RIETI Workshop

Reform of UK Competition Policy: a ‘state of the art’ competition regime?

May 29, 2003, 15:00-17:00
Special Conference Room #3, 11th Floor, Main Building, METI

Paper Presented by Professor Stephen Wilks, University of Exeter

Preliminary draft, please do not quote without permission.

Research Institute of Economy, Trade and Industry
1-3-1 Kasumigaseki, Chiyoda-ku
METI Annex Building 11th Floor
URL: http://www.rieti.go.jp/

Paper for RIETI Tokyo Workshop, May 2003
Preliminary draft, please do not quote without permission.

Reform of UK Competition Policy: a 'state of the art' competition regime?

Stephen Wilks[*]

The last five years have seen a revolution in UK competition policy. After a fifty year history of hesitant and qualified legislation two acts passed in 1998 and 2002 have produced an assertive and comprehensive body of law supported by a generous increase in resources for implementation. It could be claimed that the legislation borrows the best from the European system and the best from the American system to comprise a modernised body of law which is not only the most comprehensive in the world but offers a model for a 'state of the art' competition regime.

The scale of the revolution can be judged from the way in which competition policy has been re-conceptualised within the British political economy. Competition policy is rather obviously concerned with encouraging competition within markets in order to make them work more effectively. The effective working of markets has two faces. One is to increase efficiency, both productive efficiency (producing goods more cheaply) and allocative efficiency (supplying goods at prices close to costs to those who demand them). The second face is that of 'market regulation'. Ensuring that markets operate sufficiently smoothly to avoid the development and exploitation of market power. This approach is orientated towards equity rather than efficiency. It involves ensuring that monopolies are not rampantly exploitative and cartels are controlled so that trust in the market can be maintained. There is also a third face to competition policy. It has a symbolic and quasi-constitutional role of establishing a commitment to economic democracy and to a market system. This has been an important role in America where the term 'antitrust' is still used. It was also apparent in Germany where the 'cartel laws' are an important underpinning of the social market economy, and in Europe the competition rules are a bed-rock of the dominant imperative of market integration. In the new market economies competition rules play a similar role and a workable body of competition rules is a pre-requisite for membership of the OECD.

In the UK competition policy was originally conceived in 1943 as a way of achieving full employment in the post-war economy.[1] But although it was prompted by ideas of market

---

[*] Professor Stephen Wilks is a member of the UK Competition Commission. He writes here as an independent academic and none of the views expressed in this paper should be attributed to the Commission.

efficiency the first 25 years of policy development were hesitant and minimalistic. British policy stressed the 'second face' of policy, a limited form of market regulation aimed at curbing the worst excesses of monopolisation (which was rampant) and restrictive practices (which were shameless). The word 'competition' did not even appear in British legislation until 1980. The 'third face' of policy, that of a constitutional foundation, has never seemed so important in Britain where the market system has been so deeply embedded and opposition to the excesses of capitalism came from the watered down socialism of the trade union movement. The 'first face' of policy – encouraging efficiency – was a pious hope rather than a serious goal.

The focus of British policy on 'economic regulation' was built into the decision-making process. Decisions on monopoly abuse, restrictive practices, mergers and utility price controls were all based on a test of 'is this against the public interest?' and were all ultimately taken by ministers. The public interest test was exceedingly malleable and, up until the 1980s, was used, among other things, to protect employment, to pursue regional development and to deter foreign takeovers. This focus began to change in the 1980s as part of the neo-liberal economic shift under Margaret Thatcher but the public interest test itself was not finally abandoned until this year – in April 2003.

From May 1997, under the New Labour Government, competition policy underwent a transformation. It was reconceptualised as a core element of supply side policy and as a key to improving economic efficiency and thus addressing a major political goal – 'closing the productivity gap'. This shift from the regulatory second face of policy to the first face of economic efficiency had been building up for about ten years. In some ways it is a legacy of Thatcherite neo-liberalism and of guidance from free market ministers in the DTI who interpreted 'the public interest' as meaning strictly 'increasing competition'. The first public policy shift came in 1984 when the Tebbit guidelines declared that ministerial policy would be to refer merger cases for investigation 'primarily on competition grounds'.[2] During the 1980s 'competition' became an organising principle of public sector reform. The privatisation of the utility industries from 1984 onwards demonstrated that a combination of private management and the deliberate introduction of competition could squeeze out the quite extraordinary productivity gains that were seen in the telecommunications, gas, electricity, and water industries. In these privatised companies profits grew rapidly, partly due to reductions in the cost-base which was radically pruned with extensive cuts in the labour force. Those who were eventually to become the leadership of New Labour watched these developments in opposition. Tony Blair as shadow Trade and Industry and then Energy spokesman, Gordon Brown as a shadow Treasury spokesman [3]. While toeing the Labour line in debates it was during this period that Blair and Brown began to understand the power and the logic of the Conservative shift to market solutions. There is a (probably apocryphal) story from the mid-1980s that 'Tony Blair was sitting quietly with his constituency agent, John Burton , when he suddenly exclaimed: "you know John, I understand it all. Finally, I've actually got it". When Burton asked him what, Blair triumphantly replied: "Microeconomics!"'[4]. As the 1980s gave way to the 1990s Blair and Brown must have been as perplexed as the rest the competition policy community about the inability of the Conservatives to embed their market solutions by means of new competition legislation. An intention to legislate was announced by the DTI under Lord Young as early as 1987[5] but ten years later still nothing had been done.

When Labour's historic election victory was achieved in 1997 amongst the first economic legislation onto the statute books was the Competition Act 1998. The competition 'community' were delighted, industry was worried, the press were puzzled (no populism in competition law), political analysts found this a truly defining moment. The Thatcherite approach to the supply side that was implemented from 1979 onwards had been revolutionary and shocking. Hitherto the orthodox supply side policy had stressed a mixed economy and 'industrial policy'. That whole apparatus was demolished, talk of intervention, subsidy, incomes policy, planning, even dialogue, went out of the window to be replaced by measures to reinforce market pressures, introduce the market, reinforce incentives and increase competition. Government was not inactive, Gamble's phrase 'Free Economy, Strong State' sums up the posture perfectly.[6] It worked hard to establish a market framework and in its second term embarked on an astonishing programme of privatisation.

It is salutary to look back to 1980 to recall the incomprehension and the sustained opposition to the Thatcherite project. Right up until the 1992 election Labour was still harking back to an anti-market policy of state intervention. But from 1994 onwards, when Tony Blair became leader of the Labour Party, he and Gordon Brown moved rapidly to turn it into a social democratic party which accepted the market, private ownership, incentives, a 'hands-off' government, free labour and capital markets, and competition. The 1998 Competition Act symbolised the extent of that convergence. In doing so it also underlined the curiosity that a Conservative Government so wholly committed to competition had for ten years failed to legislate; a Labour Government which ten years ago had adamantly opposed much of what the Act stood for, passed legislation within 18 months. For political scientists the Act further confirmed both the emergence of Labour as a social democratic government and the dawn of a new consensus on supply-side policy. Mrs Thatcher had noted that in 1979 "our analysis of what was wrong with Britain's industrial performance centred on low productivity and its causes".[7] This was also exactly the analysis undertaken by Gordon Brown and in endorsing both the Conservative analysis and their embryonic legislation he put an end to the disease in British politics of 'adversary politics' (the syndrome in a two party system that each 'adversary' reverses the micro-economic policies of its predecessor when it gains power). With the end of adversary politics came a bi-partisan endorsement of market solutions underpinned by a robust competition policy.

Gordon Brown has become arguably the most powerful Chancellor of the Exchequer for 50 years. His preoccupation with productivity has therefore spilled out of the Treasury and become a preoccupation of other ministers, particularly in the DTI. In April (unfortunately coinciding precisely with the victory in Baghdad) Brown gave a characteristically triumphalist budget speech in which he proclaimed:

> I can tell the House that – unlike America, Germany and Japan – the British economy has grown uninterrupted, free of recession, for every single quarter for the past six years.

In a large section on productivity he asserted:

> That the productivity gap per head with Germany has narrowed to just 4 per cent, with France that gap is 16 per cent but has fallen significantly; and the productivity gap with Japan has been eliminated – with Britain now around 7 per cent higher.

But Brown's real obsession, and the source of his inspiration, is the United States. He and the Treasury are far more inclined to look to Washington rather than Brussels when devising supply-side initiatives and it is the US/UK productivity gap of around 40 per cent that is the holy grail. Accordingly Brown also promised that:

> Our budget reforms will learn from American innovation, competition and enterprise and we will introduce new flexibilities into our economy.[8]

Productivity gaps are a staple of economic history. Britain agonised over its productivity gap with Germany in the 1890s and the 1950s were replete with comparisons with the United States and Anglo-American productivity missions. In its current manifestation the figures which mobilised the Treasury took productivity as based on output per worker (as opposed to output per hour or total factor productivity) and the widely cited figures were:

	UK	US	France	Germany
GDP per person employed	100	129	126	126
GDP per hour	100	128	120	131
GDP per capita	100	137	105	113 [9]

The comparison with France and Germany on GDP per person employed reflected the relatively high employment in the UK but the US figures for GDP per capita indicated that it was possible to have high employment and high productivity. Work by McKinsey underlined American success and persuaded Labour that the US model was preferable to the 'Rhineland capitalism' of Europe. Part of that model was the strength of competition in the domestic market.

Whether competition policy can actually improve efficiency and raise productivity is a moot point. The outcomes from implementing competition policy in the UK are poorly understood and what little work is available indicates that competition policy had minimal impact.[10] Nonetheless, there is a theoretical pre-supposition that increased competition will increase efficiency and the UK government has largely accepted Michael Porter's 'Harvard School' conclusion that a strongly competitive domestic environment is conducive to better competitiveness. This has been articulated very clearly as a rationale for the legislation.

The Competition Act 1998.

The Competition Act reforms British policy on restrictive practices and abuse of monopoly power. Since 1972 British companies have been subject to parallel regulation through the competition provisions of the European treaties – article 81 which prohibits anti-competitive agreements, and article 82 which prohibits abuse of a dominant position. The 1998 Act takes the controversial step of aligning UK law with European law by reproducing the European rules in British domestic legislation.

In some ways this is an obvious step, although unwelcome to that influential portion of the Conservative Party who are antagonistic to 'Europe'. It is nonetheless controversial because it involves a major shift from a particular British model of policy to European practice. In particular the new Act involves a shift to a far more legalistic prohibition system in which the competition agencies (mainly the Office of Fair Trading, OFT) have greatly increased powers of investigation, powers of decision, and powers to fine companies in breach of the law by up to 10% of turnover over three years. Moreover, the prohibition is based on the test of agreements which 'have as their object or effect the prevention, restriction or distortion of competition'.[11] This is an explicit 'competition' criteria. Further, the Act establishes a legal regime. The shift is momentous since the British system was agnostic, with few investigatory powers, few penalties (other than voiding agreements), and was 'administrative' with really very little legal apparatus, and ultimately under the control of a minister. British industry was torn between a desire for predictability, consistency and open markets on the one hand; and a fear of over-zealous prosecution, legalisation and a challenge to existing competitive advantage on the other. The lobbying from the CBI (Confederation of British Industry) was therefore ambiguous and not particularly influential.

The European influence is effective not only through the wording of the Act but also through the novel provision that administrative and legal interpretation of the Act should draw on European legal cases, precedents and Commission documents. This is contained in the famous 'section 60' of the Act which is known technically as the 'governing principle' clause but is known jokingly among lawyers as the 'Eldorado' or 'Klondike' clause because it will generate so much work and so many client fees. One core difficulty is the tension in

European law between economic efficiency and market integration. While economic efficiency is important, the imperatives of creating a single market and eliminating barriers to trade has meant that European officials and courts have often given pre-eminence to market integration. This provides unsuitable guidelines and precedents for law within one country and is already creating ambiguity over vertical agreements. Current economic orthodoxy holds that vertical agreements between companies at different levels in the supply chain do not inhibit efficiency unless those companies already have separate sources of market power. In European practice, however, vertical agreements have been attacked because they are seen to divide the market. The UK authorities have rejected the stringency of the European approach and exempted vertical agreements from UK legislation. This is just one extreme example of the generic issue of creating a legal link between the accumulated body of European practice and jurisprudence, and the approach of the domestic law. Indeed, this raises the familiar concerns about sovereignty and constitutional integrity that have fuelled the 'anti-Europe' debate in British politics.

Much of the debate about the suitability of the Act was coloured by assessments of the effectiveness of European legislation. While alignment with Europe might be logical it was sensible only if the UK were aligning with an effective system. On the whole legal and business opinion agrees that European law is effective in dealing with anti-competitive practices, the main concerns were with the administration of the regime, not the law itself. As regards control of monopoly, opinions are far more divided. In this area the European authorities are seen as hesitant, the substantive provisions unsatisfactory (with no efficiency defence for instance) the case law thin and unsatisfactory (eg. In definition of what is meant by 'abuse'), and with a poorly developed ability to deal with oligopolies. The British Government felt that oligopoly abuses were a more important element than the rarer case of abuse by a single company monopoly. Accordingly they retained the traditional British controls of scale and complex monopolies in the Act[12]. The Competition Act therefore provides an updated and refined model based on European law together with retention of one of the more effective parts of the UK law.

Given the thorough nature of the legislation it is ironic that the government may have gone too far down the European route. Just as the legislation was being passed the European Commission was preparing radical proposals on 'modernisation' of the procedures for implementing the European rules[13]. These proposals have now passed into law and have decentralised administration of the European rules. They will require some amendment of the Competition Act but along the way they reinforce the strength of the UK domestic regime by giving the UK authorities direct power to apply the European rules as well as their domestic law.

In addition to creating more stringent competition laws the Competition Act strengthened the competition agencies, created a new competition court, and removed the political influence of ministers. These three elements are discussed in the next section. The revolutionary nature of the changes was reflected in the 16 month delay between the Royal Assent and the coming in to force of the Competition Act on 1 March 2000. This breathing space allowed business to size-up the fresh challenge and allowed the OFT to engage in consultation and issue guidance on the very complex procedural issues. The guidance was widely praised and can be accessed on the OFT's excellent web site.[14] Early experience of the new legislation is that it is working well. Complaints are coming in to the OFT at a rate of up to 3,000 per year[15], the Director General has been making decisions which include several high-profile adverse decisions which have led to substantial fines, appeals have been made to the Competition Appeal Tribunal (CAT) which has issued some extensive judgements and in several cases found against the OFT. In addition the number of private actions is increasing under which plaintiffs are suing trading partners for damages arising from breach of the Act. Good progress on stage one of the reforms!

The Enterprise Act 2002.

The Enterprise Act was a shock and a revelation to the rather closed world of competition policy specialists. The Competition Act had been the product of years of consultation and was available 'off the shelf' for the incoming Labour Government to enact with relatively little change. Very few people expected Labour to 'finish the job' by legislating on mergers and oligopolies and the leading academic lawyer observed, only half jokingly, that 'we seem to have a clear 25 year cycle in our domestic competition law, and I have to say that I am really looking forward to 2023' (for the next piece of legislation).[16] In August 1999 Stephen Byers, DTI Secretary of State, had begun consultation on reforms of the system of merger regulation but the Labour election manifesto, published in May 2001, had promised only that 'we will extend our fair and robust competition regime by giving more independence to the competition authorities'.[17] The Manifesto was very detailed and programmatic but concealed a frenetic burst of activity and appraisal in the Treasury.

At the heart of the new Act is comprehensive reform of the British system of merger control. Surprisingly this transformation has raised little press or public comment. When the first British merger control legislation was passed in 1965 a prominent economist noted that 'perhaps the most important post-war extension of the powers of the executive in the affairs of the private sector was legislated with scarce a suspicion of public anxiety'.[18] Something similar could be said in 2002 about the extension of economic logic. There was no public anxiety about the fundamental change of principle which shifted merger evaluation from a public interest test to a much more specifically economic test of 'substantial lessening of competition' (SLC test). Officials would point out that the legislation was only formalising what had in any case become standard practice but the principled shift remains momentous. Here we see a test of political acceptability being replaced by the independent application of economic law. This is almost a constitutional shift (especially in a UK legal system which is uncomfortable with economic law). It represents the incorporation of market economics into the control of business power and narrows the ability of the state to discipline excess.

The formal responsibility for competition policy lies with the DTI but the genesis of the policy incorporated into the Enterprise Act lay with the Treasury. This is Gordon Brown's Act and, while the Competition Act is clearly a 'European' enactment, the Enterprise Bill is equally clearly 'American'. Like Blair in Downing Street, Brown runs the Treasury through a closed group of advisers, semi-detached from his officials. In their internal debates about productivity Brown, his economic adviser Ed Balls, and their circle analysed the American experience, talked to leading American commentators such as Irwin Stelzer, and visited Washington. They decided to go down the US route. This involved a huge shift which has erected a legal apparatus of economic law completely foreign to the UK tradition. It creates genuinely independent competition agencies, makes the competition court fully independent, facilitates private actions for damages, allows class actions, increases investigation and enforcement powers and, most symbolic, creates a new criminal offence for individuals found guilty of operating a 'hard-core cartel'. This includes bid rigging and carries a term of imprisonment of up to five years. In addition the merger regime will be based on a US-style 'SLC' test and the Act also retains the ability to investigate whole markets.

The Treasury's urgency and impatience yielded a joint Treasury/DTI work programme on productivity immediately after the June 2001 election. It was issued over the joint names of Gordon Brown and the new DTI Secretary of State, Patricia Hewitt, but it was clear that this was the Treasury talking.[19] It rehearsed the measures which were to be formally announced in a DTI White Paper in July and both documents advanced the competition policy/productivity rationale. To quote, 'competition is a central driver for productivity growth in the economy, and hence the UK's international competitiveness'.[20] In substantiation the White Paper cited eight academic studies, including two by Michael Porter (one of which uses Japan to establish that only sectors with strong domestic competition are internationally competitive).[21] Confounding Richard Whish's fears, the government did not wait 25 years to legislate, in just on two years from the Competition Act coming into effect a draft Enterprise Bill was published, on 26 March 2002. It was introduced into parliament with a punishing timetable which severely limited debate. One MP remarked 'it is extraordinary that a Bill of such complexity is to be pushed through Parliament with so little opportunity for detailed scrutiny and debate' he cited also the CBI's complaint 'especially since so much that was being proposed was new and unexpected'.[22] Making the same point, rather more colourfully, a colleague observed 'it was Bismark who once commented that those who love laws, like those who love sausages, should not see how they are made'.[23] The following table illustrates how the sausage factory churned out the Enterprise Act very rapidly, with much greater urgency that the Competition Act:

	Competition Act	Enterprise Act
published	15 October 1997	26 March 2002
Royal assent	9 November 1998	7 November 2002
comes into effect	1 March 2000	1 April 2003
time in Commons (days)	250	91
time in Lords	141	136
Total (days)	391	237
number of pages	129	439
number of clauses	76	281
days per page	3.03	0.52
days per clause	5.14	0.81

On this very crude statistical profile it is clear that the Enterprise Bill was debated in Parliament much less thoroughly that the Competition Bill. Already lawyers are complaining about one side effect of this, which is a clumsily drafted and excessively complex Act which will charge a price on future generations of lawyers which could perhaps have been reduced by a little more patience from the Treasury.

The timing and speed of the passage of the legislation thus indicates the priority that Labour and the Treasury attached to the competition provisions. The Treasury imperative was enshrined in the Treasury's machinery of control. Under Gordon Brown the Treasury has negotiated 'PSAs' (public service agreements) with other ministries in return for their budgets. In the 'Commons summary of the Bill the DTI minister pointed out that 'there remains a productivity gap with our key competitors – France, Germany and the United States. My Department's No. 1 public service agreement target is to tackle this productivity gap'.[24] In response to Treasury pressure the DTI pulled out all the stops. The speed with which the Act came into effect also posed challenges for the competition agencies, which had to set up codes and procedures; for the legal profession, who had to advise their clients; and for business people who were faced with a new and rather intimidating apparatus of legal control.

There is nothing half-hearted about this legislation. Labour ministers are showing something of the zealotry of the newly converted. They not only want a good competition regime, in the spirit of targets and benchmarking they want 'the most effective competition regime in the OECD'.[25] To aid in this the DTI commissioned a peer review of all OECD competition regimes which identified areas where the UK needed to improve to become 'best in class'. This included the criminal cartel offence and the main recommendations fed into the Enterprise Act. Now that the Act is law ministers clearly feel, with some justification, that the UK really does have the best regime in the OECD. It is 'state of the art' – the best that can be achieved.

Of course the current state of the art gives priority to economic efficiency, what was referred to above as the 'first face' of competition policy. We will come back to the economics of competition implementation below but first the discussion shifts to the agencies.

The Agencies

As a compensation for this picture of radical legislative change there has been significant continuity in the agencies implementing competition policy. The role of the agencies is absolutely crucial and it is a source of irritation to read abstract discussions of competition law or economics which fail to take into account the design of the agencies, their resources, leadership, competence, credibility, doctrine and, above all, their use of discretion. There are a rather bewildering array of agencies involved:

OFT, Office of Fair Trading. Created in 1973, now the central player. Chairman John Vickers, a leading competition economist. Budget increased from £22 million (1998-99) to £54 million (2003-04) and staffing from 420 to 550

CC, Competition Commission, formerly the Monopolies and Mergers Commission with a history that goes back to 1949. Re-named in 1998 and now with greatly expanded powers under the 2002 Act. Chairman, Sir Derek Morris, a prominent economist. Up to 50 part-time members and acts as a tribunal, an investigatory agency and with some implementation powers. Budget increased from £7mn (1998-99) to £24 mn (2003-04) and staffing from 80 to 170.

CAT, Competition Appeal Tribunal, a specialist competition court created in 1998 and made fully independent in 2002. To hear procedural and substantive appeals and to consider private actions for damages. President, Sir Christopher Bellamy, former member of the EU Court of First Instance.

Other agencies:

DTI, Department of Trade and Industry. Much of its work and staff transferred to the OFT but keeping some analytical and policy responsibility not least to advise the Secretary of State.

Sectoral regulators. Concurrent powers under the Acts are held by the industry-specific regulators which include OFWAT, OFGEM, and OFTEL.

European authorities, especially DG-Comp, the European Commission's Directorate-General for Competition. Following the 'modernisation' reforms by the Commission, which

> have delegated much of the implementation formerly undertaken by Brussels to the national authorities, a network of European agencies is being created which involves more exchange, case-sharing, and co-operation in developing policy and practice.

Competition policy is particularly susceptible to the influence of the implementing agencies. There is a twofold basis for this internationally consistent rule. First, because the vast majority of competition regimes either have, or are moving towards, independent agencies. Second, because competition rules are breached pervasively and systematically in all market economies. The Sherman Act prohibition on actions "in restraint of trade" is so wide that the US developed the 'rule of reason' doctrine to allow reasonable agreements. Similarly the EU article 81(1) prohibition applies to "all agreements …. which have as their object or effect the prevention, restriction or distortion of competition'. This covers a huge swathe of business practices. On an expansive definition it could be hard to see what would not be caught. Given this hugely powerful legal weapon the way in which the agencies choose to define and deploy their powers gives then very substantial discretion which may be used to operate a minimalist regime, such as that operated under the Reagan administration 1981-89; or to operate aggressively and expansively, as in the EU, also during the 1980s. In the UK a rather passive and reactive policy stance became more assertive in the late 1980s and the Labour Government seeks to build on that record. It 'wants to see a step change with the authorities looking beyond enforcement to a role of advocacy and promotion'.[26]

The Labour Government might demand agency activism but it has surrendered direct control of agency operations. Ever since 1948 the operation of competition policy, and since 1965 especially of merger control, has been under the ultimate direction of ministers. In the jargon it has been under 'majoritarian' control by elected politicians. It has therefore been subject to political priorities and has at times undoubtedly been 'politicised'. These two acts breach that historic pattern and give vastly increased independence to the agencies. In the government's words, they will 'respect the absolute independence of our competition authorities'.[27] Here too we see the hand of Gordon Brown. One of his first, most dramatic, and most applauded acts when he became Chancellor in 1997 was to give independence to the Bank of England to set interest rates. The Enterprise Act reproduces in micro-economic policy the sub-contracting of responsibility that we have seen in macro-economic policy. Effectively power is being transferred to 'non-majoritarian' agencies, to people who are not elected. This move to the delegation of competition policy provides one of the central problematics concerning the operation of the law and the effectiveness of the policy. How actively or aggressively will the authorities behave? How will they define the key terms and concepts of the law? Which approach will they take to the main economic issues such as efficiency, customer benefits and dynamic competition? How credible will they become? Which interests will they favour and who will be the gainers? And the political science question, how as non-majoritarian bodies will they establish their legitimacy and accountability? In order to answer such questions we need to have some theory of why delegation takes place and here we can borrow from principal-agent theory.

In earlier work I have advanced five rationales for the delegation of decision-making to independent agencies. They are expertise; insulation from party political influence; demands from business; blame avoidance; and the creation of an economic constitution.[28] I suggested that in the early days of agency creation the third and fifth factors were of greater importance – a combination of demands for industry for a visible but weak agency and the need to reassure voters and consumers that the market economy would not be overly exploitative. But as policy has evolved, for over 100 years in the American case and over 50 years in the UK, so the agencies have built up greater competence, confidence and credibility. Governments have enhanced the powers of the agencies and accepted them as stakeholders and sources of influence. In recent manifestations of policy the rationale for independence has moved towards expertise, insulation from party political influence and blame avoidance. The agencies have influenced their own institutional design and have become substantially more powerful. To that extent there is a dynamic of path dependence at work.

From a principal-agent point of view, developed within a context of rational choice, the creation of an agency is an exercise in institutional design that not only solves current problems, but which pre-determines future patterns of action in ways that favour the creators and their constituencies. At the core of the approach is the concept of 'credible commitment'. For an enacting coalition commitment problems arise when policy makers are unable to guarantee the durability of future benefits. There is always the risk that future legislation will supersede current policy and future administrations will reverse current arrangements. The enacting coalition can reduce that risk by delegating authority to an agent that is relatively independent from legislative or bureaucratic influence. In order to maximise beneficial effects the agencies must be designed in such a way as to minimise divergences from the original distribution of benefits.

I find the US-style rational choice analysis of the vote-maximising goals and trade-offs of legislation unhelpful in the British context. But the principal-agent analysis does raise the useful concepts of credible commitment and institutional design. The 1998 and 2002 Acts, with their withdrawal of political intervention, their creation of competition tests, and their strengthening of independent agencies are precisely an exercise in credible commitment. They are not providing direct political benefits to legislators but they are providing the Treasury with a long-term and potentially irreversible commitment to competition economics in the state's regulation of business. This binds the DTI and future Secretaries of State, more particularly it signals to industry that there is no escape from the legal apparatus and the economic reasoning embodied in competition economics. The great benefit of agency independence to the competition authorities is that it ought greatly to increase voluntary compliance by companies. The rules are clear, the agencies have a mission to enforce them, the penalties are substantial, companies would be well advised to comply and in the process competitive pressures within the economy intensify and the outcome is improved labour productivity. Very logical, very effective and potentially rather cheap. But will it work? The following sections pick up some of the possible flaws in this model but for a moment let us stay with agency design.

There are two contrasting risks with agency independence. First, might the agencies become too independent and diverge from the competitive model currently envisaged? Second, in the independence sufficient. Is the appearance of complete independence a reality?

On the first risk there is a distinct possibility of excessive independence. Partly due to the possibility of a determined leadership with a distinctive interpretation of competition policy, but more likely as a result of developments in the economics or the law. Both these areas have an internal logic of their own and are discussed in the ensuing sections. On the second risk have ministers really granted complete independence? There are a number of avenues for continued political influence. First, the DTI appoints the Chairmen of the OFT and the CC, for up to five years, and the Lord Chancellor appoints the President of the CAT. The DTI also appoints the Board of the OFT and the membership of the CC. This power of appointments conveys considerable influence. Second, the DTI controls the budgets of each of the agencies. Third, the legislation includes various avenues for political intervention including a residual public interest over-ride for mergers (to protect the defence industry) and reserve powers to over-ride the OFT in order to refer market inquiries to the CC.[29] Fourth, the agencies remain civil service bodies and, whilst they are recruiting widely, their culture is attuned to the Whitehall ministries and this influence is reinforced by the appointment, especially to senior posts, of former officials from the DTI, Treasury and central ministries. The Deputy Director General of the OFT has always been a former DTI civil servant (and this pattern continues). These sources of influence are more likely to impact on the OFT that on the CC or the CAT which have the additional (although not absolute) strengths of the tradition of judicial independence. As far as the OFT is concerned, independence is in reality far from absolute. The Bank of England parallel is also a reminder that even in that case of ostensible independence the Bank is required to meet certain inflation targets and there are residual powers of ministerial intervention. Moreover, the British system of Parliamentary sovereignty allows ministers who control a Parliamentary majority in the House of Commons to legislate quickly and absolutely to repeal earlier legislation. The problem of ‘credible commitment’ is always more extreme in the UK than in the USA and the OFT’s independence does not, at least yet, match that of the Independent Regulatory Commissions of the United States.

Issue 1 - competition policy in one country.

The discussion so far has concentrated on the reform of law in one country. Some reference has been made to European developments but the wider context is the globalisation of antitrust. Networks of contacts across the major OECD competition agencies have grown in scale and importance. It is this setting which enhances the importance of the British reforms as a state-of-the-art model and raises the possibility of policy learning and even policy transfer. There are a series of other questions raised by globalisation of this policy area. Space does not allow a full treatment but one aspect that might be touched upon is the question of cross-border efficiency analysis.

The curiosity of national legislation is, of course, that 'political markets' (nation states) do not coincide with 'economic markets' which may be local, regional or global. If efficiency defences in merger or oligopoly cases are to be taken into account the question arises of the distribution of the efficiencies. If there is a domestic loss of competition, but the creation of greater efficiencies in foreign markets the policy of domestic competition authorities is typically to ignore overseas efficiencies. This penalises the companies themselves and foreign consumers.[30] This is a nice ethical issue and a challenging basis for developing international co-operation. It could have the potential to introduce 'industrial policy' type defences into major cases. Under what circumstances will the efficiency gains for domestic companies operating abroad over-rule loss of competition in domestic markets? This has been little discussed in the UK debate but can hardly be ignored in the European and potentially the transatlantic setting. This whole area is becoming increasingly significant.

Issue 2 - Judicialisation

As from April 2003 UK domestic competition policy has moved fully from a regime that was primarily 'administrative' to one that is fully legalised. In the administrative model decisions were made judgementally on the balance of 'the public interest', investigatory powers were minimal, legal arguments were restricted to judicial review of processes, precedent was relatively unimportant, there were no financial penalties and no appeal on the substance to the courts. All this has changed and there will be unanticipated effects on the rigour of policy, the dynamics of implementation and the distribution of benefits. There will be winners and losers. The immediate winners are the lawyers and there is developing a major shift towards legal reasoning and a 'legal discourse'. The competition agencies are recruiting lawyers in large numbers and the big law firms are enhancing their competition departments. British business has barely begun to grapple with the challenge but it has been deluged with warnings (for the first time the tax authorities have agreed to send an information leaflet with tax forms. This leaflet explains the changes in the competition obligations and has gone to 1.6 million businesses).[31] Over the next few years there will be an expansion in corporate legal advice and compliance programmes. Perhaps oddly the government is positively encouraging this legal take-over. The White Paper makes a virtue of what has often been criticised as overly incestuous in the American system, it observes that 'in the US, there is a true 'revolving door'' and it aspires to create the same pattern in the UK for the 'best competition lawyers and economists' to move from business to government and back again.[32]

It should hardly be necessary to assert that the law is not neutral. Extensive historiography has charted the ebb and flow of American antitrust as law enforcement was affected by the prevailing presidential politics and by the appointment of Supreme Court Justices and Attorney Generals.[33] Less overtly political patterns of judicial activism are seen in the German courts and in the way that the Berlin, and now the Dusseldorf courts of appeal have limited the impact of the Bundeskartellamt. In Europe the effect is equally evident in the remorselessly supportive and teleological rulings of the European court of Justice up to the early 1990s and the later much more critical and de-stabilising findings of the Court of First instance during the late 1990s.

The effect of increased judicialisation on the development, stringency and impact of policy will be seen at several different levels. Let's consider technicality, cost, access and evolution. On the question of technicality, resort to legal argumentation is inevitably going to make policy more opaque, which carries a risk of losing public and business support, and carries an associated risk of cutting across economic prescriptions. In one of the first major articles on the operation of the Competition Act Barry Rodger observes that:

> It is clear that the 1998 Act has dramatically altered the competition landscape in the United Kingdom. There has been a clear shift to a more legalistic framework.

His article amply illustrates the point. In an account of one of the first prohibition decisions, the Napp case, concerning predatory pricing in slow-release morphine, Rodger comments:

> In relation to abuse, the notion of the special responsibility on dominant undertakings, derived from Community jurisprudence, was emphasised. However, although heavy reliance was placed on Community case law, particularly AKZO, it was notable that, despite the reference to the Commission's decision in Irish Sugar, the DGFT (Director General of Fair Trading) did not seek to rely on the court's pronouncements on the selectivity of discounting as an abuse in Irish Sugar.[34]

There is more of this. Rodger's article deploys no less than 94 footnotes. This is lawyers talking to lawyers and, looking at this first case, non-legal observers must wonder about the wisdom of incorporating the full complexity of European precedent and jurisprudence into UK law through the article 60 'Eldorado' clause. The effect is to produce decisions challenging even to competition specialists and quite impenetrable for the lay person.

The technical legal discourse attaches immense importance to single words or phrases. How do we define 'abuse' in article 82 – there are whole chapters on the subject 'but the suspicion remains that the real answer to the question "what is an abuse" is "whatever the European Court and Commission say it is"'.[35] Similarly, what about "may affect trade between member states" in articles 81 and 82? The European Court has created a very wide definition that essentially captures any major transactions. While it may be amusing to penetrate the façade of certainty which lawyers are apt to create there is a more serious point at work. The words and the concepts mould the implementation and the policy. They do so in ways that can impede desired policy objectives and can actually impede the effective application of economic theory.

The interplay of law and economics is complex and has been widely studied. The reluctance of the British judiciary to engage with economic principles and the conflicting dogmas of rival economists and economic theories was one reason for the long retention of the British administrative system. Is 'economics' justiciable? is an important question to which many British judges traditionally answered 'no'. In discussion of the Act, Rodgers and MacCulloch pick up the point which they call 'pigeon-holing in market analysis'. They see two facets to the problem. The first is simple justiciability:

> Although competition laws tend to be based … on economics, competition law has struggled to accurately translate the economic concerns into the form of a legal wrong with which it can deal. A classic example …. is the way competition laws have struggled to deal effectively with oligopolies. These issues are pigeon-holed into legal terminology such as anti-competitive agreements and collective dominance'. (These lead to market share analysis) 'even though many economists would clearly argue that this is formalistic and unnecessary in assessing market power.[36]

The second facet is the effect of compromises reached within the law to create justiciability. Here he cites the distinction in European law between cooperative and concentrative joint ventures. In practice this is a matter of degree, almost arbitrary, but the law treats the two categories completely differently.[37]

Turning to cost, recourse to the law is expensive, in money, time, senior management attention (and often in the share price). Success in a large or complex case often rests on the ability to deploy the right law firms with their teams of specialists working to a tight timetable (especially in merger cases). The small group of leading competition lawyers can also make a difference as individuals. At the most extreme end of the spectrum of cost we can look to how the law has been applied in the United States and particularly at the Department of Justice's attack on IBM, accused in 1969 of having a single-firm monopoly of the computer industry (with an alleged 70% market share). The case went to trial in 1975, trial lasted for six years and the Assistant Attorney General eventually withdrew charges in 1982. The trial transcript ran to 104,400 pages.[38] In part the case revolved around the significance of 'bundling' products together, an earlier treatment of the issues that were again to surface with the Microsoft case. There are a series of by-products of this prospect of legal overkill. On the one hand it might deter business from entering into otherwise reasonable agreements and mergers. On the other hand it might equally deter the competition authorities, make them risk averse, and push them to compromise on assertive action. What is also clear is that big companies with sizeable budgets can buy the best legal advice which, in some cases, might amount to buying the outcome.

The question of cost is also related to the question of access. Competition law should allow relatively easy challenge of abusive or exploitative behaviour. The Enterprise Act has various measures to encourage challenge including facilitation of private action, a direct focus on consumers, the possibility of class actions, the nomination of certain (mainly consumer) groups to make privileged 'super-complaints', and some novel provisions to give concessions to 'whistle-blowers'. But the elaboration of competition law may also put up barriers in respect of the need for legal advice, the cost of employing specialists and, above all, the level of opacity. The more complex and tortuous the law becomes, the more difficult it is for consumers and competitors to assess their rights, and for companies to establish clear compliance programmes.

As regards the evolution of the law, a judicially-driven system has the danger of entrusting policy development to legal argumentation and to the lawyers. Will this happen? Is it dangerous? Is it more dangerous than the alternative of entrusting policy developments to politicians? Answers to these questions will depend to some extent on the study of legal political economy. What incentives drive lawyers and the legal profession? There is some element of sheer intellectual excitement, there is status and position, and there are very substantial fees from some very rich clients. Analysis of self-interest and the possibility of biasing law reform towards the defensive protection of big companies are possible lines of development. The other option in answering such questions is to look at the experience of other lawyer-driven systems. The German experience is not reassuring. Sturm argues that German cartel law became overly dominated by lawyers and lost its way, becoming introverted, self-referential, marginalized and increasingly ineffectual.[39] The experience of the United States is perhaps more relevant and there is a research agenda here for study of the US experience together with a 'read-across' for the implications for the UK. The fora for policy development are the legal journals, the many conferences and events such as Professor Ehlermann's annual conference at the European University Institute. The premier forum is the big Fordham Law Institute meetings every Autumn. These gather together the elite of the competition world with the leading players from the EU, the UK, Germany, France, the USA and so on. The agendas are a roll-call of current policy issues, they are dominated by lawyers and legal issues. It is not wholly reassuring to note that the Conference sponsors are dominated by the leading law firms – Allen and Overy, Freshfields, Linklater and Alliance and so on – perhaps the privatisation of policy development? (and in October 2000 not a single Japanese – or Chinese –speaker)[40]

Issues 3 - <u>the long march of the economists</u>.

The first economists were not appointed to the predecessor of the Competition Commission until 1971, and even then were regarded with great suspicion. Today economists hold the top posts in both the major competition agencies. Moreover, in 2002 the European Court of First Instance tore apart three major merger prohibition decisions and attacked the Commission for woefully inadequate economic analysis. The response was a reorganisation of DG-Comp which split up the Merger Task Force, give far more prominence to economic reasoning, and appointed a chief economist.

At last the economists have established their mandate over UK competition policy and, if judicialisation has transformed the procedural basis of the competition regime, so the introduction of the economic teats promises to transform the substantive basis. The Chapter I restrictive practices test now rests on an evaluation of 'the prevention, restriction or distortion of competition'. The merger test rests on 'the substantial lessening of competition' and the oligopoly or monopoly test rests on 'whether any feature, or combination of features, of each relevant market …. prevents, restricts or distorts competition'.[41] These are economic tests to be assessed by economists and by economic expertise. Accordingly the DTI has appointed economists as Chairman (Sir Derek Morris) and as one of the three Deputy Chairman (Paul Gerosky) of the Commission, and has appointed the economist John Vickers to be Chairman of the OFT. These senior appointments are mirrored by the appointment of economists and introduction of training in economics throughout each organisation.

The impact of economic theory, and indeed of economists, on competition policy has received extensive attention.[42] In UK competition policy there has not been the sort of visibility of economic doctrine seen in the United States although individual economists such as Stephen Littlechild have had strong and declared views (in his case Chicago verging on Austrian[43]) and have been influential policy makers. The relatively limited impact of economic doctrine was of course due to the public interest test. The process of deciding cases certainly used economists who in recent years have become increasingly influential but they were not dominant. In the old civil service cliché the economists 'were on tap, but not on top'. This will change and economic theory will become central to the evaluation of cases through the legal imperative to assess the effect of structure and behaviour on competition. At each stage of the analysis economic principles will be applies, in particular to:

- market definition, which will be based mainly on cross-elasticities of demand unless the markets are bidding or network markets. For mergers the crucial analytical step, which drives the decision, is often market definition.
- Market structure, standard analysis will include market shares, barriers to entry, vertical and horizontal relationships, technological determinants and the degree of internationalisation.
- Market behaviour, the nature of the firms, record of competitive strategy, financial health, pattern of agreements, evaluation of counter-factuals.

In virtually all cases, from anti-competitive agreements to mergers, economists will be working through these analytical stages which will become increasingly routinised The quality of the analysis will be scrutinised rigorously by the courts. A watershed in this respect was the decision of the European Court of First Instance on the appeal by Airtours against the Commission's decision to block it's takeover of First Choice in 1999. The judgement was issued in 2002 and was a stinging indictment of the Commission's economic analysis. Thus 'the Court has provided clear guidance on the standards of economic reasoning that should be applied to merger cases. Facts should be assessed carefully and related to the economic case being made'.[44] This devastating judgement was followed during 2002 by two more cases in which the CFI struck down Commission decisions. By the end of the year the Commission was on the ropes and subject to a torrent of criticism. It eventually accepted the necessity to reinforce its economic expertise and the lesson will not be lost on the other competition authorities across Europe where, as in the UK, the Court's influence will come either directly or through it's influence on the CAT.

Like law, economics is not neutral. Asserting the primacy of economic argument is a long way from providing predictability or of providing delivery of the goals of government. The rather cynical view that if you ask four economists to assess an issue you will get five answers simply points up the way that empirical, theoretical and contextual material can be assembled to produce varying answers. An additional uncertainty is introduced by ambiguity over the goals of policy. In the US the current view is that the sole economic goal of antitrust is consumer welfare. The EU has made similar protestations but also in practice appears to pursue multiple economic goals including fairness to competitors (protecting competitors rather than competition), promotion of small and medium sized enterprises, and single market integration.[45] For the UK the Enterprise Act also privileges consumers through the provision to allow the merger if 'any relevant customer benefits …. outweigh the substantial lessening of competition'. Customer benefits include lower prices, higher quality, greater choice or greater innovation, but the benefit must apply in the UK.[46] This therefore provides an 'efficiency defence' and one assumes that the consumer welfare focus should also drive the pressures that will in turn create greater productivity – but the economic linkage is not clear, does a focus on consumer welfare also produce, in theory, improved productivity? This link appears to be part of the Porter equation through the 'demand conditions' element of his 'diamond'[47], but Porter's analysis provides only one approach.

Interpretation of the market and competition within it can be filtered through a variety of economic theories. Drawing on American experience John Vickers has pointed to a 'post-Chicago synthesis' since 1992 which is less doctrinaire and tends to treat each case on its merits. He also points to the maturing of a whole series of theoretical advances originating in 1982, a year which 'saw the publication of seminal papers on the economic theory of tacit collusion, predatory pricing, limit pricing, contestable markets, monopoly regulation and bargaining'. He picks up in particular the application of game theory to industrial organisation economics and strategic competition.[48]

Vickers may be right about the synthesis but as theory evolves so, like the law, it becomes increasingly arcane. The old 'structure-conduct-performance' paradigm is now passé and, equally, old certainties about market shares are no longer treated as decisive. A major revision in thinking concerns the importance of dynamic, as opposed to static, markets. It recognises that present anti-competitive conditions can quickly be transformed by Schumpeterian gales of creative destruction and it is important to look at dynamic forces operating over time. The direction of argument is to caution against over-literal law enforcement and to assert that business has changed and that policy should recognise the emergence of a 'new economy'. The new economy of IT, telecommunications, software, the media and biotechnology challenges many traditional assumptions so that the old theories based ultimately on the theory of perfect competition are positively misleading. Companies which appear anti-competitive with huge market shares, massive profits, and substantial monopolies are 'under permanent threat from innovating competitors …. equating high market share with dominance in the case of these "fragile monopolists" of the new economy is potentially very damaging to innovation and competition'.[49] Here Chicago re-enters the picture on the back on innovation.

It is interesting to speculate on whether the emphasis on contemporary economic theory will make competition policy more or less assertive. In a fascinating study Eisner found that the increased influence of economists in US antitrust led to disarmament, to far less assertive implementation. He was influenced by the Reagan/Chicago assault on antitrust but argues that the process by which economics became dominant was already under way.

> In the end, the triumph of economics in the antitrust debates and enforcement created the conditions necessary for the growing influence of the Chicago School in the definition of policy. The triumph of conservatism was an expression of shifts in economic expertise within professional agencies that were beyond the control of political actors.[50]

It will be interesting to see how the pattern plays out in Europe and in the UK. There is a fear that the complexity of theory combined with a certain ‘market fatalism’ will lead economics to be more permissive. If this were to happen it is likely that Labour ministers would be disappointed and would begin to question the wisdom of entrusting law enforcement to economics-dominated agencies. Eisner anticipates exactly the fear, and links it nicely to the question of agency independence when he observes that ‘the principal-agent linkages that are expected to force a measure of accountability and responsiveness fail to serve this function once the content of policy is determined by experts’.[51]

It will also be interesting to see if economics leads to some of the future possibilities explored above in relation to law. The economic analysis is if anything more inaccessible than the legal analysis. The cost in time and money is likely to be far less, although there will be a further expansion in economic consultancies. There is also likely to be a reduction in predictability and to this extent there is a tension with legal process and with the desire from business for greater predictability. If the motto of welfare economics is ‘it all depends’ then each case will have to be assessed on its merits and preliminary economic analysis will be necessary before business can predict how the case will be treated by the competition authorities.

Issue 4 - competition policy and economic democracy.

This section will review of the relationship between the ‘first face’ of competition policy – efficiency; and the second and third faces – of economic regulation and an economic constitution. It asks if recent reform has narrowed policy to a dangerous extent so that it has lost touch with its roots. The concern is that competition policy will fail to reassure the public that the social and political problems associated with the excesses of economic power can be adequately addresses. Even in the US Eisner notes that ‘there is no clear evidence that antitrust as an economic policy must take priority over the political and social dimensions of policy’.[52] Is reformed policy therefore still capable of legitimating the contemporary capitalist system or has New Labour taken a step too far in bending policy so clearly to the productivity agenda?

Conclusion – a ‘state-of-the-art’ competition regime.

This paper has argued that the reform of UK policy has indeed produced a state of the art competition regime. The UK had done its best to create a regime that accords with the best current legal and economic advice, which commands (sometimes grudging) support from business, and which has consciously learned from the other leading competition jurisdictions. Closing thoughts would include the question of whether those overseas do indeed see the UK regime as a model? Whether it illustrates weaknesses as well as strengths? And whether the principles of competition law and economics which underpin the regime are sufficiently universal to be applied in other countries? Would they work in Japan?

---

[1] See Stephen Wilks, In the Public Interest: competition policy and the Monopolies and Mergers Commission, Manchester University Press, 1999, p.12

[2] DTI, press release, 5 July 1984

[3] See John Rentoul, Tony Blair: Prime Minister, Timewarner edition, 2002, first published, 2001, chapter 8, 'Doubtful capitalist'.

[4] Daniel Finkelstein in The Times, 15 May 2003.

[5] Wilks, In the Public Interest, pp. 301-02.

[6] Andrew Gamble, The Free Economy and the Strong State: the Politics of Thatcehrism, London, Macmillan, 1988.

[7] Margaret Thatcher, The Downing Street Years, London, HarperCollins, 1993, p.93.

[8] Gordon Brown, Budget speech, 9 April, The Times, 10 April 2003.

[9] Cited in Geoffrey Owen, 'Industry', in Anthony Seldon (ed) The Blair Effect: the Blair Government 1997-2001, London, Liitle Brown, 2002, p.218.

[10] On monopoly see R.Clarke, S.Davies and N.Driffield, Monopoly policy in the UK : assessing the evidence, Cheltenham, Elgar, 1998, p.186).

[11] Wording of article 81 reproduced in the Competition Act, section 2.

[12] These provisions were repealed in the 2002 Act and replaced by new provisions for market investigations – which effectively retained the approach.

[13] Published as Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commisssion Programme 99/027, Brussels, 28 April 1999.

[14] www.oft.gov.uk

[15] Margaret Bloom, 'The New UK Competition Act' in Barry Hawk (ed), Annual Proceedings of the Fordham Corporate Law Institute, New York, Juris, 2001, p.63. Margaret Bloom is Director of Competition Policy at the OFT.

[16] Richard Whish, 'UK Competiton Law: Panel Debate' in Barry Hawk (ed), Annual Proceedings, p.114.

[17] Labour Party Manifesto, p.ll

[18] C.K.Rowley, 'Mergers and public policy in Great Britain', Journal of Law and Economics, 11, 1968, p.83.

[19] HM Treasury and DTI, Enterprise and Productivity: The Government's Strategy for the next Parliament, Treasury, June 2001.

[20] DTI, Productivity and Enterprise: a World Class Competition Regime, London, HMSO, Cm 5233, July 2001, p.1.

[21] M.Porter, M.Takeuchi and M.Sakakibara, Can Japan Compete ?, Macmillan, 2000

[22] John Wittingdale, Hansard, 10 April 2002, col. 53

[23] Nigel Waterson, Hansard, 10 April 2002, col. 108

[24] Melanie Johnson, Parliaamentary Under-Secretary of State for Trade and Industry, Hansard, 17 June 2002, col. 109

[25] DTI public service target, cited in DTI, Peer Review of the UK Competition Policy Regime, London, PriceWaterhouseCoopers, 18 April 2002, p.2

[26] DTI, Productivity and Enterprise, p.15.

[27] DTI, Productivity and Enterprise, p.12.

[28] Stephen Wilks with Ian Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies', West European Politics, 25(1), January 2002, 148-72, pp.156-57

[29] Enterprise Act 2002, section 132.

[30] See Simon Evenett, Alexander Lehman and Benn Steil, 'Antitrust Policy in an Evolving Global Marketplace', in Simon Evennet, Alexander Lehman and Benn Steil, Antitrust Goes Global: What Future for Transatlantic Cooperation?, Washington, Brookings, 2000, p.6

[31] Bloom, 'The New UK Competition Act', p.63.
[32] DTI, Productivity and Enterprise, p.19.
[33] Louis B. Schwartz, 'Cycles of Antitrust Zeal: Predictability?, The Antitrust Bulletin, XXXV(4), Winter 1990, 771-800.
[34] Barry Rodger, 'Early Steps to a Mature Competition Law System: Case Law Developments in the First 18 Months of the Competition Act 1998', European Competition Law Review, 23(2) February 2002, pp. 67 and 53.
[35] Brenda Sufrin, 'The Chapter II Prohibition', in Barry Rodger and Angus MacCulloch, The UK Competition Act: A New Era for UK Competition Law, Oxford, Hart, 2000, p.129.
[36] Barry Rodger and Angus MacCulloch, Competition Law and Policy in the EC and UK, London, Cavendish, second edn, 2001, p.280.
[37] Note that this particular problem was resolved by legislative change in 1997.
[38] For a fascinating study see Franklin Fisher, John McGowan and Joen Greenwood, Folded, Spindled and Mutilated: Economic Analysis and *US v. IBM*, Cambridge, MIT, 1983.
[39] Roland Sturm, 'The German Cartel Office in a Hostile Environment' in Bruce Doern and Stephen Wilks, (eds) Comparative Competition Policy: National Institutions in a Global Market, Oxford, Clarendon, 1996, p.196.
[40] Hawk (ed), Annual Proceedings of the Fordham Corporate Law Institute.
[41] Enterprise Act, section 141(2).
[42] For instance, William Kovacic and Carl Shapiro, 'Antitrust policy: a century of economic and legal thinking', Journal of Economic Perspectives, 2000 14(1); and the fascinating study by Marc Eisner, Antitrust and the Triumph of Economics, Universityu of North Carolina Press, 1991.
[43] Stephen Littlechild originated the 'RPI-X' formula for utility price regulation and was a great misssionary for the introduction of competition into the utility industries, notably as Director General of Electricity Regulation.
[44] Alan Overd, 'After the Airtours Appeal', Editorial, European Competition Law Review, 2002, p.376.
[45] Christian Ahlborn, David Evans, and Atilano Jorge Padilla, 'Competition Policy in the New Economy: Is European Competition Law Up to the Challenge ?', European Competition Law Review, 2001, p.165.
[46] Enterprise Act, sections 22(2)(b) and 30(1).
[47] Michael Porter and Christian Ketels, UK Competitiveness: moving to the next stage, DTI Economics Paper 3, London, DTI and ESRC, May 2003, p.27.
[48] John Vickers, 'Competition Economics and Policy', European Competition Law Review, 42(3) March 2003, p.97.
[49] Ahlborn et al, 'Competition Policy in the New Economy', p.162, they cite, for instance, Nokia which by 2000 was the second biggest European company by market capitalisation.
[50] Eisner, Antitrust and the Triumph of Economics, p.231.
[51] Eisner, p.18
[52] Eisner, p.235