R. D94.
143. See e.g. CEMATAX [1973] C.M.L.R. D135; Davidson Rubber [1972] C.M.L.R. D52.
144. Hummel Isbecque [1965] C.M.L.R. 242.
145. See, Fonderies Roubaix-Wattrelos v. Fonderies A-Roux (Case 63/75) [1976] 1 C.M.L.R. 538, [1976] E.C.R. 111 at paras. 6-8 of the judgment. But c.f. W.Q. No. 440/70 O.J. 1971 C29/9 - Commission of opinion that an agreement should be notified where it differentiates between products made and sold in the domestic state and products imported from or exported to other Member States.
146. See e.g. BP Kemi - DDSF [1979] 3 C.M.L.R. 684.
147. e.g. Vaessen - Moris [1979] 1 C.M.L.R. 511.
148. See e.g. FEDETAB v. Commission (Cases 209-215 and 218/78) [1981] 3 C.M.L.R. 134, [1980] E.C.R. 3125 at paras. 54-56 of the judgment.
149. See Parfums Marcel Rochas v. Bitsch (Case 1/70) [1971] C.M.L.R. 104, [1970] E.C.R. 515 at p. 524. More generally an export ban imposed by a supplier on a purchaser is not a "condition of business" for purposes of Article 4(2)(2) - Moet et Chandon Ltd. [1982] 2 C.M.L.R. 166 at para. 15 of the decision.
150. See Windsurfing [1984] 1 C.M.L.R. 1.
151. *ibid.*
152. *ibid.*
153. *ibid.* See also Toltecs/Dorcet [1983] 1 C.M.L.R. 421 at p. 426.
154. See e.g. Burroughs/Deplanque [1972] C.M.L.R. D67; A0IP/Beyrard [1976] 1 C.M.L.R. D14.
155. Commission Regulation 2349/84/EEC, O.J. 1984 L219/15, (23 July 1984) on the application of Article 85(3) of the Treaty to certain categories of patent licensing agreements.

156. A similar exemption exists in UK law for goods and services. See Sections 9(5) and 18(5) RTPA 1976 discussed in Chapter 1. Section E.
157. e.g. See, Guardian, February 19 1985 and February 28 1985 - Europe's largest computer firms agreed to co-ordinate development of computer software that can be used under the "UNIX" operating system. The participants derive from the UK; Germany; Italy; France and Holland. The agreements provides for the standardisation of interfaces between software computer systems operating under the Unix trademark. The aim of the agreement is to improve compatibility between computer languages, compilers, work stations and database management and by this to make application software readily interchangeable between different makes of computer. This would, in theory, reduce seller and user costs whilst increasing the size and availability of software libraries.
158. Fedetab and others v. Commission (Case 209-215, 218/78) [1981] 3 C.M.L.R. 134; [1980] E.C.R. 3125 at para. 63 of the judgment: "The use of that form is therefore mandatory and is an essential prior condition for the validity of the notification. It takes account, for the purpose of laying down detailed rules for the application of Article 85(3), of the need, expressed in Article 87(2)(b) of the Treaty, to ensure effective supervision and to simplify administration to the greatest possible extent."
159. e.g. Distillers v. Commission (Case 30/78) [1980] 3 C.M.L.R. 121; [1980] E.C.R. 2229 at paras. 23, 24 of the judgment, but c.f. for a slightly more relaxed view VBBB v. Eldi Records (Case 106/79) [1980] 3 C.M.L.R. 719; [1980] E.C.R. 1137 where the Court held that where an agreement had been appended to Form A/B which had been fully completed but which was not 100% perfect in its accuracy this would be counted as proper notification. On this basis the case can be distinguished from Distillers where the amendment, which was of a substantial nature, was not notified on Form A/B.
160. *ibid.*
161. Commentary in this part relates to the draft text of the revised Form A/B. Consequently reference to the exact text of the current form of Form A/B should be made to ensure accuracy. See also the explanatory note issued in conjunction with Form A/B - [1985] 1 C.M.L.R. 576, O.J. 1985 C50/2 (22 February 1985).
162. VVVB v. Eldi Records (Case 106/79) [1980] 3 C.M.L.R. 719, [1980] E.C.R. 1137.
163. Article 15(1)(a) Regulation 17/62/EEC.
164. See Papiers Peints de Belgique [1974] 2 C.M.L.R. D102 on appeal to the European Court (Case 73/74) [1976] 1 C.M.L.R. 589, [1975] E.C.R. 1491.
165. See e.g. Unione Nazionale Consumatori (Case 113/73) [1976] 1 C.M.L.R. 295, [1973] E.C.R. 1465 at pp. 1468, 1469. See also Distillers [1978] 1 C.M.L.R. 400 (distributor whose exports were curtailed by an export ban); Johnson & Johnson [1981] 2 C.M.L.R. 287 (importer suffering consequences of an export ban from the producers market); Dutch Bicycles [1978] 2 C.M.L.R. 194 (trade association member complaining of punishment by association) Continental Can [1972] C.M.L.R. 10 (target company threatened with take-over); Metro - SB - Grossmarkte v. Commission

165. continued ..

(Case 26/76) [1978] 2 C.M.L.R. 1; [1977] E.C.R. 1875 (wholesaler); Michelin [1982] 1 C.M.L.R. 643 (wholesaler against his supplier's discount practices) GVL [1982] 1 C.M.L.R. 221 (pop group refused services of royalty collecting association); British Telecommunications [1983] 1 C.M.L.R. 45 (message transmitting company hindered by restrictive policy of nationalised industry).

166. FRUBO [1974] 2 C.M.L.R. D89.

167. See, W.Q. No. 1012/80, O.J. 1980 C316/12.

168. Article 6 of Regulation 99/63/EEC.

169. The complainant may require the Commission to provide it with a reasoned refusal and to give it a time period in which to submit its comments: see Article 175(3) EEC. This grants a right of action to any natural or legal person who wishes to complain that a Community institution has failed to address to it any act other than an opinion or recommendation. There are certain procedural steps that must be gone through first however. These are mentioned in Article 175(2).

170. See Gema v. Commission (Case 125/78) [1980] 2 C.M.L.R. 177; [1979] E.C.R. 3173 at para. 17 of the judgment.

171. See, Firma Demo -Studio Schmidt v. Commission (Case 210/81) [1984] 1 C.M.L.R. 63, Commission did not dispute that its letter was an "act" within meaning of Article 173 EEC. See also Metro - SB -Grossmarkte v. Commission (Case 26/76) [1978] 2 C.M.L.R. 1; [1977] E.C.R. 1875 where European Court stated that it was in best interests of satisfactory administration of justice and the proper application of competition rules that a person whose complaint has been rejected should be able to have that refusal reviewed before the Court.

172. In Armstrong Patents v. Commission (Case 146/80) withdrawn from the Court by the complainant, the Commission pleaded that a complainant had no right to a decision. Following Firma Demo Studio Schmidt v. Commission (supra) this position is perhaps difficult to sustain. See Kerse, Antitrust Procedure in the EEC (1984 Supplement) at pp. 11, 12.

173. See Hasselblad (GB) Ltd. v. Orbinson [1984] 3 C.M.L.R. 679 (C.A.) at para. 8 of the judgment.

174. See Twelfth Commission Competition Report (1982) p. 40 para. 35 note 2 and related text.

CHAPTER 7

GENERAL ENFORCEMENT AND NEGOTIATIONS WITH THE COMMISSION

A. INTRODUCTION

In this Chapter the question of enforcement is considered. An overview of Commission procedure is given. Likewise, Article 85(3), the basis of formal and informal negotiations with the Commission, is discussed. The prospect of remedies before the national courts is also discussed including actions for damages. National actions based on EEC law are likely to become increasingly important in the future. Also discussed in this chapter is the question of informal discussions with the Commission; the great majority of cases are dealt with informally by the Commission.¹

In this chapter the following will be discussed:

- Section B: Survey of Commission procedure. In this section Commission procedure is discussed starting with the initiation of formal proceedings and ending with the possible appeal of a formal decision to the European Court of Justice.
- Section C: The legal basis of formal negotiations. In this section Article 85(3), the exemption formula, is discussed. Guidance is given on the sorts of factors the Commission look for in determining exemption.
- Section D: Formal enforcement in national Courts. Private parties may sue (or threaten to sue) other parties before their national Courts for damages or injunctive relief. The relevant causes of action and remedies are discussed.
- Section E: Negotiating informal settlements with the Commission. In this section guidance is given as to the procedure and practice surrounding informal negotiations with the Commission.
- Section F: The opposition procedure: accelerated procedure for notification and clearance of certain types of agreement.

B. SURVEY OF COMMISSION PROCEDURE

I. Initiation of Procedure by Commission

The Commission may initiate proceedings following a notification by the parties or a complaint. It may also act upon its own initiative as a result of research into specific sectors of the market, the monitoring of trade journals and questions asked in the European parliament. With respect of cases involving UK parties the Commission often send an official to inspect the register of restrictive trade practices in Chancery Lane in London. This contains information of restrictive agreements caught by UK law under the RTPA 1976. The Commission also discuss matters with national authorities.

II. Investigation and discovery

The Commission (unlike the OFT in respect of UK law) has wide ranging powers of investigation to support its fact finding functions. Refusal by the parties to comply with these investigations can result in quite heavy fines being imposed. An investigation may commence with a simple request for information; it may, however, entail inspectors "turning up" on the doorstep armed with a search mandate. These options are discussed below.

III. Requests for Information

Requests for information are covered by Article 11 of Regulation 17/62/EEC. This empowers the Commission to obtain "necessary" information from the Governments and, competent authorities of the Member States (e.g. the OFT in the UK or the Bundeskartellamt in West Germany), from undertaking and, from trade associations.² A request sent by the Commission will state the legal basis of the request, its purpose and also the penalties for supplying incorrect information.³ There is apparently no duty on those "requested" to supply the information, no drastic consequence attach to outright refusal to disclose.⁴ Failure to comply will however lead to the Commission issuing a formal decision requiring disclosure and fixing an appropriate time limit within which compliance must occur if fines are to be avoided. Parties may appeal this formal decision to the Court of Justice under Article 173(2) EEC. A copy of this decision is sent to the relevant authority in Member States where the

undertaking is situated. This is the OFT in the UK.

In practical terms refusal to comply or only part compliance with a request may give that undertaking breathing space. It will take time for Commission officials to obtain a formal decision from a commissioner requiring disclosure of information and, subsequent to that, it will take more time to obtain a formal decision imposing fines.⁵ The maximum fine that can be imposed is 5000 units of account.⁶ The Commission may also impose periodic fines which apply for every day of non-compliance. These may range from 50 to 1000 units of account per day. Fines will not be imposed until parties have had an opportunity to explain themselves.

It is probably a wise move to comply with Commission requests. If they have to issue formal decisions and impose fines they will naturally be less well disposed to the parties when they come to deal with the substance of the agreement later. They may also ask themselves why the parties were so reluctant to furnish information and may draw adverse conclusions. If parties experience genuine difficulties in collecting data then such as has been collected should be transmitted to the Commission along with an accompanying letter explaining the reasons for the partial compliance and promising disclosure of the remainder of the information as soon as it becomes available. Time periods given for disclosure by the Commission are generally quite short, often under a month. Additional periods of time may be requested by the parties in order to facilitate compliance. It is often advised that if parties are in doubt about the accuracy of information to be disclosed they should delay its notification and verify its accuracy as soon as possible.

There is a clear danger in notifying inaccurate data that the Commission will construe it as "incorrect" and impose fines on the parties.⁷ If the Commission requests information on market share for example it will be essential to ensure that the person responsible for complying with the request has defined the market correctly. If figures were given for the UK alone the undertakings in question would appear significantly more powerful than if figures were given for the whole of the EEC. In practice the Commission have to issue very few decisions in order to enforce their requests.⁸ The Commission must respect the confidentiality of information supplied.⁹ Nonetheless it is probably wise to mark documents as being secret or to enclose them in a separate file. Confidentiality therefore is no excuse for non-disclosure.¹⁰

IV. On the Spot Inspections

The Commission has the power to send inspectors to: "(a) examine the books and other business records; (b) to take copies of or extracts from the books and business records; (c) to ask for oral explanations on the spot; (d) to enter any premises, land and means of transport of undertakings."¹¹

Officials may only exercise these powers upon presentation of a written authority or decision specifying the subject matter and purpose of the investigation and the penalties for incomplete production of documents. To assist the undertakings the Commission attaches to the authorization or decision an explanatory memorandum outlining the scope and limits of the Commission's powers and the rights of the undertaking.¹² The Commission must give prior warning to the relevant authorities in the Member State concerned of their investigation and those authorities may assist the Commission with the investigation. The OFT in the UK regularly attend at investigations. Over the past few years between 10 - 50 investigations have taken place of UK companies per annum though the annual trend is upwards. In each case an OFT officer attended.¹³

The Commission may come with an authorization but frequently they arrive already armed with a formal decision. There is no requirement that they start with an authorization and only then proceed to a formal decision as there is with regard to requests for information.¹⁴ As with requests for information an obstructive attitude on the part of the investigated undertaking may lead the Commission to draw certain conclusions.

With regard to the summoning of legal assistance the Commission state the following in their explanatory memorandum to both an authorisation and a decision:

"The undertaking may consult a legal adviser during the investigation. However, the presence of a lawyer is not a legal condition for the validity of the investigation, nor must it unduly delay or impede it. Any delay pending a lawyer's arrival must be kept to the strict minimum to ensure that the business records will remain in the place and state they were in when the Commission officials arrived. The officials' acceptance of delay is also conditional upon their not being hindered from entering into and remaining in occupation of offices of their choice. If the undertaking has an in-house legal service Commission officials are instructed not to delay the investigation by awaiting the arrival of an external legal adviser."

The Commission may ask oral questions on the spot. If personnel of the undertaking decide to answer their explanations may be minuted and a

copy given to the undertaking. The duty to answer questions is limited. The Commission's view appears to be that it can require oral answers to specific concrete questions arising out of the books and business records. Apparently, they accept that they have no right to demand answers to questions requiring careful consideration and perhaps the gathering of information.¹⁵

Undertakings usually grant the Commission the use of a photocopier. If this is not granted the Commission may copy out longhand the text of any relevant document they consider necessary thus involving them in a long stay at the premises. The Commission will pay for use of a photocopier. It may be wise for an officer of the undertaking to perform the photocopying thus enabling extra copies to be made for their legal adviser and to keep a proper record of all documents taken. The destruction of documents will, if discovered, lead to fines.¹⁶ The conspicuous absence of specific documents in a series, for example, a potentially key letter in a sequence of correspondence between rivals, invokes the suspicions of the Commission.

Correspondence between an independent legal adviser (not an in-house lawyer) and the undertaking in question is privileged and need not be disclosed.¹⁷ This was the judgment of the European Court in A.M. & S. Europe v. Commission.¹⁸ The Commission have interpreted this judgment to mean that:

"... the protection of the principle of confidentiality implies, in respect of the condition concerning the rights of defence, that it must cover all written communications exchanged after the initiation of the administrative procedure which may lead to a decision on the application of Articles 85 and 86 of the Treaty or to a decision on the application of Articles 85 and 86 of the Treaty or to a decision imposing a pecuniary sanction on the undertaking, and that it must also be possible to extend it to earlier written communications which have a relationship to the subject matter of that procedure."¹⁹

and,

"... that in the initial stages of any dispute it is for the Commission to decide whether a document is protected by legal privilege. Where an undertaking refuses, on the ground that it is entitled to protection of the confidentiality of information, to produce, among the business records demanded by the Commission, written communications between itself and its lawyer, it must provide the Commission's authorized agents with the relevant material of such a nature as to demonstrate that the communications fulfil the conditions for being granted legal protection, although it is not bound to reveal their content."²⁰

The Commission may order disclosure by a formal decision. This may be challenged by the parties before the European Court.²¹

V. Statement of Objections

Where, following fact-finding, the Commission consider it necessary to pursue the case a formal procedure is opened. There is some doubt as to what legally constitutes an opening of a formal procedure.²² In practice the Commissioner responsible for Competition signs a form declaring proceedings open. In due course the undertakings and competent authorities in the Member States concerned are notified. The Commission will then issue a statement of objections and this will be served on the undertakings concerned. Service of the statement of objections may be at the same time as the giving of notice of the opening of a formal procedure.²³ A statement of objections is not issued in every case. In the majority of cases the Commission proceed more informally by negotiating with the parties to achieve modifications of the agreement which will enable the Commission to conclude the negotiations on an informal basis. This informal procedure is examined in depth in Section E below.

The statement of objections will include the basic facts as perceived by the Commission, the reasons for the applicability of Article 85 or 86, and the grounds for refusing Article 85(3) EEC where applicable. This is not a legally binding document and may not be challenged before the European Court.²⁴ The document is not usually very long but can, in truly exceptional cases, run to hundreds of pages.²⁵

VI. The Parties Written Reply: Access to Commission file

Parties to proceedings have a right to reply.²⁶ This involves responding to the statement of objections and presenting their own position. In making submissions the parties may have a right of access to certain Commission documents.²⁷ Parties are informed of the contents of the Commission's file by means of an annex to the statement of objections (or to the letter rejecting a complaint). This lists all of the documents in the file and indicates documents or parts thereof to which parties may have access. Parties are invited to consult these documents at the Commission's headquarters though if the undertaking wishes to examine only a few the Commission may forward copies. The following documents will not be made available to the parties:

- (i) documents or parts thereof containing other undertakings' business secrets;
- (ii) internal Commission documents, such as notes, drafts or other working papers;

(iii) any other confidential information such as documents enabling complainants to be identified where they wish to remain anonymous, and information disclosed to the Commission subject to an obligation of confidentiality.²⁸

Where an undertaking makes a justified request to consult non-accessible documents the Commission may make a non-confidential summary of the contents available.

The statement of objections will specify a time period for submission of a defence. The period will never be less than two weeks and may well be very considerably longer. Usually however a period of about 6-8 weeks is given.²⁹ The time limit is extendable, though the longer the original period allotted by the Commission the less likely it is that an extension will be granted.³⁰

Parties should be wary about admitting facts or issues in these written proceedings. Submissions in reply should carry the proviso that the contents of the reply including any admissions made therein are without prejudice to anything the parties may wish to argue before the European Court at a later date. It appears that an admission at this stage forecloses the opportunity of raising the issue in a hearing before the Court.³¹

VII. Oral Hearings

Article 19 of Regulation 17.62/EEC requires the Commission to permit the parties an opportunity to make oral representations before the Commission arrives at a formal decision.³² For this purpose the Commission conduct a hearing presided over by a hearing officer. This officer is appointed to ensure that the rights of the defence are respected not only during the oral hearing itself but also in the stages preceding the hearing. The hearing officer is separate from the Commission officials conducting the case. The officer is fully responsible for conduct of the hearing. In 1982 the Commission stated:

"Administratively, the Hearing Officer belongs to the Directorate General for Competition. To ensure his independence in the performance of his duties, he has the right of direct access to the Member of the Commission with special responsibility for Competition policy; if he considers it appropriate he may refer to the Member his comments on the draft decision.

In order to make sure that the Commission, when taking a decision on a draft decision of an individual case, is fully informed of all relevant factors, the Member of the Commission with special responsibility for competition policy may also submit to it the Hearing Officer's opinion."³³

The hearing date is usually set for a few weeks after the end of the period allotted to the written reply and takes place in Brussels. It is difficult to persuade the Commission to change this date given that the latter have to arrange for translation services and rooms to be available in advance. In practice the Commission rely most heavily on the written proceedings. The hearing is of short duration, usually one day only. Often it is divided so that parties may submit comments in the morning and other interested parties, including the Member States and complainants, may make submissions in the afternoon. A complainant may only hear such evidence as is not confidential. Parties must therefore be prepared to split their submissions into confidential and othersise.³⁴

As implied above the hearing is open not just to the parties but also to Member States, to complainants and to anyone else with a "sufficient interest."³⁵

In the IBM Settlement³⁶ case the hearing held in February 1982 lasted one week. IBM presented the evidence of 20 witnesses (17 in person, 3 by written deposition) who represented not only IBM but also competitors and computer users associations. Moreover, a string of American and European academics, economists and other experts intervened. One U.S. Government official also attended as observer.³⁷ Following the hearing the Commission sent IBM a statement of proposed remedies, and following informal negotiations, a second hearing took place in June 1983. The IBM settlement case is one of the most extensive ever undertaken by the Commission albeit that it ended in a negotiated result rather than a formal decision.

Minutes will be taken of proceedings at the oral hearing and the undertakings have a chance to read and approve their contents as a true record. This enables the Commission and the Advisory Committee (see below) to have an accurate record of proceedings.

VIII. The Advisory Committee on Restrictive Trade Practices and Monopolies

The Advisory Committee comprises officials represented by each Member State who are competent in antitrust law.³⁸ The Committee is influential and is consulted by the Commission prior to the taking by it of:

(a) decisions establishing infringements under Articles 85 or 86; (b) decisions giving negative clearance; (c) decisions renewing, amending or revoking an exemption under Article 85(3); (e) decisions imposing fines or periodical penalties. The Advisory Committee advises further on:

investigations by the Commission into specific sectors of the economy (sector inquiries) and draft bloc-exemptions.

The opinion of the Advisory Committee is secret; the parties have no opportunity to view it. Nor indeed is the opinion usually disclosed in Court proceedings before the Court of Justice. The existence of this secret opinion has been widely criticised.³⁹

IX. Decisions of the Commission⁴⁰

The Commission takes very few decisions per annum, perhaps a dozen. By contrast a large number of informal settlements are arrived at. These are discussed below where statistics are given. Given the relative unimportance of decisions to the negotiation process only a brief survey of the complex law governing their issue will be given here.

(i) Interim Measures

The Commission may issue interim orders where requested by a party making a complaint. These measures are akin to interlocutory injunctions in English law. However, by comparison they are much slower to obtain. The power to take interim measures derives impliedly from Regulation 17/62/EEC⁴¹ but can only be exercised upon proof of certain very strict criteria. The Court has stressed that interim measures must be: indispensable to the effective exercise of the Commission's functions; limited to urgent cases; temporary and conservatory. In essence the measure must be necessary to avoid serious and irreparable damage to a complainant.⁴² The Court has held that the Commission cannot require of a party by an interim order something that they could not require in a final decision. Thus the Commission cannot compel a supplier to manufacture a product and supply it where a refusal to supply that product is not in breach of Article 85 or 86 and hence could not be made the subject of a final decision.⁴³

In terms of time taken to obtain relief the current minimum would be in the region of 10 weeks.⁴⁴ If both complainant and complained of are situated in the UK an application to the national Court for an interlocutory injunction may be a more rapid means of securing relief (though not necessarily a cheaper one; complaints to the Commission are free).

(ii) Provisional decisions

The Commission may inform parties who have notified their agreements on Form A/B and hence have obtained provisional validity that they consider the agreement to infringe Article 85(1) and be inappropriate for exemption under Article 85(3).⁴⁵ Having so informed the parties provisional validity ends and with it the immunity from fines disappears.⁴⁶ In appraising the parties of this situation the Commission is issuing a decision. Provisional decisions are relatively rare.

(iii) Final decisions

The Commission has wide ranging powers when issuing decisions. A decision may prohibit conduct (a cease and desist decision) or it may declare conduct to be in breach of the law where the conduct in question is already terminated and a cease and desist order hence inappropriate.⁴⁷ It is uncertain whether the Commission has power to prospectively forbid an agreement that has not been made. Though, following a Commission warning parties who subsequently enter an agreement risk heavy fines.

There is no doubt but that the Commission's power of decision extends to positive orders i.e. an order requiring the parties to take specific action to cure the breach.⁴⁸ The Commission may include in a decision matters not expressly covered in the statement of objections.⁴⁹

(iv) Form of decision

Decisions must be reasoned.⁵⁰ The Commission must set out in a clear and relevant fashion the principles of law and fact upon which it bases its judgment.⁵¹

Decisions may confer negative clearance i.e. that on the facts before it the Commission can find no grounds for the application of Articles 85 or 86 EEC. However, decisions conferring negative clearance do not apparently bind the national Court though the latter will no doubt take notice of them. But, if new facts emerge, the national Court is perfectly entitled to apply Article 85(1) and grant appropriate remedies against the parties. A decision granting negative clearance does not prevent future action by the Commission.⁵²

A decision may grant an exemption under Article 85(3) or renew, amend or revoke such a decision. Decisions of this ilk will be of fixed duration and will often attach conditions to their operation.⁵³

A decision may be appealed to the European Court under Article 173 EEC (see below).

X. Fines, Penalties

Article 15 provides for fines to be imposed in a number of situations. Fines of between 100 and 5000 units of account may be imposed where undertakings or associations, intentionally or negligently: (a) supply incorrect or misleading information in notifying an agreement and/or applying for negative clearance; (b) supply incorrect or incomplete information in response to a request for information made by the Commission; (c) fail to supply information within the time limit fixed by a decision demanding information; (d) disclose documents in an incomplete form during an on the spot investigation; or (e) refuse to submit to an on the spot investigation ordered by a formal decision.

Under Article 15(2) fines of between 1000 to 1,000,000 units of account or a sum in excess of that but not exceeding 10% of the turnover in the preceding business year of the relevant undertaking may be imposed for intentional or negligent infringement of Articles 85(1) or 86 EEC. Fines of identical gravity may be imposed in respect of breaches of conditions imposed in decisions granting exemption under Article 85(3).

The power to impose fines of up to 10% of the "turnover in the preceding year" is an effective sanction. Though the sanction has only been regularly imposed since 1969 it is today a standard part of the Commission's machinery.⁵⁴ The phrase "turnover in the preceding business year" refers to turnover of all products for the whole world. It is not turnover for the relevant products in the EEC or even turnover of all products in the EEC. The justification for the wide formulation is based simply upon the ability of an undertaking to pay a fine. The Court has stated that the upper limits mentioned in Article 15(2) exist "to prevent fines from being disproportionate in relation to the size of the undertaking".⁵⁵

Article 16(1) of Regulation 17/62/EEC provides for periodic penalties of between 50 to 1,000 units of account per day. These may be imposed to compel an undertaking to: (a) terminate an infringement rapidly; (b) refrain from any act prohibited by a decision made in relation to an Article 85(3) exemption; (c) supply complete and accurate information demanded by a decision; and (d), submit to an on the spot investigation ordered by a decision.

The "unit of account" is the EEC currency mentioned in Regulation 17/62/EEC. Fines are now expressed in ECU's (European Currency Units). Fines will also be expressed in local currencies. For rough purposes only an ECU equals approximately 55-60 p. (U.K.) This figure should of course be verified by reference to prevalent exchange rates.⁵⁶

In fixing fines the Commission must (under Article 15(2) of Regulation 17/62/EEC) have regard to both, "the gravity and to the duration of the infringement". The following will be relevant factors:

(i) Nature of the infringement

If the infringement concerns a practice known to be habitually challenged under Articles 85 or 86 by the Commission (for example price discrimination, refusal to supply, loyalty rebates, price-fixing, market sharing, ~~export bans~~) then a large fine may be imposed. Conversely, if the practice is one that the Commission has not examined before or if the market is unusual for some reason the Commission may refrain from imposing fines on account of the novelty of the case. In cases involving a degree of novelty where an informal settlement has taken place and the parties are thus made fully aware of the Commission's position then a subsequent breach of an undertaking given in good faith to the Commission as part of the settlement may well result in a formal decision and the imposition of a fine.⁵⁷

(ii) Knowledge of the parties

The Commission will consider the extent to which the parties were aware or should have been aware of the breach.⁵⁸ Fines may, it will be recalled, be imposed for intentional or negligent infringements. Part of the reason for not imposing fines in respect of novel cases (see above) is that the parties were probably infringing the law innocently rather than intentionally or negligently.

(iii) Conduct of Parties

The Commission may consider whether the parties operated their agreement in a covert and secret manner or whether they openly notified to the Commission. In Cast Iron and Steel Rolls⁵⁹ the parties operated a "warning mechanism" which was activated in the event of a sudden inspection or visitation of the authorities. In such an event a "neutral" telex would be sent to other parties which

read: "Re IRMA, attention Mr. ____ The figures from a German company for the next market survey are wrong. They will therefore be distributed at a later date." The end of panic telex would state: "Re IRMA, attention Mr. ____ We have now received the correct figures from the German Company. You will receive the market survey in a few days. Thank you for your comprehension." The implication drawn from this alarm system by the Commission is obvious. The Commission concluded: "The alarm system ... and the code system ... make it clear that the parties were fully aware that their conduct constituted infringements of Community legislation"⁶⁰

(iv) Nature of the Product and its relevance to consumers

The Commission consider the importance of a product to the consumer. An agreement fixing prices for an important product (commonly used foorstuffs, motor vehicles, alocohols) may attract larger fines than an agreement concerning specialist consumer luxuries.⁶¹

(v) Economic Context

The Commission may consider the political and economic context of a market. Thus, where an agreement occurs in the context of a declining market and international moves are in operation to restructure and rationalize the industry then the Commission may refrain from imposing heavy fines where this would impose additional financial strain on the resources of the undertakings in question.⁶²

(vi) Number and size of Undertakings

Where the combined market share of the parties is high this will be an indication of the gravity of the agreement for the market. A price-fixing agreement between X, Y and Z who together control 63% of a market will have significantly more restrictive consequences than a similar agreement between A, B and C who combined control only 12% of the market.⁶³

(vii) Extent of participation

Parties may be involved to a greater or lesser degree in a cartel. This will be considered when determining the level of fines to be imposed.

(viii) The state of national law

The Commission recognise that an undertaking may, by complying with national law, be forced into an infringement of Community law. Whilst the latter takes precedence over the former the Commission may

appreciate that an undertaking's breach of Article 85 or 86 is, to an extent, involuntary. Compliance with national law, however, is not a defence to breach of Community law.⁶⁴

(ix) Profits made by the undertakings

The Commission bear in mind the relationship between cartel profits and level of fines. The latter must have a deterrent value and hence may be related to the level of profits earned as a result of the cartel.⁶⁵

(x) Ability to Pay

The Commission consider the defendants capacity to pay a fine. Thus, in Cast Iron and Steel Rolls a relevant factor was the depressed financial position of the parties and their need to preserve capital to assist in restructuring.

(xi) Duration of infringements

In assessing the fine the Commission obviously consider the duration of the breach. In practice duration will play a part in assessing gravity.

(xii) Mitigation and Commission practice

In terms of mitigation the Commission may consider inter alia: the extent to which parties relied upon legal advice; the extent to which the parties relied upon a non-binding notice issued by their Commission; the extent to which the parties were open in the dealings with the Commission; and to the extent to which they voluntarily abandoned their cartel.

Current Commission practice is to impose fines of up to about 4% of total turnover though the Commission do not exclude the possibility of a much higher percentage for appropriate cases of flagrant infringement. The Commission do not calculate fines by any mathematical formulae but, as suggested above, work by reference to a host of factors which include the duty to punish individual infringements.⁶⁶

XI. Appeals to the European Court of Justice

Parties may appeal a Commission decision to the Court under Article 173 EEC. This reads:

"The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."

The addressee of a decision may appeal to the Court whether fines are imposed or not.⁶⁷ Third parties (for example, the complainant or other competitors, suppliers or customers of the addressees) may also apply to the Court to have the decision reviewed if they can prove that it is of "direct and individual concern" to them (see the wording of Article 173 para. 2, above). A person entitled to make a complaint has a right under Article 173 to seek review of the decision (see Chapter 6, Section on - Complaints by third parties: Form C).⁶⁸ It has been argued that any person who might suffer direct loss or injury as a consequence of the decision or "act" in question should have the right to use Article 173. Thus, if the Commission issue a decision exempting X, Y and Z under Article 85(3) and rivals of X, Y and Z see this as a threat to their legitimate interests they should be entitled to challenge the Commission on the basis of Article 173.⁶⁹

The grounds of review are those set out in Article 173 paragraph 1.⁷⁰

The Court also enjoys unlimited competence to review fines imposed by the Commission.⁷¹

C. THE LEGAL BASIS OF FORMAL NEGOTIATIONS:

ARTICLE 85(3)

Parties may negotiate with the Commission in respect of amendments to agreements which will enable the latter to grant an exemption under Article 85(3). Discussions also occur on how parties may bring their agreement within the terms of a bloc-exemption. Such discussions will only

be feasible where the parties have notified their agreement in proper manner. Where the parties have operated a clandestine cartel the Commission may be unsympathetic to moves, following discovery of the agreement, by the parties to initiate exemption discussions. The criteria for Article 85(3) exemption are given below. The application of these principles to specific types of agreement and trade association practice is discussed in the later chapters. There is no type of agreement that in theory cannot benefit from Article 85(3).⁷²

I. Article 85(3): Text

Article 85(3) provides that the prohibition on all restrictive agreements caught by Article 85(1) shall be declared inapplicable in the case of,

- "- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

Article 85(3) thus contains 4 elements: 2 positive elements which parties must seek to establish their agreements exhibit; and 2 negative elements which parties must seek to establish their agreements are devoid of. The positive elements are:

- contributing to improving the production or distribution of goods etc.
- allowing consumers a fair share of the resulting benefit.

The two negative elements are:

- imposing restrictions which are not indispensable;
- affording the possibility of eliminating competition in respect of a substantial part of the relevant products.

Although not expressly stated in Article 85(3) a fifth element exists, that the positive elements outweigh any negative elements i.e. that the advantages of the agreement outweigh the disadvantages.

Many agreements as notified are unsuitable for Article 85(3) treatment. Parties wishing to gain acceptance of their agreement must be willing to change it and should notify their willingness to modify to the Commission. It may well be that the Commission do not proceed to a formal decision following discussions and amendments but conclude an informal settlement. This procedure is discussed below. In practice, the **formal** Article 85(3) procedure is cumbersome and of limited use. Only a very small handful of cases each year (perhaps 5 or 6) pass through this gateway to exemption. Almost all agreements are informally settled.⁷³

II. First Positive requirement

"... contributes to improving the production or distribution of goods or to promoting technical or economic progress ..."

To determine whether improvements exist the Commission objectively compares the situation that exists with that which would exist in the absence of the agreement, decision, concerted practice etc. Given that this entails a comparison of the actual with the hypothetical the analysis cannot be absolutely precise. Accordingly, the Commission must be satisfied with reasonable probability of improvements. The starting point for the Commission is that free market forces ensure improvements more effectively than restrictive agreements.⁷⁴ Thus, the Commission set out to determine whether the agreement in question de facto improves upon free market forces. The subjective assertions of the parties themselves will therefore be immaterial.⁷⁵ Moreover, if the agreement only improves the economic interests of the parties then the Commission will not apply Article 85(3).⁷⁶ (See second positive requirement below).

The following factors may be relevant to parties arguing in favour of improvements **under** Article 85(3):

(i) Reduction of Costs

Agreements which enable costs to be reduced and which accordingly allow the benefits of reduced costs to be passed on to consumers by way of lower prices are smiled upon by the Commission. The benefits of cost saving or the more efficient use of capacity are manifold. The Commission thus, for example, look for increased output, lower tooling costs, lower raw materials costs, more rapid amortization of investments, improved quality, increased diversity, reduced marketing and advertising expenses etc. Parties must prove that the improvement is substantial, that it is not superficial. The Commission

may look for a "before and after" analysis of costs.⁷⁷

(ii) Expansion of outlook and improvement in distribution

The Commission look for what they term "broadening the offers". This simply means expanding outlook and economic activities. An agreement might lead to increased diversity of product, new R & D potentials, increases in the number of suppliers to serve a market, expansion of points of sale, improvement and updating of procedures and services, improvements in transport and distribution.

(iii) Increased market penetration and new markets

The Commission may be impressed with proof that new markets will be opened up. Thus, a joint venture between X and Y to create a new product will perhaps be accepted on the basis that it creates a new market.

(iv) Improved transparency

The model of the perfect market envisages perfect knowledge by all traders of market conditions, of prices and terms and conditions of sale. However, the Commission may be cautious about allowing transparency improving agreements since if X has more knowledge about the pricing policy of Y, X will be better armed to follow Y's price moves. Transparency can substitute the risks of competition for the concerted behaviour of greater knowledge.⁷⁸ (See Chapter 9 on Exchange and Dissemination of Information which is specifically on this question.)

(v) Employment

The Commission has not laid down in any detail its views on preservation of employment or job creation. Such factors do not directly impinge on the competitive situation. The question has been focused upon with respect to cartels designed to reduce structural overcapacity in declining industries. The Commission has condoned, under Article 85(3), these rationalization agreements where they satisfy a number of criteria. The Commission have stated in this regard: "production can be considered to be improved if the reductions in capacity are likely in the long run to increase profitability and restore competitiveness, and if the co-ordination of closures helps to mitigate, spread and stagger their impact on employment."⁷⁹ Employment and social condition thus have some part to play.⁸⁰

(vi) Specific agreement types

With respect to exclusive dealing agreements the Commission look for improvements in distribution, enhanced penetration of foreign markets, improved after-sales services, adequate stocking of spare parts, continuous supply, and the overcoming of legal and linguistic problems associated with foreign markets. With selective distribution systems the Commission looks for expert dealers able to effectively market the suppliers products, adequate demonstration, storage and general advertising space. With regard to specialisation agreements the Commission looks primarily for an improvement in production by the parties and improved quality of product. With regard to licensing agreements the Commission adopt a clause by clause approach. In particular they have exempted restriction on the licensor not to grant any more exclusive licenses thereby encouraging the licensee to concentrate his efforts and either improve market penetration or open up new market possibilities. The same philosophy may also justify restrictions on the licensee actively selling outside of his contract territory. As for the disadvantages that the Commission will look for and which may ruin chances under Article 85(3) there are certain pointers. Any agreement tending to separate off national markets will be frowned upon. Thus, export bans; prohibitions on selling to customers outside of national bounds; no-dumping clauses whereby parties in different Member States agree not to sell below the price of the market leader in another Member State etc., will almost never be accepted. A similarly strict attitude is taken to agreements which exclude competitors. New firms improve and contribute to the promotion of technical and economic progress; anything imposing barriers to entry will thus be incompatible with Article 85(3) exemption. Certain practices may be assumed to be unacceptable. Thus, price-fixing, market sharing, export bans, exchange of price lists, loyalty rebates are examples of habitually unlawful practices albeit that in EEC law no notion of per se illegality exists as it does in the USA.

III. Second Positive requirement

"... while allowing consumers a fair share of the resulting benefit ..."

"Consumers" is construed widely and means all purchasers of the products or services concerned. Thus a wholesaler ~~may be a~~ "consumer" of a supplier-manufacturer; a retailer ~~may be a~~ "consumer" of a wholesaler. The

High Street shopper is of course the ultimate "consumer".⁸¹ The word "benefit" is likewise construed widely and means any advantage which is likely to result from the agreement.⁸²

(i) "Equitable Participation in the resulting profit"⁸³

The primary advantage the consumers benefit from is lower prices.⁸⁴ This may be manifest as maintained prices in spite of increased costs.⁸⁵ In deciding whether the cost advantages will be passed on to consumers the Commission examine the state of the market. If the market is competitive they might conclude that sufficient incentive exists to ensure that cost savings and other economies are passed on. The existence of some competitive pressure on the parties thus tends to satisfy the Commission. Such pressures may derive from direct rivals to the parties or from powerful purchasers who can exert pressure on suppliers thereby ensuring that the latter supply on favourable terms. Where the supplier distributes via exclusive dealers the fact that the suppliers dealers are subject to competition from other dealers might convince the Commission that profits will be passed down the chain of distribution. Where the Commission finds no evidence of competitive pressures they are far more sceptical of arguments suggesting that economies have been passed on; their experience teaches them that absent an effective competitive incentive benefits are rarely passed on.⁸⁶

(ii) Other benefits to the Consumer

"Benefit" may materialise in a number of forms: increased output to satisfy demand; improved customer services, guarantees and after-sales services; regular supply, wider range of products; increased stocks; greater market transparency through more accurate and informative advertising; technical improvements in products and services etc.

In some circumstances it is clear that so called benefits are in reality unacceptable. Thus, a cartel in which the parties improve product quality by eliminating lower quality products or services and rediverting resources to the production of higher quality products or services may be unacceptable because of the reduction in choice they entail. Low quality cheaper products or services may form an integral part of consumer choice.

(iii) "Fair Share"

Benefits conferred must be adequate; it is not enough for the parties to throw the scraps to the consumer and keep the lions share for themselves. So far as is practicable the consumer must obtain a fair share of all the benefits perceived to flow from the agreement. Thus if an agreement confers cost savings and higher quality produce or services the consumer must obtain the higher quality product or service at a reasonable price which reflects the cost savings. Another relevant consideration is whether the advantages enjoyed by the consumer outweigh, or are outweighed by, disadvantages flowing from restrictions in the agreement. This consideration is discussed below.

IV. First negative requirement: Indispensability

The agreement must not,

"(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives."

As with the other elements of Article 85(3) whether a restriction is indispensable to the attainment of the "positive" requirements (the benefits) is objectively decided, the subjective expressions and exhortations of the parties are immaterial.

Parties must thus always ask themselves whether they need all of the restrictions. If the Commission, on examining an agreement, decide that it contains superfluous (dispensable) restrictions then an immediate rejection of an application for an exemption may follow. It is often easier to prove dispensability than it is to prove the existence of positive benefits (above). Parties may of course modify their agreements.

Parties sometimes contend that the restriction is indispensable because they would not have concluded the agreement without it. This test of indispensability is not acceptable to the Commission, it is linked to the subjective views of the parties and is not an objective test of necessity or indispensability.⁸⁷ A more reliable test in the eyes of the Commission is whether a reasonable, hypothetical businessman would have entered the agreement without the restriction. To apply this test the Commission will look to see whether the restriction in question is central or peripheral to the substance of the agreement. A restriction in a joint venture agreement between X and Y requiring both parties not to compete

with the joint venture company may be essential to that agreement to make it work. A second restriction on X and Y not to compete with each other for 12 years following termination of the joint venture is most unlikely to be central to that agreement. An objective businessman may not consider it worth entering the agreement without the first restriction; he may still enter the agreement without the second.

Certain restrictions are generally considered indispensable to the materialisation of certain benefits. Thus exclusivity clauses in exclusive dealing agreements (dealer purchase only from single supplier) may be indispensable in achieving effective distribution of the suppliers goods.⁸⁸ Exclusive licenses of intellectual property rights may be necessary to provide the incentive for the licensee to exploit the right effectively. Restrictions on inter-party competition may be necessary in a specialisation agreement to enable the parties to devote their research and development efforts to the respective products and accelerate advancement thereby.

It is perhaps pertinent to add that clauses not caught by Article 85(1) may be as superfluous, burdensome and illogical as they please.

V. Second negative requirement: elimination of competition

The agreement must not,

"(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

As with the first negative requirement, this is an absolute barrier to exemption. An agreement can prove technologically radical and of benefit to consumers, yet fail at either of these two negative hurdles. In assessing this requirement the Commission must define the product market. For details see Chapter 6. Analysis focuses upon the market share of the parties to an agreement. The following indications appear to be relevant:

- (i) parties together control 100% of market: competition no longer possible, exemption not grantable other than in exceptional circumstances;⁸⁹
- (ii) parties together control 90% of market: most unlikely that effective competition will survive after the agreement has come into operation, exemption very unlikely;
- (iii) parties together control 60% of market: effective competition outside of agreement will be under severe strain from agreement, exemption unlikely;

- (iv) parties together control 50% of market: exemption feasible will depend on external factors.
- (v) parties together control 30% of market: effective competition can probably thrive outside of agreement. If parties to the agreement are thereby enabled to compete with larger existing firms then the agreement may enhance competition;⁹⁰
- (vi) parties together control approximately 20% of market: exemption probable;⁹¹
- (vii) parties together control 0-20% of market: unless remainder of market populated by a plethora of very small firms agreement most unlikely to effect competition. Even if agreement makes parties largest group in market competition outside probably still likely to be effective, exemption very probable.

Factors other than market share may be relevant. The existence of intense competition on the world market may justify even an agreement between major oligopolists.⁹² The Commission seem to accept that agreements may be valid, even where they effectively preclude competition altogether on the market, if on expiry of the agreement competition will be restored in a more healthy form. Thus a controlled reduction of capacity agreement (rationalization scheme) between firms in declining markets may be justified on the basis that once restructuring has occurred a healthier competitive climate may prevail.⁹³ Finally, an agreement between X, Y and Z who, between them, control 75% of production may not eliminate competition if their purchasers (customers) are large and capable enough to commence own production should X, Y and Z act anti-competitively.⁹⁴

VI. Positive Elements Outweigh Negative elements

It is implicit in Article 85(3) that when the Commission evaluate an agreement they will balance pros and cons. To gain exemption pros must outweigh cons. Before a decision rejecting exemption is given parties will have been given a fair idea of how the Commission weigh individual factors in the balance from the statement of objections and from any informal discussions. Accordingly, parties must be prepared to attempt to redress the balance in their favour by eliminating or modifying clauses or by suggesting other changes to their agreements and practices.

VII. Conditional exemption

The Commission may impose conditions on exemptions.⁹⁵ The imposition of conditions enables the Commission to feel more confident about granting exemption. Parties must therefore expect a price to be paid for an exemption over and above any modifications they may have to have made to their agreements in order to render them suitable for exemption. The following types of condition may well be imposed:

- (a) time conditions granting exemption for a limited period of years;
- (b) notification conditions whereby parties must report back to the Commission any consultations with government, minutes of board meeting, copies of know-how and other intellectual property licenses, details of prices charged or paid, all amendments to existing agreements etc.

VIII. Involvement of third Parties

The granting of an exemption to X and Y might distress Z who is a rival of X and Y. Z may submit his comments to the Commission in confidence at any time. The Commission will publish the main facts of a proposed exemption in the Official Journal of the European Communities (the O.J.) and will invite interested parties to comment prior to the making of the formal exemption decision.⁹⁶ The views of such third parties will be taken into account and the substance of any relevant comments (though not the identity of the party making the comments) may well be included in the decision with Commission commentary on those comments. As noted above third parties may challenge an exemption if it materially affects them before the European Court.

D. ENFORCEMENT IN NATIONAL COURTS⁹⁷

Articles 85 and 86 EEC are directly effective.⁹⁸ That is, they may be pleaded by private parties against other private parties before national Courts. Parties with a legitimate grievance need not complain to the Commission, they may take matters into their own hands and sue the parties causing them damage in the national Courts. The threat of a damages claim or an injunctive order may be a powerful bargaining counter for use by an aggrieved party. Moreover, it is only at the national level that compensatory damages may be obtained; such are not available to private parties at the Community level.

I. Causes of action

A cause of action is a legal justification for bringing a court case. In UK law there are three possible causes of action: (i) breach of statutory duty; (ii) causing loss by unlawful means; (iii) the so-called "new torts".

(i) Breach of Statutory Duty⁹⁹

X Where a statute imposes a prohibition and a person breaches that prohibition thereby causing damage to another person then that other person may, in some circumstances, sue the wrongdoer for damages regardless of the fact that the statute does not expressly provide him with a remedy. Articles 85 and 86 EEC impose prohibition on parties. Article 85 forbids restrictive agreements; Article 86 forbids abuses of a dominant position. Neither Article allows private citizens to recover damages in action brought at the Community level. If the Commission impose a fine the money received goes into the Community purse; neither the Commission nor the Court may award damages to an aggrieved party.

It has now been established by the House of Lords that breaches of Article 85 and 86 give rise to an action for breach of a statutory duty.¹⁰⁰ Aggrieved parties may go to court to collect damages and/or¹⁰¹ obtain injunctions preventing other parties from breaching the competition law or from continuing with a breach of the competition laws. It is clear that national remedies may be more effective than complaining to the Commission. Indeed, it appears to be unnecessary to establish the conditions generally considered necessary to prove the existence of the right to sue for damages in a breach of statutory duty case where the duty breached derives from a directly effective Community law. The House of Lords in the leading case of Garden Cottage Foods v. Milk Marketing Board¹⁰² seemed to assume that the conditions were fulfilled in the case of Article 86 EEC. Other courts have followed this approach with respect to other directly effective provisions of the Treaty of Rome.¹⁰³

(ii) Causing Loss by Unlawful means

There would appear to be a cause of action in English law based upon the following:

"If one person, without just cause or excuse, deliberately interferes with the trade or business of another, and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully. He is liable in damages; and, in a proper case, an injunction can be granted against him."¹⁰⁴

The tort will have limited value in terms of EEC competition law. To prove the tort the plaintiff must establish: (a) that the defendant used unlawful means; and (b) that the defendant deliberately and specifically interfered with the trade of the plaintiff.¹⁰⁵ It has been accepted that a defendant who breaches his statutory duty employs unlawful means.¹⁰⁶ Thus, in the cases of breaches of Articles 85 and 86 the unlawful means requirement is not hard to satisfy. It is, however, very difficult to prove that the defendant deliberately focused his unlawful behaviour on the plaintiff. If X and Y agree to supply their goods at the same fixed price and customer A decides to purchase goods of the type produced by X and Y then those latter two parties can hardly be said to have deliberately sought to interfere specifically with A's trade.¹⁰⁷ The case may differ if Z a dominant supplier operates a predatory pricing regime to force a small newcomer to the market into bankruptcy. In such a case the requisite degree of deliberateness of harm to a specific person exists.

(iii) The "new torts"

In Application des Gaz v. Falks Veritas Ltd.¹⁰⁸ Lord Denning commented of Articles 85 and 86 EEC:

"So we reach this important conclusion: Articles 85 and 86 are part of our law. They create new torts or wrongs. Their names are 'undue restriction of competition within the Common Market'; and abuse of a dominant position within the Common Market. Any infringement of those articles can be dealt with by our English Courts. It is for our Courts to find the facts, to apply the law and to use the remedies which we have available."

However, despite the inventiveness of Lord Denning other judges have been critical of this tort.¹⁰⁹ Indeed the House of Lords in Garden Cottage Foods v. Milk Marketing Board implied that it was superfluous and unnecessary.¹¹⁰ In view of the availability of the tort of breach of statutory duty the view that the "new torts" are unnecessary is probably valid.

II. Remedies

In English law the principal remedies sought by the plaintiff will be: (i) damages; and/or (ii) an injunction. The fact that there is a machinery designed to enforce competition law operative at the community level (ie under Regulation 17/62/EEC) is irrelevant when considering remedies at the national level.¹¹¹

(i) Damages

It is now established that an action for damages will lie for breach of Articles 85 and 86 EEC.¹¹² Indeed, it is apparently the case that damages may be awarded for breach of any directly effective right in European law.¹¹³ Where the Court grants an injunction, for example to prevent a dominant concern from refusing to supply customers, an aggrieved party may claim damages in addition to an injunction.

(ii) Injunctive relief

Irrespective of any damages claim a plaintiff may seek an end to the practice or agreement which threatens the business of the plaintiff. A plaintiff may request either an interlocutory injunction (a temporary or interim injunction pending full trial) or a perpetual injunction.

An interlocutory injunction will be ordered where the Court is satisfied of a number of conditions:¹¹⁴ (a) that there is a serious question to be tried between the parties and that it is not frivolous or vexatious;¹¹⁵ (b) that if there is a serious triable question whether the "balance of convenience" lies in favour of granting the requested remedy;¹¹⁶ (c) that an award of damages to the plaintiff at full trial would be an inadequate remedy and that cessation of the defendant's behaviour is necessary; (d) that the plaintiff can make an undertaking that should he fail in the main trial he will pay damages to the defendant who has been forced to cease his activity pending trial and that this undertaking is adequate to protect the defendant.¹¹⁷

The decision of the High Court in granting or refusing interlocutory relief will only be overturned on appeal in exceptional cases.¹¹⁸

The jurisdiction of the Court to grant a perpetual injunction against anti-competitive conduct is entirely discretionary albeit that the power will be exercised in accordance with case law. Injunctions are rarely appropriate if damages will suffice.¹¹⁹ If the plaintiff is in any way responsible for the anti-competitive conduct (e.g. he is an ex-party to an agreement caught by Article 85(1)) the Court may refuse the remedy.¹²⁰

Injunctions may be prohibitory or mandatory. A prohibitory injunction restrains the doing, continuance or repetition of the

unlawful act. Thus a prohibitory injunction may prohibit the parties to an agreement from fixing prices; it may prohibit a dominant supplier from discriminating in price between customers; it may prohibit a trade association from recommending unreasonable standard terms and conditions for use by members. A mandatory injunction requires the defendant to undo some wrongful act, for example, an order requiring a dominant supplier to resupply a customer who has been unlawfully refused supplies in breach of Article 86 EEC¹²¹. Most injunctions are of the prohibitory form.

Where a party has been successful in obtaining an injunction the Court may order damages in addition to or in lieu of the injunction.¹²²

E. NEGOTIATING INFORMAL SETTLEMENTS WITH THE COMMISSION

I. Relevant Statistics

Very few notified agreements reach a formal decision. Conversely, hundreds of agreements each year are settled informally between the parties and the Commission. The statistics below give an indication of this pattern.¹²³

DATE	FORMAL DECISIONS	INFORMAL SETTLEMENTS
1976	9	380
1977	17	263
1978	14	200
1979	6	276
1980	9	183
1981	11	121
1982	0	479
1983	15	343
1984	19	211

II. Commencement of negotiations: Procedure

Parties invariably request the Commission to consider settling notified cases on an informal basis. It is important to consider at what stage of proceedings this request should be made or even if it should be made at all. If parties to an important agreement seek to obtain a formal decision from the Commission clearly they will make no request and the Commission will proceed to a formal decision. Usually however parties are content to negotiate a compromise without the Commission opening the formal procedure and preparing a statement of objections. This may be the case with relatively common and straight forward types of agreement (e.g. patent licenses or exclusive dealing agreements) where the Commission is sure of its ground.

In more complex cases or in cases involving more serious restrictions the Commission may well issue a formal statement of objections, in such cases an oral hearing might also occur enabling the parties to present their views orally to the Commission. The institution and continuation of the formal procedure does not preclude an informal settlement. Indeed, it can facilitate a settlement since, with the issuance of the formal statement of objections, the parties will be better informed concerning Commission thinking and hence better placed to respond.

Parties may submit memorandum of proposed alterations to their agreements at any time and the Commission will give its response on the adequacy of the suggestions. Negotiations may continue in this form over many months and even years.

If the Commission consider that the parties in making submissions are, in reality, stalling for time they are more likely to proceed formally to a prohibitive decision.

In the IBM settlement case¹²⁴ the Commission used the formal process as a bargaining counter to expedite IBM's negotiating response and to encourage an effective settlement. In an answer given to a Written Question in the Parliament the Commissioner responsible for Competition stated: "At a hearing in June 1983, IBM made known its views on the action it would be required to take in the event of a decision under Article 86 of the EEC Treaty. It subsequently asked the Commission to terminate the proceedings without taking a formal decision. The only pressure to which IBM was subject stemmed from the fact that the formal proceedings were conducted in parallel with the informal discussions."¹²⁵ It is understood that the Commission and IBM met in a sequence of meetings during 1983 and 1984 in order to work out a settlement and that the Commission informed

IBM that in the absence of an agreed settlement by a specified date in mid 1984 the Commission would issue the formal decision that they had already drafted. The actual settlement was arrived at following an eleventh hour meeting with the Commission

III. Settlement Procedure: Undertakings and Suspension of proceedings

In the IBM settlement case the Commission settled with IBM on the basis of an undertaking given by the latter to the Commission. The Commission agreed to suspend proceedings against IBM and in a letter from the Commissioner responsible for competition to the General Counsel of IBM it was stated:

"Furthermore, you may be assured that the Commission will not seek to reactivate the suspended proceedings so long as IBM's implementation succeeds in giving substantial satisfaction. You will appreciate nevertheless that the suspension of a particular proceeding cannot preclude the Commission, as a public authority, from terminating this suspension or from initiating a new proceedings in respect of IBM's conduct. Should the Commission reactivate the suspended proceeding it will rely exclusively on Articles 85 and 85 of the Treaty, and not upon your undertaking, in this or any other proceeding.

You will readily acknowledge that the effect and implementation of IBM's undertaking must be kept under constant review by my services. Apart from other action, I have instructed my services to call a meeting annually to take stock of the implementation of your undertaking and its effects. If need be, adjustments will then be discussed. The essential purpose of your undertaking is to provide necessary interface information and we shall welcome close co-operation with you to carry this out. The way in which this is done will be important and the spirit of the undertaking should prevail over the letter of particular examples or particular phrasing."¹²⁶

A number of points may be made about this case which indicate Commission policy:

(i) Undertakings are not decisions

An undertaking does not constitute a formal decision; it is expressed to have no legal consequences at all. To this extent it would not fit within the definition of a decision laid down by the Court of Justice (see below at V, the legal value of comfort letters).

(ii) Undertakings suspend proceedings

An undertaking of the IBM type is merely a suspension of proceedings; it is not a termination of proceedings.

(iii) Undertakings have no legal effect

An undertaking of the IBM type has no legal effects as between the Commission and the parties. The IBM undertaking was expressed to be "without prejudice". Article 19 of that undertaking provides that the undertaking and all related documents (correspondence, memoranda and discussions between parties and Commission) were not to be used in any way by the Commission or IBM. Moreover, Article 19 continued, "it is fundamental to this undertaking that it shall not be enforceable by any other natural or legal person or any national authority or agency."

It seems unlikely however that a formal, published undertaking given by a party to the Commission can bind a national Court to take no notice of it. The admissibility of such evidence before a national Court presumably depends upon national rules of evidence e.g. on documents stated to be without "without prejudice". Further, the undertaking and related documents are public documents, they are not confidential or private documents.

(iv) Good faith undertakings

Undertakings may be given in "good faith". Any breach of a "good faith" undertaking may be construed, by the Commission, as bad faith. In arriving at a formal decision following reactivation of formal proceedings breach of a bad faith undertaking may be relevant in deciding upon fines. The Commission may also consider the undertaking in semi-contract terms i.e. IBM will modify its behaviour and the Commission, for its part, will suspend formal proceedings.

(v) Monitoring

Undertakings may involve monitoring by the Commission. The Commission, in the IBM case, required IBM to keep it informed of such data as the former deemed necessary to effectively monitor the undertaking. The Commission expect IBM's competitors to assist in the monitoring by making complaints where appropriate.¹²⁷

(vi) Periodic adjustments

Undertakings may be subject to periodic adjustments. This will occur in the light of monitoring and supervision by the Commission.

(vii) Duration

The undertaking may be of limited duration. The IBM undertaking operates until 1 January 1989 (it was signed on 1 August 1984). Thereafter it will remain current until one year after IBM give notice to the Commission of their intention no longer to comply with the undertaking. Alternatively, it lapses if at any time the Commission issue a formal decision against IBM.

IV. Settlement Procedure: Comfort letters

(i) Content of Comfort letters

The IBM case discussed above was exceptional both in its substance and procedure, the final meetings involved a number of EEC Commissioners as well as the Director General and other senior officials from DG IV - the Competition Directorate. In more normal circumstances parties to agreements or trade association officials will discuss their cases with ordinary officials from DG IV. When agreement is reached a letter will be sent to the parties signed by a senior Commission official or a Director in DG IV. This letter - the "Comfort letter" - states that the Commission intends to close the file on the case, usually a reason is given. The information provided in a comfort letter varies from case to case.¹²⁸ It may, for example state: that the agreement falls within a bloc-exemption;¹²⁹ that in view of the changes made by the parties the Commission do not intend to take further action; that the agreement does not fall within Article 85(1). The letter might reserve the right to reconsider the position in the light of further developments. It might also provide for supervision of the future behaviour of the parties.

(ii) Publication Procedure

Before issuing a comfort letter to conclude a case the Commission have developed a procedure for allowing interested third parties to intervene. In 1982 and 1983 the Commission published two notices. The first notice concerned comfort letter as a means of closing cases where the parties apply for negative clearance.¹³⁰ The second notice concerned comfort letters as a means of closing cases where the parties seek exemption under Article 85(3) EEC.¹³¹ The procedure for both is fairly similar. In brief the Commission will publish, in the Official Journal, of the European Communities the essential ingredients of the agreement. This can run to 3 or 4 pages.

The Commission will state that they intend to close the file on the case in question and they will then invite third parties to comment usually within a one month period. Having received comments the Commission will then send a provisional letter. According to the Notice: "Such letters will not have the status of Decisions and will therefore not be capable of appeal to the Court of Justice. They will state that the Directorate General for Competition, in agreement with the undertakings concerned, does not consider it necessary to pursue the formal procedure through to the adoption of a Decision under Article 85(3) ..." The Notice on negative clearance is, *mutatis mutandis*, the same. The only difference is that the Commission have stated that in respect of exemption comfort letters a list of the cases dealt with in this manner, following publication of their details, will be appended to the annual Commission Competition Report. In respect of negative clearance comfort letters third parties will be notified of the sending of the letter by means of a notice published at a later date in the Official Journal simply noting the existence of the comfort letter.¹³² These procedures have now been used on a number of occasions.¹³³ Though, the Commission do not issue these notices in respect of every comfort letter sent out.

(iii) Legal effect of publication procedure

There is one question that should be asked in respect of these procedures. Both notices justify the procedures by reference to Article 19(3) of Regulation 17/62/EEC, the question is how? Article 19(3) reads: "Where the Commission intends to give negative clearance pursuant to Article 2 or take a decision in application of Article 85(3) of the Treaty, it shall publish a summary of the relevant application or notification and invite all interested third parties to submit their observations within a time limit which it shall fix being not less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets." (emphasis added) Article 19(3) envisages the positive taking of a decision - see the words in emphasis ; when the Commission issues a comfort letter it has no positive intention of taking a decision. Indeed the converse applies with the comfort letter acting as a substitute for a decision. Article 19(3) cannot strictly be authority for the comfort letter publication procedure. The nearest that one can realistically come is to say that the Commission have in the interests of natural justice and due process initiated a procedure

analogous to that outlined in Article 19(3). It is most unlikely that the Court would look unfavourably however on this procedure in light of the concern expressed by the Court for procedural fairness and of the general calls for greater transparency made by various bodies, including the European Parliament.¹³⁴

V. The legal value of Comfort letters

Comfort letters are not formal decisions issued pursuant to Regulation 17/62/EEC. They are simply administrative letters which are based upon the facts as known to the Commission. They cannot be relied upon by the addressee as against third parties nor do they prevent national Courts, seised of a case under Articles 85 or 86, from arriving at a different assessment of the agreements concerned in the light of the information available to them. Though, whilst comfort letters do not bind national Courts, the opinion they express constitutes a matter which national Courts may take into account. Thus, a comfort letter is no safeguard against a national Court declaring the agreement void under Article 85(2).¹³⁵

Whilst clearly not formal decisions in the Regulation 17/62/EEC sense, comfort letters do exert a legal effect.¹³⁶ It is accordingly arguable that a comfort letter may be reviewable as a decision under Article 173(2) EEC.¹³⁷ The European Court, under that provision, may review decisions addressed to natural or legal persons. It may review: (a) decisions addressed to third parties which are of direct and individual concern to the plaintiff; and (b) decisions which are in the form of a regulation but which are also of direct and individual concern to the plaintiff. In this context the European Court has widely construed the word "decision". In IBM v. Commission,¹³⁸ the Court stated:

"... any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the object of an action under Article 173 for a declaration that it is void. However, the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that article."

A number of points arise. First, so called "old agreements" (see Chapter 6) which enjoy provisional validity once notified lose that validity by a comfort letter. This brings about a serious change in the parties position and there appears to be a strong case for saying that such a comfort letter constitutes a decision which may be appealed to the Court

of Justice.¹³⁹ If a comfort letter is a decision then, under Article 190 EEC it must be properly reasoned.

For the vast majority of cases, i.e. the "new" cases there is more doubt. A comfort letter does affect the parties rights ; it effectively deters the Commission from considering the possibility of an exemption under Article 85(3) EEC. Thus, an agreement which might have benefited from the exemption is now bereft of exemption and vulnerable before a national Court.¹⁴⁰ On this basis it is arguable (though not as strongly as with "old" agreements) that comfort letters are decisions. If this is so they must be reasoned.

In practice much of the above will be immaterial. The Commission have stated that they will only issue a comfort letter if the parties are content for them to close the procedure in this manner.¹⁴¹ Hence, if for practical reasons of certainty, parties prefer the Commission to proceed to formal decision the Commission will respect this wish. It seems that very few parties do so desire and almost inevitably parties are happy to receive a comfort letter.

VI. Can the Commission be Compelled to Settle: Article 175

(i) Article 175: failure to act

Article 175 EEC reads:

"Should the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established.

The action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion."

Any individual may, in accordance with the third paragraph, commence proceedings but only where the Commission has infringed the Treaty. Thus, a plaintiff must establish that failure to settle constitutes an infringement of the Treaty. In this respect it seems most unlikely that failure to settle is an infringement of Community law.

The Court has, in other circumstances, held that a complainant

may not employ Article 175 to compel the Commission to take a formal decision on the existence of an alleged breach of Article 85 or 86 by other persons. In GEMA v. Commission¹⁴² the Court held that Article 3 of Regulation 17 - which empowers the Commission, upon the application of a natural or legal person, to take a decision requiring the parties to an alleged agreement to terminate it - imposes no obligation on the Commission to act. Article 3 provides a power to take decisions, it does not impose a duty to take decisions. It thus appears that parties to an agreement may not compel the Commission to take a decision viz-a-viz their agreement holding it to be in infringement of Article 85 and forbidding its continuance. Though it is unlikely that parties to an agreement would desire this outcome.¹⁴³

If the GEMA v. Commission approach to interpretation of Regulation 17/62/EEC is correct then parties to an agreement cannot compel the Commission to make a decision granting them negative clearance under Article 2 of Regulation 17/62/EEC or a decision granting an exemption under Articles 4, 6 and 8 of Regulation 17/62/EEC since all of those provisions simply empower the Commission to take decisions they do not require the Commission to take formal decisions. It thus seems most unlikely that parties may compel a settlement. Though it might be arguable that having notified their agreement parties are entitled to some official response from the Commission. One of the reasons for refusing to allow plaintiffs to compel Commission decisions is that the Commission has a choice under Regulation 17/62/EEC of issuing a formal decision or settling informally.¹⁴⁴ It might well be therefore that parties to an agreement can compel some action from the Commission since an incapacity to compel a formal decision does not necessarily imply an incapacity to compel some official action.¹⁴⁵

(ii) Does compliance by parties raise duty on Commission to settle?

The Court has held that for the Commission to ignore a draft agreement submitted by the parties as a possible basis for a negotiated settlement would represent a breach of the requirements of good administration.¹⁴⁶ It follows that where a draft agreement submitted to obtain a settlement meets all of the points laid down by the Commission in the statement of objections then the Commission must at least consider it. Failure to take due account of the draft may render any decision subsequently adopted by the Commission susceptible to judicial review. Thus, to the extent that parties submit a draft agreement

which satisfies the Commission's objections as expressed in a statement of objections there may be a duty on the latter to settle. This might extend to Commission objections expressed more informally in an official statement of objections. There is no duty to settle if the draft agreement submitted by the parties does not meet the Commission's requirements.

VII. Can third parties challenge a settlement?

An informal settlement between the Commission and the parties involving closure of the file and notification thereof to the parties by a comfort letter may give rise to grave concern by a third party or a complainant who considers this unsatisfactory. Where the Commission adopts a formal decision granting an exemption or negative clearance this may be challenged under Article 173(2) by any person who can prove that the decision, although not addressed to him, is of "direct and individual concern". It is established that an actual complainant has locus standi to bring an action under this provision and this apparently extends to any other person who also has a legitimate interest to bring a complaint.¹⁴⁷

Given that a comfort letter almost certainly constitutes an act within the meaning of "acts" in Article 173 EEC then there should be no reason why a third party who feels deleteriously affected by a settlement should not seek review of it under Article 173(2) EEC.¹⁴⁸

VIII. Lobbying¹⁴⁹

It is worth noting that parties may employ lobbyists in competition cases if they feel this will assist their cause. The Commission do not verify or in any way validate the credentials of those acting for parties to proceedings before the Commission. Nonetheless, the Commission adopt a generally cautious stance to lobbying tactics.¹⁵⁰ It is understood that in the IBM settlement case, IBM persuaded certain high level American politicians to make their presence known to the Commission. Indeed, the Commission entered into lengthy discussions with the US Department of Justice over the case though the latter were not necessarily against the Commission's action given that they had hitherto failed in a mammoth antitrust suit against IBM.

IX. Division of Labour in DG IV - The Competition Directorate

The Directorate General for Competition - DG IV - comprises some 250 persons under the control of a Director General. The cutting edges of DG IV are directorates B and C. Directorate B comprises three divisions responsible for: (i) mechanical and electrical engineering, electronic, motor vehicles and transportation, telecommunications; (ii) textiles, clothing, leather and other manufacturing industries; and (iii) distributive trades, services, banking and insurance, the media.¹⁵¹ Directorate C comprises three divisions responsible for: (i) steel, coal, transport; (ii) energy (excepting coal), chemicals, agricultural and food products; and (iii) non-ferrous metals, non-metallic mineral products, building, wood, paper.¹⁵² Directorate D co-ordinates the activities of B and C.¹⁵³ This has four divisions broken down by the legal classification of the case as follows: (i) horizontal restrictive practices, abuses of dominant position; (ii) co-operation agreements, joint ventures, mergers; (iii) industrial and intellectual property rights; and (iv) distribution agreements.

The team assigned to a case will generally comprise a member of Directorates B or C and a member of Directorate D. In larger cases a team of 4 or 5 persons may combine. In complex negotiations with major multinationals an even larger team may operate which may include senior personnel and even Commissioners in exceptional cases.

F. THE OPPOSITION PROCEDURE

I. Legal Framework¹⁵⁴

The Commission has issued bloc-exemptions for specialisation agreements, patent licensing agreements, and, research and development agreements.¹⁵⁵ These bloc-exemptions contain lists of permissible (white) clauses and non-permissible (black) clauses. Agreements satisfying the criteria as laid out in the bloc-exemptions need not be notified. Where agreements contain restrictions or exceed thresholds that are not expressly permitted but are not expressly prohibited the bloc-exemption may be extended to cover the agreement. Details of the process of extension are given below.

II. Details of Opposition Procedure: How to Apply

The rules apply only to specialisation agreements; patents; licenses; and, research and development agreements. Under the procedure the bloc-exemption accorded by the various Regulations covering those agreement types is extended to include agreements duly notified to the Commission. The exemption covers these agreements six months from the date the notification is received by the Commission provided the latter raises no objections in the interim.¹⁵⁶ To so benefit an agreement must not contain any of the "black" prohibited clauses described in the various regulations.¹⁵⁷

This expedited procedure only operates where parties make express reference to the Article of the bloc-exemption covering the relevant type of agreement which refers to the opposition procedure. This reference must occur in either the notification or an accompanying communication. Thus the opposition procedure operates only where the parties apply for it to operate. The Commission may not activate the procedure if the notification is incomplete and not in accordance with the facts.

The procedure may apply to agreements notified prior to entry into force of the Regulation provided parties submit a communication to the Commission expressly referring to the Article of the relevant bloc-exemption covering the opposition procedure and to the notification.

III. When will Opposition be Raised

The Commission may oppose the exemption at any time during the six month period.

The Commission must oppose the exemption if it receives a request so to do from a Member State within three months of the transmission to the Member State of the notification (or of the Communication where related to a notification made prior to commencement of the regulation). Member States however may only justify opposition on considerations relating to competition policy. The Regulations give no guidance on whether parties may view objections made by Member States. Presumably there is no right of inspection though given the greater degree of ~~access~~ to Commission files tolerated by the Commission a request to see any opposition raised might be considered.

The Commission may withdraw their opposition at any time. Where the opposition was first raised at the request of a Member State and this is maintained withdrawal of opposition may only occur following consultation with the Advisory Committee on Restrictive Practices and Dominant Positions. Thus Member States retain an input into any Commission decision to withdraw

opposition. The Commission is however not bound by the opinion of the Advisory Committee. Commission opposition may further be withdrawn where either the parties establish that the conditions of Article 85(3) are satisfied, or, the parties amend the agreement so as to satisfy Article 85(3). Where such is the case exemption applies from the date of notification or the date of amendment respectively.

Where the Commission oppose exemption and this is maintained the usual procedure envisaged by Regulation 17/62/EEC applies.

The Commission will notify the parties of any opposition by letter.

IV. Commission Response

The Commission intend to issue comfort letters at the end of the opposition period which state that an exemption could be obtained if the formal procedure were continued with. They expect recipients generally to be satisfied with this comfort letter despite the legal questions hanging over the precise status of comfort letters. In practice parties will almost certainly be satisfied with a comfort letter.

FOOTNOTES

1. Kerse, Antitrust Procedure in the EEC (1981) and supplements; Davidow, EEC Fact-Finding Procedures in Competition Cases, An American Critique (1977) 14 C.M.L. Rev. 175; Korah, EEC Competition Law and Practice, an Introductory Guide (2nd ed., 1981); Korah, The Rights of the Defence in Administrative Proceedings under Community Law (1980) C.L.P. 73; Ferry, Procedure and Powers of the EEC Commission in Antitrust Cases (1979) 1 E.I.P.R. 126; Temple Lang, The Procedure of the Commission in Competition Case (1977) 14 C.M.L. Rev. 155; Van Bael, EEC Antitrust Enforcement and Adjudication as seen by Defence Counsel (1979) 7 Revue Suisse de Droit International de la Concurrence 1; Korah, Narrow or Misleading Replies to Requests for Information (1982) 2 Bus. L. Rev. 69; Joshua, The Element of Surprise: EEC Competition Investigations under Article 14(3) of Regulation 17 (1983) E.L. Rev. 3; Kreis, EEC Commission Investigation Procedures in Competition Cases (1983) 17 International lawyer 19.
2. The notion of "necessary" information is to be construed widely, see Korah, EEC Competition Law and Practice, an Introductory Guide (2nd ed., 1981) at p. 33. See, Acciaieria di Brescia v. High Authority (Case 31/59) [1960] E.C.R. 71; RAI/UNITEL [1978] 3 C.M.L.R. 306.
3. See Kerse, op. cit., at pp. 59-70 for a searching analysis of this subject.
4. Article 11(4) of Regulation 17/63/EEC however states that undertakings "shall" supply the information requested. But see Commission answer to W.Q. No. 677/79 O.J. 1979 C310/30 where the latter acknowledge that undertakings are not legally obliged to furnish information unless a formal decision of a Commissioner has been obtained.
5. For discussion of this two stage procedure see per Advocate General Warner in Transocean Marine Paint Association v. Commission (Case 17/74) [1974] 2 C.M.L.R. 459 at pp. 471, 472, [1974] E.C.R. 1063 at pp. 1089, 1090.
6. See Articles 15 and 16 of Regulation 17/62/EEC.
7. Under Article 15(1)(b) of Regulation 17/62/EEC which empowers the imposition of fines for the furnishing of incorrect data. "Incorrect" has been defined as: "... any statement ... which gives a distorted picture of the true facts asked for, and which departs significantly from reality on major points. Where a statement is thus false or so incomplete that the reply taken in its entirety is likely to mislead the Commission about the true facts, it constitutes incorrect information within the meaning of Article 15(1)(b)": Telos [1982] 1 C.M.L.R. 267 at para. 21 of the decision. See also, National Panasonic Belgium [1982] 2 C.M.L.R. 410; Comptoir Commercial d'importation [1982] 1 C.M.L.R. 440.
8. See Korah, Narrow or Misleading Replies to Requests for Information (1982) 2 Bus. L. Rev. 69.
9. See e.g. RAI/UNITEL [1978] 3 C.M.L.R. 306; Misal [1973] C.M.L.R. D37; Fire Insurance (D) [1982] 2 C.M.L.R. 159; Deutsche Castrol [1983] 3 C.M.L.R. 165.

10. See, Acciaieria de Brescia v. High Authority (Case 31/59) [1960] E.C.R. 71 at p. 82; CSV O.J. 1976 L192/27. See also FNICF [1983] 1 C.M.L.R. 575.
11. Article 14(1) Regulation 17/62/EEC. See generally Kerse, op. cit., at pp. 70-87; Eleventh Commission Competition Report (1981) pp. 28-30 paras. 17-21 ; Twelfth Commission Competition Report (1982) pp. 39, 40 paras. 33, 33.
12. See Twelfth Commission Competition Report (1982) p. 39 para. 32. The text of the explanatory memorandum may be found in the thirteenth Commission Competition Report (1983) at pp. 270-272 (annex).
13. See DGFT Annual Reports for years 1980-1984. In 1980 28 visits by Commission officials were made to 25 UK undertakings; In 1981 13 visits were made to 11 UK undertakings; In 1982 44 visits were made to 43 UK undertakings; In 1983 46 visits were made to 43 UK undertakings; in 1985 25 visits were made to 24 UK undertakings.
14. See National Panasonic v. Commission (Case 136/79) [1980] 3 C.M.L.R. 169; [1980] E.C.R. 2033.
15. *ibid.* See Kerse op. cit., at pp. 81-84.
16. See, Business Records of Vereinigung Deutscher Frieform Schmieden [1978] 1 C.M.L.R. D63. In Pioneer [1980] 1 C.M.L.R. 457 the Commission considered the failure to take minutes an aggravating factor when considering fines.
17. See, Twelfth Commission Competition Report (1982) at p. 54 para. 52. An "independent" lawyer according to the Commission is one subject to "... the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose". This is related to the position of a lawyer as a collaborator in the administration of justice. There is some doubt as to the scope of this privilege, see Faull (1983) 8 E.L. Rev. 411; Forrester (1983) 20 C.M.L. Rev. 75; Joshua (1983) 8 E.L. Rev. 15; Boyd (1982) 7 E.L. Rev. 493; Ghandi (1982) 7 E.L. Rev. 308.
18. (Case 155/79) [1982] 2 C.M.L.R. 264; [1982] E.C.R. 1575. See for Commission interpretation, Twelfth Commission Competition Report (1982) pp. 52-55.
19. Twelfth Commission Competition Report (1982) at p. 53 para. 52.
20. *ibid.*, at p. 54 para. 53.
21. *ibid.*, and see also at p. 39 para. 33.
22. In IBM v. Commission (Case 60/81) [1981] 3 C.M.L.R. 635, [1981] E.C.R. 2639 the Court held that the initiation of a procedure was not a decision subject to judicial review under Article 173 EEC. They held that it was simply a procedural step adopted prior to a formal decision on the case.
23. ICI v. Commission (Cases 48, 49, 51-57/69) [1972] C.M.L.R. 557; [1972] E.C.R. 619.

24. IBM v. Commission (Case 60/81) [1981] 3 C.M.L.R. 635, [1981] E.C.R. 2639 at para. 21 of the judgment. The Court explained its reasoning as follows: "A statement of objections does not compel the undertaking concerned to alter or reconsider its marketing practices and it does not have the effect of depriving it of the protection hitherto available to it against the application of a fine, as is the case when the Commission informs an undertaking, pursuant to Article 15(6) of Regulation No. 17, of the results of the preliminary examination of an agreement which has been notified by the undertaking. Whilst a statement of objections may have the effect of showing the undertaking in question it is incurring a real risk of being fined by the Commission, that is merely a consequence of fact, and not a legal consequence which the statement of objections is intended to produce." (para. 19 of the judgment).
25. As is believed to have been the case in the IBM case (supra). The IBM response however included a request for further details of the Commission's complaint which ran to over 100 pages and the actual IBM reply is reputed to have been in the order of 7,000 pages.
26. See Article 19(1) Regulation 17/62/EEC, Kerse, op. cit., at pp. 99-106.
27. Consten & Grundig v. Commission (Cases 56 and 58/64) [1966] C.M.L.R. 418; [1966] E.C.R. 299 at para. 5 of the judgment: "[the parties] must be informed of the facts upon which these complaints are based. It is not necessary, however, that the entire contents of the file should be communicated to them." In Hoffman-La Roche v. Commission (Case 85/76) [1979] 3 C.M.L.R. 211, [1979] E.C.R. 461 at para 11 of the judgment the Court was a little more elaborate: "the undertaking concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Article 86 of the Treaty."
28. See Twelfth Commission Competition Report (1983) pp. 40, 41 paras. 34, 35.
29. See Article 2(4) Regulation 99/63/EEC. See Almini v. Commission (Case 19/70) [1971] E.C.R. 623 - where the Commission fail to fix a time a sufficient time period to enable the parties to properly exercise their rights must be assumed. See also ICI v. Commission (Cases 6-7) [1974] 1 C.M.L.R. 309, [1974] E.C.R. 223 - Advocate General Warner described the two week period set for such a complex case as "patently unreasonable".
30. See Ferry, Procedures and Powers of the EEC Commission in Anti-Trust Cases (1979) E.I.P.R. 126 at page 129. (author is a Director of Directorate B of DG IV - the Competition directorate).
31. See, Distillers v. Commission (Case 30/78) [1980] 3 C.M.L.R. 121, [1978] E.C.R. 2229.
32. See also Hearing Regulation 99/63/EEC O.J. Sp. Ed. 1963-4 p. 47. This lays down procedural rules for governing the hearing.

33. Twelfth Commission Competition Report (1982) pp. 41, 42 paras. 36, 37. See also, Thirteenth Commission Competition Report (1983) pp. 273, 274 for the terms of reference of the Hearing Officer. This is a useful document to refer to for any parties involved in oral hearings.
34. For a detailed account of proceedings before the Hearing Officer parties should see Kerse, op. cit., at pp. 108-111.
35. See Article 5 of Regulation 99/63/EEC and Article 19(2) of Regulation 17/62/EEC.
36. The results of the settlement are reported at [1984] 3 C.M.L.R. 147.
37. But c.f. Commission answer to W.Q. No. 292/82, O.J. 1982 C 174/20.
38. See Kerse, op. cit., at pp. 121-124.
39. See per Advocate General Warner in Distillers v. Commission (Case 30/78) [1980] 3 C.M.L.R. 121, [1978] E.C.R. 2229; Van Bael, EEC Antitrust Enforcement and Adjudication as seen by Defence Counsel (1979) 7 *Revue Suisse du Droit International de la Concurrence* 1; UNICE Memorandum (21 February 1981), EEC Procedures in Competition Cases.
40. Kerse, op. cit., Ch. 6.
41. See Article 3(1) Regulation 17/62/EEC. The power was confirmed by the Court in Camera Care v. Commission (Case 792/79R) [1980] 1 C.M.L.R. 334, [1980] E.C.R. 119. The power to take interim measures under the ECSC Treaty was confirmed some years earlier in National Carbonising Co. v. Commission (Cases 109 and 114/75) [1975] 2 C.M.L.R. 457; [1977] E.C.R. 381. See Ferry, Interim Relief under the Rome Treaty - The European Commission's Powers (1980) 3 E.I.P.R. 330; Temple Lang, The Powers of the Commission to Order Interim Measures in Competition Cases (1981) C.M.L. Rev. 49. Both authors are senior officials in the Commission.
42. See Commission comment on ECS/AKZO [1983] 3 C.M.L.R. 694 at Thirteenth Commission Competition Report (1983) at p. 95 para. 151.
43. See Ford-Werke v. Commission (Cases 228, 229/82) [1984] C.M.L.R. 649 noted, Hendry, (1984) E.L. Rev. 344.
44. ECS/AKZO [1983] 3 C.M.L.R. 694: 13 May 1983 request to Commission for interim measure; 8 June 1983 statement of objections sent; 23 June oral proceedings; 4 July Advisory Committee; 29 July decision of Commission issued. A period of approximately 10 weeks thus elapsed between request for an interim measure and actual decision. Furthermore, the Commission received the first complaint in June 1982 so would have been in possession of some (or most) of the facts prior to the actual request for interim relief. Where the request is made contemporaneously with the initial complaint the Commission may have to devote more time to fact collection.

45. Under Article 15(6) Regulation 17/62/EEC.
46. Cimenteries v. Commission (Cases 8-11/66) [1967] C.M.L.R. 77, [1967] E.C.R. 75. See also, Portelange v. Smith Corona Marchant International (Case 10/69) [1974] C.M.L.R. 397; [1969] E.C.R. 309; Sirdar/Phildar [1975] 1 C.M.L.R. D93; Bronbemaling/Heidemaatschappij [1975] 2 C.M.L.R. D67 noted (1979) E.L. Rev. pp. 413, 414.
47. Article 3 Regulation 17/62/EEC.
48. e.g. ICI and Commercial Solvents v. Commission (Case 6,7/73) [1974] 1 C.M.L.R. 309; [1974] E.C.R. 223; Consten & Grundig v. Commission (Cases 56 and 58/64) [1966] C.M.L.R. 418; [1966] E.C.R. 299.
49. See ACF Chemiefarma v. Commission (Case 41, 44, 45/69) [1970] E.C.R. 661 at paras. 91-93 of the judgment; FEDETAB v. Commission (Cases 209-215, 218/78) [1981] 3 C.M.L.R. 134; [1980] E.C.R. 3125 at para. 68 of the judgment.
50. Article 190 EEC. See Germany v. Commission (Case 24/62) [1963] C.M.L.R. 347 at p. 367, [1963] E.C.R. 63 at p. 69: "In imposing upon the Commission the obligation to state reasons for its decisions, Article 190 is not taking mere formal considerations into account, but seeks to give an opportunity to the parties defending their rights, to the Court of exercising its supervisory function and the Member States and all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty."
51. *ibid.*
52. The principle of *res judicata* has no application.
53. Conditional exemptions are contemplated by Article 8(1) Regulation 17/62/EEC. See e.g. International Energy Agency [1984] 2 C.M.L.R. 186 noted, Green, (1984) E.L. Rev. 449.
54. See Twelfth Commission Competition Report (1982) pp. 56-58 paras. 62-66.
55. Musique Diffusion Francaise SA v. Commission (Pioneer) (Cases 100-103.80) [1983] 3 C.M.L.R. 221 at para. 109 of the judgment. See also Johnson & Johnson [1981] 2 C.M.L.R. 287.
56. Details of the exact exchange rate may be obtained from the financial press, the Bulletin of the European Communities, the Official Journal, or the Commission headquarters in each Member State.
57. See for an example of a "good faith undertaking" the IBM Settlement [1984] 3 C.M.L.R. 147 at p. 152. IBM gave to the Commission an undertaking which commences as follows: "IBM undertakes in good faith" The Commission reason that infringement of this undertaking will constitute by IBM's own admission "bad faith". A very heavy fine commensurate with IBM's world strength would probably follow.
58. See, Michelin v. Commission (Case 322/81) [1985] 1 C.M.L.R. 282 at para. 107 of the judgment - Michelin deemed to be aware of previous decisions of the Commission and judgments of the Court and therefore could not argue that they did not have knowledge of the likely attitude of the Commission.

59. [1984] 1 C.M.L.R. 694 at paras. 20-22 of the decision. See also Peroxygen Cartel [1985] 1 C.M.L.R. 481 at para. 54 of the decision.
60. *ibid.*, at para. 55 of the decision, see also para. 64.
61. See e.g. Theal/Watts [1977] 1 C.M.L.R. D44 (record cleaning devices).
62. Cast Iron and Steel Rolls [1984] 1 C.M.L.R. 694 at paras. 72-76 of the decision.
63. e.g. Floral [1980] 2 C.M.L.R. 285. In Musique Diffusion Francaise SA v. Commission (Pioneer) (Cases 100-103/80) [1983] 3 C.M.L.R. 221 at para 120 of the judgment the Court stressed that in assessing fines the Commission may consider, "the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which the undertaking was able to exert on the market." - thus the Court apparently link size of parties to restrictive effect.
64. See e.g. Groupements des Fabricants de Papiers Peints de Belgique v. Commission (Case 73/74) [1976] 1 C.M.L.R. 589, [1975] E.C.R. 1491. Though, the involvement of government may be a factor in mitigation of fine - A.R.O.W. v. B.N.I.C. [1983] 2 C.M.L.R. 240 at p. 260 para. 77.
65. See e.g. Kawasaki [1979] 1 C.M.L.R. 448.
66. See generally Thirteenth Commission Competition Report (1983) pp. 56-58 paras. 62-66.
67. Article 173 allows review of "acts", this is wider than just a formal decision. See Commission v. Council (AERT) Case 22/70) [1971] C.M.L.R. 335, [1971] E.C.R. 263 at paras. 39-42 of the judgment. See the notion of "provisional decision" discussed in the text on 'Decisions of the Commission'. "Decision" is widely construed, see e.g. Camera Care v. Commission (Case 792/79R) [1980] 1 C.M.L.R. 334, [1980] E.C.R. 119 - Advocate General Warner thought refusal by Commission, in a letter, to take an interim measure was a decision.
68. Metro SB Grossmärkte v. Commission (Case 26/76) [1978] 2 C.M.L.R. 1, [1977] E.C.R. 1875 at para. 13 of the judgment. Noted: Dinnage, (1979) 4 E.L. Rev. 15; Temple Lane (1978) E.L. Rev. 177. See also on locus standi Piraiki - Patraiki Cotton Industry v. Commission (Case 11/82) [1985] 2 C.M.L.R. 4 - more liberal approach to locus standi of third parties.
69. Kerse, *op. cit.*, at p. 223.
70. See Kerse, *op. cit.*, at pp. 227-233; Hartley, *The Foundations of European Community Law* (1981) Chapter 15 and generally Chapters 11-16; Usher, *Exercise by the European Court of its jurisdiction to annul competition decisions* (1980) E.L. Rev. 287.
71. Article 172 EEC. See also Article 17 of Regulation 17/62/EEC: "The Court shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty imposed."
72. See Commission answer to W.Q. No. 675/76 O.J. 1977 C50/16.

73. In the period January 1979 until December 1984 (6 years) only 19 formal decisions were made. See W.Q. No. 1095/84, O.J. 1985 C39/23 where these 19 cases are listed and various points made in respect of exemption. By 1977 only 56 formal exemptions had been given whereas by 1980 approximately 25,000 distribution agreements were settled on the basis of the bloc-exemption for exclusive dealing agreements in Regulation 67/67/EEC. (See Ninth Commission Competition Report (1979) at p. 16).
74. Bayer/Gist Brocades [1976] 1 C.M.L.R. D98; Gerofabriek [1977] 1 C.M.L.R. D35.
75. Consten & Grundig v. Commission (Cases 56 and 58/64) [1966] C.M.L.R. 418, [1966] E.C.R. 299 at p. 396.
76. Consten & Grundig v. Commission (Supra); German Floor Tiles Manufacturers Association [1971] C.M.L.R. D6; Central Heating [1972] C.M.L.R. D130.
77. e.g. Prym-Beka [1973] C.M.L.R. D250; EMO O.J. 1979 L11/16 (17 Jan. 1979) (Calculation need not be very precise, generalisations which are as accurate as may reasonably be expected appear to be satisfactory).
78. See International Energy Agency [1984] 2 C.M.L.R. 186 where the Commission exempted an information system operated by the major oil companies within the framework of the International Energy (IEA). The IEA is a sub-body of the OECD and operates an emergency oil sharing scheme for periods of crisis supply. The involvement of the oil majors, being the major carriers of bulk oil in the world, is essential to the scheme. It is they that will, in an emergency, undertake the redistribution and allocation of supplies. Accordingly exemption, under Article 85(3), was a political necessity. The fact that the IEA scheme involved exchanges of data between the firms concerned and the resultant increased transparency was essentially viewed as a necessary evil. See for commentary, Green, (1984) E.L. Rev. 449.
79. See Twelfth Commission Competition Report (1982) pp. 44, 45 para. 39.
80. See, W.Q. No. 2182/83 O.J. 1984 C158/16 concerning control of restructuring by multinationals. The Commission was asked whether it was concerned that corporate restructuring could take place without due regard to employment. The Commission commented that the Vredeling Proposal on disclosure of information to employees (O.J. 1983 C217/3, 12 August 1983) would help in this matter. Generally, they considered that employment and social consequences were of importance: "The Commission wishes restructuring plans to be carried out with full account being taken of the social consequences of the decisions envisaged and it hopes that it will be possible to create new jobs in regions particularly severely affected by the crisis." It would be inconsistent with this policy for unemployment not to be relevant to Article 85(3).
81. See W.Q. No. 307/84, O.J. 1984 C243/2. The Commission stated: "Also, it must be remembered that the term 'consumer' in this context refers not only to end-users, but includes trade purchasers, which may require a different type of approach."

82. *ibid.*: "the decisions in which Article 85(3) has been applied show a wide range of different benefits which the agreements in question brought about: lower prices, a more extensive offer of products, greater stability in terms of quantities supplied and prices, better information and orientation for consumers, efficient after-sales service, faster delivery."
83. See KEWA [1976] 2 C.M.L.R. D15; United Processors GmbH (URG Cartel) [1976] 2 C.M.L.R. D1 - the actual phrase used by the Commission.
84. e.g. CEMATAX [1973] C.M.L.R. D135.
85. F.N.C.F. O.J. 1971 L134/6 (28 May 1971). See also Vacuum Interrupters [1977] 1 C.M.L.R. D67.
86. SNPE-LEL [1978] 2 C.M.L.R. 758; Gerofabriek [1977] 1 C.M.L.R. D35.
87. See Consten & Grundig [1964] C.M.L.R. 489 (Commission decision).
88. See paragraph 8 of the preamble to Commission Regulation 83/83/EEC O.J. 1982 C172/3, [1982] 2 C.M.L.R. 642: "The other restrictions on competition allowed under this Regulation in addition to the exclusive supply obligation produce a clear division of functions between the parties and compel the exclusive distributor to concentrate his sales efforts on the contract goods and the contract territory; they are, where they are agreed only for the duration of the agreement, generally necessary in order to attain the improvement in the distribution of goods sought through exclusive distribution." Note that the Commission use the word "necessary" instead of indispensable, the two words appear to be interchangeable.
89. See United Reprocessors GmbH (URG Cartel) [1976] 2 C.M.L.R. D1, three major reprocessors of nuclear fuels combined in a joint R & D recovery and marketing cartel - the URG cartel. This provided, inter alia, for price fixing, investment co-ordination, allocation of orders, control of licences, exchange of know-how. There was no effective competition in Western Europe outside of the parties. Although the exemption under Article 85(3) is silent on the matter it is understood that the agreement obtained exemption because of the political need for the EEC to have a corporation that could compete on the world market with intense American competition. There were apparently also Community energy policy considerations in play. See for commentary, Green (1983) E.L. Rev. 58.
90. For example X, Y and Z combine in an agreement controlling 30% of the market. Together they compete with A who controls 17% of the market, B who controls 25% of the market, and, C who controls 28% of the market. The sudden arrival of the X, Y, Z agreement can disturb the status quo between A, B and C and engender competition that hitherto had been eliminated between the oligopolists A, B and C.
91. e.g. BMW [1975] 1 C.M.L.R. D44.
92. See United Reprocessors GmbH (URG Cartel) [1976] 2 C.M.L.R. noted supra.
93. See Twelfth Commission Competition Report (1982) pp. 43-45 at paras. 38-41.

94. e.g. see Europemballage and Continental Can v. Commission (Case 6/72) [1973] C.M.L.R. 199, [1973] E.C.R. 215. Former purchasers of a dominant manufacturer of metal containers commenced own-production. For example, Nestles produced cream cans, Shell produced oil cans.
95. Article 8(1) Regulation 17/62/EEC.
96. See Article 19(3) Regulation 17/62/EEC. See O.J. 1983 C295/6 (2 November 1983). Notice from the Commission on procedures concerning notifications pursuant to Article 4 of Council Regulation No. 17/62. Commented on by the Commission in answer to W.Q. No. 307/84, O.J. 1984 C 243/2,3.
97. See generally on this topic: Green, The Treaty of Rome, National Courts and English Common Law: The Enforcement of European Competition Law after Milk Marketing Board (1984) *Labels Zeitschrift* 509; Kerse, op. cit., at pp. 267-270; Rew, Actions for Damages by Third Parties under English Law for Breach of Article 85 of the EEC Treaty (1971) 8 C.M.L. Rev. 462; Picanol, Remedies in National Law for Breach of Articles 85 and 86 of the EEC Treaty: A Review (1983) 2 L.I.E.I. 1; Jacobs, Damages for Breach of Article 86 EEC (1983) E.L. Rev. 353.
98. BRT v. SABAM (Case 127/73) [1974] 2 C.M.L.R. 238; [1974] E.C.R. 313.
99. See, Winfield & Jolowicz on Tort (1984) Chapter 7 excellent, succinct account of the conditions that must be satisfied before the tort exists.
100. Garden Cottage Foods v. Milk Marketing Board [1983] 3 W.L.R. 143 (H.L.) majority judgment given by Lord Diplock, dissenting judgment by Lord Wilberforce. Similar conclusions have been derived in foreign Courts. See BMW cars in Germany, BGH (23.10.1979) - Case KZR 21/78, English version of the judgment at (1980) 3 E.C.C. 213. See also, URS v. N.V. Scheld Sleepvaartbedrijf [1965] C.M.L.R. 251 (Holland) - damages available for breach of Article 85 EEC.
101. Plaintiffs may sue for damages; if they are suing for an injunction they may also obtain damages. See Section 50 Supreme Court Act 1980, Green op. cit., at pp. 528-532.
102. [1983] 2 W.L.R. 143 at p. 152.
103. See Bourgoin v. Ministry of Agriculture, Fisheries and Food [1985] 1 C.M.L.R. 528, Mann J. applied the tort of breach of statutory duty to Article 30 EEC in a case where the Government was being sued for £19m damages in respect of an illegal import ban of French Turkeys. However on appeal the Court of Appeal (as yet unreported) in a majority decision (Nourse and Parker L.J.'s) held that Article 30 EEC was not actionable on the basis of breach of statutory duty but was actionable on the basis of misfeasance in public office. However Oliver L.J. in a powerful dissent held that Article 30 EEC was actionable as a breach of statutory duty and the Garden Cottage Foods judgment was not distinguishable. In Queen v. Attorney General Ex parte Imperial Chemical Industries PLC [1985] 1 C.M.L.R. 588 Woolf J. had to consider whether Section 134 and Schedule 18 of the Finance Act 1982 constituted state aids within the meaning of Article 92 EEC. If they were state aids then the UK

103. continued -

Government would have breached Article 93(3) EEC which imposes a duty on Governments to notify new aids to the European Commission prior to implementing them. ICI claimed that the sections of the Finance Act above gave tax relief to their competitors. Woolf J. held that the sections of the Act did not amount to state aids. However, he did state: "If I had come to the conclusion that Article 93(3) had been infringed in a manner which gave ICI rights under the directly applicable final sentence, I would have had no doubt that ICI had locus standi. ICI would then have a cause of action as Lord Diplock makes clear in his speech in Garden Cottage Foods Ltd. v. The Milk Marketing Board" (*ibid* at p.608)

104. per Lord Denning M.R. in Acrow (Automation) Ltd. v. Rex Chainbelt [1971] 3 All E.R. 1175 at p. 1181 approving the judgment in, Torquay Hotel Co. Ltd. v. Cousins [1969] 1 All E.R. 522 at p. 530. See also, Winfield & Jolowicz on Tort (1984) p. 505.

105. See generally Winfield & Jolowicz on Tort (1984) p. 505; Heydon, Economic Torts (1978); Salmond and Heuston on Torts (1981) Ch. 16.

106. Lonhro Ltd. v. Shell Petroleum Co. Ltd. (No. 2) [1982] 3 W.L.R. 33 (H.L.).

107. It is not sufficient that X and Y might foresee that due to their price fixing all purchasers, including A, will suffer interference with their trade in the form of higher pricing. Foreseeability of the harm is not enough: Lonhro Ltd. v. Shell Petroleum Co. Ltd. (No. 2) supra. In that case Shell could foresee that if it illegally continued to supply Rhodesia (as it then was) with oil during the currency of the UK Government ban on trade with that country (following its UDI in 1965) then the state of emergency would continue for a prolonged period and Lonhro's commercial interests in Rhodesia would be further harmed. However, Shell through its unlawful behaviour (breach of the Government ban on trade) did not deliberately seek to harm Lonhro.

108. [1974] Ch. 381 at P396 (C.A.), repeated by Lord Denning in Garden Cottage Foods in the Court of Appeal [1982] 3 W.L.R. 514 at p. 516. The new tort theory was apparently accepted by Parker J. in the High Court of that case (unreported, at p.3 of the solicitors agreed note of judgment).

109. See Valor International v. Application des Gaz SA and EPI Leisure [1978] 3 C.M.L.R.87 at p. 100 para. 43 per Lord Justice Roskill; Bourgoin v. Ministry of Agriculture Fisheries and Food [1985] 1 C.M.L.R.528

110. See [1983] 3 W.L.R. 143 at pp. 152, 153 per Lord Diplock who was very critical of the new tort theory.

111. Garden Cottage Foods v. Milk Marketing Board [1983] 3 W.L.R. 143(H.L.) See the judgment of the European Court in Firma Molkerei-Zentrale Westfalen-Lippe GmbH v. Hauptzollamt Paderborn (Case 28/67) [1968] E.C.R. 145 at p. 153 where the Court differentiates between the philosophy of Community enforcement by the Commission and national enforcement by private citizens. The former seeks Community

111. continued -
objectives the latter seeks private objectives. The two levels of enforcement are hence complementary and not mutually exclusive. This meets the concern of Lord Wilberforce (dissenting) in Milk Marketing Board *ibid.*, at p. 159 E-F that to grant national remedies entails an unwarranted enlargement of Community remedies.
112. Garden Cottage Foods v. Milk Marketing Board [1983] 3 W.L.R. 143 (H.L.).
113. See Bourgoin v. Minister of Agriculture Food and Fisheries [1985] 1 C.M.L.R. 528 at p. 541 para. 26. But see the decision of the Court of Appeal which casts doubt on this. See Roussel et al v. The Netherlands (19 July 1984) (unreported in English) District Court, the Hague - Court awarded damages for: lost turnover, loss of goodwill, loss of interest and interest costs; and, costs for legal advice and assistance. Case concerned action against Government of the Netherlands for breach of Article 30 EEC.
114. See, American Cyanamid v. Ethicon [1975] A.C. 396 H.L. and the consideration of that case by Lord Diplock in Garden Cottage Foods v. Milk Marketing Board [1983] 3 W.L.R. 143 (H.L.). See also, James Budgett v. British Sugar Corporation (unreported) noted Korah (1979) E.L. Rev. 417. The British Sugar Corporation (BSC) refused to accept orders from a large sugar merchant for the supply of its named, regular customers contrary to Article 86 EEC. An interlocutory injunction was granted (ex parte) on Friday February 16 and was discharged the following Tuesday by the Court following an undertaking being given by BSC on similar terms pending full trial. Breach of an undertaking given to a Court is contempt of Court. The parties later settled their dispute so the case was not heard on its merits.
115. It is not necessary for the defendant to go so far as to prove a prima facie case, the burden of proof is less onerous. See American Cyanamid v. Ethicon (supra).
116. The Court may consider all relevant considerations when assessing the balance of convenience including the degree of disturbance the granting of interlocutory relief would cause to the defendants business. This factor was considered by Parker J. in the High Court in Garden Cottage Foods v. Milk Marketing Board (unreported) at p.4 of agreed solicitors note : "I reject the application for interlocutory relief on two principal grounds which may overlap each other, which come within the balance of convenience. The position is as follows. If no relief is granted the Plaintiff is still able to purchase butter albeit less profitably from four appointed distributors and others. It would therefore appear that a remedy of damages would be available in due course. If relief though is granted the defendants will have to disrupt their business and the business of their distributors. It appears to me therefore that this is a sufficient ground for rejecting this application." The application was also rejected on the grounds that the wording of the injunction as suggested by counsel was not sufficiently precise to enable the defendants to know how to behave without breaching the injunction. As a proviso: Only where the judge is unable to make up his mind about where the balance of convenience lies may he make an assessment of the relative strengths of each parties case from the affidavits. This proviso has been criticised. See Winfield & Jolowicz *op. cit.*, at p. 628, and Fellowes v. Fisher [1976] Q.B. 122 at p. 138 per Lord Denning M.R.

117. See e.g. Griffith v. Blake (1884) 27 Ch. D 474 (C.A.).
118. Garden Cottage Foods v. Milk Marketing Board [1983] 3 W.L.R. 143 at p. 146 B-E (H.L.) affirming Hadmor Productions v. Hamilton [1983] 1 A.C. 191 (H.L.). The only reasons for which an appellate Court may apparently overturn a trial courts ruling are: (a) trial judge misunderstood law or evidence before him; (b) trial judge based his ruling on an inference of facts which subsequently proved to be incorrect; (c) existence of a change of circumstance which, were the trial judge to become aware of, he would vary his order; (d) trial judge acted wholly unreasonably.
119. Wood v. Sutcliffe (1851) 2 Sim N.S. 163.
120. This is usually termed the "clean hands rule": Measures Bros. Ltd. v. Measures [1910] 2 Ch. 248 C.A.
121. e.g. James Budgett v. British Sugar Corporation (unreported) noted supra.
122. Section 50 Supreme Court Act 1980: "Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to or in substitute for, an injunction or specific performance." Section 50 simply repeats the effect of Section 2 of the Chancery Amendment Act 1858 (Lord Cairns' Act). See for examples, Leeds Industrial Co-operative Society v. Slack [1924] A.C. 851; Johnson v. Agnew [1979] 1 All E.R. 883 (H.L.) (damages in lieu of specific performance); and, Kennaway v. Thompson [1980] 3 W.L.R. 361 (C.A.) (damages in lieu of an injunction).
123. Information obtained from Commission Competition Reports for years 1976-1983. See answer to W.Q. 1740/79, O.J. 1980 C140/4 where the Commission stated that they were investigating about 300 cases simultaneously and that, "It is also to be expected that, as every year, several hundred cases can be settled without a formal proceeding being necessary." See also Commission answer to W.Q. No.2007/82, O.J. 1983 C118/22.
124. Details of the settlement are published at [1984] 3 C.M.L.R. 147; and, Bull E.C. 10/84 Annex 4 p. 96.
125. See W.Q. 457/84 and W.Q. 695/84, O.J. 1984 C344/2 (24 Dec. 1984) at p.3.
126. See, Bull E.C. 10/84 Annex 4 p. 103; [1984] 3 C.M.L.R. 147 at p.151.
127. See Commission answer to W.Q. 457/84 and W.Q. 695/84, O.J. 1984 C344/2 (24 Dec. 1984) at p. 3 para. 3 of answer; and Commission answer to W.Q. No. 1269/84, O.J. 1985 C65/25 at p.26(3).
128. See Temple-Lang, Community Antitrust Law - Compliance and Enforcement (1981) 18 C.M.L. Rev. 335 at p. 355 for examples of the contents of confort letter.
129. e.g. AEG-Telefunken [1982] 2 C.M.L.R. 386 (Commission decision): Commission notified parties that on facts before it the distribution agreement as notified fell within the bloc-ememption then applying to distribution agreements (Regulation 67/67/EEC). See also, Eighth Commission Competition Report (1978) para. 78.

130. See, Notice from the Commission on procedures concerning notifications pursuant to Article 2 of Council Regulation 17/62, O.J. 1982 C343/4; [1984] 1 C.M.L.R. 38.
131. Notice from the Commission on procedures pursuant to notification pursuant to Article 4 of Council Regulation No. 17/62, O.J. 1983 C 295/6; [1984] 1 C.M.L.R. 128.
132. Twelfth Commission Competition Report (1982) p. 38 para. 30. See also Commission Answers to W.Q. No. 815/82 O.J. 1982 C 259/26 (4 Oct. 1982); and, W.Q. No. 874/82 O.J. 1982 C 287 (4 Nov. 1982).
133. See e.g. Europages O.J. 1982 C 343/5, [1984] 1 C.M.L.R. 38; Rovin O.J. 1983 C 295/7, [1984] 1 C.M.L.R. 87; BPCL/ICI O.J. 1984 C 20/9 [1984] 1 C.M.L.R. 257; Kathon Biocide O.J. 1984 C.59.
134. See the criticism made by the Parliament in its Resolution on the Commission's Tenth Competition Report O.J. 1982 C 11/78 at para. 42 where they called, "for more information to be provided in the Annual Reports and in other publications, on the principles and criteria guiding the Commission in reaching its informal settlements, in order to provide more guidance for affected undertakings." See also para. 43 of the resolution where the Parliament call for the publication of the internal rules of procedure of the Commission for the investigation and adjudication of suspected infringements. In the Resolution of the Parliament on the Twelfth Commission Competition Report (Thirteenth Commission Competition Report, Annex p.237 at p. 240 para. 35) the Parliament acknowledges the attempts of the Commission to improve the status of comfort letters by the publication procedure.
135. See Commission answer to W.Q. No. 1508/81, O.J. 1982 C 85/6 where the Commission stress that comfort letters have limited legal effect. See, for a searching analysis of this area, Korah, Comfort letters - Reflections on the Perfume Cases (1981) E.L. Rev. 14.
136. For the leading judgments of the Court on Comfort letters see: Anne Marty v. Estée Lauder (Case 33/79) [1981] C.M.L.R. 143, [1980] E.C.R. 2481; Lancome v. Etos (Case 99/79) [1981] 2 C.M.L.R. 164, [1980] E.C.R. 2511; Procureur de la Republique v. Guerlain, Rochas-Lanvin, Nina Ricci (Cases 253/78 and 1-3/79) [1981] 2 C.M.L.R. 99, [1980] E.C.R. 2327; L'Oreal v. PVBA (Case 31/80) [1981] 2 C.M.L.R. 235, [1980] E.C.R. 3775.
137. See Korah, op. cit., at pp. 30-33.
138. (Case 60/81) [1981] 3 C.M.L.R. 635, [1981] 1 E.C.R. 2639 at para. 9 of the judgment. Court held that the statement of objections was not an act subject to judicial review. See also Alcan v. Commission (Case 69/69) [1970] C.M.L.R. 337, [1970] E.C.R. 385 at p. 393; GEMA v. Commission (Case 125/78) [1980] 2 C.M.L.R. 177, [1979] E.C.R. 3173 per Advocate General Capotorti.
139. Korah, op. cit., at pp. 30-33.
140. But c.f. Commission answer to W.Q. No. 1508/81 O.J. 1982 C 85/6 - Commission indicated that the new publication procedure would "upgrade" the value of the comfort letter and thereby help avoid national Court judgments at variance with them.

141. See, Thirteenth Commission Competition Report (1983) p. 61 para. 62.
142. (Case 125/78) [1980] 2 C.M.L.R. 177 [1979] E.C.R. 3173.
143. but c.f. Kerse op. cit., at p. 235.
144. The Court has recognised that this option exists, in Gema v. Commission supra at para. 18 of the judgment the Court interpreted the existence of a power, as opposed to a duty to take decisions, as a legitimate means of allowing, "... the Commission the opportunity of not adopting a decision to compel the undertakings concerned to put an end to the infringement established." And see, IAZ - International Belgium v. Commission (Cases 96-102, 104, 105, 108, 110/82) [1984] 2 C.M.L.R. 276 at para. 15 of the judgment.
145. See Hoffman La Roche v. Commission (Case 85/76) [1979] 3 C.M.L.R. 211, [1979] E.C.R. 461 at paras. 129-134 of the judgment where there may be an implication that should parties wish clarification of their position a notification seeking negative clearance should be undertaken.
146. See, IAZ International Belgium v. Commission (Cases 96-102, 104, 105, 108, 110/82) [1984] 2 C.M.L.R. 276 at para. 15.
147. See, Metro v. Commission (Case 26/76) [1978] 2 C.M.L.R. 1, [1977] E.C.R. 1875; Schmidt v. Commission (Revox) (Case 210/81) [1984] 1 C.M.L.R. 63. See also, Dinnage, Locus Standi and Article 173 EEC: the effect of Metro SB Grossemarkt v. Commission, (1979) E.L. Rev. 15; Temple Lang, The position of third parties in EEC Competition Cases (1978) 3 E.L. Rev. 177. But c.f. Piraiiki - Patraiki v. Commission (Case 11/82) [1985] C.M.L.R. 4.
148. The Court is currently being asked to rule on this question. See (Cases 142 and 156/84) British American Tobacco Ltd. v. Commission O.J. 1984 C 195/4 and O.J. 1984 C 178/3 where an outline of the parties complaints is given. In brief the parties content that the terms of a settlement between the Commission and Philip Morris are inexplicably inconsistent with the statement of objections issued by the Commission. Moreover, that the Commission reached a settlement before the parties had been given an opportunity to make their views known. Though see Commission answer to W.Q. No. 306/84, O.J. 1984 C 225/20 (27 Aug. 1984) where the Commission state: "Where the Commission changes the provisional position which it adopted in a statement of objections, it is either because it accepts all or some of the clarifications and arguments made in reply to the statement of objections or because the agreement or conduct originally objected to had been abandoned or adequately notified." See also IAZ International Belgium v. Commission (Cases 92-102, 104, 105, 108, 110/82) [1984] 3 C.M.L.R. 276 at para. 15 of the judgment, it is contrary to the requirements of good administration for the Commission to ignore a draft agreement submitted by parties as the basis of a possible settlement after the statement of objections has been sent. However, if the draft fails to take account of all the Commission's objections then this is not a defect vitiating a subsequent decision.

149. See W.Q. 497/84, O.J. 1984 C 243/20 (12 Sept. 1984) where MEP Mr. Anthony Simpson defined lobbying, in a parliamentary question to the Commission, as, "... the term 'lobbying' may be taken to mean: persons in a position of influence, hired for the purpose, addressing or soliciting members of the Commission outside the framework of established administrative procedures in order to obtain, in an adversary proceedings, an outcome different from that which would normally issue from the usual and foreseeable application of existing competition policy to a set of facts before the Commission."
150. Commission answer to W.Q. 306/84 O.J. 1984 C 225/20. This has however been criticised by Van Bael, Comment on the EEC Commission's Antitrust Settlement Practice: The Shortcircuiting of Regulation 17 (1985) Swiss Review of International Competition Law 67 at p. 71.
151. The current Director of Directorate B is Mr. John Ferry.
152. The current Director of Directorate C is Mr. Gianfranco Rocca.
153. The current Director of Directorate D is Mr. Aurelio Papalardo.
154. For detailed analysis including discussion of whether the procedure is *untra vires* see Venit, The Commission's opposition procedure (1985) C.M.L.Rev. 163.
155. See, O.J. 1984 L 219/15 (patent licencing agreement) Article 4; O.J. 1985 L 53/1 (specialisation agreements) Article 4; O.J. 1985 L 53/5 (Research and Development agreements) Article 7.
156. Where the notification is made by registered post the period of six months runs from the date shown on the postmark of the place of posting.
157. i.e. Article 3 for patent licenses; Articles 4, 5 and 6 for Research and development agreements; there are no "black" clauses in the bloc-exemption on specialisation agreements.