SEMINAR, ON THE LAWS OF FAIR TRADING
Guarujá, State of Sao Paulo, 4-6 May 1995

THE BRITISH EXPERIENCE REGARDING THE DEFENCE OF COMPETITION

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It is an honour to be invited to this Seminar to share with you some of our experience in the United Kingdom in the field of competition policy. That experience, which now extends over nearly 50 years, has been forged in a well developed market economy. I am very conscious that your own situation here in Brazil is very different as are your laws, institutions and traditions. Nevertheless I see that there is a growing conviction here that enterprise flourishes best when business is subject to the disciplines of competitive market forces rather than to the control and regulation of the state. The United Kingdom has led the way in recent years in the privatisation of state owned enterprises beginning with airlines and telecommunications and later extending to all the public utilities, gas, water and electricity, and to most of public transport. Few of these could have been described as a reasonably competitive industry. In many the privatised enterprises had a dominant position - even a natural monopoly in some instances - and part of the privatisation process was to construct a special regulatory regime for several of the industries over and above the general competition law.

However, most of my remarks will be about the application of that general law, in which the Office of Fair Trading has a pivotal rôle. I have organised my observations on our experience under three headings, cartels, dominant firms and oligopolies, and merger control. In all these areas there is currently debate in the United Kingdom about the case for reform of the law and I will touch upon some of these arguments in the hope that they may be of interest here. I shall have to provide some description of what is in fact a rather complex system of law and administration but I will not attempt in this paper to draw comparisons at each stage with the Brazilian law.

Cartels

The first requirement in any competition law is an effective law on cartels, that is agreements to fix prices or to share markets. Other than in the most exceptional circumstances, cartels can have no redeeming features. They invariably reduce efficiency in the cartelised industry and slow the pace of innovation. They raise prices to customers. That is obvious enough. But it is often said that cartels contain the seeds of their own destruction because of the tensions and compromises involved in reaching agreement, and the temptations then to cheat by shading the cartel price in some way. There is some truth in this, but that is not to say that a law against cartels is unnecessary. Cartels are damaging whilever they last; and in some circumstances they can persist for a long time if not detected by the authorities.

As an example, ready-mixed concrete is a sector in which cartels have been uncovered in many countries including the United Kingdom. The reasons are not hard to fathom. One supplier's concrete will be identical with another's, and customers will want to buy at the lowest price, on large projects by competitive tender. Because the product can only be transported a short distance, it is easy for the suppliers to identify all the likely bidders for a particular contract. The way is then open for them to organise which one of their number will submit the bid that will win each tender. Bid rigging may not always be so easy to organise, but it is a threat to competitive tendering for many materials and services where the market is essentially local.

A potentially potent threat to any cartel may be the expansion of international trade and the increasing impact on the domestic market of international competition. It may be difficult to induce foreign suppliers, where they can be identified, to join `the club' and, in elevating the price, the cartel will make the market that much more attractive to imports. One of the benefits of the lowering of barriers to trade and improved market access is the promotion of more competitive domestic markets. And that can in turn be beneficial to a country's prospects. Our experience in Britain in the post-war period is that the protection of domestic industries from competition will be damaging not just to consumers but, in the long run, to the international competitiveness of the industry.

Experience shows that it is possible, however, to organise cartels on an international basis. Such recent European Commission cartel cases as cement and cartonboard illustrate this. The cartonboard cartel involved no fewer than 19 firms from 10 different countries. This illustrates the strong temptation for businessmen to substitute cooperation for competition even across national boundaries. It should be a priority of competition authorities to stop the collusive forms of cooperation, while permitting those arrangements which could be beneficial, for example agreements to cooperate in R&D or to establish technical standards.

Unfortunately the United Kingdom law relating to cartels (the Restrictive Trade Practices Act 1976) is weak. The law requires details of restrictive agreements to be notified to the Office of Fair Trading (OFT) for inclusion in a public register. If the restrictions in an agreement are insignificant the OFT can permit the agreement to proceed. If the effects of the restrictions on competition are significant (as those of a cartel surely would be) then it is the duty of the Director General of Fair Trading (DGFT) to refer the agreement to the Restrictive Practices Court (a branch of the High Court). The law presumes that the restrictions are against the public interest but the parties may endeavour to convince the Court to the contrary. Should they fail, the restrictions will be struck down and a Court Order made (or undertaking from the parties sought) prohibiting the parties from operating the agreement.

There is no penalty for failing to notify the OFT of an agreement and no financial penalty can be imposed by the Court should restrictions be found to be contrary to the public interest. Moreover the OFT has severely limited powers with which to follow up suspicions - invariably based on information from a `whistleblower' - of a secret cartel.

The Government has proposed to reform the law on restrictive agreements, basically to model United Kingdom law on Article 85 of the Treaty of Rome.[17] Anti-competitive agreements would then be prohibited and parties to them would become liable to fines unless the agreement would lead to economic benefits, in which consumers would share, sufficient to justify an exemption from the prohibition. As part of the proposals, the OFT would be given powers to require information and to enter premises to examine books and business records, take copies of documents and question staff: While the exercise of such powers by the European Commission in the United Kingdom has engendered some controversy (illustrated by the epithet `dawn raids' to describe use of the powers) there can be no doubt that the powers are necessary to combat secret cartels. In the cartonboard case (where fines of ECU. 132.15 m were imposed) the European Commission described how parties met in Swiss hotels to agree price increases and concealed their activities by drawing up bogus minutes of their meetings and making virtually no written notes. Without the power to make unannounced `raids', an authority's effectiveness in dealing with secret cartels is diminished.[18]

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[17] The proposals are contained in Department of Trade and Industry, Opening Markets: a New Policy on Restrictive Trade Practices, Cm, 727,1989.

18 In the United States price fixing cartels are likely to be treated as criminal conspiracies when the powers appropriate to criminal law enforcement become

Dominance and Oligopoly

A more interesting area of competition law is perhaps that dealing with dominant firms and oligopolies. While cartels can be said to be invariably harmful, the same cannot be said about concentrated markets. With some technologies, economies of scale can mean that a market has to be concentrated in few hands if production and distribution is to be organised in the most efficient way. Or firms may achieve a large share of their market by the excellence of their products or the service they offer. It is of course in no way the purpose of competition policy to prevent the exploitation of economies of scale or to penalise firms for their success in the market place. But it is a purpose to ensure that business success is not obtained through the frustration of competition or used as a platform for the exploitation of consumers. The market power likely to be enjoyed in a concentrated market can be misused either to exclude or restrict competition from any rivals or to prevent or restrict new entry into the market. It is one of the challenges of competition policy to distinguish legitimate competitive conduct from conduct that is anti-competitive in purpose or effect, and to cide whether the prices charged by firms with large market shares should be a matter of concern to the authorities.

In fact the United Kingdom has a very wide-ranging law for dealing with these issues. The main provisions are contained in the Fair Trading Act 1973 (the statute that created the post of Director General of Fair Trading and established his Office) and, as far as I know, they are unlike the laws of any other country. The Fair Trading Act provides for the investigation of what are called monopoly situations. These are of two types. A `simple' monopoly situation exists if 25 per cent or more of the supply of a good or service in the United Kingdom or a part of it is accounted for by one person or business, a 'complex' monopoly situation if 25 per cent or more is accounted for by two or more persons or businesses whose conduct has the effect of preventing, restricting or distorting competition. It should be stressed that the 25 per cent is a jurisdictional threshold and is not intended to be a definition of market dominance.

Investigations are conducted by the Monopolies and Mergers Commission (MMC). This is an independent, statutory body, with a full time

available to the competition authorities (the Department of Justice Anti Trust Division) chairman and up to 50 part time members. It is a tribunal not a court. It acts as its own fact finder (it has a staff of around 100 officials) and its proceedings are inquisitorial not adversarial. The MMC must decide whether any facts arising from the monopoly situation it has investigated operate or may be expected to operate against the public interest. If it so finds, it may make recommendations as to the appropriate remedial action. The `public interest' is not defined in the law but is to be interpreted by the MMC in the particular case.

The MMC makes its report on its investigation to the Secretary of State for Trade & Industry (who has overall Ministerial responsibility for competition policy) and it is for him to decide what action if any to take on the MMC's report. There is no right of appeal against the Secretary of State's decision. He has wide order making powers with which to seek a remedy though usually undertakings are sought from the parties, undertakings that are enforceable in the courts**.**

Investigations can be initiated by the Secretary of State but as a matter of practice this is a function of the Director General of Fair Trading (DGFT). He is an independent officer of the Crown backed by a staff of about 140 officials on the competition policy side of the OFT (it also has consumer protection responsibilities). The DGFT is charged with keeping commercial activities under review to identify situations which may call for reference to the MMC. The mere existence of a monopoly situation will not be sufficient however; whatever the position in law, it has become established practice that the DGFT needs to have prima facie evidence that a market is not working effectively before he will intervene.

It will be obvious that the scope of this law is wide and that it affords the DGFT a wide measure of discretion in dealing with situations of market power. Over the years a variety of market structures and practices in most sectors of the economy have been investigated by the MMC. And once a reference has been made, the MMC can enquire into all aspects of a firm's policies and make whatever recommendation it thinks fit.[19]

Two recent cases will illustrate the scope of MMC enquiries and recommendations. The investigation of contact lens solutions[20] focused on Allergan and CIBA Vision which had 38 per cent and 34 per cent of the

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[3] Strictly it should be said that the MMC's terms of reference can be limited by the DGFT, though that is rarely done, and that there is an alternative procedure to a monopoly reference whereby the DGFT can require the MMC to investigate a specified `course of course' which he believes to be anti-competitive (this under the Competition Act,1980).

[20] Monopolies and Mergers Commission, Contact lens solutions, Cm.2242,1993.

United Kingdom market respectively : three other suppliers had shares in the 6 - 9 per cent range. Allergan was clearly the market leader : it had the stronger product range and was better represented in the major retailers. It was also a far more profitable company with an average return on capital employed 1988-92 of 102 per cent, far above the average for manufacturing industry generally or for pharmaceutical companies. Allergan argued that its high profits were the reward for its success in developing and marketing good products in a risky industry leading to a virtuous circle of economies of scale and falling costs. The MMC did not accept that these factors justified such high returns which it believed were only possible because competition both between the suppliers and at retail level was not as vigorous as it might be. The MMC concluded that Allergan's pricing policy operated against the public interest.

The MMC also concluded however that the regulatory regime for contact lens solutions inhibited competition; companies wishing to supply contact lens solutions have to obtain a product licence from the Department of Health, and contact lens solutions may only be sold by qualified opticians and pharmacists (Boots had 31 per cent of retail sales). The MMC recommended relaxation of the regulatory agreements to encourage more competition at both levels, but that if this proved ineffective price control should be considered.

Invariably on any reference the MMC examines and comments on the profitability of a monopolist : it always looks for evidence that market power has been exploited. One commentator has christened this 'the English disease' adding 'only in the UK have we operated a system which has been as intent on smelling out excessive prices and profitability as the Spanish inquisition smelt out heresy'[21]. Yet the assessment of the level of prices and profits is a step on the way to the assessment of the effectiveness of competition and to the judgement on whether there are any adverse effects of the monopoly situation upon the public interest. In taking these steps the MMC will have regard to entry conditions in the market and the potential for competition stimulated by the high profits. Where it concludes that entry is unlikely, there is every reason why the MMC should concern itself with the level of prices and profits and, if competition cannot be created, recommend price control. Competition is superior to regulation, but if competition cannot work, or be made to work by the encouragement of new entrants, regulation may be the only answer. Of course, regulation can generate its own inefficiencies and distortions; this means that the choice of regulatory

[21] J Lever, Developments in UK Law, in B Hawk (ed.), Annual Proceedings of the International Anti Trust Law and Policv Conference, Fordham Corporate Law Institute,1992, New York, p.36.

technique is important and in this regard there is increasing experience in the United Kingdom, especially in the field of utility regulation, of the use of price cap formulae - a technique designed to preserve the incentives to improve efficiency while holding the rate of increase of prices in check. Price increases are limited to a fixed number of percentage points below the rate of inflation but if a firm is able to reduce its costs, it can increase its profits - at least until the formula is revised.[22]

There is no doubt that the administrative system operating in the UK is better suited to the assessment of prices and profits and to reaching judgements on whether they are `excessive' than a judicial system. 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.

The comparison should be with the profitability that would prevail were there effective competition in the market, i. e. the 'as if competition test', as the Germans put it. The assessment would have to take account of relative riskiness and efficiency levels. Imperfect data will be available for such assessments and the evidence required by a court to establish that a level of prices was unlawful seems, from the experience of other systems, to be of a higher order than that on which the MMC are prepared to reach a judgement. Not that the judgement is ever easy; but the scope for investigating the exploitation of market power by charging prices higher than would be likely in a competitive market, or indeed discriminatory prices, is undoubtedly a distinctive and arguably advantageous feature of the United Kingdom system.

Another interesting recent report concerns video games.[23] In this case the MMC reached adverse conclusions on a number of practices of Nintendo and Sega, who effectively share the United Kingdom market. One was discriminatory pricing of software and hardware (with higher margins on software than hardware) which the MMC concluded raised the total cost of games play to consumers and inhibited entry possibilities for new systems. These pricing policies were linked to the control by Nintendo and Sega of third party publishers of software for video games through a number of restrictions they imposed in their licensing agreements, the most severe of which was a requirement that the cartridges for all Nintendo licensees and all except Sega's larger licensees have to be manufactured under the control of the licensor and bought from them.

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[22] In the case of regulated water companies, the formula limits price increases to the rate of inflation plus a fixed number of percentage points. This recognises the substantial investment needs of the water industry.

[23] Monopolies and Mergers Commission, Video Games, Cm.2781,1995.

The MMC concluded that these restrictions allow the two companies to control the release of other publishers' software and to limit the choice of games available to consumers and that they were against the public interest. The MMC also noted that both companies incorporated technical features in their products, some of which introduced territorial segmentation, which make it difficult to produce software on their machines independently and without infringing the companies' intellectual property rights. Although the MMC recognised that Nintendo and Sega are entitled to protect their intellectual property rights and to be adequately remunerated for their innovations, it considered that the charges levied on third party software publishers for the supply of cartridges were excessive. By setting excessive prices for cartridges supplied to independent publishers, the MMC found that both companies were able to charge higher prices for their own software than would otherwise be the case.

The MMC concluded that both companies had developed entrenched positions on the basis of their intellectual property rights and associated know-how, and its recommendations focused on the licensing arrangements of the two companies. It recommended that the licensing restrictions on third party publishers should be removed, and in particular the requirement that the licensor arrange or control the manufacture of cartridges, though it mentioned that enforcement against the Japanese licensors could raise jurisdictional problems (as well as difficulties under domestic copyright law).

This case is one of several recently where the issues have concerned intellectual property rights, either restrictive terms in licences as in video games or refusals to license. Obviously it is inherent in the concept of an intellectual property right that the owner is under no obligation to licence it to others but cases have been brought where the DGFT has taken the view that the refusal is arbitrary (for example where licences were granted for a long period and then refused) or where refusal was thought to have detrimental effects on the development of competition in a related or downstream market (for example the market for spare parts or for maintaining and servicing equipment). On the whole however the MMC has been reluctant to interfere with the way firms use their intellectual property, recognising its rôle in encouraging innovative and creative activity. It has only done so on good evidence that the intellectual property bestows not merely an exclusive right but also a degree of market power that has been exploited to an unacceptable extent notwithstanding the exclusivity inherent in ownership of the right :

obviously this calls for a rare judgement which, if it has to be made, might be better reached by a tribunal like the MMC than by a court of law.[24]

It was always intended that this part of United Kingdom law could usefully be used for the investigation of oligopolistic markets, markets comprising or dominated by a few firms with similar market shares. Such market structures are quite a feature of a developed economy like the United Kingdom. The characteristic of an oligopoly is that no one firm can make a competitive move without taking into account the likely reaction of its rivals. The nature and degree of competition in oligopolistic markets then depends upon the strategies that are adopted in face of this interdependence. Inevitably there is a tension between cooperative and competitive forms of behaviour.

In a so-called 'tight' oligopoly where the few firms produce a homogeneous *product in a stable and transparent market, the mutual recognition of the interdependence of their actions is likely to lead to highly coordinated price behaviour : prices will tend to move in parallel and not only that, to tend to the level that would prevail if the market was fully monopolised. Since prices change as if by agreement the parallelism is often called 'tacit collusion'. But in this extreme form, parallelism can be described as collusive behaviour only in the sense that it reflects an understanding by each of the firms of what is the rational and self interested response to the interdependence of their actions that derives from the structure of the market. Looser forms of oligopoly may permit more competitive pricing and in any oligopolistic market there can be competition in advertising and promotion (since it will be more difficult for rivals to match advertising and promotional activity than to match a price cut) and in the search for, and introduction of new techniques and products (which even more obviously, can, if successful, serve to steal a march over rivals).*[25]

But it is parallel pricing that tends to engage the interest of competition authorities since it will always be suggestive of a cartel even though the courts in most countries have ruled that an unlawful agreement cannot be inferred from parallel pricing alone : there must be evidence of some positive contact or communication between the parties.

Over the years there have been a number of investigations of oligopolistic markets by the MMC where the focus has been on parallel pricing. In a number of these cases the MMC has ultimately accepted the

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[24] Agreements for the licensing of intellectual property fall outside the Restrictive Trade Practices Act.

[25] The relative benefits to consumers of these different forms of competition is an interesting question not addressed here.

industry's arguments that any parallelism was the result of competition operating in concentrated markets where products were standardised and costs and cost structures were similar. Firms could not be criticised for responding rationally to the actions, or anticipated actions, of their competitors.

But in some cases the MMC have been more critical. In white salt for example[26], a duopoly protected by high entry barriers, after an extensive analysis of price changes, with each company notifying the other of its price changes in advance but with one of them, ICI, invariably taking the lead, the MMC observed :

> 'In a market such as salt in which firms are producing broadly standardised products, we would expect prices to be similar. However, depending on the particular circumstances, this similarity of prices may reflect active price competition or the lack of it. In the case of white salt we conclude it is the latter. White salt is an industry with a long history of arrangements which have had the effect of restricting price competition. From the 1930s until 1959 the industry operated under the umbrella of a common price agreement. From 1959 to 1980 the major producers operated similar aggregate rebate schemes. With this history, parallel pricing without any formal agreement was more likely to be achieved than in an industry without such a history. The most striking feature of the pricing behaviour of the two producers over the last 10 years is the absence of a single instance of one company failing to follow the lead of the other in setting list prices'.

While the companies denied `collusion or collaboration of any kind', the MMC added:

> 'The evidence shows that price notifications are so interwoven that the price follower knows in advance what the price leader's increase will be, and before the leader actually implements his price increase he knows that his lead is being followed'.27

[26] Monopolies and Mergers Commission, White salt, Cm.9778,1986.

[27] This is a clear example of the concept developed in the United States of the 'facilitating device' - practices which make it easier for oligopolists to coordinate their behaviour without an explicit agreement.

Despite some competition in discounts, the MMC concluded that price competition had been severely restrained with effects adverse to the public interest. The high profits of British Salt, the more efficient of the duopolists, were central to this conclusion and the MMC's recommendation was that the future prices of that company should be regulated. This recommendation was accepted by the Secretary of State and white salt prices continue to be regulated by the OFT.

As well as the investigation of horizontal conduct in oligopolistic markets of various forms, the MMC has also investigated industry-wide vertical restraints in a number of oligopolistic industries. Examples include selective distribution systems in motor cars and newspapers and exclusive distribution and purchasing arrangements in petrol and beer.[28] In all these cases, the DGFT had been concerned that the vertical restraints created significant entry barriers and were likely to frustrate the development of more efficient or new forms of retailing. But the outcome of the MMC's investigations was mixed.[29] In petrol it found nothing against the public interest in the restrictions imposed by oil companies over their retail outlets, whether owned by the company or independent, whereas in beer the MMC was highly critical of the tied house system and its recommendations have led to a substantial reorganisation of the brewing industry and the `pubs' trade. The brewing industry was however considerably more concentrated than the petrol industry.

In newspapers, the MMC found the refusal of wholesalers to supply retailers solely on the ground that a locality was already adequately served to be against the public interest, and the Secretary of State's response to the report was to require a major liberalisation of the conditions on which newspapers are supplied to retailers. Again in contrast, in motor cars the MMC concluded that the selective and exclusive distribution system through franchised dealers was generally beneficial to consumers although some modifications were recommended: dealers to be free to advertise outside their territories, dealers to be free to hold dealerships from different manufacturers in different territories and from different manufacturers in the same territory but only in distinct premises a reasonable distance apart. Not even these

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[28] All but the newspaper distribution case raised important questions about the interface between UK and EC law because of exemptions granted by the European Commission under Article 85(3) for most of the vertical restrictions that were of concern to the UK authorities.

[29] Monopolies and Mergers Commission, Beer, Cm.651,1989; Petrol, CM.972,1990; Motor cars, Cm.1808, 1992; Newspapers, Cm.2422, 1993.

recommendations were implemented and the prospect of showrooms with cars from different manufacturers side by side is now a distant prospect.

The DGFT's policy continues to be to look critically at vertical restraints when imposed (or accepted) by a firm with any degree of market power or when adopted (or demanded) by a significant number of firms in an industry. His concern is invariably the possibility that restrictions on intra-brand competition will hold back efficiency and innovation in retailing and diminish consumer choice, particularly with the enormous changes in prospect in the way goods and services are sold with the growth of electronic information systems provided by satellite and cable television and other means.

Concerns of this sort lay behind the investigation announced last week into the distribution policies of suppliers of no fewer than eight types of domestic electrical goods. [30] The OFT had had complaints from retailers of threats not to supply them and of other sanctions if the retailer did not charge the price recommended by the manufacturer or relate his price in a specified fashion to that price. Certain manufacturers had refused to supply retailers whose policy was known to be to undercut manufacturers' recommended prices (so-called 'discount stores') perhaps under pressure from established retailers. Overt resale price maintenance is prohibited in the United Kingdom. While the policies at issue here fall short of overt resale price maintenance they appeared to have much the same effect. The manufacturers' arguments are that selective distribution enables them to ensure that retailers can provide necessary pre-sales services such as technical advice and demonstration facilities because without the restrictions the consumer would get the help he needed from the one store and then make his purchase at a lower price at another 'no-frills' store (that is, the restrictions are necessary because of the 'free-rider' problem). They also argue that there is strong competition at the manufacturing and retail levels evidenced by the number of suppliers and brands. Retailers can handle as many brands as they like : there is no exclusive dealing. Nevertheless, it appears to the OFT that there is some restriction of retail price competition and it will be for the MMG to weigh all the effects of the practices and reach a conclusion on where the public interest lies - in line with the rule of reason approach widely advocated for the assessment of vertical restraints.

This rather discursive comment on some of the issues that have been addressed under the United Kingdom law on dominance and oligopolies will,

[30] These are televisions, video cassette recorders, hi-fi systems, camcorders, washing-machines, tumble-driers, dishwashers and refrigerators

I hope, have underlined a fundamental feature of the law, its wide scope (reflected in the low market share thresholds) and the wide discretion it gives to the DGFT as to how he will apply the law.

That discretion is extended by the opportunity to resolve cases without a reference to the MMC by an undertaking from the parties to the DGFT (or if more appropriate to the Secretary of State) that they will modify their behaviour to deal with the matters that were of concern.

A recent example is undertakings given by BSkyB relating to the terms on which BSkyB, dominant in the broadcasting of television programmes by satellite in the United Kingdom, will supply programmes to operators of cable television services for onward transmission to viewers; the undertakings restrain BSkyB from adopting policies the purpose or effect of which would be to require cable companies to procure the whole range of BSkyB owned channels rather than to select them on an à la carte basis. The DGFT's concern was that BSkyB's 'bundling' of its programmes (only possible because of its dominant position) could inhibit the growth of, and competition from, cable television operators in the United Kingdom.[31]

Business has misgivings about the law because of the uncertainties about *the practices and policies that might fall under the scrutiny of the DGFT and, if he makes a reference to the MMC, about the conclusions the MMC (and ultimately the Secretary of State) will come to. `Each case is judged on its merits' is the reality, not a catch phrase but it does mean that business has less guidance on how to comply with the law and the policy with which the law is applied than it would like.*

While the flexibility of the system is, by contrast, one of its attractions to the authorities, there is some disadvantage from their point of view in the United Kingdom type of law. The main one is that its deterrent effect is very limited : and the greater the deterrence of anti-competitive conduct the more cost effective is any competition law. Action can only be taken at the end of the investigation process and any remedies that may be imposed will apply only to the particular case. And whatever the findings, there can be no question of penalties or opportunities for private actions for damages. This contrasts to the position under European Community law. Article 86 of the Treaty of Rome prohibits any conduct that amounts to an abuse of a dominant position[32] and, in appropriate cases, sizeable fines can be imposed for conduct found to be unlawful as well as the sorts of remedy

[31]Who also provide competitive local telephone services to BT, the dominant telecoms supplier.

[32] So long as there is an effect on inter-State trade.

available under United Kingdom law. For example, last month the European Court upheld a fine of Ecu. 3.15 m. imposed on BPB Industries, the dominant UK supplier of plasterboard for its practice of offering builders' merchants a `fidelity rebate' if they agreed to deal exclusively with BPB.

Recently the Government reviewed the question whether the United Kingdom should adopt a law similar to Article 86[33] but decided to retain the present system. The issue is again on the political agenda as a result of an enquiry being conducted by the Trade and Industry Committee of the House of Commons.[34] In his evidence to the Committee, the DGFT has argued that the law should prohibit not only cartels but also other forms of anti-competitive conduct and behaviour that could generally be held to be abusive when practised by a dominant firm. Predatory conduct, that is the deliberate acceptance of losses with the aim of eliminating or preventing competition in the expectation of supra-normal profits in the longer term, is an example. This could be dealt with more satisfactorily under a prohibition than under the present administrative system.

Although it is generally held that predatory conduct is unlikely to be encountered very often because of the demanding circumstances for predation to be rational commercial behaviour, the OFT has had to deal with many allegations of predation in the bus sector since it was deregulated in 1986. Except for controls over the safety of vehicles and the competence of drivers, there is virtual free entry into the market for local bus services. New entrants tend to be small and to 'cherry pick' among the more profitable routes in the incumbent operator's network. Not surprisingly the incumbent will often respond aggressively and not surprisingly the entrant will often claim that the response was predatory. Investigation of the complaint can take several months (sometimes the target will have gone out of business in the meantime) and if the conduct is finally held to have been predatory and against the public interest the likeliest remedy is some undertaking as to the operator's future conduct on the routes involved. It is difficult to believe that this sort of outcome will do much to deter a powerful incumbent from a similar response to a subsequent new entrant on other routes. A reputation for strategic and aggressive responses to new entry can readily amount to a most effective entry barrier. Fines are much more likely to deter predatory conduct.

The main objection to a prohibition-type law has been the difficulty of defining the conduct that is to be unlawful, and that may attract fines. Laws

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33 Department of Trade and Industry, Abuse of Market Power, Cm.2100,1992.

34 The Committee is expected to report in mid-May. Meanwhile an independent critique has just been published: National Consumer Council, Competition and Consumers.

which attempt comprehensive definitions of abusive conduct of several types such as the Canadian Competition Act are said to be inflexible (and to provide untold opportunities for legal argument) while those which offer only a few purely illustrative examples such as Article 86 of the Treaty of Rome are said to be too vague. No doubt it is case law arising from the decisions of the authorities and judgements of the courts that provides the guideposts for the business community.

Anyway any prospect of the United Kingdom substituting a prohibition system for the present approach to the control of dominance and oligopolies is a distant one

Whatever the law and enforcement system, policy towards dominant and oligopolistic firms should, as far as possible, be to encourage additional competition usually through new entrants into the market. Market dominance is often sustained by anti-competitive practices and these need to be struck down in the interest of increasing competition. Sometimes the competition will take the form of imports, but competition authorities should take no different view whether it is domestic or overseas companies that find more opportunity in the market.

It may be necessary for the authorities to take positive steps to facilitate entry by requiring a dominant firm to grant access to an essential facility to its competitors. Telecommunications networks and gas pipelines are good examples of essential facilities. It has been an overriding objective of the Office of Telecommunications (Oftel), the industry regulator, to promote competition to BT, the dominant operator, primarily by establishing fair conditions of connection to BT's networks. Similarly in gas, conditions on which competitors have access to British Gas's pipelines for the transportation of their gas have been laid down by the Office of Gas Supplies (Ofgas), the industry regulator. That there are now some 60 licensed competing operators of telecommunication services and that competitors to British Gas are eroding its dominant share of the industrial sector of the gas market is some testimony to the success of these policies, though technological change and widening market opportunities have contributed substantially in both cases and there is a long way to go before effective and sustainable competition makes regulation of these industries unnecessary (let alone of the natural monopolies such as water supply).

Merger Control

Merger control is a vital part of competition policy because it is never easy to control the exercise of market power once it has been acquired.

Yet mergers and acquisitions are part of the competitive process itself, one of the means by which resources in one sector of the economy move to another, one of the ways by which inefficient management is replaced by more effcient management. The merger process is facilitated in the United Kingdom by our well-developed capital market and financial institutions.

The rationale of merger control is, of course, that there are some circumstances where a merger may be thought to have detrimental effects from a public interest point of view whatever the benefits to the stakeholders in the companies, ultimately the shareholders. The obvious circumstance is where lasting market power is created by the merger. The objective of merger control is to identify, and if necessary stop, those mergers which give rise to a conflict between the private interests of the parties and the wider public interest, in particular the interests of consumers, and to put the minimum of difficulties in the way of all other mergers. In other words, the purpose is to ensure, as far as possible, that mergers do contribute to the competitive process and to the efficient allocation of resources.

The United Kingdom system of merger control was established in 1965. It is also an administrative system. The Secretary of State, advised by the DGFT, may refer to the MMC any merger, acquisition or partial acquisition which involves the acquisition of assets above a certain size (currently £70 million or more) or creates or enhances a market share of 25 per cent or more (i e a ‘monopoly situation’ as defined in the Fair Trading Act).[35]

In recent years OFT has scrutinised about 200 mergers a year which qualify for reference but only about 4 per cent, on average, have been sent to the MMC.

If a reference is made, it is for the MMC to investigate the merger and to report whether or not it operates or is likely to operate against the public interest. The test is the same as is to be applied in investigations into dominance or oligopolies. The Secretary of State has considerable statutory powers to remedy any adverse effects that are identified by the MMC, including the power to prohibit a merger, to allow a merger only on certain conditions or in the case of a completed merger, to require a divestment. He is not obliged to accept the findings of the MMC although he cannot take any action against a merger which the MMC has concluded would not operate against the public interest.

[35] If a merger meeting these criteria also has a `Community dimension’ under the European Communities merger control regulation then it falls within the jurisdiction of the European Commission rather than the national authorities.

Recently the Secretary of State's powers have been increased to enable him to accept enforceable undertakings from the parties as an alternative to making a reference to the MMC. The undertakings will usually be for one or other party to divest itself of certain assets but behaviourial undertakings may also be given and accepted. This `fix it first' approach is seen by the Government as reducing the burden on industry of merger control. In the last three years 11 cases have been settled this way but it remains to be seen how useful a power it will prove to be - both to business and to the authorities.

It is a duty of the DGFT under the Fair Trading Act to keep himself informed about merger activities which may qualify for investigation by the MMC but there is no obligation to notify mergers to the authorities. A voluntary pre-notification system was introduced in 1989, but it is little used. Most companies or their advisers prefer to tell OFT informally of their merger proposals (not infrequently, on a strictly confidential basis), but a significant proportion are only learned about from the Press and sometimes only after the merger has been completed.

This latter problem can be eased, at least for larger mergers, by a mandatory pre-notification system. Such a system also has the advantage for the authorities of providing them at the outset with a certain amount of the information about the transaction needed for their assessment. Mandatory pre-notification is burdensome, however, and on both business and the authorities, and this was the reason why the United Kingdom Government opted for a voluntary system.

It is the wide discretion enjoyed by the Secretary of State in deciding whether or not to refer a merger to the MMC that distinguishes United Kingdom merger control from most other systems. From time to time references have been made on grounds other than the effects of a merger on competition, but since 1984 it has been explicit Government policy that competition considerations will be the primary factor taken into account by Ministers in making their decisions, taking account of the international dimension of competition as well as the competitive situation in domestic markets.

Merger policy therefore concentrates upon horizontal mergers although sometimes vertical mergers can give rise to competition concerns by the foreclosure of competitors from a significant part of a market. It is almost unknown now for the United Kingdom authorities to raise any objections to a conglomerate merger or to be concerned about a merger on grounds of its size alone.

The MMC also invariably bases its findings on a case on its assessment of the effects of a merger on competition in the United Kingdom, despite the broad public interest test set down in the legislation. Sometimes however efficiency gains have been considered to offset any anti-competitive features and, even more rarely, other factors have been given weight such as effects on employment or the implications of foreign ownership of a strategic industry or technology.

The broad consistency of the policy has not prevented criticisms, however. Some argue that the law should be changed to make explicit that a merger should only be prohibited when it leads to a significant and persistent increase in market power, while others argue that Ministers should be more willing than at present to refer mergers on other grounds, in particular where a merger appears likely to have an impact on regional activity or development. Some wish to put bigger hurdles in the way of mergers because of an accumulation of evidence that, for whatever reasons, mergers often do not produce the efficiency improvements claimed for them. Others are concerned that merger control is already too great an inhibition to enterprise and that some mergers which would increase efficiency or stimulate innovation do not take place because of the costs and uncertainties of the system.

This latter point leads to perhaps the most fundamental of all the arguments about merger control in the United Kingdom (and in some other countries). Markets are increasingly global with competition taking place on an international rather than a national stage. Larger companies are necessary, it is argued, especially in high-technology industries, if United Kingdom companies are to be competitive with their American, Japanese or other counterparts. A merger which creates a large share of the national market should be allowed, it is argued, if it enhances the companies' international competitiveness. The issue turns on the market analysis. If the domestic market is part of a wider international market then indeed there need be no concern : there is no conflict between merger control and the enhancement of international competitiveness through economies of scale and scope. It is only if the national market is protected in some way that a merger of domestic firms leading to efficiency gains from economies of scale can be disadvantageous to domestic consumers because of the unchecked market power created by the merger. These are circumstances when in the United Kingdom system a reference would be justified for the MMC to make the necessary trade-off Even if some mergers are deterred by such a policy, that is a price that has to be paid if merger control is to be an effective part of competition policy.

Of course merger control can only be effective if it is intelligently applied. It is when differing policy objectives are pursued under the banner of merger control that confusion is most likely to arise. Merger control should be seen as an element in competition policy. But more than any other part of competition policy, merger control involves prediction and judgement. Guidelines in terms of market shares and concentration measures can be a useful device for screening out those mergers which require closer scrutiny, but otherwise there is no place for a 22 mechanical analysis. [36] An exercise in economic rather than legal analysis is required, though an analysis that often has to be conducted with imperfect information (sometimes biased information) and under considerable time pressures, and an analysis that has to be forward looking.

In order to assess the likelihood of a horizontal merger creating or increasing market power, a number of factors have to be considered. First the relevant product and geographic markets have to be established so that the market share of the merging companies and the number and relative sizes of their competitors can be estimated. Secondly it is necessary to focus on the likely intensity of competition between the remaining competitors - a particular challenge where the structure is oligopolistic - and whether any attempt to take advantage of market power will be frustrated by the expansion of other firms or the entry of newcomers. Assessment of entry conditions (which depends on the magnitude of entry barriers including trade barriers) is another challenging part of the exercise for it is crucial that the dynamics of the market are brought into the assessment. Other constraining factors may be the purchasing power of larger buyers. Finally it will be necessary to consider any efficiency gains or other benefits claimed for the merger (recognising that these are often overstated).

This brief catalogue of factors must suffice to indicate the sort of analysis that is required first in a preliminary way by the OFT and then in-depth if a reference is made to the MMC.

The authorities' decisions often come in for criticism but that is `par for the course' with merger control. The United Kingdom system no doubt has its shortcomings. But it does provide a necessary check on those relatively few mergers which create or enhance market power. And while controversy about the policy and the substantive rules in the law breaks out from time to time, few in the United Kingdom would deny the crucial importance of an effective merger control.

[36] As with the Merger Guidelines published by the United States' anti-trust agencies.

Conclusion

This paper has stuck closely to the brief of commenting upon British experience in the application of United Kingdom law. I hope that some of that experience may be of interest, even value, in Brazil.

It will be appreciated that competition policy is applied in an increasingly international context. In the United Kingdom and other members of the European Union, the interface between national and European competition law is increasingly important, as the economies of the Union become more integrated. In most countries imports are a growing source of competition in national markets and the interface between trade policy and competition policy becomes more important. More important still, the growth of international business with the globalisation of markets and the revolution in methods of communication is posing new challenges for competition authorities. Anti-competitive conduct does not stop at national boundaries; cross-border mergers and other alliances can have anti-competitive effects in several national markets.

As there is little likelihood of early agreement to international rules to regulate anti-competitive conduct and alliances, closer cooperation between national authorities seems to many the obvious way of responding to these challenges. There may be problems over jurisdiction (certainly as far as the United Kingdom is concerned) and restrictions on the disclosure of information to other authorities that will not lightly be eased. But cooperation is easier and more likely to be effective the more similar are the laws and procedures of the countries involved. While it was not the purpose of the paper, I imagine that the description I have provided of United Kingdom competition law will have shown that in many respects it is a very distinctive system.