

UNITED KINGDOM

(1998)

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I Introduction

1. The main development during the year was the enactment of the Competition Act 1998. This prohibits anti-competitive agreements and the abuse of a dominant position, and gives the Director General of Fair Trading (DGFT) stronger investigative powers - and, for the first time, the power to impose interim measures and financial penalties. The year saw a great deal of work in developing guidelines and an education programme for businesses to enable them to prepare for the new legislation.

2. Where competition law enforcement was concerned, action under existing legislation continued at much the same level as in previous years. Action against anti-competitive practices included continued proceedings in the Restrictive Practices Court against the football Premier League. In the field of mergers, the United Kingdom's competition authorities continued to liaise closely with the European Commission and United States Department of Justice in the case of the proposed alliance between British Airways and American Airlines.

II. Changes to competition laws and policies proposed or adopted

1. Summary of new legal provisions in competition law and related legislation

3. The Competition Act 1998 (the CA98) was enacted on 9 November 1998. The CA98 prohibits anti-competitive agreements (Chapter I) and the abuse of a dominant position (Chapter II), and gives the DGFT strong powers of investigation and enforcement, including the ability to impose interim measures and financial penalties. The two prohibitions mirror Articles 85 and 86 of the Treaty of Rome, so aligning the United Kingdom's domestic competition legislation with European Community competition legislation. Section 60 of the CA98 is designed to ensure that the prohibitions are enforced consistently with the European Community prohibitions. The prohibitions will come into effect on 1 March 2000. One other important feature of the CA98 is that the sectoral regulators have concurrent powers with the DGFT in the sectors falling under their jurisdiction.

4. When the prohibitions come into effect the Restrictive Trade Practices Acts of 1976 and 1977, the Restrictive Practices Court Act 1976, the Resale Prices Act 1976 and sections 2 to 10 of the Competition Act 1980 will be repealed. In addition, powers of investigation under the Fair Trading Act 1973 are strengthened. Until the prohibitions come into effect parties can apply for early guidance on whether agreements made in the interim period are likely to breach the Chapter I prohibition.

2. Guidelines

5. During 1998, the DGFT published informally for consultation a number of draft guidelines which explain how he intends to apply and enforce aspects of the CA98. Further guidelines are in preparation. Additionally, the Office of Fair Trading (OFT) took part in over 50 seminars on the CA98, mainly organised by law firms for their clients. A formal education programme aimed principally at small and medium sized enterprises was launched by the DGFT on 26 November 1998. This includes the provision of speakers at seminars arranged by business organisations such as chambers of commerce and trade associations. By the end of 1998 over 120 chambers of commerce had been invited to participate. In addition, the OFT plans to publish a series of simple booklets for business and has produced a video to encourage businesses to comply with the CA98 by demonstrating the possible consequences of infringing the prohibitions.

3. *Proposals for new legislation*

6. In July the Treasury published a consultation document on its proposals to reform the regulation of financial services with a draft of the Financial Services and Markets Bill. Under these proposals the DGFT would continue to be responsible for the competition scrutiny of the rules of the Financial Services Authority, investment exchanges and clearing houses. In addition he would be responsible for the competition scrutiny of the rules of the Competent Authority for Listing. Such scrutiny would be an advisory function, as the rules of these bodies are excluded from the application of the Chapter I prohibition of the CA 1998.

III. Enforcement of competition laws and policies

1. *Action against anti-competitive practices by competition authorities and the courts*

7. In 1998, a total of 1,173 complaints were received about alleged anti-competitive practices, monopoly abuses and attempts to impose resale price maintenance (compared with 909 in 1997). In some cases the complaints proved to be unfounded, or not to come within the scope of the legislation; in others, the companies or organisations complained of were able to satisfy the DGFT that there was no need for further investigation or action. The actions taken in other cases are described in the following sections.

i) Restrictive Agreements (Restrictive Trade Practices Acts 1976 & 1977)

8. The Restrictive Trade Practices Acts of 1976 and 1977 provide the means to evaluate the effect on competition of certain commercial agreements and to prevent the operation of arrangements that are significantly anti-competitive. Details of all relevant agreements must be sent to the DGFT to be entered on the Register of Restrictive Trading Agreements.

9. The DGFT has two main responsibilities under the Acts. First, he must appraise the relevant restrictions in agreements that have been sent for registration at the proper time and, if necessary, refer them to the Restrictive Practices Court. The restrictions in such agreements are lawful unless and until the Court strikes them down. Second, he seeks out, investigates and evaluates registrable agreements that have not been sent for registration, many of which are harmful cartel agreements, with a view to referring them to the Court. It is unlawful to give effect to restrictions in a registrable agreement that has not been furnished for registration.

Agreements submitted for registration

10. In 1998, details of 1,119 agreements were sent to the DGFT, compared with 1,375 in 1997. On examination, however, many of the agreements that were submitted proved not to be registrable: a further 763 agreements were added to the register. This brought the total number entered since it was established in 1956 to 14,882. The significant reduction in the number of agreements submitted during the year was doubtless a consequence of orders that came into effect in January. The requirement to provide the DGFT with details of sale-and-purchase, share-subscription, and franchise agreements (other than price-fixing) was removed altogether, while the minimum turnover threshold for other agreements was raised from £20 million to £50 million.

Restrictions

11. Most agreements placed on the register do not contain restrictions of such significance that they justify investigation by the Court. In these circumstances, under section 21 (2) of the 1976 Act, the Secretary of State can, on the DGFT's advice, direct that reference to the Court is not required. During the course of 1998, the DGFT gave such advice on 1,075 agreements, including common form agreements.

12. In a number of other cases the DGFT exercised his discretion under section 21(2) of the 1976 Act not to refer to the Court agreements which had ended or from which all restrictions had been removed.

Investigations

13. The Cartels Task Force continued to receive and investigate complaints about secret cartels throughout 1998. A total of 52 new investigations were started (compared with 44 in 1997) and in seven cases (four in 1997) notices were issued requiring the provision of information on agreements. In a number of other instances informal enquiry letters were sent out. It is anticipated that some of the cartels uncovered during the course of the year will be referred to the Restrictive Practices Court in 1999.

14. Several of the cases investigated raised strong suspicions of the existence of a cartel, but the Task Force was unable to make progress in its attempts to prove those suspicions. Under section 36 of the 1976 Act, the DGFT must have 'reasonable cause to believe' that persons may be party to a registrable but unregistered agreement before he can issue a statutory notice requiring them to provide details. In an earlier case the Court ruled that 'reason to believe' is an exacting test. This ruling has caused serious difficulties in the past in bringing suspected cartels before the Court. The change of emphasis under the CA98, which provides that a formal investigation can be initiated when the DGFT has 'reasonable grounds for suspecting' that a cartel is in operation, should prove to be a significant step forward in the detection of secret agreements.

15. When the DGFT has reason to believe that an agreement which is unlawful under the Restrictive Trade Practices Acts has been deliberately concealed, he almost invariably refers the matter to the Court. Under section 35 of the 1976 Act the Court may then make orders requiring the parties not to enforce restrictions in the agreement and not to enforce restrictions in any other registrable agreements which have not been notified to the DGFT within the prescribed time limits. The DGFT may also ask the Court to make orders, under section 2 of the 1976 Act, requiring the parties to registered agreements not to make any similar restrictive agreements. Breaches of orders, or of undertakings given in lieu of orders, constitute contempt of court and may lead to fines and, for directors or employees, imprisonment for up to two years.

Court cases concluded

16. **Bus services in North West England** - In April, proceedings were initiated against ten bus operators in North West England. In an undefended hearing on 5 November, the Court accepted undertakings from seven of the parties not to give effect to any of the agreements to which they were parties, or to enter into similar agreements in future, and not to enforce any other registrable agreements not properly furnished to the DGFT. The Court made orders to the same effect against the other three parties. While different operators were affected in different ways, the agreements involved collusion to withdraw services from particular routes in Manchester in exchange for being given a clear run in the provision of services in Liverpool (with similar arrangements in reverse), and fixing the prices of children's fares on weekend and off-peak services. The Court ruled that the agreements to share out routes and fix charges

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were likely to have resulted in higher fares and a lower level of competition than would have been the case with open competition.

17. **Ceiling tiles** - In April proceedings were initiated against five distributors of ceiling tiles. The DGFT alleged that the parties had been involved in a secret cartel involving two price-fixing agreements. In an undefended hearing on 27 July, the Court made orders against four of the parties, and accepted undertakings from the fifth, not to give effect to the agreements, or to any similar agreements in the future, and not to enforce any future registrable agreements without submitting details to the DGFT within the specified time limits.

18. **Laboratory filters** - On 18 March proceedings were successfully concluded against Gelman Sciences Ltd and Sartorius Ltd, suppliers of laboratory filters. The companies had agreed to exchange information on the prices charged to current and potential customers and to limit the extent to which they would attempt to undercut each other's prices. The aim of the agreement was to enable each company to protect its existing market share and to end the price war that had previously existed between them. In an undefended hearing, the Court accepted undertakings from the companies not to give effect to the agreement, or similar agreements, and not to enforce any other registrable agreement not submitted to the DGFT in time.

19. **Replacement car panels** - Proceedings against three companies involved in the supply of replacement car panels were initiated in February. In an undefended hearing on 29 July, the Court accepted undertakings from two of the companies and made an order against the third not to give effect to the agreements, or similar agreements, and not to enforce any other registrable agreement not properly submitted to the DGFT. The Court heard that the agreements began after the entry of a new competitor to the market in 1992, and took the form of denying supplies to the market entrant. The agreements were designed to keep prices higher than they would have been with the increased competition.

20. **Rugby football** - On 27 July, the Rugby Football League gave undertakings to the Court, and Mike Burton Sports Travel Ltd consented to the making of an order under section 35 of the Act: in both cases the parties were required to comply with their legal obligations to supply the DGFT with details of restrictive trading agreements. They had both failed to provide details of an exclusive agreement for ticket sales and hotel and travel arrangements for overseas supporters travelling to the UK for the 1995 Rugby World Cup. They had previously failed to provide details of a similar agreement for the Australian Rugby League's Tour of the UK in 1994.

Court proceedings

21. **Bus services in Hull** - On 19 November, proceedings were issued against 12 operators of school buses in Kingston upon Hull. Evidence had been uncovered that company representatives had met secretly in a hotel and had agreed the minimum prices at which they would tender to supply school-bus services and the routes for which each operator would tender. The DGFT applied to the Court for orders restraining all of the parties to the various alleged agreements from giving effect to them or enforcing any other registrable agreements which had not been submitted to the DGFT in time. The case was expected to be heard in the early part of 1999.

22. **Football Association Premier League** - Proceedings relating to the sale of football television rights continued against the Premier League, the BBC, and BSkyB under section 1(3) of the 1976 Act. The case concerns restrictions in the Premier League rule book and in the agreements made to televise football matches. The restrictions mean that only 60 of the 380 Premier League matches played annually are televised live and the football clubs themselves are prevented from individually selling the rights to other

matches. Restrictions in the rule book relate also to playing in matches or competitions not specifically approved by the Premier League. The significance of these had been heightened by widespread reporting of the possible emergence of a European Superleague. The DGFT has argued that the overall effect of the restrictions is to lead to unsatisfied demand, higher prices, and less choice for consumers. The hearing opened on 9 January 1999.

ii) *Resale price maintenance (Resale Prices Act 1976)*

23. Under the Resale Prices Act 1976, it is unlawful for suppliers of goods to impose minimum resale prices on dealers, or to compel them to charge those prices by threatening to withhold supplies or impose some other penalty. In 1998, the DGFT received 39 complaints alleging contravention of the Act, compared with 58 in 1997. In six cases, the DGFT obtained written assurances from suppliers that they would not seek to impose minimum prices at which dealers could resell their goods.

24. **Medicaments Review** - On 8 January 1998, the DGFT applied to the Restrictive Practices Court to have the case for resale price maintenance on over-the-counter medicines reviewed. He believes that circumstances have changed considerably since the original order was made in 1970. Changes in consumer behaviour, the nature of the chemist's business, and the structure and operation of the retail market, and the fact that manufacturers abandoned resale price maintenance on branded prescription-only medicines in the 1970s, form part of the DGFT's case. The Proprietary Articles Trade Association and the Proprietary Association of Great Britain are opposing the application. During the year both sides submitted their evidence to the Court. The Court is expected to decide (at a hearing on 10 and 11 February 1999) whether there has been a significant change in circumstances. If so, a full hearing of the case will take place, probably towards the end of 1999.

iii) *Competition Act 1980*

25. Anti-competitive practices by individual firms with a market share of 25 percent or more can be investigated under the provisions of the Competition Act 1980, either informally or by reference to the Monopolies and Mergers Commission (MMC). Alternatively, in order to remedy the anti-competitive effects of the behaviour concerned, the DGFT may accept undertakings from a company in lieu of a reference. In 1998, there were no new references.

Reports by the MMC

26. The MMC published one report in 1998:

29 July Courses of conduct pursued by Birds Eye Wall's Ltd in connection with the supply of wrapped ice cream

27 **Birds Eye Wall's Ltd** - The MMC found that the ice-cream manufacturer Bird's Eye Wall's Ltd had engaged in three of the four courses of conduct they had been asked to investigate, and concluded that each of these activities had restricted and distorted competition both between wholesalers and between manufacturers. This had produced a restriction of choice and competition in the supply of wrapped 'impulse ice cream' (ice cream purchased for immediate consumption). The DGFT was asked to negotiate undertakings that would carry into effect the remedies that the MMC had suggested, and these were accepted by the Secretary of State on 27 November.

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28 The MMC accepted that their recommendations would go only part way to remedy the anti-competitive effects they had identified; they would not address the wider issues that, in their view, were adversely affecting competition in the ice-cream market but which lay outside their terms of reference. Unusually, the MMC invited the DGFT to consider whether a further and wider reference might be appropriate. A further reference was made on 22 December.

iv) Monopoly situations (Fair Trading Act 1973)

29. Section 2 of the Fair Trading Act 1973 requires the DGFT to keep commercial activities in the United Kingdom under review in order to detect monopoly situations (as defined in sections 6 - 11) and uncompetitive practices. The DGFT carries out this function in two ways. First he monitors the economic performance of industries to identify areas where there may be monopolies and abuses of monopoly situations. Happiest particular attention to the economic importance of firms with large market shares, taking account of the degree of import penetration and of information on price levels and movements, profits and market behaviour. Secondly, he takes note of complaints and other representations he receives from business and the public.

30. Where a monopoly situation is found, the DGFT can refer the case to the MMC for investigation, but there is no presumption that he must always do so. When he does make such a reference, however, it is for the MMC to determine whether a monopoly situation does exist and, if so, whether it operates, or may be expected to operate, against the public interest. Alternatively, the DGFT may accept undertakings in lieu of reference to remedy competition problems.

References to the MMC

31. The DGFT made two monopoly references in 1998:

27 January: the supply of raw cow's milk

22 December: the supply of impulse ice cream

Reports by the MMC

32. No monopoly reports were published in 1998.

Action on earlier reports

33. **Beer Orders** - the DGFT continued to monitor brewers' compliance with the 1989 Beer Orders. He has satisfied himself that the large brewery groups have complied with the requirement to keep their number of tied premises within the maximum permitted under the Supply of Beer (Tied Estate) Order 1989.

34. **Domestic electrical goods** - Following the 1997 MMC report on anti-competitive practices in the markets for four white goods (washing machines, tumble driers, dishwashers and cold food-storage equipment) and four brown goods (televisions, video-cassette recorders, hi-fi systems and camcorders), the Secretary of State made an Order, the Restriction on Agreements and Conduct (Specified Domestic Electrical Goods) Order 1998, which came into force on 1 September 1998. Undertakings were also

accepted by the Secretary of State from Empire Stores Group plc, General Domestic Appliances Holdings Ltd, Dixons Group plc, and Combined Independents (Holdings) Ltd together with 21 of its local groups.

35. The Order prohibits suppliers of the specified goods from recommending or notifying a price at which the goods should be resold and from making or carrying out any agreement to the extent that it restricts dealers' determination of the prices at which they sell the goods. It also prohibits withholding supply of the goods from dealers except under certain circumstances. These circumstances include: orders for goods that are below a minimum level or above a maximum level in terms of value or quantity; the unavailability of goods; the creditworthiness of dealers; and situations where one or more of the supplier's criteria for selecting dealers are not met. Any selection criteria used must not relate to dealers' selling prices or profit margins, or discriminate between dealers because of their selling prices or profit margins. They must also not relate to whom dealers sell their goods or the hours which dealers' premises are open. Suppliers must set out in writing the reason for withholding supply, if supply is to be refused.

36. In addition, the Order makes it unlawful for a supplier to discriminate between dealers by charging them different prices for goods on the grounds that some dealers may sell or advertise them at lower prices than others, or to give preference to any dealers on such grounds. Dealers are prevented from procuring a supplier to withhold supply, discriminate or give preference. The Secretary of State also has the power to issue directions to suppliers or dealers relating to steps taken by them to ensure their compliance with the Order.

37. **Exhaust gas analysers** - The DGFT completed a review of the UK market for the calibration and servicing of exhaust gas analysers, and concluded that there were no grounds for action under the competition legislation.

38. **Foreign package holidays** - Following the MMC report in December 1997, the Secretary of State made an Order in August 1998 to address two of the three recommendations made by the MMC. The Order came into force on 16 November 1998. The Order makes it illegal for travel agents and tour operators in vertically integrated groups to discriminate against any customer in the price they pay for a foreign package holiday, or to make an additional charge, if the customer does not buy insurance with the holiday. The Order also makes it illegal for a tour operator to include in its agreements with a travel agent conditions which have the effect of restricting the discounts the travel agent offers on other tour operators' holidays.

39. To give effect to the MMC report's third recommendation - the introduction of measures to make ownership links more transparent - the Secretary of State asked the DGFT to obtain suitable undertakings from the four largest vertically integrated travel groups. Negotiations on those undertakings continue, and it is expected that the undertakings will cover the presentation of ownership links at those companies' retail premises, and on their travel agencies' printed brochures, advertisements and stationery.

40. **Performing rights** - The DGFT continued to monitor the progress being made by the Performing Right Society (PRS) towards meeting the recommendations made by the MMC in their 1996 report on the administration of performing rights and film synchronisation rights. Of a total of 44 recommendations, 39 have now been met and the rest are in hand. The PRS has announced major changes to its systems of revenue collection and allocation and the DGFT will be monitoring the PRS's performance in these areas.

41. **Thomas Cook Group Ltd** - Undertakings given by Thomas Cook in March 1996, following the MMC's 1995 report on the acquisition of Interpayment Services Ltd (ISL), require the company to consult the DGFT before it changes the currencies in which ISL Travellers' Cheques are issued. The DGFT told the Secretary of State in October that he had approved a proposal by Thomas Cook to issue, with effect from 1 January 1999, both a Thomas Cook MasterCard Euro Travellers' Cheque and an ISL Visa Euro

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Travellers' Cheque. As a consequence of Germany entering the European Monetary Union, both cheques will have replaced the MasterCard Travellers' Cheque and the ISL Deutschemark Travellers' Cheque by June 2002.

v) *Financial Services*

42. Under the terms of the Financial Services Act 1986, the DGFT is required to consider the implications for competition of the rules of the Financial Services Authority (formerly known as the Securities and Investments Board) and of bodies seeking recognition as self-regulating organisations (SROs), investment exchanges and clearing houses, and to report his findings to the Treasury. He is further required to report on amendments to those rules and on the organisations' practices whenever he identifies competition concerns.

43. During the year the DGFT reported that an application by the Swiss Exchange for recognition as an overseas investment exchange did not give rise to significant anti-competitive effects.

44. He also launched reviews of the rules on the polarisation of investment advice and the worked principal agreement regime operated in conjunction with the Stock Exchange Electronic Trading System. Both will be completed in 1999.

2. *Mergers and acquisitions*

45. In 1998, the DGFT considered a total of 425 merger cases - whether in the public domain (public mergers), under the confidential guidance procedure, or by way of informal advice. Year-on-year, this represents an increase of approximately 7 percent on the 396 cases considered in 1997.

46. Under the Fair Trading Act, the DGFT is required to keep himself informed about actual or prospective merger situations and to recommend to the Secretary of State whether a merger which qualifies for investigation should be referred to the MMC for more detailed investigation. If the MMC finds that a merger operates or is likely to operate against the public interest, the Secretary of State can make orders or obtain undertakings from the parties to remedy the adverse effects identified in the MMC's report. In lieu of a reference to the MMC, however, the Secretary of State may - if the DGFT so recommends - accept undertakings from the parties to remedy any adverse effects that the DGFT has identified. In 1998, such undertakings were accepted in three cases.

Confidential guidance

47. One or more parties to a merger can ask the DGFT for confidential guidance on the chances of its being referred to the MMC by the Secretary of State once it is in the public domain. In 1998, the DGFT considered 61 such requests, compared with 64 in 1997, a decrease of 5 percent. The DGFT advised on 44 requests, an increase of 7 percent on the 1997 total of 41; the remaining 17 requests were found not to qualify or were abandoned. In addition, in 67 cases where mergers were possible, OFT staff gave the parties informal advice about qualification for investigation and the potential for reference.

Prenotification

48. There is a statutory procedure to allow parties to a merger to prenotify the DGFT of its details. In such cases, the Secretary of State must announce his decision on whether to refer the merger to the MMC within 20 working days of the DGFT's receiving the completed pre-notification form (35 working days if the DGFT exercises his power to extend the timetable); otherwise the power to refer it to the MMC is lost.

49. During 1998, the DGFT considered 45 mergers under this procedure, against 51 in 1997. None of these was found not to qualify and none was abandoned. In 29 cases (64 percent) a decision was reached within the initial consideration period of 20 working days..

Other proposed or completed public mergers

50. Unless a proposed merger has been prenotified under the statutory procedures there are no statutory time limits on reference to the MMC. For completed mergers, the Secretary of State loses the power to make a reference four months from the time the completion becomes public.

51. The DGFT considered 252 proposed or completed public mergers, compared with 218 in 1997, an increase of 13 percent. The DGFT advised on 179 cases, an increase of 21 percent on the 1997 total of 142. The remaining 73 cases were either found not to qualify for investigation or were abandoned before a decision was taken.

52. These figures exclude newspaper mergers, which are dealt with by the Secretary of State under sections 57-62 of the Fair Trading Act. Mergers of water enterprises (where each enterprise has gross assets of at least £30 million) are also considered separately, under the provisions of the Water Industry Act 1991, but no references under this head were made in 1998.

53. The total value of the assets acquired or bid for in the qualifying merger situations examined by the DGFT in 1998 was £180 billion (£106 billion in 1997). Horizontal mergers (where some activities of the merging firms overlap) accounted for 92 percent of the total number of qualifying cases examined in 1998 (95 percent in 1997).

References to the MMC

54. The Secretary of State made eight merger references to the MMC under the terms of the Fair Trading Act in 1998, two fewer than in 1997. All of these references were made in accordance with the advice of the DGFT and all of the references were made on competition grounds. The references were:
31 MarchLadbroke Group plc/Bass plc (the Coral betting business):

22 AprilTomkins plc/Kerry Group plc

21 MayNew Decaux plc/More Group plc
reference subsequently laid aside

10 JulyARRIVA plc/Lutonian Buses Ltd

24 SeptemberCendant Corporation/RAC Motoring Services

14 OctoberIMS Health Incorporated/Pharmaceutical Marketing Services Inc

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29 October British Sky Broadcasting Group plc/Manchester United plc

21 December Rockwool Ltd/assets of Owens-Corning Building Products (UK) Ltd

Reports by the MMC

55. Four merger reports were published in 1998:

9 March Fresenius AG/Caremark Ltd

23 September Ladbroke Group plc/Bass plc (the Coral betting business)

24 September Tomkins plc/Kerry Group plc

18 November ARRIVA plc/Lutonian Buses Ltd

In all four cases the MMC found the merger to be against the public interest

56. **Fresenius AG/Caremark Ltd** - The MMC concluded that the proposed acquisition was against the public interest since it would lead to a clear loss of competition in the supply of contracted home care services. The proposed merger also entailed an element of vertical integration which the MMC considered that Fresenius would use to increase the sales of its own products and so reduce purchasers' freedom to choose the products and services they judged best suited. The MMC was unable to identify any benefits of the merger which might offset these adverse effects. In the absence of any other possible remedy, the MMC recommended that the merger be prohibited. The Secretary of State, in accordance with the DGFT's advice, accepted the MMC's findings and recommendation and asked him to obtain appropriate undertakings.

57. **Ladbroke Group plc/Bass plc (the Coral betting business)** - The MMC concluded that the merger would have the effect of removing Coral as an important third national competitive force in the off-course betting market. This, in turn, would lead to a weakening of price competition at the national level; a dampening effect on innovation; and a reduction in consumer choice. The MMC did not believe that the adverse effects of the merger were offset by benefits. The MMC recommended that the merger be prohibited and Ladbroke be required to divest, as a single entity, the whole of Coral's UK business. The Secretary of State, in accordance with the advice of the DGFT, accepted the MMC's findings and recommendations and asked the DGFT to obtain appropriate undertakings.

58. **Tomkins plc/Kerry Group plc** - The MMC concluded that the acquisition by Tomkins of six of the former Spillers flour mills from Kerry Group would lead to a significant increase in concentration in the supply of flour, particularly 'free' flour. Also, the merger would result in the removal of a significant national competitor, Spillers, from the market. This would lead to higher prices and less choice. The MMC considered that since the adverse effects arose from the impact of the merger on the structure of the industry, only a structural remedy was appropriate. The MMC believed that the divestment of all six acquired mills was not necessary but that Tomkins should be required to sell the four acquired mills at Avonmouth, Liverpool, Newcastle and Tilbury. In addition, Tomkins should be required to undertake not to increase the production of hard flour at the Spillers Cambridge mill for a period of one year from the divestment. The Secretary of State, in accordance with advice from the DGFT, accepted the MMC's findings and recommendations. The DGFT was asked by the Secretary of State to obtain suitable undertakings from the parties.

59. **ARRIVA plc/Lutonian Buses Ltd** - The MMC concluded that the acquisition by ARRIVA of Lutonian eliminated competition on many bus services in Luton and also resulted in a loss of potential competition in providing services elsewhere in Luton. This was expected to result in higher fares, lower choice, less innovation and poorer service levels than would otherwise have been the case. ARRIVA's aggressive behaviour prior to the merger - intended, in the MMC's view, to drive Lutonian out of the market - increased the barriers to entry and so reduced the prospect of competition from new entry. The MMC did not believe that any benefits from the merger were sufficient to offset these adverse effects and recommended that the merger be prohibited. To facilitate the divestment of the Lutonian business, the MMC recommended that ARRIVA be required to give certain behavioural undertakings to safeguard the establishment of the divested business and protect it from unduly aggressive conduct by ARRIVA in the future. The Secretary of State, in accordance with the DGFT's advice, accepted the MMC's findings and recommendations and asked the DGFT to obtain appropriate undertakings.

Undertakings in lieu of reference

60. When it appears that a reference to the MMC might otherwise be necessary, the Secretary of State may, on the advice of the DGFT, accept undertakings to remedy the adverse effects in lieu of reference. In 1998, there were three cases in which undertakings were given in lieu of reference (bringing to 21 the total of such cases since this procedure was introduced in 1990):

12 February Jarvis plc/Fastline Group

2 July Federal Mogul Corporation/T&N plc

25 November PowerGen plc/D R Investments, owner of East Midlands Electricity plc

61. **Jarvis plc/Fastline Group** - In accordance with the DGFT's recommendation, the Secretary of State accepted undertakings from Jarvis that it would establish a separate subsidiary business for the hire of tamping equipment and ballast regulators, to be operated on an arm's length, non-discriminatory and equitable basis. The undertakings also addressed related issues including the confidentiality of business information, preventing cross subsidies between Jarvis' businesses, separate accounting and providing information to enable the undertakings to be monitored. The undertakings deal with competition concerns arising in the rail infrastructure market from Jarvis' high share of plain line tampers, switch and cross tampers and ballast regulators. They ensure that Jarvis cannot foreclose the rail infrastructure market to competitors.

62. **Federal Mogul Corporation/T&N plc** - In accordance with the DGFT's recommendation, the Competition and Consumer Affairs Minister accepted undertakings from Federal Mogul and T&N that required Federal Mogul to divest all of T&N's European thinwall bearings business to a purchaser unconnected to the company and approved by the Secretary of State. The undertakings were designed to remedy concerns about the level of concentration in respect of the supply of thinwall bearings to original equipment manufacturers. On 18 December, Federal Mogul completed the sale of T&N's European thinwall bearings business to Dana Corporation.

63. **PowerGen plc/DR Investments, owner of East Midlands Electricity plc** - The Secretary of State accepted undertakings from PowerGen to divest, by 30 April 1999 or such later date as he may agree in writing, 4GW of coal-fired electricity generating capacity to purchasers and on terms approved by him. The undertakings, which were designed to address competition concerns arising from the bringing together of two major players at either end of the electricity supply chain, also require PowerGen to terminate,

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before 1 April 2000, its rights to receive earn-out payments from Eastern Electricity plc under an agreement made on 22 November 1995 relating to the sale of certain generating plant to Eastern. The undertakings also provide that, subject to possible exceptions approved by the Secretary of State, the assets of the plant should be preserved, kept intact and maintained as a going concern prior to divestment and, following divestment, that PowerGen will not regain any interest or influence over the future operation, management or control of the divested plant. The Secretary of State also accepted a number of informal assurances from PowerGen which, in common with assurances given on previous electricity mergers, were designed to address largely regulatory concerns.

64. In initially advising the Secretary of State on this case, the DGFT recommended that the merger should be referred to the MMC for further investigation. This was consistent with the advice he had given to one of the Secretary of State's predecessors when advising on the similar mergers of National Power plc/Southern Electric plc and PowerGen plc/Midlands Electricity plc. The Secretary of State felt, however, in the more recent case that undertakings in lieu of a reference may be appropriate and asked the DGFT to negotiate undertakings along the lines indicated above. In providing final advice to the Secretary of State on the undertakings, the DGFT commented that in order for the divestments to be effective in restoring competition in the mid-merit sector of the generating market, it would be necessary to ensure that the plant would not be constrained to operate at low load factors. A key consideration, therefore, was whether the divested plant would have similar flexibility to the plant retained by PowerGen. This was primarily determined by two aspects - the proportion of PowerGen's company-wide sulphur emission "B" limits which will accompany the divested plant and the quantity of UK (high sulphur) coal the new owners of the divested plant would be required to purchase. The DGFT noted that the first of these issues was bound up with the Environment Agency's current review of the sulphur permit framework.

Action on other mergers

65. **British Airways plc/American Airlines Inc** - In the case of the proposed alliance between major UK and US airlines, officials continued to liaise closely with the other competition authorities considering the scheme - the European Commission and the US Department of Transportation. On 30 July, the Commission published a notice about the proposed alliance agreement, inviting third parties to comment on proposals it was minded to make under Article 89(1) of the Treaty of Rome for measures to remove the anti-competitive effects of the agreement. Although the Commission had reached no firm views about some aspects of the projected agreement, it did put forward a proposal that the two airlines should give up a total of 267 flight slots from their combined slot holdings at Heathrow and Gatwick airports - for which they should receive no compensation. Among the Commission's other key proposals were: a reduction in frequency on three routes (London to Dallas, Miami, and Chicago); the hypothecation to certain designated routes of up to 119 of the maximum number of surrendered slots; the surrender of airport facilities to enable other airlines to make use of those slots; and a number of other measures to deal with various industry-wide issues - such as the pooling of frequent-flyer programmes, the use of computer reservation systems, and arrangements with travel agencies and large customers, all of which, in the Commission's view, operated as barriers to entry in the context of the proposed alliance.

66. On 6 August, as part of the on-going consultation process, the Secretary of State published the advice the DGFT had submitted on the Commission's proposals. In this, the DGFT made it clear that - although general agreement had been reached with Commission officials on the underlying economic analysis affecting the proposed alliance - he could not finalise his advice while some important aspects of the deal remained uncertain. Third parties were given until 4 September to make written representations, broadly coinciding with the Commission's own consultation period. In total, 41 responses were received (these were in addition to the representations that had been made following the publication of the UK's draft competition analysis early in 1997).

67. Following the latest round of consultation, a number of press reports suggested that the two airlines had put the proposed alliance on ice for the foreseeable future. But, by the end of December, no formal notification had been received to indicate that either party, or the Commission, wished to abandon consideration of the proposal. Appraisal of the proposal therefore continues in the light of the responses received from interested third parties. Following further consideration of the matter - in conjunction with the Commission and the US authorities, as appropriate - the DGFT anticipates submitting additional advice to the Secretary of State in due course.

Action on earlier reports

68. **Bertelsmann AG/Book Club Associates** - In 1986, Bertelsmann, which already owned the Leisure Circle book club, acquired a 50 percent share of Book Club Associates (BCA) through its acquisition of Doubleday. It then sought to acquire the remaining 50 percent of BCA from WH Smith. This proposed merger was referred to the MMC which concluded in 1988 that the merger was against the public interest. This was because BCA and Leisure Circle were then the two largest UK book clubs and the merger would eliminate Leisure Circle as an effective competitor to BCA. Following this report, Bertelsmann gave an undertaking that it would not acquire any further interest in BCA. In June 1998, Bertelsmann sought release from the 1988 undertakings. The Secretary of State, in accordance with the advice of the DGFT, concluded that the market had so changed since the 1988 report that the public interest issues identified by the MMC were no longer raised and granted Bertelsmann a release from the undertakings on 29 September.

69. **General Utilities plc and SAUR Water Services plc/Mid Kent Holdings plc** - Following publication of a report by the MMC in January 1997, General Utilities plc and SAUR Water Services plc both gave undertakings that they would terminate the agreement made between them with a view to making an offer for the issued share capital of Mid Kent; and that they would not enter into any similar agreement without the prior written consent of the Secretary of State.

70. **FirstGroup plc/SB Holdings Ltd** - The then Secretary of State announced on 31 July 1997 that, in the light of changes to the bus market in Glasgow since the MMC's report, she had asked the DGFT to review and advise on the decision to accept the MMC's recommendation. Following a full and comprehensive review of the bus market in central and south east Scotland the DGFT advised that while the divestment of a Glasgow bus depot (with routes) was no longer required, FirstGroup should still be required to divest the enlarged Midland Bluebird operation. However, the Secretary of State announced on 31 July 1998, that she had decided that divestment was no longer required and, instead, to seek from FirstGroup a package of behavioural undertakings, including undertakings on prices and minimum service levels, restrictions on fare and frequency changes, journey intervals and tendered services. At the year end these undertakings were still being negotiated.

71. **Bass Brewers Ltd/Carlsberg-Tetley plc/Carlsberg AB** - On 22 August, in accordance with a recommendation in an MMC report published in June 1997, Bass exercised its option to place its 50 percent interest in Carlsberg-Tetley with Carlsberg AB. Negotiations concerning the additional undertakings to be given by the parties was, at the year end, still continuing.

72. **London Clubs International plc/Capital Corporation plc** - On 14 December, following the publication of the MMC's report in August 1997, London Clubs International (LCI) gave undertakings not to acquire control of Capital Corporation plc (Capital). The undertakings also prevented LCI from attempting to influence the policy of Capital or from co-operating with Capital with respect to any matter unless it related to the formulation of policy and guidelines of the British Casino Association; it gave effect

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to decisions, guidelines or recommendations of the Gaming Board, or any Government Department or public authority; or any such co-operation was common industry practice and did not restrict competition between casinos controlled by LCI and Capital.

73. **Littlewoods Organisation plc/Freemans plc** - On 25 September, following publication of the MMC's report in November 1997, the Littlewoods Organisation plc (Littlewoods) gave undertakings which would prevent it from acquiring control of Freemans plc. The undertakings also prevent Littlewoods from attempting to influence the policy of Freemans or any company with control of Freemans.

74. **Peninsular and Oriental Steam Navigation Co/Stena Line Ltd** - In their report of 19 November 1997, the MMC had concluded that the creation of a joint venture company merging the P&O and Stena Strait of Dover (short sea route) ferry operations could be expected to operate against the public interest, but they considered that the adverse effects would be limited to the passenger market and would not be felt until 1999, after the existing duty-free concessions had been abolished. The Secretary of State decided that the joint venture should be permitted to go ahead - subject to a price cap on passenger services to come into effect in certain circumstances. These are: where the DGFT finds that the aggregate market share of the joint venture and Eurotunnel of the market for tourist vehicles on short sea routes is at least 90 percent, and the joint venture's share is at least 30 percent; and following the anticipated ending of duty-free concessions in mid-1999, and the expiry of any initial exemption granted by the European Commission pursuant to Article 85 of the Treaty of Rome. Undertakings to this effect were accepted by the Secretary of State on 27 February.

75. **National Express Group plc/ScotRail Ltd** - On 15 April 1998, in accordance with recommendations in an MMC report published in December 1997, undertakings were accepted from the National Express Group plc to divest its coach subsidiary, Scottish Citylink Ltd (Citylink), by 16 June 1998 to a buyer approved by the DGFT; and, for the period of the current ScotRail franchise agreement, not to increase scheduled National Express coach services nor introduce new coach services within Scotland without the DGFT's consent. On 21 August 1998 the DGFT approved the divestment of Citylink to Metroline plc.

Newspaper transfers and mergers

76. The transfer of the ownership of newspapers can raise issues that touch on the accurate presentation of news and the free expression of opinion. For this reason, newspaper transfers and mergers are treated differently from other company mergers. These procedures are administered by the Secretary of State. They were first introduced under the Monopolies and Mergers Act 1965 and retained in the Fair Trading Act 1973.

77. In some circumstances, newspapers cannot change hands without the consent of the Secretary of State. Unless the proposed transfer meets particular conditions, that consent cannot be given until the MMC has reported on the matter. When a newspaper merger is referred, additional members may be appointed to the inquiry group, drawn from the specialist panel maintained for that purpose.

Reference to and report by the MMC

78. In 1998 there was one reference to, and report by, the MMC:

23 February Johnston Press plc/Home Counties Newspapers Holdings plc

79. **Johnston Press plc/Home Counties Newspapers Holdings Ltd** - The inquiry concerned the proposed transfer to Johnston Press plc (Johnston) of the 48 local newspapers owned by Home Counties Newspapers Holdings plc (HCN). Johnston was the fifth largest publisher of regional and local newspapers in the UK. HCN was much smaller, and published a mix of paid-for and free weekly newspapers in London, Essex, Hertfordshire, Bedfordshire, and Buckinghamshire.

80. The MMC was satisfied that the increase in concentration that would arise from the transfer at national level would not give rise to public interest concerns. They were also satisfied that the transfer gave rise to no regional concerns that were distinct from the issues arising in local markets. At local level, Johnston's and HCN's operations overlapped in five localities outside London. The MMC noted that, if the transfer were to proceed, Johnston's share of the circulation and distribution of weekly newspapers in these areas would rise to between 51 percent and 72 percent. In all the overlap areas there was some competition from free Sunday newspapers and the MMC was satisfied that, where these were sufficiently established, they would provide real choice for local readers and ensure that the interests of local advertisers generally were adequately protected. They took the view that this was the position in three of the overlap areas but not in two others, where the free Sunday newspapers were not sufficiently well-established to provide effective competition in the event of the transfer. They considered that competition from other media, or the general threat of entry by other publishers, was not by itself adequate to protect the interests of readers and advertisers in these localities.

81. HCN's titles in those two areas were, however, making substantial losses and the MMC concluded that if Johnston were not to acquire HCN, these titles would close, producing competitive conditions almost identical to those that would arise from the transfer. They also believed that, if the merger went ahead, Johnston would retain and develop some of HCN's paid-for weekly newspapers, and that this could be of particular value to readers in rural areas. Accordingly, they concluded that the transfer might be expected not to operate against the public interest, and the Secretary of State gave his consent to the proposed transfer.

Transfers not referred to the MMC

82. The Secretary of State gave consent to the following transactions without requiring the MMC to report:

5 February Mirror Group plc/*The Racing Post*

10 March Trinity International Holdings plc/*East End Independent*

12 May Newsquest Media Group Ltd/Kinsman Reeds Ltd

30 June Newsquest (Investments) Ltd/Review Free Newspapers Ltd

6 November Sheffield Newspapers Ltd/*The Sheffield Journal*

22 December Johnston Press plc/*The Arbroath Herald & Angus County Advertiser, Guide & Gazette - Broughty Ferry Guide, Carnoustie Gazette, and Monifieth Advertiser*

IV Resources of competition authorities¹

Office of Fair Trading

Over the period of this report the staff of the Competition Policy Division of the OFT averaged 130. For accounting purposes, the OFT's financial year runs from 1 April to 31 March. For the 1998/99 financial year, the estimated total budget for running costs and capital expenditure was £21.7 million. The estimates, as a percentage of OFT's total running costs, for activities reported on in sections II and III above were: work on competition legislation - 6.2 percent; restrictive agreements - 11.5 percent; anti-competitive practices and monopolies - 10.6 percent; financial services - 1.9 percent; and mergers - 6.7 percent.

Monopolies and Mergers Commission

On 31 December 1998, the MMC's core staff numbered 72. According to the demands made by individual inquiries, the core staff are supplemented by industrial advisers and administrative staff on short-term contracts. The MMC's estimated out-turn for 1998/99 is about £6.7 million.

NOTE

1. The figures in this section of the report do not include numbers or costs of legal advisers and other staff in the OFT providing support to those engaged on competition matters, external legal costs, or the resources of other Government departments engaged in work in the field of competition law and policy.