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Commission II – Kommission II

THE EFFECT OF EUROPEAN AND NATIONAL COMPETITION LAW ON THE AGRICULTURAL SECTOR

L'ECONOMIE AGRICOLE FACE AU DROIT DE LA CONCURRENCE EUROPEEN ET NATIONAL

DIE AGRARWIRTSCHAFT IM LICHTE DES EUROPÄISCHEN UND NATIONALEN WETTBEWERBSRECHTS

National Report – Rapport national – Landesbericht

United Kingdom – le Royaume-Uni – Vereinigtes Königreich

United Kingdom report – Rapport du Royaume-Uni – Bericht des Vereinigten Königreichs

Agriculture in the light of European and national competition law

Hugh Mercer

1. Introduction and Legal foundation of national Competition Law

Until the Competition Act 1998, the United Kingdom operated a highly complex system of registration of agreements under a law called the Restrictive Trade Practices Act. The regime was highly formalistic and ill-suited to dealing with informal cartels, resulting in a low level of competition law enforcement. In recent years, there have been two major developments in competition law in the United Kingdom. These are the entry into force of the Competition Act 1998 and the Enterprise Act 2002.

The Competition Act 1998 will form the main focus of this report. It introduces into UK law two prohibitions on conduct known as the Chapter I and the Chapter II prohibition. These are closely analogous to Articles 81 and 82 of the Treaty of Rome respectively. Thus Chapter I deals with restrictive agreements whereas Chapter II deals with abuse of a dominant position.

The Enterprise Act 2002 which has come into force in 2003 effects two main changes for present purposes. These are that serious anti-competitive conduct such as price-fixing has been made a criminal offence and secondly it introduced a modified regime for mergers and acquisitions.

Standing back for a moment therefore, the UK has moved from being a relative backwater in competition law terms to the frontline of competition enforcement in the space of three years. The Office of Fair Trading (the UK version of the Bundeskartellamt) is one of the only organisations hiring lawyers in London at the moment and it has had some notable successes in the first three years of operation of the new regime. The OFT has a high reputation for the clarity of its guidance with good quality well-produced guidance documents freely available on the internet. Examples of successful trust-busting in the last few years have included fines on large pharmaceutical companies; the largest retail groups and suppliers and licensors of replica football kit. The origins of the OFT are as a pro-consumer organisation dealing with consumer credit and unfair contract terms matters. This shows in the product areas where they have been particularly active – complaints about products which directly affect consumers are most likely to bear fruit.

Where possible, examples are given in this report from the agricultural sphere. However given both the youth of the regime and the fact that there is a provision parallel to the EU Regulation 26/62 taking some fields of agriculture outside the scope of competition law, the number of examples is disappointing for the purposes of such a report. A further possible factor for the low number of examples might be a certain resistance by the participants in the agricultural sector to invoke competition law arguments. Thus although British Sugar for example has a monopoly on the processing capacity for sugar beet in the UK and although the negotiations on the terms for supply of sugar beet invariably end up in neverending arbitrations, the farming community and their leaders in charge of the negotiations have been unreceptive to the idea of openly relying upon the Chapter II prohibition on abuse of a dominant position despite the fact that the effect of such reliance would be to impose a set of implied conditions on the conduct and negotiating position of British Sugar.

Perhaps such reticence by the farming community to rely upon competition law arguments reflects some deeper held belief that agriculture is under threat from competition law. In fact,

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from the competition law perspective, nothing could be further from the truth. Evidently certain major agricultural products remain subject to common organisations of the market but likewise major areas of agriculture remain outside such areas and subject to free competition. One matter which has influenced the perception of competition law positively has been the investigation by the OFT into the market power of supermarkets. In practice in the UK, even large groups of producers tend to be at the mercy of the buyers from the large distribution chains. However attempts to reduce such power are proving so far elusive.

However as regards competition law provisions specific to agriculture, there is only the provision equivalent to EC Regulation 26/62. There are no sector-specific provisions for special branches of trades. Indeed, until 2003 there were sector-specific provisions for certain professional rules such as those of doctors, lawyers, nurses etc. Allegedly on grounds of lack of use, these provisions have been removed and the overall philosophy is that everyone is subject to the rigours of the market place. Nor are there specific provisions seeking to encourage particular types of organisation such as cooperative producer organisations, horiozontal cooperation in the forest sector or otherwise. Such organisations are clearly permitted but have to comply with the general rules.

The approach of this report will accordingly be to consider principally the scope of the two prohibitions, to explain the methods of enforcement and to sketch in outline the new regime for mergers.

2. The Prohibitions

2.1) "Chapter I" prohibition

2.1.1) The prohibition

"Chapter I" prohibition, contained in section 2 of the Act, is similar to Article 81. It also provides for the non-exhaustive list of similar examples. Section 2 (1) states that :

> *"Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which*
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> *(a) may affect trade within United Kingdom and*
>
> *(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,*
>
> *are prohibited unless they are exempt in accordance with the provisions of this Part."*

The application of Chapter I prohibition requires five conditions to be met :

1) To be an undertaking within the same meaning as in European law : any natural or legal person capable of carrying on commercial or economic activities relating to goods or services whatever its legal status. Legal and economic independence are required to be more than one undertaking.

2) The presence of an agreement, decision of association of undertakings, concerted practice.

   In joined cases T-202/1998 , T-204/1998 and T-207/1998 Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission of the European Communities. [2001] ECR II-02035, the Court of First Instance was concerned with the question of the definition of a illegal agreement. The case concerned meeting that occurred end of the 80'between British Sugar and Napier Brown. The court decided that "*the argument of British Sugar and Napier Brown that their meetings constituted neither an agreement nor a concerted practice under Article 85(1) of the Treaty cannot be accepted*", that indeed, "*the content of those undertakings does not any way justify the need for British Sugar to discuss its pricing intentions with its competitors, or even merely to inform them of those*

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intentions on a regular basis. In addition, the Court accepts the Commission's observation that those undertakings could hardly justify bilateral meetings between British Sugar and Tate & Lyle, given that the undertakings concerned only unlawful conduct in relation to the Merchants" and that "*the fact that only one of the participants at the meetings in question reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice*. "The parties have appealed against that decision (C-359-2001).

3) The agreement must have an effect on trade and on competition although this condition will normally be satisfied by an effect only on competition. In order to prove this point, expert evidence will invariably be necessary, either by a specialist in the relevant market or by an expert economist.

4) The agreement must have an appreciable effect on the market. In order to escape the prohibition, the combined market share of parties and associated undertakings cannot exceed 25% although individual exemptions are possible even if the 25% threshold has been reached. However it is unlikely that the market share test will apply where the agreement concerns either direct or indirect price fixing or sharing of markets; the imposition of minimum resale prices; or if the agreement is part of a network of similar agreements which have a cumulative effect on the market.

5) Finally, the effect on competition "within the UK" is considered rather than the effect on trade between member-States as in Article 81. This difference has several consequences. Firstly, a risk of double fines can occur, although in accordance with s.38(9) EC fine must be taken into account. Secondly both UK and EC jurisdiction are competent. And finally, the notification should theoretically be done to both the European Commission and the OFT (Office of Fair Trading). There are however several advantages to notifying agreements to the European Commission : the system of exemption is parallel (see below); the effect of EC notification covers all EC and the Director General will generally take no action until the European Commission has completed its assessment.

In case CP/0504-01 "Decision of the Northern Ireland livestock and Auctioneers' Association of undertakings to recommend that its members introduce a buyer's commission in Northern Ireland cattle marts", the OFT decided on 3 February 2003 (No. CA981/2003) that the recommendation in question was a decision by an association of undertakings that had as its object the prevention, restriction or distortion of competition in the provision of services by cattle auctioneers at livestock marts in Northern Ireland. Their reasoning was that:

- the relevant market was the market of services provided by cattle auctioneers at livestock marts in Northern Ireland
- the recommendation to introduce a buyer's commission recorded in the minutes of the relevant meeting of the NILAA and expounded in the press Release constitutes a decision by an associations of undertakings
- the recommendation to charge a buyer's commission of £2 had the object of restricting competition and eliminating the uncertainty of the market place thus infringing the Chapter I prohibition
- the NILAA was an undertaking and as it represented 65 % of all the cattle marts in Northern Ireland, its decision affects trade within a part of the UK.
- the recommendation was not notified to the Director for exemption and no relevant block exemption or exclusion applies

But due to exceptional circumstances (BSE), the OFT concluded that the NILAA should not pay a penalty in this case.

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2.1.2) *Exclusion Order*

a) Vertical agreements

Section 50 of the Competition Act allows the Secretary of State to exclude vertical agreements and land agreements from the application of the Chapter I prohibition. The Exclusion Order defines vertical agreement as "*an agreement between undertakings, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services and includes provisions contained in such agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods or services by the buyer or its customers".*

It is especially important that the economic relationship between the parties is such that each of the undertakings involved in the agreement operates at a different level of the production or distribution chain with the result that an agreement between one manufacturer and a group of six competing wholesalers will not benefit from the exclusion nor will agreements involving undertakings which operate at more than one level of the production or distribution chain and which concern the respective activities of undertakings at the same level of the production or distribution chain.

Conditions of an agreement which are not related to the conditions of purchase, sale and resale are not covered by the exclusion. However provisions relating to the assignment or use of intellectual property rights will benefit from the Exclusion Order when those provisions are part of a vertical agreement, relate to the assignment of the right to the buyer or use by the buyer of intellectual property rights (e.g. a licence is given to a software buyer to reproduce that software in order to sell it on may benefit from the exclusion), not constitute the primary object of the agreement (not a simple patent licence) and are directly related to the use, sale or resale of the goods or services by the buyer or its customers (a trade mark licence to a distributor or franchisor for example).

The benefit of the exclusion does not apply to vertical agreements that fix prices. However agreements where the seller imposes a maximum or recommended sale price may benefit from the exclusion if this maximum or recommended sale price does not result, in practice, in a fixed or minimum sale price because of pressure from, or any incentives offered by, any undertakings involved.

Finally, the Exclusion Order provides that the Chapter I prohibition does not apply to an agreement to the extent that it is a vertical agreement. The exclusion may therefore apply only to certain parts of an agreement rather than an agreement in its entirety.

Overall the definition of a vertical agreement in the Exclusion Order reflects that in the EC Vertical Agreements Block Exemption. The most significant difference between the two is that the EC exemption only applies where the market share of the supplier (or buyer in exclusive supply obligation) does not exceed 30 % of the relevant market. There is no such a market cap in the UK Exclusion Order. The overall principle, subject to the specified exceptions, is that all vertical agreements are exempt.

b) Land agreements

The Exclusion Order also excludes the Land Agreements from the Chapter I prohibition. Land Agreement means agreements related to the creation, alteration, transfer or termination of an interest in land and also certain obligations and restrictions. Thus for example agreements between tenants as to the nature of goods they will sell in a particular areas are not excluded/exempt.

2.1.3) *Exemptions*

An agreement which falls within the scope of the Chapter I prohibition may be exempted if it satisfies the criteria in section 9 of the Act. There are three types of exemption:

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- Individual exemption : by application on Form N, parties to an agreement may obtain from the OFT an exemption if the agreement satisfies the statutory exemption criteria of section 9. It is up to the parties to demonstrate that all the conditions of s.9 are satisfied and DGFT may impose conditions and obligations and specify a period. The exemption can be given retrospectively.
- Block exemption : The DGFT may, by order, make domestic block exemptions. Any such block exemption may impose conditions or obligations subject to which the block exemption will have effect. An opposition procedure is available for agreements which fall outside the scope of the block exemption.
- Parallel exemption : where agreement is within an individual or block exemption from EC competition rules, it is automatically exempted under the Act without the need for individual exemption.

  In accordance with section 9, the criteria which must be met for an exemption to be granted are the same for both goods & services:

  - the agreement must contribute to improving production and distribution or to promoting economic or technical progress;
  - it must not impose restrictions which are not indispensable to attainment of objectives or afford opportunity of eliminating competition
  - a fair share of any benefit must accrue to consumers

2.1.4) Exclusions in Schedules – Horizontal agreement : Agricultural products

Schedules 1 to 4 exclude further agreements from Chapter I prohibition on the grounds that they are separately regulated : Mergers and concentrations, planning obligations, professional rules (sched. 4) and agreements falling under other enactments (e.g. FSA, broadcasting etc. B Sched 2).

Under Schedule 3 section 9, agreements which relate to production of or trade in an agricultural product are excluded from the prohibition if :

- they form an integral part of a national market organisation; and
- are necessary for the attainment of the objectives set out in Article 33 of the Treaty [see C-265/1997 Cooperatieve Vereniging de Vereunugde Bloemenveilingen Aalsameer BA v. Florimex BV [2000] ECR I-2061]; and
- are agreements of farmers' associations (or associations of such associations) belonging to a single member State which concern (i) the production or sale of agricultural products, or (ii) the use of joint facilities for the storage, treatment or processing of agricultural products; and
- under which there is no obligation to charge identical prices.

Section 9 refers directly to Council Regulation 26/92 and defines "agricultural product" by reference to any product of a kind listed in Annex II of the Treaty.

The only addition in the UK Act is the role of the OFT which may give a "direction" for an particular agreement if he decided that the exclusion does not apply to it but any European decision on the application of Regulation 26/92 to particular agreements will be strictly followed by the UK authorities with the result that the European case law is highly relevant and the exclusion is to be strictly interpreted.

Examples of cases where Regulation 26/92 was inapplicable : because the relevant product was not listed in Annex II: T-61/89 *Dansk Pelsdyravlerforening v Commission* [1992] II-1931 on fur, C-250/92 *Gottrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselsksap AmbA* [1994] ECR I-5641 on farm fertilizers, C-123/83 *BNIC v Clair* [1985] ECR 391 on potable spirits ; because the objectives of Article 39 were not respected : c-71/74 *Frubo v*

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Commission [1975] ECR 563, c-399/93 *Oude Littikhuis and others v Verenigde Cooperatieve Melkindustrie Coberco BA* [1995] ECR I-4515; because production was not concerned: *Cooperatieve Stremsel- en Kleurselfabriek v Commission* [1981] ECR 841 which concerned the manufacture of rennet.

See also joined cases C-319/1993 , C-40/1994 and C-224/1994 *Hendrik Evert Dijkstra v Friesland (Frico Domo) Coöperatie BA and Cornelis van Roessel and others v De coöperatieve vereniging Zuivelcoöperatie Campina Melkunie VA and Willem de Bie and others v De Coöperatieve Zuivelcoöperatie Campina Melkunie BA*. [1995] ECR I-4471 on the retroactivity of a decision to exclude an agreement from the Regulation 26/62.

2.2) “Chapter II” Prohibition

2.2.1) The prohibition

Section 18 of the Competition Act 1998 is heavily based on Article 82 of the Treaty :

> *“(1)Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade between within United Kingdom*
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> *(2) Conduct may, in particular, constitute such an abuse if it consist in:*
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> *(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
>
> *(b) limiting production, markets or technical development to the prejudice of consumers;*
>
> *(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
>
> *(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”*

The analysis of a case under Chapter II prohibition follows the same structure as that in Article 82.

a) The market

The main difference in the definition of the market between EC law and UK law is that there is no need for the dominant position to be in the whole or in a substantial part of the UK – a relatively small part of the UK could constitute a market.

To define the relevant geographical market, three aspect must be considered : the demand-side issues, the supply-side issued and the imports. The question is to identify whether customers could easily obtain similar products from suppliers in other areas on reasonable terms (costs of transport, value of the product, mobility of consumers, chain of substitution).

Robert Wiseman Dairies, report and press release, [2001] UKCLR 190 & 1082.

- On 3 February 2000 OFT made a report following a complaint against Robert Wiseman Dairies (Wiseman). Although the report was not conclusive because less than two third of the panel agreed, it was suggested that Wiseman was the largest processor, supplying 74% of the milk taken by all categories of customers in Scotland. It was first considered that the market for the supply of fresh processed milk was distinct from that other dairy products. In term of geographical market, the panel found initially clear evidence, based on 1992 data, that of distinct markets in Scotland and England and Wales. However the panel later split when it considered a potential chain of substitution and whether this chain was broken between Northern England and Scotland. Because the panel was unable to reach a majority on this question or on Wiseman’s conduct, the Secretary of State was not in a position to impose sanctions. Nevertheless, on 14 September 2001, Wiseman gave voluntary assurances to change its policy and allow increased competition.

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The question of defining the relevant product market is the question to which group or goods or services does conduct extend. It is basically necessary to look for the products which are the closest substitute for the products or services under investigation (demand-side substitution) and for which consumers would be prepared to switch in the event of a price increase of goods in question or to which producers would switch production in event of significant price increase (supply side substitution).

- In the case *Potato Marketing Board v. Hampden-Smith*, Court of Appeal ,21 March 1997, Mr Hampten-Smith farmed 435 acres overall and decided to develop his production of potatoes. Initially, the Potato Marketing Board provided him for 3 acres of « basic area » which were later increased to 4.5 acres. In accordance with the Potato Marketing Scheme, a levy is charged on producers each year by reference to the area of potatoes planted by the producer : that is the "ordinary area contribution". There is an "excess area contribution" which is penal fine to discourage producers growing in excess of their quota which is what Mr Hampden-Smith did. He refused to pay the penalties and was convicted in first instance. On appeal, Mr Hampden-Smith claimed that the Scheme was illegal because contrary to ex-Articles 86 and 37 of the Treaty. However, under 82, the Court found that " (…) the Board does not occupy a dominant position in the market for the simple reason that it is not in the market at all. » The reason was that the board had no competitor or customers, it only regulated the market but is not in competition with it.

b) The Dominance

In order to define dominance, the OFT guidelines still refer to United Brands [case C-27/76 *United Brands v Commission* [1978] ECR 207] whereby dominance is "*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers"*

The criteria to be considered in order to assess the dominance include:

- **the market shares**: less than 40% will tend not to indicate dominance but over 50% will tend to indicate dominance. Evidences of this can be found in any information provided by undertakings themselves, trade associations, customers or suppliers, market search reports on production and sales, internal production and imports.
- **entry barriers** : a cost that must be borne by an undertaking entering a market and that does not need to be borne by an incumbent undertaking already operating in the market. The OFT provides for a classification of entry : absolute advantages, strategic advantages and exclusionary behaviour.
    - absolute advantages is the preferential access to important assets or rights e.g. copyright, patents, raw materials, ports (if other ports could not use the same market)
    - strategic advantages are the reputation for exclusionary behaviour, contracts in existence tie up distribution channel
    - exclusionary behaviour are for instance vertical restraints, predatory behaviour and refusal to supply.

  The rate of innovation in the market is also a factor as faster innovation erodes entry barriers,
- **buyer power** : if the buyer could switch from one supplier to another at little cost to itself

Joint dominance (means several parties with economic links) must also be considered [see case T-228/97 *Irish Sugar Plc v Commission* [1999] ECR II-02969 (appealed)]

c) The abuse

The list of prohibited abuse provided in section 18 is non exhaustive and is further defined in the OFT Guidelines:

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- **excessively high prices** : the profits of a dominant undertaking in the relevant market consistently exceeding its relevant cost of capital might indicate that its prices are excessive as would do a persistent excess without stimulating new entry or innovation (OFT says that only likely to be abuse "where undertaking is so dominant, and new entry so unlikely" that high profits will not stimulate innovation.
- **price discrimination** : the OFT has accepted that this kind of abuse raises complex economic issue and do not mount automatically into an abuse. In most markets undertakings are normally expected to set prices equal to their marginal cost, but in industries with high fixed costs, it may be more efficient to set higher prices to customers with higher willingness to pay. DGFT would normally consider discrimination only where prices were excessive and were used to exclude competitors.
    - o Case *Milk Marketing Board v Simon Chantler & Others*, Queen's Bench Division, 18 December 1998. The plaintiffs, producers of milk, marketed milk from their farms through a company called Bodfari Producers Limited (BPL), in which each had a share, although the company was effectively controlled by the defendants (who were the only directors of the company to exercise executive functions). However, on 24 March 1994 the European Court of Justice gave a ruling in Case C-40/92 Commission v United Kingdom [1994] ECR 1-989, the effect of which was that such supplies contravened the scheme. Hence the claims were subject of the settlement agreement. The parties to the agreement were the board, BPL, the various producers who had been marketing their milk through BPL ("the Bodfari producers") and the defendants. The defendants started an action on the ground that the settlement agreement was void or unenforceable because the board was in breach of its obligation under European Law (a) not to discriminate without objective justification between agricultural producers in equivalent situations and (b) not to abuse its rights as an exclusive purchaser of milk. The Court dismissed the case and decided on abuse of power, that "*Nor can I see that it is an abuse of power for the board to be permitted to settle claims on what it believed to be terms which fairly reflected the merits. ... ; but if both parties were able to reach the agreement, it is likely that the result would be fair...*". About discrimination, the Court said : "*In the situation that the board had claims against a large number of producers, it was manifestly in their general interest (and in the interest of all milk producers in the country, who would not wish the board to spend a long time and a lot of Money fighting one arbitration after another) that they should be able to settle them. It was also readily foreseeable that a producer who was happy to enter into a settlement might later be able plausibly to point to the position of another producer who fared better (either by settlement or by award of the arbitrators) and suggest that their positions were comparable. If such settlement agreements could be repudiated on that account a likely consequence would be to make it very difficult for the board to settle such claims. In my judgment the detriment which this would cause to the board and producers alike would far outweigh any possible advantage of adopting the approach to the question of discrimination for which the defendants contend* ».
    - o *R v Monopolies and Mergers Commission & anr ex p. Milk Marque*, Queen's Bench Division – Kay J , 10 December 1999 where the Monopolies and Mergers Commission (MMC) published a report on 6 July 1999 on the supply in Great Britain of raw cow's milk and concluded that Milk marque Ltd had a scale monopoly of 49,6 % of the market for the supply of milk in Great Britain in 1997/98. The MMC reported that Milk Marque Ltd exploited its monopoly position by using its selling system to discriminate in term of price and to control the supply of milk made available to the market thereby keeping the prices higher than they would otherwise have been. Consequently, the Minister accepting MMC's findings, asked the OFT to advise him on reform to Milk Marque Ltd's selling procedure and imposed interim measures. Milk Marque and the National

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Farmers Union (NFU) applied for judicial review. On 4 November 1999 Milk Marque's member voted in favour of restructuring and the Minister indicated that he would not pursue interim measures. Permission was granted for judicial review because the initial findings on prices by the MMC did not appear to be conclusive, i.e. because the MMC compared the UK prices with the EC Target Price for milk even though it is not a reliable comparator as it is a policy goal and not an indicator of what market prices are anywhere within the EC. Issues were referred to the European Court of Justice on the interpretation of Regulation 26/62 (C-137/00) and in essence ask the court to what degree national competition law is permitted to apply to products within the common organisation of the market. The delay in giving judgment in this case demonstrates perhaps the difficulty of the issues.

- **discounts** are anti-competitive if they are used to foreclose a market for example fidelity discounts or tied product.
- **predation** is presumed if the price is below the average variable costs. Evidence of the intention to eliminate competitor (e.g. by targeting of price cuts) is generally needed when the price is above average variable cost but below average total costs (perhaps also evidence of other costs). Price above average total cost would normally exclude predation.
- vertical restraints are not excluded (cf Chapter I prohibition) and amount to an abuse namely when it result in market foreclosure, raising rivals= costs, competition dampening. Vertical restraints may be objectively justified, e.g. by preventing free riders benefiting from demonstration & advertising of others, provided that the restrictions of competition is proportionate to the benefits produced. Examples of vertical restraints include resale price maintenance, selective distribution, exclusive distribution, tie-in sales and bundling, full-line forcing, quantity forcing, fidelity forcing, non-linear pricing.
- **refusals to supply**, provided that it is not justified by poor creditworthiness or capacity constraints.
  - o Case *Hinde Livestock Exports Ltd v Pandoro Ltd – Gernon and Others v Pandoro Ltd*, Supreme Court of Ireland, 18 December 1997 [1998] EuLR 116. The initial plaintiffs in this case are companies engaged in the business of transporting live animals to the continent and the defendant is a member of the P&O group which operated a ferry which carried live cattle for slaughter, fattening and breeding between Ireland and the Continent. The defendant which has a monopoly in this kind of ferry decided to stop all shipments of livestock on 31 July 1997. The origin of this decision seemed to be new regulations governing the humane transport of animals and activists demonstrations against the transport of live animals. The plaintiffs issued proceedings and sought, by way of interlocutory relief, an order directing the defendant to continue to provide a livestock export service to the plaintiffs. The High Court rejected the relief and the case was brought on appeal. The Supreme Court allowed the appeal finding that there was a prima facie case that the defendant was in a dominant position and that there had been an abuse of that dominant position.
- **refusal of access** to facility which is impossible or excessively difficult owing to physical, geographic or legal constraints (or is highly undesirable for reasons of public policy)
- **action in related market** (see Tetra Pak II : dominant in one market and abuse in closely related market)

2.2.2) Exclusions

In accordance with Section 19 the Chapter II prohibition excludes mergers and concentrations (schedule 1), the operation of services of general economic interest, compliance with legal requirement, avoidance of conflict with international obligations/compelling reasons of public policy, operation relating to coal or steel, compelling reasons of public policy and subject to an order by the Secretary of State etc.

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Schedule 3 also includes agricultural products (see above).

2.2.3) Exemptions

There is no power for the DGFT to grant exemptions from the Chapter II prohibition. If an undertaking's behaviour involves an agreement which is exempt from Chapter I prohibition, the position under Chapter II will depend on the type of exemption.

If the agreement has an individual exemption or an parallel exemption, it cannot be looked at again in absence of any change in circumstances.However, a block exemption does not prevent the undertaking's behaviour from being an abuse under Chapter II prohibition.

The Act provides that financial penalties cannot be imposed in respect of conduct of minor significance which can be defined by the turnover or the market share of the undertaking.

- The benefit of a block exemption (or a parallel block exemption) under Chapter I does not prevent the undertaking's behaviour from being an abuse under the Chapter II prohibition

3. Procedure

OFT role: *R v. Ministry of Agriculture, Fisheries and Food and Secretary of State for Wales ex p. The Dairy Trade Federation Ltd*, High Court of Justice, 26 September 1994, [1998] EuRL 253.

3.1) Responsible authorities

- DGFT
- sectoral regulators (telecoms, water, electricity, rail, gas)
- European Commission
- But:
  - B DGFT will follow EC decision. DGFT will generally follow comfort letters or will consult EC before not doing so
  - B if comfort letter given on grounds of lack of effect on inter-state trade, EC priorities, lack of community dimension, Chap 1 may nevertheless apply

3.2) Notification

1) For guidance

Ask OFT whether conduct would be likely to benefit from an exemption B gives exemption from fines. If OFT considers that an infringement is likely, the guidance may indicate whether a block or parallel exemption applies or whether he would grant individual exemption if asked to do so.

- B particularly important for agreements in period 09.11.99 and 01.03.2000 not notified under RTPA
- B applies to both Chapter I and Chapter II

2) For decision

A party to an agreement must notify the OFT who decides whether the prohibition has been infringed and if not, whether it is because of the effect of an exclusion or because the agreement is exempt.

- that prohibited : the applicant may have included a request for individual exemption
- that outside prohibition ; the DGFT may consult the public
- that exempt (DGFT must consult other interested parties)

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Block and parallel exemption are automatic, it is no need to notify. Fees may be charged for OFT services

3.2.1) Investigation

By s.25 Competition Act 1998, OFT has a general power where he has "reasonable grounds for suspecting" infringement

- power to request for information in writing or on-the-spot investigation
- power to require documents from any person B any specific document relevant to the investigation (s. 26)
- power to require a person to create a document comprising requested information
- authorise officers to enter peacefully any premises (s. 27) without warrant
- apply for warrant for force entry if reasonable grounds to suspect that documents not produced
- power to take all necessary equipment
- power on premises to take documents/copies; require explanation of the document; require information held on computer to be taken compulsory reference by employees to legal advice on border line activities

nb : there no statutory right to obtain outside legal help but in practice, a reasonable time will be given when no in-house lawyer available

nb : limit to seizure : no privileged communication

3.2.2) Effect of infringement

1) OFT gives **directions** to bring infringements to an end.

- Those directions includes modification of the agreement, information of third party, termination of the agreement
- Directions are given to appropriate persons as parties to the agreement or perpetrators of the conduct as direct parents, affiliates or private individuals with the ability to influence or procure actions by the infringing persons.
- Reasons for the decisions must be given

There is a right of appeal to a specially created court, the Competition Appeals Tribunal

2) If a person subject to direction fails to comply without reasonable excuse, the DGFT may **apply to the court for an order**. Breach of such an order would be contempt of court, punishable by fines or imprisonment.

3) **fines** of up to 10% of UK turnover for intentional or negligent conduct

Immunity : – for agreement qualified as "small agreement" (s.39)

– temporary for agreement notified to European Commission

4) Criminal Penalties – s. 188 Enterprise Act creates a "cartel offence" – price fixing, market-sharing, bid-rigging and limiting production of the supply of goods. It came into effect in 2003 and there are no examples of its use.

The prosecuting authority will be the Serious Fraud Office. The OFT will act as an "examining magistrate" investigating and, if the case appears to be criminal, passing the dossier to the SFO to decide whether or not to prosecute

5) When he has reasonable suspicion that Chapter I or II prohibition has been infringed but has not completed his investigation, the DGFT has the power to take interim measures (s.35)

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Conditions : – if risk of serious, irreparable damage to a particular person or to the public interest

– urgency

nb : no requirement for cross undertaking in damages

3.2.3) Relationship with EU Competition Law

- s.60 mission statement B ensure that as far as possible cases “dealt with in a manner which is consistent with [EU law]”
- courts/OFT to avoid inconsistency with principles of Treaty and ECJ
- have regard to any relevant decision or statement of the Commissions (comfort letters are not legally binding but DG will not depart from them except when the agreement raises special question in the UK)
- in certain areas, EC principles are not relevant because Competition Act sets up a domestic prohibition system

4. Mergers

The merger must be a relevant merger situation which requires the UK turnover of the enterprise being acquired to be exceed £70m or the enterprises which cease to be distinct supply or acquire 25% of goods or services of the relevant kind supplied in the UK or in a substantial part of it. Thus the result of the increase in share plus the resulting share must be at least 25%. In practice this would tend to rule out the application of the merger rules to mergers of agricultural cooperatives and similar organisations.

If the merger is a relevant merger, the test to be applied by the OFT in determining whether to refer the merger to the Competition Commission for further investigation is whether there is at least a significant prospect that a merger may be expected to lessen competition substantially. The first phase screening process is therefore carried out by the OFT with the full investigation into the merger being carried out by the CC. The OFT’s explanation of the substantial lessening of competition argument is when it is expected to weaken rivalry to such an extent that customers would be harmed, e.g. through reduced product choice, because prices could be raised profitably, output could be reduced and/or product quality or innovation could be reduced.