Conclusion

Much has been written about the failing firm defence argument though rarely is there mention of it in any competition law (Canada's Competition Act being a notable exception). Outside the United States, the number of decided cases where the failing firm issue has been a major feature is relatively small. Nevertheless, such cases raise important and difficult issues for the competition authority.

In Australia the failing firm argument may have to be considered under s. 50 to establish whether or not there is a substantial lessening of competition or under s. 90 in respect of an application for authorisation on public interest grounds.

Where the merger would, on normal s. 50 considerations, lead to a substantial lessening of competition, suggesting that the merger should be prohibited, the possibility that the failing firm may exit the market if the merger is prohibited requires a modification of the usual assessment.

It is suggested that two prerequisites have to be established if the failing firm argument is to be entertained, and that the onus of doing so should fall on the parties. These are that the failure of the failing firm is indeed imminent and that there are no alternative buyers whose acquisition of the failing firm would cause no, or a lesser, competition problem.

Although, where the prerequisites are met, the effects of a merger on the structure of the market may be little different in the short term from the structure that would emerge if the failing firm was allowed to exit — the less so, the more dominant in its market is the acquiring firm — there can still be reasons for concluding that competition may be more adversely affected if the merger takes place. The issue is whether competition is **substantially** lessened by the merger. For this to be likely, there will need to be a change in the dynamics of the market. To establish that the consequence is likely to be a substantial lessening of competition is likely to require close attention to the strategic opportunities open to the acquiring firm rather than to more traditional market shares, barriers to entry and the like.

As far as authorisation is concerned, the saving of jobs and capacity is a potential public benefit. Evaluation of such benefits in the context of a merger which has been found to be likely to lead to a substantial lessening of competition will always be difficult, as the Commission notes in its determination on the Western Australian Newspapers application. But the difficulties do not appear to be any greater than in any other authorisation application.

Reform of UK competition law

A Bill to reform United Kingdom (UK) competition law was introduced into Parliament in October 1997 and is expected to receive Royal Assent in July 1998. Reform is overdue. Indeed, the previous Government published its proposals as long ago as July 1989 but was unable thereafter to find a slot for them in any of its legislative programs. The present Competition Bill is more radical in the changes it will make both to the substantive provisions of the competition law and to the machinery with which the law will be enforced.

This article outlines the main changes and considers how likely they are to meet the objectives of the reform. The main objective is to improve the effectiveness of the law in dealing with anti-competitive business conduct. It is also intended that the changes will align UK competition law more closely to the law of the European Community as set out in Articles 85 and 86 of the Treaty of Rome. The objective here is to reduce compliance costs for UK business and the possibility of conflict between the two systems of law.

The new law

When enacted, the Competition Bill will introduce two prohibitions, one of anti-competitive agreements and the other of conduct amounting to the abuse of a dominant position. The first prohibition (called, in the

statute, the Chapter I prohibition) will replace the Restrictive Trade Practices Act. This is a woefully inadequate instrument for dealing with cartels, and it is cumbersome and inefficient as a means of dealing with agreements which contain restrictive provisions but which, on examination, are found to have no significant effects on the competitive process or which offer economic benefits that offset the anti-competitive effects.

Under the present law, cartels are only unlawful if they are not notified to the Office of Fair Trading (OFT) before they come into effect. But there are no financial penalties for failure to notify details of an agreement. If a secret and therefore unlawful cartel is uncovered, it will be referred by the Director General of Fair Trading (DGFT) to the Restrictive Practices Court for a declaration that the restrictions in the agreement, e.g. on the prices to be charged, are against the public interest, the test laid down in the statute. Invariably the parties will not defend the action and the Court will make an order (or accept an undertaking) to prevent the parties from giving effect to the restrictions or from making any other agreement 'to the like effect'. There are no financial penalties for making an agreement that is found to be against the public interest, but breach of a court order can lead to heavy fines for contempt. In 1995 the Court imposed record fines of over £8 million on ready-mixed concrete companies for continuing bid rigging schemes in contempt of a court order.

A further weakness of the present law is that the DGFT has no investigatory powers worthy of the name should the OFT suspect the existence of an unlawful agreement. He can serve a notice requiring persons to provide details of any agreement that falls within the scope of the legislation to which they are party but he has no powers with which to collect evidence directly.

All this is to be changed by the new law. Except where certain *de minimis* provisions apply, agreements and concerted practices which have the object or effect of preventing, restricting or distorting competition in a market within the UK will be prohibited in principle, and such agreements and concerted practices will be void and unenforceable. Exemption from the prohibition can be obtained if the agreement can be shown to improve the production and distribution of goods or services or technical or economic progress with a fair share of the benefits accruing to consumers. There is also to be a system of block exemptions.

The language of the prohibition, including the non-exhaustive list of types of agreement likely to be prohibited, and of the exemption provision, is precisely that of Article 85 of the Treaty of Rome except for the omission of the requirement in Article 85 that interstate trade is affected. Where there is such an effect, an agreement falls within the jurisdiction of the European Commission (EC) rather than of any national authority.

Yet there is to be a major difference between the scope of the Chapter I prohibition in the new UK law and Article 85. It is the Government's intention that vertical agreements should be excluded from the prohibition, except for those vertical agreements which include price restrictions, most obviously agreements imposing resale price maintenance (the existing law on which will be repealed). Whether this intention is carried through depends upon a satisfactory definition of the excluded agreements being devised before the Bill is enacted. But the Government's reasoning is that vertical agreements will be more effectively dealt with by other parts of the competition law because they are only likely to have perceptible anti-competitive effects where one of the parties to the agreement has market power (unless they become a cloak for collusive conduct which would fall within the Chapter I prohibition). There is also concern to avoid the system overload that has plagued the EC with large numbers of distribution, franchise and other vertical agreements being notified but found not to restrict competition or, if they do, to be exemptible. The structure of Article 85, and of the Chapter I prohibition in the new UK law, does not lend itself to the rule of reason approach which is best suited to the assessment of vertical agreements. It may then seem illogical that vertical agreements which contain restrictions to do with prices are not to be excluded from the prohibition. The distinction is based on the view that distribution agreements, say, which restrict price

competition between dealers are more likely to have detrimental effects on efficiency and innovation, and on consumer choice, than, say, territorial restrictions. But the point is clearly arguable.

The second prohibition introduced into UK law by the Competition Bill (called the Chapter II prohibition in the statute) is of any conduct of one or more firms which amounts to the abuse of a dominant position. The language, including the illustrative list of abusive conduct, mirrors Article 86 of the Treaty of Rome. This is a more controversial part of the reforms. Notwithstanding the development of Community jurisprudence on Article 86, there is concern in a number of quarters in the UK about the vagueness of the concept of abuse as a standard for unlawful business conduct and for the imposition of financial penalties. It is to be emphasised that it is abusive conduct that is prohibited, not dominance as such. But conduct that would reinforce a dominant position, e.g. predatory pricing, clearly would fall within the prohibition.

Investigation

The investigatory powers of the DGFT will be substantially strengthened. This is crucial to the effectiveness of the new legislation. Where he has 'reasonable suspicion' of an infringement, the DGFT may conduct an investigation in the course of which he, or his authorised officer, can require a person to produce specified documents and to provide explanations of them. With notice, he will be able to enter and search premises (if necessary by force) and take copies of documents. Notice can be dispensed with on the authority of a High Court judge. Obstruction of the investigation or deliberately providing false or misleading information will be a criminal offence. But the DGFT will not be able to interrogate persons who might be expected to have evidence of an infringement. This is a weakness in the battery of additional investigatory powers.

Enforcement and penalties

The DGFT will have the power to order interim measures prior to completing an investigation to avoid serious irreparable damage to a party or to protect the public interest. The lack of interim measures has long been seen as a weakness of the present law though it has to be acknowledged that a similar power is rarely used by the EC.

If the DGFT concludes that there has been an infringement of either prohibition he may give directions aimed to bring it to an end and third parties will have the right to recover damages if a direction is not complied with.

The DGFT will also be able to impose financial penalties on firms of up to 10 per cent of their turnover in the UK (although there are to be immunities from fines for parties to 'small agreements' and for abusive conduct of 'minor significance'). There is, however, no power to impose financial penalties on persons. This is a serious limitation of the new law, particularly as a deterrent to collusive conduct.

Review

The DGFT clearly has a powerful position in this system. Earlier thoughts that the position of DGFT should be replaced by a Commission which would then have the decision making role have been put aside. The Bill creates no advisory body which the DGFT would be required to consult, although he might establish one of his own volition. Not only does the DGFT personally decide whether there has been an infringement of the law or whether an anti-competitive agreement might be exempted, he also decides the level of any financial penalty.

The process by which the DGFT's decisions can be reviewed is therefore of particular importance. A new body, the Competition Commission, is to be established. Members of the Commission will constitute appeal tribunals to hear appeals against any decision of the DGFT (including by those not directly concerned in a case but considered to have a 'sufficient interest') and against the level of any penalty imposed. Decisions of an appeal tribunal will be appealable to the Court of Appeal on points of law.

It seems likely that a significant number of the DGFT's decisions will be appealed, certainly in the first years of operation of the new legislation. The tribunals will therefore have a key role in establishing some early case law.

The regulated utilities

Although prime responsibility for enforcing the prohibitions of anti-competitive agreements and of conduct amounting to abuse of a dominant position is to lie with the DGFT, the separate regulators of the telecommunications, gas, electricity, water and railway industries are to have concurrent jurisdiction to apply the new law in the sectors for which they have regulatory responsibility. This is a controversial feature of the Bill. Some, including the DGFT, argue that it will risk inconsistency in the interpretation and application of the new law. The counter argument, strongly made by some of the regulators, is that they have greater expertise in their sectors than the DGFT and that the strengthened competition law will give them a powerful weapon with which to fulfil their statutory duty to promote competition in their sectors. This latter point can hardly be disputed.

Effectiveness of the changes

There can be no doubt that the forthcoming changes will improve the effectiveness of UK competition law in deterring and, as necessary, penalising anti-competitive conduct. Yet the Government has chosen to retain the long established provisions, now in the Fair Trading Act, by which 'monopoly situations' can be referred by the DGFT to the Monopolies and Mergers Commission (MMC) for investigation. A monopoly situation exists if 25 per cent or more of the supply (or acquisition) of any good or service in the UK is accounted for by one firm or if 25 per cent or more is accounted for by firms who 'so conduct their respective affairs' as to prevent, restrict or distort competition in the UK ('scale' and 'complex' monopoly situations respectively). The MMC must report to the Minister (the Secretary of State for Trade and Industry) on whether any matters relating to the monopoly situation adversely affect the public interest, and it can make recommendations as to remedies. But the decision on the action to be taken — which can include divestment or other restructuring but not financial penalties — is entirely for the Minister.

The intention is that scale monopoly references will be largely supplanted by the new prohibition of conduct amounting to abuse of a dominant position, even though the market share denoting dominance will invariably be larger than 25 per cent (Community jurisprudence suggests at least 50 per cent). It is the power to impose structural remedies after an MMC investigation that has led the Government to keep the provisions on the statute book though the power has rarely been used. There is another reason as far as the provisions on complex monopolies are concerned. These have proved a useful means of having thorough investigations of a variety of market structures in which there is no one dominant firm and a variety of business practices which can be said to prevent, restrict or distort competition but which, at the initial stage at least, would not have appeared to be abusive. The view is that this part of the existing law is more suited to the investigation of oligopolistic markets and practices such as 'conscious parallelism' or networks of vertical restraints (as in motor car distribution, to give but one example) than either of the new prohibitions. Given the difficulties that the EC has in establishing a concerted practice under Article 85 or a position of joint dominance under Article 86, there is some substance in the view. However, retaining such a considerable part of the present law will complicate both enforcement practice and compliance as business will be uncertain whether conduct may be found unlawful or merely an appropriate matter for a monopoly reference — despite the guidance that the DGFT is obliged to provide on the application of the new law.

The functions of the MMC in relation to monopoly references will pass to the new Competition Commission. Its tasks will reflect the hybrid nature of the system: as explained, it will hear appeals in a quasi judicial capacity against decisions of the DGFT enforcing the new prohibitions, but it will also conduct its own investigations on references made to it by the DGFT and report to the Minister on whether any matter has adverse effects on the public interest with recommendations as to the action, if any, that the Minister should take.

It must remain to be seen how much use of the monopoly reference provisions of the present law the DGFT will make when he has the power to enforce the new prohibitions.

Merger control

Little will be said here on merger control as the Competition Bill makes no changes to the present system. It will continue to be for the Minister to decide, taking account of the advice of the DGFT, whether a merger should be referred to the MMC for investigation and for the MMC — or the Competition Commission as it will be in the new setup — to report to the Minister on whether the merger operates, or is likely to operate, against the public interest. As with monopoly references, it is for the Minister to decide the action, if any, to be taken, on an MMC report. This is not to suggest that the system is without shortcomings. The breadth of the public interest test and the decisive role afforded to Ministers have been criticised, for example. But compared with the rest of the competition law, there is no consensus on the need for reform of merger control, let alone on the direction that any reform should take.

Relationship with Community law

The new prohibitions are deliberately closely modelled on Articles 85 and 86 of the Treaty of Rome with the aim of reducing the potential inconsistency, even conflict, between national and Community law. Moreover, the Competition Bill requires that decisions taken in relation to the prohibitions shall be consistent with the way in which Articles 85 and 86 have been interpreted by the European Court, and in taking decisions and issuing rules and guidelines the DGFT (and the utility regulators) must have regard to any relevant decision or statement by the EC. This is a highly significant provision of the new law pointing to a closer alignment of UK and Community law than has prevailed up until now.

Where there is conflict between national and Community law, the basic principle is that Community law takes precedence and must be applied. Conflict can be avoided by restraint on the part of a national authority and by the duty of the EC to cooperate with the authorities of the Member States in the application of Community law. But where laws are very different, restraint and cooperation, valuable clearly as they are, may not be sufficient.

In *Walt Wilhelm v Bundeskartellamt* (1969), a case concerned with conduct which was prohibited under both Community and national (here, German) law, the European Court ruled that the law of the Community was to prevail. It added the dicta that 'if the ultimate general aim of the Treaty [of Rome] is to be respected this parallel application of the national law can only be allowed in so far as it does not prejudice the uniform application throughout the common market of the Community rules on cartels and the full effect of the measures adopted in implementation of those rules', and that the Community authorities, in order to achieve the objectives of the Treaty, are permitted 'to carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activities within the whole Community'.

It is clear that where conduct is prohibited by Article 85 or 86, it cannot be permitted at the level of national law. Approval of an agreement or of conduct by a national authority cannot prevent the EC from subsequently condemning it under Community law. It is also clear that if the EC has concluded that Community law does not apply, national authorities are free to take action under national law.

The uncertainty concerns whether a national authority can prohibit under national law an agreement that has been exempted under Article 85(3) or which qualifies for exemption under one or other of the block exemption regulations. The EC contends, in *Bundeskartellamt v Volkswagen and VAG Leasing* (1993) for example, that national authorities may not prohibit exempted agreements as that would be to detract from the uniform application of Community law and the harmonious development of economic activities within the Community, e.g. where agreements are exempt because they will encourage R&D and the development of new products. The alternative view is that an exemption is not a positive action, enforcing Community law, but a concession from its application leaving a national authority free to apply a stricter national law if it chooses. So

far the European Court has not been called upon to resolve these alternative interpretations.

The issue may seem rather esoteric, but its significance is underlined by the EC's efforts to decentralise the application of Community competition law. Because of the wide interpretation given to the test of whether inter-State trade is affected by an agreement or conduct and to the scope of the prohibition of anti-competitive agreements in Article 85(1), particularly in respect of vertical agreements, many of the cases that fall within the jurisdiction of the EC are found to have effects largely or wholly in the territory of a Member State.

EC policy, as laid out in its *Notice on Cooperation between National Competition Authorities and the Commission in handling cases falling within the Scope of Articles 85 or 86 of the EC Treaty* (October 1997), is to encourage national authorities to take on such cases unless they should display some particular 'Community interest' (a policy endorsed by the Court in *Automec II* (1992)). The EC urges governments to give competition authorities power to enforce Articles 85 and 86 themselves, while emphasising that the granting of an exemption under Articles 85(3) is reserved by regulation to the EC. The UK competition authorities do not have the power to apply Community law, so EC cases which are passed to them under the decentralisation policy will be dealt with under UK law as it is, and as it will become when the Competition Bill is enacted. The EC Notice insists that the outcomes of such cases must be compatible with Community law and not capable of defeating the practical effectiveness of Articles 85 and 86.

The changes to UK law will clearly facilitate achievement of this objective. But the retention of the monopoly provisions of the Fair Trading Act and the intended treatment of vertical agreements mean that conflict will remain a possibility. Close cooperation between the respective authorities will continue to be needed to minimise that possibility.

Conclusion

The changes to UK competition law will do much to increase its effectiveness. The OFT will be transformed from an essentially administrative office into an enforcement authority. Its whole culture will need to change. The MMC is to be disbanded after 50 years (and the production of several hundred reports) to be reborn as the Competition Commission with new appeal functions. These are exciting developments. It may seem odd that a large part of the present law is to be retained. Any thoughts that the European Community model should be incorporated wholesale into national law — as has happened in some Member States — has been resisted. Articles 85 and 86 have their own shortcomings. In its reforms, the Government seeks to draw on the better features of each system. But in so doing, it has not only passed up the opportunity to simplify a complex system, it has also preserved differences between UK and Community competition law. This is at a time when the EC is seeking to decentralise the handling of cases which, while falling within its jurisdiction, nevertheless mainly affect the markets of a Member State. Arguably, the real problem is the wide reach of Article 85. Some in the UK would like to see a clearer boundary between the jurisdiction of the Community and of the national authorities, perhaps in terms of turnover as is the case in respect of merger control. But that would require revision of the Treaty of Rome and that is not a prospect. The possibility of conflict between UK and Community law remains, as does the need for UK business to cope with significantly different legal systems. But at least the problems are less than with the law as it was before the reforms. It remains to be seen how things will work out in practice but many will welcome those changes that have aligned UK competition law more closely to the law of the Community.