

Going European : Britain's New Competition Law

by MICHAEL UTTON*

I Introduction

Exactly fifty years after the passage of the first law of modern times dealing explicitly with competition or antitrust policy in Britain, a new law, fundamentally changing the basis of much of British policy, was passed in 1998. The *Competition Act, 1998* has as its main purpose the alignment of British law with that of the European Union. European law applies to all cases involving inter-member trade within the Union while the new British law applies to trade within the UK.

The need for major reform had long been recognised and the previous Conservative Government had introduced a number of discussion papers and a draft bill.¹ Within a year of taking office the incoming Labour Government published a revised bill which included some important revisions to the original proposals. The new Act passed into law in November 1998 and the major provisions become effective in March 2000.²

The main purpose of this paper is to discuss these important changes to British law. In section II we discuss the new provisions for dealing with restrictive agreements (collusion) and in section III those dealing with abuse of market dominance. Those sections of the previous legislation which are retained are considered in section IV. Conclusions are given in section V.

* Professor of Economics, University of Reading, UK.

¹ For example *Abuse of Market Power*, Cmnd 2100, HMSO, London, 1992, *Tackling Cartels and the Abuse of Market Power : A Consultation Document*, HMSO, London, March 1996. *Draft Bill* with the same title was published in August, 1996.

II Restrictive Agreements : Competition Act, Chapter 1

The major changes are set out in Chapters 1 and 2 of the Act dealing respectively, with Restrictive Agreements and Abuse of a Dominant Position. Both closely follow the substance and terminology of Articles 85 and 86 of the Treaty of Rome. Thus in Chapter 1, agreements or concerted practices between undertakings which may affect trade within the United Kingdom and have as their object or effect the prevention, restriction or distortion of competition are prohibited, unless they are exempt (paragraph 2). A list of the types of agreements to which the Act *particularly* applies is then given, although it is clear that other forms of agreement might also be prohibited. Agreements are prohibited which

- ‘(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of such contracts’ (ibid.)

All prohibited agreements are automatically void.

These provisions replicate almost exactly Article 85 sections (1) and (2). The main difference is the reference to trade within in UK. Agreements are thus to be judged on the basis of their *effects* on competition compared to their precise *form* which was essentially the position under the previous law. All of the restrictions listed are those associated with typical

² *Competition Act, 1998, chapter 41, HMSO, London, 1998.*

cartel behaviour, either relating directly to price fixing and market sharing (points (a) - (c) above) or indirectly to assist the maintenance of the restriction (points (d) and (e)).

Under the terms of the Act the official in charge of British policy, the Director General of Fair Trading (DGFT) has to publish Guidelines on how he expects to proceed.³ It is clear that, following European case law, the prohibition applies where there is an *appreciable* effect on competition. His interpretation is likely to be that where participants to an agreement jointly account for less than 25 per cent of the market, the effect on competition will not be 'appreciable', although where an agreement specifically fixes prices or market shares, the effect may be 'appreciable' even though the combined share falls below the 25 per cent threshold (*Guidelines – The Major Provisions*, p 5).

Article 85 section (3) of the Treaty of Rome provides for exemptions from the prohibition. Almost identical provisions are included in the Competition Act. Participants in an agreement may apply for exemption on the ground that it:

- '(a) contributes to;
 - (i) improving production or distribution, or
 - (ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits; but
- (b) does not;
 - (i) impose on undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

³ The Guidelines have been published by the DGFT's office as a series of separate papers, each with its own title. They are individually cited in the text below using the separate titles.

- (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question' (paragraph 9).

The key features are thus that any benefits claimed for an agreement must be shared between producers and consumers, and in addition that it does not involve the suppression of competition. Exemption can operate at three levels: individual, block and parallel. First, a *particular* agreement operated by a group of firms in the United Kingdom may be granted exemption if it meets the above criteria. Secondly, a whole class of agreements conforming to both of the above criteria and to a standard set of conditions may be given exemption. (For example, the most familiar of those exempted under Article 85 (3) relate to research and development, and to specialisation of product ranges. Others involve vertical agreements and deal with specific products, such as petrol, beer, and motor vehicles.) Thirdly, parallel exemption applies where an agreement operates only in the United Kingdom but whose terms conform with agreements given a block exemption under Article 85 (3).

Firms seeking exemption can proceed in either of two ways. They can apply to the DGFT for informal *guidance* on whether or not their restriction is likely to be granted exemption. Notification of the agreement will give provisional immunity from financial penalty for participants whether or not the final decision of the DGFT is favourable to the participants. However, the *guidance* procedure remains informal and confidential without any consultation with interested third parties. Alternatively, firms can apply to the DGFT for a *decision*. In this case the procedure is much more thorough and the views sought of interested third parties. A favourable *decision* gives exemption from the Chapter I prohibition, with the additional benefit of contractual certainty.

This approach to restrictive agreements applies not only to formal arrangements, overt collusion, but also covers 'concerted practices' or tacit collusion. The meaning of concerted

practices has to be gleaned from European case law. The key judgement was in the *Dyestuffs* case where the Court defined a concerted practice as a ‘form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the importance and number of the undertakings, as well as the size and importance of the said market.’⁴

On the other hand, in a subsequent case, the Court recognised that firms retained the right ‘to adapt themselves intelligently to the existing and anticipated conduct of their competitors’.⁵ The two judgements neatly encapsulate the policy dilemma. In markets shared by a few large firms it may be extremely difficult to distinguish intelligent pursuit of the individual firm’s best interest and tacit assent to what amounts to a co-ordinated, joint policy. Economic analysis indicates that firms optimising their position independently on the assumption that their rivals are doing likewise can consistently earn abnormally high profits, *ceteris paribus*. It also tells us that if they go further and actually communicate their intentions to each other and thus co-ordinate their behaviour, the joint return will be even higher. However, it is one thing to distinguish the two cases in theory but quite another to substantiate the difference in practice. The difficulties that may arise in applying the provisions of the Act to tacit collusion are dealt with in more detail in section III below.

Perhaps the most important change in the new Act and one which critics had long recommended, is the provision for penalties to be levied against firms found to have been

⁴ ICI v Commission Case 48/69 [1972] ECR 619, [1972] CMRL 557 paragraph 64.

⁵ OJ [1985] L85/1, 3CMLR 474, cases C89/85 etc. A Ahlstrom Oy v Commission [1993] 4 CMLR 407.

operating a prohibited agreement. Under the new Act the DGFT can order a fine up to a maximum of 10 per cent of the offending firms' UK turnover. Hitherto firms found to have been participating in an unregistered and therefore illegal agreement merely had to desist. There was no financial penalty. If subsequently they were found to have ignored the order they could be fined for contempt but such cases were relatively rare and the sanctions against running what could be a very profitable cartel were thus practically non-existent. Another innovation of the Act is the possibility for third parties to pursue claims for damages in the courts as well as to seek interim relief from the effects of a prohibited agreement.

In addition to the introduction of fines, under the Act the DGFT has dramatically increased powers of investigation. The Director may enter premises, examine documents and remove them, as necessary. Failure to comply with the requests of the DGFT for information can result in fines for the persons involved. Deliberate obstruction of the DGFT's enquiries can result in up to two years imprisonment plus a fine (Chapter III, sections 42 and 43). Before the passage of the new Act the DGFT's powers were extremely limited. The office had no authority to enter premises and seize documents. Members of companies suspected of operating an unregistered agreement were not required to provide information prior to the initiation of proceedings in the Restrictive Practices Court. The DGFT had to rely largely on information from aggrieved companies or that already in the public domain. The preliminary stages of an enquiry, therefore, were severely hampered. The new penalties and powers of investigation both bring British policy into line with that of the European Union.

The DGFT, whose office has been responsible since 1973, inter alia, for maintaining the register of restrictive agreements, following up complaints from competitors or customers, and initiating proceedings in the Restrictive Practices Court, thus receives greatly enhanced powers under the new Act. The Office will prosecute prohibited agreements, determine whether or not an agreement is exempt and set the level of fine against offending companies.

For restrictions operative in the UK its role is therefore similar to that of the European Commission. The Restrictive Practices Court which hitherto has heard cases under the previous legislation will be phased out once the new law becomes fully effective.

At the European level appeals against decisions and size of penalty set by the Commission can be made to the European Court of First Instance. In the UK under the new Act appeals against the decisions of the DGFT may be made to the newly formed Competition Commission. This new body will replace the existing Monopolies and Mergers Commission. It will have a dual role: first as the appeals tribunal for Chapter I (and Chapter II) decisions made by the DGFT, and secondly as an enquiry body responsible for investigations into so-called scale monopolies (where one firm has a market share of at least 25 per cent), complex monopolies (essentially concentrated oligopolies) and mergers. This second role is taken over from the existing authority of the Monopolies and Mergers Commission (MMC). Some possible complications arising from this second role are discussed in section IV below.

While in many respects Chapter I of the Act follows closely the provisions of Article 85 one very important and controversial area is not included in the new British law, whereas it is included in European law. An early case decided by the European Court made it clear that Article 85 covered vertical as well as horizontal restrictions⁶. The original intention was for the new British law also to cover vertical restrictions. Thus in the introductory commentary to the Draft Bill the possible advantages of many vertical restrictions where there is no significant market power in either market, were clearly recognised, and the provision of an exclusion for such restrictions was being considered. However, it was also recognised that there was 'a significant challenge in devising a suitable definition of vertical agreement which is of real practical benefit to business but at the same time avoids unintentionally excluding anti-

⁶ *Establissemments Consten and Grundig v Commission* 56/64, 58/64 [1966] ECR, [1966] CMLR 418.

competitive agreements between competitors' (Draft Bill, 1997, para. 3.9).⁷ In the event the challenge proved too great for the legislators and no exclusion was incorporated in Chapter I of the Act. As things stand, therefore, it will be possible for the Minister to issue an Order under section 50 of the new Act to exempt vertical restrictions from the Chapter I prohibition. The DGFT is to issue Guidelines on how vertical restrictions are to be treated, but these are so far unavailable. Since the European Commission is currently reviewing its own approach to vertical restrictions and since the main purpose of the 1998 Act was to align British law with that of Europe, further progress will probably have to await the introduction of the new European policy.

Overall, however, the new Act has addressed most of the shortcomings identified in the previous approach to restrictive agreements. Restrictions having a substantial effect on competition are prohibited; the DGFT can play a much more pro-active role in investigating and punishing illegal agreements; but those restrictions bringing benefits to both producers and consumers may continue.

III Abuse of a Dominant Position : Competition Act, Chapter II

The guidance offered by economic analysis on the adverse consequences of the most blatant forms of collusion is sufficiently clear-cut for competition policy controls to be relatively non-controversial. The same cannot be said for what, under Article 86 of the Treaty of Rome, is termed 'abuse of a dominant position'. In fact after a lengthy consultation process the previous Conservative government came to the conclusion that incorporation into British law of an Article 86 equivalent would be ill-advised.

⁷ Department of Trade and Industry, *A Prohibition approach to anticompetitive agreements and abuse of a dominant position: a draft Bill*, August 1997, London.

The incoming Labour government had no such inhibitions and incorporated as Chapter II of the new Act a replica of Article 86. Thus under paragraph 18(1) ‘any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom’. There follows a list of examples of conduct which may constitute an abuse:

- ‘(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage;
- (d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts’.

The list which is the same as that in Article 86, is meant to be illustrative rather than exhaustive. It appears to cover many forms of conduct by dominant firms which have been much analysed in the economics literature, including unduly high or low (predatory) prices (a); output restriction and innovation retardation, (b); price discrimination, (c); tying and full line forcing (d).

The investigatory and enforcement procedures are the same as in Chapter I. Investigations will be headed by the DGFT who will be able to impose fines of up to 10 per cent of the UK turnover on firms found guilty of an abuse. Appeals against his decision can be made to the Competition Commission which has the power to confirm or reverse the initial verdict and agree or alter the fine imposed. A similar parallel procedure will be available for firms seeking either informal *guidance* or a more formal *decision* about some aspect of their

proposed market conduct. In sharp contrast with Chapter I provisions, however, 'Provisional immunity from financial penalty does *not* apply to conduct notified under Chapter II (*Guidelines – The Major Provisions*, p10). Thus even if the DGFT's preliminary *guidance* is that certain conduct probably does not infringe the Chapter II prohibition, this would not necessarily prevent the Office from imposing a fine if it subsequently determines that an infringement has taken place after all. Although this may be possible in principle it is difficult to envisage it occurring in practice. The more likely outcome is that the firm or firms in question, found to have violated the prohibition would be ordered to desist, without any fine.

The lack of immunity is clearly related to a major difference between Chapters I and II. In common with Article 86, under Chapter II there is no provision for exemption, even though the conclusions of economic analysis on many aspects of dominant firm behaviour are ambiguous. We return to this point below.

The prohibition in Chapter II implies that the DGFT has to carry out a three stage process, each of which, to judge from the existing case law in the European Union (and from Section II cases in the United States) involves complex and controversial analysis. The first stage is to define the relevant market. To determine whether a firm has abused a dominant position requires knowledge of what it is dominating. The *Guidelines - Market Definition*, issued by the DGFT closely follow recent discussions of this subject by proposing to use the 'hypothetical monopolist' test. 'One way to look at this problem is to consider an undertaking that was the only supplier of the product (or group of products) at the centre of the investigation and use the conceptual framework of whether a *hypothetical monopolist* of these products would maximise its profits by consistently charging higher prices than it would if it faced competition' (p4). The concept is familiar from the *US Merger Guidelines* and more

recently in the European Commission's *Notice on Market Definition*⁸. It incorporates the idea of both demand and supply constraints on market power. Any firm believing itself to have market power and hence attempting to raise price by a significant amount will be frustrated in that attempt if a substantial number of consumers switch to substitute products: in effect the substitutes belong to the same market. Similarly if supplies are substantially increased because producers can readily switch their production in response to the attempted change in relative prices, their capacity belongs in the same market. In addition to this 'product' dimension of market definition, the *Guidelines* also discuss the 'geographic' dimension for which the same 'hypothetical monopolist' test will be used.

In applying these procedures to market definition the DGFT has indicated that the Office will use a variety of information, including replies on substitution possibilities from customers and competitors, evidence on the extent of switching costs and past patterns of price behaviour (*Guidelines - Market Definition*, pp 5-6). There are encouraging signs in the *Guidelines* that some of the pitfalls in market definition revealed in previous cases considered by the European Commission and Court under Article 86, will not be repeated when the new Act comes into operation. The DGFT is unlikely, for example, to conclude that a firm has a dominant position merely because it is the sole producer of its own products. As Fox dryly remarked in her review of the *Hugin* case, under US law 'a company's own brand of product is almost never a market'.⁹ Similarly while recognising that in some markets one group of consumers may be more 'captive' than others, it is also made clear that this alone is

⁸ *Draft Notice on the Definition of the Relevant Market for the purposes of Community Law*, [1997] 5 CMLR 113.

insufficient to allow the inference that the ‘captive’ customers form a distinct market. In the *United Brands* case¹⁰ identification of two groups of ‘captive’ consumers (the very young and the very old) helped persuade the Court that bananas formed a distinct market rather than being part of a wider market for fruit. The *Guidelines* make it clear that the key point is whether such ‘captive’ groups could form the basis of price discrimination by the dominant firm. Under certain circumstances they may then form an important part of a Chapter II prosecution.

The second stage of the process is to determine whether ‘dominance’ is present in the market. In the relevant *Guidelines -The Chapter II Prohibition* the key concept embodied in various European cases is cited: the ability of a firm to act independently of competitive pressures in setting its prices. Thus in *United Brands* the Court defined dominance as ‘a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by *affording it the power to behave to an appreciable extent independently of its competitors, and customers and ultimately of consumers*’.¹¹ A year later exactly the same wording was used in the *Hoffman-La Roche* case.¹² The determination of whether such independence exists in a particular case will involve the consideration of market shares (of the leading and other firms), the condition of entry, as well other factors, such as buyer power and government regulation (*Guidelines - The Chapter II Prohibition*, pp 6-7). It is emphasised that while market share is important it

⁹ E.A. Fox – Abuse of a Dominant Position under the Treaty of Rome – a comparison with US Law, *Annual Proceedings of the Fordham Corporate Law Institute*, Matthew Bender Albany. The case referred to is *Hugin v. The Commission* [1979] 3 CMLR 345.

¹⁰ *United Brands v. EC Commission*, [1978] ECR207, [1978] 1 CMLR 429.

¹¹ *Ibid*, at 486 (italics added)

¹² *Hoffman-La Roche v. Commission* [1979], 3 CMLR 211

is not 'determinative' of dominance. No market share thresholds are specified in the Act but the DGFT has indicated that a firm is unlikely to be regarded as dominant with a share of under 40 per cent unless there are other indicators of dominance (for example, the weak position of all other firms in the market). In addition, the recent history of any *changes* in market shares, especially amongst the leading sellers will also be studied on the ground that 'volatile market shares for the largest undertakings, successful entry and expanding market shares for many small undertakings may indicate that a market is relatively competitive.' (*Guidelines - Assessment of Market Power*, p12).

In all of this the emphasis seems to be correct and the DGFT will be addressing the central issues. Less encouraging, however, is the inclusion in the new British law of the notion of 'joint dominance' which appears in Article 86. Thus paragraph 18 of the new Act refers to 'any conduct on the part of one *or more undertakings* which amounts to an abuse of a dominant position.' (italics added). In the previous section we noted that the Chapter I prohibition applied not only to overt collusion but also to tacit collusion by reference to the European doctrine of 'concerted practices'. According to one authority it had been assumed until a case in 1992, that at the European level the 'joint dominance' provision was unnecessary because such actions were prohibited under Article 85.¹³ However, in the *Italian Flat Glass* case the Court took a different view and confirmed the principle of joint dominance: 'There is nothing, in principle, to prevent two or more independent entities from being, on a specific market, united by such economic links that by virtue of that fact, together they hold a dominant position vis a vis the other operators in the same market.'¹⁴ Accordingly under the Guidelines for the new Act it is envisaged that the concept of 'joint dominance' may

¹³ Whish, R. *Competition Law* (3rd edition, 1993) Butterworths, London, pp 280-2.

¹⁴ *Societa Italiano Vetro Spa v Commission*, Case T-68/69 etc. [1992] II ECR 1403, 5 CMLR 302.

apply to highly concentrated oligopolies (*Guidelines - Assessment of Market Power*, p9). Precedents already exist in European law on the interpretation of 'concerted practices'. It is not clear why these cannot be followed in the case of joint dominance. The DGFT attempts, rather unconvincingly, to distinguish the two categories: 'Where joint dominance exists undertakings might engage in some form of "tacit collusion" - failing to compete on price even though there is no agreement between them. In some cases this type of behaviour may be prohibited under Chapter I as a concerted practice, but if the level of collusion falls short of a concerted practice it might in principle be considered under Chapter II if the undertakings were jointly dominant' (*Guidelines - The Chapter II Prohibition*, p10). There is no indication of how or in what ways the two different types of conduct might be distinguished in practice. Perhaps it would be better if the whole notion of joint dominance were always to give way to that of a concerted practice.

The third stage of the Chapter II proceedings involves the determination of whether an abuse of dominance has occurred. The relevant guidelines make relatively few references (with one exception) to the previous judgements of the European Commission or Court in Article 86 cases (*Guidelines - The Chapter II Prohibition*). Given the controversy surrounding a number of them, this is probably an advantage. In the *Guidelines* the useful distinction is made between exploitative and anti-competitive (exclusionary) behaviour. Examples of behaviour which exploit consumers are excessively high prices or discriminatory prices. In view of the European Court's decision in the *United Brands* case the discussion of price discrimination is especially interesting. In that case the dominant firm's price discrimination which divided the European market along national frontiers was, not surprisingly, declared incompatible with the Common Market. If allowed to persist it would have undermined the central principle of creating a unified market. At the European level this principle overrides any doubts arising from the ambiguous guidance on third degree price

discrimination given by economic analysis. At the purely national level, however, the issue does not arise. The *Guidelines*, therefore, make it clear that price discrimination raises complex issues and is not automatically an abuse. It is recognised that '[t]here are many areas of business where it is a usual and legitimate practice' (*Guidelines - The Chapter II Prohibition*, p11). The DGFT anticipates finding price discrimination an abuse only where there is evidence of excessively high prices or evidence of exclusionary conduct.

The prime example of exclusionary conduct is predation and on this issue the DGFT does draw on two recent cases decided by the European Court.¹⁵ In both cases the Court determined that a price below average variable cost is predatory. Where price is between average variable and average total cost the behaviour *may* be predatory if there is clear additional evidence of *intent* to eliminate a competitor. Accordingly the *Guidelines* indicate that the DGFT will use these rules in his investigations of UK cases, with the corollary that price above average total cost will normally be regarded as non-predatory.

In view of the controversy surrounding the issue of predatory pricing and the enormous literature on the subject, triggered by the famous Areeda-Turner article in 1975, the *Guidelines* are surprisingly clearcut. We will have to wait for the first cases before we can decide whether such boldness is justified.

One reason why the previous government had decided *not* to include an Article 86 equivalent in its competition law reform was the ambiguity surrounding much of the market conduct that such a provision seeks to address, in comparison with straightforward price-fixing by a group of firms. Some price discrimination may extend the market or ensure that some customers continue to be provided with the product; some apparently very low prices

¹⁵ Case C62/86 Akzo Chemie BV v Commission [1993] 5 CMLR 215 and Tetra Pak II [1997] 4 CMLR 662.

by an established firm may reflect a high level of technical efficiency and low costs; some refusals to supply reflect sound commercial judgement rather than an attempt to exclude. In the light of such ambiguities the previous government had decided against the incorporation of a prohibition on 'abuse of a dominant position' and determined instead to retain the MMC which could be used to give a public interest ruling after detailed investigation.

However, once the prohibition had been included, recognition that much apparently exclusionary behaviour by dominant enterprises may frequently improve efficiency, suggests that it would have been consistent to have provided for exemptions, similar to those from Chapter I. As we have mentioned above (p9), however, no such exemptions are possible under the new Act. The European Court has sought to overcome this limitation (embodied in Article 86) by developing the doctrine of *objective justification*. Where the conduct of a dominant firm leads to improvements in efficiency and where the simultaneous restriction of competition is proportionate to that improvement, then it is possible that no abuse will be found.¹⁶ This rather oblique way of allowing dominant firms to defend their market is also to be allowed by the DGFT. Thus in the *Guidelines -The Chapter II Prohibition* he writes 'conduct for which there is an objective justification is not regarded as an abuse even if it does restrict competition.....It will still be necessary for a dominant undertaking to show that the behaviour is proportionate to the justification. *Conduct which stems from the superior efficiency of an undertaking is not an abuse - the purpose of competition policy is to encourage, not to penalise, efficiency*' (p8, italics added). The opening cases under Chapter II are likely to be crucial for establishing the ground rules for such objective justification. The absence of an exemption clause means that each case will have to be argued on its merits

¹⁶ For a discussion of 'objective justification' see Whish – *Competition Law*, 3rd edition, 1993, Butterworths, London.

(there obviously can be no ‘block exemptions’) but given the frequent complexities of firm behaviour, this compromise procedure can be justified on the ground that it helps to minimise the risk of mistakenly permitting unduly restrictive market conduct.

Exactly the same procedure will be followed where a dominant firm imposes vertical restraints. Vertical agreements normally will be covered by the Chapter I provisions but where a dominant firm imposes a vertical restraint a Chapter II prohibition may apply.

However, the DGFT takes great pains in the Guidelines to explain that in many cases an objective justification for a restraint will be accepted, provided that the benefits claimed could not be achieved without producing some anticompetitive effects and that any restriction is proportionate to the gains (*Guidelines - The Chapter II Prohibition*, p17).

Enthusiasm for the reforms embodied in Chapter I of the Act has generally been greater than for those in Chapter II.¹⁷ The nature of the restrictions that Chapter II deals with is, however, inherently more complex than that of Chapter I. What the new Act replaces are the anti-competitive practices provisions of the 1980 Competition Act which have had comparatively little impact.¹⁸ In particular, there were no effective sanctions against dominant firms found to have acted against the public interest. There was therefore little to deter such firms from continuing to use anticompetitive conduct for as long as they were not discovered. The *Guidelines* make it clear that the DGFT is fully aware of recent economic analysis which indicates the circumstances where there are net gains in efficiency from ostensibly restrictive behaviour. Sensible implementation of the *Guidelines* in the first cases considered under the

¹⁷ See, for example, D. Hay – Is More Like Europe Better? : An Economic Evaluation of Recent Changes in UK Competition Policy, in A. Robertson and N. Green (eds.) – *The Europeanisation of UK Competition Law*, Hart Publishing, Oxford, 1999.

new Act should remove much of the uncertainty that firms may feel in the face of the significant changes in UK policy (although many of the firms likely to be involved will probably have had experience of Article 86).

IV The Investigatory Role of the Competition Commission

Although the new Act signifies a very profound departure for UK competition policy not all of the previous procedures have been swept away. The second role of the new Competition Commission (mentioned on p7 above) is to take over from the MMC authority to investigate scale monopolies, complex monopolies and large mergers. The provisions for these enquiries set out in the 1973 Fair Trading Act, are retained. On advice from the DGFT, the Minister can ask the Commission to carry out an enquiry to determine whether or not the circumstances specified are likely to operate against the public interest and to make recommendations. We shall deal briefly with each category in turn.

So called *scale monopolies* refer to situations where one firm has 25 per cent or more of a UK market and where the preliminary evidence of the DGFT suggests that a public interest enquiry into the operation of the whole market is required. The retention of this power is in order to deal with an abuse which is likely to recur due to the structural deficiencies of the market, or where a prior infringement of the prohibition in the 1998 Competition Act has already been proven but where the DGFT believes that there is a real prospect of further abuse by the same company. 'The structural remedies available under the scale monopoly powers may be the only effective means of preventing further abuses' (*Guidelines - The Major Provisions*, p20). Structural remedies are not available under

¹⁸ For an assessment see M.A. Utton, Anticompetitive Practices and the UK Competition Act 1980, *Antitrust Bulletin*, XXXI, 2, 1994.

Chapter II (or under Article 86). There is, therefore, a case for the sparing use of this retained authority of the MMC, especially since there is some evidence that in the recent past structural remedies have been effective in improving market performance.¹⁹

A *complex monopoly* is where a group of companies which are not connected and which together account for at least one quarter of a UK market engage in conduct which has the effect of restricting, distorting or preventing competition. The *Guidelines* explain that '[t]he complex monopoly provisions are retained for activities which are not caught by the Competition Act prohibitions: where, for example, a group of companies all adopt similar practices or engage in parallel behaviour which appears to be anti-competitive, but there is no overt collusion or agreement' (*Guidelines - The Major Provisions*, p20). There is no further comment on how a *complex monopoly* may differ from 'joint dominance' or how the behaviour of either may differ from a 'concerted practice'. One of the objectives of the new Act is to improve the clarity and transparency of competition law. The possible penalties may be harsher but, it was said, at least firms would know in advance where they stood. As far as tacit collusion is concerned this objective has not been met. At this stage firms operating in a concentrated oligopoly may have their market conduct challenged either under Chapter I as a 'concerted practice' or under Chapter II as an outcome of 'joint dominance', or alternatively under the Fair Trading Act as an aspect of a 'complex monopoly'.

A very large omission from the new Act is any change in the policy towards *mergers*. The existing machinery for scrutinising and possibly blocking large mergers is retained. The Competition Commission may be asked by the Minister to report on whether or not a

¹⁹ See in particular R. Clarke, S. Davies, and N. Driffield, *Monopoly Policy in the UK: Assessing the Evidence*, Edward Elgar, Cheltenham, 1998.

proposed merger may operate against the public interest²⁰ Two aspects of existing policy have been repeatedly criticised. First, the Minister, a politician, has complete discretion over the decision to refer a merger proposal to the Competition Commission. In many prominent and controversial cases the process has appeared to become highly politicised and not conducive to cool economic assessment. Secondly, in its deliberations the Competition Commission only has to be satisfied that the proposed merger will not operate *against* the public interest. Those which appear to be neutral in their effect will be allowed to proceed. This has led a number of observers to conclude that the emphasis is wrong in that it allows proponents of mergers which may have a profound effect on the structure of a market, to offer very little in the way of convincing evidence about net gains which might result. They therefore call for a change in the presumption so that the Competition Commission would have to be convinced of the positive benefits of a merger before concluding that it is in the public interest. As a result, it is claimed, the quality of the evidence submitted in support of a proposal would be greatly improved.²¹

Whether or not one agrees with the second criticism, it does appear inconsistent that a major reform of two central aspects of competition policy (collusion and abuse of dominance) can proceed, while leaving a third, mergers, untouched. In principle there is no reason why large mergers (or indeed scale monopolies and complex monopolies) could not be subject to the same investigation and appeal procedures as now embodied in Chapter II of the new Act. In fact the government has now indicated that merger policy is to be reviewed with proposals promised for the second half of 1999.

²⁰ Under current law a merger creating or enhancing a market share of 25 per cent or more or which involves the acquisition of net assets of £70 million or more, may be referred.

²¹ See J.A. Fairburn and J.A. Kay (eds.) *Mergers and Merger Policy*, Oxford University Press.

A final point can be made about the scope of the Act. The provisions discussed in this and the previous sections also apply to the regulated industries. These industries which were privatised during the 1980's and early 1990's include telecommunications, gas, electricity, water and railways, and each operates under licence (or franchise in the case of railways). Each has its own regulator who is responsible for ensuring compliance with the terms of the licence. The DGFT and the regulator are to work concurrently to ensure that the industries also comply with the provisions of the new Act. According to the Guidelines 'a case will be dealt with by whichever of the Director General of Fair Trading or the relevant regulator is better or best placed to do so' (*Guidelines - Concurrent Application to the Regulated Industries*, p4). The allocation of cases will be based on sectoral knowledge, previous contacts between a complainant and the regulator or DGFT and so on. Given the increased volume of work that the operation of the new act is likely to generate for the DGFT's office the likelihood is that most cases involving the regulated industries will be handled by the relevant regulator.

V Conclusions

After a long delay the far reaching new Competition Act was passed on the fiftieth anniversary of the foundation of modern policy in this area. The major thrust of the new law is to align British policy on restrictive agreements and abuse of a dominant position with that of the European Union. For intra-Union trade European law applies, and the new British law strictly applies to trading within the United Kingdom. In future businesses will know that as far as possible the principles upon which British cases are determined are the same as those applied at the European level.

Major weaknesses in previous British policy have been addressed in the new Act. Restrictive agreements are prohibited, and the test to be applied is whether they have the

effect of preventing, distorting or restricting competition. It is the *effect* not the *form* of agreements that is paramount. Companies found to have operated a prohibited agreement will be fined and there are penalties for deliberately obstructing the investigations of a case. The DGFT has substantially increased powers to initiate investigations and his role is likely to become much more pro-active than has been possible in the past.

The efficiency enhancing effects of some kinds of agreements are recognised by the provision for exemptions in certain circumstances, including the possibility of block exemptions for particular classes of standard agreements in some trades or types of activity (e.g. research joint ventures).

Most, if not all, of these reforms have been approved on all sides. More controversial has been the decision to include a prohibition on abuse of a dominant position. Critics have noted the rather weak and less than compelling precedents at the European level, as well as the ambiguous guidance on a number of issues (e.g. price discrimination and predatory pricing) given by economic analysis. In comparison with the certainty of prohibition for well-defined restrictive agreements, there is much less certainty and transparency on what constitutes an abuse of a dominant position. However, the DGFT has issued detailed *Guidelines* on how the complexities of market definition and market power will be approached and it is clear that his staff is well acquainted with modern treatments of these subjects.

One major area of competition policy has been excluded from the new Act. Mergers (as well as scale monopolies and complex monopolies) will continue to be subject to the previous investigatory procedures via the new Competition Commission (replacing the MMC). The two major criticisms of merger policy, therefore, have not been addressed: merger enquiries are subject to too much political discretion, and the neutral presumption weakens the quality of the data submitted and hence the ultimate analysis. The present government, however, is reviewing the situation and has indicated that it is prepared for

reform. Now that the new procedures under the 1998 Act are in place, reform of merger policy should be eased. Large mergers thought to raise serious competition issues could be subject to the same Chapter II procedures. The DGFT would examine the case, and decide on the action to be taken. Appeals against his decision could be made to the Competition Commission.