

The Competition Bill in the House of Lords

by Tim Frazer



Tim Frazer outlines the background and gives details of the content of the bill currently awaiting royal assent, showing that, although English law will become much closer to EC law, significant differences will remain.

The Competition Bill has completed its second reading and committee stages in the House of Lords; and the likely nature of the new law is now emerging. There has been universal acclaim for the general themes underlying the new law and few regrets at the demise of the remote and impracticable provisions of the *Restrictive Trade Practices Act 1976* (RTPA). However some practical problems remain with the bill in its present form (or its likely form on report). This article, while acknowledging the triumphs, explores the remaining problems. Lord Fraser's description of the bill as 'half-baked and ill thought out' (*Official Report*, 30/10/97, col. 1149) seems rather unfair; but there are certainly issues which remain to be resolved.

The introduction of the Competition Bill into the House of Lords represents the first legislative response to a process which commenced with the publication in 1988 of a green paper (*Review of Restrictive Trade Practices Policy*, Cm 331). Although a radical revision of competition policy was advertised in the subsequent white paper (*Opening Markets: New Policy on Restrictive Trade Practices*, Cm 727, 1989) no action was taken to bring the matter to Parliament until the publication in August 1996 of a draft bill by the Department of Trade and Industry (DTI), following a further round of consultation (see the DTI's consultation document no. 996, *Tackling Cartels and the Abuse of Market Power*). The Labour government continued the process with the publication in August 1997 of a further draft bill and consultative document (*A prohibition approach to anti-competitive agreements and abuse of dominant position*). The bill was published on 15 October 1997 and completed its second reading and committee stages in the House of Lords before the end of November 1997. It is expected to receive royal assent in May or June 1998.

EUROPEAN ALIGNMENT

The principal feature of the bill is the repeal of the RTPA and the introduction of effects-based prohibitions of anti-competitive agreements and abuse of dominance. The provenance of such prohibitions is the Treaty of Rome; the UK

is one of the last member states to conform its domestic competition legislation with EC law. In that respect it is also preceded by the countries of Central and Eastern Europe, many of whom have aligned their laws with art. 85 and 86 of the treaty in preparation for a closer association with the European Union.

The new law is more impressively underpinned by powers of enforcement and investigation than is currently the case. Fines of up to 10% of UK turnover can be imposed for breach of the prohibitions, interim orders can be used to preserve the status quo, third parties are given enhanced rights of intervention, and the Office of Fair Trading will have the power to undertake searches of premises used for business. This has been achieved by a bill which, while not a model of simplicity, does not rebuild a Byzantine edifice from the rubble of the RTPA.

HARMONISATION

'We are borrowing, not applying, EC law'. (Lord Simon, *Official Report*, 25/11/90, col. 962).

As one of the purposes of the legislative changes is to bring UK domestic competition law more into line with EC law, the major provisions of the bill are modelled on art. 85 and 86. This policy on compatibility between the two legal regimes was exhibited in the 1988 green paper (see para. 3.15 - 3.17) and was maintained in the white paper (see para. 2.6) and in the two consultative documents which preceded the introduction of the bill into the House of Lords. The practical advantages to business of avoiding inconsistency and conflict between the two legal regimes have been emphasised by the DTI. On behalf of the government, Lord Haskel stated:

'I cannot over-emphasise that the purpose of the Bill is to ensure as far as possible a consistency with EC approach [sic] and thereby to ease burdens for business.' (*Official Report*, 17/11/97, col. 417).

The mechanisms put in place to achieve such harmony are twofold: the use of the wording of art. 85 and 86 in the corresponding provisions of the bill; and the requirement of cl. 58

that the bill be interpreted and applied in a manner which is consistent with the treatment of corresponding provisions of EC law.

The first of these strategies has given rise to two look-alike prohibitions based on art. 85 and 86. Clause 2 of the bill prohibits anti-competitive agreements and cl. 18 prohibits the abuse of a dominant position. Clause 2 (the Chapter I prohibition) mimics art. 85 almost word for word, with the substitution of 'within the UK' for 'between member states' and 'within the common market'. This transliteration of the article, rather than its adaptation, presents some problems of interpretation. Clause 2 prohibits:

'agreements between undertakings, decisions by associations of undertakings or concerted practices which (a) may affect trade within the UK; and (b) have as their object or effect the prevention, restriction or distortion of competition within the UK'.

The prohibition is to apply only if the transaction is, or is intended to be, implemented in the UK. Thus, in order for the Chapter I prohibition to apply, three conditions as to location must be satisfied:

- (1) the transaction must be capable of affecting trade within the UK,
- (2) the object or effect of the transaction must be anti-competitive within the UK, and
- (3) the transaction must be, or must be intended to be, implemented in the UK.

In practice, these conditions will differ very little, if at all, from each other.

SEMANTIC CONVERGENCE

The requirement to show that trade in the UK may be affected (in addition to demonstrating an anti-competitive object or effect within the UK) is more an example of semantic convergence than of real legislative harmonisation, since the corresponding words used in art. 85 perform a very particular purpose not relevant to a national legal regime. Thus art. 85 is only capable of applying to a transaction where it 'may affect trade between Member States'. This is a means of distinguishing those transactions which are regulated at a Community level from those regulated at a national level only. As the EC Commission has recently said, in order to be regulated by art. 85:

'an agreement must be likely to have an effect on the freedom of trade between Member States whether directly or indirectly, actually or potentially, in a way which could damage the realisation of the objectives of the single market, in particular by partitioning national markets or by the modification of competitive structures within the Community.' (Notice of the Commission relating to the revision of the notice on agreements of minor importance (OJ 1997 C29/3)).

Since the jurisdictional elements of the UK legislation are dealt with in the requirement that the anti-competitive effect must be felt in the UK, there seems to be little logical requirement for an additional requirement that trade in the UK be affected by the transaction. Other member states who have adopted legislation on similar lines to art. 85 have not followed the dual approach adopted by the bill. (For a translation of extracts of the relevant national legislation, see J Maitland-Walker, *Competition Laws of Europe*, Butterworths, London, 1995.)

Lord Simon accepted that EC competition law:

'has certain elements which cannot simply be transposed into the domestic system'.

since they do not make sense in a purely domestic context. This is put forward as an explanation of the substitution of 'competition within the United Kingdom' in place of 'competition within the common market'. It does not, however, justify the inclusion of the requirement to demonstrate that, additionally, trade within the UK may be affected by the transaction.

COURTS' APPROACH

The second strategy for convergence is contained in cl. 58 which requires questions arising under the new legislation to be dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law. Any court or tribunal determining a question arising under the new law must act with a view to securing that there is no inconsistency between the principles applied, and decisions reached by such a court, and the principles laid down by the Treaty and the European Court of Justice (and any relevant decision of the European Court of Justice). The court is also required to 'have regard' to any relevant decision or statement of the Commission. The Director General of Fair Trading (DGFT) will also be subject to these requirements. *

This provision is a device used to achieve a dynamic harmony with EC jurisprudence as it develops, as well as to simplify the presentation of the statutory provisions. Reliance on European Community jurisprudence and practice will enable the *Competition Act* to be adopted without specific provisions relating to the definition of key terms or as to the practice to be adopted in relation to key principles. Similarly, the guidelines and rules to be produced by the DGFT will be subject to the need to provide for harmony with corresponding EU practice and principles.

SOME DISTINCTIONS

Although, as noted above, the wording of cl. 2 demonstrates an unduly slavish reproduction of art. 85, there are some distinct differences between the bill and the corresponding provisions of EC law. There will, for example, be a broader grant of professional privilege under the bill than is available in relation to art. 85 proceedings under *AM & S Europe Ltd v EC Commission* (Case 155/79) [1982] ECR 1575, so that relevant communications of employed solicitors will benefit from the privilege.

Further, the provisions relating to immunity from fines will differ. As noted below, minor agreements and conduct of minor significance will not usually attract fines. However there will be no guaranteed immunity for agreements notified to the DGFT for guidance or for exemption. Although cl. 13(4) and 14(4) may appear to grant such immunity along the lines permitted in art. 15(5) of Regulation 17/62 (OJ 1959-62, 87) the effect of sched. 5 para. 3(2)(a) is considerably more draconian than is art. 15(6) of the regulation. The latter provision, it will be recalled, provides for immunity from fines to be prospectively removed where the EC Commission forms a preliminary view that the agreement is unlikely to benefit from the exemption provisions of art. 85(3). In sched. 5, however, the bill retrospectively removes the immunity wherever the DGFT

makes a provisional decision that it would not be appropriate to grant an individual exemption to a notified agreement.

One further point of departure worth noting is that the monopoly provisions of the *Fair Trading Act 1973* are to be retained alongside the art. 864-type provision contained in cl. 18 (the Chapter II prohibition). Thus, the complex monopoly provisions of the 1973 Act are to be used to fill the gap between the Chapter I and Chapter II prohibitions. The scale monopoly provisions will be used (if it all) only where the structural remedies available there will be more effective in relation to serial abusers.

VERTICAL AGREEMENTS

In the 1989 white paper, the government concluded that vertical agreements should be included in the prohibition, but it signalled a change of policy when it consulted in 1996. In the consultation document published with the first draft of the bill it indicated that the debate on the regulation on vertical agreements under EC law had caused it to review its earlier decision not to exclude vertical agreements from the prohibition. The DTI stated the government's new view when it consulted on the 1997 draft of the bill – viz, that the exclusion of vertical agreements would:

- (1) reduce the burden on industry and on the regulatory authorities;
- (2) target attention on cases of market power or network agreements; and
- (3) reduce the restrictive effect imposed by block exemptions.

Having reviewed the difficulty of defining a vertical agreement, the 1997 draft bill did not include any provisions relating to them. Although the government remain convinced of the need to exclude vertical non-price agreements from the Chapter I prohibition (even if a different approach is adopted under art. 85) it was somewhat hampered by the fact that the EC Commission's own study of the regulation of vertical agreements was not concluded at the time the bill was published. The bill was therefore introduced in the House of Lords without any reference to vertical agreements and no such references were added during the second reading and committee stages.

THE DE MINIMIS DOCTRINE

In keeping with the principle of compatibility with art. 85, the Chapter I prohibition is intended to apply only to those transactions which have an appreciable effect on competition. An explicit appreciability test was not included in the bill for fear that this might cause a semantic divergence between the Chapter I prohibition and art. 85. The practice of the EC Commission in determining the question of appreciability is contained in its *Notice on agreements of minor importance*. The bill does, however, depart from practice under art. 85 and 86 by the introduction of two new categories, 'small agreements' and 'conduct of minor significance'. Both of these are to be defined by reference to turnover and market share, the turnover threshold being somewhere between £20m–£50m.

The bill provides that parties to small agreements, and persons carrying on conduct of minor significance, will enjoy an immunity from fines; the immunity may be prospectively withdrawn by the DGFT. In all other respects, the prohibitions will apply to such agreements or conduct. The limited nature of

the immunity for small agreements conflicts with the underlying assumption about the interpretation of cl. 2, noted above. Small agreements are excluded from art. 85 on the virtually irrebuttable presumption that they cannot affect competition to a significant degree. Such agreements can therefore be taken to be valid, stable and beyond likely challenge by parties, third parties or enforcers. Such an immunity is not available under the bill, since small agreements will be prohibited, and the relevant clauses will be void ab initio and unavailable in legal proceedings. The only immunity offered is one against fines. Full immunity will only be available to agreements which are both small and which do not have an appreciable effect on competition. If there is a difference in these concepts, it will make it difficult to give advice in relation to modest agreements; if there is no such difference, the introduction of the new categories seems unnecessary and prolix.

SIGNIFICANT DEPARTURE

The whole purpose of the EU approach – under the Commission's *Notice* – is to enable parties to a (defined) minor agreement to relax about competition regulation, knowing that the agreement would be extremely difficult to challenge. If the UK method is to be a dual approach (a definition of small agreement, and a definition of appreciable effect), then this will be a significant departure from the EC approach – a departure surely not intended by cl. 58. The government has also indicated that there will be an exemption for agreements which, at the date of enactment, benefit from directions under s. 21(2) of the RTPA (which discharges the DGFT from taking proceedings in respect of agreements which are not of such significance as to call for investigation). The DGFT will be able to nullify any such exemption on an individual basis, but the proposed approach will further confuse the position relating to small or insignificant agreements, and will preserve a distinction between the UK legislation and art. 85.

THE RIGHTS OF THIRD PARTIES

One of the key differences between the current and proposed regimes was to be the place of third party rights in ensuring the full deterrent effect of the prohibitions. Third party actions, although available under RTPA, s. 35 have not had any significant role to play in supporting the enforcement of the current regime or in protecting the rights of persons injured by the operation of an unlawful restriction. The rights available under the proposed legislation are to be assisted in three ways:

- (1) by enabling a decision of the DGFT to be admitted as evidence in a third party action;
- (2) by enabling the DGFT to disclose material to third parties about a breach; and
- (3) by enabling third parties with sufficient interest to appeal against decisions of the DGFT.

The first such feature extends the corresponding provisions of RTPA s. 35(7) (which concerns only findings of law and fact made by the Restrictive Practices Court); the second is available under RTPA s. 41; the third is a novel feature – presently actions can be commenced under the RTPA only by parties to an agreement or by 'persons aggrieved' by the registration or non-registration of an agreement. However what is missing from the bill is any convenient means by which a third party may bring a civil action for breach of either of the prohibitions.

It will be recalled that RTPA s. 35(2) provides that the obligation

to comply with the registration requirements of that statute is a duty, breach of which:

'is actionable accordingly subject to the defences and other incidents applying to actions for breach of statutory duty'.

No such statement appears in the bill. Lord Lucas reported to the House that he had searched for such a provision in case it was to be found 'somewhere in its crannies and crevices' (*Official Report*, 17/11/97, col. 454). The government responded that there is 'no need to make explicit provision in the bill' to achieve an effective right of private actions (col. 956), and that third party actions under the law will be the same as those under art. 85 and 86. In that there is a paucity of authority on the nature of third party actions under those articles, and some continuing uncertainties in relation to the nature of available remedies (see Hall et al, 'UK' in *The Application of Articles 85 and 86 of the EC Treaty by National Courts in the Member States*, EC Commission 1997), it is somewhat surprising, and rather unsatisfactory, that a key feature of the bill is left to implication and conjecture.

CONCLUSION

Lord Lucas in the second reading of the bill suggested that:

'many businessmen fancy 'a bit of corporate nookie' – cuddling up to a competitor or abuse of a dominant position. After all, that is only human nature. It is reasonable for the government to want to control those urges in the interests of us all and in the end the health of the business community'.

The bill certainly forms the basis of a reliable control mechanism; with some fine-tuning, it should be capable of providing an effective and long-term legislative regime. 

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The themes of this paper will be dealt with at greater length in Tim Frazer and Stephen Hornsby, *The Competition Act 1998*, Jordans, 1998.

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