COUNTRY STUDIES

United Kingdom - The Role of Competition Policy in Regulatory Reform

2002

Introduction

The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers. This report on the role of competition policy in regulatory reform analyses the institutional set-up and use of policy instruments in the United Kingdom. This report was principally prepared by Mr. Michael Wise for the OECD.

Overview

Related Topics

OECD REVIEWS OF REGULATORY REFORM

REGULATORY REFORM IN THE UNITED KINGDOM

THE ROLE OF COMPETITION POLICY IN REGULATORY REFORM

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

ORGANISATION FOR ECONOMIC CO-OPERATION

AND DEVELOPMENT

Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the Organisation for Economic Co-operation and Development (OECD) shall promote policies designed:

– to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;

– to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and

– to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

The original Member countries of the OECD are Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The following countries became Members subsequently through accession at the dates indicated hereafter: Japan (28th April 1964), Finland (28th January 1969), Australia (7th June 1971), New Zealand (29th May 1973), Mexico (18th May 1994), the Czech Republic (21st December 1995), Hungary (7th May 1996), Poland (22nd November 1996), Korea (12th December 1996) and the Slovak Republic (14th December 2000). The Commission of the European Communities takes part in the work of the OECD (Article 13 of the OECD Convention).

Publié en français sous le titre :

LE ROLE DE LA POLITIQUE DE LA CONCURRENCE DANS LA RÉFORME DE LA RÉGLEMENTATION

FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *The Role of Competition Policy in Regulatory Reform* analyses the institutional set-up and use of policy instruments in the United Kingdom. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in the United Kingdom* published in November 2002. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 16 member countries as part of its Regulatory Reform programme. The Programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses relative to the principles endorsed by member countries in the 1997 *OECD Report on Regulatory Reform*.

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, specific sectors such as telecommunications, and on the domestic macro-economic context.

This report was prepared by Michael Wise in the Directorate for Financial and Fiscal Affairs of the OECD. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in the United Kingdom. The report was peer-reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

TABLE OF CONTENTS

THE ROLE OF COMPETITION POLICY IN REGULATORY REFORM

EXECUTIVE SUMMARY

Competition policy is integrated into the UK's general policy framework for regulation in several complex ways. The role of competition policy in regulatory reform is recognised in practice and in recent statements of principle. As regulatory reform stimulates structural change, vigorous enforcement is needed to preclude the possibility that private market abuses might reverse the benefits of reform. In the UK, structural change predated stronger competition law by a decade or more, stretching the capacities of specialised regulators to deal with the market power that resulted from widespread privatisations. Mainstream competition policy instruments have now been modernised and integrated more closely with the roles played by specialist regulators.

The UK adopted explicit competition policy instruments over 50 years ago. The central institutions are the Department of Trade and Industry (DTI), the Director General of Fair Trading (OFT), and the Competition Commission (formerly the Monopolies and Mergers Commission). Competition policy ideas have underpinned major structural reforms for nearly 20 years. The programme of privatisation, which was one of the main drivers of those reforms, included competition policy principles as well as the goals of reducing the size of the state and the entities directly dependent on it, and reducing the burden that inefficient firms put on the budget. Yet until recently competition law enforcement was weak. Enactment of the Competition Act 1998 is the most visible sign of a credible emphasis on enforcement. It adopts the "prohibition" approach to restrictive practices and abuse of dominance, while streamlining and strengthening the enforcement process. So far, reforms have retained the distinctive aspects of the previous system, notably the Commission's responsibilities for studying and recommending action about problems of monopoly and market power. One long-standing issue that is still in process is the reform of the process of merger review, which appears to have been generally effective although it arguably lacked transparency and certainty. The OFT and the Commission also have a more active role in reviewing legislative and regulatory proposals, now that the new enforcement processes are in place.

The UK's general reliance on sectoral specialisation to apply competition policy is explained in part by the lack of strong competition policy tools at the time public monopolies became private ones. The practice, and the range of variations on the institutional themes, also display the UK's predisposition for particularity in institutional structures, for pragmatic adjustment rather than comprehensive design, as well as a general concern to diffuse power widely. Institutions and systems for ensuring consistency among the many regulators with concurrent, overlapping powers seem to be working, but the boundary between sectoral and general competition policy competence is still contested occasionally.

Although the 1998 law has been described as the most important and fundamental improvement in competition policy for a quarter century, and the experience applying the new tools is still limited—it has only been effective since March 2000—the government has already called for further reforms, principally to strengthen the institutions that apply the law and the sanctions for infringing it. This ambitious package, coming so soon after the previous one, presents a moving target for any effort to assess conditions or the success of previous reforms. Indeed, the conventional term "reform" may not apply well to the UK, where change in the regulatory regime has been a constant process for 20 years. At least, the object of study should be the evolution of regulatory policy, rather than the current state of it. The extent of the changes still being made or proposed, in the regulators' substantive goals and missions as well as in the design of the institutions, implies there is still scope for significant improvements in the regime. Or, perhaps, it just displays the characteristic pragmatic search for incremental perfections.

BOX 1: COMPETITION POLICY'S ROLES IN REGULATORY REFORM

In any assessment of the relationship between competition and regulation, the threshold, general issue is whether regulatory policy is **consistent** with the conception and purpose of competition policy. There are four particular ways in which competition policy and regulatory problems may interact:

- Regulation can **contradict** competition policy. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve the regulatory goals. When such regulations are changed or removed, firms affected must change their habits and expectations.
- Regulation can **replace** competition policy. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise in support of regulation, that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.
- Regulation can **reproduce** competition policy. Regulators may have tried to prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that seemingly duplicate policies may have led to different outcomes.
- Regulation can **use** competition policy methods. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

Competition policy foundations

The UK presents stimulating contrasts. The economic and political doctrines of liberalism were born there. Its entrepreneurial and trading traditions are long and deep. It pioneered the restructuring of traditionally monopolised, state-owned utility sectors. It was among the first countries in Europe to adopt formal competition policy, over 50 years ago. But strong enforcement powers were added to the competition policy "toolkit" only recently. The design, or rather the evolution, of policies and institutions reflects the national habit of incremental, particular problem-solving. The government's ambitious recent proposals represent an unusually deliberate announcement that broad-based principles of competition will be a principal foundation of UK regulatory policy.

Context and history

Liberalism and free trade flourished in a nation that was dependent on the sea and at the centre of a global empire. The industrial revolution had come first to the UK, in conditions of limited government direction, laying a foundation for development that was based on enterprise autonomy. The commercial culture that emerged in the 19th century promoted the common virtues of a market-based system, such as independence, private property, and freedom of contract. Family-controlled firms co-existed with securities-market capitalism. Perhaps because the "natural" conditions to support market competition were so strong, there may have been less sense that formal laws were needed to protect it.

The virtues of markets were appreciated more strongly than the virtues of competition. In the early 20th century, businesses engaged in stable co-operation, combination, and self-regulation through private coercion and negotiation, all justified philosophically by individualism and freedom of contract. Then the economic crisis of the depression led to such measures as the Import Duties Act of 1932, which destroyed competition in many sectors. Producer interests, of organised labour and organised capital, joined in the 1930s to rationalise industries through restrictive practices and market sharing. By 1945, after years of policies to respond first to depression and then to wartime mobilisation, the economy was characterised by cartels, oligopolies and restrictive practices, often openly sanctioned and administered by government departments, trade associations, and formal agreements.

One project of the post-war government was to create a new administrative structure to examine whether those practices and situations were really in the public interest. Laws to address constraints on competition, some of them ancient, were clearly not up to the task any more. Statutes to control monopolistic conduct date from at least the 13th century. The first reported decision declining to enforce a contract in restraint of trade because it was contrary to public policy, *Dyer's Case*, dates from 1414.[1] But this long common-law tradition had not blossomed into a general policy of promoting competition in the public interest. To the contrary: the *Mogul Steamship* decision[2] in 1892 prevented using common-law principles about restraint of trade to vindicate public interest concerns and appeared to permit any conduct short of a "well-defined tort" to get rid of a business rival. Summarising the situation viewed from a US perspective, "economic mayhem was tolerated if it was motivated by avarice, but not if it was motivated by spite" (Bernhard, 1960). To be sure, this supposed anarchy was a matter of controversy. Responding to public debate about the "monopoly problem", the government set up a Committee on Trusts in 1918, which considered a proposal for an investigating tribunal, and a monopolies bill was drafted but then laid aside.

The experience of total planning in WWII produced the intellectual basis for a systematic policy to control monopoly. An influential 1943 memo[3] argued that the inefficiencies and injustices resulting from market power would prevent achieving full employment in the post-war economy. The memorandum was echoed in the 1944 White Paper on Employment, calling for powers to study the extent and effect of restrictive agreements and combines and to take action against those practices if they were contrary to the public interest. The motivation was partly political, as the White Paper stated that "[i]n a democratic country, the public must be the master of industry." It was not a neo-liberal manifesto. Rather, the success of the planned system through the war supported a "post-war settlement" that envisioned continuing it, to maintain high employment in an environment of negotiation and voluntarism. Preventing restraints on competition was to be part of a regulatory and economic system that was still controlled from the centre. The process of adopting a law about private monopoly coincided with widespread nationalisation and the creation of new public monopolies. Thus, this post-war round of reform also created the problems that another round of reform was to address 40 years later.

The UK took the early lead among European jurisdictions in enacting competition legislation, with the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948. The long title aptly describes its themes. The new system was administrative, directed more toward researching and publicising problems of monopoly than to enforcing rules against them. The very general "public interest" approach was to avoid legalism and encourage negotiation. The new Monopolies and Restrictive Practices Commission,[4] whose part-time members came from a range of backgrounds, including business and academia, was to study industry problems—but not the conduct of particular firms—that were referred to it by the government. The Commission might recommend solutions, which the government might implement, at its discretion. The Commission got off to a slow start, but after it was strengthened in 1953 it became quite active. Its first general report, on *Collective*

Discrimination, reached sweeping conclusions, calling in effect for enactment of a tough prohibition-exemption scheme to control anti-competitive practices. Its proposal looked very much like the then-new European Coal and Steel Community, whose terms foreshadowed the now-familiar competition rules of the Treaty of Rome. Rather than follow this unanticipated and disconcertingly ambitious recommendation, the government eviscerated the Commission, repealing the 1953 improvements and virtually ending references to it for many years.

Instead, the government proposed new legislation, the Restrictive Trade Practices Act 1956, and a new body to apply it. The Restrictive Practices Court, which like the Commission included lay as well as judicial members,[5] took its roles and the rules of the new legislation much more seriously than either business or the government had expected. By applying the law's requirements strictly and finding most agreements it reviewed to be contrary to the public interest, this Court's decisions over the next decade effectively eliminated the once-widespread overt cartels.

As restrictive practices were being dealt with strictly, "monopolies" continued to be handled generously. By 1965 the Commission had issued only 6 reports in the preceding 10 years. That year the Commission was revived, in the midst of publicity and controversy about big corporate combinations, by giving it a new responsibility to review and report on mergers, applying the same "public interest" test and under the same terms—a merger would be reviewed only if the government referred it to the Commission for that purpose, and the government retained discretion about the remedy to apply. The approach remained administrative and relatively permissive, "compliance-based" rather than doctrinaire or legalistic, and decidedly multi-factor. A Board of Trade official noted at the time, without irony, that too much emphasis should not be placed on competitive effects, and that promoting the public interest "might in certain circumstances mean ignoring the direct interests of consumers and users" (quoted in Wilks, 1999, p. 202).

Still, the enforcement structure looked weak. One object of concern was the apparent political influence behind the decision whether to refer a matter to the Commission for study and recommendation. Departments were often accused of defending their industrial clients. In response to these concerns, and to an increasingly vocal consumer movement, major legislation in 1973 refocused the "public interest" test to emphasise competition and created an executive agency and a spokesman dedicated to that goal. The Fair Trading Act 1973 restated the substantive basis of competition policy. A new official, the Director General of Fair Trading (DGFT), was designated to apply and champion that policy, with the support of the Office of Fair Trading (OFT). Over the following quarter century, the role of the DGFT has become increasingly important. The government's latest proposals imply further changes that would secure OFT's position as the principal player in UK competition policy.

Creating a visible, independent public official responsible for competition changed the terms of debate but did not resolve the issues. Commission reports in the 1970s called attention to competition problems in professional services and a number of consumer products. Studies on monopolies and on restrictive practices, issued in 1978 and 1979 and based largely on the collected evidence from the Commission, found the UK economy to be dominated by large firms, operating in oligopolistic markets, to a greater extent than any other major industrial power, and identified characteristic monopolising practices. The Restrictive Trade Practices Act was proving to be cumbersome and costly to apply, handicapped by the formalism that had led to its early success. The 1980 Competition Act dealt with these problems, in several ways. It empowered OFT and the Commission to address particular practices and to deal with conduct of individual firms, not just industries and "monopolies". Moreover, by using the substantive language of the Treaty of Rome, the 1980 Act focused on competitive effects. Reflecting the new government's priorities, the law authorised the Commission to make inquiries into economic problems in nationalised industries. The

Commission produced 35 such reports from 1980 to 1993, on postal services, railroads, electric power, water, steel, and coal.

With the 1980 Act, competition policy became a central element of the government's program for the first time. But the next step to promote competition was not continued perfection of the machinery of law enforcement. More important than further reform of the competition policy institutions themselves was the radical programme of privatising state-owned monopolies, deregulating markets, and introducing competition sector by sector—often guided by new independent regulators modelled on DGFT. Market-stimulating reforms extended well beyond the utility and transport industries to include fundamental changes about housing, health care, pensions, exchange controls, and industrial relations. By comparison, cleaning up the details of law enforcement may well have been much less important to competition policy, broadly conceived.

The most important recent legislative development in competition policy, more narrowly conceived, was the Competition Act 1998 ("CA98"). Enacted in November 1998, it became fully effective 1 March 2000. This law conformed the UK's law about restrictive agreements and abuse of dominance to the "prohibition" approach of the EU. For the first time, the UK competition law imposes real penalties, rather than simply cease-and-desist orders. Powers of investigation were also strengthened substantially.

The statutory framework was simplified by repealing several other laws[6] and the procedures under them (UK (OECD CLP), 2000). In the words of two British professors, the UK's competition law had become "bizarre," "a web of Byzantine complexity" (Whish, 1993, p. 700; Craig, 1987, p. 202). Three laws[7] and three institutions[8] had been responsible for cartels. Mergers had involved 5 laws[9] and OFT, DTI, and the Commission. And natural monopolies could involve all the above, plus special sectoral laws and utility regulators. After the 1948 Act, there had been 21 additional enactments about competition policy, of which 14 remain in effect even after the 1998 Act (including 12 sector-specific or special laws).[10] Although the Restrictive Trade Practices Act had obviously ended its useful life, the Fair Trading Act was believed to be working. Thus despite adopting the basic EU law and approach to restrictive practices and dominance, the UK has also retained the provisions about monopoly in the Fair Trading Act and the institutions and methods for applying it. In addition, several independent sectoral regulators have concurrent powers with DGFT to enforce the Competition Act in their sectors, as well as the separate sectoral laws about licensing and conduct that also have strong competition policy features. And although the new law eliminated one institution, the Restrictive Practices Court, it created another one in its place, the Appeal Tribunals of the Competition Commission.

The new law was a long time coming. A plan to review the competition law had been announced by the Secretary of State for Trade and Industry in 1986. It languished for a decade. By the mid-1980s, the advantages of shifting to a system like the EU's had become increasingly obvious. The concept was formalised in a white paper in July 1989, *Opening Markets: New Policy on Restrictive Trade Practices*. The delay in actually making the change, until 1998, may have made it possible to enact more sweeping reform, as the EU's own practice matured during this period. But in the meantime, some sharp public controversies and disagreements, among interest groups and even between the different competition policy institutions, highlighted the increasing public awareness of the importance of competition policy. Business groups did not oppose conforming UK law to the Art. 81 "prohibition" approach for agreements; however, they preferred the UK's discretionary approach to abuse of dominance, and they preferred administrative negotiation over adversary litigation and third-party claims. The original proposals in the 1980s followed that approach and would not have included Art. 82-like provisions in the UK law (Utton, 2000). On the other side, the National Consumers

Council and the Consumer's Association took a position in favour of much stronger competition rules (Wilks, 1996).

During this period, the Commission was being criticised for unpredictability and an allegedly lax attitude. On several occasions, it was suggested that the Commission simply be abolished. In 1991, a Parliamentary committee recommended combining it with OFT into a single Competition and Mergers Authority. Commission reports on auto retailing and parts, finding "complex monopoly" (owing in part to other regulations, such as the EC block exemptions and limits on imports) but declining to call for relief, drew sharp criticism from consumer organisations, including calls for abolishing the Commission completely because it was too permissive. Other reports finding complex monopolies but declining to find harm to the public interest drew public criticism from DGFT, culminating in his public endorsement of creating a single competition agency—contrary to government policy, and shortly before his resignation in 1995. Meanwhile, DTI was signalling its own disagreements with DGFT, declining to follow his recommendations to refer mergers twice within a few weeks in early 1993, instructing DGFT not to open an inquiry (of a bus monopoly) in 1994, and, ironically, refusing in 1995 to refer to the Commission a merger involving the board game, Monopoly, evidently because DTI thought a domestic monopoly would be a stronger exporter. The opposition promised stronger competition policy, including bringing the law into line with European practices, if it were given the chance to govern.

The long delay in revising the Competition Act and moving more clearly to an EU-style system suggests a lack of urgency and a consensus that the UK institutions were working well enough. The lack of controversy when it was finally adopted suggests an equally broad consensus in favour of incremental reform. Competition policy in the UK has shown considerable long-term consistency and bi-partisan support, perhaps because competition policy was often not politically salient. But the broad, shallow consensus in support of the general direction may have delayed reform in the 1990s, despite widespread recognition that the UK system needed it.

The prominence that the government has given to competition policy in the last few years suggests that this long-standing traditional viewpoint is changing. From the outset, the designers of UK competition policy had deliberately declined to follow foreign models. But now, following the EU model appears to have broad support. The drafters of the new law thought that the most controversial part of it would be the instruction to interpret UK law according to EU jurisprudence, for this was the first UK legislation to require following the EU even where the EU treaty did not require it. But that feature of the law drew little criticism or debate. Moreover, over the last 25 years, beginning with the 1973 Fair Trading Act and the creation of DGFT in response to consumer interest concerns and continuing through the major structural reforms of the 1980s, competition principles have moved to the centre of economic policy-making. After the 1998 Act, the government has maintained the momentum, with proposed improvements to the merger enforcement regime, even stronger enforcement tools, and new responsibilities about analysis of regulations that will integrate competition policy into the process of assuring overall quality of regulation.

Policy goals

As befits a country with an unwritten constitution, the goals of UK competition policy are not set out in the statutes. The Competition Act contains no statement of purpose. There is a statutory elaboration of the basic substantive criterion under the Fair Trading Act 1973, the "public interest,"[11] but its breadth and inclusiveness provide little guidance for, or constraint on, decision-makers' discretion. The desirability of "maintaining and promoting effective competition" is the first element, implying some logical or substantive priority over the others. But the statute does not further explain the sense in which the term "competition" is used. The second element, the interests of consumers and users with respect to price and quality, would typically be considered a product of healthy competition, and thus the statute links them implicitly. The third element explicitly recognises the role of competition in promoting productive efficiency and innovation, casting doubt on the claim that those goals could be better achieved by monopoly. The last two elements of the public interest test, "balanced distribution of industry and employment" and helping UK firms compete in foreign markets, have no necessary connection to competition policy as that is usually understood.

The balance among possible goals appears more clearly in the actions taken and in the announcements and explanations of decision-makers. In the last few years, these announcements and explanations have become increasingly coherent. Extracts from speeches and other formal political pronouncements imply that UK embraces a process-dynamic conception of competition, as rivalry and the potential for rivalry, rather than measuring it in terms of allocative efficiency. The links among competition, consumer benefit, and productive cost discipline are well recognised. Policy statements by the different institutions show subtle, and probably inconsequential, differences in emphasis. The Department of Trade and Industry (DTI) links competition policy with large-scale government policy goals. In a recent consultation about merger policy, DTI described "effective and dynamic competition" as "part of its wider agenda of promoting competitiveness and growth. Strong competition provides the best guarantee to consumers of choice and value. But it also makes for strong businesses, providing the spur for them to be dynamic and innovative … ." The OFT Guidelines on "The Major Provisions of the Competition Act 1998" echo these process-oriented, dynamic themes, adding the idea that competition is "crucial to the efficient allocation of resources." The consumer policy link is explicit in the sound-bite from a parliamentary speech: "Competition is also the most effective way of ensuring that consumers receive a fair deal."[12] The OFT's formal Statement of Purpose combines the elements with similar deftness: "The OFT's goal is to make markets work well for consumers. Markets work well when there is vigorous competition between fair-dealing businesses. When markets work well, good businesses flourish."[13]

Confidence in the multiple benefits of competition policy has developed in the course of the many structural reforms of the last two decades. Before then, if there was any consistency in the evident purpose of UK competition policy it was probably scepticism. The term "competition" was not used in the title of legislation until 1980. Competition was not treated as an end, but as a means to efficiency and economic welfare, and at first there was some doubt that competition was either efficient or good. The common pattern of decisions under the 1948 law was a finding of "monopoly" (usually oligopoly) that was nonetheless said to be justified by efficiency. The Commission has occasionally found—as recently as 1993—that "a principled pursuit of competition would not, on the facts of the case, be likely to increase efficiency." International competitiveness has sometimes been seen as inconsistent with intense domestic competition, and claims that national champions and domestic monopolies are needed for international trade have been made as recently as 1995. The goal that inspired the original law was full employment. For much of the period from 1964 to 1983, decisions were dominated by industrial policy. When consumer policy and prices became important issues in the 1970s, the Commission was seen as an agent for price control.

Competition policy in reform: current issues

Tests against other policies marked the evolution and maturation of the competition policy institutions. The full title of the original law, calling for "inquiry and control," shows that its drafters were genuinely agnostic. The point of the law was not enforcement, but inquiry, to find out what was actually going on and report on the balance of costs and benefits, over a wide range of possible social and economic values. Another function was to educate policymakers and the public, first about the harm done by restrictive practices and the elaborate machinery of the formal cartels, and then about the complex problems of oligopoly. As confidence grew with experience, competition principles and institutions were enlisted to support structural reforms. After resisting this step for a long time, now the UK has embraced a comprehensive conception of competition policy and its role in regulatory policy.

Yet another current theme in UK regulatory policy may re-introduce a degree of *ad hoc* balancing. Regulatory policy in the UK has deliberately moved from a focus on efficiency to a concern about equity, encapsulated in title of a 1997 green paper, "A Fair Deal for Consumers". Regulators are called upon to define "quality" of service in terms of distributional issues and to establish a framework for addressing social and environmental concerns. The rhetoric masks some potential incoherence, or at least disguises tradeoffs, in targeting distributional goals while still promoting efficiency. The issue will be most prominent in the regulation of traditional monopoly sectors, rather than the situations that arise in ordinary competition law enforcement. But competition policy decisions may be faced with claims about social and environmental effects, especially in decisions under the Fair Trading Act that must be justified in terms of the "public interest." Although officials stress that the "public interest" will concentrate on competition, the statute does not limit the policy goals that might also be considered relevant.

A goal that often appears relevant, and that is closely related to the emphasis on distributional concerns, is keeping consumer prices down. In recent years, it has been argued that lack of competition was increasing consumer prices in the UK. This conclusion was backed by studies claiming to show that mark-ups and prices were higher in the UK for products such as cars. OECD economists have demurred, pointing out in the 2000 Annual Report on the UK that aggregated UK price levels were among the lowest in the EU, at least before the pound appreciated after 1996 (OECD, 2000). That OECD report noted a comparison of prices for the same products in the UK, Germany, France, and the US that identified 8 products that were significantly more expensive in the UK, and 3 that were significantly cheaper. (A DTI study of grocery and household products found few significant price differences compared to Germany, France and the US. A more recent study of branded consumer goods found that the UK and Sweden had higher prices for many of the goods looked at compared to France, Germany and the US). On balance, the OECD economists expressed scepticism that weak domestic competition was leading to higher prices, arguing instead that the persistence of cross-border price differentials, greater than intra-country differentials subject to similar cost differences, implied that the problem was more likely due to anti-competitive constraints on international trade such as the EU block exemption about auto dealers.

More generally, the UK government has been concerned about lagging productivity, and has identified competition policy as the first of 5 areas where policy improvements could correct that lag[14] (OECD, 2000, p. 80). The high priority that the government has assigned to further strengthening is reinforced in the June 2001 announcement by HM Treasury and DTI, *Productivity in the UK: Enterprise and the Productivity Challenge*. At the top of the list of programme actions is "major reforms to the competition regime including full independence for better resourced competition authorities, a new duty to promote competition across the economy, reform of the complex monopoly regime, and a proposal of criminal penalties for those involved in cartels" (p. 1). The discussion highlights innovation, efficiency, lower barriers to entry by smaller businesses, and benefits to ultimate consumers of lower prices and higher quality. It also acknowledges there is further room for improvement of the competition regime, to achieve the goals of strong, independent authorities, broad scope of application, strong deterrence, real redress, international consistency and co-operation, and high public profile befitting its importance for economic performance. More concrete proposals were detailed in a formal DTI white paper in July, *Productivity and Enterprise: A World-Class Competition Regime*, They would give OFT a more wide-ranging and visible advocacy role, reduce the role of ministerial discretion in merger and "market" investigation cases, provide new avenues for complaint and redress, and modernise some of the processes of the Commission and OFT. The most radical proposal is to send individuals to jail for participating in a cartel.

Substantive issues: content of the competition law

After the 1998 Act, the UK's basic competition law now parallels the EU's in all important respects. In addition, though, the UK has kept its unique approach to examining problems in concentrated industries and dealing with mergers. That approach, based on exhaustive multi-factor study and publicity, provided a strong analytical foundation for the structural reforms of the last 20 years; however, it did not support a general program of strong enforcement against anti-competitive conduct. The 1998 Act has addressed that weakness by strengthening enforcement processes and sanctions, narrowing exclusions, and continuing the shift toward assessing effects rather than form.

Evolution of the UK law demonstrates how, in common law traditions, the elaboration of procedures is as important as the analysis of substance. The Competition Act 1980 supplemented the Fair Trading Act by adapting its existing process for the investigation of market conditions into a means for investigating a particular restrictive agreement or practice of a particular company. The 1980 Act also introduced a substantive innovation, by describing those agreements and practices in terms that directly paralleled the language of EU competition law, looking at actual, intended, or likely effects on competition in a market. But no practices were always treated as anti-competitive, not even horizontal price-fixing and market division. This focus on effects was both a step toward embracing the full EU approach and a change from the formal terms of the Restrictive Trade Practices Act, which nonetheless remained in effect too.

The 1998 Act completed the fundamental shift to European models. The UK now adopts the standard EU prohibitions against restrictive agreements and abuse of dominance. Equally importantly, the law includes a broadly phrased instruction to follow the EU in applying the parallel provisions of UK law. This means not only decisions of the European Court of Justice and the European Commission, but also other relatively formal communications by the EC, such as annual reports, and guidelines issued through comment processes. These are to be treated as authoritative guidance for UK competition law (Sec. 60).[15] Judges will thus have to refer to EC texts and decisions to interpret basic concepts of the UK law (Bloom, 2000). All EC individual and block exemptions apply automatically, and agreements that are formally notified to the EC are provisionally immune from financial penalty under the UK law. This incorporation of EC exemptions is not a complete novelty, as notification was not required under the old Restrictive Trade Practices Act for agreements that would have benefited from EC block exemption regulations. Following EU precedent without reserving the potential for domestic variation should make compliance simpler for business.

BOX 2: THE COMPETITION POLICY TOOLKIT

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: "horizontal" agreements among firms that do the same things, and "vertical" agreements among firms at different stages of production or distribution. The second category is termed "**monopolisation**" in some laws, and "**abuse of dominant position**" in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called "**mergers**" or "**concentrations**," usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. But vertical agreements also often promote efficiency. Because the competitive effects of vertical agreements can be more complex, and are usually less serious, than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuse of dominance or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

Merger control tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

Horizontal agreements

Agreements that restrict competition are prohibited.[16] The statute's language, scope, and listing of particular types of agreements follows the EU model. This "Chapter I prohibition" replaces the previous process of notification and review under the Restrictive Trade Practices Act. The new law also threatens more significant sanctions against violations. Before, parties to an anti-competitive agreement could be subject only to an order to cease the offending conduct. Now, violators face fines of up to 10% of group turnover within the UK, annually for the duration of the violation (up to 3 years). The risk of penalty began when the prohibition went into effect in March 2000, and thus potential penalties will be increasing until March 2003. The clear Chapter I prohibition shows that the UK is now putting a priority on promoting competition.

The DGFT may decide to exempt a particular agreement, and the Secretary of State may issue generally applicable block exemption regulations, according to the same criteria that apply to individual and block exemptions in the EU system. The EC's exemptions, both current and prospective, are incorporated by reference (Sec. 10, Sec. 60). Parties that are in doubt about whether their agreement is prohibited may obtain some comfort by notifying it to the OFT and awaiting a ruling. Exemptions can be back-dated to before the time of notification, reducing the incentive to file just to establish a place in line. OFT does not intend to use up its resources processing a mountain of defensive notifications and responding to special pleading. Public education about the scope of the law and of the generally applicable exemptions has tried to encourage complaints and discourage frivolous notifications. Firms are welcome to seek informal and non-binding advice from OFT staff. But if firms want something more reliable than informal advice, such as explicit guidance about whether their agreement is likely to violate the law (Sec. 13), or a formal decision that it does not (Sec. 14) there is a non-trivial application fee for seeking that additional security: £5 000 for guidance, £13 000 for a decision (Bloom, 2000).

Small firms, in particular, are invited not to bother asking for advice. Agreements among parties whose collective market share is below 25% are considered generally unlikely to have an appreciable effect on competition. OFT has issued official guidance instructing firms not to notify such agreements.[17] This *de minimis* principle does not shield price fixing, market sharing, or elements of a network of agreements that cumulatively have an anti-competitive effect. The terms of the current OFT guidance, which does not amount to a formal exemption but rather represents the views and the enforcement intentions of the DGFT, restate (with some variations) similar *de minimis* exemptions that applied under the previous laws.[18]

The prohibition of restrictive agreements can be a useful tool to eliminate the anti-competitive effects of self-regulation. That is what the Restrictive Practices Court was doing from 1956 to 1965, against formally organised cartels. Self-regulation is an important element in the government's approach to light-touch regulation, where it is possible and in accordance with other policies such as competition. But there remain areas of self-regulation, particularly by professional service providers, for which formal statutory exclusion is still possible. The government has announced its intention to limit or remove those exemptions, pointing to a recent OFT study of professional services for evidence of their effects.

Experience applying the new prohibition is limited. Not until early 2002 did the OFT find that a horizontal agreement violated the Chapter I prohibition. One reason is that such cases take time to prepare, and the prohibition only applies to cartel behaviour since March 2000. Applications of the previous law were limited, too. The Restrictive Practices Court struck down many formal cartels, but the tools for investigating clandestine agreements were very weak. Under the Restrictive Trade Practices Act, DGFT could demand evidence (by issuing a statutory notice requiring firms to provide details) only after demonstrating a "reasonable cause to believe" that the firms were parties to a non-registered agreement. The courts interpreted this requirement strictly, so that OFT could not obtain proof of an agreement until it already knew a great deal about it. The lack of effective sanctions also crippled enforcement. Against the international lysine conspiracy, which incurred enormous fines in many other jurisdictions, the Restrictive Practices Court could only accept an undertaking and issue a cease and desist order. Similarly weak actions or settlements were taken concerning conspiracies to fix prices for bus services and electrical products, and against one to support dealer efforts to fix automobile prices by limiting discounts (UK (OECD CLP), 1999). Now that sanctions are considerably stiffer, the OFT has adopted and publicised a leniency program, modelled on US experience, to encourage applications for leniency and leads for investigations.

So far, only one case has resulted in fines under the new law for participating in a cartel; that number may increase, as OFT has launched several investigations. But the government has already proposed to add an even stronger sanction, by making horizontal collusion a criminal offence and thus threatening individual participants with imprisonment. This step would add substantial leverage to the leniency program, by giving key individuals strong reasons to come forward quickly to provide evidence that would inculpate corporate violators.

BOX 3: THE EU COMPETITION LAW TOOLKIT

The law of the United Kingdom now follows generally the basic elements of competition law that have developed under the Treaty of Rome (now the Treaty of Amsterdam):

- **Agreements**: Article 81 (formerly Article 85) prohibits agreements that have the effect or intent of preventing, restricting, or distorting competition. The term "agreement" is understood broadly, so that the prohibition extends to concerted actions and other arrangements that fall short of formal contracts enforceable at civil law. Some prohibited agreements are identified explicitly: direct or indirect fixing of prices or trading conditions, limitation or control of production, markets, investment, or technical development; sharing of markets or suppliers, discrimination that places trading parties at a competitive disadvantage, and tying or imposing non-germane conditions under contracts. And decisions have further clarified the scope of Article 81's coverage. Joint purchasing has been permitted (in some market conditions) because of resulting efficiencies, but joint selling usually has been forbidden because it amounts to a cartel. All forms of agreements to divide markets and control prices, including profit pooling and mark-up agreements and private "fair trade practice" rules, are rejected. Exchange of price information is permitted only after time has passed, and only if the exchange does not permit identification of particular enterprises. Exclusionary devices like aggregate rebate cartels are disallowed, even if they make some allowance for dealings with third parties.

- **Exemptions**: An agreement that would otherwise be prohibited may nonetheless be permitted, if it improves production or distribution or promotes technical or economic progress and allows consumers a fair share of the benefit, imposes only such restrictions as are indispensable to attaining the beneficial objectives, and does not permit the elimination of competition for a substantial part of the products in question. Exemptions may be granted in response to particular case-by-case applications. In addition, there are generally applicable "block" exemptions, which specify conditions or criteria for permitted agreements, including clauses that either may or may not appear in agreements (the "white lists" and "black lists"). Any agreement that meets those conditions is exempt, without need for particular application. Some of the most important exemptions apply to types of vertical relationships, including exclusive distribution, exclusive purchasing, and franchising.

- **Abuse of dominance**: Article 82 (formerly Article 86) prohibits the abuse of a dominant position, and lists some acts that would be considered abuse of dominance: imposing unfair purchase or selling prices or trading conditions (either directly or indirectly), limiting production, markets, or technological development in ways that harm consumers, discrimination that places trading parties at a competitive disadvantage, and imposing non-germane contract conditions. In the presence of dominance, many types of conduct that disadvantage other parties in the market might be considered abuse. Dominance is often presumed at market shares over 50 percent, and may be found at lower levels depending on other factors. The prohibition can extend to abuse by several firms acting together, even if no single firm had such a high market share itself.

- **Reforms in administration**: Recent and proposed reforms of EU competition policy reduce the scope of the prohibition against vertical agreements and would eliminate the process of applying for exemptions for particular agreements. Instead, exemption criteria would apply directly in decisions applying the law, and these decisions would increasingly become the responsibility of national competition authorities.

Vertical agreements

The Chapter I prohibition, taken literally, also applies quite broadly to vertical agreements between sellers and buyers. But an equally broad exemption removes the prohibition from all but the most egregious misconduct. Resale price maintenance had been the subject of a separate law, the Resale Prices Act 1976, which made it 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. This law was replaced by the 1998 Act, which is interpreted to apply an equivalent prohibition (UK (OECD CLP), 1999*b*). But in other respects, a broad exclusion removes most vertical agreements from the prohibition.

The exclusion under UK law[19] is more generous than the new block exemption of the EU (Bloom, 2000). The Chapter I prohibition does not apply to a "vertical agreement", as specially defined,[20] that deals with conditions of purchase and sale and related assignments of intellectual property rights. An agreement that amounts to a maximum or recommended resale price might benefit from the exclusion, as long as the result in practice was not to fix the resale price, by pressure or incentive. (See OFT Guidance, *Vertical agreements and restraints*, OFT publication 419). To reduce the scope of possible business uncertainty about coverage, the UK exclusion does not depend on market share. Categories of agreements that are likely to benefit include exclusive distribution agreements, exclusive purchasing agreements, selective distribution agreements and franchise agreements. The exemption also specifically excludes "land agreements", that is, agreements about interests in land, including some covenants controlling land use (Order 2000, Statutory Instrument 2000 no. 310). DGFT can remove the benefit of the general exclusion in particular cases, but only after notice to the parties (OFT, 2001*a*).

The other competition laws still prove useful against vertical restraints. In one of the last developments under the Resale Prices Act, and the last action by the now-defunct Restrictive Practices Court, OFT petitioned to end the order that exempted over-the-counter medicines from the prohibition. In early 2001, OFT prevailed and retail prices for these products dropped dramatically. The provisions in the Fair Trading Act 1973 about scale and complex monopoly may also be relevant to vertical agreements, where market structure leads to a pattern of vertical agreements that prevent entry (OFT, 2001*a*). Retention of these powers evidently made it feasible to provide for a broad exclusion from the Chapter I prohibition (Bloom, 2000). An example is automobile distribution. After an inquiry that began in 1999, the CC opined in April 2000 that one reason for comparatively high auto prices in the UK was a "complex monopoly" in distribution.[21] The high proportion of company car-fleet sales implies there is cross-subsidisation between retail and fleet sales. In addition, there was some evidence of actual collusion to prevent discounting (OECD, 2000, 168-71). To deal with the problems identified, DTI announced rules to prevent discrimination in favour of fleet buyers and to permit dealers to advertise their "bottom line" price.

The July 2001 White Paper announces that the government intends to repeal the exclusion for vertical agreements. The reason given is to align the UK exemption with the less generous EC exemption and thus encourage parties to seek redress in private actions.

Abuse of dominance

The "Chapter II" prohibition of the Competition Act now parallels the EU treaty language, by prohibiting conduct that is an abuse of a dominant position. This prohibition is the principal substantive innovation in the new law. The same type of conduct might have been found to violate previous law, but the conduct would not have been remediable until after a finding of violation, and the only sanction would have been a prospective order. Now, parties that engage in abusive conduct risk fines. Calling attention to the importance of this new requirement, the first fine imposed under the new law was against abuse of dominance.

The new prohibition co-exists with the long-standing provisions of the Fair Trading Act 1973 for dealing with "monopoly". The UK resisted moving to the EU approach to dominance, in part because of a belief that the UK system was superior. Rather than choose between them, the UK decided to keep both. There is no clear assignment of cases or conduct to one law or the other, although the OFT's guideline about the major provisions of the Competition Act indicates that "normally" the Competition Act will be applied. To guide business, ministers have said they do not expect to use the traditional scale monopoly powers until after a finding of abuse of dominance—and perhaps only after repeated abuse—under Chapter II. Much of the experience under the Fair Trading Act has been with oligopoly, or "complex monopoly" as it is called in the Act. The related notion of "joint dominance" under the EU approach is not as well developed. UK officials have observed that the characterisation of complex monopoly may offer commentary on the concept of "joint dominance" for the EC, and vice versa. (Bloom, 2000). Other perceived advantages of the UK's traditional approach are its attention to the exploitation of market power, provision for structural remedies, and careful examination of efficiencies.

BOX 4: “MONOPOLY” UNDER THE FAIR TRADING ACT

The Fair Trading Act defines two types of “monopoly” that can be investigated. The terminology is loose, as neither type is necessarily an economic monopoly. Each type is defined in terms of share of supply:

- In a “scale monopoly”, one entity accounts for at least 25 per cent.
- In a “complex monopoly”, a number of entities together account for at least 25 per cent, and they engage in conduct which prevents, restricts, or distorts competition.

The definitions are jurisdictional, not analytical. They identify the cases where the Competition Commission has the power to investigate and, if the Commission identifies effects adverse to the public interest, the Secretary of State has power to take remedial action.

The 25 per cent threshold is not a definition of dominance, and indeed would not necessarily be measured as a share of an economic market. The percentage measure is of the supply (or acquisition) of goods or services of a particular description in the UK or a part of it. Once the share of this “reference market” establishes jurisdiction, a full study by the Commission will establish the economic market that is relevant to assessing the conduct of the “monopolists” and the public interest. The relevant product and geographic market may turn out to be wider or narrower than the reference market.

The definitions are broad enough that a “monopoly” reference can involve not only a clearly dominant firm, but also a tight or loose oligopoly, or even a more fragmented structure in which a practice by all market participants appears to restrict competition. The concept has supported investigations of the rules of professional bodies, industry-wide practices such as adherence to recommended retail prices, networks of vertical agreements in petrol, beer, films and motor cars, and selective distribution in fine fragrances and newspapers.

In each case, the Commission must establish whether the firms that are a “monopoly” for jurisdictional purposes actually enjoy market power and exercise it in ways that are detrimental to the public interest. The “public interest” is not defined, although the statute lists a number of factors the Commission must consider, of which the first is the desirability of promoting competition. But in the end, the Commission may take account of any matter that they consider relevant, without limitation.

Conduct

Commission reports have found a wide variety of practices to be against the public interest—predatory conduct, exclusionary practices of many kinds, and exploitative conduct. Examples of conduct of dominant firms, or “scale monopolists”, include:

- acquisition of small competitors (animal waste and pest control services);
- retrospective loyalty bonuses and volume rebates (matches and disposable lighters);
- discounts for not stocking competitors’ products (frozen foods);
- refusal to supply (bicycles and pest control services);
- restrictive terms in copyright licensing agreements (video games);
- uniform delivered pricing (plasterboard);
- discriminatory pricing (contraceptives, gas and animal waste);
- predatory pricing (concrete roofing tiles and bus services);
- excessive prices (artificial lower limbs, white salt, contact lens solutions).

The complex monopoly provisions have been used to investigate both vertical restraints and “conscious parallelism”, that is, so-called “tacit collusion” in oligopolies where there is common behaviour but no evidence of agreement not to compete.

The Commission has found no reason to recommend action where entry was thought to be relatively easy (as in tampons) or profits were considered a due reward for efficiency and innovation (as in soluble coffee). Apparently exclusionary practices of a dominant firm have been found not against the public interest either because consumer choice was considered wider and competition more effective than market shares might suggest (as with freezer exclusivity in ice cream) or because of countervailing public interest benefits (as in liquefied petroleum gas, where safety considerations were held to justify exclusive dealing arrangements).

Remedies

The remedies potentially available, which are applied by the Secretary of State, not the Commission, range from price control to divestiture. Most often, the Commission's "public interest" finding and recommendations lead to undertakings by the firms to change their conduct in the future. The Secretary of State may accept enforceable undertakings as an alternative to making a reference to the Commission. OFT monitors compliance with undertakings and their continuing appropriateness in the light of any change in market circumstances.

Where market power is supported by anti-competitive regulation, the Commission's recommendations may include changing those regulations. An investigation of contact lens solutions found that manufacturers and a large retail chain were exploiting market power, but that the regulatory regime was a major factor inhibiting competition. The Commission recommended relaxing the regulatory controls on entry encourage more competition at both levels, but that if this proved ineffective, then price control should be considered.

A retrospective study of how remedies have worked suggests that structural remedies are more effective than behavioural ones. A research project undertaken for the OFT found that:

- the investigation itself sometimes had a beneficial effect, such as by stimulating the industry to cut prices;
- price controls and divestiture were more effective than termination of practices or agreements;
- the two cases of divestiture that were studied (roadside advertising and artificial lower limbs) led to dramatic changes;
- in four of five cases studied, behavioural undertakings to terminate a practice had little or no effect;
- remedies were sometimes overtaken by events (for example, privatisation transformed electricity supply and thus the market for electric meters, and the AIDS crisis increased demand for contraceptives, which brought new suppliers);
- strategic responses may have limited the impact of undertakings (for example, measures to stimulate competition in retailing package holidays encouraged tour operators to integrate vertically into travel agency).

Source: UK (OECD CLP), 1996.

For the Commission, a key part of every reference is to find out whether market power has been exploited, by examining price levels and profitability. Where entry is unlikely and competition cannot be created, the Commission may recommend price control. This administrative system was believed to be better suited than a judicial system to the assessment of prices and profits and to reaching judgements on whether they are excessive. Courts may be reluctant to condemn if the criteria by which a company's profits are to be assessed cannot be set out in the law. To compare actual experience with the prices and profits that would prevail if there were effective competition, the Commission must make judgements about risks and efficiencies. Data will likely be imperfect, or at least less clear than the evidence a court would require to establish that prices were unlawful. Before the new Competition Act was adopted, OFT opined that "The scope for investigating the exploitation of market power … is undoubtedly a distinctive and arguably advantageous feature of the United Kingdom system" (UK (OECD CLP), 1996).

Now that the new law is in place, OFT finds itself examining price levels, profitability, and claims about efficiency too. The OFT guidelines make clear that the Chapter II prohibition will be applied through an economic analysis that is sensitive to effects and efficiencies, even though the law appears absolute, like the EU model making no provision for exemptions. Following the EC principle of "objective justification", conduct by dominant firms that improves efficiency may be permitted even though it might impair competition, as long as the impairment is proportionate to the benefit.[22] The guidelines also call for using an economics-based "hypothetical monopolist" test for defining relevant markets.[23] The guidelines appear to frown on the notions that the product of a single firm could be a "market" to itself and that the existence of some captive customers would define a separate market. Rather, in the latter situation, for example, the key point is whether a firm could successfully discriminate to harm those customers.

The first fine under the Competition Act 1998 was for abuse of dominance in the form of price discrimination. A supplier with a monopoly of a widely used pharmaceutical product (with market share over 95%) set price below variable cost for hospital accounts to exclude competitors, but at a much higher, exploitative rate for outpatients. Thus, in the same case it was fined for charging too little and too much. The 72-page decision[24] undertakes a detailed analysis of prices and profits to determine whether they demonstrate the exercise and exploitation of market power. Although OFT does not make findings about the "public interest," the decision goes into the same kind of detail and judgement that such findings by the Commission would entail.

The Competition Act process is simpler than the Fair Trading Act process, and it may become a more powerful tool. OFT investigates, decides, and imposes the sanction (which may be appealed to a Commission Appeal Tribunal). The early results suggest that OFT intends to apply it vigorously. The first decision imposes a substantial fine (more than 8% of relevant turnover, and about 5% of the firm's total turnover) for cutting prices below cost to meet the competition of a new entrant (who was probably also pricing below cost to establish a market position). The OFT's decision found prices high enough to constitute abuse of dominance, based in part on excessive profits, even though the firm was complying with the profit regulation that applies to enterprises in the industry[25]. The decision implies that supra-normal profits to recoup research expenses are not justifiable after the term of a patent has expired, and it finds that a party's failure to change its behaviour upon being notified that OFT believes it is violating the law is an aggravating factor justifying a higher fine. The Competition Act may supplement or substitute for access rules in regulated industries, if the "essential facilities" doctrine is read into it through Section 60 so that dominant players will be obliged to provide access to their systems.

By contrast, the processes under the Fair Trading Act are more complex, and the outcomes may appear inconclusive. The divided and shared responsibilities over the various stages—preliminary investigation, recommendation, report, and remedy—may produce discordant, or at least variable, views. An example comes from the treatment of supermarkets, which have received attention from the Commission and OFT on several occasions. In 1981, the Commission found that supermarkets could obtain substantial, non-cost related discounts from suppliers, but that this was in the public interest because strong retail-level competition required supermarkets to pass the discounts on to consumers. In 1985, an OFT paper concurred that consumers were the primary beneficiaries of supermarket buyer power. In 1998, OFT returned to the industry, prompted by claims of increasing concentration and fears about the impact of out-of-town superstores on traditional town-centre shopping areas. OFT did not propose to re-examine the existence of buyer power, considering that as given. OFT assumed that buyer power would lead to excess profits unless retail competition was strong enough, and thus OFT sought to compare the largest firms' profits to the risk adjusted cost of capital (UK (OECD CLP), 1999*b*). OFT found the high profits it was looking for, inferred that retail competition was inadequate, and referred the matter to the Commission in April 1999.[26] But the Commission's report in October 2000 failed to find the predicate excessive profits, and instead concluded again that the retail-level industry was broadly competitive. The Commission's report describes practices which might distort competition, but most of them involved low prices, not high ones. The Commission admitted that any remedy to control supposedly "below cost" pricing would have the perverse effect of increasing price levels generally, and so recommended none. But the Commission did recommend adopting a "code of conduct" to prevent large firms from bullying small suppliers.[27]

The complex interplay among institutional roles appears clearly in the 1999 *Milk Marque* matter. The Commission found a "scale monopoly" in dairy products and recommended breaking it up.[28] The Secretary of State disagreed, and instead asked DGFT to seek a consensus with the industry on a long-term reform and to negotiate behavioural undertakings. Milk Marque rejected DGFT's proposed undertakings, though, especially a limit on acquiring more processing capacity. Instead, Milk Marque proposed to follow the Commission's approach, by breaking itself up into three geographically distinct companies. After consulting with DGFT, who supervises the implementation of remedies, the Secretary of State decided that divestiture would indeed be effective (UK (OECD CLP), 1999).[29]

The UK's traditional system of dealing with monopolies and oligopolies had little deterrent effect. Abusers faced neither financial penalties nor exposure to the risk of private lawsuit, although there was a risk of regulatory intervention (under terms that could be negotiated), and in a few extreme cases, divestiture. The Commission's reports did not create precedents in the legal sense, so they did not provide a reliable guide to the likely course of policy or even to the next decision. The new Competition Act prohibition threatens more tangible consequences. Yet even though the new system is just now being implemented, further changes in the traditional process are already under consideration, emphasising the importance the government places on this policy area. The method of referring a matter to the Commission will be generalised by eliminating the jurisdictional share-of-supply tests. Instead, a matter could be referred if OFT finds, after investigation, reasonable suspicion that that a market is operating in a manner that adversely affects competition. And most fundamentally, the general, limitless "public interest" test is to be replaced by a conventional competition-based standard, and the Commission's decision and remedy would be final—except that ministers might intervene in exceptional cases which raise defined "public interest" issues such as national security. OFT may be asked to report on the effectiveness of remedies in previously-investigated areas.

Mergers

Much of the merger review process is analogous to the treatment of monopolies under the Fair Trading Act. Reform of the merger review process is now a high priority, a principal goal being to reduce the degree to which decisions appear to be influenced by factors other than competition policy.

Mergers are assessed according to the same general "public interest" test that applies to monopoly references. Thus all the matters in the statutory description of the "public interest", and others too, might be relevant: maintaining and promoting effective competition, promoting the interests of consumers, promoting efficiency, maintaining balanced distribution of industry and employment in the UK, and promoting competitive activity on the part of UK companies in overseas markets (OFT, 2001*a*). Competition policy has been the principal basis for reference since at least July 1984, when the Secretary of State for Trade and Industry stated that his policy had been, and would continue to be, "to make references primarily on competition grounds." This announcement has no legal force, but successors have announced they too would follow the "Tebbit Guidelines". In October 2000, the Secretary of State made a general commitment to accept OFT advice about references, "save in exceptional circumstances," thus anticipating the intention of the pending merger reform bill. The scope of the public interests to be protected is illustrated by the reasons the Commission gave in its April 1999 report for preventing British Sky Broadcasting from acquiring Manchester United: The principal reason was the effect on competition in the market for broadcasting football, but the

Commission was also concerned that it might undermine the public interest in competitive equality between the clubs on the pitch. Other recent decisions about salmon farming and ITV mergers illustrate an even broader interpretation of what would count as a reduction of competition.

Structural thresholds determine whether a merger may be referred for investigation, but they do not necessarily determine whether it is ultimately found to be contrary to the public interest. A merger either must create or enhance a 25% share of supply of a particular good or service in the UK or a substantial part of the UK, or it must involve the acquisition of assets exceeding £70 million in value (OFT, 2001*a*). The jurisdictional threshold about share of supply operates like the similar threshold for identifying a potential "scale" or "complex monopoly" under the Fair Trading Act; it is a rough approximation about a likely area of commerce, rather than a premature conclusion about the relevant economic market. OFT has virtually unlimited discretion in determining whether the jurisdictional threshold is met.[30] The government proposes to change the alternative "assets" test to one based on the total UK turnover of the enterprises being acquired, and set the level at £45 million (for the entire enterprise and subsidiaries, not just for the lines of business at issue).[31]

Review of mergers in regulated industries is done under the competition laws, without formally involving the sectoral regulators. Sectoral regulators are generally invited to comment, but have no role making a decision. The competition authorities have the power to investigate some merger-like transactions in regulated sectors, such as bids for rail franchises and "Public-Private Partnership" schemes that may qualify for investigation as mergers (OFT, 2001*a*). A number of merger decisions have supported regulatory reforms. In airlines, the British Air-CityFlyer Express combination was subject to conditions capping control over slots in order to encourage new competition. In electric power combinations and acquisitions involving generation assets, firms have agreed to undertakings, including substantial divestitures and modification of contracts, to preserve post-reform competition (UK (OECD CLP), 1999). Special rules apply in two sectors: mergers involving water and sewer firms must be referred to the Commission if they exceed an assets threshold (UK (OECD CLP), 1999), and newspaper mergers must be referred to the Commission and then authorised by the Secretary of State if they exceed a circulation threshold.[32]

No standard, universal analytic methodology is applied, although OFT has published guidelines about issues such as market definition. The authorities consider broad questions such as whether a merger would result in significant, non-transitory price increases, a reduction in innovation or choice, or otherwise act against the interests of consumers. Analytical methods and the treatment of market shares may vary according to the case. The possibility of new entry is relevant, and claims about efficiencies and alternatives to merger may be considered "with appropriate circumspection" (OFT, 2001*a*).

There is no requirement for companies to notify the competition authorities about a merger. The pre-notification process, added to the Fair Trading Act by the Companies Act in 1989, is voluntary. By following the process, which took effect in 1990, companies are assured of a decision by OFT and the Minister within 20 working days (plus one possible 15-day extension) (OFT, 2001*a*; UK (OECD CLP), 1999). If the parties do not pre-notify, there is no statutory deadline for the reference to the Commission as long as the merger is not consummated. If it is, then the reference must be made within four months after that time (UK (OECD CLP), 1999). The voluntary process is not as widely used as some had expected. Evidently, some firms fear that putting the officials to a deadline for decision may increase the odds that the merger will be referred to the Commission (Wilks, 1999, p. 220). Firms frequently enter undertakings in lieu of a reference to the Commission, to avoid delay and uncertainty.

All three competition policy institutions may be involved in a merger review. The role of the Secretary of State, and thus of political discretion, has been prominent in the past, despite repeated efforts to downplay it. OFT is responsible for conducting the initial investigation. OFT advises the Secretary of State whether it should be cleared or referred to the Commission for a more detailed investigation. OFT may also advise the Secretary of State to seek undertakings from the companies in lieu of a reference to the Commission. The Secretary of State decides whether to clear the merger, seek undertakings in lieu of reference, or refer it to the Commission. If it is referred, the Commission conducts a detailed investigation and makes a report to the Secretary of State. If the Commission concludes that the merger is against the public interest, the Secretary of State may prohibit it, allow it to proceed subject to conditions, or take no action. OFT would be asked to negotiate undertakings with the parties, if the decision is to permit the transaction subject to conditions. If the Commission concludes that a merger is not against the public interest, the parties may proceed and the Secretary of State has no powers to act (OFT, 2001*a*). Thus, each of the three competition policy institutions may undertake some degree of independent substantive analysis of the same transaction. Ultimately, it is the decision of the Secretary of State that matters most, although the Secretary of State has announced that she will accept OFT's advice in making that decision (in all but exceptional circumstances).

The potential for conflict and duplication is reduced somewhat by the advisory role of the Mergers Panel. This standing inter-departmental committee considers the larger and more difficult cases, which amount to about 10 percent of the total. Created in 1965, it is now chaired by the OFT's Director of Competition Policy. Regular members include representatives from DTI and Treasury, and occasional participants include ministries with an interest in a matter (such as Transport, Agriculture, Defence, the Foreign Office, or the Scottish Office), the utility regulators, and the Commission. The Merger Panel reviews a short Panel Paper, presented by a case officer, that summarises the issues, and presents its views to the DGFT about whether to recommend a reference. If the matter is referred, the panel paper would become the starting point for the Commission investigation. The presence of the interested ministries and regulators suggests that the Merger Panel may provide an occasion for consideration of a range of issues, if not horse-trading over references.

Consultation in advance is encouraged and even formalised, under the label "confidential guidance." Parties to a merger can ask OFT about the likelihood that it will be referred to the Commission once it is in the public domain. Guidance may be subject to the Mergers Panel process, and the proposed advice for the Secretary of State's decision is cleared with DTI officials and Ministers. The process is entirely confidential, so there is room for unreported exercise of discretion. Discussion and negotiation may thus lead to a resolution that telescopes formal review and reference.

The perception that there is political or other influence in this process is greater than the fact. Public disagreements among officials may reflect differences of opinion about the mergers' competition policy merits. The Secretary of State rejected DGFT advice about merger reference in 23 cases up to 1997 (14 times refusing to refer cases, 9 times referring them despite advice not to). The Secretary has occasionally refused to follow the Commission's recommendations, too. In 1995, the Secretary permitted a merger despite the Commission's finding that it was against the public interest. In 1996, the Secretary agreed with the Commission minority (and DGFT) to block two electric power mergers despite the Commission's conditional approval, and in 1997 rejected another in similar circumstances. The general policy approach of the person who is the Secretary of State can make a critical difference: one individual made 23 references in just one year (1989-90), but another made only 6 references over more than 3 years (1992-95). There have been no similar conflicts in recent years. But the wide variation in practice, and the publicity drawn by the minister-level interventions, support a view, reportedly shared by professional observers, that competition authorities in the UK have been significantly less politically independent than those in some other jurisdictions (PWC, 2001, p. 23).

After the 1998 Competition Act was adopted, merger reform became the next legislative priority. Proposals to change the merger review process have been through 2 rounds of public consultation since 1999. A major purpose is to emphasise the importance of competition factors and to de-emphasise the role of the Secretary of State. The substantive test, of effect on the "public interest", would be replaced by one concerned about "substantial lessening of competition". The proposal deliberately does not follow the EU's "dominance" test, because a broader test about competitive effects would deal better with oligopoly situations.

To underline the importance of basing merger decisions on the competition policy issues, the process will be simplified to remove the Secretary of State from most cases. OFT would do a preliminary investigation, and if that revealed potential competition problems and facts that support jurisdiction, it would refer the matter to the Commission for full investigation. The Commission's decision about the matter would be final.[33] The Secretary of State would have no role in decisions about references or remedies, except in a "small minority" of cases which raise defined "exceptional public interest issues", which so far would be limited to national security. Characterising the residual discretion for ministerial intervention or override has been a matter of considerable debate. The likely approach will be to indicate a criterion in the statute, but also to provide that more criteria could be added by affirmative Parliamentary resolution. The public interest concern would be flagged at the outset of the investigation, so that it could not be invoked at the end to reverse a decision; on the other hand, a new "public interest" criterion might added by ministerial decision, anticipating later Parliamentary confirmation. The government has stressed that it has no current plans to expand the list beyond national security.

The proposal's treatment of how other policy issues might outweigh "competition" effects implies that, for purposes of merger policy at least, "competition" is conceived primarily in structural terms. The proposal would permit OFT or the Commission to consider benefits to consumers as reasons to permit an otherwise anti-competitive merger or to relax the conditions imposed on it. But the description of those consumer benefits—lower prices, or greater innovation, choice or quality of products or services—are what would be expected of a pro-competitive merger. It is difficult to imagine a merger that would reduce prices, increase innovation, and improve service, yet would be found to reduce competition except in the trivial sense of increasing concentration, or in a narrow sense from considering particular markets in isolation while ignoring competitively significant strategic complementarities among them. Perhaps the intention is to provide a principled basis to justify approving a merger that exceeds rule-of-thumb concentration measures. And perhaps the government also wants to emphasise that the consumer must receive some of the benefit from a merger that increases both efficiency and market power.

Consumer protection

Links between competition policy and consumer policy are potentially strong. The reconstruction of UK competition policy in 1973 resulted in part from pressure to respond to the demands of consumer interests. OFT has had a major role in consumer protection as well as competition policy from the outset.[34] For many years, consumer protection was OFT's highest-profile role. Judging by the prominence of consumer issues on the OFT website, it may still be. Among its consumer protection functions have been the promotion of industry self-regulatory codes about customer service, licensing businesses that offer consumer credit (under the Consumer Credit Act), policing estate agents (under the Estate Agents Act), preventing unfairness in consumer contracts (under the Unfair Terms in Consumer Contracts Regulations), and prohibiting misleading advertising (applying the Control of Misleading Advertisements Regulations, backstopping the Advertising Standards Authority and local authority Trading Standards Departments). Authority over advertising is divided, and other rules or bodies are responsible for broadcast and credit advertising. In describing its overall mission, OFT emphasises its defence of consumer interests by ensuring market competition. The importance of connecting consumer interests with competition-based reform is recognised generally. In the regulated sectors, independent consumer bodies are being established now, appointed by the government and funded by a levy. It is too early to say how they will work or what they will do, but the intention is clear. One element of the government's newest proposals would give these bodies, as well as NGO consumer groups, the power to submit formal "super-complaints" about industry-wide competition problems.

Institutional issues: enforcement structures and practices

The institutional structure for applying competition policy remains strikingly complex, even after the reforms of 1998. Before, four institutions shared responsibilities: the Department of Trade and Industry, the Monopolies and Mergers Commission, the Restrictive Practices Court, and the Director General of Fair Trading. Now, there are three, but one has been divided into two parts, as the Restrictive Practices Court was eliminated, while the Monopolies and Mergers Commission was recast as the Competition Commission and divided into the 'reporting' side and the Appeal Tribunals. And this does not count the proliferation of other bodies that apply competition policy in particular sectors, described in the next section. More changes are on the way, as the government intends to expand the single-executive DGFT into a multi-member board.

Competition policy institutions

The Director General of Fair Trading is the principal enforcement official. The DGFT is supported by the Office of Fair Trading, a non-ministerial government department with a total staff of about 500. The DGFT is appointed for a term of 5 years by the Secretary of State for Trade and Industry, subject to an application and screening process that applies generally to similar officials. Once appointed, the DGFT is to be independent in performing activities under the competition laws (OFT, 2001*a*). These laws assign legal and decision powers to DGFT as an individual, not to OFT.

DGFT may be transformed from an individual regulator into a collegiate body. The government's July White Paper and the Enterprise Bill proposal announce its intention to transform DGFT into a Board, rather than an individual decision-maker. The members of the proposed board would include senior OFT officials and part-time non-executive members, the latter probably comprising a majority. The members would be appointed in the same way that DGFT is appointed now, and would be required to demonstrate relevant experience or expertise. The board would have statutory authority to participate in decisions and executive functions.[35] Although the part-time members would not formally represent particular interests or sectors, it is likely that appointments would recognise important constituencies. Other independent UK regulators have shifted from individual to board structures. For the telecoms and energy regulators, a first step was to set up an "advisory panel", preparing the way for a multi-member agency. Following that precedent, DGFT announced the formation of an advisory panel on 2 May 2001. The members of this advisory panel have backgrounds in consumer issues, local government, business, media, and academia. DGFT, whose role had been to investigate, recommend, and petition for decisions from other bodies such as the Restrictive Practices Court, now acts as the principal decision-maker under Competition Act 1998. A single-executive structure is probably most effective for the "executive" enforcement functions. Some care will be required to design a collective body that can do what remains of the "prosecution" job effectively, while retaining a transparent and predictable collective decision-making process.

A collegiate body is already deeply involved in competition cases, of course. The recently-renamed Competition Commission is the longest-established European competition agency and one of the oldest among the OECD members. The Commission's historic role has been principally to study and recommend, rather than to reach a final decision—although its finding that a merger or monopoly does not threaten the public interest is in effect a final decision. The Commission has 2 full-time members, its Chairman and the President of the Appeal Tribunals. All the other members serve part-time: 2 Deputy Chairmen, 55 members of the reporting panel, 23 members of the panel for electricity, water, telecoms, and electricity matters (of whom 8 are also members of the reporting panel), and 20 members of the Appeal Tribunals panel, one of whom is also a member of the reporting panel. Members are appointed by the Secretary of State for Trade and Industry for 4-year terms, renewable once. The original commission was dominated by lawyers, but economists are now in the ascendancy. (At first, some feared that economists were "apt to hold fanatical views which might lead to minority reports".[36]) Members come from a variety of backgrounds, and because they serve only part-time, they usually hold other positions as well.

The Commission's historic function has been to investigate and report on matters that are referred to it. References are made by the Secretary of State for Trade and Industry, DGFT, and sectoral regulators.[37] References are of 4 principal types: monopolies, mergers, and newspaper mergers (all three under the Fair Trading Act 1973), and utility and other licences (under various sectoral laws). References are made by regulators when a firm refuses to go along with the regulator's request to change the conditions of its licence. At the end of each inquiry the Commission submits a report to the Secretary of State or the regulator, setting out the evidence and its conclusions and recommendations. In merger and monopoly references, the issue is whether the transaction or situation is contrary to the public interest; in licence references, the issue is whether the public interest would be harmed unless the license condition is changed.[38]

The Appeal Tribunals are part of the Commission, but they operate separately. Established to hear and decide appeals from decisions applying the Competition Act 1998, the Appeal Tribunals began operation in 2000 and heard its first case in 2001. The Appeal Tribunals may confirm, set aside, or vary the decision by DGFT or the sectoral regulator, remit the matter for further action, and in general reach any other decision that DGFT or the regulator could have reached (Competition Commission, 2000). Like the Restrictive Practices Court that it substantially replaces, many of the members had no expertise or experience in competition policy or analysis when appointed. (Two of the original members were formerly non-lawyer members of the Restrictive Practices Court). The President, though, is an expert, having concentrated on competition law as a barrister and served for 7 years on the EU's Court of First Instance (Competition Commission, 2000).

The Department of Trade and Industry is at the top of the institutional structure. Supported by the staff of the Competition Policy directorate, the Secretary of State has the power to appoint DGFT and members of the Commission, to develop legislation and government policy about competition, and to decide about references and relief in merger and monopoly matters. In the historian's colourful phrase, the Secretary of State "is the sun around which British competition policy orbits" (Wilks, 1996, p. 150). Overlapping responsibilities lead to some duplication of resources and efforts, both about particular cases and about policy. DTI, with cabinet access, has been seen to have the upper hand. The Secretary of State has statutory authority to give directions about issues and priorities, and has on at least one occasion, in 1994, intervened to prevent DGFT from proceeding with an investigation. Aware that the power to intervene, even if used rarely (or not at all: the power to instruct a Commission inquiry group has never been used), undermines confidence that enforcement decision are reached independently and on the merits, DTI has been moving to limit itself to policy. A common theme of the recent amendments to the law and of the current reform proposals is to give more final decision-making responsibility to DGFT and the Commission, and to limit the scope of the Secretary of State's potential intervention in enforcement decisions. DTI also proposes a broader and more visible policy role for OFT, encouraging OFT to call attention to competition problems that result from regulation and enlisting OFT assistance in the review of regulatory proposals.

The importance of decision-making independence is well understood and reasonably well implemented, despite some exceptional cases. Independence at the Commission is a firmly-embedded priority in its internal culture as a quasi-judicial body. In a subtle and characteristically British balance of independence and responsiveness, the Commission in 1996 negotiated a "memorandum of understanding" with DTI, and one element of the defined tasks was to maintain the members' independence. In practice, DTI does not instruct OFT or the Commission nor does it intervene in individual cases. But secondment and movement of personnel among the three bodies encourages long-term consistency of viewpoint and providing channels of communication. Despite the assurances, the public reportedly remains sceptical. An opinion-leader survey in 1988 disclosed that few observers believed the Commission was free of government pressure, and that other bodies (including OFT) were seen to be materially more independent.[39] Another survey in 2001 found that the scepticism had not disappeared (PWC, 2001). That scepticism reveals how difficult it is to establish credible decision-making independence in a government tradition that is steeped in ministerial accountability. In the proposed new merger process, the scope of the Secretary of State's residual power to define the terms of intervention is set out somewhat ambiguously, accompanied by an assurance that the government has no plans to use that power—at least, no "current" plans.

Both OFT and the Commission have taken major steps to improve how they explain their processes and decisions to the public, steps which included extensive public consultations in 1999 about the transparency of those processes. Publicity about its final reports has always been a key feature of the Commission's work, because one of its principal functions has been to inform the public and influence industry norms. Recently, the Commission has been publicising the intermediate stages of its processes, too. In 1998, the Commission began releasing the "issues letter" setting out its concerns during an investigation, and the Commission has experimented with open hearings. OFT has begun publishing its analysis and advice to DTI about whether there should be a merger reference and posting the status of merger matters on its website. In Competition Act proceedings, DGFT must publish its decisions and seek public consultation about proposals to grant individual exemptions. Following notification for a decision, the public may also be consulted about a proposed decision that the prohibition has not been infringed (OFT, 2001*a*). Some observers fear that the efforts to make deliberations more transparent may be reaching a point of diminishing returns, by adding costs without adding value. Publishing the detailed merger reference advice may tend to commit DGFT to a position and place a burden on the Commission to justify deviating from it, for example. Hearings at the Commission have revealed some benefits from public discussion, but also some complications, as not all of the matters aired for the public are very relevant to the competition issues, and the implication that the industry is accused and in the dock is inconsistent with the Commission's neutral fact-finding stance (Competition Commission, 2000).

One cause for public uncertainty about the course of UK competition policy was the Commission's long-standing refusal to treat its own decisions and reports as precedents that would be followed in its future decisions. Open-minded willingness to re-examine old conclusions when examining new facts is a laudable value of academic inquiry, but keeping important questions perpetually open or subject to substantial change could frustrate business planning. OFT has tried to help businesses plan for the impact of the new Competition Act by issuing an extensive set of detailed guidelines. These were developed through a public consultation process. The 18 final guidelines now available on the OFT website cover general subjects such as market definition, market power, and OFT's investigational tools, and some particular and technical subjects such as the law's effects on trade associations and professional and self-regulatory bodies, how DGFT will assess penalties, and the scope of the exclusion for land agreements. Several of the completed and draft guidelines explain how the law will be applied by the sectoral regulators with concurrent authority.

The new law was also accompanied by a public education campaign. To bring home the expanded investigative powers, OFT distributed 3000 copies of a video about a dawn raid. Officials gave hundreds of speeches and open houses around the country. A direct mailing about the law went out with the value added tax forms to 1.6 million businesses (Bloom, 2000). A million copies of the leaflets explaining the act were printed for distribution through other channels. (UK (OECD CLP), 1999). Still: there are reports that the business and policy-making public has little awareness of competition enforcement issues. The first big fines under the new Act and headline-making merger decisions should help correct that.

Competition law enforcement

The roles, functions, and relationships of these institutions vary depending on the substantive provisions invoked. As enforcement tools have become stronger, nearly all of them have been given to DGFT, whose role is thus increasingly important. Under the Fair Trading Act, DGFT refers monopoly matters to the Commission. The Secretary of State may also refer a potential monopoly situation to the Commission on his own initiative, and can veto a DGFT monopoly reference (but has never done so). The Commission issues a report and recommendations, but the Secretary of State decides what action to take, if any, and implements it, and DGFT is responsible for monitoring compliance (OFT, 2001*a*). The merger review process is broadly similar to the monopoly process (although the proposed reform would make the Commission's decision final in virtually all cases). The process for applying the Competition Act 1980 had also involved a reference to the Commission and final decision by the Secretary of State. [40] Increasingly, though, matters (including mergers) were being resolved through undertakings negotiated by DGFT, without the reference to the Commission. Now, application of the new Competition Act 1998 is entrusted principally to DGFT (and the sectoral regulators, discussed below), who makes formal, enforceable first-instance decisions, which are reviewable by an Appeal Tribunal of the Commission, and DTI has no role.

OFT's approach to restrictive agreements under the old law had been administrative. Under the Competition Act 1998 it is increasingly inquisitorial. The Restrictive Trade Practices Act 1976 provided for notification of restrictive agreements, which might have led to action before the Restrictive Practices Court. The Competition Act 1998 repealed that law,[41] although some notification process—not a requirement—remains available under the new Act. OFT discourages parties from resorting to it. Like the EC, OFT is trying to concentrate its resources on investigating problematic agreements, and away from reassuring parties about benign ones (Bloom, 2000). The combination of publicity about the scope of exemptions and substantial application fees for guidance and decisions seems to have worked. In 2000, only 10 notifications were filed, while complaints were coming in at a rate of 2000-3000 per year (Bloom, 2000).

DGFT has a full range of powers of investigation and decision. DGFT's powers to investigate, first provided by the Fair Trading Act 1973, were strengthened significantly by the 1998 Act. The jurisdictional threshold was relaxed to make it easier to investigate secret cartels. Now, a formal investigation can be initiated when DGFT has "reasonable grounds for suspecting" that a cartel is in operation (UK (OECD CLP), 1999). Investigation can include requiring the production of specified documents or specified information, entering premises, and, with a warrant, searching them (OFT, 2001). Sanctions for failure to comply with investigative demands can be strong: deliberate obstruction can result in 2 years imprisonment and a fine (Sec. 42-43). A leniency programme encourages participants to provide information about cartels, by offering to reduce or eliminate their financial penalties. The decision process is reminiscent of the EC's process: the "rule 14 notice" to the parties, setting out the facts, conclusions, legal assessment, proposed action, and reasoning, is similar to a "statement of objections". Parties may respond to it with oral or written submissions, and they have reasonable opportunity to inspect OFT's file (Bloom, 2000). Under the Competition Act, DGFT has the power to decide whether the Act has been infringed, to grant interim measures, to issue directions, and to impose financial penalties. Those penalties can be as great as 10 per cent of the undertaking's UK turnover during the period of the infringement (up to three years).

The Commission was not conceived as an enforcement body, despite its quasi-judicial character, and its processes have thus been comparatively informal and flexible. Inquiries are handled by groups of from 4-6 members. A group's inquiry is typically supported by a case manager, economist, and accountant. An inquiry group may also hire outside consultants. Each group can set its own rules, subject to guidance from the Chairman. At the outset, an inquiry is announced in the press and the main parties are contacted directly. The timetable is posted on the Commission's website. A group may hold "open" meetings, with the public, or "joint" meetings, to give the main parties an opportunity to present their position. Means of gathering information include questionnaires, industry surveys, and site visits. The Commission can require parties to provide information, but the process is cumbersome and the Commission prefers to rely on co-operation; in the past, the Commission has declined to compel responses even when executives were known to be lying (Wilks, 1999, p. 57, 122). Co-operation is encouraged by strong protection of confidentiality. Confidential business material will not be disclosed as long as the business at issue remains in operation. Main parties are informed, by an "issues letter," of the provisional findings and of the remedies that might be recommended. The issues letter is typically noted on the website, and the remedies statement might be. Participants have sometimes expressed unease about the absence of familiar structures of pleadings and responses at what looks like an adjudicative body. Hearings are transcribed, but statements are not under oath and are not subject to cross-examination. Responding to frequent complaints about delay, the Commission took steps to meet deadlines and now usually achieves its goals: 3 months to complete a merger reference, 9 months for monopoly reference, and 6 months for utility matters. A finding that a merger or monopoly is against the public interest requires the concurrence of a 2/3 majority.

The Commission's new Appeal Tribunals can re-examine decisions applying the Competition Act and take any action that DGFT or the regulator could have taken. The Tribunals' powers are wide: to uphold, quash, or vary the decision or the amount of a penalty, or to return the matter for further proceedings (Competition Act, Schedule 8; Competition Commission, 2000). In this process, the Tribunal re-opens the matter and may hear new evidence that was not presented before. There is no presumption supporting the prior decision. The breadth of this power implies that the Appeal Tribunals could become the principal decision-maker under the Competition Act. Procedures before the Appeal Tribunals are somewhat more formal that at the Commission's reporting side. They are based on those of the Court of First Instance of the EC, which deals with appeals from the competition decisions of the European Commission. The procedures emphasise economy and expedition, through early disclosure of each party's case and evidence in a fully argued document active case management by the tribunal to identify issues early and avoid delay, strict timetables, effective procedures for establishing contested facts; and structured oral hearings conducted within defined time limits. The goal is to complete straightforward cases in six months or less (Competition Commission, 2000). These rules contemplate a streamlined process, based primarily on a written record, and guided by the judge-rapporteur, whose role is to focus matters for clarification and possible cross-examination. The rules encourage the "hot-tub" treatment of expert testimony, through "a structured discussion, in the presence of the tribunal, between the parties and their experts" to narrow the area of real dispute before the hearing.

Further appeal or review are possible, but the grounds are limited. The Court of Appeal[42] may hear appeals from the Appeal Tribunals on a point of law and on the amount of any penalty (Competition Commission, 2000). Judicial review is also possible, to challenge procedural unfairness, *ultra vires* action, or fundamental unreasonableness. The judicial review process, once rare and heretofore unsuccessful, is increasingly common, and in 2001 a Commission finding was overturned for the first time. The Commission has always maintained that its fact-specific decisions do not create precedents for other decisions. But in utility matters, at least, judicial review appears to expect a degree of substantive consistency between decisions. In the *Scottish Hydro-Electric* case, a firm convinced a Court of Appeal that the Commission should have treated it like another firm in the same sector, even though the complaining firm had accepted less favourable terms before the Commission decided the other firm's matter.

Other enforcement methods

Private parties can sue for injunctive relief and damages for infringement of the Chapter I or Chapter II prohibitions. DGFT's findings of fact are binding (against the infringers) in actions brought by others for relief from an infringement (Bloom, 2000). If DGFT does not take action or find an infringement, a disappointed complainant may have some, limited, opportunity to seek a decision elsewhere. A person with a sufficient interest may request that DGFT withdraw or modify a decision (except concerning a penalty or modification after appeal). A formal decision of non-infringement could be appealed, but simply rejecting a complaint without a formal decision might not be; that issue has not been tested in court. DGFT is likely to exercise his discretion to issue and publish an appealable non-infringement decision, in order to clarify the law, to set a precedent, or to meet public interest in the complaint. And a disappointed complainant might seek judicial review (OFT, 2001*a*). There is some scope for private action under the Fair Trading Act 1973, which permits private parties to ask a court to enforce an undertaking (OFT, 2001*a*). The common law doctrine invalidating contracts in unreasonable restraint of trade may still be available. It has been applied narrowly, although the courts have permitted some third parties, not privy to the contracts, to challenge them. (Whish, 1985, pp. 26-35). The possibility of bringing suit on behalf of a class of injured parties is so far untested, as "class actions" are not provided under UK law (Bloom, 2000). The new law seems to have stimulated interest in private initiatives (Bloom, 2000). The government is interested in stimulating it more, as the 2001 legislative package promises to provide new procedures for redress, a new direct right of appeal to the Competition Appeals Tribunals against OFT decisions when seeking interim measures while a case is under consideration, and permitting third parties to file claims for damages at the Appeal Tribunals, following an infringement decision by OFT or the European Commission for which the appeals process has been exhausted.

Private suits can be brought in the UK against breaches of the substantively similar provisions of the EU treaty. DGFT still does not have the power to apply Art. 81 or Art. 82 (Bloom, 2000) (although the government intends to confer that power to implement reforms to the EU enforcement system that enlarge the role of national competition authorities). Few private cases have been brought in the UK under EU law, and no court has awarded damages. Because of the instruction in Sec. 60 of the Competition Act to follow EU jurisprudence, development of law in private suits in the UK should follow developments affecting private suits in the EC.

International issues in competition policy and enforcement

Although the UK has now tied the substance of its competition policy to the EU, it has retained a conservative perspective about the treatment of trans-national effects. Competition policy and enforcement are directed only at conduct within the UK and its effects on competition in the UK. Analysis would of course take into account conditions and actions elsewhere that affect the market, such as actions in other countries that influence the likelihood of imports. The possible effects of actions or conditions in the UK on competition elsewhere are not taken into account (OFT, 2001*a*). It appears that the UK does not yet embrace a pure "effects" test. Instead, restrictive agreements are prohibited if they are implemented in the UK (Sec. 2(3)).

Caution about trans-national effects in UK competition jurisprudence is not a result of inexperience or anxiety about foreign trade and investment, of course. The land of Adam Smith has a long history of open foreign trade and is a major destination, and source, of foreign investment. In general, market openness issues raise no particular competition problems, nor is the treatment of foreign firms remarkable. The fate of an interesting exception to that general rule proves it: ten years ago, the Secretary of State announced an intention to refer all mergers of UK firms by state-owned foreign firms, responding to a spate of acquisitions of UK water companies. But reference was the end of the intervention in nearly every case, for the Commission found all but one of the half-dozen transactions to be consistent with the public interest. The "Lilley doctrine" was quietly abandoned after about a year.

The UK has been trying to improve its means of co-operating with other competition agencies, although no formal co-operation agreements have been entered. Twenty years ago, the UK adopted legislation to block production of evidence and prevent enforcement of foreign judgements, which was invoked once in an antitrust lawsuit.[43] Since then, the UK has taken many steps toward co-operation with investigations and process in other countries, although the blocking law remains on the books. The proposed Enterprise Bill will harmonise the various rules, including the Competition Act, that set out conditions under which UK authorities can exchange information with each other and with foreign authorities in both criminal and civil matters. OFT would then be able to disclose information, subject to various safeguards, for the purposes of proceedings in the UK and elsewhere. The Secretary of State for Trade and Industry would have a general power to prohibit disclosure where he believes that it would be more appropriate for the investigation to be carried out by a UK court or the court of a third country (OFT, 2001*a*). The Criminal Justice (International Co-operation) Act 1990 implements the UK's obligations under international conventions on gathering evidence abroad. Foreign authorities can approach the Home Office for assistance in obtaining information situated in the UK which they require for the purposes of a criminal prosecution in their own territory. If the Home Secretary grants the request, the information is obtained by UK authorities under the supervision of a UK court and transmitted to the requesting country. To show the Government's desire to improve co-operation in antitrust matters, ministers have decided to make it clear that they are in principle prepared to accede to legally valid requests for assistance under the Act in criminal antitrust cases. Such requests would obviously have to be considered on a case by case basis to ensure that they did not, for instance, raise any jurisdictional issues. It is expected that in the overwhelming majority of cases there are unlikely to be any problems over granting a request (OFT, 2001*a*). The UK/US Treaty of Mutual Legal Assistance had once contained an antitrust exclusion in a side letter, which was removed in May 2001.

Agency resources, actions, and implied priorities

Overall resource levels are unclear, but the trend appears upward. OFT added more than 50 positions to handle the new Competition Act responsibilities, and the government is considering further increases in staff capacity. The Commission's staff has grown too, although some of the growth may represent a shift of resources from the old Restrictive Practices Court to the new Appeal Tribunals. As of March 2000, the Commission's staff (in full-time-equivalents) was 82, up about 10% since 1998—which was the lowest level since 1979—but well below the peak of 119, in 1990 (Wilks, 1999, p. 53; Competition Commission, 2000). OFT's total staff is about 500, now in three main divisions (Consumer Regulation Enforcement, Competition Enforcement, and Markets and Policy Initiatives), plus divisions for legal services, communications, and resources. About 40-45% of its operating expenses, and roughly the same proportion of its total staff, are attributable to the competition mission, including mergers and special regimes.

Table 1: Trends in Resources at OFT

	Staff[1]	Budget[2] (£MM)
2001	232[3]	22.1[4]
2000	170	14,2
1999	125	11,6[2]
1998	na	9,8[2]
1997	na	7,8[2]
1996	na	7,5[2]

1. In post at the end of the financial year (not FTE).
2. Financial year is April-March (so, for example, the 2001 figure is for the period 1 April 2001-31 March 2002. Figures are approximate, including an estimated proportion of the running costs of support services allocated to competition activities.
3. Includes staff of the Markets and Policy Initiatives Division, some of whose work may also include consumer issues.
4. Includes costs of the work of the Markets and Policy Initiatives Division, some of which includes consumer issues.
Source: (OFT, 2001*a*)

The complex institutional structure makes it difficult to identify how many resources are devoted to analysis and advocacy. Much of that work appears to be done now by DTI's competition policy division, which has 63 people (OFT, 2001*a*). OFT has not had a consistent policy and advocacy role until recently, but more resources will be devoted to that function. OFT will soon have a new, third division, with a broad mandate to examine markets for factors that may adversely affect the interests of UK consumers. If the division's examination reveals misconduct, the matter might be sent to the competition or consumer affairs divisions for enforcement action; if the problems in the market result from laws or regulations, the outcome might be advice to ministers. The new division will also lead OFT's policy initiatives.

OFT's competition staff received intensive special training to prepare them for the new enforcement regime. The same training was given to staff from the sectoral regulators who will have the same responsibilities. This 9-month program in law, economics, and competition policy led to postgraduate university certification. About 170 staff had completed the program by the end of 2000. A computer-based distance-learning version has been developed to offer to future staff, and some of the material may be used in outreach assistance to new competition authorities. (Bloom, 2000).

The OFT's main priority is to deploy its new legal tools, that is, to enforce the law as it now stands. Beyond that generality, there is evidently no clear direction about the kinds of problems that should receive the most attention. Hard-core horizontal collusion would be an important target, and several matters are under investigation, but the first fine imposed under the new law was against abuse of dominance, not price fixing. OFT does not keep track of its resource commitments in a way that would show what its priorities are in practice.

Table 2. Trends in Competition Policy Actions

	agreements[1]	abuse of dominance[2]	mergers[3]	unfair competition[4]
2000: matters opened	11	n/a	192	
sanctions or orders sought	-	-	14	
orders or sanctions imposed	-	1	9	5
total sanctions imposed			n/a	n/a
1999: matters opened	318	1728	254	82
sanctions or orders sought	6	2	10	3
orders or sanctions imposed	8	1	11	8
total sanctions imposed	n/a		n/a	n/a
1998: matters opened	815	1173	269	103
sanctions or orders sought	4	2	8	2
orders or sanctions imposed	5	2	8	2
total sanctions imposed	n/a	n/a	n/a	n/a
1997: matters opened	687	909	254	138
sanctions or orders sought	2	1	11	1
orders or sanctions imposed	3	3	12	2
total sanctions imposed	n/a	n/a	n/a	n/a
1996: matters opened	602		274	130
sanctions or orders sought	1	4	11	2
orders or sanctions imposed	2	3	12	12
total sanctions imposed	n/a	n/a	n/a	n/a
1995: matters opened	518	1216	275	116
sanctions or orders sought	3	9	8	-
orders or sanctions imposed	2	3	10	5
total sanctions imposed	n/a	n/a	n/a	n/a

	agreements[1]	abuse of dominance[2]	mergers[3]	unfair competition[4]
1994: matters opened	686	1162	231	139
sanctions or orders sought	1	3	8	-
orders or sanctions imposed	5	6	5	3
total sanctions imposed	n/a	n/a	n/a	
1993: matters opened		1557	197	246
sanctions or orders sought		7	3	-
orders or sanctions imposed		5	2	-
total sanctions imposed		n/a	n/a	n/a

[1] For 1993-99: registrable agreements (horizontal and vertical) under the Restrictive Trade Practices Act. 1976. For 2000: agreements under CA98. Matters opened: For 1993-99, cases found to be registrable (on average half of those notified). For 1995-99: also includes investigations started by Cartels Task Force. 2000: notifications for a decision/guidance. Sanctions or orders sought: court proceedings commenced. Orders or sanctions imposed: court orders or undertakings including undertakings in lieu of court proceedings.
[2] Cases dealt with under monopoly provisions of Fair Trading Act 1973, Competition Act 1980, Resale Price Maintenance Act 1976. Matters opened: total all complaints received. Sanctions or orders sought: references to MMC/CC. Orders or sanctions imposed: remedies imposed following MMC/CC report, including undertakings: and undertakings given in lieu of a reference.
[3] Cases under merger provisions of Fair trading Act 1973, excluding newspaper mergers. Matters opened: qualifying mergers. Sanctions or orders sought: references to MMC/CC. Orders or sanctions imposed: merger disallowed or remedies imposed.
[4]Control of Misleading Advertisements Regulations 1988. Matters opened: total complaints. Sanctions or orders sought: High Court proceedings commenced by OFT. Most cases are referred to the ASA or local authority Trading Standards Departments for action. Orders or sanctions imposed: orders of, or undertakings to, the High Court: and undertakings in lieu of proceedings.
[5] Transitional period leading to CA98 coming fully into force.
Source: (OFT, 2001*a*).

Limits of competition policy: exemptions and special regulatory regimes

Economy-wide exemptions or special treatments

There are few exemptions or exclusions from the general competition laws. Provisions for creating exclusions appear open-ended, but Ministers have made clear that exclusions from the general competition laws will be limited. The UK's usual method for tailoring competition policy to problems of particular sectors is to create special regulatory institutions.

In a few sectors, a different regulatory scheme is used to ensure competition. Agreements that are subject to competition scrutiny under these other regulatory regimes are exempted from the Ch. I prohibition about restrictive agreements. These are listed in Schedule 2 of the Competition Act: the Financial Services Act 1986, the Companies Act 1989, and the Broadcasting Act 1990 (OFT, 2001*a*).

In general, an agreement or conduct "to comply with a legal requirement" is excluded from both the Ch. I and Ch. II prohibitions. For this purpose, a "legal requirement" can be something imposed "by or under" an "enactment" in the UK. In addition, the EU or EEA treaties or a foreign "enactment" could also support an exclusion, to the extent they have legal effect in the UK. Agreements or conduct that are necessary to avoid conflict with international obligations, and that are also the subject of an Order by the Secretary of State, are similarly excluded (OFT, 2001*a*). The phrase “by or under” implies that subordinate regulations or decisions could give rise to an exclusion, but evidently the exclusion is applied only to the requirement, and not to any exercise of discretion in fulfilling it. A list of the areas that benefit from this exclusion is set out in Schedule 3 of the Competition Act. It is not clear whether this listing is exclusive and exhaustive, or whether other agreements or conduct that are not on this listing but that met these statutory conditions would be held to be excluded from the Ch. I or Ch. II prohibitions, if such a claim were made in a particular matter.

Exclusions had been more common under the Restrictive Trade Practices Act, even though the general provision for exclusion under that law was less generous than the formulation used in the new Competition Act.[44] The list of exclusions from the Restrictive Trade Practices Act included intellectual property agreements and some exclusive dealing contracts and export cartels. There was also a long schedule of professional services, which was incorporated into a schedule of exclusions from the new Competition Act.[45] Several exclusions evidently were not carried over into the new act, notably the general provision excluding agreements approved by the Secretary of State that “may be of substantial importance to the economy, may promote efficiency or productivity,” and so on (RTPA Sec. 29). This very broad provision had only been used once. Similar criteria now appear in the new Competition Act as grounds for exemption, though. A 1968 amendment permitted agreements that were intended to keep prices down, as an anti-inflationary measure (RTPA, Sec. 30); it fell into disuse as the government stopped trying to control prices. Agreements concerning agriculture, fisheries, and forestry were exempted (Sec. 33), and other legislation excluded other regulatory programs in those sectors (Whish, 1985, p. 120). An exclusion for agricultural products survived in the new Act.

The Secretary of State has the power to expand the list of exclusions without further primary legislation. He may, by order, declare that a class of agreements is not subject to the Ch. I prohibition if he is satisfied that they “do not in general have an adverse effect on competition” or that they would be better treated under the Fair Trading Act (Secs. 3(3), 3(4)). The Secretary’s power to exclude conduct from the Ch. II prohibition is even broader, not being subject to an analogous requirement of finding that the conduct does not have an adverse effect on competition (Sec. 19). The Secretary of State’s powers are limited by the need to take account of Article 10 of the European Union (Consolidated) Treaties. And the Secretary may by order exclude agreements from the prohibition even without the finding about lack of effect on competition—that is, exclude agreements that do impair competition—on finding that there “are exceptional and compelling reasons of public policy” for doing so. (Schedule 3 Sec. 7). Authorisation of these exclusions for admittedly anti-competitive conduct under the terms of Schedule 3 requires action by Parliament, but this could be done by a negative procedure that does not require debate and positive action. This procedural requirement is the only check on the Secretary of State’s discretion.

The Secretary of State also has broad discretion to exempt agreements or conduct if the Secretary is “satisfied” that it would be “appropriate” to do so in order to avoid conflict with an international obligation. This authority to create an exemption may be applied to a particular agreement, to a class of agreements meeting a particular description, or in the case of exemption from the Ch. II prohibition, to “particular circumstances.” The exemption can be granted retroactively, to excuse conduct after a claim has been filed challenging it. This broad power appears to have been created deal with a specific issue: the section states specifically that agreements about international civil aviation are intended to be covered by it (Schedule 3.6).

Conduct of government entities may be subject to the law’s basic prohibitions, if they are acting as “undertakings.” This definitional term is taken from EU law. Whether an entity is an “undertaking” is not determined by legal status or source of funding, but by whether it is engaged in economic or commercial activities. The prohibitions might thus apply to local authorities, government departments and agencies, educational institutions, and NHS Trusts. But because the Crown is not liable for financial penalties, remedies would be limited to injunctions, orders, and damages (OFT, 2001*a*). The UK has adopted the EU's basic rule about the application of competition policy to enterprises granted special or exclusive rights. Schedule 3(4) exempts "an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned." OFT and OFGEM are engaged in a consultation about a draft guideline explaining the scope of this potential exemption, principally by setting out the relevant EC terms and interpretations. The draft discusses how the principles might apply in the energy, postal services, water, telecoms, and rail sectors, and points out that in many cases, the services as now provided in the UK probably would not be exempted.

Two technical, general exemptions in the UK deal with rights to and uses of real property. The exclusion for "land agreements" excuses agreements that create, alter, transfer, or terminate an interest in land, as well as some of the usual kinds of ancillary clauses often found in such agreements about rent payment and conditions on the use of leased premises. But the exclusion may not necessarily extend to constraints on competitive or commercial activity, such as non-compete agreements or tying commitments about other services.[46] And "planning obligations" under the Town and Country Planning Act 1990 (and its Scotland and Northern Ireland equivalents) are exempt from the prohibition concerning restrictive agreements (Schedule 3(1)). This novel provision does not have an obvious parallel in EU law (Bloom, 2000).

The limited immunity for small and medium sized businesses is somewhat different from the EC's *de minimis* rules. Parties to a small agreement would not face financial penalties for violating the Ch. I prohibition (unless the DGFT has withdrawn the immunity from fines), although DGFT might issue an order against it and the parties could face a third-party suit. A "small" agreement is one under which the parties' combined world-wide turnover is under £20 million. Analogously, the conduct of a firm with total turnover under £50 million is deemed to be of "minor significance" and hence immune from fines for breach of the Ch. II prohibition (again, unless immunity has been withdrawn). The OFT's guidance about the meaning of "appreciable effect" for restrictive agreements applies a general market-share threshold of 25%, and is thus much more generous than the EC's *de minimis* rule, which sets separate, lower thresholds, now 10% for horizontal agreements and 15% for vertical ones. But any agreement to fix prices (including resale prices) or divide markets is deemed to have an appreciable effect regardless of the parties' size or market shares. An agreement that is one of a network of similar agreements that have a cumulative effect on the market is treated as capable of having an appreciable effect even if the parties' individual shares fall below the guidelines' thresholds (OFT, 2001*a*).

Sector-specific exclusions, rules and exemptions

The numerous sectoral regulators generally share the objective of protecting and promoting competition, along with regulatory tasks that include controlling aspects of the industry that may be subject to monopoly power. Details of the regulatory institutions vary slightly, due to modifications and adaptations of a common basic design. The system of utility regulation evolved incrementally and pragmatically as the privatisation programme proceeded in the 1980s. Some principles were clear from the beginning, of course, particularly the preference for private ownership and market solutions. The requirements of competitive structures and regulatory oversight became clearer with experience.

The major restructuring campaign began shortly after the 1980 Competition Act had created a role for the Commission related to regulatory policy, in the form of a new category of reference for report and recommendation about nationalised industries. These "section 11" references became a high priority, leading to 35 reports between 1980 and 1993. Most were about water, electric power, postal services, and rail and other transport services. One focus of these inquiries was the industry's efficiency, or rather the lack of it. Thus these nationalised-industry reports did not deal with telecoms and gas during this period, because those were profitable. An equal number of Commission reports were issued about regulated sectors in response to monopoly or merger references from 1985-99, and these did include gas and telecoms.

The Commission's monopoly reports may also be one source of what has become a standard tool of UK sectoral regulation, the "RPI–x" pricing scheme. A DTI paper in 1983 about telecom pricing advocated this form of "incentive regulation", based on an index of costs minus an efficiency factor.[47] The paper noted that similar remedies had been suggested in monopoly matters at the Commission (involving breakfast cereals and contraceptives, not utility services). This price control was envisioned as a short-term, interim solution for these sectors, to be applied until competition was strong enough that regulation would no longer be needed. That attitude may have tended to down-play the importance of designing regulatory institutions well for the long run (Wilks, 1999, p. 253).

The first sectoral regulator, the Director General-Telecommunications, set the pattern for its successors. Like DGFT and OFT, DGT was a single-person regulator supported by an acronymic staff, OFTEL. The DGT was given powers like those of DGFT about references to the Commission under the competition laws. Maintaining and promoting competition was originally only a secondary duty for DGT, though. The reform legislation also created a role for the Commission to examine the regulator's monopoly licensing actions, in loose parallel with its monopoly-inquiry responsibilities.

Licensing was the main innovation in the regulatory structure. The regulators' licensing responsibilities include the authority to deal with market power, in ways that overlap with DGFT's powers to deal with abuse of dominance. The system set up for DGT has been incorporated in the other regulatory systems. The Minister grants licences based on advice from the regulator. The regulator has power to propose modifications to those licences later, such as changes to the rate levels or formulas. If licensees do not accept the changes, the regulator can refer the proposed amendments to the Commission for investigation and a determination about the public interest. The Commission's findings apply what is essentially the Fair Trading Act's public interest test, but "with regard" to the regulator's statutory duties. Those duties are not quite identical for each regulator. If the Commission finds that the existing, unmodified licence is inconsistent with the public interest—that is, if it basically agrees with the regulator that something needs to be done differently—it can suggest its own specific modifications. The regulator has not been required to follow these suggestions, though. The Commission's principal role in the regulatory regimes is thus oversight of regulators' licensing decisions.

The sector regulators for gas, electricity, telecoms, water, and rail have full power along with DGFT to apply the Competition Act. Concurrent power is not a novelty under the 1998 Act, as the sector regulators already had reference powers under the Fair Trading Act and concurrent powers to apply the 1980 Competition Act. Concurrency turned out to be a contentious issue in the debate over the new Act, though, as some regulated firms, fearing that sectoral regulators would be tougher, preferred that DGFT have exclusive jurisdiction. OFT expects that shared responsibilities will not lead to divergent applications of the law, but that interpretations will develop principally along the lines the OFT takes. For one thing, DGFT will be producing more decisions under the Act. Appeals from all Competition Act decisions, by OFT and by sectoral regulators, follow the same path to the Commission's Appeal Tribunals, which can ensure consistency among them. All decisions under the Act will be subject to the Sec. 60 obligation of consistency with EC principle. And the regulators share common procedural rules, including a "single notification point" which is at OFT.

OFT and the regulators have formalised a process for handling concurrency, obliging them to consult with each other about responsibility when a problem arises. It is expected that the sectoral regulator would normally take the lead where both the regulator and DGFT could act. The presumption of sectoral competence means that a case whose facts lie clearly within a sector would normally be handled by the sectoral regulator, although if it raised a cross-cutting competition issue then OFT could take the lead. Regulations and a permanent Concurrency Working Party, chaired by OFT, set and apply the ground rules[48] Despite the formality, much will depend on maintaining good day to day working relationships. The Concurrency Working Party does not actually make decisions that bind the regulator-members, because that would inconsistent with true independence. It provides a forum for overview, while day-to-day matters are handled administratively. There is some centralisation of notifications (for informal guidance or for formal decision), which must go to OFT first. But complaints can be addressed to any authority with jurisdiction, and that authority is not required to notify any of the others that a complaint is being investigated until it becomes necessary to use formal investigative powers. OFT must agree before other regulators can use the Competition Act information gathering powers. Despite the lack of formal obligation to notify the others, the Working Party admonishes that it would be good practice for agencies to share information about complaints at an early stage to ensure against duplication of effort. The Working Party expects that agreement about which office handles a matter will be reached within a month, and experience so far shows that most can be assigned in a few days. If the authorities with concurrent jurisdiction cannot agree, the decision will be made by the Secretary of State for Trade and Industry. The Working Party has taken on the role of helping resolve disputes, including holding a formal meeting if necessary, before resorting to DTI. These more formal jurisdiction-resolving procedures have not been needed yet, though (OFT, 2001*a*). And they may not be needed much ever, as the principal area of dispute is not likely to be over whether one agency or another should handle a Competition Act complaint, but over whether the issue is best addressed through the Competition Act or through the regulator's power to oversee compliance with licence terms.

The regulators have also tried to ensure consistency through guidelines for applying the new law, which are being produced jointly with and authorised by OFT. Reviewing the draft guidelines for that purpose was one of the Concurrency Working Party's tasks (Bloom, 2000). Each of the principal regulators has now produced a final guideline describing how it will exercise its Competition Act responsibilities, except for the Rail Regulator, whose draft guideline has been under consultation for some time. For the most part, the regulators' guidelines restate the descriptions of the law and procedures in terms similar to those of the OFT guidelines. Variations address particular statutory obligations or issues frequently encountered in individual sectors.

Mergers in regulated sectors are handled through the same process that applies generally, except for water (discussed below). The sectoral regulators have no formal responsibilities or decision powers over mergers in their sectors. In fact, though, the sectoral regulator is always consulted and indeed does most of the public consultation in the process of review (Bloom, 2000).

Although the regulators were built on a common model, each displays some distinctive features. The differences in roles and powers among the regulators for different sectors are difficult to explain except as random historical accidents. The basic model is that the regulator has concurrent power to take actions under the Competition Act (and seek references under the Fair Trading Act), and must follow the "public interest" conclusion of the Commission in a licence dispute, although it need not follow the Commission's recommendations about remedy. But:

In electric power, the Secretary of State can block a reference of a licence dispute (but has never done so); this is not true in other sectors.

In water, price determination references lead to Commission decisions that are mandatory on both the regulator and the regulated entity.

In broadcasting, the ITC or regional Channel 3 licence holders may refer disputes to the Commission about competition provisions of their licences, to which the Commission applies an efficiency test modelled on the exemption provisions of EU (and now UK) competition law. The Commission may specify the required modifications.

In air transport, regular references for airports are required every 5 years, and the Commission's role is advisory. Unlike the other regulators, the airports authority has no concurrent powers to apply the competition laws, except over air traffic control.

In rail transport, there is no appeal to the Commission from the regulators' decision about access charges.

The Utilities Act 2000 introduced some changes in the standard model. Originally intended to apply to the whole range of sectoral regulators, the changes were ultimately limited to electricity and gas. But similar changes are planned for the other regulatory regimes. OFGEM's mandate to promote competition is rephrased: it is to "to protect the interests of consumers … wherever appropriate by promoting effective competition …", and in doing so to have regard to the interests of those who are disabled, sick, old, poor, or rural. The Act provides for the government to issue formal guidance about the regulator's role in achieving social and environmental goals. The relative priorities of this explicit guidance from the government and maintenance of the regulator's formal decision-making independence remain to be tested. Expansion of the regulatory mission beyond economic regulation and promotion of competition will also test the regulator's ability to maintain coherent and transparent principles in its decisions. The Act has tightened up the regulatory process, by requiring publication of the reasons for decisions, such as the reasons for choosing the "x" in "RPI–x" rate-setting. And the Act discourages the regulator from ignoring the Commission's findings in licence modification references, by giving the Commission the power to veto the regulator's post-report remedy. This veto power appears to apply only to electric power matters, but not to gas.

The Better Regulation Task Force (BRTF) has examined how these regulatory structures are working. Its July 2001 report focused principally on general criteria of regulatory quality: transparency, accountability, proportionality, consistency, and targeting.[49] The questions posed in the original BRTF announcement of the project promised an in-depth examination of fundamental issues: Is there a long-term need for regulation in the industry? Does the regulatory framework encourage competition and consumer choice? Has the regulator's role changed as competition developed? Has over-regulation impeded competition? Does the regulator's relationship with the competition policy institutions promote or hinder competitive market development? Can regulation increase competition while defending other values, such as maintaining health, safety, and environmental standards and protecting vulnerable consumers? Are universal service standards needed? Are cross-subsidies acceptable? In the end, the report generally supports the overall direction and current state of regulatory policy. The BRTF does recommend that regulators take more seriously the original intention that the industries move from regulation to competition, by setting annual plans to review market sectors to find where price controls and outdated licence conditions could be removed. To make this credible, the BRTF also recommends that companies should be able to challenge the regulator's failure to do that review.

The BRTF report also endorses what has become official policy, to transform the individual regulators into boards. These bodies would include both full-time executive members, principally from within the bureaucracy, and non-executive members. BRTF recommends that all members be appointed for expertise rather than to represent stakeholder groups. Even if not all are experts at the time of appointment, having many members on a board reduces the risk that individual variation in experience and aptitude will undermine consistency or quality of decisions. The boards that are under DTI oversight, including DGFT, are being restructured. The CAA has a board structure, and the government has announced plans for OFWAT to have a board. The Rail Regulator remains an individual.

Telecommunications[50]

The first independent regulator after DGFT, the Director General for Telecommunications has concurrent power with DGFT over "commercial activities connected with telecommunications" under the Telecommunications Act 1984. DGT was established to oversee and control the private monopoly created by the privatisation of British Telecom, and to support the development of competition in the industry. Substantive overlap with competition policy has been strong from the start. In 1995, DGT even proposed a new, general licence condition that would have simply incorporated the literal terms of the competition law about restrictive agreements and abuse of dominance. DGT could then revoke or suspend a licence if the licensee violated the prohibitions. British Telecom consented to the licence modification, then tried to challenge in on judicial review. The court refused to let BT complain against something it assented to—though indicating in *dictum* that DGT's "arrogation" of the power to apply the competition law through the summary process of licence enforcement was probably *ultra vires*. In any event, this "fair trading condition" has been superseded by its own terms with the enactment of the Competition Act 1998.[51]

The telecoms regulator has extended its mandate beyond "competition," as that is conventionally described. On the one hand, it has announced special rules about predation to apply in the sector. The OFTEL guidelines about the application of the Competition Act go beyond the principles of OFT's guidelines for that purpose, which follow relevant ECJ decisions. OFTEL's guidelines set out new criteria specifically designed for network industries with very high fixed costs and negligible marginal costs. Understandably, these parallel the relevant EC instructions about telecoms access regulation. But it curious that they are presented as applications of the Competition Act, yet because they are not required by EC competition law, there may be no need for UK competition authorities to follow them in competition analysis. On the other hand, OFTEL has evidently decided that the regulatory mandate extends beyond the assurance of effective competition. OFTEL's consultation document about reducing the role of regulation acknowledges that competition between telecoms suppliers is likely to be the best regulator—provided it is effective in delivering benefits to customers. Noting that because of market failures, effective competition may sometimes not be present, the document also contends that even where effective competition is present, "there are some circumstances where it cannot deliver the best deals to consumers. Consequently, even in the longer run, there is likely to be a residual role for sectoral regulation"[52] Nowhere does document describe what those circumstances might be, other than a non-specific reference to universal service, and thus the passage appears, perhaps unintentionally, simply to stake a claim for bureaucratic immortality (Sharpe, 2000).

Electric power and natural gasr[53]

Originally under separate regulators, these industries are both now subject to the Office of Gas and Electricity Markets (OFGEM—in Northern Ireland, to the Office for the Regulation of Electricity and Gas (OFREG)). The energy regulators have concurrent power with OFT over "commercial activities connected with the generation, transmission or supply of electricity" under the Electricity Act 1989. OFGEM has concurrent power over "the shipping, conveyance or supply of gas and activities ancillary thereto" under the Gas Act 1986. In another example of tiny distinctions in otherwise common schemes, OFREG's powers over gas in Northern Ireland are slightly different from OFGEM's in England, Scotland, and Wales; OFREG's powers include storage but do not include shipping. The energy sector regulator was the first to be replaced by a board structure.

The privatisation of British Gas and the introduction of competition in the sector have been a long and difficult process. It started poorly, with the creation of "a huge, arrogant, inefficient and exploitative private sector monopoly," representing "a serious misjudgement on the part of a Government committed to competition" (Wilks, 1999, p. 261). Several Commission inquiries helped direct the transformation of this sector. Although there was never a "Section 11" nationalised industries report, in 1980, there had been a contentious Fair Trading Act report on *Domestic Gas Appliances*. After privatisation, in 1987, DGFT referred the non-regulated part of British Gas's business, based on complaints from industrial customers. The Commission found that British Gas was acting like the monopoly it was, through extensive price discrimination, refusals to supply, unfair contract terms, and undue purchasing power. The Commission's recommendations led to an order against the price discrimination and limits on the monopolist's share of new gas field purchases. In 1992, the regulator, then OFGAS, referred transport and tariff issues to the Commission, while DTI made a parallel reference under the Fair Trading Act to cover the monopolist's non-regulated business as well. This time, the Commission's four-volume report, published in 1993, recommended formal divestiture of trading and transport operations, lower tariffs, and even (cautiously) an end to the tariffed monopoly. DTI accepted some of these recommendations, but not formal divestiture. In 1992, legislation opened up the market for the smaller industrial and commercial users, while British Gas agreed to separate its functions internally. But it was not until 1997, after the Gas Act 1995, that British Gas was formally split into 2 separate companies, Centrica for trading and BG plc for pipeline transport.[54]

The other side of OFGEM's docket has sparked the first controversy over whether to use the power to enforce licence conditions or the power to enforce the Competition Act. OFGEM proposed licence modifications to deal with the risk of abusive practices in one aspect of electric power services. Two firms refused to accept the changes, and so OFGEM took the matter to the Commission for a "public interest" finding. OFGEM claimed that the conduct could not be prohibited by the Competition Act because it could be done by firms that did not have dominant positions. OFT disagreed with that interpretation of how the Competition Act would apply, and contended, in a comment submitted in the modification process, that the better course was to use the Competition Act rather than the licence modification. In the event, the Commission found that the new licence conditions were not necessary to protect the public interest. OFGEM nonetheless has asked the minister to impose the conditions anyway. This dispute fell outside the defined jurisdiction of the Concurrency Working Party, which has not been asked to determine whether conduct presents a licence condition issue, under the sectoral law, or a Competition Act issue, but only who has jurisdiction in the latter case.

Water and sewer service

The need for regulation arose as the UK's 10 water and sewer companies were privatised and became licensed local monopolists in 1989. Another 17 water companies are similarly recognised and licensed. Under the 1991 Water Industry Act, the Office of Water Services (OFWAT; actually, the Director General of Water Services) regulates prices under the terms of their licences.[55] The goals of this regulation are to ensure financial soundness and performance, protect customers against monopoly-level charges, promote economy and efficiency, and facilitate effective competition, including new entry. The Water Industry Act 1999 changed the price-setting system to require OFWAT approval of charges. In doing so, the Director is now to "have regard to" ministerial guidance about social and environmental objectives, and proposed charges schemes must incorporate regulatory requirements about the needs of disadvantaged customers. Despite the geographic monopoly grants, since 1992 competitive or "inset" entry has been permitted to serve large customers, which are now defined as those with demand over 250,000 cubic meters annually. The incumbent can be required to supply bulk water for the entrant and to hook it up to the existing sewerage system. So far, there is no common carrier obligation under statute, but parties may agree to it, and unreasonable refusal to grant access could be considered an abuse of dominance. OFWAT would apply the "essential facilities" doctrine in making that determination. Although licences prohibit unduly preferential or discriminatory charges, incumbents may adjust tariffs for large customers in anticipation of competition, so long as they cover the relevant long-run marginal costs and the rates are made available to others similarly situated. Charges for those large customers are no longer included in the overall "tariff basket", in order to discourage predatory or exclusionary pricing.

OFWAT has concurrent power with OFT over commercial activities in England and Wales connected with the supply of water or the provision of sewerage services. DGFT has jurisdiction in this industry in the rest of the UK, including Scotland, where the water companies are public. OFWAT's guidelines describe particular competition issues that could arise in the sector, concerning contract terms, connection, and misuse of licences for "abstracting" water from wells or rivers. The guidelines point out the risk of collusion that would undermine the regulator's use of comparative or "yardstick" rate-setting.[56] OFWAT has followed OFTEL in adopting a special "network industries" conception of costs for identifying predation, drawn from the EC's notice about telecoms access issues[57] rather than from EC jurisprudence about abuse of dominance.

Mergers in the water supply sector are subject to special rules. All substantial transactions (those over £30 million) must be referred to the Commission. The legislation is the legacy of the early post-privatisation experience. The environment minister who was responsible for the privatisation in 1989 later became Secretary of State for Industry, at a time when publicly-owned foreign firms were buying the newly-private UK water companies. He determined that all such acquisitions would be referred to the Commission. The Commission has found most mergers in this sector to be contrary to the public interest.

The ministry with policy responsibility over water and sewer services had been the Department of Environment, Transport and the Regions; after the 2001 election, responsibility was transferred to the new Department of Environment, Food and Rural Affairs. Legislation has been under consideration to formalise a common carriage requirement, obligating companies to take bulk supplies from others. Permitting full competition is complicated by the fact that most consumers do not have meters, because the old system set charges by the ratable value of the house, not its actual consumption. Before the reorganisation, there had been no plan to convert OFWAT from a single director to a board structure, but in the response to consultation on the draft Water Bill, DEFRA has announced that it intends to create a board structure for OFWAT.

Railways

Since 1994, the vertically integrated national monopoly rail system has been broken up and sold off into some 100 new entities. Restructuring was accompanied by the creation of the Rail Regulator, who is an individual supported by an office, ORR. The Rail Regulator's statutory duties are to protect the interests of users, promote the use and development of the national railway network, promote economy and efficiency, and promote competition. The duty to promote competition is evidently interpreted to mean protecting the interests of new and would-be entrants. The Rail

Regulator's principal function now is to serve as the economic regulator of the infrastructure monopoly, Railtrack.

The policy goals of reform were to reduce the public subsidy, meet customer needs, and reduce road congestion by making public transport more attractive. Several issues were prominent in the design of the new industry and regulatory structures. Customers could be frustrated if the new system were too complex. Experience with post-deregulation "bus wars" had shown the risk that short-term competition could disregard customer interests and undermine network benefits. Resistance from incumbents, especially employees, was expected. In addition, investors would be concerned about moral hazard risks to long-term investments.

Ownership of infrastructure was assigned to a new corporation, Railtrack. Freight operations were sold as 6 separate entities (most of them to the same buyer). In-house supply services, such as rolling stock leasing, heavy maintenance, and engineering design, were sold to the private sector in order to create competitive supply conditions (UK (OECD CLP), 1998). Franchises were issued for operation of existing passenger services. Most franchises were for 7 years and are thus coming up for re-franchising in 2003 and 2004. Terms of the franchises called for either paying a subsidy or collecting a premium, depending on conditions (UK (OECD CLP), 1998). Most of the franchisee operations have been local monopolies, and most continue to receive subsidies. The Railway Act provided for some open access services, but "on-rail" competition has been limited (UK (OECD CLP), 1998). Franchise terms typically include provisions for "moderation of competition," permitting franchisees to nominate areas for protection against access by new entrants. The intent was to allow franchisees time to become familiar with the commercial operation of their businesses and to allow the Regulator to test gradual increases in competition (UK (OECD CLP), 1998). ORR has been engaged in consultations on the provisions for "moderation of competition" that should be included in the new franchises.

The Regulator's principal tools for promoting competition are enforcing the terms of Railtrack's licence and approving access agreements. There is no appeal from the Regulator's decisions about access matters (except for judicial review), nor is there any appeal to the Commission about access charges (UK (OECD CLP), 1998). ORR has concurrent power with DGFT over "the supply of railway services", under both the Competition Act and the Fair Trading Act, but has made little use of this power so far. Some regulatory actions confer exemption from the Competition Act. According to ORR's draft Guidelines for its application of the Competition Act—unlike those for the other regulators with concurrent power, these are not yet final—access agreements approved by ORR, franchise agreements, and some other industry-wide agreements will get the benefit of the "regulatory authorisation" exemption. The draft guidelines describe a number of railway-specific issues. They call attention to the risk that market power over rolling stock leasing may be a threat at the time of franchise transfer; so far, this risk has been addressed by voluntary industry guidelines about franchise and leasing terms. Other issues discussed include joint timetables and "quality partnerships" for setting service standards, intermodal competition, and the likelihood that markets could be defined in terms of time-of-day service and customers' scheduling flexibility. Conduct that may violate the Ch. I prohibition could include agreements about scheduling to prevent competition, about services to restrict output, or about access denial to prevent entry, as well as collusion about franchise bidding or fares. Exemptions would likely be granted for such conveniences as through-ticketing and co-ordinated timetables. The draft guidelines do not adopt any special usage or definition for predation or essential facilities.

The Rail Regulator has strongly criticised weaknesses in the original restructuring, especially the way Railtrack was privatised in 1996. ORR has undertaken to overhaul Railtrack's basic licence terms to make it more accountable, to revise Railtrack's basic contracts with operators to clarify responsibilities and make it more responsive, and to reform Railtrack's financial transparency to encourage it to put its money in the right places.[58] Issues of continuing concern, in addition to operational safety in the wake of several serious accidents, have included reducing the public subsidy that underpins commercial profitability, correcting the evident mismatch between franchise duration and investment horizons for infrastructure and rolling stock improvements, and designing access charges that provide appropriate incentives (UK (OECD CLP), 1998).

Many of these issues have been assigned to a new institution to handle. The Transport Act 2000 established a new Strategic Rail Authority, which is now responsible for designing and issuing passenger rail franchises. Longer terms for the proposed new franchises will, it is hoped, encourage operating companies to commit to greater investment, service standards, and other conditions. The process will rely on competition for the market, more than in it, to achieve better outcomes for consumers. The new Authority is also responsible for consumer protection matters, such as fares, quality of service, overcrowding and complaint handling, administering freight grants in England, and steering forward investment projects aimed at opening up bottlenecks and expanding network capacity. It also funds the Rail Passengers' Council and Committees, which act as consumer advocates. The Strategic Rail Authority's statutory goals and purposes do not include promoting competition, nor do its instructions include choosing the least anti-competitive alternative. The creation of the new Authority is an implicit commentary on the experience of the Rail Regulator model. Frequent turnover—there have been 3 different Rail Regulators during the last 5 years—underlines the risk that policy could become personalised. The new Authority adopts the now-preferred institutional model of a multi-member board. And the new Authority will handle most of the sensitive regulatory issues in this sector, leaving ORR as the economic regulator of Railtrack.

Air transport

The Civil Aviation Authority has several regulatory roles affecting air transport. A new one is to regulate the public-private partnership performing air traffic control services. In that role, CAA has concurrent powers with DGFT to apply the Competition Act (Transportation Act 2000, Ch. V; OFT, 2001*a*). For its other functions, including regulation of airports and airlines, CAA does not have concurrent Competition Act powers, and thus DGFT has sole enforcement responsibility. Conduct undertaken pursuant to CAA decision would likely be exempt from Competition Act enforcement, of course. CAA's Economic Regulation Group sets the price-cap charges for Heathrow, Gatwick, Stansted, and Manchester, after reference to the Commission—unless the secretary of state directs otherwise. By statute, those charges must be revisited every 5 years. A formal consultation process is already underway for the review that must be done in 2003.

International aviation issues are often determined by a combination of competition analysis and pure negotiation. The UK has indicated a desire to shift responsibility here to the independent competition authorities and reduce the amount of ministerial involvement. Concerning third-party international aviation issues (that is, those involving countries outside the EU), the July 2001 White Paper states that "Previously, UK Ministers had a role in decision-making, but all decisions will now be taken by the OFT" (DTI, 2001, p. 22).

Bus transport

DGFT became active in the bus industry when post-privatisation competition led to serious claims of anti-competitive predatory and exclusionary conduct, as well as price-fixing and a rash of mergers. These issues have been dealt with so far under the terms of the general competition law, often through undertakings accepted from the companies. The Transport Act of 2000 has now provided special rules for DGFT to apply in the bus industry. “Quality partnerships” and ticketing agreements may be approved if they improve the quality of vehicles or services or reduce congestion or pollution, provided that any reduction in competition is proportionate to the benefits.

Financial services

OFT began an inquiry into the commission-fixing activities of the Stock Exchange in 1979. The case was taken out of the OFT’s hands by legislation that exempted the Stock Exchange from the Restrictive Trade Practices Act. In return for that protection, the City agreed to the reforms that led to the “big bang” of 1986. This course paralleled securities industry reform in other jurisdictions, such as the US, where enforcement action failed because of a technical exemption, but the industry nevertheless accepted pro-competitive reforms to avoid further public embarrassment. Under the Financial Services Act 1986, those who carry out investment business were required to belong to a self-regulating organisation or a recognised investment exchange or be a member of a recognised professional body. DGFT examined the rules and other arrangements of such bodies from a competition viewpoint and reported his findings to the Chancellor of Exchequer, who could impose changes if he found them significantly anti-competitive. The rules of the self-governing and professional bodies in this sector could be exempted exempt from the Ch. I prohibition (UK (OECD CLP), 2000, p. 3). This exemption is set out in the Competition Act (Schedule 2 part 1).

The Financial Services and Markets Act 2000 retains DGFT responsibility to review and advise about the rules of the Financial Services Authority (FSA), investment exchanges, and clearing houses, and it provides for a similar responsibility for the competition scrutiny of the rules of the “Competent Authority for Listing” (UK (OECD CLP), 1999). If DGFT considers that these rules are having an anti-competitive effect, he will make a reference to the Commission who will then investigate the matter. If the Commission finds that they do have an anti-competitive effect, then the Commission must also weigh up other the considerations which the FSA will have had in mind in adopting the rules, for example, the need for financial prudence and stability. If the Commission considers that, notwithstanding such factors, the measures could be amended to reduce or remove an anti-competitive effect, the Commission will report this to Treasury Minister. The Commission will also scrutinise the practices, rules and guidance of investment exchanges and clearing houses (Competition Commission, 2000 However, the ultimate action is up to the FSA and the Treasury. If the Commission finds a restriction of competition that is not justified, then the Treasury must instruct the FSA to take appropriate action—“unless exceptional circumstances exist.” The gloss on the meaning of “exceptional circumstances” is elliptical, requiring only that the Treasury decide it “would not be appropriate or necessary” to order the FSA to take action. Suggested examples are that the Authority has already addressed the problem in some way, or that the Treasury believes that changing the rules would produce “grave risk” to the financial system. And the Treasury can order changes in the rules even where the Commission finds no problem, for example to meet international obligations or consumer protection needs.

The Chancellor of the Exchequer commissioned an independent expert to review “levels of competition, innovation and efficiency in UK banking markets” (Cruickshank, 1999). The resulting “Cruickshank report” led to a reference under the Fair Trading Act for a Commission inquiry into clearing services to small and medium sized enterprises (and perhaps also to the reference and rejection of a major banking merger). The Commission’s inquiry had not been completed as of late summer 2001. Nonetheless, in March 2001 the government had already taken the occasion of the Commission’s statement of potential remedies to announce plans to give OFT new powers to regulate payments systems access and charges "to promote effective competition" there (OFT, 2001*a*). The likely model is a separate section or office within OFT, established by separate legislation.

Earlier drafts of what became the Financial Services Act 2000 retained a loosely-phrased exclusion from competition law liability, for conduct "contemplated by" financial sector regulation. The interim Cruikshank report recommended tightening that up, to exclude conduct only where a legal instrument authorised the exclusions (the approach used for the general exclusions provided in Schedule 3 to the 1998 Act) or where the regulator had reviewed the particular conduct at issue and authorised or required it (Cruickshank, 1999, p. 17). The Act ended up using language somewhere in between those options: conduct is exempt from the Competition Act prohibitions if it was "encouraged" by the Financial Services Authority's "regulating provisions". Time will tell whether the level of official sanction described as "encouraged" is materially different from something that is "authorised" or "contemplated".[59]

Insurance

Insurance companies had enjoyed an exemption from the Restrictive Trade Practices Act, which had the effect of allowing them to co-operate through information exchange and risk sharing where necessary for the appropriate working of the industry. It could in theory have allowed them to standardise terms and conditions and fix premiums. The exemption from the RTPA did not extend to other competition statutes, though. Agreements to fix prices, or to share markets, or which in other ways significantly affected competition or amounted to unacceptable collective behaviour, could be investigated and controlled under the provisions of the Fair Trading Act if the requisite jurisdictional requirements were met, such as combined market share (UK (OECD CLP), 1998*b*). The RTPA has been repealed, and there is no similar exemption provided from the Competition Act 1998.

Professional rules[60]

The Commission has issued some 14 reports on professional services, 9 of them in 1976 alone. Despite this "significant and sustained attack on restrictive practices" in these sectors (Wilks, 1999, p. 295), significant restraints and exemptions persist. OFT and the government have called for their elimination. The government asked OFT in 1999 to review competition in professional services, to identify restrictions, whether arising from law, professional rule, or other source, that had the effect of preventing, restricting or distorting competition to a significant extent. OFT's study was to identify any consumer benefits claimed for the restrictions, but to leave for further consideration whether these benefits justified the restrictions. The OFT's March 2001 report targeted lawyers, accountants, and architects. Observing that previous efforts by OFT and the Commission had been followed by significant reforms encouraging competition over price and advertising and greater flexibility in forms of practice, the report nonetheless identified several remaining restrictions. Architects and solicitors still use methods that tend to stabilise some fees. Advertising is still subject to restraints that discourage advertising unnecessarily. And OFT pointed out competitive implications of restrictions on forms of practice, such as barristers only practising solo and taking work only from solicitors rather than directly from clients (OFT, 2001*b*).[61]

Bringing professional associations fully within the Competition Act will require statutory change. The Secretary of State has the power to exclude rules regulating a professional service or service providers from the Ch. I prohibition. Professional bodies must apply to the Secretary for designation in order to obtain this exemption. DGFT may advise the Secretary whether retaining a designation is desirable, and the Secretary is to consult with other ministries whose functions relate to the services involved. But the Secretary's authority to make the designation is otherwise unfettered. The list of professions that might be designated is long: barristers, advocates, solicitors, doctors, surgeons, dentists, ophthalmologists and optometrists, veterinarians, nurses, midwives, physiotherapists, chiropodists, architects, accountants, auditors, insolvency advisors, patent agents, parliamentary agents, surveyors, engineers and technical experts or consultants, teachers, and religious professionals. (Competition Act 1998, Schedule 4).[62] The exclusion does not apply to all the activities of professional bodies or organisations but only to the extent that an agreement constitutes a designated professional rule, imposes obligations arising from such a rule, or constitutes an agreement to act in accordance with such rules. To date, no rules have been formally designated by the Secretary of State; however, OFT believes that a request for such a designation could not practically be denied under the law as it stands (OFT, 2001*b*). The government announced in March, at the same time that the OFT report appeared, that it plans to remove the Schedule 4 exclusion from the Competition Act and to consult further about what can be done to remove further unjustified restrictions[MW1] (OFT, 2001*a*).

Agricultural products

Agreements about production or trade in an agricultural product that are an "integral part" of a national market organisation, that are necessary to accomplish a goal of Art. 39 of the EU Treaty, or that amount to a joint arrangement among farmers for production, sale, storage, or processing (as long as it does not require setting identical prices) are exempt from the Ch. I prohibition. This exemption appears intended to correspond to a Commission exemption for agricultural co-operatives.

Newspaper mergers

Newspaper mergers and transfers of control are subject to special rules. They date from the Monopolies and Mergers Act 1965. In some circumstances, newspapers cannot be transferred without the consent of the Secretary of State, and that consent cannot be given until the Commission has reported on the proposed transaction. Broadly, the rule applies if the merger involves newspapers with combined daily sales of more than 500,000 copies. The Commission's inquiry group may include members chosen from a specialist panel maintained for that purpose (UK (OECD CLP) 2000, p. 16). Each of the 10 members of the specialist panel is a journalist, writer, journalism professor, or publishing executive (Competition Commission, 2000).

The reason for special rules about newspapers is said to be that changing the ownership of newspapers can raise issues about accurate presentation of news and free expression of opinion. This underlying reason for the special regime implies that a merger could be rejected if the Commission found that the proposed acquiring party would not report news accurately, a "public interest" judgement that is far afield from standard competition policy concerns. The law has been invoked to ensure balance of opinion. For example, in 1999 a publisher of regional papers was permitted to acquire titles in Northern Ireland on the condition of making divestitures to ensure the preservation of an editorial voice for one side of the Republican-Unionist debate (UK (OECD CLP), 1999).

Broadcasting

Two exemptions under the Broadcasting Act 1990 are set out in Schedule 2 Part III of the Competition Act. They deal with arrangements for Channel 3 news, where decisions about the scope and likely effect are made by the Secretary, and networking agreements, where qualification is determined by the Independent Television Commission. The Broadcasting Act 1990 gives DGFT two statutory responsibilities. The first is to consider and report on the extent to which Channel 3 networking arrangements satisfy the competition test set out in the Act. The second is to monitor and report on the BBC's compliance with the 25 per cent quota in relation to independent productions on their television services. The Broadcasting Act also sets absolute limits on audience share. Further, more general rules about media ownership rules are under consultation. Regulatory responsibility for broadcasting is likely to be combined in a new unit with telecoms, OFCOM.

Environmental protection

The schedule of particular exemptions (Competition Act 1998, Schedule 2 Part IV) refers, in opaque cross references, to obligations under the Environmental Protection Act 1995 that, by implication, are to some extent exempted from the Ch. I prohibition.

Competition advocacy for regulatory reform

In the public debate about the effects of regulation on competition, the principal voice has been that of DTI. The Commission's reports, particularly those on nationalised industries, have touched these themes, too. OFT has rarely addressed regulatory issues directly, but the government intends to give OFT a much more visible public advocacy responsibility.

The large-scale structural reforms that began in the 1980s were motivated by a general policy of reducing the role of the state in the economy, as well as by a desire to increase the scope for competition. Reports by the Commission, especially those under its "section 11" authority to examine nationalised industries, were important contributions to the debate over the need for change and the shape of the new institutions. In the most recent review of overall policy about the regulation of utility sectors, DTI has taken the lead, establishing a separate unit, the "Utilities Review Team", to manage the consultations and prepare the studies and proposals.

By comparison, OFT's reports and studies have been more reactive. OFT has done some studies in response to particular requests. Recent examples are a joint OFT-OFTEL report in December 2000 on conditions for e-commerce and a March 2001 report on competition issues in professional services. The e-commerce report finds industry conditions generally supportive and thus does not present a detailed analysis of regulatory barriers or proposals for reform. By contrast, the professions report recommends changes in legislation. Otherwise, OFT's research papers deal mostly with competition policy theory, review of orders, and market and industry economic conditions., with regulation problems not being a principal target. A series of reports on the rules of self-governing financial and professional bodies responds to statutory requirements. OFT is now consulted occasionally about regulatory or legislative proposals, principally when those may directly affect its enforcement responsibilities.

The Government has recently announced a new role for OFT in assessing the competitive impact of laws and regulations. In white papers in February and July 2001, the government described how OFT and other regulators will be given a new role "to assess when laws and regulations create barriers to entry and competition, or channel markets in a particular direction, thereby holding back innovation and progress." In particular, OFT will be empowered to "identify key sectors where competition concerns have been identified and undertake in-depth studies to examine the need for action," point out to the government any barriers that come to light during enforcement investigations, and work with the Regulatory Impact Unit and other departments to provide information about the effects of proposed regulations on competition.

OFT and the Commission are to highlight where they find in the course of their investigations that regulation impairs competition. Recent experience provides some examples, such as the Commission's report on supermarkets, which examined claims that planning rules discourage entry. The Commission has always been able to examine and discuss how regulations affect markets and to recommend changes, but OFT's authority was less clear. OFT does has general powers to monitor markets and report to ministers, under Art. 2 of the Fair Trading Act. DTI wants them to do this more. In the August white paper, the government makes a commitment to respond to reports from OFT and the Commission about the anti-competitive impact of existing regulations. Second, OFT or the Commission have been able to receive and respond to a specific request to look at a sector where a competition problem may be a result of regulation. An example is OFT's March 2001 report on the professions. OFT could undertake such a study on its own initiative, too. The idea of canvassing the entire corpus of existing legislation to identify competition problems has been considered, and, so far, rejected. Third, OFT may be involved in the process of developing new legislation.

Conclusions and policy options

Until recently, UK competition and regulatory policies presented a curious contrast. A revolutionary program of utility-sector deregulation promoted competition in long-monopolised sectors, supported by an intellectually interesting though usually forgiving system for dealing with concentrated industries. But the general competition enforcement regime was obviously deficient, relying on ineffective efforts to stop existing conduct and lacking means to prevent or remedy abuses. Now the UK has an invigorated and modern general competition enforcement system, soon to be made even more vigorous and up-to-date, while retaining and expanding a unique approach to examining market-wide problems. But promoting competition in the regulated sectors is requiring more attention than had been anticipated originally, while the competition policy goals of sectoral regulation are being supplanted by new missions. For the first time in at least a generation, competition policy concepts are at the centre of the UK's economic policy approach, and the government is determined to improve it still further.

The post-election announcement by the Chancellor of the Exchequer and 2 cabinet ministers that competition policy would be the top item in a list of high-priority measures to close the "productivity gap" shows that competition-based reform is supported strongly at high levels in the government.[63] If this programme is sustained, the balance of interests represented by the "post war settlement," and reflected in the less ambitious course of UK competition policy up to 1998, may be replaced by a different economic policy paradigm, in which competition concepts will occupy a fundamental, even quasi-constitutional, place for the first time in the UK.

The UK public is not yet fully persuaded that competition is that central, though. A recent survey of experienced observers in the UK reports that only 10% thought competition policy was important to the UK public; by comparison, in the US the figure was 83% (PWC, 2001). The blue-ribbon regulatory reform group, the Better Regulation Task Force, does not mention competition or market solutions in its "Five Principles of Good Regulation", which are preoccupied instead entirely with process issues such as transparency, accountability, proportionality, consistency, and targeting. But that relative lack of direct attention may simply result from lack of direct familiarity, as competition policy had not been at the top of the agenda before. Until the late 1980s, competition policy was consistently overshadowed by other components of economic policy. Other means were used to control industry and even monopoly, notably nationalisation in the late 1940s and planning and direct intervention in the 1960s and 1970s. Because competition policy was not on the front pages, competition legislation had not been considered urgent. The long period of institutional experimentation between 1948 and 1998 kept the principles in public debate, even if they were usually in the background. Over time, a broad, if shallow, consensus developed, and competition policy reforms have enjoyed bipartisan support when eventually adopted.

That proved true for the reforms that were enacted in the Competition Act 1998. While maintaining most of the basic institutions, the 1998 Act has finally made the enforcement of general competition law in the UK credible. The law now provides a well-considered, thorough set of enforcement tools. In several respects it is a clear departure from the cautious UK tradition. It adopts virtually the entire European competition policy "blueprint", of prohibition based on competitive effects, rather than agnostic, academic investigation of the public interest. And it threatens real penalties for violations. These more stringent sanctions have barely been tested yet, so it may be premature to identify what they will, and will not, deter effectively. Retention of the older provisions of the Fair Trading Act about monopoly preserved an interesting and valuable alternative approach, although some of it needs updating. For example, the threshold share-of-supply jurisdictional tests are peculiar, unprincipled, and ultimately irrelevant. The old merger review process has proven susceptible to uncertainty. Both are now due for substantial overhaul.

These still-unreformed processes highlight the complexity and apparent redundancy of the institutional structure, in which the Commission may re-examine OFT's initial work before a reference, and then DTI may second-guess and supplant what the Commission has concluded in its report. To be sure, there may be some benefits to the overlaps, which create bargaining leverage and opportunities for friendly competition about policy and competence. The threat to send a matter to the time-consuming uncertainty of a Commission inquiry can elicit a negotiated settlement. Recent OFT industry studies appear to cover the same kind of territory that was long the Commission's preserve. The "tri-partite" system, a product of the eclecticism that characterises British public administration, has come in for both criticism and praise:

> The existence of three distinct sources of administrative discretion makes it difficult to establish general principles and makes procedures opaque, but does have the same effect as the separation of powers in the American constitution—it prevents the development of arbitrary or determined policy by any one branch of government. That is why industry likes the present arrangements — they may be clumsy but they are not threatening (Wilks, 1999, p. 218).

The potential for last-minute ministerial intervention can undermine the principled application of policy. The government is trying hard to correct that, by emphasising the steps it is taking to ensure the decision-making independence of OFT and the Commission and to emphasise how limited its exercise of discretion will be under the proposed new merger regime. That resolve remains to be tested by a tough case. Unfortunately, past interventions, even though few and even though under a previous government, will not be forgotten quickly. It may take 25 years of abstinence to erase the memory of the events of the mid-1990s. The overall plan is evidently to emphasise the independent role of OFT, and to counter the risk of arbitrariness by restructuring it as a board rather than a single regulator.

The three institutions may often seem to be doing the same kinds of things, but they are taking pains to keep the public fully informed about it. Transparency and consultation with the public are so fully elaborated that some complain, sheepishly, that the point of diminishing returns has been passed. Consultations with the public about legislative proposals and guidelines are thorough and the process is taken seriously. Several aspects of the latest reform package, including the merger process revisions, have changed significantly in response to comments received. The product is sometimes quirky. The numerous guidelines interpreting the Competition Act display a commendable desire to inform and educate the public, but the resulting "informal" guidance shows the signs of intensive lawyering, perhaps anticipating judicial attention. To be sure, the guidelines are an order of magnitude more comprehensible than the statutes they explicate, whose nested layers of careful outlining, artificial definitions, and cross-references make them unintelligible to non-experts.

The leaders of OFT and Commission, both Oxford economics professors,[64] have promised vigorous application of their new enforcement toolkit. Leaders depend on followers. Especially at OFT, the unit that must supply most of the troops, an "enforcement" culture and the related competence need to be developed. Many steps have been taken already to address that need, such as staff training and increased funding. But the transformation will take time. With the addition of a new responsibility for advocacy and a new unit for policy studies, OFT must take care that attention and resources are not diverted from the necessary drudgery of effective law enforcement.

Analysis of competition problems that are caused by other laws and regulations has received less attention from any of the three principal institutions. Even at the Commission, this topic has usually been a by-product of studies done for other purposes. But the Commission's "section 11" reports, as well as some merger and monopoly references, contributed to the long-term program of reforming the infrastructure monopolies. And DTI housed the Utilities Review unit that has shepherded the recent initiatives to overhaul the system of sectoral regulation.

This chapter is too brief for an in-depth discussion of how competition has developed, or not, in the many sectors that the UK has privatised and liberalised since the mid-1980s. In bus transport, reforms had unexpected competition-policy results, of monopolising practices that the pre-1998 competition policy tools could not readily correct. In rails, recent dissatisfaction with the structure that emerged from privatisation does not seem to result from misconceptions about competition policy, but from mismatch of incentives for efficient operation and for encouraging infrastructure investment. Experiences in other major sectors are reviewed in other chapters of this project. In general, the regulators appear to take their competition policy missions seriously. The carefully crafted formal system for managing their concurrent competition law powers has worked as planned, indeed it has hardly needed to be invoked at all. One reason, though, is that conflict over application of the competition laws themselves is unlikely. Rather, the issue at the edge is whether sectoral laws should still be used to promote competition, now that the competition law itself is stronger and more complete. The situation that led to the recent electric power licence reference to the Commission presented the problem, whether "substantial market power" that may not amount to "dominance" should be dealt with through regulations under sectoral licensing authority, or by expansion of competition law concepts, or by a reference and report under the Fair Trading Act. The answer is still unclear, and indeed it is still unclear who is competent to provide that answer.

BOX 5: EXPERIENCE WITH UTILITY REGULATION

A review in 1999 of the UK's considerable experience with introducing competition into heretofore monopolised and regulated industries drew several lessons:

A competitive market structure must be created as soon as possible; the power of dominant incumbents to resist entry was under-estimated. Liberalisation leads to dynamic changes and thus tends to make utility markets look more like ordinary markets over time. Roles and objectives of government, regulators, and companies must be clear and distinct.

"Independent economic regulation on the RPI–X model has generally stood the test of time and works well". Constitutional independence from political lobbying improves decisions. The price-cap method is now accepted, although there is controversy about getting the cap right, to balance the company incentive to productive efficiency against the consumer interest in sharing the benefits. The review concluded that governments and regulators can be "ambitious" about the scope for efficiency savings. There was more fat in the system than had been realised, and companies needed to be disciplined for pocketing the easy savings and then not taking stronger actions.

Experience revealed some problems in the design of regulatory institutions, too. "Regulation frequently became perceived as a clash of personalities", in the media and financial community. The process of reference to the Commission, which was supposed to arbitrate between companies and the regulator, "tended to exacerbate rather than reduce this problem because of the infrequent references to it". Markets became concerned that decisions were inconsistent and unpredictable, increasing "regulatory risk" and hence costs. And the system as originally provided did not assign responsibility for social and environmental goals, which are broader than a technocratic economic regulator's usual remit.

The government announced a "new approach", a package of incremental changes, to the system of sectoral regulation. Some of the highlights:

- Give sectoral regulators a new primary duty "to protect the interests of consumers, wherever possible and appropriate through promoting effective competition".
- Establish "powerful independent consumer councils" as advocates.
- Eliminate the personality element and improve transparency by replacing individual regulators with boards, requiring them to work together on common issues, and requiring more consultation and publication of reasons for decisions.
- Make the government's responsibility for social and environmental goals clearer, by issuing non-binding guidance about these subjects to the independent regulators.
- Focus on regulating "quality" by setting service standards and regulatory powers to enforce compliance with them.
- Increase flexibility, by merging regulators and regimes where markets are merging.

Source: HM Treasury, Competition, Regulation and Energy Team, August 1999: The UK approach to utility regulation

New themes in the approach to regulation and competition policy suggest a deliberate effort to forestall "reform fatigue" after 20 years of fundamental restructuring and to build a broad base of support for the new approach. Regulation based on markets and competition is not presented as an end in itself, but as a means to achieve greater productivity and a "fair deal" for the consuming public. The emphasis on protecting the interests of disadvantaged populations and on social and environmental goals reassures sceptics that market values will not be treated as the only values. The redirection of competition enforcement itself responds implicitly to complaints of consumer groups that in the past the "public interest" test had been applied principally to excuse anti-competitive restraints. OFT, charged with enforcing several important consumer protection statutes as well as the competition laws, is well placed to link these concepts and persuade these constituencies. The synergy is encapsulated in DGFT's mission slogan, "making markets work well for consumers." Following one of the new general themes, OFT has made it a priority to deal with markets and problems that concern the most vulnerable consumers. In June 2001 OFT moved immediately to apply new powers against misleading consumer marketing. The first Competition Act fine targeted monopoly pricing of a pain-killer that is critically important to cancer patients.

Appealing to consumer interests acknowledges, but does not resolve, the tension of accommodating social and distributional goals within a framework designed to promote efficiency. The tension is most acute for the sectoral regulators, who must both ensure observance of the competition rules and make price and service decisions about their sectors. In supporting "universal service" conditions to protect vulnerable populations, they must find a way to achieve the efficiency of eliminating cross-subsidies without eliminating the service that had been subsidised. In fine-tuning and applying the RPI–X method, they must choose some standard for identifying a fair distribution of the gains from competition, decide whether and how much to balance gains in equity against losses in efficiency, and face the implications of those decisions for long-term incentives to invest in the sector. Competition policy analysis suggests a way to clarify, if not answer, some of these questions. In some jurisdictions, decision-makers have confronted the trade-off question directly—should they permit conduct that increases productive efficiency, even though consumers must pay more? A preference for maintaining or increasing the consumers' share of surplus can motivate consistent competition policy (although a preference for maximising total surplus would be equally consistent, of course).

Quantitative cost-benefit analysis supports the competition-markets theme and the motivation to improve productivity and ultimately competitiveness. The draft regulatory impact assessment with the July 2001 White Paper cites economists' estimates of welfare loss from monopolistic behaviour of between 0.5% and 1% of GDP, that is, between £4.5 billion and £9 billion annually. Conversely, other analysts found that the weakness of UK competition policy under the post-war "settlement" had led to lower productivity and growth (Broadberry, 1998). Measures of the loss from anti-competitive practices are always less certain than measures of the cost of enforcement, and the net benefit depends on comparing the two (as well as other difficult-to-measure costs and benefits, of deterrence and perhaps over-deterrence). The overall budgets for the enforcement bodies provide a rough estimate of direct costs. Even more detail is available from the Commission's annual reports, which publish the costs of each inquiry. For example, the milk and new cars inquiries each cost about £1.5 million, and the impulse ice cream inquiry, about £1 million (Competition Commission, 2000). But the reports do not net those figures against the impact of the restraints or the benefit of remedial action. OFT is reportedly trying to develop a methodology to measure the net loss to consumers from competition violations and thus the likely benefit from stronger enforcement (OECD, 2000, p. 84). The challenge in any such exercise is to identify and measure not only the direct costs from the particular conduct, but also the systemic benefits of deterrence, from the anti-competitive mergers that are not proposed and the cartels that do not happen.

Policy options for consideration

The pace and magnitude of the announcement of initiatives complicates the task of offering advice. Government announcements and White Papers already provide a detailed blueprint for the next round of competition policy reforms. Most of the items discussed below are already detailed in these proposals. The first items listed are the most important: to strengthen institutional independence, update the processes for dealing with mergers and monopolies, and enlist OFT and the Commission in the process of assessing the competitive impact of other laws and regulations.

BOX 6: THE GOVERNMENT'S 2001 COMPETITION MISSION STATEMENT

The Government is committed to promoting competition in the economy to improve the UK's productivity performance and to make markets work well for consumers.

The Government will:

- Respect the absolute independence of our competition authorities.
- Not interfere in cases which are under investigation.
- Adopt remedies recommended by the Competition Commission except where there are exceptional public interest grounds not to do so—in such cases, Government will explain its reasoning fully.
- Ensure that the legal framework allows our competition authorities to address all forms of anti-competitive behaviour.
- Explain the importance of competition policy to the public, businesses and the media.

- Respond positively where the OFT, the Competition Commission or a sector regulator believes that regulations significantly undermine competition—publishing within 90 days a reasoned analysis of how Government intends to proceed.
- Appoint only those with expertise relevant to competition to the Competition Commission and only those with expertise relevant to competition or consumer protection to the OFT Board.
- Ensure that our competition authorities are properly resourced to meet their objectives.

Source: DTI, 2001

- ***Confirm OFT and Commission independence.***

Assuring the independence of the decision-makers should be a high priority. The recent DTI-sponsored peer-review study found that a perceived lack of independence was considered a significant weakness in the UK competition policy structure. The government's intentions to change this situation are undeniable, and the amount of ink spilled over defining how much discretion will be retained makes that discretion seem more important than it will probably be in practice. The government's proposal to require mission statements and annual reports, to demonstrate that the institutions are accountable to the public and parliament, confirms what is already the practice. The proposal to appoint only people with expertise relevant to competition to the Commission and to the OFT Board will reduce the appearance that decisions represent the outcome of negotiations among interest group representatives. Perhaps unexpectedly, the likely increase in reliance on judicial process through private actions and recourse to the Appeal Tribunals will also reinforce independence, at least from the government. One reason to transform DGFT into a board is probably to reduce the cause for concern about arbitrariness. But despite that assurance, disappointed parties are likely to resort increasingly to the Appeal Tribunals, particularly because of the opportunity to reopen the record and reach a new decision there—at least, until the Appeal Tribunals decisions show a strong presumption in favour of the OFT decision.

- ***Reform the merger process.***

The merger review process has been due for reform for a long time. A principal goal of the merger reform package is also to establish decision-making independence. Replacing the "public interest" standard with a competition-based test will make that possible and credible. The test chosen, "substantial lessening of competition" rather than one based on the concept of dominance, departs from the general recent practice of adopting EU substantive concepts; however, it will fit better with the UK's historical attention to "complex monopoly," which can be particularly important in some merger settings. The reservation of power to intervene for defined public interest reasons is understandable. After that standard has been in use for 50 years, it would be unrealistic to abandon it totally. On the other hand, some of the grounds that OFT and the Commission may consider in addition to effects on competition are confusing. The notion that an anti-competitive merger might nonetheless be permitted because it will lead to lower prices and better products suggests there is some ambivalence in the conception of "competition" used in merger analysis. Perhaps the intention is to justify the imposition of remedies or conditions to ensure lower prices or better products, while permitting an otherwise anti-competitive merger, although eligible consumer benefits must flow from the merger itself, and not rely on the remedies to come about. Provisions to strengthen information-gathering powers, by permitting authorities to suspend deadlines until firms comply with information requests and providing for sanctions for non-compliance with Commission requests, should make the process more efficient. Providing for a wider range of permitted remedies, such as compulsory licensing, will give firms and enforcers more options to meet actual conditions. But the UK intends to continue relying on voluntary notification and post-merger investigation, believing that this method gives businesses more flexibility (if they are prepared to accept the risk of subsequent investigation), rather than mandatory pre-notification for significant transactions, which is more efficient for regulators but more costly for business. The proposal to permit OFT to seek interim orders, to prevent irreversible changes pending the completion of an investigation, will mitigate some of the weaknesses of that method, notably the likely risk that problems would have to be addressed through less effective behavioural remedies.

- ***Modernise the "monopoly" process.***

The Commission's process for dealing with "monopoly" needs updating too, and the government's proposals parallel in some respects the proposals about mergers. Providing a general, formal process for open-ended study of market conditions and flexible, prospective remedies for problems found is a unique and valuable tool. Because it provides a degree of flexibility that is not found in the standard EU tool kit, the UK has decided to retain and improve it, at least until the Ch. II prohibition has developed similar adaptability. But these studies would no longer depend on some primitive concept of "monopoly." Rather, "market" references to the Commission would be made by the OFT (or a sectoral regulator with concurrent power) where there are reasonable grounds to suspect that competition in an market is being prevented, restricted, or distorted by aspects of market structure or by the conduct of firms or their customers, yet there is no obvious breach of the Competition Act. The Commission would both investigate the issues and, if appropriate, develop the remedies. The process would not usually involve ministerial action, although a minister might intervene in exceptional circumstances where he considers that the action proposed by the Commission may have an effect on national security or other public interest considerations (which would be specified by statutory instrument). Here too, the intention is to empower the independent decision-makers, but it will be difficult, and perhaps impossible, to abandon completely the possibility of political-level intervention.

- ***Authorise stronger advocacy roles for OFT and Commission.***

Underlining the importance of identifying anti-competitive constraints from all sources, the first specific item in the White Paper's listing of proposals is to give OFT clear legal duties to promote competition generally. OFT and the Commission will be encouraged to examine the competitive impact of existing regulations. More importantly, the government has committed to making a public response to their findings within 90 days. The balance of policies may call for retaining constraints on competition, but the government has promised to explain how it reaches that balance. Giving OFT an advocacy role is overdue; the promise to respond publicly to its findings should make that new role more effective. (In February 2002, the Regulatory Impact Unit and OFT jointly launched guidance to policy makers across Government on how to assess the impact that their proposed policies and legislation will have on competition in the market place. They will be required to carry out a competition assessment as part of their RIA before policies are implemented). This new role should be integrated into a broader process of examining whether the many changes and reforms of the last 20 years have achieved their goals.

- ***Clarify relative roles of regulatory statutes and general competition law.***

The processes that invoke the Commission's powers provide a natural and appropriate avenue for avoiding or resolving uncertainties about the relative scope of sectoral laws and competition policies. One problematic way to combine policy approaches, simply incorporating the competition law into licence terms, should no longer be a temptation. Enforcing the law by enforcing licence conditions looks attractively efficient, but it could evade the means provided for controlling administrative abuse and ensuring policy consistency. Now that the competition law has become stronger and the regulators have the power to apply it, employing their presumably superior knowledge of the industry, the need for any special sectoral competition-policy regime is unclear. The regulators' elaboration of guidelines for applying the Competition Act 1998 show how its general terms can be applied to the sectors' particular conditions. For the issues that seem to fall into the cracks, a "market reference" to the Commission, enlisting the experts on its utilities panel, may be the optimal approach. Not only could it resolve the sector's issue, but it could do so in a way that enriched the development of general competition policy. The recent controversy about strategic conduct in the electric power system illustrates this. It was argued that conventional competition law doctrines would not permit finding "dominance" because the usual market share concepts were too primitive. But a better response could be to develop more flexible concepts of market definition and competitive effect to be applied generally.

- ***Reduce the scope of exclusions.***

A significant category of exclusions from the Competition Act is for the rules of some professions. Following the OFT's report on continued competition problems in that area, the government has appropriately promised to eliminate the special schedule of exclusions for the rules of professional organisations. Their powers over entry and over practitioners can be used to prevent efficient entry and competition. Exemption would still be possible where there really are benefits in particular settings, but the burden would be on the industry to demonstrate them.

- ***Provide the right resources for the new missions, especially at OFT.***

Steps have already been taken to strengthen budget and staff resources. The funding level increased more than 50% between 1997 and 2002. The latest proposals would go further. Recognising that establishing a new "culture" and adding new staff take time, one proposal is to use short-term contracts to bring some new people in now. This proposal is part of a hopeful endorsement of the "revolving door" as an inducement and career path. Flexibility to offer higher pay is being considered, to attract the right kind of experts. The OFT's new Markets and Policy Initiatives Division appears to be another inducement to bring in talented experts to work on interesting issues. This new division will be committed to doing 5 industry studies a year, as well as responding to the super-complaints, and doing 2 studies a year about regulation problems. There may be some risk that, with all the high-priority matters in this division, it may siphon off talent and undermine the priority of stronger enforcement.

- ***Encourage sharing information with foreign competition authorities.***

Many modern competition problems are international and global in scale, particularly cartels and major mergers. The government intends to enact legislation to authorise wider co-operation with other enforcement agencies in both civil and criminal settings (except merger filings). The Protection of Trading Interests Act is not mentioned in the latest proposals; it will probably be kept in reserve, unused.

- ***Widen the scope for third-party access and redress.***

Several measures are proposed to provide avenues for parties to complain and obtain relief. Providing real avenues for private relief is not just a supplement to the public enforcers' resources. It can also be an important means of ensuring the independence of the enforcement institutions, which can be embarrassed if a private plaintiff prevails in a matter that the enforcers refused to pursue. Provisions already in place have not been used much, but that disuse may reflect their weaknesses, rather than the lack of any need or demand for them. Most interesting and promising is the proposal to permit private actions to be heard by the Appeal Tribunals. At one time, OFT proposed a kind of "super-complaint" to OFT, which could be filed by consumer groups. These "super-complaints" could not seek enforcement action under the Competition Act, but only a reference to the Commission for study. The Enterprise Bill proposal takes a stronger step toward acknowledging organised consumer-group initiative. The White Paper noted that to create a representative action to collect damages on behalf of large groups of identifiable consumers would depend on solving the problem of dispensing or otherwise making appropriate use of the sums collected. The Enterprise Bill proposal would permit representative bodies to bring damages claims to the Appeal Tribunals, but only on behalf of named and identifiable consumers. The Enterprise Bill would also enable consumer groups to bring so-called "super complaints" to the OFT where there is evidence of market failure. The OFTC would be obliged to inquire and determine whether the complaint merits full investigation.

- ***Maintain focus on horizontal issues.***

From the guidelines and other statements about enforcement intentions, it appears that OFT intends to concentrate its attention on horizontal restraints and abuses, while not wasting time on innocuous or even efficient arrangements in distribution. A well-crafted exclusion maintains the statutory prohibition against the only vertical restraints that could even arguably impair competition in the absence of dominance or a strong horizontal component. Thus it is surprising that one item in the White Paper proposals is to eliminate this exclusion. The reason given is to encourage more private suits. That would indeed be the result, but many of those suits could be unnecessary or even counter-productive. Private competition claims about distribution issues are often formalistic contract disputes dressed up in other clothes. Perhaps the intention is to provide an outlet for firms who believe they are the victims of the greater bargaining power of a large supplier or customer. Providing only single damages is some control against abuse of process. But it would send an unfortunate signal to jettison the exclusion, which is economically sound and represents an efficient application of enforcement resources. Perhaps change could justified to conform the UK exclusion to the EC block exemption, if the concern is maintaining consistency. This would still be a step backwards, in that it would eliminate the issues of abuse and dominance from the typical claim and thus increase the risks for the contracts of firms holding market shares arguably greater than 30%.

- ***Consider individual sanctions for hard-core cartels.***

The most stimulating proposal is to impose criminal sanctions on individuals for cartel violations. Although there is little experience yet to test the deterrent power of the sanctions available under the 1998 Act, the DTI-sponsored peer review suggested that the step would be supported. The threat of personal liability and punishment is a powerful deterrent, if it is credible that a judge would actually impose the sentence. The White Paper shows that substantial thought has already been given to the implications and complications of defining the offence, and the Enterprise Bill proposal refines these ideas further. The alternative of imposing heavy fines against individuals was considered but rejected. Firms would find ways to indemnify their executives; to get their attention and change their conduct, it would be more effective to threaten them with jail. (Another idea in the proposal, firing the board of a company that is found to be in serious violation, might also get the attention of senior executives, but only if they could not exit via golden parachutes). The sanction would be applied to supplement EU sanctions and thus add an important and useful weapon that the EC does not now have. That is, it is contemplated that OFT would go after the individual executives where the EC is taking action against their companies. The proposed offence would extend to participating in hard core horizontal cartels, bid rigging, and market division, but not to vertical agreements. . The proposal would add a non-criminal sanction against individuals, too: a court could disqualify a director from being involved in company management (for up to 15 years) if the director's conduct in relation to a breach of the law makes him unfit to be a director. This is an area where policy is continuing to develop rapidly, in the course of preparing the Enterprise Bill for publication. Adopting a criminal-law approach would not be unprecedented, as several OECD Member countries use criminal processes to impose financial penalties, and some send violators to prison. But it would be a bold—and welcome—move for a country with a reputation for changing policies by increments, for tinkering with details of rules and institutions, searching for a balance or equilibrium among values and interests in a policy process that mirrors the iterative adaptation of markets.

[1] *Dyer's Case* (1414), YB II Henry 5, f. 5, pl. 26.

[2] Mogul SS Co. Ltd. v. McGregor, Gow & co., [1892] AC 25.

[3] Hugh Gaitskell and G. K. Allen, *The Control of Monopoly*.

[4] The name of this entity has changed several times, to "Monopolies Commission" and then to the "Monopolies and Mergers Commission", which was formally abolished and succeeded by the "Competition Commission" in 1998, occupying the same offices, performing most of the same functions, with most of the same members. Unless context requires more precision, they are all referred to here as the "Commission".

[5] The Court comprised three High Court judges, one each from Northern Ireland and Scotland, and as many as 10 lay members. It acted in chambers of three members, one of them being a judge. The structure is closely parallel to that of the Appeal Tribunals of the Competition Commission, created by the 1998 legislation which abolished the Restrictive Trade Practices Court.

[6] The laws repealed included the Restrictive Trade Practices Acts 1976 and 1977, Restrictive Practices Court Act 1976, Resale Prices Act 1976, and §§2-10 of the Competition Act 1980.

[7] Restrictive Trade Practices Act, Resale Prices Act, and Deregulation Act 1994.

[8] Restrictive Practices Court, High Court, and DGFT.

[9] Monopolies and Mergers Act 1965, Fair Trading Act 1973, Competition Act 1980, Companies Act 1989, Deregulation Act 1994.

[10] Telecommunications, 1984; Transport, 1985; Airports, 1986; Financial Services, 1986; Gas, 1986; Companies, 1989; Water, 1989; Electricity, 1989; Broadcasting, 1990; Water Industry, 1991; Railways, 1993; Deregulation and Contracting Out, 1994.

[11] Fair Trading Act 1973, Sec. 84.

[12] Statement by the Secretary of State for Trade and Industry in the Budget Debate in the House of Commons on 7 March 2001, Hansard, columns 458-459, responding to the OFT's release of its study about the professions.

[13] OFT press release, 17 July 2001.

[14] The others are entrepreneurship, education, investment, and public sector efficiency.

[15] The Act says that "statements" are to be followed, but this is interpreted to exclude policy proposals and speeches.

[16] The terms of the statutory prohibition also require that the agreement affect trade in the UK. This echo of the EU prohibition is unlikely to have significance independent of the "effect on competition" test.

[17] OFT Publication 401, *The Chapter I Prohibition* (March 1999).

[18] Under the 1980 Competition Act, a *de minimis* provision excluded companies with turnover under £10 million or market share under 25 per cent of a relevant market in the United Kingdom. And under the

Restrictive Trade Practices Act, a *de minimis* exemption relieved from the notification requirement agreements among parties whose aggregate annual UK turnover was under £20 million when the agreement was entered (unless the agreement was to fix prices).

[19] (Land and Vertical Agreements Exclusion) Order 2000, under section 50 of the Competition Act.

[20] That is, "an agreement between undertakings, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services." The special usage and exclusion "includes provisions contained in such agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods or services by the buyer or its customers." An agreement between a firm and a group of its customers or suppliers would not qualify, because the group would include several firms at the same level of the process. But a firm might benefit from the exclusion even if it operates at both levels itself, if the agreement at issue pertains only to activities at a different stage from the one it is performing with respect to that agreement.

[21] Other reasons for comparatively high prices in the UK include the strong pound, the UK preference for right-hand drive, and the EU block exemption that has permitted distribution restraints since 1984.

[22] OFT, *Guidelines—The Chapter 2 Prohibition*, at 8.

[23] *Guidelines—Market Definition* point out the parallels to the EC's *Draft Notice on the Definition of the Relevant Market for the purpose of Community Law* [1997] 5 CMLR 113 and the US merger guidelines.

[24] *Napp Pharmaceutical Holdings Ltd*., DGFT, No. CA98/2/2001. 30 March 2001.

[25] The abuse is determined at the product level, not the enterprise level. The problem of allocating common costs is avoided by ignoring them, instead identifying abuse by excessive gross margins.

[26] OFT press release, 8 April 1999. The terms of reference were broad, to examine barriers to entry, the effect of land costs, the intensity of price competition, and relationships to suppliers.

[27] Competition Commission, *Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom*, www.competition-commission.org.uk/reports/446super.htm#summary. 10 October 2000.

[28] Monopolies and Mergers Commission, *The supply in Great Britain of raw cows' milk*, 6 July 1999.

[29] Although Milk Marque's members then voted to accept the proposed break-up, it joined the National Farmers' Union in challenging the Commission's findings before the European Court of Justice as inconsistent with the EU's Common Agricultural Policy

[30] There has been only one challenge, to whether the OFT had properly found a "significant part of the UK", and the House of Lords deferred to the OFT to make that determination.

[31] Also, to be sure to cover deals that affect related markets, DTI considered but then rejected adding a provision conferring reference jurisdiction over any transaction involving a firm with a 40% share of supply of any good or service.

[32] Fair Trading Act, Secs. 57-62.

[33] At one time, DTI considered an extreme streamlining, to have OFT and DGFT do both the preliminary investigations and final decisions, on the model of the EC Competition Directorate and Commission. But after a round of consultation, DTI decided it would be best to retain a completely independent decision-maker.

[34] In 1973, the competition bill was added to a consumer protection bill in order to get Parliamentary time for it, and one result was that both functions ended up with DGFT (Wilks, 1999, pp. 157-89).

[35] Announcement, 18 May 2000, on DTI website.

[36] 1948 Board of Trade memo, quoted in Wilks, 1999, p. 93.

[37] In cases referred under the terms of the Broadcasting Act, references may be made by the Independent Television Commission or the Channel 3 licensees.

[38] Licence review powers vary slightly among sectors. For electricity and gas, the Utility Act gives the Commission a veto over the OFGEM's decision about how to implement the Commission's findings; in water, the Commission's review in effect determines the price; in airports, the statute requires a reference and report every five years for each airport.

[39] Harris Research Centre for the Central office of Information, Report on Perceptions o the Monopolies and Mergers Commission (unpublished, March 1988), discussed in (Wilks, 1999, pp. 58-59).

[40] Under the now-superseded process, DGFT, after preliminary investigation, could recommend that DTI accept undertakings from the firms. Where no acceptable undertakings were given, the practice could be referred to the Commission to decide whether it was anti-competitive and, if so, whether it operated against the public interest. Unlike a monopoly reference, this kind of reference (known as a competition reference) would specify the company involved, the goods or services to which it related and the practice under investigation. The Commission could then make recommendations to the Secretary of State who, with the advice of DGFT, could either make an order to amend or end the practice or ask DGFT to obtain undertakings to that effect. [OFT website description]

[41] Its notification requirement was also suspended (except for price-fixing agreements and modifications to previously filed agreements) during the transition period before the new Act became effective.

[42] In England and Wales; the Court of Session in Scotland, and the Court of Appeal in Northern Ireland.

[43] Protection of Trading Interests Act 1980; *see* Waller *et al*l (1997), *Antitrust & American Business Abroad*, Third Ed., §4.17.

[44] The RTPA did not apply "to an agreement which is expressly authorised by an enactment, or by any scheme, order or other instrument made under an enactment" (RTPA Schedule 3, ¶1(1)).

[45] Some agreements were "grandfathered": "agreements with directions" under sec. 21(2) of the Restrictive Trade Practices Act are permanently excluded, unless materially varied. These agreements—about 6000 of them—would typically have been considered too inconsequential to require investigation by the Restrictive Practices court. The OFT does not have to look at them and the parties do not have to notify them. Schedule 3, Competition Act 1998).

[46] OFT Guidance about Land Agreements, OFT publication 420.

[47] Stephen Littlechild, "Regulation of British Telecommunications' Profitability, DTI (February 1983). The author of this paper later served as a member of the Commission on 14 inquiries, including pioneering studies of airports and gas (Wilks, 1999, p. 269).

[48] The goals of the Concurrency Working Party (set out in an annex to the Terms of Reference in its revised guideline, *Concurrent Application to Regulated Industries*) are (from (OFT, 2001*a*)):

To facilitate, to the greatest extent possible, a consistent approach by the regulators and the Director General of Fair Trading to the exercise of their functions under the Act,

To consider the practical working arrangements between them,

To provide a vehicle for the discussion of matters of common interest, and the sharing of information where appropriate and where legally permitted, and

To co-ordinate the provision of advice and information on the Act to the public.

[49] The Government's published response to the BRTF recommendations is available at www.cabinet-office.gov.uk/regulation/taskforce/2001/regulatorsresponse.

[50] Detail and full discussion is in a separate chapter of this study.

[51] It would have lapsed anyway on 31 July 2001. OFTEL Guidelines for Application of Competition Act, OFT417.

[52] OFTEL Strategy Statement: Achieving the Best Deal for Telecoms Consumers, Para. 2.17 (January 2000)

[53] Detail and full discussion is in a separate chapter of this study.

[54] Another reference and report, in 1996, was an occasion for the Commission to develop and explain the principles of RPI–x ratemaking.

[55] Other, private water suppliers are subject to environmental but not economic regulation.

[56] This principle is also recognised in the sectoral legislation, which provides that the regulator's ability "to make comparisons between different water companies should not be prejudiced." (Water Industry Act, 1991, Sec. 34).

[57] European Commission, Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector Framework, relevant markets and principles, Notice 98/C265/02.

[58] Speech by Tom Winsor, Rail Regulator, to Institute of Economic Affairs conference, The Future of UK Rail, "Positively regulating the railway industry", 26 June 2001.

[59] The Cruickshank report also set out a proposed "typology" of the relationship between competition regimes and regulatory regimes that presumably do or must require anti-competitive conduct to achieve their economically legitimate purposes: *integrated* (one organisation has both functions), *hierarchical* (regulation and competition are assigned to different bodies, with one of them having the dominant role), *arbitrated* (same, but a third party such as a court resolves conflicts), and *"no problem"* (no provision to resolve conflicts, on the assumption that they will never arise). The two intermediate options are recommended for any situation in which the relationship and priority is not obvious, and each will require occasional if not continuous oversight from the competition authority to ensure that the application of regulation does not stray. The report recommended the "integrated" model for the financial sector. That is, competition responsibility would be internalised within the sectoral regulator for finance, rather than shared among the regulator, OFT, and the Commission or a court or ministry, in order to assign responsibility clearly for drawing the regulation-competition balance. The argument advanced for this recommendation could apply to nearly any sectoral regulation situation. It has not, evidently, been found persuasive outside of the finance sector.

[60] Detail and full discussion is in a separate chapter of this study.

[61] OFT has other responsibilities to keep track of the anti-competitive potential of professional rules. Under the Courts and Legal Services Act 1990 and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, the DGFT is required to look, from a competition viewpoint, at the rules of bodies seeking or holding rights of audience in the courts or the right to conduct litigation, and to advise the Lord Chancellor or Secretary of State for Scotland as to the effect of such rules upon competition. The Companies Act 1989 requires the DGFT to keep under review the rules and guidance issued by bodies regulating auditors. If he finds any which are significantly anti-competitive in any respect, he reports this to the Secretary of State, who can then impose changes.

[62] Under the Restrictive Trade Practices Act, there was a similar list, in Schedule 1, of "designated" (mostly professional) services excluded from the registration requirement: legal (barristers, advocates, solicitors), medical (and surgical), dental, ophthalmic, veterinary, nursing, midwives and other medical paraprofessionals, architects, accounting, auditing, "insolvency services," patent agents, parliamentary agents, surveyors, engineers, teachers, professors, and ministers.

[63]In 1999, a Treasury study of UK competition policy admitted that the institutional framework had "neither set the right environment for competition, nor been conducive to rigorous enforcement of competition." It found that the substantive standard, the "public interest," was unfocussed, as the primary objective of promoting efficiency was mixed up with other objectives such as regional development and domestic ownership. The framework for application was ineffective, as institutions duplicated each other yet lacked enforcement power, while rules were unduly technical and burdensome, for businesses and authorities alike. And statutes and regulations often were factors inhibiting market competition. The Competition Act 1998 had addressed many of these problems, by setting clear prohibitions, increasing OFT's enforcement powers, adding resources, and targeting efforts. But mergers policy remained to be reformed, the intention being to give the competition authorities "a large degree of independence" from DTI, and make them primarily responsible for applying a new competition-based test. This apparent independence would improve predictability and confidence: "Whilst, in reality, the instances of the Secretary of State disagreeing with the recommendations of the competition authorities are very low as a proportion of the total number of cases, these have tended to be high profile cases. This may have disproportionately affected business perceptions of the regime, so the proposed reforms should also generate economic benefits by improving the perceived predictability, as well as the clarity and efficiency of decision making." Measures being considered at that time to address the competition-dampening effects of other regulation (often appearing as barriers to entry, particularly to entry by smaller firms), included giving regulators a competition goal so they could try to strike a balance themselves, and making an independent body responsible for overseeing how well the other regulators' policies and decisions balance those objectives (HM Treasury, Competition, Regulation and Energy Team, August 1999: The UK approach to competition policy).

[64] And the DGFT is a published authority on regulatory reform and competition: Vickers, John, *Regulatory Reform–Economic Analysis and British Experience*, MIT Press, Cambridge, Massachusetts, 1994 (with Mark Armstrong and Simon Cowan); Vickers, John, *Privatisation and the Natural Monopolies*, Public Policy Centre, London, 1985 (with George Yarrow).

SOURCES

Bernhard, R. (1960), "English Law and American Law on Monopolies and Restraints of Trade", *Journal of Law and Economics*, Vol. 3, p. 137. October.

Bloom, Margaret (2000), *The New UK Competition Act.*

Broadberry, S. N. and N. Craft (1998), "The post-war settlement: not such a good bargain after all," *Business History*, 40:2. April.

Government of the United Kingdom (2000), Competition Commission, *Annual Review and Accounts 1999-2000*.

Craig, P. (1987), "The Monopolies and Mergers Commission," in *Regulation and Public Law*, R. Baldwin and C. McCrudden, eds., London.

Cruickshank, Don (1999), *Review of Banking Services in the U.K. (Interim)*, (22 July 1999)

Government of the United Kingdom (2001), Department of Trade and Industry, *Productivity and Enterprise: A World-Class Competition Regime*, July.

OECD Committee on Competition Law and Policy (1996), *Roundtable on Abuse of Dominance and Monopolisationˆ,* Note by the United Kingdom, Paris [OECD/GD(96)131].

OECD Committee on Competition Law and Policy (1998), *Roundtable on Railways: Structure, Regulation and Competition Policy*, Note by the United Kingdom, February, Paris [DAFFE/CLP(98)1].

OECD Committee on Competition Law and Policy (1998*b*), *Roundtable: Competition and Related Regulation Issues in the Insurance Industry,* Note by the United Kingdom, December, Paris [DAFFE/CLP(98)20].

OECD Committee on Competition Law and Policy (1999), *Annual Report on Competition Policy Developments in the United Kingdom,* Paris.

OECD Committee on Competition Law and Policy (1999*b*), *Buying Power of Multiproduct Retailers,* Note by the UK, July, Paris [DAFFE/CLP/(99)21].

OECD (2000), *Economic Surveys: United Kingdom*, June, Paris.

Government of the United Kingdom, Office of Fair Trading, (2001), *Concurrent Application to Regulated Industries*, January.

Government of the United Kingdom, Office of Fair Trading (2001*a*), Communication with OECD Secretariat.

Government of the United Kingdom, Office of Fair Trading (2001*b*), *Competition in Professions*, March.

PriceWaterhouseCoopers (2001), *Peer Review of the UK Competition Policy Regime: Final Report to the Department of Trade and Industry*, April.

Sharpe, Tom (2000), "Concurrency or Convergence? Competition and Regulation under the Competition Act 1998", *Beesley Lectures on Regulation*, Institute for Economic Affairs, 28 November, London.

Utton, Michael (2000), "Going European: Britain's new competition law," *Antitrust Bulletin*, vol. 45:2, p. 531.

Whish, Richard (1985), *Competition Law* (London).

Whish, Richard (1993), *Competition Law*, 3d ed. London.

Wilks, Stephen, "The Prolonged Reform of United Kingdom Competition Policy", in *Comparative Competition Policy*, G. Bruce Doern and Stephen Wilks, eds., pp. 139-184, Oxford.

Wilks, Stephen (1999), *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission*, Manchester.

Williamson, Brian (2001), "UK 'Incentive' Regulation: International Best Practice?", in *Regulatory Review 2001/2001*, ed. Peter Vass, p. 271. Bath.

Page: 49

[MW1]From June 2001 post-election plans; carefully vetted language, not really committing to anything other than the formal end of the exclusion.