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Anticompetitive Practices in Great Britain: Expanded Enforcement under the Competition Act 1980

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NOTES

ANTICOMPETITIVE PRACTICES IN GREAT BRITAIN: EXPANDED ENFORCEMENT UNDER THE COMPETITION ACT 1980

TABLE OF CONTENTS

I. INTRODUCTION

The Competition Act 1980[1] represents a significant expansion in Great Britain's enforcement of anticompetitive practices. For the first time an individual practice by an individual firm can be thoroughly investigated and stopped if the practice is found to be both anticompetitive and against the public interest.[2] An anticompetitive practice is defined as one that "has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with . . . goods . . . or ser-

1. C. 21.
2. 404 PARL. DEB., H.L. (5th ser.) 1113 (1979).

vices in the United Kingdom."[3] The public interest determination involves a nebulous balancing of numerous general considerations such as the promotion of effective competition and consumer interests.[4] Prior to the Competition Act 1980, investigations of anticompetitive practices were confined to monopolistic practices and were required to involve the entire market sector.[5]

An understanding of the historical development of British antitrust policy is fundamental to a clear perception of the existing statutory structure. Although antitrust legislation in Great Britain dates from the days of the Magna Charta and the Norman Conquest,[6] modern legislation developed quite slowly. Great Britain was among the last of the Western trading nations to enact such legislation, perhaps because of differing political and social influences on competition policy.[7] During the first half of the twentieth century, the public became more willing to accept statutory antitrust regulation. The two world wars witnessed increasing Government intervention with business.[8] Restrictive practices and market shares were also increasing,[9] but common law remedies dealt ineffectively with the antitrust problem.[10]

Since the existing statutory structure tends to reflect previous legislation, an analysis of Great Britain's prior enactments is helpful. The Monopoly and Restrictive Practices (Inquiry and Control) Act 1948[11] was the first modern British antitrust legislation. This tentative attempt to regulate monopolies and restrictive practices emphasized neutral inquiry.[12] The administrative tribunal that was created made no presumption that such practices were against public policy. This neutral posture was soon thrown aside, and subsequent legislation took a progressively

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3. Competition Act, 1980, c. 21, § 2(1).

4. These considerations are set forth in section 84 of the Fair Trading Act, 1973, c. 41. *See* text accompanying note 192 *infra.*

5. These investigations were conducted under the Fair Trading Act, 1973, c. 41. *See* text accompanying notes 178-88 *infra.*

6. *See* notes 31-33 *infra* and accompanying text.

7. *See* notes 37-40 *infra* and accompanying text.

8. *See* text accompanying notes 42-54 *infra.*

9. *See* notes 55-69 *infra* and accompanying text.

10. These common law doctrines include monopoly, conspiracy, and contracts in restraint of trade. *See* notes 70-82 *infra* and accompanying text.

11. 11 & 12 Geo. 6, c. 66.

12. *See* text accompanying note 103 *infra.*

tougher stance.[13] British antitrust legislation gradually expanded to regulate precisely-defined restrictive agreements,[14] resale price maintenance,[15] and mergers.[16] Although early legislation applied exclusively to transactions in goods,[17] the statutory scope eventually encompassed services as well.[18]

The current antitrust laws are scattered among numerous statutory provisions.[19] The British approach to antitrust laws is expressed in separate attacks on restrictive practices as opposed to broad attacks on monopolies and mergers. Restrictive agreements are controlled through a public registration process[20] and reviewed by a specially-created court.[21] Resale price maintenance is banned through similar procedures.[22] Monopolies and mergers are investigated differently, with entire market sectors referred to a commission especially designed to determine whether a monopoly or merger operates against the public interest.[23] This overall statutory structure is both too narrow and too broad. It is too limited because many types of anticompetitive activities are not within its scope.[24] The Competition Act 1980 alleviates this problem.[25] The structure is too broad because potentially beneficial agreements may be discouraged by the registration process.[26] Numerous other troubling problems plague the existing system.[27]

The Competition Act 1980 represents a unification of the previ-

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13. *See* text accompanying notes 111-13 *infra.*
14. *See* text accompanying notes 118-25 *infra.*
15. *See* text accompanying notes 132-51 *infra.*
16. *See* text accompanying notes 152-58 *infra.*
17. *See* text accompanying note 92 *infra.*
18. The Monopolies and Mergers Act, 1965, c. 50, brought the service sector of the economy within the scope of British antitrust legislation. *See* note 153 *infra* and accompanying text.
19. *See* the Fair Trading Act, 1973, c. 41; the Restrictive Trade Practices Act, 1976, c. 34; the Resale Prices Act, 1976, c. 53; the Restrictive Practices Court Act, 1976, c. 33; the Restrictive Trade Practices Act, 1977, c. 19; the Competition Act, 1980, c. 21.
20. *See* text accompanying note 114 *infra.*
21. This court is the Restrictive Practices Court. *See* notes 109-10 *infra* and accompanying text.
22. *See* text accompanying notes 137-43 *infra.*
23. This is the Monopolies and Mergers Commission. *See* note 90 *infra.*
24. *See* notes 275-80 *infra* and accompanying text.
25. The Act alleviates this problem but does not solve it. *See* text accompanying note 453 *infra.*
26. *See* text accompanying note 282 *infra.*
27. *See* notes 283-96 *infra* and accompanying text.

ously separate thrusts of British competition policy. Restrictive practices can be examined without the limitations inherent in a public registration system. Investigations proceed without the necessity of analyzing an entire market sector to discover monopoly conditions.[28] The main contribution of the Act is that individual anticompetitive practices by a single firm, regardless of its market share, are subject to investigation. Relying on the discretionary application of an extremely broad definition of what constitutes an anticompetitive practice,[29] the Act offers the potential of the large scale regulation of anticompetitive conduct. Whether actual enforcement will reflect this vast potential remains to be seen, but the potential implications of the Competition Act 1980 can be examined by analyzing existing British competition policy.[30]

II. HISTORICAL BACKGROUND

A. *Prestatutory Developments*

Modern British antitrust legislation has ancient origins. The earliest such legislation in Great Britain was in force long before the Norman Conquest.[31] Legislation dating from the Magna

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28. *See* text accompanying notes 180-82 *infra.*

29. *See* text accompanying note 455 *infra.*

30. One government official describes existing British competition policy in the following way:

> Competition policy, as it has evolved in this country, is a sufficiently flexible instrument to take account not only of technological circumstances which may require a concentrated structure for some UK industries but also of the impact of import competition within the domestic market. It has a positive role to play in encouraging market structures and forms of competitive behaviour which are likely to stimulate UK firms to produce those goods and services demanded by consumers at home and abroad, now and in the future, at the least possible cost in the use of scarce resources.

OFFICE OF FAIR TRADING, ANNUAL REPORT OF THE DIRECTOR GENERAL OF FAIR TRADING 11 (1979).

31. For an interesting discussion of early European legislation, see R. WILBERFORCE, A. CAMPBELL & N. ELLES, THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES 21-22 (2d ed. 1966) [hereinafter cited as WILBERFORCE]. The earliest English legislation included the following:

> In the laws of Edward the Elder a special penalty—the Oferhyrnesse—was imposed for offences against the King, and these offences included that of buying outside markets. There was also a further law of Athelstane (*circa* A.D. 930) which ordained that "no man buy any property out of port over xx pence; but let him buy there within, on the witness of the port reeve, or

Charta made all monopolies illegal, including those granted by kings, because they restricted individual freedom. But throughout the subsequent centuries legislative loopholes permitted British and other European monarchs to grant monopolies.[32] Other early English legislation limited trade practices such as forestalling and engrossing.[33]

Great Britain had no modern antitrust legislation until 1948, more than half a century after the first such legislation in the United States and Canada.[34] Although Germany, France, and Norway adopted antitrust legislation shortly after World War I, Great Britain sluggishly followed its European neighbors.[35] One British commentator points out that:

> [i]t is a remarkable fact that a country—the United Kingdom—which in so many fields of commercial law and trading practices has either given a lead to other nations, or at least has been among the leaders, should, in this sphere of modern legislation, have been among the last of the Western trading nations to take State action against monopolies and restrictive practices.[36]

Numerous political and social factors might account for this delay, but one general explanation might be Great Britain's unique

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of another unlying man or further, on the witness of the reeves at the Folk Mote."

Id. at 21 (footnotes omitted).

32. For an interesting discussion of royal monopoly grants, see *id.* at 27-31.

33. *Id.* at 23. Forestalling means "[i]ntercepting a person on the highway." BLACK'S LAW DICTIONARY 777 (rev. 4th ed. 1968). In the restrictive trade context, forestalling the market means stopping a person en route to market with the intention of buying his merchandise to resell at a higher price, convincing him to increase his prices at that market, or dissuading him from going altogether. *Id.* One statute branded forestallers as oppressors of the community and enemies of the whole country. *See* WILBERFORCE, *supra* note 31, at 23. Engrossing is an old criminal law concept whereby a monopoly is obtained through the buying up with the intent to resell at an unreasonable price of a large quantity of a market commodity, especially corn or other "dead victuals." BLACK'S LAW DICTIONARY 623 (rev. 4th ed. 1968).

34. For a discussion of the development and significance of European and North American antitrust legislation, see generally the individual countries' section in O.E.C.D., GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (1979).

35. For an overview of British antitrust legislation, see generally O.E.C.D., 2 GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES, United Kingdom § 0 (1979).

36. WILBERFORCE, *supra* note 31, at 6.

attitudes towards competition. There is an unwillingness to promote one individual's freedom at the expense of another. This is part and parcel of the notion that unrestricted competition eventually results in the greatest good for the greatest number.[37] Great Britain's unique attitude towards competition may also be analyzed by contrasting the British approach with that of the North American democracies. The feeling that there should be no overmighty citizens capable of wielding great influence without being elected representatives of the people is prominent in North American democracies and prompts extensive efforts to control monopolies.[38] This consideration is less important in Europe.[39] The British attitudes towards anticompetitive practices may also reflect a gentlemanly approach to competition law which places great emphasis on the importance of voluntary cooperation.[40] Regardless of the reasons underlying British hesitancy concerning modern antitrust legislation, after World War II public opinion changed sufficiently to allow enactment of the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948.[41]

It is impossible to pinpoint a precise cause for the change in British public opinion occurring during the first half of the twentieth century. Three broad considerations may help explain this evolution in British opinions and policy. First, public opinion

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37. One commentator explained this notion by comparing the United States and British experiences:

> [O]ne may generalize to say that freedom to compete has always been important in the United States; there was vociferous and powerful public opinion upholding this freedom in the 1870s and '80s, and the legal expression of it came in the strongly worded prohibitive Sherman Act of 1890. This, as well as making illegal all restrictive practices, also forbade monopolization, thus preventing the extinction of competition by too much competition. In this country, however, the influence of Benthamite economic liberalism prevented such emphasis on any one aspect of the individual's economic freedom at the expense of another; all were equally important and, if left to conflict without restriction, would result eventually in the greatest good of the greatest number. This doctrine clearly fitted in well with the traditional economic *laissez-faire* ideas and English conservatism, and it had some influence on the speed of development of new legislation on monopolies and restrictive practices.

C. BROCK, THE CONTROL OF RESTRICTIVE PRACTICES FROM 1956 20-21 (1966) (footnotes omitted).

38. *See* Korah, *Competition Policy*, 1 ANGLO-AM. L. REV. 90, 90 (1972).

39. *Id.*

40. *See Seconds Out!*, THE ECONOMIST, Apr. 12, 1980, at 47, col. 3.

41. 11 & 12 Geo. 6, c. 66.

concerning the interaction between industry and Government changed throughout this period. Although the Government adhered to a strict free trade position prior to World War I, in the following decades the public tolerated growing Government intervention. Second, the structure of industry was in flux. The establishment and use of restrictive practices rapidly expanded, as did the size and market power of industrial firms. Third, the common law remedies in restraint of trade were ineffective.

Prior to World War I, Great Britain followed a general policy of free trade.[42] It is probable that British industry was more highly competitive than German or United States industry at this time:[43]

> A high proportion of the output of the staple British industries was sold in foreign markets where restraints over competition were difficult or impossible to impose. At the same time the adherence of Great Britain to its traditional free trade policy meant that the home market was exposed to foreign competition and that the price-fixing efforts of cartels were likely to be defeated by imports.[44]

Thus, during the early part of this century, British commentators argued that the free trade policy rendered antitrust legislation unnecessary.[45] The ease with which foreign rivals could move into the British market, provided the competitive spur for big business in the United Kingdom.

Protectionist developments in subsequent decades undermined this free trade thesis.[46] During World War I the British Government disrupted the free trade policy by imposing nonrevenue duties on certain imports to aid British industry by limiting shipping and conserving foreign exchange. The following decades witnessed further limitations,[47] exacerbated by an international economic depression in the 1930s. During this interwar depression period, substantially reduced business activity and the associated

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42. C. ROWLEY, THE BRITISH MONOPOLIES COMMISSION 17 (1966).
43. G. ALLEN, MONOPOLY AND RESTRICTIVE PRACTICES 53 (1968).
44. *Id.* at 53-54.
45. C. ROWLEY, *supra* note 42, at 19.
46. For a more detailed study of Great Britain's free trade policy and the move towards protectionism, see *id.* at 17-19.
47. These limitations included protective legislation for the British dyestuffs industry in 1920 and heavy *ad valorem* import duties imposed on numerous commodities in 1921. *Id.* at 18.

excess capacity in staple British industries such as shipbuilding, coal, steel, and textiles led to both semi-official and voluntary schemes for controlling prices, outputs, and manufacturing capacity.[48] This fear of excesses led to strong trade organizations establishing restrictive agreements.[49] World War II accelerated British protectionism because the war effort demanded a total commitment of natural resources, and the Government accordingly imposed extensive import controls. By the end of World War II, Government intervention in industry was quite extensive:

> Termination of hostilities did not involve, as it had in 1919, a rapid dismantling of import controls. The immediate background to the 1948 legislation was one of exchange control, quantitative controls over imports, and high *ad valorem* tariffs. Britain during the 1940s was a highly protectionist country by any standard.[50]

These developments undoubtedly weakened the argument that antitrust legislation was unnecessary because of the perfect competition provided by a free trade system. The protectionist movement is important because it disrupted the free trade thesis and indicated a growing toleration of Government intervention in industry.

Just as World War I had a great impact upon the relationship of Government and industry, so did it affect the composition of industry itself. As intervention in industrial affairs increased,[51] the Government's administrative agencies rapidly expanded. Industrialists were frequently employed as civil servants to supervise the imposition of controls.[52] These events also stimulated the

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48. These schemes included competition restrictions, compulsory cartelization, rationalization of production, and amalgamations. *See* A. HUNTER, COMPETITION AND THE LAW 74-75 (1966).

49. One source suggests that these restrictive agreements "became the vehicles to carry on the doctrines and practice of restrictions to another generation of businessmen." *Id.* at 15-16.

50. C. ROWLEY, *supra* note 42, at 19.

51. This intervention included the following controls:

> the issuing of building licenses, limitations on plant capacity, output quotas, raw material allocations and regulations regarding working hours. Quality standards were imposed and publicly enforced and a rudimentary utility clothing scheme was introduced. Import and export licensing regulated the pattern of international trade. Price fixing and rationing became a feature of the domestic economy.

Id.

52. *Id.* at 20.

development and expansion of trade associations, which established close working relationships with Government. The advantages of cooperation emphasized by these close connections encouraged further growth of the trade associations.[53] Government intervention was even greater during World War II.[54] By 1945 the public showed much greater interest in maintaining Government controls over anticompetitive practices. Thus, extensive cooperation between industry and Government in times of crisis led to increased acceptance of Government trade restrictions.

An additional factor in the evolution of British attitudes regarding antitrust legislation is the increase in both restrictive practices and the industrial firms' market power during the 1914-1948 period. In some respects the significance of this factor is difficult to assess because:

> [i]t is not as if trade restriction was later in development, or was less widespread in this country than elsewhere. The movement towards the formation of trade associations and towards the development by them of restrictive rules and agreements was well started in the nineteenth century and had reached adult status before the 1914-18 war.[55]

On the other hand, the free trade system in pre-World War I Great Britain tended to stimulate a more competitive market structure than that which existed in other major industrial nations. Also, the merger movement in Britain was not nearly as conspicuous as it was in the United States in the late nineteenth century.[56] Although effective combinations did take place,[57] these industries were relatively unimportant in that era and constituted a minority.[58] But the most significant British industries were the classical industrial-revolution type, and these remained in the hands of numerous independent firms.[59]

Prior to World War I the Government showed little official in-

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53. *Id.*

54. *Id.* at 26.

55. WILBERFORCE, *supra* note 31, at 7.

56. A. HUNTER, *supra* note 48, at 73.

57. The combination movement was especially successful in the soap, salt-mining, match, tobacco, whiskey, cement, alkali, and explosives industries. For an interesting discussion of monopoly development in Great Britain, see G. ALLEN, *supra* note 43, at 50-56.

58. A. HUNTER, *supra* note 48, at 73.

59. These industries included coal, steel, shipbuilding, engineering, and textiles. *Id.*

terest in examining the industrial structure. By the end of the war the need to study industrial organization became more apparent. The war had required a substantial industrial upheaval in order to transform business firms into efficient war-production units, and this drew Government attention.[60] Public hostility towards suspected wartime profiteering by organized industries also undoubtedly influenced the Government.[61] On the other hand, there was widespread recognition that large-scale industry and powerful marketing organization had helped Germany during the war, and some felt that British export performance might be improved by following Germany's lead.[62] In light of these conflicting viewpoints, the Government established two important committees[63] shortly after the end of World War I.

The two committee inquiries in the immediate postwar period confirmed that many of the great modern combinations originated at the turn of the century and that an even greater tendency to combine existed from that time onward. The general attitude was that trade associations were developing rapidly, especially with the help of cooperative wartime production, and should be investigated. Although the British admired the efficiency of large-scale production in the United States and Germany, Britain's most important world competitors, the concern remained that combinations might be against the public interest. Because of uncertainty regarding the societal impact of monopolies, the Committee on Trusts reported that "it would be desirable to institute machinery for the investigation of the operation of monopolies, trust and combines . . . ."[64] This suggestion was not actually followed until nearly thirty years later.

One of the most famous Government documents regarding antitrust policy is the White Paper,[65] a document touted as an official statement on employment policy. The White Paper was published without prior notice by the wartime coalition Government

60. C. BROCK, *supra* note 37, at 25.

61. C. ROWLEY, *supra* note 42, at 28.

62. *Id.*

63. The two committees formed were The Committee on Commercial and Industrial Policy After the War and The Committee on Trusts. *Id.* at 28 n.1. For a discussion of committee reports, see WILBERFORCE, *supra* note 31, at 40-43 and C. ROWLEY, *supra* note 42, at 28-34.

64. WILBERFORCE, *supra* note 31, at 40; *see* REPORT OF THE COMMITTEE ON TRUSTS, CMD. No. 9236 (1919).

65. WHITE PAPER ON EMPLOYMENT POLICY, CMD. No. 6527 (1944).

in 1944, a time when all political parties were committed to a full-employment policy.[66] The document presents the argument that widespread monopolies and restrictive practices might lead to higher prices and profits, rather than to greater output and employment. The White Paper states:

> Employers, too, must seek in larger output rather than higher prices the reward of enterprise and good management. There has in recent years been a growing tendency towards combines and towards agreements, both national and international, to divide markets and to fix conditions of sale. Such agreements or combines do not necessarily operate against the public interest; but the power to do so is there. The Government will therefore seek power to inform themselves of the extent and effect of restrictive agreements, and of the activities of combines; and to take appropriate action to check practices which may bring advantages to sectional producing interests but work to the detriment of the country as a whole.[67]

It is doubtful that the White Paper's recommendations would have overcome the lingering suspicion and hostility[68] towards antitrust activities had the White Paper not associated full-employment policy with antitrust measures.

One additional factor possibly affected public opinion concerning the evolving industrial structure. Superior theoretical eco-

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66. *See* G. ALLEN, *supra* note 43, at 62.

67. WHITE PAPER ON EMPLOYMENT POLICY, CMD. No. 6527 (1944), quoted in A. HUNTER, *supra* note 48, at 76.

68. G. ALLEN, *supra* note 43, at 62.

> Had it not been for this association of the full-employment policy with anti-monopoly measures, it is doubtful if the resistance to change would have been overcome. The established civil servants were almost all suspicious of the new proposals and the politicians in both parties were divided in their opinions. In general, Labour ministers brought up on Socialist doctrines saw little merit in free competition, and the Marxists among them thought of monopoly as a stage on the road to the State ownership of productive resources . . . . Industry . . . viewed proposals to regulate monopoly with hostility, and the public itself showed little interest in the controversy. It may be that murmurs from the United States Government, then in a mood of renewed liberalism, exerted some influence. That Government was actively concerning itself with the operations of international cartels and was pressing other governments for indications of their policies in regard to them. Inquiries by the British Government into those cartels, and the official attitude towards British participants in them, could hardly be dissociated from policy towards monopoly and restrictive practices as a whole. Something had to be done.

Id. at 62-63.

nomic models had been developed to explain monopolistic evils in a straightforward analytical fashion.[69] During the first three decades of the twentieth century, the models of perfect competition and pure monopoly were being refined. Those interested in studying monopolies and restrictive practices could find no suitable economic theory with which to analyze these phenomena. Because existing theoretical models were inadequate, most government reports relied on plausible reasoning derived from only one or two examples. The development of imperfect competition theory in the late thirties helped fill the gap. By 1948 this analysis, with its sloping demand curve and geometric representation of various equilibrium positions, had been fully absorbed. Even the noneconomist could then appreciate the different degrees of monopoly, as well as the associated output and price levels. As monopolies and restrictive practices increased in Great Britain, this new economic model provided an important graphic picture of the cost of anticompetitive developments to British society.

Although no modern antitrust legislation existed in Great Britain prior to 1948, three common law doctrines were applied to deal with monopolies and restrictive practices.[70] These were monopoly, conspiracy, and contracts in restraint of trade. The common law notion of monopoly has been comparatively ineffective because the courts have interpreted it very narrowly to cover only pure monopolies.[71] The tort of conspiracy prohibits two or more persons from acting with intent to injure a third party.[72] Although this doctrine appears at first glance to readily control restrictive trade activity, an examination of case law reveals the underlying weakness of this theory.[73] If the association's main

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69. *Id.* at 32-33.

70. For a thorough treatment of the common law approach, see WILBERFORCE, *supra* note 31, at 45-115.

71. Monopoly was a term that originally applied only where one individual controlled the total supply of a product. In Great Britain's highly industrialized economy, a single person or corporation can rarely, if ever, achieve complete national domination. *See* A. MARTIN, RESTRICTIVE TRADE PRACTICES AND MONOPOLIES 5 (1957). Apart from monopolies created or authorized by statute, absolute monopoly has never been attained. *Id.* Although the courts have broadened the meaning to include situations in which an individual has a limited monopoly with respect to one particular group, this doctrine has remained ineffective. C. BROCK, *supra* note 37, at 21-22.

72. A. HUNTER, *supra* note 48, at 69-70.

73. *See, e.g.*, Sorrell v. Smith, [1925] A.C. 700; Mogul Steamship Co. v. MacGregor, Gow & Co., [1892] A.C. 25.

purpose is to further the members' own trade interests, it cannot be an illegal conspiracy. The injury is actionable only if the chief motive of the conspiracy is malicious, and malicious intent is practically impossible to prove.[74] The modern doctrine of contracts in restraint of trade is largely derived from *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*[75] Such contracts are void only if the courts find them unreasonable as between the parties and against the public interest,[76] and these qualifications render the doctrine useless. Since most contracts are drawn up for the mutual benefit of the parties concerned, unreasonableness between the parties is extremely difficult to prove. It is doubtful whether an agreement could ever be invalidated on the basis of public injury. Once a restrictive trading agreement is shown to be reasonable in light of the contracting parties' interests,[77] the person challenging the agreement has the burden of proving that it is injurious to the public.[78] And unless a contracting party positively alleges public injury, the court will not even consider that possibility.[79] As for the public interest aspect, legal tradition denies consideration of economic evidence in assessing the public interest,[80] thus making it virtually impossible to prove unreasonable injury to the public.

The inescapable conclusion is that common law doctrines ineffectively controlled monopolies and restrictive trade practices in the 1940s. The courts' concern with conflicting notions of freedom to contract and freedom to compete[81] resulted in self-imposed re-

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74. In Sorrell v. Smith, [1925] A.C. 700, Viscount Cave set forth the controlling principles:

(1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable.

(2) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues.

Id. at 712.

75. [1894] A.C. 535.

76. *Id.* at 565.

77. G. BORRIE & A. DIAMOND, THE CONSUMER, SOCIETY AND THE LAW 223 (1964). The contracting parties are deemed to be the best judges of what is reasonable between themselves. *Id.*

78. *Id.*

79. *Id.* at 224. Even if a judge does consider potential public injury, the preservation of competition is not viewed as a great public advantage. *Id.*

80. C. BROCK, *supra* note 37, at 24.

81. *Id.* at 24.

straints that nullified the doctrines' regulatory power.[82] In order for change to occur, the legislature would have to act.[83] In 1948 the legislature did act.

B. *Early Legislation*

Although common law controls are not dead, statutory controls are far more important today.[84] Great Britain's current antitrust legislation is complex and scattered among numerous statutory provisions.[85] Since recent laws tend to reproduce and modify previous legislation, a historical analysis of British statutory controls is helpful.

The Monopolies and Restrictive Practices (Inquiry and Control) Act 1948[86] (1948 Act) was Great Britain's first modern antitrust statute. As its title indicates, the 1948 Act was enacted primarily to allow inquiries into industries suspected of monopolistic behavior. Although the British Government sought to determine whether such behavior might be contrary to the public interest,

> [i]n effect, they seemed to declare, rather disingenuously: 'We are ignorant in this country about the extent of monopolies and restrictive practices and about their economic effects. At present we have no means of discovering whether these effects are good or bad. But we believe that where monopoly is found to exist, it should be investigated and its effects assessed by an impartial

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82. *Id.* at 24-25. Judicial reluctance to tackle the competition problem is explained as follows:

> It is not, of course, a function of the judiciary to set up principles; in fact it consciously seeks to avoid this. Its process of evolution is by a gradual interpretation and re-interpretation of statute or of case law, stabilized by the appeal to precedent in each particular case. In this way a necessary degree of legal stability is maintained. But it is clear, with reference to the period 1890-1948, that this particular aspect of the judicial system is not of great advantage when dealing with a rapidly developing, complex economic system. Concern with economic organization might be considered more properly the function of the government rather than of the judiciary.

Id. at 25.

83. *See* note 81 *supra.*

84. Some recent cases involve the enforcement of solus petrol ties, which are agreements restricting the brands of petrol to be sold at filling stations. *See* O.E.C.D., 2 GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES, *United Kingdom* § 3 (1979).

85. *See* note 19 *supra* and accompanying text.

86. 11 & 12 Geo. 6, c. 66.

tribunal.'[87]

The 1948 Act marked no material development in the common law rules applicable to restrictive agreements and practices. In light of industry's lingering suspicion regarding antitrust legislation,[88] however, the 1948 Act marked a dramatic change.[89]

The tribunal created by the 1948 Act was the Monopolies and Restrictive Practices Commission (Commission).[90] The Board of Trade, as the department best suited to supervise industry and commerce,[91] regulated the Commission's activities. The Commission, having no independent power to initiate proceedings, investigated and reported on matters referred to it by the Board. The matters that might be referred to the Commission were essentially questions of market dominance.[92] Industrial references could be made only if monopoly conditions existed. The 1948 Act defined monopoly conditions to include industries where one firm supplied one-third or more of the market, or where two or more firms together supplied that amount and thus restricted competition by their joint actions.[93] Once monopoly conditions were identified, the Commission had to judge whether the industry's practices or structures were against the public interest.[94] The public

87. G. ALLEN, *supra* note 43, at 63.

88. *See* note 68 *supra* and accompanying text.

89. G. ALLEN, *supra* note 43, at 63. The Act went remarkably far in light of postwar circumstances:

> Soon after the end of the war most of those who had advocated a vigorous anti-monopoly policy had left government service, and the field remained in possession of lukewarm supporters or opponents. This, together with the continuing hostility of industry, meant that there could be no question of mounting an attack on monopolies and restrictive practices on American lines. Indeed, in view of the weight of opposition and suspicion, it is remarkable that the Act of 1948 went as far as it did.

Id.

90. The Monopolies and Restrictive Practices Commission was renamed the Monopolies Commission in 1956. *See* Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, §§ 28-29. In 1965 the agency became the Monopolies and Mergers Commission, the name it still retains. *See* Monopolies and Mergers Act, 1965, c. 50. For a thorough explanation of the Commission's role, see C. ROWLEY, *supra* note 42.

91. C. ROWLEY, *supra* note 42, at 51.

92. Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, 11 & 12 Geo. 6, c. 66, § 2(1).

93. *Id.* § 3(1).

94. Gribbin, *Recent Antitrust Developments in the United Kingdom*, 20 ANTITRUST BULL. 377, 378 (1975).

interest was defined as the attainment of production efficiency, technical progressiveness, entry into markets, and increased exports.[95] Findings that the structure or operation of an industry was contrary to the public interest were made in a report.[96]

Unless the Commission reports contained trade secrets they were laid before Parliament and published.[97] The Board of Trade might then declare the practice illegal as against the public interest, but the Government was not bound by the Commission's recommendation. And the Government might declare as void some practice not condemned by the Commission or choose methods not recommended by the Commission for regulating the industry.[98]

The Commission's chief task, then, was to investigate particular industries to see whether the one-third rule[99] applied. The Commission next had to discover whether the industry's structure and operation violated some notion of the public interest. Finally, if it contravened public interest, the Commission had to make recommendations for rectifying the situation. Between 1948 and 1956 the Commission investigated only twenty industries.[100]

Several important points should be remembered about this initial Commission. First, it was an administrative and not a judicial tribunal. Second, anticompetitive behavior was examined on an industry-wide basis.[101] The investigation of all the firms in the relevant market sector, and the evaluation of the impact of their trading practices on the public interest, was an extremely time-consuming task.[102] Also, the act only applied to goods as opposed to service industries. Finally, the notion of what constituted the public interest was highly imprecise. The 1948 Act emphasized neutral inquiry; nothing was assumed to be contrary to the public interest. As one commentator explained:

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95. *Id.*

96. C. BROCK, *supra* note 37, at 34.

97. *Id.*

98. *Id.*

99. *See* text accompanying note 93 *supra.*

100. Gribbin, *supra* note 94, at 378. Of these twenty industries, eighteen had cartels controlling between fifty and one hundred percent of the industry's total output. *Id.*

101. In contrast, the Competition Act, 1980, c. 21, allows investigation of individual firms.

102. OFFICE OF FAIR TRADING, ANTI-COMPETITIVE PRACTICES 3 (1980) [hereinafter cited as GUIDELINES].

> Initially this first period was one of tentative investigation and experimentation, and not all cartel arrangements were judged to be against the public interest. A major collective practice was the determination of common minimum selling prices; and though in most cases these were condemned the Commission found some relatively exceptional circumstances in which the practice was permissible; for example, where considerable technical cooperation between the firms resulted in a high level efficiency and quality, and where there was an external check on prices from a strong and knowledgeable buyer.[103]

But this first period did result in the condemnation of many collective arrangements: price fixing, sales quota, resale price maintenance, exclusive dealing, loyalty rebates, collective boycotts and collusive tendering.[104] Because the Board of Trade believed that these illegal collective practices were widespread, it asked the Commission to report on their general effect on the public interest.[105] This report, entitled Collective Discrimination,[106] in combination with previous Commission findings, led to the enactment of the next major piece of legislation.[107]

The Restrictive Trade Practices Act 1956[108] (1956 Act) was a considerable departure from earlier British attitudes regarding restrictive practices. Instead of an administrative tribunal, the judiciary handled the investigation and control of restrictive practices.[109] The 1956 Act created a new court, the Restrictive Practices Court, consisting of both judges and laymen.[110] Another major change was that the 1956 Act did not adopt a neutral posture;[111] emphasis thus shifted from inquiry to control of restric-

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103. Gribbin, *supra* note 94, at 378-79.

104. Such collective practices included most price-fixing, sales quota, resale price maintenance, exclusive dealing, loyalty rebates, collective boycotts, and collusive tendering. *Id.*

105. *See* WILBERFORCE, *supra* note 31, at 118.

106. For an in-depth examination of the Collective Discrimination Report, see *id.* at 141-46.

107. Gribbin, *supra* note 94, at 379.

108. 4 & 5 Eliz. 2, c. 68.

109. C. BROCK, *supra* note 37, at 45. Of course, administrative machinery is utilized in order that the desired categories of restrictions may be brought before the court. *See* WILBERFORCE, *supra* note 31, at 148.

110. Gribbin, *supra* note 94, at 379. For a detailed analysis of the operation of the Restrictive Practices Court, see C. BROCK, *supra* note 37.

111. *See* text accompanying note 103 *supra.*

tive practices.[112] Collective restrictions were considered to be against the public interest unless the defendant successfully pled one of the narrowly-defined gateways.[113] Finally, the 1956 Act established the Office of the Registrar of Restrictive Trading Agreements, which had exclusive responsibility for registering all agreements subject to the Act.[114] The Office would then either certify the agreement as having no economic significance or take the agreement to the Restrictive Practices Court for judgment.[115] In order to avoid any duplication of control, the powers of the Monopolies and Restrictive Practices Commission were curtailed to preclude examination of agreements that were to be registered under the 1956 Act.[116] The Monopolies and Restrictive Practices Commission was accordingly renamed the Monopolies Commission.[117]

A threshold question under the 1956 Act was what agreements had to be registered. Sections 6 to 8 of the Act defined the types of agreements that were liable to registration.[118] The term agreement was construed very broadly to include less formal types of transactions, even arrangements that were never intended to be legally enforceable.[119] Certain basic requirements earmarked an agreement for compulsory registration. The agreement had to be made between two or more persons carrying on business[120] in Great Britain in the production or supply of goods.[121] Agreements pertaining to services and purely unilateral restrictions were excluded from the Act's scope.[122] Finally, the prohibited restrictions only involved particular matters enumerated in section 6(1), such as prices, quantities, manufacturing processes, or customers. Section 21 provided numerous gateways by which agreements could

112. C. BROCK, *supra* note 37, at 45.

113. Gribbin, *supra* note 94, at 379. The term gateway is used to describe a safe harbor from liability.

114. *Id.*

115. *Id.*

116. Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 29.

117. *See* note 90 *supra.*

118. For a detailed analysis of what agreements had to be registered, see WILBERFORCE, *supra* note 31, at 238-302.

119. *Id.* at 151.

120. The requirement of carrying on business is discussed in WILBERFORCE, *supra* note 31, at 263-65.

121. Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 6(1).

122. WILBERFORCE, *supra* note 31, at 153.

escape liability.[123] These gateways included showing that the restriction was reasonably necessary to protect the public against injury[124] and other assorted affirmative defenses.[125]

One unique aspect of the 1956 Act was that illegal restrictive agreements were subject only to the civil remedy of injunctive relief.[126]

> The "odour of criminality" is kept away from the world of restrictive practices in trade. But the extent of this distinction should not be exaggerated. In the first place, although the immediate order which is made by the court is of a civil character, namely, an injunction, any breach of that order involves a contempt of court with quasi-criminal sanctions . . . . In any event, it would be wrong to deduce from the civil character of the proceedings . . . any intention on the part of the legislature to reduce the thrust of the Act against the practices within its scope.[127]

A second interesting aspect of the Act is that the registration process was not merely the preliminary step to judicial investigations. Registration was regarded as an essential instrument for reducing restrictive practices through the publicity of registration.[128] This technique was claimed effective because of statistics showing a continuing decline in the number of registered agreements. When 1959 ended, 2,240 agreements had been registered.[129] This figure represented about eighty percent of all those agreements registered through 1975.[130] The parties to more than 2,000 of these agreements either abandoned or altered their agreements after registration but before they went to court.[131]

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123. For a detailed analysis of these safe harbors, see *id.* at 342-403.

124. Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 21(1)(a).

125. *Id.* § 21(1)(b)-(g). Thus, once an agreement was registered, the parties to the agreement could seek to retain the restrictions in their agreement by demonstrating that those restrictions offered one or more of seven benefits specified in section 21 of the 1956 Act. *See* INTERDEPARTMENTAL GROUP, A REVIEW OF RESTRICTIVE TRADE PRACTICES POLICY 9 (1979) (consultative document known as a Government Green Paper, presented to Parliament by the Secretary of State for Prices and Consumer Protection by command of Her Majesty) [hereinafter cited as GREEN PAPER].

126. *See* WILBERFORCE, *supra* note 31, at 148-49.

127. *Id.* at 149.

128. *Id.* at 151. The register was open to the public. Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 11(4).

129. Gribbin, *supra* note 94, at 380.

130. *Id.*

131. *Id.* The majority of agreements were voluntarily terminated for the fol-

The restrictive practice of resale price maintenance was expressly prohibited by specific antitrust legislation. Although collective enforcement of resale price maintenance was prohibited by the 1956 Act,[132] individual enforcement was not controlled until the Resale Prices Act 1964.[133] The Resale Prices Act 1964 expanded the jurisdiction of both the Registrar[134] and the Restrictive Practices Court[135] to include cases involving resale price maintenance by direct contract terms, by refusals to supply those who sell below the resale price, or by refusals to supply such price cutters except on unfavorable terms.[136]

The 1964 Act had a built-in presumption that resale price maintenance was contrary to the public interest, but suppliers could assert an affirmative defense much like that available for potentially restrictive agreements under the 1956 Act.[137] Section 5(2) of the Resale Prices Act 1964 provided that the Restrictive Practices Court could exempt certain classes of goods if it appeared that enforcement would result in certain specified injuries to consumers. These injuries included reduced product quality,[138] product unavailability,[139] price increases,[140] lessened product safety,[141] and reduced service in connection with the product.[142] A tailpiece required a balancing of the detriment to consumers if an

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lowing reason:

> It is widely believed that the earlier decision by the court . . . pointed the way that judgments would go and left the participants and their legal advisors with the very clear impression that an ordinary run-of-the-mill cartel would not survive a contest. Voluntary termination, therefore, became the major means by which cartel agreements in the UK were formally ended.

Id.

132. The 1956 Act imposed an absolute ban on the collective enforcement of resale price maintenance, such as agreements between retailers not to purchase from a supplier who failed to enforce resale price conditions. Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 24.

133. C. 58.

134. *See* text accompanying notes 114-15 *supra.*

135. *See* text accompanying note 110 *supra.*

136. Kintner, Joelson & Griffin, *Recent Developments in United Kingdom Antitrust Law,* 19 ANTITRUST BULL. 217, 236 (1974).

137. *See* notes 123-24 *supra* and accompanying text.

138. Resale Prices Act, 1964, c. 58, § 5(2)(a).

139. *Id.* § 5(2)(b).

140. *Id.* § 5(2)(c).

141. *Id.* § 5(2)(d).

142. *Id.* § 5(2)(e).

exemption was granted against the detriment if the practice was stopped.[143]

The Resale Prices Act 1964 required the Registrar to compile a list of suppliers claiming an exemption, arrange the suppliers according to classes of goods, and bring cases before the Restrictive Practices Court.[144] The suppliers could continue resale price maintenance until the court decided about the goods in their class. Although many industries initially sought an exemption,[145] only four ever went to trial and two of these resulted in the grant of an exemption.[146] The great majority of industries claiming an exemption simply abandoned the case before a court decision.[147] The Registrar regarded its program as a tremendous success, because "resale price maintenance, at least as publicly practiced, had largely disappeared in the United Kingdom except for the

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143. The tailpiece is the general provision that sometimes follows a list of specific exemptions. For example, section 5(2) provides five explicit situations in which the court could exempt resale price maintenance. The tailpiece broadly provides that "in any such case that the resulting detriment to the public as consumers or users of the goods in question would outweigh any detriment to them" the exemption will not apply. Resale Prices Act, 1964, c. 58, § 5(2). Thus, this tailpiece requires a public balance even if one of the specific gateways has been met.

144. Kinter, *supra* note 136, at 236.

145. *Id.* One hundred sixty industries initially claimed an exemption. *Id.*

146. GREEN PAPER, *supra* note 125, at 21. These exemptions came about as follows:

> Subsequently, only four cases came before the Court. When the first Court found against resale price maintenance in the first two cases (confectionary (1967) and footwear (1968)), the manufacturers or suppliers of most other classes of goods abandoned resale price maintenance rather than face the prospect of expensive Court proceedings with little likelihood of success. However, the other two cases were successful. The first case (1968) concerned the Net Book Agreement and was not contested by the Registrar on the ground that the Net Book Agreement, which involved enforcement of resale price maintenance but also restrictions under the 1956 Act, had already been found by the Court to be not against the public interest. The second case concerned ethical and proprietary medicaments which gained exemption by order of the Court in 1970; the grounds were that abandonment would lead to a reduction in the quality or variety of ethical medicaments and a reduction in necessary services, while in the case of proprietary medicaments it would result in a reduction in the number of outlets.

Id.

147. Kinter, *supra* note 136, at 236.

exempted areas of drugs and books."[148]

The Resale Prices Act 1964, however, did not make resale price maintenance a criminal offense.[149] Enforcement was through civil proceedings. A trader who felt he had been unlawfully refused goods could obtain a court order requiring the supplier to deal with him.[150] A civil action could also be brought on behalf of the Crown.[151]

The next major antitrust legislation was the Monopolies and Mergers Act 1965[152] (1965 Act). This Act embodied three important developments in competition law. First, the Act brought the service sector of the economy within the scope of antitrust legislation.[153] Second, under the 1965 Act, mergers and proposed mergers could be referred to the Monopolies and Mergers Commission[154] if: "(i) the merger created or enhanced a monopoly in the supply of any particular goods or services in the United Kingdom, a monopoly being a 33⅓ percent share of the relevant market; or (ii) the value of the assets to be taken over exceeded £15 million."[155] If the Commission concluded that a merger or proposed merger was against the public interest,[156] the Secretary of State

148. *Report of the Registrar of Restrictive Trading Agreements* 1966-1969, 15 ANTITRUST BULL. 563, 584-85 (1970).

149. In fact, § 4(1) of the Act expressly prohibits criminal liability for resale price maintenance. Resale Prices Act, 1964, c. 58.

150. *Id.* § 4.

151. *Id.*

152. C. 50.

153. The failure to control restrictive practices regarding services, as opposed to goods, was a notable omission from the 1948 Act. *See* Gribbin, *supra* note 94, at 382.

154. This was the second time the Commission had been renamed. *See* note 90 *supra.*

155. *See* Monopolies and Mergers Act, 1965, c. 50, § 6(b)(i)-(ii).

156. One commentator relates the public interest consideration to merger policy as follows:

> It is difficult to draw any firm conclusions about the types of merger likely to be found against the public interest as there have been few cases considered thus far; but what is clear is that merger control was not operated with severity; there being no equivalent to the Department of Justice guidelines. Even mergers referred on combined grounds of monopoly and size had a relatively high chance of getting clearance. However, there was a higher probability that mergers which increased shares in the same market would be referred than those considered simply for their size. Thus, to the extent that policy operated directly to restrain mergers, it was the horizontal rather than the diversified that attracted attention.

was empowered to prohibit it or, if the merger had already taken effect, to either regulate the merged companies or require their dissolution.[157] The 1965 Act's third main feature was a separate provision for the examination of newspaper mergers.[158]

III. Existing Statutory Structure

The current British restrictive practices and monopoly laws are found in six statutes. These are the Fair Trading Act 1973,[159] the Restrictive Trade Practices Act 1976,[160] the Resale Prices Act 1976,[161] the Restrictive Practices Court Act 1976,[162] the Restrictive Trade Practices Act 1977,[163] and the Competition Act 1980.[164] In order to highlight the impact of the Competition Act 1980 upon British antitrust legislation, this Act will be considered separately after the general two-pronged thrust of antitrust enforcement is discussed. This two-pronged approach hits monopolies and mergers on the one hand and restrictive trade practices on the other. The Competition Act 1980 helps fill the gap between these two types of legislation.[165]

A. *Monopolies and Mergers Legislation*

The principal statute relating to monopolies and mergers legislation is the Fair Trading Act 1973.[166] This Act is the longest and most complex of all British competition laws.[167] The main topics[168] it addresses are the establishment of the Office of Fair

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Gribbin, *supra* note 94, at 383.

157. Monopolies and Mergers Act, 1965, c. 50 § 6.

158. *See id.* § 8.

159. C. 41.

160. C. 34.

161. C. 53.

162. C. 33.

163. C. 19.

164. C. 21.

165. Marshall, Concept and Practice of the British Restrictive Practices and Monopoly Law, 8 Int'l Bus. Law. 59, 64 (1980) (paper prepared for the Zurich Meeting of Committee C—Antitrust Law and Monopolies).

166. C. 41. This act repeals the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, c. 66, and the Monopolies and Mergers Act, 1965, c. 50.

167. Gribbin, *supra* note 94, at 391.

168. Besides the main topics, the Fair Trading Act 1973 also deals with consumer protection and pyramid selling. *Id.*

Trading, monopolies and mergers, and restrictive trade practices.[169]

A principal feature of the Fair Trading Act 1973 is the substantial administrative change made by creating the position of the Director General in the new Office of Fair Trading (OFT).[170] The Director General is an independent and nonpolitical appointment.[171] This nonpolitical aspect is important in relation to the Director General's ability to refer cases to the Monopolies and Mergers Commission.[172] Prior to the Fair Trading Act 1973, only Ministers of the British Government could make references to the Commission. The creation of the OFT ended a long debate regarding the questionably political nature of these references.[173] One British commentator described this policy evolution in the following way:

> [W]hen in 1970 the Conservative Government began to think about new legislation, there had come to be recognition that monopoly policy was evolving in a largely non-political direction. It was therefore attracted to the idea of having an independent body outside Government which would become expert on competition matters, have powers to make its own references to the Monopolies Commission, be able to implement the latter's recommendations, and also try to secure voluntary changes from industry. It thought that by this, greater continuity in monopoly policy would develop and there would be a more thorough and consistent scrutiny of industry practices and structures.[174]

Although the OFT's creation decreased the political aura surrounding monopoly references, it must be noted that the Secretary of State appoints the Director General[175] and has total veto power over the Director General's reference.[176]

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169. *See* text accompanying notes 206-07 *infra* for a summary of how the Fair Trading Act 1973 impacts upon restrictive trade practices.

170. Fair Trading Act, 1973, c. 41, § 1.

171. Gribbin, *supra* note 94, at 391. The Director General is neither a Minister nor a civil servant. He is appointed for renewable periods of five years and may only be removed because of incapacity or misbehavior. *Id.*

172. *See* Fair Trading Act, 1973, c. 41, § 50.

173. *See* Gribbin, *supra* note 94, at 394-95.

174. *Id.* at 395-96.

175. Fair Trading Act, 1973, c. 41, § 1(1).

176. *Id.* § 50(6). This veto power over a proposed reference must be publicly exercised, and accordingly it is not used lightly or frequently. Gribbin, *supra* note 94, at 396.

Commission investigations are now normally carried out on the Director General's reference.[177] Section 2 of the Fair Trading Act 1973 creates an affirmative duty on the Director General's part to "keep under review the carrying on of commercial activities in the United Kingdom, and to collect information with respect to those activities . . . with a view to his becoming aware of . . . monopoly situations or uncompetitive practices."[178] These review and information-gathering functions break with the past; prior policy implementation had relied primarily upon complaints, official statistics, and the unsolicited flow of information into the Government.[179]

It must be remembered that monopoly references can be made only if monopoly conditions exist. A statutory monopoly qualifies for investigation only if one firm has at least twenty-five percent[180] of the market for supply or acquisition of particular goods or services,[181] or when a number of firms together constitute at least twenty-five percent of the market and operate so as to restrict competition.[182] Thus, a monopoly reference can only be made after the Director General has examined a particular market sector and determined that the requisite market share exists.

The OFT reviews monopoly situations in two ways.[183] First, the economic performance of industries is monitored to identify sectors requiring closer study.[184] This is done by reviewing statistical information on market structure and other market aspects such as advertising.[185] Various other indicators, such as financial and

177. Marshall, *supra* note 165, at 62. The Secretary of State has concurrent reference powers, *id.*, as does any Minister. Fair Trading Act, 1973, c. 41, § 51.

178. Fair Trading Act, 1973, c. 41, § 2(2).

179. Gribbin, *supra* note 94, at 391-92.

180. The 1973 Act lowered the statutory minimum for monopoly conditions from the 33 ⅓% required under the Monopolies and Mergers Act, 1965. *See* text accompanying note 93 *supra.*

181. This is known as a scale monopoly. Marshall, *supra* note 165, at 62.

182. This is known as a complex monopoly. *Id.; see* Fair Trading Act, 1973, c. 41, §§ 6-7, 11.

183. OFFICE OF FAIR TRADING, ANNUAL REPORT OF THE DIRECTOR GENERAL OF FAIR TRADING 35 (1980) [hereinafter cited as ANNUAL REPORT].

184. *Id.*

185. Statistical information on market structure at various levels of the Standard Industrial Classification is assembled in an effort to identify product markets in which leading firms exercise market power. Competition from imports is taken into account. *Id.*

international trading performances, are also considered.[186] Second, the OFT considers firm and consumer complaints about allegedly unfair practices that are frequently related to monopoly conditions.[187] A monopoly reference proposal can be developed only after a comprehensive study of the particular market, including its structure, the conduct of the leading firms, and the economic performance of both the industry and main firms.[188] Although there is no presumption that the monopoly is in itself harmful, it is recognized that market dominance is liable to abuse.[189]

Once the reference is made, the Monopolies and Mergers Commission investigates and reports. The Commission must first determine whether a monopoly situation truly exists.[190] If it does exist, the Commission must consider whether the situation operates, or may be expected to operate, against the public interest.[191] This determination involves, among other things, a consideration of the desirability:

> (a) of maintaining and promoting effective competition between persons supplying goods and services in the United Kingdom;
> (b) of promoting the interests of consumers, purchasers and other users of goods and services in the United Kingdom in respect of the prices charged for them and in respect of their quality and the variety of goods and services supplied;
> (c) of promoting, through competition, the reduction of costs and the development and use of new techniques and new products, and of facilitating the entry of new competitors into existing markets;
> (d) of maintaining and promoting the balanced distribution of industry and employment in the United Kingdom; and
> (e) of maintaining and promoting competitive activity in markets outside the United Kingdom on the party of producers of goods, and of suppliers of goods and services, in the United Kingdom.[192]

The Commission must report by a set time limit, subject to extension by the Secretary of State.[193] The investigation involves

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186. *Id.*
187. *Id.*
188. *Id.*
189. Marshall, *supra* note 165, at 62.
190. *Id.; see* notes 180-82 *supra* and accompanying text.
191. Marshall, *supra* note 165, at 62.
192. Fair Trading Act, 1973, c. 41, § 84(1)(a)-(e).
193. Marshall, *supra* note 165, at 62. This provision is in response to industry criticisms that the Commission took an average of two years to complete a

taking evidence from the firms directly concerned, others involved in the industry, and consumers.[194]

If the Commission finds that a monopoly exists and operates against the public interest, the adverse effects must be specified.[195] The Secretary of State then has broad powers to remedy these adverse effects.[196] Normally, however, the Secretary simply asks the Director General of the OFT to discuss possible remedial actions with the parties.[197] After the results of this meeting are disclosed to the Secretary, the Director General is usually asked to obtain an undertaking from the firms concerned.[198]

The Fair Trading Act 1973 has a less dramatic impact on mergers. The requisite market share triggering a violation is reduced to twenty-five percent, as it is for monopolies.[199] Merger reference can only be made by Ministers.[200] The Director General does have an important role, however, since the Act requires him to keep informed of actual and potential mergers and to advise the Secretary of State whether or not a particular merger should be referred.[201]

Merger cases also require that the Commission determine whether under section 84 the particular matter operates, or may be expected to operate, against the public interest.[202] Present British merger policy presumes that mergers are on balance beneficial.[203] The Commission is also required to judge the likely future behavior of the combined group, as compared with that of the separate companies.[204] After the investigation, the Commis-

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report. Gribbin, *supra* note 94, at 397.

194. Marshall, *supra* note 165, at 62. Firms generally have legal representation during the investigation. *Id.* If the firms being investigated are uncooperative, there are back-up powers to require information. *Id.*

195. Fair Trading Act, 1973, c. 41, § 54(3).

196. Marshall, *supra* note 165, at 62. These powers include ordering the divestment and split-up of companies. *Id.*

197. *Id.*

198. Obtaining and undertaking can involve the OFT in complex, drawn-out negotiations, especially if the firms are not controlled in Great Britain. *Id.*

199. Fair Trading Act, 1973, c. 41, § 64(2).

200. Gribbin, *supra* note 94, at 397. Contrast the merger approach with that adopted in regard to monopoly references. *See* notes 171-73 *supra* and accompanying text.

201. *See* Fair Trading Act, 1973, c. 41, § 76.

202. *See* text accompanying notes 191-92 *supra.*

203. Marshall, *supra* note 165, at 62.

204. *Id.* at 63.

sion must produce definite conclusions and reasons to support them.[205]

B. *Restrictive Trade Practices Legislation*

The Fair Trading Act 1973 makes several important changes in restrictive trade practices legislation. Under section 94 the Director General takes over the post of the Registrar of Restrictive Trading Agreements.[206] This statute also extends the scope of the 1956 Act to include services,[207] as well as goods.

The combined responsibilities of the OFT is a development of great potential importance indicating a unified approach to competition problems;[208] it is the first time that the policy aspects of restrictive trade practices and monopolies are examined by one body. In 1975 a British commentator optimistically predicted that "as the considerable expertise derived from the enforcement of the restrictive practices legislation is added to the speedy and flexible exercise of the monopolies and mergers powers, the Office of Fair Trading will have a wider range of potential remedies for failure of competition than has ever existed before."[209]

The Restrictive Trade Practices Act 1976, the Resale Prices Act 1976, and the Restrictive Practices Court Act 1976 are consolidation statutes. These acts conveniently repeal and reproduce without modification provisions scattered in numerous prior statutes.[210] The Restrictive Trade Practices Act 1977 merely provides a vehicle by which the Secretary of State can make orders providing that certain matters be disregarded when determining when an agreement is registrable. It also exempts certain types of

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205. *See* Fair Trading Act, 1973, c. 41, §§ 69-72.

206. *See* text accompanying notes 114 & 134 *supra.*

207. Fair Trading Act, 1973, c. 41, §§ 107-117. *See* text accompanying note 122 *supra.*

208. Gribbin, *supra* note 94, at 400.

209. *Id.* at 401. The Competition Act 1980 develops this unification theme even further and adds to the OFT's remedies. *See* text accompanying notes 450-52 *infra.*

210. The Restrictive Trade Practices Act 1976 consolidates the enactments relating to restrictive trade practices. *See* Restrictive Trade Practices Act, 1976, c. 34. The Resale Prices Act 1976 consolidates provisions of the Resale Prices Act 1964 still having effect, Part II of the Restrictive Trade Practices Act 1956 and related enactments. *See* Resale Prices Act, 1976, c. 53. The Restrictive Practices Court Act 1976 consolidates certain enactments relating to the Restrictive Practices Court. *See* Restrictive Practices Court Act, 1976, c. 33.

financial agreements from registration.[211]

Unless specifically exempted, all written or oral business agreements under which two or more parties accept specified restrictions must be registered with the Director General of Fair Trading.[212] The restrictions concerned must thereafter be modified, abandoned, or defended before the Restrictive Practices Court, unless the agreements are so insignificant that they need not be investigated.[213] The Restrictive Practices Court then assesses the restrictions against legislative criteria and determines whether they are against the public interest.[214]

A threshold determination under these statutes is what constitutes an agreement. Legislation gives the term a wide meaning that covers written, oral, and implied agreements.[215] Even agreements that were never intended to be legally enforceable are subject to registration.[216] Recommendations by trade associations to their members must also be registered.[217] Covered agreements include those relating to goods,[218] services,[219] and exchanges of information regarding goods.[220] Certain special types of agreements are expressly exempt from registration, such as the agreements of approved cooperative wholesale societies.[221] The Secretary of State can exempt by order agreements that are of substantial importance to the national economy and meet strict criteria.[222] The Secretary can also exempt agreements made at his request that

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211. Restrictive Trade Practices Act, 1977, c. 19, § 2.
212. Marshall, *supra* note 165, at 59.
213. *Id.*
214. *Id.*
215. GREEN PAPER, *supra* note 125, at 10.
216. Restrictive Trade Practices Act, 1976, c. 34, § 43(1).
217. *Id.*
218. Restrictive Trade Practices Act, 1976, c. 34.
219. *Id.* §§ 11-20.
220. Restrictive Trade Practices Act, 1977, c. 19, § 3. These information agreements are between two or more parties to furnish to each other or to other persons information with respect to the matters discussed in Restrictive Trade Practices Act, 1976, c. 34, § 7(1)(a)-(h).
221. Restrictive Trade Practices Act, 1976, c. 34, § 32. Section 33 exempts agreements between certain agricultural, forestry, and fishery associations. Agreements authorized by the European Coal and Steel Community Treaty are also exempt. *Id.* § 34. Schedule Three excludes certain exclusive dealing contracts, certain know-how agreements, trademarks, patents, and agreements authorized by statute. Schedule 1 excludes agreements relating to certain professional services. For other exemptions, see *id.* §§ 9, 18, 29, 30.
222. *Id.* § 29.

are designed to prevent increases in or reduce prices.[223]

The next issue involves identifying restrictions triggering registration. Broadly speaking, an agreement must be registered if the parties accept restrictions regarding the price of goods,[224] the terms upon which goods are supplied or acquired,[225] the quantities or descriptions of goods to be produced,[226] or the persons to or from whom, or the areas in which, the goods are to be supplied or acquired.[227] Similar restrictions apply to agreements as to services.[228] Agreements need only be registered if the parties accept such restrictions. Acceptance includes situations in which the agreement simply confers benefits upon parties who comply with the restrictions or imposes obligations for noncompliance.[229]

The Director General must be notified within certain time limits of agreements that must be registered.[230] Failure to register renders the restrictions void,[231] and subsequent operation is an unlawful, but not criminal, offence.[232] If the restrictions are placed on the register, they are subject to public inspection unless the Secretary of State directs that confidentiality be maintained.[233]

The Director General must[234] refer every registered agreement to the Restrictive Practices Court for a decision regarding whether the restrictions are contrary to the public interest, except in three instances. First, the Director General need not refer the agreement in a section 21(2) procedure.[235] Under this procedure, when the application is submitted[236] the Secretary of State tells the Director General not to refer it because the restrictions involved are insignificant. The second situation occurs where the

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223. *Id.* § 30.
224. *Id.* § 6(1)(a).
225. *Id.* § 6(1)(c).
226. *Id.* § 6(1)(d).
227. *Id.* § 6(1)(f).
228. *See id.* § 11(2)(a)-(e).
229. *Id.* § 6(3)(a)-(b).
230. *See id.* § 24.
231. *Id.* § 35.
232. *Id.*
233. GREEN PAPER, *supra* note 125, at 11. Confidentiality is maintained if disclosure would be contrary to the public interest or if trade secrets are involved. *Id.*
234. Restrictive Trade Practices Act, 1976, c. 34, §§ 1(2)(c), 21.
235. GREEN PAPER, *supra* note 125, at 11.
236. The Director General must first make a representation asking for this.

agreement has been terminated or modified so that it no longer requires registration.[237] Finally, the Director General may refrain from referring the agreement if he thinks it appropriate in light of any directly applicable provision of the European Communities.[238]

Once the agreement reaches the Restrictive Practices Court, the emphasis is upon the restrictions.[239] Each restriction is considered separately.[240] If the parties decide not to defend[241] a particular restriction, or if there is an unsuccessful defense, the court is bound to declare that the restriction is contrary to the public interest.[242] If such a declaration is made, the court usually makes an order or accepts an undertaking to prevent enforcement of the condemned restrictions.[243] Breach of an order or undertaking may result in contempt of court proceedings.[244]

The Restrictive Practices Court is composed of one judge and at least two appointed members.[245] Although case evaluations are decided by majority verdict, the judge alone rules on matters of law.[246] A restriction is presumed to be contrary to the public interest unless the parties can establish that they meet one or more of eight specific criteria, which are usually called gateways.[247] The gateways require a showing of at least one of the following:

> (a) that the restriction or information provision is reasonably necessary, having regard to the character of the goods to which it applies, to protect the public against injury (whether to persons or to premises) in connection with the consumption, installation or use of those goods;
> (b) that the removal of the restriction or information provision would deny to the public as purchasers, consumers or users of any goods, other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the

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237. *See* Restrictive Trade Practices Act, 1976, c. 34, § 21.
238. *See id.*
239. GREEN PAPER, *supra* note 125, at 12.
240. *Id.*
241. Decisions to defend an agreement may result in the judicial proceedings lasting two years, although the actual hearing only lasts several days. *Id.* at 13.
242. *Id.* at 12.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 12-13.
247. *See* Restrictive Trade Practices Act, 1976, c. 34, § 10(1)(a)-(h). A gateway is a safe harbor. *See* note 123 *supra* and accompanying text.

restriction or information provision itself or of any arrangements or operations resulting therefrom;
(c) that the restriction or information provision is reasonably necessary to counteract measures taken by any one person not party to the agreement with a view to preventing or restricting competition in or in relation to the trade or business in which the persons party thereto are engaged;
(d) that the restriction or information provision is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who, either alone or in combination with any other such person, controls a preponderant part of the market for such goods;
(e) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction or information provision would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together, in which a substantial proportion of the trade or industry to which the agreement relates is situated;
(f) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction or information provision would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry;
(g) that the restriction or information provision is reasonably required for purposes connected with the maintenance of any other restriction accepted or information provision made by the parties, whether under the same agreement or under any other agreement between them, being a restriction or information provision which is found by the Court not to be contrary to the public interest upon grounds other than those specified in this paragraph, or has been so found in previous proceedings before the Court; or
(h) that the restriction or information provision does not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry and is not likely to do so . . . .[248]

248. Restrictive Trade Practices Act, 1976, c. 34, § 10(1)(a)-(h).

Although the above gateways apply to restrictive agreements and information agreements regarding goods, very similar gateways apply to service agreements.[249] Even if the parties come within one of these gateways to the court's satisfaction, the court must still determine whether the overall public detriment outweighs the advantages resulting from the operation of the restriction.[250] If the restriction is found to be reasonable in light of this balance, it is not against the public interest.

The Resale Prices Act 1976 condemns both individual and collective resale price maintenance.[251] The Restrictive Practices Court can exempt particular classes of goods if the suppliers can prove that certain benefits will accrue from the continuation of minimum resale prices.[252] The suppliers must also show that these benefits outweigh any detriment.[253]

Although the procedure outlined in the Resale Prices Act 1976 is quite similar to that used to control restrictive agreements, there is an important difference. The Act goes beyond the Restrictive Trade Practices Act 1976 by making void the unilateral enforcement of a restriction. Restrictive trade agreements are thus defined to require some sort of concerted action.[254]

C. *Possible Conflict with EEC Competition Policy*

On January 1, 1972, the United Kingdom became a member of the European Economic Community (EEC), and the rules of competition under the Treaty of Rome became effective.[255] The general principle is that community law prevails over national law.[256] It is hoped that national laws complement rather than conflict with EEC policy.[257]

The behavior of firms supplying the British market from home production or from imports originating outside the EEC is not governed by community rules.[258] Where overlap is possible, Brit-

249. *See id.* § 19(1)(a)-(h).
250. *See id.* § 10. The tailpiece involves the balancing process. *See* note 143 *supra.*
251. Marshall, *supra* note 165, at 60.
252. Resale Prices Act, 1976, c. 53, § 14.
253. *Id.*
254. *See* GREEN PAPER, *supra* note 125 at 13.
255. Gribbin, *supra* note 94, at 409.
256. Marshall, *supra* note 165, at 60.
257. Gribbin, *supra* note 94, at 409.
258. *Id.*

ish legislation provides discretionary safeguards to avoid conflict. Under the Restrictive Trade Practices Act 1976, for example, the Director General may refrain from referring a registered restrictive agreement to the court if he thinks it appropriate in light of a directly applicable EEC provision.[259] Similarly, the Restrictive Practices Court has discretion not to exercise some of its powers under the Act and can vary previously made orders.[260]

The possibility does exist, however, that the Restrictive Trade Practices Court may approve an agreement that is condemned by the EEC and vice versa.[261] Monopolies and mergers legislation under the Fair Trading Act 1973[262] apparently does not conflict with EEC competition policy.[263]

D. *The Dilemma*

British legislation prior to the enactment of the Competition Act 1980 represented a tremendous evolution from the tentative beginnings of the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948. Examination of the success of these statutory developments has received mixed reviews. The general conclusion seems to be that the legislation has been very effective in regulating certain types of anticompetitive behavior.[264] The problem, however, is that "there are some worrying examples of evasions which have come to light in recent years as well as some loopholes which need to be closed."[265] A recent government study, the Green Paper,[266] assessed the problems underlying such gaps in the antitrust legislation.

A fundamental difficulty with this legislation involves failures to register. The restrictive trade practices legislation requires that certain restrictive agreements be registered with the OFT. The registration process alone has uncovered a wide range of previously unknown national agreements and has accordingly been an invaluable information source, especially in the early stages of

259. *See* text accompanying note 238 *supra.*
260. Marshall, *supra* note 165, at 60.
261. *Id.*
262. C. 41.
263. Marshall, *supra* note 165, at 63.
264. *See* GREEN PAPER, *supra* note 125, at 25.
265. ANNUAL REPORT, *supra* note 183, at 10.
266. *See* note 125 *supra.*

such legislation.[267] Although statistical studies point to the tremendous success of these registration requirements, it must be remembered that such statistics can only be based upon the agreements actually registered. If the number of registered agreements decreases, either the use of such agreements is diminishing or British businesses are simply more reluctant to report them.[268] The number of unregistered agreements that continually come to light suggests that a great percentage of illegal agreements exist.[269] Although it is widely believed that most restrictive agreements are unregistered, there is, of course, no way to determine the precise proportion.[270]

Failure to register may occur for a number of reasons: (1) ignorance or uncertainty about the complex restrictive practices legislation;[271] (2) calculating that there is little chance of success before the Restrictive Practices Court;[272] or (3) deliberate evasions of the law.[273] Failure to register renders the applicable restrictions in the agreement void, but does not result in criminal proceedings.[274]

Registration is unnecessary if the agreements are structured so that they fall outside the precisely worded registration requirements. For example, restrictions must be accepted by two or more parties before the agreement is registrable.[275] Agreements formulated so that only one party accepts restrictions need not be registered.[276] This type of deliberate avoidance should not be overstated because the existing statutory structure simply does not compel the registration of every restrictive agreement. Since the form of the agreement is the sole criterion for registration, drafting methods will always be found to avoid the necessity of registering.

Agreements that represent a crossover between goods and services create an additional loophole. The restrictive trade provisions regarding goods are entirely separate from those concerning

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267. GREEN PAPER, *supra* note 125, at 20.
268. *See* note 146 *supra.*
269. Marshall, *supra* note 165, at 61.
270. *See* GREEN PAPER, *supra* note 125, at 20.
271. *Id.* at 35.
272. *See* note 146 *supra.*
273. *See* GREEN PAPER, *supra* note 125, at 35.
274. Marshall, *supra* note 165, at 61.
275. Restrictive Trade Practices Act, 1976, c. 34, §§ 6, 11.
276. GREEN PAPER, *supra* note 125, at 35.

services. This means that agreements between parties who supply goods but only accept restrictions relating exclusively to services are not covered, and vicē versa.[277] Although avoidance of registration through such arrangements is felt to be minimal, it occurs with sufficient frequency that this unusual category of cases should be brought under control.[278]

Numerous restrictive agreements are never registered because they fall within classes of agreements specifically exempted by legislation.[279] The Green Paper suggests that certain of these statutory exemptions may in fact be too broad, especially the exclusion relating to professional services.[280]

The Green Paper makes some general conclusions regarding problems arising from the scope of the restrictive practices legislation. These problems are summarized as follows:

> (i) All qualifying agreements have to be registered, whether they affect competition or not. Although registration is intended to be a neutral act, it is not so viewed by many of those affected, with the risk that the legislation may deter the making of innocuous or beneficial agreements and recommendations.
> (ii) On the other hand, the legislation does not catch some agreements or arrangements which, while avoiding registrability, may be similar in effect to some of those which are covered.
> (iii) The form of the legislation, under which the criteria for registrability are quite distinct from the criteria for evaluating the public interest, means that the parties to an agreement and the Office of Fair Trading have to devote disproportionate resources to technical questions of registrability. It is often difficult to know precisely what agreements are registrable.
> (iv) The requirements of the legislation may well be overlooked by some (mainly small) firms, perhaps understandably in view of its complexity.[281]

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277. Marshall, *supra* note 165, at 61. An example of this is the following:
> [I]f a number of manufacturers of goods agree that none of them will pay to any haulier more than a certain mileage rate for the service of hauling their goods, their agreement will fall outside the legislation. But an agreement by the hauliers not to charge any of the manufacturers less than a certain mileage rate for hauling their goods would, of course, be registrable.

GREEN PAPER, *supra* note 125, at 39.

278. GREEN PAPER, *supra* note 125, at 40.

279. For a discussion of these types of agreements, see *id.* at 36-39.

280. *Id.* at 37.

281. *Id.* at 40.

Thus, many of the problems underlying the restrictive practices legislation can be traced to the total reliance upon the agreement's form as the mechanism that triggers registration. Other problems exist in relation to the evaluation procedure utilized by the Restrictive Practices Court.

Several fundamental criticisms have been voiced concerning the court's evaluation procedure:

> (i) As a result of a combination of the cost (including management effort) involved in defending agreements, the slowness of the Court procedure, and the knowledge of its previous decisions, few parties to an agreement are willing to test it before the Court even if they believe that it can be justified, and the procedures therefore lead to the legislation operating in effect as a *per se* prohibition of registrable agreements.
> (ii) That, in consequence, agreements that might be beneficial are prevented from being operated, and that this is inconsistent with the objectives of the Government's industrial policy.
> (iii) That it offers an inadequate means of dealing with short-term agreements, and permits the extended operation of undesirable agreements.[282]

The public interest criteria established by the Restrictive Trade Practices Act 1976 are extremely difficult to apply. The complexity of these criteria, which are the eight gateways and the balancing tailpiece of the act,[283] are thought to cause the Restrictive Practices Court serious interpretation problems.[284] It is also argued that the very low success rate of agreements taken before the court suggests that the gateways are too strict or the court defines them too narrowly.[285]

Because of the inherent limitations in the restrictive practices legislation, many anticompetitive arrangements can only be reached through monopoly references to the Monopolies and Mergers Commission.[286] The monopolies and mergers statutory structure, however, contains a major barrier to reaching these anticompetitive arrangements.

The fundamental difficulty provided by the monopolies and mergers legislation is that before an anticompetitive practice can

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282. *Id.* at 41.
283. *See* notes 247-48 *supra* and accompanying text.
284. *See* GREEN PAPER, *supra* note 125, at 42.
285. *Id.*
286. *Id.* at 58.

be reached, a monopoly situation must exist. Before a reference can be made, the Director General of the OFT, as the principal source of monopoly references to the Commission, has the difficult task of conducting an in-depth examination of an entire market sector.[287] Thus, a firm with a qualifying market share can only be referred to the Commission after a time-consuming and complex analysis of the entire industry. Firms with less than a twenty-five percent market share escape scrutiny under the monopoly legislation altogether unless it can be shown to comprise a complex monopoly.[288]

Because of the difficult analysis required to make a monopoly or merger reference, comparatively few have actually been made. Out of about 1500 referable mergers since 1965, only about fifty merger references have been made to the Commission.[289] This amounts to an annual rate of about three percent.[290] Half the mergers that were referred and not abandoned were found to be against the public interest.[291] As for monopolies, the Commission has produced about thirty-five reports since 1959.[292] In thirty of these reports, the Commission criticized some aspect of the dominant firm's behavior.[293]

Some attribute the Commission's lack of zeal regarding monopolies and mergers regulation to political overtones.[294] It is also asserted that the Commission "flounders"[295] when it attempts to give substance to the vague notion of public interest. Alleging that the Commission ignores market structures in favor of short-term price movements, commentators have concluded that the Commission is simply not doing its job properly.[296]

After a detailed evaluation of the shortcomings of Britain's restrictive practices legislation, the Government Green Paper enunciated several important objectives in its recommendations. First, the Green Paper indicated that potentially beneficial agreements

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287. *See* ANNUAL REPORT, *supra* note 183, at 35.

288. *See* note 182 *supra* and accompanying text.

289. Marshall, *supra* note 165, at 63.

290. *Id.*

291. *Id.* Only thirteen references were found to be against the public interest, and fifteen others were abandoned after being referred. *Id.*

292. *Id.*

293. *Id.*

294. *See Open Up on Mergers,* THE ECONOMIST, Sept. 16, 1978, at 89, col. 1.

295. *Sleeping Cerberus,* THE ECONOMIST, Jan. 13, 1979, at 60, col. 1.

296. *See id.*

should not be deterred or prevented by the present legislative quagmire.[297] On the other hand, the Green Paper stipulated that broader controls should be created in order to reach those agreements outside the scope of existing statutes.[298] If possible, the legislation's operation and understandability should be greatly simplified.[299] Finally, the Green Paper indicated that enforcement should generally be strengthened.[300]

To these ends the Green Paper proposed a system that emphasized the effects of competition rather than the form of restrictive agreements.[301] The proposal involved an effects-based system in which a "Competition Authority"[302] analyzes the effect of a certain practice and condemns it if its effect or purpose restricts competition.

The Competition Act 1980 became law in the year following the Green Paper's publication. The Act creates a competition authority much along the lines of that recommended by the Green Paper. The Act adopts an effects-based system in which the controlling determination is whether conduct has, is intended to have, or is likely to have the effect of restricting, distorting, or preventing competition.[303] The choice of this general definition for anticompetitive practices aroused much controversy in Great Britain.

Parliamentary critics of the anticompetitive practice definition opposed it for two related reasons. The first concern involved the plight of businessmen who fear investigations for offenses they did not know they committed.[304] One opponent expressed his complaint as follows:

> [T]here is very real concern over the lack of precision in the very, very woolly definition in Clause 2. I have repeatedly said in this House that I am no lawyer; but highly trained legal brains have studied this particular clause and have had quite a field day in suggesting what operations could be caught under it, which I do not think is the Government's intention or indeed would be in the public interest. I believe it is absolutely vital that industry, trade and

297. *See* GREEN PAPER, *supra* note 125, at 58.
298. *Id.*
299. *See id.*
300. *See id.*
301. *See id.* at 58-59.
302. *Id.* at 59.
303. *See* Competition Act, 1980, c. 21, § 2.
304. *See Seconds Out!, supra* note 40, at 47, col. 3. Businessmen would have preferred a list of proscribed practices. *Id.* at 48.

> the public should know what constitutes breaking the law, particularly for the hundreds of smaller trade groups, already overburdened by bureaucracy, who have neither lawyers nor accountants on their payrolls to sort out this latest governmental . . . "lawyers' paradise."[305]

A related concern involved the tremendous discretion suddenly thrust into the hands of the Director General of the OFT.[306] Thus, the opponents desired the anticompetitive practices provision to be set out with more precision, perhaps by more clearly describing or even listing conduct that would be condemned.

Parliamentary proponents felt that naming individual anticompetitive practices with specificity would destroy the Act's thrust.[307] Championing the Green Paper approach of an effects-based system, one member of Parliament explained:

> [W]e do not think it appropriate to specify in detail the varieties of anti-competitive practice. Not only is it very difficult to describe many commercial practices in precise legal terms—and if we attempted to do so in the Bill each case would turn not solely on the important question of whether the practice actually had anti-competitive effects but, on legalistic questions of whether the practice actually being pursued was the practice contained in the definition rather than on the much more important point of whether the results were the undesirable ones that we sought to control.[308]

The controversial, broad language remained in the Act and became the central focus of expansive, new antitrust powers in Great Britain.

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305. 404 PARL. DEB., H.L. (5th ser.) 1127 (1979).

306. One Parliamentarian exclaimed:

> Poor man! I have the profoundest respect for the Director General of Fair Trading, but he really is being made into an inflated Solomon in order to be able to guide any and every type of industry, service, professional practice, to define, in his opinion alone, in industries with which he may never have been closely associated, what is and what is not preventing competition.

405 PARL. DEB., H.L. (5th ser.) 600 (1979).

307. *See* 404 PARL. DEB., H.L. (5th ser.) 1139 (1979).

308. 405 PARL. DEB., H.L. (5th ser.) 602 (1979).

IV. THE COMPETITION ACT 1980

A. *Overview*

The Competition Act 1980[309] represents a major development in British antitrust legislation. The exciting impact of this Act is that:

> for the first time an individual practice by an individual firm can be thoroughly investigated and stopped where it has anti-competitive effects and is found to be against the public interest, without involving every firm in the industry, without needing to find that there is a monopoly situation, and . . . without the delay of a full Monopolies and Mergers Commission investigation.[310]

Thus, the main innovation is the provision for the investigation of anticompetitive practices that are probably already subject to some form of control, but the existing statutes are "too blunt and the resources available for enforcement too thin."[311] The Act attempts to plug some gaps in existing legislation with the possibility of another bill in the near future to fill the remaining gaps.[312]

The Act adopts a two-stage approach. It first empowers the Director General to carry out a preliminary investigation to establish whether or not conduct amounts to an anticompetitive practice. The Director General need not consider the advantages or disadvantages to the public interest.[313] If an anticompetitive practice is identified in his published report, the Director General can either make a reference to the Commission for further investigation or accept an undertaking from the party concerned. The second stage involves the responsibilities of the Commission once it receives a reference. The Commission has a limited period within which to establish whether an anticompetitive practice existed. If the practice was anticompetitive, then the Commission must determine whether the conduct is against the public interest. Upon an adverse finding, the Secretary of State has several alternatives. He can either ask the Director General to seek an undertaking or he may make an order prohibiting or remedying the conduct.

Besides strengthening the power of the OFT and the Monopo-

309. C. 21.

310. 404 PARL. DEB., H.L. (5TH SER.) 1113 (1979).

311. Korah, *The Competition Act 1980,* 1980 J. BUS. L. 255, 255.

312. *Statutes: Competition Act 1980,* 43 MOD. L. REV. 429, 429 (1980).

313. *See Government Amends Competition Bill,* THE TIMES (London), Nov. 28, 1979, at 20, col. 2.

lies and Mergers Commission to deal with anticompetitive practices, the Act has other important elements. First, it gives the Secretary of State a new power to refer nationalized industries and other public bodies to the Commission.[314] Second, it creates a new procedure by which the Secretary can ask the Director General to investigate prices.[315] Finally, the Act abolishes the Price Commission.[316]

B. *Anticompetitive Practices Covered*

The pertinent language defining anticompetitive conduct for the purposes of the Competition Act 1980 is contained in section 2(1):

> [A] person engages in an anti-competitive practice if, in the course of business, that person pursues a course of conduct which . . . has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods . . . or the supply or securing of services in the United Kingdom or any part of it.[317]

This section clearly avoids setting forth an extensive list of anticompetitive practices, choosing instead a broad definition to identify situations justifying a preliminary investigation.

Section 2(1) makes it clear that a practice need not actually have an anticompetitive effect. It is sufficient for the practice to be intended to have, or likely to have, such an effect. This means that the Director General may have to analyze what a firm intends to achieve by engaging in the practice and whether the practice is likely to have an anticompetitive impact in the future.[318]

The choice of wording, however, has another important implication. The anticompetitive practice apparently must be pursued "in the course of business." Since the practice must be a course of conduct, an isolated act or a series of unconnected acts are pre-

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314. Competition Act, 1980, c. 21, § 11.

315. *Id.* § 13; *see Statutes: Competition Act 1980, supra* note 312, at 431-32.

316. Competition Act, 1980, c. 21, § 1. The Price Commission investigated prices and margins. It had the power to freeze prices during investigation. The Commission basically operated as a weapon against inflation, but it also was seen as a means of improving competition policy. *See* Marshall, *supra* note 165, at 62-63.

317. Competition Act, 1980, c. 21, § 2(1).

318. GUIDELINES, *supra* note 102, at 8.

sumably not covered.[319] This wording has been viewed as the only major limitation on the broad wording of section 2.[320]

The Act and the Anti-competitive Practices (Exclusions) Order 1980 provide certain exemptions to the anticompetitive practices definition. Interestingly enough, a practice cannot be anticompetitive if it arises from an agreement registrable under the Restrictive Trade Practices Act 1976.[321] Registrable agreements are presumed to be against the public interest and fall within the Restrictive Practices Court's separate jurisdiction.[322] Another exemption applies to firms with an annual turnover of less than 15 million that have less than twenty-five percent of the relevant market.[323] Practices that are carried out in certain sectors such as international shipping and international civil aviation are also exempt.[324]

The Office of Fair Trading has issued guidelines to help interpret the OFT's role under the act. The guidelines describe the general scope of anticompetitive practices by emphasizing the necessity of taking individual circumstances into account. The controlling test is based on:

> whether a practice is anti-competitive, not on the form of the practice, but on its effect on competition. By adopting this approach, the Act enables proper consideration to be given to the individual circumstances of a practice, which will vary from case to case. A practice which may frustrate competition in one set of circumstances may not do so in another. For this reason, it would have been unjust for the Act to have listed practices which were to be regarded as being anti-competitive in all circumstances.[325]

For these same reasons, the OFT refuses to state with certainty which practices are likely to be investigated.[326] The OFT does, however, set forth in its guidelines certain practices that might be found anticompetitive under certain circumstances.[327]

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319. STATUTES: COMPETITION ACT 1980, *supra* note 312, at 432.
320. *Id.*
321. Competition Act, 1980, c. 21, § 2(2).
322. GUIDELINES, *supra* note 102, at 6.
323. *Id.* The firm cannot be a member of either a group with an annual turnover of 15 million or more or a group which has a 25% share or more of the relevant market. *Id.*
324. *Id.*
325. *Id.* at 6-7.
326. *Id.* at 7.
327. *See* notes 332-40 *infra* and accompanying text.

The OFT guidelines do indicate what factors will be taken into account when making the anticompetitive practice determination. The firm's market position is of prime importance.[328] Although the Act is not expressly directed at firms with dominant market positions, the OFT indicates that it is more likely that such a firm could restrict, distort, or prevent competition.[329] Thus, an important consideration in assessing anticompetitive conduct is the extent to which the firm enjoys market power, whether on a national or local level.[330]

The OFT guidelines do outline some practices which, if adopted in certain situations, could be considered anticompetitive.[331] These potentially anticompetitive practices fall within the two general fields of pricing policy and distribution policy. Practices within the pricing policy field include price discrimination,[332] predatory pricing,[333] and vertical price squeezing.[334] Practices within the distribution policy category include tie-in sales,[335]

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328. GUIDELINES, *supra* note 102, at 7.

329. *Id.* The Guidelines discuss this likelihood in the following way:

> Where a firm is only one among a host of small traders in a market, it is unlikely that it will be able to engage in an anti-competitive practice. For example, if it attempts to impose restrictive terms on its customers, all that will happen is that it will lose business to its more efficient and powerful competitors. It follows that, even though the Act does not require a monopoly situation to be identified, an important consideration in assessing whether a practice is anti-competitive is the extent to which the firm responsible enjoys market power, whether on a local or national level.

Id. at 7-8.

330. *Id.* at 8.

331. *See id.* at 7.

332. *Id.* at 8. Price discrimination is defined as the practice of selling goods or services, where there are no cost differences, to distinct and separate groups of customers—these groups being charged varying prices according to their sensitivity to price levels. *Id.* This may take the form of different discount rates from list prices in return for loyalty or exclusive supply arrangements. Price discrimination also includes situations in which the purchaser's buying power enables him to insist that suppliers grant him advantageous terms. *Id.* at 9.

333. *Id.* Predatory pricing is described as the practice of temporarily selling at below cost with the intention of driving a competitor from the market. *Id.*

334. *Id.* Vertical price squeezing is defined as arising when a "vertically integrated firm controls the total supply of an input which is essential to the production requirements of its subsidiary and also its competitors." *Id.* The price can be regulated so as to squeeze prices from competitors. *Id.*

335. *Id.* Tie-in sales are stipulations that a buyer must purchase part or all of his requirements of a tied product from the supplier of the tying product. *Id.*

full-line forcing,[336] rental-only contracts,[337] exclusive supplying,[338] selective distribution,[339] and exclusive purchasing.[340] Refusals to deal, a likely consequence of some of the distribution policies, are also viewed with suspicion.[341]

One source that the OFT indicates it will look to are the Monopolies and Mergers Commission's reports.[342] Commission judgments could well form the beginnings of a body of case law to guide the OFT.[343] The OFT notes, however, that the Commission investigations consider a practice against broad public interest issues, whereas the OFT simply considers the practice in terms of its impact on competition.[344]

An additional source upon which the OFT may rely is the Green Paper that reviewed restrictive trade practices policy.[345] After all, the Competition Act 1980 itself is broadly based on this report.[346]

C. *Procedures*

The OFT's investigation generally begins with a preliminary inquiry.[347] Most inquiries will result from complaints received from people in trade and industry, as well as from the general public.[348] News media reports and the OFT's continuing studies may also

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336. *Id.* This conduct requires a buyer to purchase quantities of each item in the product range in order to buy any of them. *Id.*

337. *Id.* These contracts restrict customers to rental or lease terms only. *Id.* Such contracts may be anticompetitive if there are no alternative methods of acquiring those goods. *Id.*

338. *Id.* This occurs where a seller supplies only one buyer in a certain geographical area and accordingly limits competition between that buyer and his competitors. *Id.*

339. *Id.* This type of distribution involves choosing sales outlets that satisfy specific qualitative or quantitative criteria. *Id.*

340. *Id.* This arises when a distributor contracts to stock only one manufacturer's products in return for an exclusive supply arrangement. *Id.*

341. *Id.* at 10.

342. *Id.*

343. *OFT's Mr. Borrie Prepares for the Chase,* THE TIMES (London), Mar. 28, 1980, at 21, col. 4.

344. GUIDELINES, *supra* note 102, at 10.

345. *OFT's Mr. Borrie Prepares for the Chase, supra* note 343, at 21, col. 4.

346. *See Statutes: Competition Act 1980, supra* note 312, at 432.

347. GUIDELINES, *supra* note 102, at 14.

348. *Id.*

reveal anticompetitive practices worth following up.[349] The preliminary inquiry involves checking that the complaint is factually correct and allowing the accused firm an opportunity to explain its side of the story.[350] If further action seems appropriate, the preliminary inquiry can also establish whether the party is exempt from the Act.[351]

If the preliminary inquiry indicates that the party is, or has been, following a course of conduct possibly tantamount to an anticompetitive practice, the Director General may decide to carry out a formal investigation. The Act provides that this formal investigation cannot be carried out until the Director General gives written notice to both the firm in question and the Secretary of State regarding the matters to be investigated and the goods or services concerned.[352] The Director General publishes details of the proposed investigation so that interested persons are aware of it.[353]

Within two weeks after receiving notice of a proposed investigation, the Secretary of State can instruct the Director General not to proceed with it.[354] Should this instruction occur, the Secretary must notify the firm concerned and publish the veto.[355]

Formal investigations are conducted by a small team[356] from an OFT branch separate from that which carried out the preliminary inquiries.[357] The team obtains information by interviewing and corresponding with anyone who is able to provide relevant information.[358] Although there is no definite time limit, the Director General must proceed as quickly as possible.[359] He can require any person to produce documents relevant to the investigation and any business to provide estimates, returns, or other types of

349. *Id.*
350. *Id.*
351. Competition Act, 1980, c. 21, § 2(5).
352. *Id.* § 3(2).
353. *Id.*
354. *Id.* § 3(5).
355. *Id.* § 3(6).
356. GUIDELINES, *supra* note 102, at 15.
357. *Id.*
358. *Id.* The team may seek information from people supplying or being supplied by the firm concerned, from people in the same business line, or from customers who responded to the advertisements. *Id.*
359. *Id.*

information.[360] This power is limited, however, to that which a person could be compelled to give in civil proceedings before the High Court.[361]

The Director General can halt an incompleted investigation with the Secretary of State's consent.[362] This very unlikely circumstance might occur if the European Community starts investigating the same matter.[363]

As soon as possible after completing the investigation,[364] the Director General must publish a report stating whether the described conduct is, or was, an anticompetitive practice and, if so, why.[365] If the practice is found to be anticompetitive, the report has to specify the person or persons concerned and the goods or services in question.[366] The report must also specify whether and why the matter should be referred to the Commission.[367]

Before the report's publication, however, the Director General discusses with the firm under investigation the relevant factual material, as opposed to his conclusions, to ensure that the facts are correct.[368] The Director General will not publish any material that might have a seriously adverse effect on the firm's interests, unless such material is necessary to the report.[369] Similarly, he will omit anything relating to the private affairs of individuals.[370] Twenty-four hours before publication, an advance copy of the final report is made available to the firm concerned.[371] This allows time to prepare for a press conference.[372]

No further action is taken if the report concludes either that the conduct is not anticompetitive or that the conduct is anticompetitive but inappropriate for reference to the Commission.[373] If

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360. Competition Act, 1980, c. 21, § 3(7).

361. GUIDELINES, *supra* note 102, at 15. Not all the information received will appear in the OFT's report. Some information may be gathered solely to give the team a better understanding of the firm's market. *Id.*

362. Competition Act, 1980, c. 21, § 3(9).

363. GUIDELINES, *supra* note 102, at 15.

364. Competition Act, 1980, c. 21, § 3(10).

365. *Id.*

366. *Id.* § 3(10)(a).

367. *Id.* § 3(10)(b).

368. GUIDELINES, *supra* note 102, at 15-16.

369. *Id.* at 16.

370. *Id.*

371. *Id.*

372. Korah, *The Competition Act 1980*, *supra* note 311, at 259.

373. GUIDELINES, *supra* note 102, at 16.

the conduct is found to be both anticompetitive and appropriate for reference, the Director General has strict statutory time limits within which he must act.[374] He cannot make a reference before four weeks or after eight weeks from the date of publication.[375]

These time limits are intended to give the firm concerned an opportunity to thoroughly study the report and write to the OFT with suggestions to rectify matters.[376] These representations might include an offered undertaking to abandon or modify the practice for a specified period.[377] The Director General is legally obliged to consider these representations.[378] He has at most twelve weeks[379] to consider them, negotiate with the firm, and decide whether to accept the undertaking. It may be difficult to complete the negotiations within the strict time constraints.[380] If the practices being investigated are not very valuable, the firm is likely to abandon them before incurring the trouble and publicity of an investigation.[381]

Upon acceptance of an undertaking, the Director General will give written notice to the firm[382] and publish the undertaking.[383] He keeps the undertakings under review to ensure that they are being carried out and that they are still appropriate in light of any changed circumstances.[384] If the Director General feels that the undertaking is no longer appropriate, he can either release the firm from it or modify the undertaking accordingly.[385] In either case he must give the firm written notice of his decision.[386] Similarly, if the firm simply fails to abide by its undertaking, the Di-

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374. *See* Competition Act, 1980, c. 21, § 5(3).

375. *Id.* This length of time can be extended to twelve weeks by the Secretary of State. *See id.* § 5(4).

376. GUIDELINES, *supra* note 102, at 16. The firm may find it useful to consider whether it might later offer the OFT an undertaking. *Id.*

377. *Id.*

378. Competition Act, 1980, c. 21, § 4(1).

379. *See* note 375 *supra* and accompanying text.

380. Korah, *supra* note 312, at 258.

381. *Id.*

382. GUIDELINES, *supra* note 102, at 17.

383. Competition Act, 1980, c. 21, § 4(4)(a). The facts are generally published through an announcement to the news media. *See* GUIDELINES, *supra* note 102, at 17.

384. Competition Act, 1980, c. 21, § 4(4)(b).

385. *Id.* § 4(4)-(5).

386. *Id.* § 4(5).

rector General gives the firm written notice of this failure.[387] If the Director General is not prepared to accept a modified or new undertaking and cannot agree to continuing the original one, he can refer the original anticompetitive practice to the Commission.[388] He is subject to the same statutory time constraint except that the time runs from the date on which the firm was informed of the change of circumstances.[389]

Once the Director General refers the matter to the Monopolies and Mergers Commission, he cannot accept any undertaking.[390] In the competition reference he must specify the person, goods or services, and course of conduct to be investigated.[391] Matters cannot be included that were not covered by the Director General's original report.[392] Matters covered by an undertaking are included only if the Director General is satisfied that the undertaking has been broken, or if he cannot agree to a new or revised undertaking under the changed circumstances.[393]

The Director General must send a copy of the competition reference to the Secretary of State who, within two weeks after receipt of the copy, can direct the Commission not to proceed.[394] The Secretary must publish this "do not proceed" instruction.[395]

At any time during the Commission's investigation, the Director General can exclude from the reference some or all of the activities of the firm concerned, or any specified goods, services, or courses of conduct.[396] The Secretary of State must be notified of this variation in the reference.[397] The Secretary can veto the variation within two weeks,[398] but he must publish his decision.[399]

Once a competition reference is made, the Commission must investigate whether at any time in the previous year any firm referred was following the named course of conduct in relation to

387. *Id.* § 4(4)(c).
388. GUIDELINES, *supra* note 102, at 17.
389. *See* Competition Act, 1980, c. 21, § 5(3)(b).
390. *Id.* §.4(8).
391. *Id.* § 6(1).
392. *Id.* § 6(2).
393. *Id.* § 6(3)-(4).
394. *Id.* § 7(1)-(2).
395. GUIDELINES, *supra* note 102, at 18.
396. Competition Act, 1980, c. 21, § 6(6).
397. *Id.* § 7(1).
398. *Id.* § 7(3).
399. *Id.* § 7(5).

the goods or services specified.[400] The Commission must next determine whether the person was engaged in an anticompetitive practice by following such a course of conduct.[401] If the practice is anticompetitive, the Commission has to investigate whether the "practice operated or might be expected to operate against the public interest."[402]

Section 84 of the Fair Trading Act 1973 guides the Commission's public interest determination.[403] The Commission must take into account all relevant matters but emphasizes the desirability of certain factors enumerated in section 84.[404] The Commission can enforce the attendance of persons who can give information and produce documents, estimates, returns, or other data.[405] Evidence can be taken under oath.[406]

The Commission must report in the period specified by the Director General.[407] This period cannot exceed six months, but the Secretary of State can extend it up to three additional months.[408] The Commission puts its conclusions in a report to the Secretary of State.[409] If the practice is found to be both anticompetitive and against the public interest, the Commission must specify the adverse effects or potential adverse effects of the practice on the public interest.[410] The report may include recommendations regarding what action should be taken to remedy or prevent such adverse effects.[411]

The Secretary of State puts each Commission report before Parliament and arranges for publication.[412] He must exclude any matter that he considers would be against the public interest.[413] Similarly, he will exclude anything relating to the private affairs

400. *Id.* § 8(2)(a). The Commission also investigates whether the firm being investigated followed a course of conduct that was different than the one named, but was similar in form and effect. *See* GUIDELINES, *supra* note 102, at 19.
401. Competition Act, 1980, c. 21, § 8(2)(b).
402. *Id.* § 8(2)(c).
403. *See id.* § 7(6).
404. These factors are set forth in the text accompanying note 192 *supra.*
405. Competition Act, 1980, c. 21, § 7(6).
406. *Id.*
407. GUIDELINES, *supra* note 102, at 19.
408. *Id.*
409. Competition Act, 1980, c. 21, § 8(1).
410. *Id.* § 8(2)(d).
411. *Id.* § 8(4).
412. GUIDELINES, *supra* note 102, at 20.
413. *Id.*

of individuals or firms if publication would have a serious and prejudicial effect on their interests.[414]

The Commission also sends a copy of its report to the Director General, who can then advise the Secretary of State.[415] If the Commission's report finds the practice to be both anticompetitive and against the public interest, the Secretary of State can either make an order[416] or ask the Director General to seek an undertaking.[417] In the latter situation, if an undertaking has been accepted by the Director General, he will give a copy of it to the Secretary of State and arrange publicity.[418] The Director General will keep the undertaking under review and can later terminate or revise it.[419] If the Director General cannot obtain an undertaking within a reasonable time, he shall report this to the Secretary of State.[420]

The Secretary of State can make an order immediately after an adverse Commission report.[421] If the Director General has been asked to seek an undertaking but does not think he can obtain one within a reasonable time or cannot obtain a satisfactory one, an order can follow.[422] This is also true if the undertaking has been broken.[423] Before the order is made, the Secretary of State must publish his intentions and indicate what provisions he will include.[424] He must seek the opinions of anyone likely to be affected by the order.[425]

The order may prohibit a named person from engaging in an anticompetitive or other similar practice specified in the report.[426] Additionally or alternatively, the Secretary can exercise his powers specified in Part I of Schedule 8 to the Fair Trading Act 1973. These provisions enable the Secretary, among other things, to:

[1] make it unlawful to make or carry out any agreement;

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414. *Id.*
415. Competition Act, 1980, c. 21, § 8(5).
416. *Id.* § 10(1).
417. *Id.* § 9(1).
418. *Id.* § 9(4).
419. *Id.*
420. *Id.* § 9(3).
421. *Id.* § 10(1).
422. *Id.*
423. *Id.*
424. *Id.* § 10(4).
425. *Id.; see* GUIDELINES, *supra* note 102, at 21.
426. Competition Act, 1980, c. 21, § 10(2)(a); *see* note 400 *supra* and accompanying text.

[2] require the ending of any agreement;
[3] make it unlawful to withhold supplies of goods or services from any specific person or firm;
[4] make it unlawful to require, as a condition of supplying goods or services, the buying of other goods, or any payment for services other than the goods or services supplied;
[5] make it unlawful to discriminate between persons (or firms) on the prices charged for goods or services;
[6] make it unlawful to give any preference in the supply of goods or services;
[7] make it unlawful to charge prices for goods or services differing from those in any published list;
[8] require publication of a list of prices;
[9] regulate prices to be charged for any goods or services;
[10] make it unlawful to notify recommended or suggested prices; and
[11] prohibit or restrict the acquisition of a business or the assets of another business.[427]

These powers are for the purpose of remedying or preventing the adverse effects specified in the Commission's report.

D. *The First Investigations*

The Office of Fair Trading launched its first two investigations just twenty-four hours after the Competition Act 1980 became effective.[428] These investigations named Raleigh Industries and Petter Refrigeration as the first targets.[429] These initial investigations are considered important test cases under the new legislation.[430]

Raleigh, a manufacturer having about forty-five percent of Great Britain's cycle market,[431] refused to supply its full range of bicycles to discount chain stores.[432] Raleigh justified this restriction on numerous grounds. First, Raleigh wanted to protect its traditional outlets, asserting that the sale of the leading brand at

427. GUIDELINES, *supra* note 102, at 21.
428. ANTITRUST & TRADE REG. REP. (BNA) A-17 (Sept. 25, 1980).
429. *Id.*
430. *Raleigh and Petter Face Fair Trading Inquiry,* THE TIMES (London), Aug. 14, 1980, at 15, col. 8.
431. *Id.*
432. ANTITRUST & TRADE REG. REP. (BNA) A-17 (Sept. 25, 1980). The OFT acted after discount stores forwarded complaints about Raleigh's refusal to supply them. *Id.*

discount stores would result in a price war that the small retailers would lose.[433] A second argument involved public safety. Claiming that the traditional, small outlets operate service and repair networks unavailable at discount stores, Raleigh indicated that accident hazards would increase if traditional outlets lost the sales necessary to backup their service departments.[434] A final argument involved lost exports. Raleigh claimed that supplying outlets that lacked after-sale service would disrupt the company's home market position, resulting in lost exports and increased imports.[435] Raleigh summed up its policies by saying that it "selects its outlets with the objective of providing good competitive coverage, a strong servicing base in the interest of road safety and continuity of cycle selling both throughout the seasonal pattern of the year and through bad years as well as good."[436] Raleigh clearly framed its arguments in terms of what would be best for the public interest.

The OFT refused to recognize any of Raleigh Industries' defenses of its trade policies.[437] In its report the OFT concluded that the refusal to supply discount stores was "a course of conduct likely to have the effect of restricting, distorting or preventing competition."[438] As for the service problem, the OFT said new ways of meeting demand would emerge if the arrangements were inadequate.[439] The report emphasized that about one-third of Raleigh's trade is with stores and mail order companies offering no after-sales service.[440]

Assuming that the competition reference is made, the Monopolies and Mergers Commission will have to determine whether Raleigh's distribution policy is an anticompetitive practice that is against the public interest. But, as the *Sunday Times* so aptly queried, "How do you weigh up a possible loss of jobs with a possible increase in bike accidents from badly adjusted saddles?"[441]

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433. ANTITRUST & TRADE REG. REP. (BNA) A-13 (Mar. 5, 1981).
434. *Id.*
435. *Id.*
436. *Raleigh and Petter Face Fair Trading inquiry, supra* note 430, at 15, col. 8.
437. ANTITRUST & TRADE REG. REP. (BNA) A-13 (Mar. 5, 1981).
438. *Id.*
439. *Id.*
440. *Id.*
441. *How the Monopolies Dice Are Kept Rolling,* SUNDAY TIMES (London), Mar. 1, 1981, at 62, col. 1.

One recently retired Commission member indicates "the Commission will find it difficult if Raleigh argues that its practices of only selling its bicycles to recognized dealers are so common as to make it absurd for Raleigh alone to be penalized."[442]

This first OFT investigation took six months, which was far longer than expected. The Director General had initially predicted that each investigation would last two or three months, with perhaps twenty or thirty completed annually.[443] Although this slow beginning might be normal for the first operations under the new legislation,[444] the OFT has a heavy workload and few resources.[445] The Petter investigation, which also began in August 1980, had not been completed as of March 1, 1981.[446]

Significantly, the OFT has secured numerous undertakings from companies that dropped practices being investigated as possibly anticompetitive.[447] In each case the Director General cut short initial inquiries that could have led to a formal reference to the Monopolies and Mergers Commission for a full investigation.[448] If numerous cases could be quickly disposed of through the acceptance of undertakings, antitrust regulation under the Competition Act 1980 would be less costly for both the companies and the public purse.[449]

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442. *Id.*

443. *Facing Up to Fair Trade,* SUNDAY TIMES (London), Apr. 6, 1980, at 63, col. 3.

444. *See id.*

445. ANTITRUST & TRADE REG. REP. (BNA) A-6 (Oct. 30, 1980). In anticipation of its additional duties under the Competition Act 1980, the OFT received forty-five new workers. *Freeing the Market,* THE ECONOMIST, July 14, 1979, at 69, col. 1, 70.

446. ANTITRUST & TRADE REG. REP. (BNA) A-12 (Mar. 5, 1981). The OFT launched a third probe near the beginning of 1981. ANTITRUST & TRADE REG. REP. (BNA) A-3 (Jan. 15, 1981). This probe concerns the affairs of a home decorating company called Arthur Sanderson. *Id.* Retailers claim that the company, which manufactures a large range of wall coverings and fabrics, refuses to supply fabrics to a number of discount outlets. *Id.* This is the same sort of conduct that the OFT found anticompetitive in the Raleigh investigation. *See* notes 431-40 *supra* and accompanying text.

447. Harris, *Competition Policy—the Quick and Painless Solution,* THE TIMES (London), Oct. 23, 1980, at 27, col. 6.

448. *Id.*

449. *Id.*

V. CONCLUSION

The Competition Act 1980 is extraordinary both because of what it does and what it does not do. What it does is unify and strengthen enforcement powers under the two branches[450] of British antitrust legislation. Restrictive practices now can be investigated even though they do not fit within the rigid form requirements[451] of the Restrictive Trade Practices Act 1976. Companies suspected of anticompetitive activity can be investigated without the necessity of analyzing an entire market sector to find the requisite monopoly conditions.[452] What the Act does not do, however, is directly address the many limitations inherent in the restrictive trade practices legislation, as pointed out by the Government Green Paper.[453] Agreements that are registrable under the Restrictive Trade Practices Act 1976 do not come within the scope of the Competition Act 1980. Thus, this new legislation fails to remedy the ineffective public registration system or the nebulous and complex judicial criteria applied by the Restrictive Practices Court.

The Act has tremendous enforcement potential because of its vague definition of what constitutes an anticompetitive practice. The Office of Fair Trading need not consider the public interest when conducting its investigations. It only needs to consider whether a practice is likely to distort competition. Thus, the Act does not require the OFT to take into account the fairness of a particular practice. Although the Monopolies and Mergers Commission must consider the public interest once a competition reference is made, it is quite possible that few investigations will proceed that far.[454] Virtually any business decision could be viewed as distorting competition for the purposes of the Act. The distortion requirement is oblivious to whether the distortion helps or hinders societal interests. The result is an effects-based structure in which the effects can be satisfactorily met by almost any business conduct.[455]

Although the potential for expansive enforcement under the

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450. *See* text accompanying notes 159-65 *supra.*
451. *See* text accompanying note 281 *supra.*
452. *See* text accompanying notes 287-88 *supra.*
453. *See* GREEN PAPER, *supra* note 125, at 33-53; text accompanying notes 281-82 *supra.*
454. *See* text accompanying notes 447-49 *supra.*
455. *See* text accompanying notes 301-03 *supra.*

new legislation is great, limited resources restrict actual enforcement. Perhaps twenty OFT investigations eventually will be completed annually.[456] It is doubtful that such a small number will effectively deter anticompetitive practices by other British firms.

The OFT's investigatory role may well provide the key to the new Act's powers. Because the OFT can secure undertakings and accordingly drop investigations before a full-blown Commission inquiry is necessary, many firms may be tempted to negotiate with the OFT rather than take a chance with the Commission. First, firms may want to avoid the time, cost, and publicity associated with full investigations. Second, the firms may fear that the Commission will condemn their business practice. Whatever the reason, a number of firms have already chosen an OFT undertaking under the new legislation.[457] Thus, enforcement under the Competition Act 1980 can be relatively swift and effective if firms are willing to cooperate voluntarily with the Office of Fair Trading.

Just as voluntary cooperation is now essential to successful enforcement under the new Act, such cooperation has been the touchstone of British competition policy throughout this century. Competition policy in Great Britain has been treated as a kind of gentlemen's agreement with officials counting on companies to cooperate with information and undertakings, and companies counting on officials not to pry into very embarrassing matters.[458] This gentlemanly approach to competition law may help explain why the British were so slow to enact modern antitrust legislation.[459] It may also help explain why the first legislative attempt was so tentative. The emphasis on voluntary cooperation is clearly evident in the public registration procedures established by restrictive trade practices legislation. Similarly, the statutory structure for resale price maintenance requires suppliers to step forward and apply for an exemption if they engage in such prohibited conduct. The gentlemen's agreement concept is also reflected by the British disdain for criminal sanctions.[460] That Great Britain is now considering criminal penalties for offenses

456. *See* text accompanying notes 443-44 *supra.*
457. *See* text accompanying notes 447-49 *supra.*
458. *See* text accompanying note 40 *supra.*
459. *See* notes 34-41 *supra* and accompanying text.
460. *See* text accompanying note 127 *supra.*

such as price-fixing[461] may signal a change in competition policy.

It is not yet certain whether the Competition Act 1980 can effectively function as a gentlemen's agreement. The British market is flooded with foreign competitors who "are not entering into the spirit of the thing."[462] That Great Britain is currently in a recession is an additional factor. Businesses may find it hard to offer gentlemanly cooperation "when fighting for survival is the order of the day."[463] It must be remembered, too, that voluntary cooperation as embodied in the restrictive trade practices legislation has not been particularly successful. It is widely believed that the great majority of restrictive agreements are simply never volunteered for public registration.[464]

The outcome of the early investigations will have a crucial impact on the new Act's ultimate effectiveness. For this reason the Raleigh investigation is significant. The anticompetitive practice singled out by the Raleigh investigation was the refusal to supply discount houses. The OFT condemned this practice because the conduct qualified as anticompetitive under the Competition Act 1980. The logical extension of the OFT's logic would presumably be that a manufacturer could never turn down a retailer's distribution request in the absence of compelling circumstances. Thus, this investigation is indicative of how the Act has broadened the scope of British antitrust legislation. It is not at all certain, however, that the Commission would find this practice to be contrary to the public interest.[465] If the Commission decides that such conduct is not against the public interest, the OFT will lose credibility.[466] The OFT cannot afford to be slapped down by the Commission too many times.[467] Credibility is essential to securing voluntary cooperation from British business. Unless firms are reasonably certain that the Commission will follow the OFT's lead, they will not be as likely to accept undertakings in an effort to avoid the full Commission investigation. Conversely, if the Com-

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461. ANTITRUST & TRADE REG. REP. (BNA) A-12 (Feb. 5, 1981). *See also Court Ruling Opens Way to Prosecution of Directors,* THE TIMES (London), Oct. 25, 1980, at 17, col. 7.

462. *Seconds Out!, supra* note 40, at 47, col. 3.

463. *Id.*

464. *See* text accompanying notes 269-70 *supra.*

465. *See How the Monopolies Dice Are Kept Rolling, supra* note 441, at 62, col. 1.

466. *Facing Up to Fair Trade, supra* note 443, at 64, col. 3.

467. *Id.*

mission does find the practice to be against the public interest, the OFT will be in a strong position to request and receive voluntary undertakings from other manufacturers engaging in similar conduct. But if the Commission becomes the OFT's rubber stamp for such decisions, public interest considerations will play little or no part in British competition policy.

The development and administration of British antitrust laws have been part of an organic process in which investigations have revealed the need for further policy transformation.[468] The success of the Competition Act 1980 as an enforcement tool depends largely upon the outcome of the early test cases. The potential for effective enforcement is great. Great Britain's competition policy is rapidly evolving from the gentlemen's agreement notion to a much tougher stance. The Competition Act 1980 exemplifies the clear trend towards expanded enforcement.

Carol B. Swanson

468. Gribbin, *supra* note 94, at 390 (1975).