# LEGAL AND ADMINISTRATIVE REGULATION IN THE UNITED KINGDOM OF COMPETITION AND CONSUMER POLICIES

By
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## I. COMPETITION POLICY

Intervention by the United Kingdom Government in the affairs of industry to promote competition began with the creation of the Monopolies Commission in 1948. Competition policy is now a long established arm of industrial policy in the United Kingdom and has undergone many changes and developments over the last 30 years. The current legislation is to be found in the Fair Trading Act 1973 (U.K.), the Resale Prices Act 1976 (U.K.), the Restrictive Trade Practices Act 1976 (U.K.) and the Competition Act 1980 (U.K.) and involves not only the Commission (now the Monopolies and Mergers Commission) but also the Restrictive Practices Court, the Secretary of State for Trade and the Office of Fair Trading.

Governments of both Britain's main political parties have contributed to the evolution of the legislation though it could not be said that all Governments have at all times been enthusiastic in their commitment to the policy. Few would disagree that in a modern, developed and still essentially market economy the State needs to

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have a purposeful policy towards competition, or, to put it more directly, towards the many circumstances in which competition is absent or ineffective. As Sir Geoffrey Howe (the then Minister for Trade and Consumer Affairs) said in introducing the Fair Trading Bill in 1973, the freedom that market economy provides "may be used to concentrate power, to limit competition and may be used in ways contrary to the public interest." There is therefore a need for some sort of legislative framework within which enterprise can flourish and develop and the interests of the community are safeguarded.

The question is what form the policy should take, what should be its underlying rationale and purpose and how should it be administered. This is not to assert that in so wide-ranging a field conflicts of objective and inconsistencies of application never occur. However, it is believed that the importance of United Kingdom (hereinafter referred to as U.K.) competition policy will increase rather than diminish in the decade ahead.

Generally speaking, U.K. competition law does not itself *prohibit* conduct that may inhibit competition but instead provides the machinery for ad hoc inquiry and investigation which may result in a court order or a Government order to prohibit a particular anti-competitive practice, to forbid a price-fixing agreement or to stop a proposed takeover or merger. Exceptions to this general rule are an agreement between manufacturers for the collective enforcement of minimum resale price and any cartel agreement which is required to be registered with the Office of Fair Trading and has not been so registered. These are void and illegal and, although no criminal penalty attaches to such agreements, civil damages may be claimed by anyone who can show loss from the effect of such an agreement. Also void and illegal is any contractual term by which a manufacturer seeks to dictate the minimum resale price at which goods may be resold, except in relation to books and pharmaceutical goods which have been specially exempted by the Restrictive Practices Court.

It is now intended to examine the roles and effectiveness of the various bodies concerned in U.K. competition legislation.

*1. Cartels — Restrictive Trading Agreements*

All agreements by virtue of which at least two of the parties accept restrictions on their freedom to compete, for example, agreements to fix prices, agreements to divide the market and agreements to establish uniform terms and conditions, are subject to the Restrictive Trade Practices legislation. Since 1956 in respect of goods and since 1976 in respect of services, restrictive trading agreements have had to be registered with a Government agency (now the Office of Fair Trading) and unless the parties are prepared to modify them to remove all significant restrictions so that I can seek the direction of the Secretary of State to relieve me of my duty to proceed against agreements that do not warrant a Court investigation, I am duty bound to refer them in due course to the Restrictive Practices Court. This is a superior court of record constituted normally by one High Court Justice and three other persons experienced in industry or commerce.

The statutory duty should be stressed since the view has frequently been expressed in newspaper reports that the reference to the Court of the Rules of the Stock Exchange was "politically" motivated. Nothing could be further from the truth. It

is obvious that the Rules of the Stock Exchange, for instance, their rules about brokers' minimum rates of commission, are *not* insignificant and so they have to be referred to the Court as a matter of law and it is for the Court to judge the rules against various criteria (known as "gateways") set out in the legislation. The Court is bound by a presumption that restrictions are contrary to the public interest and, to approve an agreement, the Court must be satisfied not only that the restrictions do pass through one of the "gateways" but also that they produce benefits to the public interest which outweight any detriments.

There are two fundamental features of the British legislation: the presumption that deliberate restrictions of competition are generally "a bad thing", but the right for the parties to agreements to try to demonstrate otherwise according to specified criteria set out in the law. The public interest concept which is so central to U.K. competition law allows, even in respect of cartels, a flexibility of attitude which should ensure that beneficial agreements are permitted while maintaining a generally hostile stance towards the more obviously detrimental forms of collusion.

The U.K. law has certainly been effective in the field relating to the sale of goods. Most of the three thousand or more registered agreements relating to goods have been terminated, the vast majority by the parties themselves. Only thirty seven agreements were contested before the Court and of those only eleven were upheld as being in the public interest. Relatively few new agreements are being registered. In the services field, some five hundred agreements have now been registered and five references made to the Court but there have not as yet been any Court hearings.

Two contrasting criticisms of the procedures may, however, be made. First, as any properly registered restrictive trading agreement may be lawfully operated unless and until the Court pronounces it is against the public interest, many years may elapse before major Court proceedings (like the Stock Exchange case) are completed and there is little incentive for the parties to such an agreement to press on with the preparation of their case. In contrast, the U.K. system of control of restrictive agreements has been criticised in that it may frustrate a number of desirable agreements either because of the stigma of registration or because of the costly process of justifying agreements before the Court. Virtually no evidence of frustrated desirable agreements has been brought to my attention, or was presented to the Liesner Committee which reviewed the legislation in 1979, although it is possible that businessmen may be inhibited unduly by existing procedures from making beneficial restrictive agreements. The Liesner Committee proposed in its Report[1] that the Director General should have an additional discretion to allow the continuance of agreements that may have a significant effect on competition but are beneficial. The merit of the existing narrow discretion is that the Commission is able through patient negotiation to achieve the abandonment or substantial modification of restrictions on competition in a very large number of agreements. A wider discretion might weaken the Commission's negotiating position.

A substantial weakness in the existing law is that there is no satisfactory way of ensuring that all restrictive agreements are registered as the law requires. Many unregistered and, therefore, unlawful agreements have come to light in recent years

1 *A Review of Restrictive Trade Practices Policy* Cmnd 7512 (1979).

(such as collusive tendering agreements in the construction industry) and the usual procedure is then to obtain Court orders restraining the parties from giving effect to the agreements and to any other registerable agreements to which they might be a party without first submitting particulars for registration. It is contempt of Court to disobey such orders or undertakings given to the Court. For example, in 1981, various suppliers of concrete pipes (including the publicly-owned British Steel Corporation) were found guilty of contempt and fined and the judge warned that contempt proceedings might in future be brought in such cases against the directors personally.

*2. Monopolies and Anti-Competitive Practices*

From the relatively few prohibitions that exist in U.K. competition law, through cartels or restrictive trading agreements where the Court is bound by the presumption that these are contrary to the public interest, there is the monopoly power and the anti-competitive practices of individual firms, where there are no prohibitions and no presumptions about the likely effects on the public interest. My role is that of initiating an enquiry and it is for the Monopolies and Mergers Commission to give a public interest judgment. The Commission receives little guidance from section 84 of the Fair Trading Act 1973 (U.K.). If they give an adverse judgment, then it is for the Secretary of State to implement such judgment by order or by accepting undertakings given by the company or companies concerned. Thus the Commission has no power of initiative and no power itself to implement its recommendations but it is given the central role of publishing a reasoned public interest judgment.

The Commission consists of six or seven members who sit at each reference. These include a full-time lawyer Chairman, and other part-time members who have a wide range of experience. Reference may be made to the Commission about the supply of any goods or services where I have reason to believe that one firm or one group of interconnected companies has at least 25% of the U.K. supply (including imports) or at least 25% of the market is in the hands of two or more firms who conduct their affairs so as to prevent, restrict or distort competition (other than by registerable agreement which conduct falls within the separate restrictive trade practices legislation). These "monopoly situations" are thresholds and not definitions of market dominance. A 25% share of the market is not of itself a sufficient ground for reference. If it were, the Commission would be overwhelmed. The Director General must have some *prima facie* evidence that an investigation would be warranted as a result of the market conduct or performance of at least some "monopolists" in the industry. In exercising this discretionary power to make monopoly references to the Commission I am, for example, concerned with the structure of the industry (including a high degree of concentration which may permit monopoly pricing), with the efficient performance of the industry or otherwise, and with conduct such as parallel pricing, refusals to supply particular customers, exclusive dealing arrangements, and forcing a full line of products on a customer.

References to the Commission have sometimes involved inquiries lasting three to four years. Recently, the time taken has been reduced but there is often a delay before publication of the Commission report and before the outcome of discussions

which I am frequently asked to pursue with a view to determining how the Commission report may be implemented. There are many types of Government orders that may be made following a Commission report, including controls over prices and profits, prohibition of certain kinds of conduct, such as refusals to supply particular outlets or discriminating in the prices charged to particular customers, and the divestment of assets. An extreme example of the latter has recently been announced by the Government following a Commission report on the monopoly of the publicly-owned British Gas Corporation in the retailing of various gas appliances. As a result, the Corporation was required to sell off its nine hundred showrooms. Usually the Secretary of State asks me to negotiate undertakings from the companies concerned rather than make a statutory order, since undertakings can be more flexible and can be renegotiated if changing conditions so require. Thus, following the Commission's inquiry into the supply of petrol, the oil companies gave a number of undertakings in 1966, such as those limiting solus ties with garages to five years and allowing all retailers to stock any brand of lubricants. Further undertakings were given by the oil companies in 1976, such as the introduction of an arbitration system to determine disputes relating to the termination or non-renewal of long-term licences issued to retailers by oil companies.

The report of the Liesner Committee (published in 1979) suggested that existing legislation was too clumsy an instrument for cases where an anti-competitive practice was being carried out by just one firm, since the Fair Trading Act 1973 (U.K.) enables only the supply of particular goods or services to be referred to the Commissioner and *not* the activities of a particular firm. The Commission's investigation has to extend to *all* firms that supply the goods or services in question.

The newly elected Conservative Government introduced what is now the Competition Act 1980 (U.K.), which not only abolished the Price Commission and enabled the Government to request the Monopolies and Mergers Commission to do cost-efficiency audits of public sector industries, but also provided for a quicker and more flexible method of investigating the anti-competitive practices of single firms. In effect, it supplemented the pre-existing legislation and the Monopolies and Mergers Commission has the same central role of giving a public interest judgment while the Secretary of State again has the role of implementing the Commission's report if he thinks fit. I am given the task of conducting a preliminary investigation if it appears to me that a firm has been pursuing a course of conduct that may amount to an anti-competitive practice. Soon after the Act came into force in August 1980, the Commission was able to announce the end of two potential cases after only informal discussions. One such case concerned ICI, and the other, bodies which held the copyright in television programme information.

My preliminary investigation is confined to determining whether the firm is or has been pursuing an anti-competitive practice and I must publish a reasoned report. If I consider that the practice is anti-competitive and that it is appropriate for the matter to go to the Commission, the Commission then has six months in which to decide whether it agrees with my finding and, if so, whether it is against the public interest. There is no presumption in the legislation that an anti-competitive practice is necessarily against the public interest and it is entirely a matter for the Commission (and not a concern of my preliminary investigations) as to whether the anti-competitive conduct may be justified on broader public interest grounds.

*3. Mergers*

So far as my Office is concerned, the control over mergers is inevitably different in that the Commission is reacting to the moves and proposals of companies rather than taking an initiative. Merger control in the U.K. was introduced in 1965 and followed logically from the experience of monopoly legislation gained since 1948 and the realisation that, if monopoly power could be harmful, it was desirable for Government to intervene selectively to prevent the creation of monopoly.

The present law, contained in the Fair Trading Act 1973 (U.K.), is substantially based on the 1965 legislation. Whereas I have the discretion to make a monopoly reference to the Commission (or now to start a Competition Act investigation) subject only to a power of veto in the Secretary of State (which has not so far been exercised), in the case of mergers my role is merely to *advise* the Secretary of State whether a merger should undergo a six months' investigation by the Commission to assess the public interest. There have been five cases in five years where such advice in favour of a reference has not been followed. The Commission examines about two hundred mergers each year. These are the mergers which come within the threshold criteria of the assets acquired exceeding fifteen million pounds or a 25% market share being created or enhanced. Relatively few mergers are referred to the Commission — less than 3% of those coming within the statutory criteria for possible reference since 1965. Of those referred, roughly one-third are abandoned, one-third allowed and one-third condemned by the Commission. Some recent conglomerate mergers have been allowed, however, only on the basis of assurances to prevent anti-competitive practices or to keep the aquired company as a separate subsidiary with an obligation to continue to present annual reports and accounts. No merger may be stopped unless a reference is made to the Commission, the Commission condemns it and the Secretary of State agrees to stop it.

Clearly the legislation is relatively benign towards mergers (though one must appreciate its deterrent effect). The last Government's consultation paper published in 1978[2] called for stronger mergers legislation. Although the present Government has declined to legislate, in 1980 the Secretary of State called for a "more sceptical approach" to be adopted by all concerned when assessing the pros and cons of prospective mergers. It is not yet evident to what extent it will be practicable to give effect to the Secretary of State's intention without legislation.

2 *A Review of Monopolies and Merger Policy* Cmnd 7198 (1978).

## II. CONSUMER POLICY

Intervention by the U.K. Government to promote consumer interests followed the report in 1962 of the Molony Committee,[3] which reviewed the law relating to safety standards, labelling, advertising, civil redress and other related matters. Another Government Report, dealing with the subject of Consumer Credit (the Crowther Report),[4] published in 1971, and a number of proposals of our permanent law reform bodies, (the English and Scottish Law Commissions, created in 1965) were also to a large extent implemented by Government. The development of consumer protection in the 1960's and 1970's has been very much a period of advance by statute law rather than through the common law, and in particular by way of criminal law and administrative controls rather than through civil law.

### *1. Civil Law: Common Law and Statute Law*

The common law has not contributed much to these developments. Although judges in the past have specified the basic obligations on the trader providing goods or services, the Courts have in the name of "freedom of contract" allowed exemption clauses to be effective despite the inequality of bargaining power between trader and consumer. The inadequacy of the common law response to exemption clauses has, however, been modified by statutory rules proposed by the Law Commission which are now embodied in the Supply of Goods (Implied Terms) Act 1973 (U.K.) and the Unfair Contract Terms Act 1977 (U.K.). However, except in those cases where the basic obligation is clear and where the legislation renders an exemption clause void (for example any term excluding liability for personal injury), the dearth of judicial precedent, (which may well persist over a long period of time) leaves a great deal of uncertainty as to the application of the law, and this is particularly so where the test for the validity of an exemption clause is that of "reasonableness".

### *2. Criminal Law to Combat Trading Abuses*

Changes in the civil law by statute, helpful though they have been for consumer protection, are overshadowed in importance by statutes providing for the creation of new criminal offences and the administrative controls which are vested in the Office of Fair Trading. The Trade Descriptions Act 1968 (U.K.) is a salient example of the use of statutory criminal law to combat trading abuses, and has been a key factor in improving accuracy and honesty in the labelling of goods, price display and brochures for package holidays. Much of its success rests, I believe, in it being part of the criminal law and in requiring a specialised enforcement agency to compel observance of the Act, namely the Trading Standards Department of the local

3 *Final Report of the Committee on Consumer Protection* Cmnd 1781 (1962).
4 *Report of the Committee on Consumer Credit* Cmnd 4596 (1971).

authority. Enforcement by public officials at public expense has given rise to a useful body of precedent. Its operation has highlighted certain weaknesses and snags and my predecessor (the former Director General) published a major Report[5] proposing various improvements.

Further examples of the use of the criminal law are the Consumer Safety Act 1978, improving on earlier legislation in the field, and various Orders made under the Fair Trading Act 1973 (U.K.) and the Prices Act 1974 (U.K.), as a result of initiatives taken by my Office. By way of example, when various contractual terms and notices purporting to exclude a trader's obligation to supply goods of merchantable quality became void in 1973, the mischievous and misleading continued use of such notices as "no money refunded" provoked the Commission into proposing an order that now makes such terms and notices not merely void but a criminal offence. An order banning misleading price display, including misleading comparisons with unrealistic manufacturer's recommended prices, was made in 1979 but its complexity has not only made it difficult for traders and enforcement agencies to interpret, it has also allowed loopholes to be located and exploited. This has led the Commission to look again at the more general mispricing provisions in Australian and Canadian legislation.

However effective criminal sanctions or their threat may be in reducing the level of trading abuses, they do nothing directly for the consumers who may have suffered loss or damage. Since 1973 the consumer has had the benefit of low cost arbitration in the county courts, without the risk of having to pay the legal costs of the trader if the consumer loses his case, provided the claim is for not more than a certain figure (which was raised to five hundred pounds in April 1981).

In addition, since 1973 the Powers of Criminal Courts Act (Eng.) enables a court which has convicted a trader of a criminal offence to order compensation to be paid in respect of injury, loss or damage caused by the offence in addition to any fine or other penalty imposed. These powers have operated in Scotland only since 1980 and even now the county court arbitration facility described above has no parallel in Scotland.

I have suggested in this article that criminal law, adequately enforced by public officials, can be a very effective way of bringing about improved trading standards. Power to seek an injunction, breach of which amounts to contempt of court, can also be useful. In a report on the self-regulatory control of advertising I have found that, with a number of improvements, the self-regulatory system run by the Advertising Standards Authority (which complements the Trade Description Act 1968 (U.K.)) should provide adequate protection for consumers. In my report I did not consider that it should be replaced by sweeping statutory controls such as those being suggested by the Commission of the European Economic Community but proposed instead a limited statutory back-up for the self-regulatory system whereby the Director General of Fair Trading may seek an injunction to stop publication of any advertisement likely to deceive, mislead or confuse where swift and effective action is needed and cannot be achieved through the self-regulatory system.

5 Report of the Director General of Fair Trading, *Review of the Trade Descriptions Act 1968* Cmnd 6628 (1976).

*3. Legal Powers Over Persistent Offenders*

Behind the proposal outlined above lies the experience of my Office with Part III of the Fair Trading Act 1973 (U.K.) which provides novel powers for coping with rogue traders who have persistently broken the law to the detriment of consumers. These powers apply not only to persistent breaches of the criminal law, such as the Trade Descriptions Act 1968 (U.K.) and the Food and Drugs Act 1955 (Eng.), but also to persistent breaches of the civil law such as failing to do work contracted for or supplying goods which are not merchantable or not reasonably fit for their purpose, contrary to the Sale of Goods Act 1893 (U.K.). Where there are such persistent breaches of the law the Director General of Fair Trading must use his best endeavours to obtain a satisfactory written assurance from the trader that he will refrain from breaking the law. If the trader declines to give a written assurance as to future conduct or, having given such, appears to have failed to observe it, I may petition the court to issue an injunction against him. Since companies can, and frequently do, go out of business, the value of a written assurance in the name of the company is limited. When the company ceases to exist, so does the assurance. Hence the value of sections 38 and 39 of the Act, whereby a "director, manager, secretary or other similar officer" of a company or a person with a controlling interest in a company, can be required to give a written assurance if he has consented to or procured persistent breaches of the law to the detriment of the consumer. If an individual closes down one business and opens up a similar one, he is still bound by his promise. Some 250 written assurances have been obtained under Part III of the Fair Trading Act 1973 (U.K.) in areas as diverse as motor dealers, men's shops, restaurants, home improvers, small local traders and major companies. Very few cases have come before the courts, but this is to be expected. Because of the underlying sanctions, a written assurance itself normally achieves the desired result.

*4. Administrative Controls: Licensing*

Car dealers and garages who cheat customers have long caused me concern as they endanger people's lives by selling unroadworthy vehicles and performing repairs incompetently. At present I have two main weapons at my disposal, the first of which is the power to demand promises of good behaviour with the sanction of court action for an injunction if the promise is either refused or broken. The other is that I can withhold, suspend or revoke a licence under the Consumer Credit Act 1974 (U.K.). Most car dealers depend on being able to arrange credit for customers so the refusal or loss of a licence could make a considerable impact on their business. It is a criminal offence to arrange credit without a licence. The full impact of the licensing provisions of this Act is only now beginning to be appreciated, as it is only since July 1978 that the third and last category of traders requiring licences have had to submit a valid application to my Office.

The licensing system covers not just businesses who lend money or provide credit for customers but also all those who introduce people to a source of credit and other so-called ancillary credit businesses, such as debt collectors. The number of applicants for licences has been over 100,000 and the licensing process is obviously a

considerable administrative exercise. The key provision of the Act, section 25, says that before a licence is granted the applicant must show he is 'fit' to engage in the activity for which the licence is required. Among factors which may be taken into account are whether the applicant has committed any offence involving dishonesty or violence, contravened any provision of the Consumer Credit Act 1974 (U.K.) or other consumer protection legislation or engaged in business practices which are "unfair or improper (whether unlawful or not)".[6]

To illustrate the operation of the section in the case of debt collectors, a licence will be refused where any debt collector persists in using such methods as the threat or use of physical violence; the parking of vans outside debtors' houses with the name and business of the debt collector prominently displayed; visiting people at their place of employment; using letters, couched in terms suggesting it is a legal summons, sometimes referred to as a 'blue frightener'. I have issued four 'minded to refuse' notices (the preliminary to actually refusing a licence) to debt collectors who had *charged* debtors for collecting their debts. In all four cases the licences were eventually issued because the debt collectors discontinued the practice.

By the end of April 1981, 493 notices of provisional refusal or revocation had been issued and 130 determinations to refuse or revoke made following written and/or oral representations. An immediate reaction to these figures might be that the proportion of either, minded to refuse/revoke notices, or resultant refusals/revocations, is so small when compared to the figure of licences issued that the whole operation is akin to using a sledgehammer to crack a nut. I do not share this view. The figures do not show those who decided not to apply for a licence because they knew they would not be granted one, those who have been on their best behaviour for fear of losing their licence, or those who have been given warnings about behaviour without formal revocation action. On the contrary, the evidence of progress indicates that the licensing system has had a considerable effect in improving trading behaviour in general and credit trading in particular. The clearly unscrupulous or fraudulent trader can be debarred from the credit world and action can be taken against unfair or aggressive trade practices. In many cases the Commission has insisted upon fairer credit agreements being introduced. Of course, to refuse a licence generally means closing down a business and this is a very serious matter. Therefore, it is right that the Commission proceeds cautiously, particularly to begin with, in its use of the final sanction of refusal. Generally speaking, the Secretary of State has upheld my decisions, (this has served to strengthen the position of the Director General). It would have been quite disastrous — and could have put the entire system at risk — if I had refused to grant licences on a large scale, and suffered reversals at the appeal stage.

A different kind of administrative control, in effect 'negative' licensing, is envisaged in the Estate Agents Act 1979 (U.K.) which comes into force in 1982. Power is given to the Director General of Fair Trading to prevent an estate agent from continuing to practise (on pain of criminal sanction) in certain defined circumstances, such as fraud or other illegal activity. The Act also requires estate agents to pay clients' money, such as deposits into a separate account and they must

6 S.25(2)(d).

be covered by indemnity arrangements providing for the money to be made good in the event of failure by the estate agent to account for it. The need for the Act was exemplified by the facts of *Sorrell* v *Finch*,[7] where the House of Lords held in 1976 that the vendor is generally not liable when the estate agent misappropriates a pre-contract deposit paid by an intending purchaser. The estate agent was an undischarged bankrupt who, when prosecuted, pleaded guilty to 13 cases of theft of deposits.

*5. Administrative Controls: Cartel Legislation*

Administrative controls also arise from the requirements to submit recommendations by trade associations of standard form contracts for registration with the Office of Fair Trading under the Restrictive Trade Practices Act 1976 (U.K.). As a general rule, all registered restrictive trading agreements (or cartel agreements) including trade association recommendations, have to be referred to the Restrictive Practices Court to determine whether they may be allowed to be effective as being not contrary to the public interest. However, if the Director General of Fair Trading considers the restrictions are "not of such significance as to call for investigation by the Court", he may make representations to the Secretary of State for Trade who may then give directions relieving the Director General from his duty to prosecute. Where restrictions take the form of requirements or recommendations to use a standard form contract there is scope for discussion between the Office of Fair Trading and the trade association as to the details of the standard form contract so as to ensure that the terms are fair to both parties, are not likely to mislead those who will use them and do not necessarily exclude variation to meet special circumstances and requirements. Since the Unfair Contract Terms Act 1977 (U.K.), the removal of terms that are void under that Act have been insisted upon and associations have been requested to justify terms that are subject to the reasonableness test under the Act. The benefit to customers of having standard conditions must also be balanced against the detriment to them of being deprived of the freedom to secure more favourable terms.

For the most part, standard contract terms apply to transactions between traders but there are certain fields where they do or could apply to consumer transactions, for example, central heating installation, plumbing, electrical work, building repair and maintenance, sale and repair of vehicles, sale, repair and mooring of boats, removals, and commercial services such as photography. In these cases my Office has an opportunity to seek amendments to ensure that terms as to liability, guarantee of workmanship and cancellation of contract are fair and reasonable.

*6. Administrative Controls: Codes of Practice*

A further administrative control over trading practices is constituted by self-regulatory codes of practice. The Director General has a statutory duty under the Fair Trading Act 1973 (U.K.) to encourage trade associations to prepare and disseminate to their members codes of practice for guidance in safeguarding and promoting the interests of consumers. Twenty codes of practice have been promoted

7 [1977] A.C. 728.

since 1973 covering a wide range of consumer goods and services — package holidays, footwear, furniture, cars and so on. They are intended to supplement the law by obtaining the agreement of trade associations on behalf of their members to raise their standards of trading in such matters as the provision of more information (including price information) to customers, pre-testing arrangements for goods, and the availability of conciliation and arbitration procedures, The customer's legal rights are often improved because the terms of contract are altered in accordance with the provisions of the code and if, for example, goods are better labelled, the consumer's legal right to obtain goods that correspond to their description is enhanced. The display of a notice that a dealer subscribes to a code of practice may be the basis for a prosecution under section 14 of the Trade Descriptions Act 1968 (U.K.).

Codes have several advantages over legal regulation, they are more flexible, can be readily revised, and responsibility for enforcement rests with those who have close knowledge of the trade, that is, the trade association council or disciplinary committee. Many practices can be dealt with, such as lack of clarity in documentation, delays in servicing, or periods of time for which spare parts for appliances will be available, whereas it may not be feasible to cover by the precise wording appropriate to legislation. Codes do, however, have particular weaknesses which are implicit in the very nature of self-regulatory codes negotiated with trade associations: difficulty of enforcement and non-applicability to those traders who are not members of the relevant association. A possible reform, now being considered by the U.K. Government, is to create by statute a general duty to trade fairly in consumer transactions, a duty which would be enforceable only through sectoral codes of practice prepared by the Office of Fair Trading after consultation with relevant trade associations. The indications are that legal development along these lines would be supported by consumer bodies and by retail organisations. Consumer bodies would welcome the wider scope and strengthened authority of codes of practice. Retail organisations would also welcome the wider scope of the codes so that traders who are outside the trade association are covered.

Although the present political climate in the U.K. does not favour the enactment of more consumer protection legislation it is surely worthwhile to seek to improve the codes of practice and to press trade associations to take firmer action against members who fail to comply with their codes. For example, the Motor Agents Association, has expelled some members and has publicised this fact in the local and trade press. Codes do little to improve the standards of trading by non-members, but if they bring about improvements among 70% or 80% of the traders, that in itself is justification enough for their existence and for devoting time and resources to improving their content, their impact and public awareness of them.

## III. CONCLUSION

Regulation in the U.K. in pursuance of policies to promote competition and the interests of the consumer has not followed a consistent pattern. It has grown like 'Topsy' and does not present a tidy picture with one common philosophical basis. The U.K. is still in the process of pragmatic development, and initiatives and decisions are now being taken in Brussels and Luxembourg as well as in Whitehall and Westminster. The U.K. is in the process of re-examining not only the substance of its laws and their *raison d'etre,* but also the role and procedures of the various departments, agencies and courts that are currently involved. Other countries have had similar though varying objectives and experiences in developing competition and consumer policies in the last twenty to thirty years. Australia is one such country from whom the U.K. has much to learn.