Editorial Article

Competition Law Reform

Introduction

Followers of competition law may be excused if they have lost track of the various plans for legislative reform. As the matter is now the subject of strong debate, a brief survey of the current proposals, and the arguments advanced by those arguing for reform, would be useful.

The most recent publication has been the Fifth Report of the House of Commons Trade and Industry Committee: "UK Policy on Monopolies" (HC 249). This follows on the heels of proposals advanced by: the outgoing DGFT, Sir Bryan Carsberg, in his 1994 Annual Report; the Labour Party; the National Consumers Council; and the Government itself in its 1989 White Paper "Opening Markets: New Policy on Restrictive Trade Practices" (Cm 727). There have been two Green Papers: "Review of Restrictive Trade Practices Policy" (1988, Cm 331) and "Abuse of Market Power" (1992, Cm 2100). Competition law in the UK, however, remains much as it was when the modern regime was created in 1948. The structure of the regime has proved remarkably resilient, in spite of two major overhauls and subsequent amendments.

Background to Existing Legislation

The shape of the current regime was set in 1944, in the White Paper on Employment Policy. This recognised that anti-competitive practices "do not necessarily operate against the public interest; but the power to do so is there" (para 54). The ensuing regime, set out in the 1948 Monopolies and Restrictive Practices (Inquiry and Control) Act therefore did not prohibit any anti-competitive conduct. Rather it established a system of monitoring commercial conduct, with the possibility of action being taken after investigation. Although the 1948 Act has been replaced the basic posture of the regime has been maintained. The Resale Prices Act 1976 is unique in making illegal horizontal price maintenance. Elsewhere potentially anti-competitive agreements are monitored by the operation of the Restrictive Trade Practices Act 1976 (RTPA); monopoly conduct by the Fair Trading Act 1973 (FTA); and anti-competitive conduct by the Competition Act 1980 (CA).

Problems with the Regime

Four Acts dealing with anti-competitive conduct may seem excessive. Those doing business in Britain must also be aware of the directly effective rules of the European Community. There is a plethora of bodies responsible for implementing the law: the Office of Fair Trading (headed by the DGFT); the Monopolies and Mergers Commission; and the Restrictive Practices Court. Attracting frequent criticism is the fact that it is a politician, the President of the Board of Trade, whose decision is often the final one. The fact that no practice is prohibited until it has been established *in that case* to be against the public interest or anti-competitive means that the same subject matter often falls to be investigated. It also means that firms may engage in conduct, knowing it to be against the public interest, yet pay no penalty when that practice is indeed condemned. Indeed much time could be saved if the phrase "public interest" was to be clarified. Third parties whose interests have been damaged by another's anti-competitive conduct have no right to recover damages and, as the MMC has recognised, may be seriously injured over the length of time it takes for the authorities to take action.

The Green and White Papers

The first Green Paper, in 1988, was followed by a White Paper in 1989. This accepted that the RTPA and, probably, the RPA should be replaced "with a new law which will incorporate a prohibition on agreements or concerted practices which have the object or effect of restricting or distorting competition in the [UK]" (para 1.2). This shows clearly the influence of European law. In the Green Paper the review committee was keen to emphasise the benefits of a convergence in the law (paras 3.15–3.17). As well as supplying ready made precedents this would reduce the burden on business faced with a harmonised regime. Greatly increased powers would be available to enforce the law, and rights would be given to third parties to bring civil actions. The White Paper was to be "introduced as soon as Parliamentary time permits".

The second Green Paper has not yet been followed up. Three options were set out. The first would involve maintaining the FTA and CA as they are, but increasing the powers brought to bear in their enforcement. The second would be to introduce a prohibition system along the lines of Article 86 of the EC Treaty. The third would be to maintain the present system, but to introduce a prohibition system alongside this. Whilst seeking comments on all three proposals the government favoured the second option.

The Current Position

The fact that no legislation has been forthcoming has attracted much criticism. The Select Committee in its report "recommend[s] that the Government introduce legislation for a prohibition on the abuse of market power and anti-competitive practices" (para 126). That is to say that it implements the White Paper, and the second option in Cm 1200. In one respect the Committee's proposals however go beyond either Green Paper. The call for a unitary authority (supported by Sir Bryan Carsberg but not by the Chairman of the MMC) would signal a fundamental change in the British regime, bringing it fully in line with that of the European Community. Whilst this proposal has the merit of simplicity, it will require further consultation. It may therefore be some time before the law is, as it now should be, rationalised.

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