Yet More Competition Law Reform in the UK: the underlying issues may not be new, but this time it’s personal.

Dr Jonathan Howden-Evans
Solicitor, Morgan Cole

Introduction

The year 2000 heralded a new era in UK competition Law. The Competition Act 1998 was the most fundamental change to the control of anti-competitive agreements in the UK since the original Restrictive Trade Practices Act in 1956 (the RTPA). The recipe for reform, represented by the Director General of Fair Trading’s (DGFT) concerns about unchecked restrictive agreements, the Government’s aim to be seen as the friend of business, and the media campaign of a “rip-off Britain”, pointed to a revolution in the making.

The DGFT declared that in the last two years of the RTPA, “Thirteen hard-core cartels in total were unearthed … with the old and feeble powers. I expect many more to be rooted out with the new, strong powers.”1 Volvo admitted a price fixing cartel on the eve of the Competition Act 1998 coming into force, in order to avoid the new powers and sanctions. Indeed, the Office of Fair Trading (OFT) expected “…to be able to destroy cartels in weeks or months rather than years.”2 This all suggested that the start of the new millennium would be a busy time for the competition authorities.

Despite the draft legislation forming the basis of the 1998 Act having ebbed back and forth from making it on to the statute book for over two decades, it soon became apparent that the hope and promises wielded around in 1998 would not be fulfilled; and by the time the Act had been in force for one year, a surprise development made it quite clear that things were once again going to change: the announcement of more domestic legislation (in the guise of an “Enterprise Bill”).

The Enterprise Bill was based on six principles identified by the Government as how to develop the best competition regime in the world3, but these principles do not really explain the changes that will come into force over the next few months.

Why change?

The DTI press release4 heralding the enactment of the Enterprise Act 2002 proclaimed that the reforms “promote strong, fair competition and open, dynamic markets” to “…help make the UK the best place in the world to do business”. Once again, we have fighting talk from a Government determined to be seen at the friend of business, which echo the promises made in the run up to the Competition Act 1998. But not all is changing.

---

3 A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), Executive Summary and pp 10 and 11. The principles are: competition decisions should be taken by strong, pro-active and independent competition authorities; the regime should root out all forms of anti-competitive behaviour; there should be a strong deterrent effect; harmed parties should be able to get real redress; Government and the competition authorities should work for greater international consistency and co-operation; and competition policy deserves a high profile because of its importance for economic performance.
The promotion of the “market based” test upon which UK competition law is now transparently rooted has accelerated the acceptance of the economics that lay beneath the legal controls. For this achievement alone, the Competition Act 1998 should be congratulated. Whilst the domestic prohibitions controlling anti-competitive agreements (i.e. the Chapter I Prohibition) and abuses of dominant / monopolistic positions (i.e. the Chapter II Prohibition) have not delivered the wealth of cases promised, they remain unchanged. This is of no surprise – the prohibitions are based on established EC jurisprudence and the UK competition authorities have found that it is taking longer than anticipated to reach decisions – their public statements that they are busy investigating anti-competitive activity and expect to be making infringement decisions much more frequently are not hollow promises. The recent record fine totalling £22.65 million imposed on Argos and Littlewoods for fixing the prices of toys and games with Hasbro (the toy manufacturer) demonstrates that the OFT mean business.

But there is no time to be complacent – things were missed last time around. The Enterprise Act 2002 achieves three things: first it plugs the gaps that the Competition Act 1998 failed to address; secondly, it builds on what can be best described as “domestic competition best practice”; and thirdly, it makes this area of law much more personal.

Plugging the gaps

There was always scope for some improvement; some of it minor, but some of it rather more fundamental to the deliverance of an effective and efficient competition law system.

A good example of a minor change is that of the Office of Fair Trading (OFT) having extended powers to investigate suspected infringements of competition law in limited cases. These include the use of covert surveillance techniques such as secret filming and/or telephone tapping. It was not possible to establish from the White Paper preceding the Enterprise Bill whether there was a case for these increased powers (let alone whether such a case could be proved). Arguably it would only be when sufficient UK investigations leading to “decisions” would we know whether the powers carved out in the Competition Act 1998 have worked. However, evidence of US investigations would indeed point to an undeniable need for the use of covert surveillance. James Griffin in his presentation to the American Bar Association in 2000, illustrated the “brazen nature of cartels”. Griffin used video footage of the secret filming of the Lysine Cartel meetings in various hotel rooms. The contempt and utter disregard cartel members had for competition authorities and their victims, asserts that all appropriate means of investigation should be made available to the OFT, where they are needed to match the wrongdoing.

The fundamental flaw in the Competition Act 1998 was how claims for damages were legislated for – or rather how they weren’t legislated for. The path chosen in 1998 was to leave the right to damages tied to European developments, which in effect was to leave it rather up in the air and of no real help to the potential claimant. The DTI’s press release announcing the Royal Assent of the Enterprise Act 2002 wonderfully understates the problem

---

© Jonathan Howden-Evans 2003
The moral rights of the author have been asserted
Database Right The Centre for International Law (maker)
faced by those who suffer at the hands of anti-competitive activity, by summarising that “…(there have been no successful actions for 30 years).”

This was the most unquestionable failing of the Competition Act 1998, but to put this in context, a brief resume of the problem at EC level is required. The European Commission cannot award damages; private actions are left to national courts, which must ensure that the rules and procedures governing the claim are no less favourable than those governing analogous domestic claims and must not make it impossible or excessively difficult to obtain redress. Those bringing a claim can rely on the findings of the European Commission in domestic proceedings. Against this background, it would have been thought that with so much of the Competition Act 1998 being drawn on EC jurisprudence, the award of damages would be straightforward; after all, the RTPA provided for a breach of statutory duty.

However, there have been many reasons given for objecting to national courts awarding damages, including the lack of coherency amongst Member States as to whether damages are available, issues of standing, differences in interlocutory proceedings, the risk of forum shopping and in any event, “…courts are not appropriate agencies to decide complex issues of fact and policy present in the competition field.”

Nevertheless, there have been many reasons given for objecting to national courts awarding damages, including the lack of coherency amongst Member States as to whether damages are available, issues of standing, differences in interlocutory proceedings, the risk of forum shopping and in any event, “…courts are not appropriate agencies to decide complex issues of fact and policy present in the competition field.”

It is true that the domestic experience of courts adjudicating on anti-competitive agreements has clearly been less than satisfactory: although the awarding of damages is a remedy that the court is used to, in competition cases there is inertia when it comes to establishing a guiding principle.

Although some other Member States have on occasion awarded damages, the precise cause of action has not been conclusively settled. The favoured theory suggests that the award of damages is based on a breach of statutory duty following the majority decision in Garden Cottage Foods Ltd v Milk Marketing Board. Indeed a 1988 consultation stated that “Article [81] has direct effect and national courts may grant injunctions for infringements; moreover a majority of the House of Lords has taken the view that damages are available for breach of the competition rules in the treaty.”

Jones argued that Francovich dictates that damages should be available to all breaches of EC law, whether committed by a Member State or private entity, drawing support from the Advocate General’s Opinion in Banks v British Coal Corporation. All of this predated the

9 Whish expressed concern about the reliance on breach of section 35(2) of the RTPA as a means of claiming breach of statutory duty for Article 81 infringements, under the principle of non-discrimination or equality of treatment, since this section was limited by the focus on registrability and the exclusion of vertical agreements, thus providing no real comparable to invoke the principle (R Whish “The Enforcement of EC Competition Law in the Domestic Courts of Member States” (1994) 2 ECLR 60, 63).
11 Although successful actions have been brought in Germany and France: eg Metro-Cartier Düsseldorf Court of Appeal, 20 Dec. 1988 and Euro Garage v Renault, Cour d’Appel, de Paris, 23 Mar. 1989 these are the exceptions to the inert state that has developed.
15 Case C-128/92 [1994] 5 CMLR 30. In Banks, Advocate General Van Gerven found that the question of whether Francovich set a precedent extending to allow one individual to claim against another individual for damages in respect of a breach of a Treaty provision having direct effect in the relations between them, must be answered in the affirmative (paragraphs 71 and 73) concluding that the “national court is under an obligation to award damages for loss sustained by an undertaking as a result of the breach by another undertaking of a directly effective provision of Community competition law” (ibid, p 74) and further “the amount of compensation payable by the Community should correspond to the damage which it caused.” (ibid, p 82).

© Jonathan Howden-Evans 2003
The moral rights of the author have been asserted
Database Right The Centre for International Law (maker)
Competition Act 1998, so the fact that the ability to claim damages remained an issue is unjustifiable.

Bizarrely, it was confirmed in Parliament that “Where third parties would have had rights under the old regime, the Bill preserves them; they will continue to be able to take action for breaches of statutory duty under the RTPA and the Resale Prices Act 1976” – when no one ever successfully brought an action for damages in the English and Welsh courts. The Government rejected the idea of the Competition Commission Appeal Tribunal being the appropriate tribunal to hear private law actions, instead opting for the courts to safeguard “…the rights of those who may be damaged by anti-competitive behaviour”17, implying that the courts were actually protecting these rights.18 The domestic courts’ experience of not recognising third party rights was blatantly left unchecked and unchallenged.

At the Third Reading in the House of Lords, an amendment was proposed (unsuccessfully) to make infringements of UK competition law actionable for breach of statutory duty.19 Lord Borrie supported this since, as a former DGFT really knew what was needed for the law to be effective. However, Lord Simon of Highbury responded that the Government: “…did not want to go wider or narrower that the rights which exist for breach of the EC prohibitions. We believe that the best way to achieve this result is for the Bill to remain silent on the issue of private rights of action…”20

Despite Pepper v Hart statements being used to defend the lack of an explicit right, the strongest messages came from guides published by practitioners. Whilst these were aimed at drumming up business and did not carry weight in court, they added to the legitimate expectations of injured third parties. Once the third party had the pitfalls of such an action explained by its legal adviser and was made aware of the costs involved, the preferred option was to complain to the OFT instead. Whilst this is a good thing in assisting the OFT by generating more complaints, it drains their resources, as the complainant who feels they have no option for pursing a private action, is less likely to accept a decision not to investigate. Explicit recognition would have been the “carrot” to those thinking about bringing an action. Nevertheless, following the Competition Act 1998 receiving Royal Assent, we were told by the OFT that:

“…third parties who consider they have been harmed as a result of any unlawful agreement, practice, or conduct may have a claim for damages in the courts.”21 (emphasis added).

“Although the Act gives limited immunity from financial penalties for ‘small agreements’…this does not extend to…the possibility of being sued for damages.”22

“Third parties who consider that they have suffered loss as a result of any unlawful agreement…have a claim for damages in the courts.”23

---

18 Although the cases in which interim injunctions were unsuccessfully sought would suggest that damages are accepted as available.
21 What your business needs to know (OFT 247, September 1999) p 10.
22 How your business can achieve compliance (OFT 424, August 1999) p 3.
One of the potential consequences of infringement will be “third party damages”.

Unsurprisingly there was no rush of private actions, although there were apparently been between ten and twenty private actions contemplated up to 19 October 2000. Mr Whiteman QC, sitting as a deputy judge, accepted that domestic courts do have the power to grant civil remedies, in *Network Multimedia Ltd v Jobjserve Ltd* on appeal against the grant of an interim injunction, he granted a further temporary injunction since he felt that damages would not be an adequate remedy should the claimant go on to win its cases at full trial. Whilst this clearly assumes damages are available, it was not the concrete ruling necessary to establish the basis for awarding damages, although the Government did claim some “…anecdotal evidence that cases are occasionally settled out of court.”

The Government would like to see greater private action so the White Paper proposed new procedures to ease private actions will be introduced, with hearings before a specialist tribunal. This runs contrary to the arguments in the Competition Bill for not making such a right to damages explicit, instead choosing to rely on the High Court and the development of EC law. The switch of jurisdiction to the Competition Appeal Tribunal (CAT) provides the common sense solution that should have been used in 1997, and makes better use of existing judicial resources. This switch is the only way to guarantee consistency and the necessary expertise. Admittedly, it could also be seen as providing a way for the OFT to abdicate responsibility, but following the EC reform of Regulation 17/62, the OFT will have less time to pursue complaints and bring its own actions.

The Enterprise Act 2002 will give an explicit right to damages, enshrined in an new section 47A to the Competition Act 1998. Third party businesses can bring actions before the CAT, relying on a previous decision by a competition authority that the domestic or EC law has been infringed; such a finding may have been reached by the OFT, European Commission (although as of May 2004 the OFT will have its new powers to enforce breaches of European competition law on behalf of the European Commission), or the CAT itself, following an appeal against an earlier OFT decision. This will prove a very cost effective way of a business recovering their losses since the business will only have to prove its losses.

However, it is not just private actions by businesses that the Enterprise Act 2002 provides for; also introduced is a new explicit “personal” action, whereby consumers can be represented by consumer bodies (like the Consumers Association) in bringing a claim for damages (see *Personalisation* below)

**Best Practice**

Best practice is nothing new in the arena of domestic competition law. Take the Fair Trading Act 1973 merger provisions: these relied on a public interest test where basically anything could be taken into account, yet the focus over the past few years has, on the whole, been...
economics based. As noted by Phil Evans of the Consumers’ Association at the Competition Commissions Evening Consultation to discuss the changes:\footnote{Speech at the Competition Commission Enterprise Act Consultation 18/11/02 (at page 43, lines 27-33 of the transcript, available at www.competition-commission.org.uk)}

“the reform [of merger law] is going to be the least problematic because it is simply an extension of what has been happening over the last few years and so it will not be a shock to anyone’s system, although I am sure lawyers will be able to charge their clients on the basis that it is a significant change.”\footnote{You may of may not see that as a disservice to the lawyers (depending on your occupation!), but the area of personalisation is one thing that we will all have to get to grips with (see \textit{Personalisation} below).}

Yet in respect of the treatment of agreements, best practice really came into its own in the interim between the Competition Act 1998 receiving Royal Assent and coming into force. A great deal of concern was expressed during the Competition Bill debates regarding the ability of the OFT to cope with notifications for guidance or decision:

“It would not be a good start to the new regime if the Office of Fair Trading and the regulators were flooded with innocuous agreements. It took years for the Commission to recover from the 30,000 agreements that were notified to it in the six months after what is now Article 81 of the treaty came into force, if it ever has recovered.”\footnote{Dr Kim Howells, Official Report, Fourth Standing Committee on Delegated Legislation, Draft Competition Act 1998 (Land and Vertical Agreements, Determination of Turnover for Penalties) Order 2000, House of Commons, Part 1 p 3, 3 February 2000, House of Commons Hansard, internet.}

Whilst these concerns were made prior to the decision to exclude vertical and land agreements, the OFT has managed to receive remarkably few notifications. But how? Under the RTPA, once an agreement was registered it was lawful to operate it until any restrictions were struck down by the RPC – giving the parties to the agreement a kind of “validity comfort”. The Chapter I Prohibition still provides the ability to notify, ie a validity comfort still exists since once notified, the parties are immune to penalty. Consequently an \textit{incentive} to notify has always been present.

So are businesses so blasé as to not care: an attitude left over from the days of legal controls with no effective sanction? There must be an unacceptable level of anti-competitive activity – otherwise we would not be going through the process of further reform. At the end of 1999, a survey of “big UK companies” found that 40 per cent. had done nothing to prepare for the Act\footnote{Survey by CMS Cameron McKenna, (1999) FT 1 December, 3. This was a decrease from the 57 per cent of companies that indicated they had taken no action, in Cameron McKenna’s survey the previous year (“OFT set to fine UK firms ignorant of EU competition rules” (1998) The Lawyer 20 October, 13.}.

Whilst the latest statistics show that awareness is now at 53\%\footnote{Annual Report of the Director General of Fair Trading, 2002 Annexe sda.}, the lack of notification cannot be due to ignorance alone – especially since competition law is regularly making the headlines.

However, in the period 1 March 2000 to 31 December 2000, only 10 were notified for guidance and 7 for a decision; there have only been a further 5 notifications for a decision in the last two years. Of those notified for a decision, they could all arguably be said to meet the OFT’s suggested triggers for notification: they all require certainty for the agreement to take place and carry financial risk, but none of the agreements go so far as to raise novel legal issues that have not been considered in the UK or EC before. Whilst the MasterCard/Europay arrangement, Link Interchange Agreement, British Horseracing Broad and the Jockey Club, BSkyB/NTL Channel Supply Agreement, all followed high profile investigations by the OFT, the remaining notifications appear to be a “belt and braces” notification. Of course, the down

\footnote{© Jonathan Howden-Evans 2003
The moral rights of the author have been asserted
Database Right The Centre for International Law (maker).}
side to the limited number of notifications is that there is a dearth of information as to the OFT’s current view and interpretation of the prohibition.

At the EC level, Article 2 of Regulation 17/62 empowers the Commission to grant negative clearances, with Articles 4 and 5 providing for notifications where an exemption is required (the exemption criteria covered by Articles 6 to 9), but the Commission encourages discussions before notifying an agreement.\footnote{Recitals (paragraph 6), Commission Regulation 3385/94 of 21 December 1994 on the form, content and other details of application and notifications provided for in Council Regulation No. 17/62.} It is this informal discussion which the OFT has based the successful implementation of domestic competition law. This ‘open door’ policy, where undertakings can obtain free informal advice as to whether they should notify an agreement, has kept notifications to a minimum. In the first year the “…OFT provided informal advice in around 50 cases.”\footnote{Annual Report of the Director General of Fair Trading, 2000, p 23.}

Reliance on this system is questionable as it would seem to be contrary to the OFT’s “Do complain, don’t notify” mantra, and one must question whether such a policy can survive should more businesses approach the OFT on an informal basis. Indeed, the reform of the Article 81 procedures will test the domestic informal advice system, since the inability of undertakings to notify the Commission will either lead to more businesses trying to find that their agreements fall within the domestic regime in order to gain immunity via notification, or if not notifying, turning to the OFT for informal advice on Article 81. Whether the OFT (even with increased resources) could cope with an increase in the amount of informal requests is doubtful. Bloom described the notifications received up to October 2000 as requiring “…a lot of work because they [were] complicated agreements.”\footnote{M Bloom, comment made at Fordham Corporate Law Institute, 27th Annual Conference on International Anti-trust Law, New York, 19 October 2000.} An increase in these sort of agreements being discussed informally will drain the resources of the OFT, and it will continue to produce insufficient precedent, with uncertainty being the unwanted scenario in a best practice regime. Unless the OFT regularly provides clear details of the questions it has been dealing with and the views it has reached, one of the fundamental foundations upon which UK competition law is now based could be detrimentally weakened. However, the future does look promising.

The Global Competition Review of 2001, surveying competition authorities around the world “…found that both the OFT and Competition Commission (CC) were held in higher regard than in earlier years, and that they ranked above many other competition authorities (equal fourth out of twenty five).”\footnote{Global Competition Review June 2001, p 14.} However, the role of the OFT is due to alter: it is evolving so as to be able to address more competition issues. These new obligations will be assisted by the introduction of a Board Structure\footnote{This kicks in formally on 1 April 2003, with the DGFT’s powers being transferred to this new Board.}, of collegiate form with three divisions: Competition Enforcement, Consumer Regulation Enforcement and Markets and Policy Initiatives. This structure is seen to better “…reflect the OFT’s unifying goal – making markets work better – and the sets of enforcement tools that [the OFT has] for competition and consumer protection”\footnote{J Vickers “The OFT: Firm Goal, Evolving Role” Speech delivered to the Competition Law Association, 2 May 2001, p 5; and has been broadly welcomed by those responding to the consultation although Lord Borrie, was one of the minority who did not find a case for reform (Proposed New Structure for the OFT: Summary Analysis of Responses (DTI, March 2001)).}.

The reformed OFT will have a duty to make its main deliberations public\footnote{The Government’s Expenditure Plans 2001-2002 and 2003-2004 and Main Estimates 2001-2002 (DTI, www.dti.gov.uk/expenditureplan as at 29/7/01) paragraph 11.23.} in accordance with the wider objective of communication as set out in the OFT’s “Statement of Purpose”.\footnote{© Jonathan Howden-Evans 2003 The moral rights of the author have been asserted Database Right The Centre for International Law (maker)}
It builds on the what has been the OFT’s developing best practice of trying to inject transparency into its decisions and promote compliance by explaining to business what the law is and how the OFT will apply it.

**Personalisation**

One thing that unites all those who will feel the impact of the changes, be they a lawyer, business person, academic or student, is the increased personalisation of competition law. This is a process which started to gather pace in the run up to the Competition Act 1998 coming into force, but has now gone into overdrive as part of the latest reform.

It was said that the Competition Act 1998 had a personalisation effect in that it referred throughout to the DGFT. This is no longer true given the transfer of powers to a new Board, yet the Act itself became personalised in that it has been portrayed as an entity that will help us all in the fight that most of us never realised we were battling against.

It was the OFT by their mantra “Do complain, don’t notify” who placed a personal emphasis on the implementation of domestic competition law – even if the original intention behind this cry was to avoid a deluge of notifications. Don’t notify – that is – self-assess has become the buzzword in competition law circles. This self-assessment was declared as the future of competition law enforcement when the European Commission published detailed guidelines for use in conjunction with Regulation 2790/1999 (the Vertical Block Exemption), and allowed individual exemptions to be backdated, thereby discouraging notifications.

This has been taken as an underlying theme of the Enterprise Act 2002, giving a much greater “personal” impact to not only UK, but EC competition law as well.

Businessmen and women will really have to work to prove their innocence against suggestion that they have not been complying with the law. Directors and executives who enter into hardcore cartel agreements (which are defined as agreements between competitors to fix prices, limit supply or production, share markets, or rig tendering processes) will face the possibility of criminal proceedings. Action will be brought by the OFT and/or the Serious Fraud Office and the test will be based on “dishonesty”.

These new criminal sanctions, imposing personal liability on individuals in respect of the primary breach of the Chapter I Prohibition, follow the CCAP Peer Review in which “83 per cent of respondents in the UK believed that criminal penalties would improve the effectiveness of the UK regime, by increasing its deterrent effect.” It has been described by “Treasury sources” as the “biggest change to competition policy in decades”. Although these proposals are a surprise given the lack of enforcement to date, the demand for such action is not new. An interview given by Stephen Byers to promote the Competition Act 1998 in 1999, promising a better deal for consumers, was instantly attacked by consumer groups who demanded tough prison sentences to ensure that punishment was effective.

What is surprising about the Government’s initial proposals however, was the severity of the sanction. Despite the US providing for criminal liability for officers, under the Sherman Act, the majority of actions were penalised by fine rather than imprisonment (although since

---

41 “The OFT: Statement of Purpose” OFT press release PN 33/01, 17/7/01.  
42 Freeman & Whish, Guide to the Competition Act 1998, (United Kingdom, Butterworths, 2000), p 74, footnote 1 (to paragraph 5.5).  
43 Productivity in the UK: Enterprise and the Productivity Challenge (HM Treasury and DTI, June 2001), p 20.  
46 Sections 1 and 2, as originally enacted.
1974 there has been greater recourse to the imposition of both a financial and penal sanction. Many other jurisdictions have criminal sanctions for individuals, including Canada, Japan, Austria, France, Norway, and Ireland, with Australia and Sweden considering their introduction. Germany has a criminal offence for bid-rigging. In the vitamins cartel, the former Managing Director of BASF-Feinchemikaliensparte received a two and a half month jail sentence and a $125,000 fine, and the former Marketing Director of Hoffman-La Roche received a four month sentence and a $350,000 fine. The Government though was keen to prevent undertakings being able to find ways to cover the costs of individuals being fined, and therefore proposed that the penalty be custodial, suggesting 7 to 10 year sentence. Even at a reduced 5 year maximum, as finally enacted in the Enterprise Act 2002, this is a dramatic change of direction for UK competition law.

The OFT and SFO will be the main prosecuting bodies and will have its powers extended accordingly, but different divisions within the OFT will handle the investigation and prosecution. Indeed there will be two separate investigations - one civil and one criminal. OFT investigators should follow the PACE codes of practice, and will no doubt have regard to the CPS Code for Crown Prosecutors in deciding whether there is sufficient evidence to prosecute. Whether the OFT can recruit the appropriately qualified prosecutors remains to be seen.

In practice, when such directors or executives are questioned in relation to any aspect of the Chapter I Prohibition, they will have to be cautioned that they may be facing criminal prosecution. If not, they will be able to rely on the privilege against self-incrimination. Such a caution would not have to be made to employees, but this in itself will mean that effective compliance is in directors and executives own self-interests, and should encourage them to ensure employees keep effective documentation (a “paper trail”) and put in place compliance policies.

The Government proposes that although there is no formal plea bargain mechanism in the UK, it will ensure that the OFT is able to decide in each case that a whistle blower who comes forward might not face a criminal trial.

Ultimately, since this criminal sanction will only apply to cartel agreements that are investigated under the UK law, it may well be of limited impact. However, the next “personal sanction” should be of much greater concern to directors in the UK.

The court will be given new powers to disqualify directors (for up to 15 years) for serious breaches of competition law (whether it be UK or EC). These powers will apply irrespective of whether there has been a criminal prosecution and regardless of whether the director was aware that the agreement or conduct breached competition law: the test will be based on whether the director contributed to the breach, failed to take steps to prevent it or ought to have known that the activity breached competition law. The difficulty facing a director, is that given the amount of publicity afforded to competition law over the last few years and the

48 A World Class Competition Regime (White Paper) DTI, July 2001 (Cm 5233), paragraph 7.17.
49 ibid, paragraph 7.36
50 Although Re Westminster Property Management Ltd (ChD, (2000) The Times 19 January) held that evidence given under the Insolvency Act 1986 could be used in disqualification proceedings as these were civil not criminal, thus the evidence could be admitted without breaching Article 6, other cases cast doubt on this. In ILJ v UK ((2000) The Times 13 October) the ECtHR held that the prosecutions use of the DTI interview transcripts (of statements that the applicants had been required by law to give) amounted to a violation of Article 6 in that the right not to incriminate oneself was breached. This follows the findings in Saunders v UK (1996] 23 EHRR 313) and R v Faryab ([1999] BPIR 569). The case against Kevin Maxwell collapsed for it was found that the evidence obtained by the DTI conducting section 432 or 442 Companies Act inquiries were used a prelude to criminal prosecution (“Curbing power at the DTI” (1999) The Times (Law Supplement) 16 March, 10).
wealth of practical information made freely available by the OFT, it will be increasingly difficult for him or her to show that they were not aware of what was required.

Like the policy adopted in respect of the criminal offence, there will be leniency for directors who come forward and blow the whistle, but only in respect of competition law and not any other offences.

Personalisation does not stop with the authorities versus the individual; in the future it will be a sword for every one of us to invoke. Consumer bodies (possibly the Consumers’ Association, National Consumer Council, councils for regulated sectors, Financial Services Consumer Panel) will be able bring actions on behalf of consumers to basically to recover the “extra” that they have been forced to pay as a result of the anti-competitive activity. This right will apply to breaches of both the UK and EC law, following a ruling by the OFT or European Commission, respectively.

Damages are to be awarded for successful complaints, either to each consumer who complained or to the representative body for them to enforce on behalf the consumers.

Should there be no consumers wanting to get involved in an action, a consumer body would still be able to bring a “super complaint” where they believe that market (due to its structure or the conduct of businesses) is harming the interests of consumers. The authorities are counting on consumers and their representative bodies to assist in policing the competition enforcement regime; and these complaints will be fast-tracked by the OFT to ensure that consumers come first. This does however present the danger that individual complaints receive less favourable treatment in terms of time or investigation.

It is also worth briefly mentioning the reform of how UK law deals with mergers and market investigations, since it will result in another significant aspect of personalising compliance. In future the weight of the decision making process will fall onto the Competition Commission (CC). Ensuring that this decision making process produces the “right” answer, the Enterprise Act 2002 introduces a new power for the CC to impose monetary penalties on those who, without reasonable excuse, fail to comply with a request for documents or information. The penalties will include a one off fixed fine and a daily default fine.

It is currently envisaged that the maximum fixed penalty will be £30,000, with the maximum for a daily fine being £15,000 per day. This switch from contempt proceedings to the imposition of potentially a substantial monetary fine might be seen by some a draconian; however, the CC would say that this will ensure that they obtain all the information they require.

Conclusion

The Enterprise Act 2002 at last ties up the loose ends that were ignored in 1998, but it is not for this achievement that it will be remembered.

The best practice approach to the implementation of the Competition Act 1998 should not have been a surprise, when the Competition Bill debates indicated the need to allow flexibility and a “common sense approach”. We have put our faith in the fact that those with the power know what they were to do. However, best practice will be relied upon more and more to deliver an effective system of not only UK competition law, but the UK’s responsibility for enforcing EC competition law, where the centre of gravity is felt here.

It is the personalisation aspect of the changes that need to be taken seriously. These follow the developments in US competition law (note the recent criminal prosecution, and
imprisonment, of the Chairman of Christies' Auction House for a price-fixing agreement). The OFT has recently raided 6 pharmaceutical companies and dozens of individual homes as part of a big investigation into suspected price-fixing affecting the National Health Service – once the Enterprise Act 2002 is fully in force they will not have to rely on the Serious Fraud Office bringing directors to task under fraud provisions. The OFT warn that their investigations and the number of decisions imposing sanctions will increase in the forthcoming year.

Even if competition law has never concerned you before, we are all, as consumers, now true stakeholders in this system. Just recently a US Appeal Court\(^1\) has once again extended the boundaries to ensuring compliance with competition law, by declaring that non-US consumers who purchased “price-fixed” goods outside of the US did have standing to sue in the US court (where treble damages are available).

For those running a business, it will be harder to show that they “innocently” acted in contravention of competition law. Despite the hype that the media have given the criminalisation aspects of the new law, it is the disqualification aspect that will be the real weapon since breaching UK law could leave its personal mark on the rest of their careers.

\(^{1}\) Empagram SA and others v Hoffman-la-Roche and others Dow Jones News Service 22.01.03