The Competition Act 1980

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Sweet and Maxwell

THE COMPETITION ACT 1980

Introductory Commentary
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PREFACE

The Competition Act 1980 has one characteristic in common with the iceberg. Much is visible on the surface, the contents of the Act itself. But quite a lot is hidden below the surface, the legal and, especially, the economic contexts in which the provisions of the Act will have to be applied. Those are the internal and the external aspects of the Act.

This book deals with both aspects. The introductory commentary by James Cunningham, in Part I, sets out the economic and the legal background, with some comments on the implications as regards competition references. The internal matters are covered in the annotations by John Tinnion to the text of the Act, in Part II.

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CHAPTER 1

WHAT IS COMPETITION ?

1. Introduction

1–01 THE Competition Act 1980 is concerned with activities which restrict competition. To understand what may restrict competition, it is necessary first to have some idea of what constitutes competition.

The layman's view would probably be that traders are competing when they vie with each other for his custom, preferably when that vying takes the form of offering him some inducements to do business, such as lower prices, etc. The economist has a more complex analysis, taking account of the *structure* of the market and also of the *behaviour* of the firms in that market (" firms " is used here in the economists' sense of economic trading units, not in the lawyers' sense of partnerships).

2. Market Structure

1–02 At one extreme is *monopoly*, where there is only one seller. The classic example is the person who, in the desert, controls the only water supply. He is not exposed to any competition, and has scope for extracting the highest price the buyers are prepared to pay—almost certainly higher than if there had been other sources of supply. In the United Kingdom there may be some instances of non-statutory monopolies, although even where there is only one producer in the country there is usually competition from imports. The more common situation will be the *dominant firm*, the firm which has so large a share of the market, and which is so much bigger than its nearest rivals, that it can decide its policy without having to take account of the reactions of its competitors and of its customers.

At the other extreme is *polypoly* or *atomistic competition*, where there are a number of small firms, each so small as not to be able to affect the market. This is the situation in many agricultural products; special measures, such as co-operatives, marketing boards, etc., have had to be introduced to provide some stability in the marketing of agricultural products.

Between the two extremes is *oligopoly*, where there are only a few suppliers in the market.

There are two sides to each market, the supply side and the demand side. On the demand side, there may be only one buyer (*monopsony*), or a few buyers (*oligopsony*), or a large number of buyers (*polypsony*).

1–03 The economic strength of a firm on, say, the supply side will to some extent depend upon the strength of the firms on the demand side. A monopolist dealing with a monopsonist does not have such a free hand as he would if the demand side consisted of a large number of small buyers. Hence the concept of *countervailing power*. J. K. Galbraith, in his " American Capitalism," cites an elegant example of countervailing power. The Great Atlantic & Pacific Tea Company, in 1937, discovered that it could manufacture its own supply of cornflakes for a capital investment of $175,000; at the price it was then paying for cornflakes, it would earn about 68 per cent. on that capital outlay. Having the resources to make that investment, it was able to secure a price reduction of about 10 per cent. from its suppliers.

3. Behaviour

1–04 Even though the market structure is such that there are a number of suppliers or buyers, it does not necessarily follow that they will compete with each other. They may restrain competition between themselves by their behaviour, for example by *cartels*, agreements which restrict competition.

1–05 In an oligopolistic situation, the few suppliers may find that a move by one is immediately countered by reactions by the others. For example, A may reduce his price, hoping to get a larger share of the market. But his competitors B and C will almost certainly reduce their prices by the same amount or more, so as not to lose their market shares. The result is likely to be that each will end up selling more or less the same amount, but at lower prices and with a lower profit (assuming demand has not changed substantially). Consequently, in an oliogopolistic situation, the firms will usually recognise their inter-dependence. Each will not act without taking account of the likely reactions of the others. This may lead to *conscious parallelism*—without any agreement or arrangement between them, each firm aligns its policies on those of its competitors, so as not to upset the market. In relation to prices, this is *price leadership*—*dominant-firm price leadership* where there is one large seller and its few competitors adopt the prices it charges, and *barometric price leadership* where oligopolists of approximately equal size realise their common interest and follow each other. Price leadership results in *parallel prices.*

1–06 There are various practices which the individual firm may adopt in an attempt to gain more business, to enlarge its market share, or perhaps to protect its existing level of business, its existing market share, from attack by its competitors. The following are some of the more important practices.

Distribution

final buyer, he is dependent upon his distributors—wholesalers and retailers. If the distributor does not push the manufacturer's product, sales will languish. The manufacturer may mount an expensive advertising and promotional campaign to create consumer demand, but some or all of the benefit will be lost without the co-operation of the distributors. One technique is to give the distributor something to work for, such as the exclusive right to handle the manufacturer's product in that area. The *exclusive distributorship* ensures that the distributor reaps the benefit of his efforts if he assists in building up a demand for the product. This will be particularly the case where the product is new—the distributor will not wish to spend time, effort, and money building up a market for the product. and then see other distributors coming in and taking some of the sales. A distributor in a strong position may be able to insist on being given exclusivity.

Some manufacturers of technically complex products have *selective* distribution networks. For example, Omega Brandt limit their appointment of retailers for " Omega " watches on a *qualitative* basis—only retailers with the appropriate type of premises and technically-qualified staff are eligible for consideration for appointment. And there is also a *quantitative* limitation. Omega Brandt will appoint only that number of retailers which the area can support, so that each retailer has the opportunity of a turnover which will justify his carrying adequate stocks ([1970] C.M.L.R. D. 49).

1–08 If the distributor is handling several competing brands of the same item, he cannot put effort into selling them all. In some trades it is inevitable that the distributor will stock a range of brands—a shop selling paint will not normally confine itself to one manufacturer's range, the supermarket will stock various brands of butter and cleaning powders, etc. But in some trades, the manufacturer may be able to introduce a requirement that the distributor will not handle competing goods. This ensures that the dealer has a greater incentive to sell that manufacturer's product—his sales efforts are not being dissipated over a number of brands of the same item. A requirement as to *exclusive dealing* was imposed by a number of ice-cream manufacturers, and was criticised, in relation to static sites, by the Monopolies Commission (" Ice Cream and Water Ices " report).

1–09 There may be *reciprocal exclusive dealing*. The manufacturer undertakes not to supply any other distributor in that area, and the distributor agrees not to handle competing goods.

1–10 These techniques will help a manufacturer or distributor who is seeking to expand, or one seeking to enter a new market or area. That is competition at work. But they may be adopted by the dominant manufacturer, or a monopolist. If the dominant firm has agreements with all the major distributors, with a condition that they will not handle competing goods, that may help to expand or protect the dominant firm's trade, but it will also tend to foreclose the market to other manufacturers of the same item. The result will be the same if most or all of the manufacturers, none with a dominant position, adopt the practice Similarly, the dominant wholesaler in an area may be able to secure exclusivity from his supplier, which could reduce the chances of other manufacturers to break into that area and of other distributors to challenge the position of the dominant firm by selling the first manufacturer's goods.

Refusal to supply

1–11 Where he has appointed an exclusive distributor, the manufacturer is precluded from supplying another distributor in that area. If, like Omega Brandt, he operates a selective distribution system, he will refuse to supply a dealer outside the system. Some manufacturers follow a policy of selling only to distributors, wholesalers or retailers, because they are dependent on the distribution system and do not wish to see it disappear; consequently, they will not sell directly to the public. Some automobile manufacturers limit the supply of spares to their appointed or recognised agents and garages.

1–12 When resale-price maintenance was lawful, the supplier could refuse to supply dealers who sold below the minimum resale price. Now, in the United Kingdom, resale-price maintenance is lawful only for books and medicaments. Supplies can, however, be refused where the dealer has used the goods as *loss leaders*. A popular consumer product, perhaps one heavily promoted by an extensive, and expensive, advertising campaign, is offered at a very low price, not in order to make a profit on that sale but to attract buyers into the shop in the hope that, once in, they will buy other things. Other retailers in the area will be unable to sell that product in the normal way and may give up stocking it, with the result that the benefit of the promotional campaign is lost, and the consumer be deprived of the goods because nobody finds it worthwhile to stock them.

In some trades, the practice has grown up of requiring retailers not to display or advertise prices below a minimum, although leaving the retailer to sell at any price he chooses, but further supplies are refused if the prohibition on displaying or advertising lower prices is infringed.

1–13 There may be refusal to supply an intermediate material. In the *Zoja* case (J.O. 1972, L. 299/51 and [1974] 1 C.M.L.R. 309), Zoja used to buy aminobutanol from Istituto Chemiotherapico, a subsidiary of Commercial Solvents, from which Zoja made ethambutol. Commercial Solvents decided to change its policy—Istituto would make the ethambutol specialities itself and would not sell aminobutanol for that purpose. Istituto refused to supply Zoja when the latter sought to purchase further quantities of aminobutanol.

Normally, where the manufacturer produces a material, A, which he uses to make product B, but some of which he also sells to other firms to make B, the trade is carried on without much difficulty provided the manufacturer does not discriminate in favour of his own production of B or against his competitors. But situations such as the *Zoja* case may arise. Another possibility is that a new producer of B may enter the market and seek to obtain supplies of A. A large existing buyer might put pressure on the manufacturer of A to prevent him supplying the newcomer, by threatening to give up buying from the manufacturer and to seek supplies elsewhere.

There is, therefore, the possibility of refusal to buy. A substantial buyer might decide to start manufacturing for itself, as Great Atlantic & Pacific Tea contemplated doing so effectively. The consequence could be to prejudice the competitive position of a supplier or to put him out of business.

1–14 Supplies may be refused on other grounds, such as bad credit risk, bad payments record, etc.

1–15 The consequences of refusal to supply will depend on the circumstances. To confine supplies to a selective distribution network may help to maintain effective distribution and competition. Denying supplies to a retailer for breach of a ban on displaying or advertising lower prices will restrain price competition in that product. But the long-term effect might be to keep up the number of retailers stocking the product and providing an after-sales service. A smaller producer of an intermediate product may find that he needs all his output for his own requirements and therefore have to refuse supplies; but a producer with surplus capacity might refuse to supply to put out of business a competitor in the further product.

Prices

1–16 The firm trying to extend its business in a product may well seek to do so by lowering its prices for that product. In the case of a small firm, this would provoke no comment (except possibly by its competitors). But a dominant firm, with a large turnover, could have substantially lower costs than its competitors, due to economies of scale. A regime of lower prices by a dominant firm could put pressure on its competitors and possibly force some of them out of business. The Monopolies Commission found that in the 1920s some competitors were put out of business by Courtauld's price reductions (" Man-made Cellulosic Fibres " report). Lower prices can also be financed by *cross-subsidisation* from profits in other lines.

Price cutting to put pressure on competitors is known as *predatory pricing*.

1–17 To lower all the prices for a particular product can prove expensive in terms of lost profits. A less expensive procedure is *discriminatory pricing*. The firm trying to enter the market in another area—perhaps a geographical area, or a new field of use—might quote lower prices in the new area, *i.e.* lower than the firm's prices to its existing customers. Or, a firm already in the market might approach a competitor's customers. offering them specially lower prices. When adopted by a smaller firm, this would be a normal way of increasing market share. When adopted by the larger or dominant firm, the result might be to force a smaller competitor out of business.

1–18 Discriminatory pricing is difficult to operate if other customers can learn of the lower prices and insist upon having the benefit of them. Discrimination is, therefore, easier with *secret prices*—perhaps a published price list, with special secret prices to special buyers.

Another means of achieving discrimination in prices is the *fighting company*. The fighting company is one of a group, but its connection with the group is not publicly known. The fighting company can then attack the customers of competitors, offering them favourable prices, without upsetting the established customers of the other group companies. The Monopolies Commission concluded that British Oxygen had used Industrial Gases (Scotland) as a fighting company (" Industrial and Medical Gases " report).

Internal transfer prices can be a means of discrimination. The manufacturer, say one company in a group, produces a raw material which it sells for the manufacture of a further product both to other companies in the group and also to outside buyers. If the price at which the raw material is sold to the other group companies is lower than the price to the outside buyers, for equivalent quantities, there is discrimination against the latter. This can also happen where the raw material is made by one department and transferred to another in the same company.

1–19 Prices may be *ex-works, i.e.* the buyer can collect the goods himself or pay the additional costs of delivery if he wishes the seller to arrange delivery. On the other hand, the seller who has his own transport fleet may prefer to keep it fully occupied, and also wish to avoid the inconvenience and confusion—as well as the lack of security—which can follow from his works being thronged by customers' vehicles over which he has no control. Working out the additional charges for delivery could be time-consuming and expensive in manpower—the calculations will have to be made, not only for actual sales, but also for quotations which do not result in orders. To avoid these disadvantages, the seller may quote only *delivered prices*, i.e. the buyer must accept that delivery will be made or arranged by the seller. Delivered prices may be quoted in relation to different zones, a different price for each zone, or, if the transport costs are not heavy in relation to the total price, the price may include delivery anywhere in England and Wales or possibly anywhere in the United Kingdom.

Delivered prices are open to criticism where there is an element of discrimination, perhaps more distant buyers being subsidised by those nearer the works where both pay the same delivered price. Following comments in reports by the Monopolies Commission ("Plasterboard" and "Building Bricks"), British Plasterboard and London Brick Company modified their respective delivered price systems. British Plasterboard undertook to arrange its delivered prices so that, for each consignment in a particular zone, the excess over the ex-works price would be such as only to recoup to the company the average cost of delivering in that zone (in England and Wales, zones usually were equivalent to counties); and collection ex-works, at ex-works prices plus reasonable loading charges, would be allowed for quantities above a minimum and subject to certain conditions. London Brick Company also undertook to introduce ex-works prices, and to maintain a separate transport account; delivered prices would be quoted, the delivery zones being annular bands around each works with radii of 20, 40, 60, 80, etc., miles from the works.

Discounts, rebates, and allowances

1–20 These are deductions from the price. They may be *off-invoice, i.e.* deductions shown on the invoice; or they may be *deferred*, i.e. the buyer pays the invoice price and receives or is credited with the deduction at some later date. They may be published, usually shown on price lists, or secret.

1–21 A common form of discount is the *status discount*. The manufacturer sets the price at which he will sell to the consumer, and allows a discount of, say, 25 per cent. or $33\frac{1}{3}$ per cent. off that price to a bona fide distributor.

1–22 Deductions for quantity take various forms. To encourage buyers to order or take deliveries in economic quantities, the seller may grant a discount for orders above a certain level, and also for deliveries in consignments above a minimum such as a lorry load. These will usually be off-invoice.

Where the customer takes a substantial quantity over a period, the supplier will be anxious to retain, or win, that business. The customer may well use the level of his purchases to obtain favourable terms. A deduction may be allowed by reference to the level of the customer's purchases in a period, say six months or a year. This *quantity rebate* may take the form of a *deferred rebate*, allowed after the end of the period when the actual level of the purchases is known. Or, it could be allowed off-invoice, by reference to the quantity taken in the preceding period or the general level of the customer's purchases (*e.g.* a " 100-ton buyer "). Or, part may be allowed off-invoice and part deferred. The discount or rebate may rise as the quantity taken increases—such as 1 per cent. for quantities over 100 tons, $1\frac{1}{2}$ per cent. over 200 tons, etc. When the deductions rise with the level of purchases, the large buyer has a strong incentive not to buy elsewhere. The more he takes from the one supplier, the higher will be his rebate or discount. In its " Metal Containers " report, the Monopolies Commission pointed out that a buyer taking 150 million cans a year from Metal Box would find his overall rate of discount reduced from 9 per cent. to about 5 per cent. if he bought about 100 million from Metal Box and 50 million elsewhere, the drop in the discount representing about 17 per cent. on the trade transferred. In other words, he would have to get a price more than 17 per cent. lower for the 50 million before it would be worthwhile considering the switch.

Because of this effect, in some trades quantity discounts may be given by reference to the customer's purchases from all suppliers, known as *aggregate rebates*. Or the customer may be graded by the level of his total purchases of that item from all suppliers—a 100-ton buyer, a 200-ton buyer, etc.

It must be kept in mind that quantity deductions are not solely for the benefit of the supplier. He may be anxious to obtain the business of the large buyers, but quantity deductions reduce the payment he will receive. The large buyer has a strong incentive to use his economic power to obtain the lowest price, or the highest discount, he can get.

1–23 The supplier can assure himself of all, or a large part, of the buyer's purchases by means of a *loyalty* or *fidelity* rebate. On the buyer undertaking to buy all his requirements of that particular item from the supplier, he receives an additional discount, irrespective of the level of his purchases. The buyer who is sufficiently powerful, and who does not wish to be entirely in the hands of one supplier, may be able to negotiate that the discount is given if he takes, say, 75 per cent. of his requirements from that supplier.

The loyalty or fidelity rebate is attractive for the supplier—he has greater assurance as to his market. For the buyer, there is the attraction that he is paying less for taking the quantity which he would have bought in any event.

1–24 A supplier who deals in more than one product may adopt quantity rebates allowed, not on the purchases of one product, but of several or all of his products added together. The term " aggregate rebate " may be used for quantity rebates of this type. They give the supplier an advantage over a single-product competitor with buyers who take more than one product.

1–25 Discounts, rebates, and allowances may be published, or secret. Secret discounts, etc., are a means of modifying published prices in negotiation with individual customers, *i.e.* they can be discriminatory. For example, an allowance for returned empties might be conceded to a strong buyer where empty containers are not taken back from other customers.

1–26 Discounts, rebates, and allowances are a means by which a firm can seek to enter a market or increase its share of the market in which it is already trading. Equally, they can be used by the firm to protect its existing trade from attack by a competitor. They can be used by the small firm, and also by the large firm. When given by the large, dominant, firm, aggregate and loyalty rebates can have the effect of foreclosing the market to its smaller competitors, and also creating an entry barrier to any firm contemplating entering the market as a new supplier. In the *Vitamins* case, the European Commission (O.J. 1976, L. 223/27) and the European Court ([1979] 3 C.M.L.R. 211) held that the fidelity (*i.e.* loyalty) rebates operated by Hoffmann-La Roche had infringed Article 86 of the Rome Treaty and restricted competition between suppliers.

Of course, if one or more suppliers in the market are giving quantity discounts, loyalty rebates, etc., then other firms in the market will be compelled to do the same, or to take other steps, to protect their trade.

Product range

1–27 A supplier who handles more than one product may be able to associate one product with another—*tie-in sales*. This can be particularly effective where, say, the market for one item is a seller's market, putting the supplier in a stronger position to push the other product. The Monopolies Commission concluded that Rank Xerox would supply plain-paper copiers only on a rental basis, not by outright sale, and the rent included supply of the toner (report on " Indirect Electrostatic Reprographic Equipment ").

An extreme form of the tie-in sale is *full-line forcing*. The dealer who wishes to take one item in a manufacturer's range is required to take the whole range.

Insistence upon tying arrangements is not necessarily confined to suppliers. The buyer of one product, A, may bargain with the supplier that he will buy A only if the supplier will take from the buyer some other product, B, which the supplier requires—*reciprocal trading*. This situation can arise where the buyer is a merchant trading in a wide variety of commodities.

1–28 Tie-in sales and full-line forcing can help the smaller firm to enter a new market or to expand. They can help the larger firm which is introducing a new line, and also be used to stop the dealer stocking only the fast-moving items in a range promoted under one brand, leaving someone else to carry the slower moving items. But they can foreclose the market, or a large part of it, to the firm with only one product or a limited range. Where one supplier is practising them, others may be forced to do so in self-protection.

Types of contract

1–29 The buyer with a continuous requirement for a product, such as a material used in a manufacturing process, may make individual purchases from time to time, perhaps seeking to take advantage of favourable price movements. That may leave him at the risk of sudden shortages—he would have no security of supply once his outstanding purchases had been exhausted. Buying large quantities for holding in stock places heavy calls on working capital, in addition to storage costs. One way of dealing with the situation is the *supply contract.* The supplier undertakes to supply against the buyer's orders throughout the contract period, possibly within maximum and minimum quantities, at a price which is specified or to be determined in accordance with a formula. The contract may be for a particular quantity or geared to the buyer's total requirements—*requirements contracts*—either 100 per cent. of those requirements or some lower proportion, depending on the policies and negotiating skills of the parties (the buyer may not be prepared to be tied to only one supplier, and the supplier may not wish to be too heavily committed to one outlet).

Supply contracts will be for a period, the length of the period depending on the parties' wish for security. The *long-term* contract gives the buyer some security as to supply, and the supplier some assurance as to his market. In extreme cases, they might be for 15 or 20 years, where the supplier erects a new plant specially to meet the buyer's needs.

1–30 Long-term contracts, where they cover the whole or a major proportion of the buyer's requirements over the period, foreclose to other suppliers that part of the market represented by that buyer. A long-term total-requirements contract between the major supplier and the major buyer in the market effectively excludes the supplier's competitors. For example, in the *B.P. Chemie/DDSF* case (O.J. 1979, L. 286/32), DDSF, formerly the only producer and later the largest buyer in Denmark, contracted to take all its requirements of ethanol from the British Petroleum group, the largest supplier in the EEC. The European Commission concluded that, although any purchase contract has the effect of excluding competitors for that quantity, exclusivity over a long period could freeze the supply position, eliminating the play of offer and demand to the disadvantage of competitors and new entrants to the market.

1–31 Long-term contracts for a substantial part of the buyer's requirements do have attractions for both parties. In addition to security of supplies, the buyer will usually get a price benefit. The supplier has some assurance as to his market. Both can more easily arrange supply to fit in with production plans.

1–32 Another form of contract is *rental only.* The manufacturer will not sell the product outright, he will only rent it out. This method of marketing is appropriate for items of plant and machinery. Rank Xerox had followed a rental-only policy with its plain-paper copiers. The Monopolies Commission considered that this policy had accelerated the introduction of the copiers—users did not have to commit capital expenditure, and could more easily replace earlier machines with later models. But the Commission criticised the policy, on the ground that it enabled differential charges to users (report on "Indirect Electrostatic Reprographic Equipment).

Other contract terms

1–33 One party or the other may seek to obtain some market advantage when making a contract. For example, the operator of a caravan site may require someone renting a site to buy the caravan from him, perhaps at the manufacturer's recommended price. There may also be a term that at the end of the agreement the caravan cannot be transferred, on the site, to a new owner, but must be removed or sold back to the operator.

Patents

1–34 As a reward for making the invention public and so adding to the general stock of knowledge, United Kingdom law gives to the patent proprietor the exclusive right to exercise the patented invention during the life of the patent, *i.e.* a monopoly of the commercial use of the invention (the right is curtailed to some extent by the doctrine of exhaustion of rights applied under EEC law). *A priori*, that would seem to be the antithesis of competition. However, the patent rights can stimulate competition by encouraging innovation, the search for other methods of achieving the same result but outside the scope of the patented invention. For example, BICC devised production methods which were outside the Pyrotenax patents, in the mineral-insulated cable field (Monopolies Commission report "British Insulated Callender's Cables Ltd. and Pyrotenax Ltd."); and the Xerox patents stimulated other groups to develop alternative methods of copying (report on "Indirect Electrostatic Reprographic Equipment").

Development of alternative techniques, even if possible, takes time. Moreover, possession of a *master patent*, protecting the essential core of a major innovation, can help to build up a commanding position, in two ways. First, the effective protection given by the master patent can sometimes be extended by patents protecting developments and improvements, Secondly, a closed system of licences can be created, under which improvements by the proprietor and licensees are kept within the system.

Integration

1–35 Integration may be *horizontal*, where a firm at one level in the economic chain takes over another at the same level, such as a supplier of a product taking over another supplier of that product, or *vertical*, where a firm takes over another either higher up the chain, closer to the raw materials (*backward integration*) or lower down, nearer the ultimate consumer (*forward integration*). Horizontal integration will reduce either the number of suppliers or the number of buyers. To that extent, it will reduce competition. But in some cases it may have the effect of increasing competition, for example where two smaller firms merge to create a stronger unit able more effectively to compete with a dominant firm, or where one firm takes over an ailing competitor about to go out of business. A take-over may be the means by which an outsider enters a market, possibly a large group with substantial resources acquiring a small firm to obtain a foothold in the market—although in that case there is some loss of *potential competition*, if the outsider might have entered the market independently and so added a new competitor.

Vertical integration may not restrict competition directly, but where a supplier acquires a buyer, or vice versa, the market may be foreclosed to the other suppliers, or buyers, as the case may be.

Conglomerate mergers are between firms which are not in the same industry. They may not effect competition directly, but in so far as a conglomerate group has profit-making activities in a variety of industries, cross-subsidisation is possible. There may also be other factors, such as easier access to finance and to basic research, etc. These may enable members of the group to be more competitive, possibly to the extent of becoming dominant in their respective industries.

Other practices

1–36 In its " Household Detergents " report, the Monopolies Commission noted that the competition between the two main producers, Unilever with 45 per cent. of the market and Proctor & Gamble with 43 per cent., was concentrated on advertising and sales promotion. For each firm, expenditure on those items represented about 40 per cent. of the average retail price. Expenditure at that level was a marked barrier to the entry of newcomers into the market. Competition between firms in the market had created a barrier to entry.

1–37 In the United States, Aluminum Company of America was held to have restricted competition by erecting new plants in anticipation of increases in demand, so forestalling competitors (*U.S.* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945)). That may have been an exceptional case—should Alcoa deliberately not have taken steps to meet foreseeable demand? In *U.S.* v. *duPont de Nemours* (118 F.Supp. 41 (1953)), duPont expanded cellophane capacity to cope with foreseeable demand, and was held to have done so properly, not in an attempt to forestall competition. In its " Plasterboard " report, the Monopolies Commission took the view that British Plasterboard, as the sole United Kingdom supplier, had a particular responsibility for ensuring that it could meet demand.

4. The Market

1–38 The concepts of monopoly and competition imply a market. The market for a product is delimited by three factors—geographical area, the nature of the product, and in some cases time.

1–39 The geographical market will be determined mainly by transport factors, particularly the cost of carrying the product or of providing the supply (as in the case of water, gas, and electricity mains). Within the area of economic transport, other factors may operate—in relation to the selling price, it may not cost much to carry books in Afrikaans from South Africa to the neighbouring African states, but language differences will probably limit sales.

1–40 The nature of the product is clearly an important factor. If medical advice is needed, there is no point in going to a lawyer or accountant. If water for washing is required, beer, wines, and spirits will not be acceptable alternatives, although they might be if the water were for drinking. Where there are acceptable substitutes, the product itself does not comprise the whole market. Whether product A is an acceptable substitute for, and therefore in the same market as, product B depends upon the *cross-elasticity of demand*. If a small increase in the price of A will result in a large increase in the demand for B, the price of which has not changed, then B is a close substitute for A and they are in the same market. For example, in the *United Brands* case, the European Commission (O.J. 1976, L. 95/1) and the European Court ([1978] 3 C.M.L.R. 83) both held that bananas comprised a separate market, and were not part of a wider market comprising "fruit." A study by the Food and Agriculture Organisation had concluded that the prices and availability of other fruit had little influence on the prices and demand for bananas. The European Court accepted that, while there might be some seasonal substitutability with some fruit such as grapes and peaches, there was no long-term cross-elasticity of demand.

The substantial demand from people with oil-fired central heating to switch over to gas-fired boilers, following the rise in oil prices, suggests that oil and gas are part of the same market for domestic heating purposes. Control by one firm of the supply of a particular product may not give a monopoly if there are close substitutes—if the price of gas rose substantially, and that of oil fell, there might be a switch back to oil.

1–41 In most instances, the temporal element may not be significant. If there are a large number of suppliers and buyers, and sales are made at frequent intervals, a sale by one supplier to one buyer, although it may mean that that buyer then drops out of the market, will not influence the market significantly, because there are other buyers and also that buyer will soon be back in the market. But in some cases involving capital goods, the time element may be important. If a nuclear electricity generating station takes 10 years to build and only one is to be ordered, the unsuccessful tenderers will be out of business unless they can find other orders elsewhere.

5. Competition Policy

1–42 The concept of *perfect competition* was developed in economics as an analytical tool. It presupposes: a sufficiently large number of buyers and sellers so that no firm can influence the market; instant knowledge by all firms in the market of each other's prices; immediate availability of further supplies if prices rise, and immediate ability to switch resources to other uses if prices fall. If supply exceeds demand at the initial price, the price will fall, reducing supply and increasing demand, and the price will settle at that point at which supply and demand are equal, *i.e.* at equilibrium. Similarly, if supply is less than demand at the initial price, the price will rise, attracting further supplies into the market and reducing demand, and the price will again settle at the equilibrium point where