# The Europeanization of British Competition Policy

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## Introduction

Competition policy presents an interesting case of Europeanization, given that the two classic channels which promote the convergence of national regulations in the EU (that is, negative, market-related regulatory competition on the one hand, and positive, state-led harmonization on the other) does not apply to this policy domain (van Waarden and Drahos, 2002: 913). In terms of positive pressure, while applicant states are expected to introduce EU-inspired/compatible competition laws prior to accession (see Fiala 2002; Tóth, 1998; Zinsmeister and Vasile, 1998), no such requirement has been imposed on those states that are already full members. Indeed, when the European Economic Community was set up in the late 1950s, only the Federal Republic of Germany's competition regime came anywhere close to the European model. Nevertheless, national competition policies evolved after 1958, and in many instances – in Italy and Sweden, for example, they have come to resemble those of the European Union (even if they are far from identikit versions) (see Drahos, 2001; and Andrews, 2002 on the Irish case;).[1]

In the case of the UK[2], a competition policy evolved from the late 1940s on. It was only in 1998 that a comprehensive revision to the post-war competition policy settlement was undertaken. The conventional wisdom is that these recent reforms embodied a Europeanization of the UK competition regime. Kon and Turnbull (2003: 70), for example, note that 'The UK Competition Act 1998 came into force on March 1, 2000 and brought the UK competition regime into line with the existing Community rules.' Claims such as these make sense when we look at the content of the 1998 Competition Act. But to what extent have these reforms really been

[1] Eyre and Lodge (2000: 65) note that this has been a process that has been easier in countries where there was no or little tradition of competition policy, the corollary being that in the UK and Germany, where there has been a well-developed post-1945 policy, the adaptation process has been more arduous. Drahos (2001) notes that the extent of convergence has been impressive given the lack of top-down pressure. She identifies four channels of influence of EU competition law: compliance costs where regimes differ; policy learning; some direct constraints on national legislation; and the constraints and incentives on the application of national law arising out of the supremacy of EC norms.

[2] In the context of this particular article, UK and British are used inter-changeably. There is no assumption that 'British' implies the exclusion of Northern Ireland. The issue of British competition policy is, however, complicated by the fact that in places what is really being discussed is 'English law'. In this draft, this issue is avoided, but it may need to be clarified in later versions.

driven by some (perceived) need to adapt to European norms and rules? The fact that it took 25 years from accession for a UK Government to implement such a reform at the very least suggests that other factors are likely to have been important – if only in explaining the *timing* of the reform. But there are also questions to be addressed about the *form* that the new provisions take.

Rather than setting out to look for evidence of Europeanization, this paper, therefore, seeks to identify the factors that were important in shaping both the timing and the form of the UK reform. However, it does this at the same time as acknowledging that much of the literature states that this was driven largely by the desire to introduce a greater compatibility between the UK policy and the EU regime. Taking as its starting-point the existing legal, economic and political literature on the UK competition policy reform, the paper begins by introducing the UK's competition policy, and more specifically, the background to reform, the content of the Competition Act of 1998, and some post-'98 developments. The second then looks first at factors that have been important in determining the timing of the reform; and then considers factors that have shaped its content. Finally, a brief conclusion suggests that recent UK reforms have been driven by two government agendas. The first is that of compatibility with the EU and the second is the creation of an effective, modernized competition policy.

Before introducing the topic of UK competition policy and reform, however, some initial comments about how the concept of Europeanization is used in this paper may avoid misunderstandings about what it is the paper is trying to do. Clearly, the 'substantive, analytical and methodological diversity of the Europeanization literature and the breadth of topics covered' (Hix and Goetz, 2001: 17) has now been fairly well documented in recent studies of this concept. Some have even tried to break 'Europeanization' into more manageable definitions, by dissecting the various ways in which it has been used, particularly in empirical research. In 1997, for example, Colino identified four such categories: Europeanization as 'Communitarization', that is, as a competence shift from the national to the EU level; Europeanization as 'Eurostandardization' in the sense of a convergence of policy in a particular sector; Europeanization as 'Euroadaptation, as an adaptive

response by national institutions and actors to European initiatives; and Europeanization as 'Euroentropy' or the institutional convergence of governance systems and institutional designs (Colino, 1997). More recently, Johan Olsen, has found five possible uses for the concept of Europeanization: as 'changes in external boundaries' (as through enlargement); the development of institutions at the European level; the 'central penetration of national systems of governance'; the export of forms of political organization; and finally, as a 'political unification project' (Olsen, 2002: 923-4).

As a consequence of the extremely different ways in which Europeanization might be defined and operationalized, as demonstrated in these lists, anyone now seeking to apply the concept must inevitably be clear about what, precisely, they mean when using the concept. In this paper, the approach selected is to understand 'Europeanization as domestic effect' (Hix and Goetz, 2001: 22), and more precisely as the domestic effect of principles, norms and rules (both hard and soft) which predominate within the EU's governance system. By way of contrast, two further points need to be made here. The first is that the adoption of this particular definition take issue with the definition used by Risse, Cowles and Caporaso (2001), which to my mind serves to confuse by equating Europeanization with 'the emergence and the development at the European level of distinct structures of governance' (2001: 1), even though their study is quite specifically about *the impact* of Europeanization *on the domestic structures of the member states*. In Risse et al., then, the focus of attention is on 'Europeanization effects', rather than on Europeanization, which here can quite conveniently be used as a kind of short-hand for 'domestic effects'.

The second point is to emphasise that there is a difference between researching Europeanization as a process, which is likely to draw attention to the change mechanisms involved in any adaptation, and, researching Europeanization as 'domestic effect'. In practice, of course, doing the latter may necessitate some serious attention paid to the former, as doing research on domestic effects inevitably raises rather thorny questions about the causal relationship between what is happening at EU level, and any change which is observable domestically.

Yet it is helpful all the same to create a conceptual dividing line between questions of process and substance (or effect).[3]

The emphasis in this paper is on the latter. Indeed, the paper takes what to some might be a rather narrow and somewhat legalistic perspective on 'Europeanization' by focusing primarily on changes in the judicial framework in the form of the repeal and enactment of new legislation on competition policy in the UK from 1998. This perspective is largely driven by the timing of the changes taking place, and the fact that it is too early to make claims about the impact of changes to the legislative process. However, some comment is also included (if only in passing) on changes to the UK regime which arise *not* directly from any reform of the legislative framework.

## The Reform of UK Competition Policy

The following section looks at the way in which UK competition policy has changed in recent years. In the first sub-section, a brief background to the 'old' regime is presented; in the second, the relevant provisions of the Competition Act of 1998, and of the 2002 Enterprise Act are introduced.

### *The UK's 'Old' Competition Regime*

The UK was the first West European country to introduce competition legislation at the end of the Second World War.[4] The policy for much of the post-'45 period has been seen as an example of 'British exceptionalism' (Wilks, 1999: 7 and 1996: 140). The 1948 Monopolies and Restrictive Practices Control and Enquiry Act was the first to enshrine the 'public interest' principle, and to establish that investigations into competition cases would be undertaken administratively on a case-by-case basis in line with British cultural preferences for non-adversarial approaches to regulation (see Wilks, 1996: 143). However, it was the legislation of

[3] For some interesting insights into possible Europeanization change mechanisms, see Olsen (2002).

the 1950s and 1960s that really established the framework of competition policy in the post-1945 period[5] to create a more formal, judicial-based policy, which became inextricably linked to the post-war settlement. However, the persistence of the competition legislation of the 1950s did not mean that the policy was unchanging over the decades that followed. As governmental (and indeed, business) approaches to industrial policy altered, so too did the application and focus of the competition rules. Yet, discretion remained at the heart of the UK system of control, in the form of a political dimension, an important role for the 'Secretary of State for Trade and Industry at the policy's political apex' (Eyre and Lodge, 2000: 66). The 1973 Fair Trading Act strengthened the administrative framework, setting up an independent agency, itself having substantial discretion held in the person of the Director General of Fair Trading (DGFT). This shifted the balance back towards informality, though restrictive trade practices remained largely judicial in character. By contrast, the 1980 Competition Act did little more than streamline existing provisions to allow for the investigation of anti-competitive practices by individual firms (i.e. monopolies). In all, then, 'The UK's policy on competition has been shaped by a pragmatic evolutionary approach, which relies on an administrative investigative style. Over time, the policy became 'sporadic, haphazard, sometimes contradictory, and increasingly complex (Wilks, 1996: 139), with the 'public interest' criterion opening the door to a discretionary form of decision-making, which privileged economic over than legal considerations (Eyre and Lodge, 2000: 66). It was not until the 1998 Competition Act that fundamental reform, ostensibly along European lines, was introduced.

Thus, although the UK had joined the European Community in 1973, it had not been possible to alter the UK's competition policy in line with European norms and rules, despite the fact that, admittedly, 'British policy … [was] "divergent"' (Wilks, 1996: 179). However, although serious competition reform was not introduced until the late 1990s, it had been mooted well before then (Suzuki, 2000: 3). Indeed, the DTI, under the Conservatives, announced a team to review its restrictive practices

[4] Some trace UK competition policy back to the nineteenth century (Eyre and Lodge, 2000: 65), or even to the Magna Carta (Wilks, 1996: 139). More generally, see Wilks (1996) for a more in-depth and nuanced treatment of the history of UK competition policy in the post-1945 period.

and mergers policy in June 1986, beginning a decade of discussions on this issue. In 1988, the DTI published a Green Paper 'Review of Restrictive Trade Practices' (DTI, 1988), which acknowledged the need for major reform. The Green Paper was followed in 1989 by a White Paper (DTI, 1989), which proposed a fundamental reform 'largely modelled on the European system' (Suzuki, 2000: 3-4). However,

> Although the government would normally form White Paper recommendations into a new bill and present it to the Parliament, it failed to do so on this issue 'for reasons which have never been fully explained, though many have speculated'.[6] However, the 1989 Paper instigated the discussion as to whether the control of monopolies based on the European system should also be introduced to Britain. Generally speaking, competition policy officials and consumer groups supported the introduction of EU-based monopolies control in which market dominance was prohibited in principle, whilst big business opposed to [sic.] that idea. A clear consensus was not found among academics, presumably because the European model based on Article 86 of the Treaty of Rome[7] was not viewed as successful in itself (Suzuki, 2000: 4)

In 1992, in yet another Green Paper entitled 'Abuse of Market Power' options for reform were proposed (Suzuki, 2000: 4). These were (i) to strengthen the existing legislation; (ii) to replace the British system with the European system; and (iii) to introduce the European system while keeping the monopoly provisions of the 1973 Act. Eyre and Lodge (2000: 68) point out that an earlier draft had only suggested adopting the prohibition (i.e. the European) approach, but that this was deemed too European by John Redwood, then a Junior Minister at the DTI, even though he supported the idea of a strong competition policy. It was also opposed by the CBI at the time.

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[5] Restrictive Trade Practices Act 1956; Monopolies and Mergers Act, 1965.
[6] The quotation here comes from Robertson, 1996: 211.
[7] Article 86, since the Amsterdam renumbering, Article 82, is the provision that deals with the abuse of a dominant position (monopoly control) in the EU. It is generally considered to be the least effective element of the Commission's competition armoury.

Ultimately, the first option was agreed, an outcome which led many to see this as a 'wasted opportunity' (Pratt, 1994). In yet another Green Paper in 1996[8], the Government's rather limited approach to competition reform seemed to shift substantially. However, while the Government showed itself more amenable to a Europeanization of restrictive practices policy, its position on monopolies remained unchanged. And once again they did not seek to introduce the draft bill to Parliament as promised 'without giving any clear reason' (Suzuki, 2000: 6). We can assume that Eyre and Lodge (2000: 69) are correct in pointing to the imminence of the 1997 general election as a crucial factor, though more broadly, Wilks (1996: 140) has pointed to the low political saliency of the policy and the relative lack of political pressure on the Government to reform, as providing an explanation of why this legislation was not prioritized.

It was left to the newly elected Labour Government in 1997 to alter this state of affairs. A commitment to competition reform was included in the 1997 Election Manifesto, and soon after coming into power, the Government introduced a Competition Bill, which both reinforced merger control and reduced ministerial involvement in competition decisions. This was more than just the inherited draft from the Tories, but had been revised following a new round of consultations (Eyre and Lodge, 2000: 69). Perhaps as a consequence, the Conservative Opposition opposed the Bill on a number of grounds, and were successful in delaying it, though the changes they were able to force were rather marginal.[9]

*The New Legal Framework*

The Competition Act of 1998 obtained royal assent in November 1998 'more than eleven years after the Conservative Party made its first promise of … reform in its election manifesto in 1987' (Suzuki, 2000: 6-7), and came into force in 2000 (see Gordan, 2001). On the surface at least the 1998 Competition Act bears a remarkable similarity to the competition provisions found within Articles 81 and 82 (formerly 85 and 86) of the EC Treaty (see Scholes et al, 1998). As Eyre and

[8] DTI 'Tackling Cartels and Abuse of Market Power' Green Paper (on monopoly control), 1996
[9] A big issue in the debates prior to royal assent concerned pharmaceuticals.

Lodge (2000: 69) state: 'The adoption of the European competition model marks a fundamental shift in the core characteristics of the traditional UK policy. For the first time, monopoly and restrictive practices policy have been combined' in one piece of legislation, and as one policy. Like the EU's competition provisions, the Act is divided into two, Chapters I and II, the first of which deals with cartel policy (restrictive practices), with the second which deals with monopoly policy (abuse of a dominant position). These[10] echo very closely the European treaty provisions (now Articles 81 and 82). In both cases, the fundamental change is the introduction of a 'prohibitive approach'. In other words, instead of dealing with competition issues on a case-by-case basis, the Act made it clear that all cartels and abuses by monopolies were banned. In the case of the former, the Act also stated exemptions, as in Article 81.

The new legislation also brought UK legislation into line with the kinds of investigative powers held by the European Commission's DG Competition, allowing officials to enter premises, engage in 'dawn raids', and, moreover, introducing civil penalties (fines) for the first time (of up to 10% of turnover). The Act also extended the rights of third parties to challenge companies and seek damages. Those familiar with the EU's competition regime will see in these revisions an echo (at the very least) of the existing European rules, which provide for all of these elements, albeit not quite in the same form that they take in the UK legislation.

The 1998 Act also restructured the Monopolies and Mergers Commission, renaming it the Competition Commission, and adding to it an Appeals Tribunal. However, it excluded merger control from its ambit, as it was claimed that to introduce a prohibitive approach in merger regulation was a more difficult exercise than for monopoly control and restrictive practices. The Government came back to this aspect of competition policy at a later date, after further consideration was given to this issue. What the Act did do, however, was to remove (virtually) all ministerial influence from (non-merger) competition decisions.

[10] Namely, clause 2, chapter 1 (Article 81 EC); and clause 18, chapter 2 (Article 82 EC)

Especially important in the context of this paper is Section 60 of the Competition Act. This reads as follows:

> …so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising … in Community law in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.

Section 60 gave some cause for concern for lawyers during the drafting process, as they saw it as contributing to uncertainty about the conditions under which Community law might be relevant to a UK case, and when it might not. It is, nevertheless, a very important clause in that it demonstrates the explicit relationship between the EU regime and the new UK approach.[11]

Once the 1998 Act came into force in 2000, the OFT was quick to make use of its new powers. The first fining decision it took concerned the sharing out of bus routes in Leeds. The first company (Firstgroup) involved in the case obtained 100% immunity from fines[12], leaving the other (Arriva) to pay a fine of £200,000.[13] There have also been number of cases falling under Chapter II of the Act. The first fining case was that of *Napp Pharmaceuticals,* with a decision taken by the DGFT on 30 March 2001. This case was important, as it dealt with the issue of excessive pricing as a form of abuse of dominant position. The decision was appealed to the newly formed Competition Commission Appeals Tribunal (CCAT). Although the DGFT decision was upheld in the main, the amount of the fine imposed was reduced. The second fining decision was also for predatory pricing by a dominant firm, in the

[11] There has also been some criticism that the reforms rely too heavily on the EU model. This line of argument emphasises the fact that the EU regime is in no way perfect, and that there is a danger for the UK in importing a flawed model into the domestic arena. Peretz (1998: 150), for example, criticized the 1998 Act for relying too heavily on the EU's Regulation 17 (the European regime's procedural regulation), which amongst other things, leaves open the question of damages. Other criticisms relate more substantively to the import of the EU's 'abuse of a dominant position' clauses (on monopoly regulation), which, of all elements of the EU's competition is the one which is often said to be least successful (see Cini and McGowan, 1998).

[12] Immunity from fines is an incentive provided in the new regime for firms who cooperate (or 'whistle-blow') in the investigation of cartel cases. There is a clear first mover advantage for cartel members who are willing to provide information on the participation of other members etc.

[13] OFT, PN 6/02, 30 January 2002

*Aberdeen Journals* decision in July 2001.[14] This involved predation in advertising space within the Aberdeen Herald and Post, and led to the imposition of a fine of £1.3 million. In this case the CCAT threw out the decision on the grounds of insufficient reasoning in respect of the market definition. In a restated decision issued on 16 September 2001, the DGFT expanded its definition of the relevant market in line with the CCAT's requirements (Kon and Turnbull, 2003: 70).[15]

The 1998 Act and its implementation are by no means the end of the competition policy reform story. The UK Government continued their efforts to create a 'world class competition regime' by producing a White Paper which was issued in July 2001 (DTI, 2001). The Paper was fed into the Enterprise Bill which received Royal Assent on 7 November 2002, and which will come into force on 20 June 2003. The Act returns to the reform of the merger regime removing ministerial involvement from merger cases in all but exceptional circumstances, so that all decisions will henceforth be taken by the OFT and the Competition Commission; and the public interest test is to be replaced by the new criterion of whether a merger results in a substantial lessening of competition (Miller, 2002: 68). Moreover, the Government also used the Act to argue that the fining system (introduced in the 1998 Competition Act) does not provide an adequate deterrent against hardcore cartels, and that penal legislation is to be introduced as a consequence. This new legislation thus allows for the prosecution of individuals who are found to be responsible for setting up, or even condoning cartels. These individuals will face criminal prosecution and prison sentences, regardless of whether the case is being investigated concurrently by the European Commission. As Eyre and Lodge have put it:

> UK competition policy was finally 'Europeanized' with the passing of the Competition Act, transforming the very essence of the traditional approach … The emphasis on pragmatism in policy development and an administrative investigative style has changed towards policy development by case law and procedural investigation. At the same time, the role of the

[14] Decision of the DGFT 'Predation by Aberdeen Journals' 16 July 2001.

> OFT had to change, moving away from routine oversight of commercial activities to a more focused approach on anti-competitive behaviour, also requiring a reorganization along the lines of DG IV (Eyre and Lodge, 2000: 71).

These provision are said to move the UK competition regime 'in just three years from one of the feeblest anti-cartel systems in the developed world to one of the most ferocious (Joshua, 2002: 231).

## Timing and Form: Explaining the New UK Competition Regime

The sub-sections below identify a range of influences, which have shaped the UK's new competition regime. These factors have been grouped under two headings. The first are those that affected the *timing* of the reform. These factors may be labelled as constraints that in some cases have metamorphosed into opportunities, or, have disappeared for some reason. The second section identifies factors which have shaped the *form* that the new regime has taken. Here, the emphasis is not on constraints/opportunities but on the substantive influences that have shaped the reform process.

### *Constraints and Opportunities: Explaining the Timing of Reform*

A number of factors appear to explain the timing of the reform process. These point to legal and broader institutional constraints which prevented reform prior to 1998, to changes in the relative power of certain interests within the domestic political arena over time, to the conscious shift in approach towards European integration that came with the election of a Labour Government in 1997, as well as to the international and European competition context.

Adapting to European legal norms has always posed problems for the UK, because of the very different legal principles which underpin the EU's legal system. While the UK has its common law, the EU (or EC, to be more accurate) is founded

[15] Other early cases, subject to case closure, were *Swann Solutions Limited/Avaya ECS Limited* (case closure by OFTEL) and *ICL/Synstar* (case closure by DGFT). In the *GISC* case, the

on the basis of a Roman Law system. The challenge for the legal community in Britain has been first and foremost to understand the differences between these two ostensibly incompatible systems, and only then to find a way to make the incompatible compatible. And while one might imagine that familiarity over time would facilitate a gradual adaptation to the European 'civil code' approach, this has not really happened to any great degree so that resistance amongst senior judges to using 'Euro-arguments' in English legal cases, for example, has even become entrenched, according to one well-informed commentator (Maitland-Walker, 1999: 1). In the case of the competition reform, this has been a factor in holding back the reform of the traditional regime – at least in any European direction. It is not clear, however, that the judges themselves were particularly active in hindering reform, even if the competition law community has been vociferous in pointing out the problems associated with the application of European case law (and, indeed, precedents established within Commission Decisions) to competition cases in the UK.

In the case of the Competition Act of 1998, a more specific concern was raised, that of the inherently overlapping nature of the two jurisdictions: that in some cases, 'achieving consistency with the principles applied under Articles 85 and 86 [now 81 and 82] … may not be appropriate' (Scholes et al., 1998: 32). As Eyre and Lodge note:

> The adoption of the European prohibition approach was less of a problem of wording than a problem of drafting enabling legislation owing to conflicts with existing powers and methods. In particular, the adoption of European case law into the English legal system caused potential problems as the European policy has often been driven by political rather than legal motives. The CBI was worried about the impact of adopting the stricter European legal interpretation into the domestic context… (Eyre and Lodge, 2000: 70).

This issue of the appropriateness of importing European case-law into the domestic arena relates in particular to the issue of the single market, which 'is simply not relevant within the context of a single national market' (Scholes et al.,

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Competition Commission Appeals Tribunal annulled the DGFT's negative decision.

1998: 45). It was not clear how the UK regime would be able to disentangle those aspect of the case-law that were relevant to the UK arena, from those that really only ought to apply to the European level. Yet, this was not seen as a barrier to reform, but as a puzzle to be clarified initially by government legislation and subsequently within cases brought before the English courts.

Broader institutional factors served as barriers to reform. The most obvious of these is that unlike many other EC/EU member states to accede after the 1950s, the UK already had an extremely well-developed system of competition regulation, and one which did not follow an approach similar to that of the European regime. Initially, at least, there was a complacency of the 'if it ain't broke…' variety amongst the British political elite. A residual element of this persisted even up to the late 1990s. However, by that stage, the UK regime was much criticized (see Wilks, 1996: 140; and Peretz, 1998 for example).[16] By the early 1990s the policy 'was held in widespread disrepute and arguments for change were promoted by almost all actors in the policy domain, ranging from the former Director-General of the Office of Fair Trading (OFT) … , former officials …, lawyers …, to Parliament … ' (Eyre and Lodge, 2000: 68). In addition, even '[b]usiness in the UK shared the perception that the established UK approach had become increasingly dysfunctional and therefore favoured a shift to the EU model' (Eyre and Lodge, 2000: 76). The DTI used this image of a discredited policy as a justification for its competition reforms, reflected in a comment in a recent White Paper that 'the Government inherited competition laws which were outmoded, ineffective and a "soft touch" by international standards' (quoted in DTI, 2001b). It seems then that this particular institutional constraint imposed by the pre-existence of the UK competition regime, was undone by a whole range of actors ready to argue for its dismantling.

A similar emphasis on interest configurations in the context of competition reform is made in a paper by Suzuki. In this paper, Suzuki makes the point that to understand the reform of UK competition policy, it is not sufficient to focus only on

[16] Wilks (1996: 140) reports that the Trade and Industry Committee, hearing evidence on the policy in March 1995 'found themselves listening to one long scream of range' about the UK system.

the influence of the EU rules, but that any complete explanation must also consider 'the endogenous development of competition policy officials' (Suzuki, 2000: 1) or the 'power structure between relevant domestic actors, such as business representatives, political parties and public officials' in charge of both competition policy and industrial policy (Suzuki, 2000: 2). In trying to explain why it took quarter of a century (from accession) for the UK to reform its competition regime, Suzuki points to the importance of the configuration of interests supporting and opposing reform, and the way in which key groups altered their position over time.

The most important of these shifts in position was undoubtedly that of the CBI. The Confederation of British Industry (CBI) were deeply opposed to the reform of competition policy when it was first mooted in the late 1980s and the government was intensively lobbied by them, particularly over the issue of fining policy (Suzuki, 2000: 10-11). However, by the mid 1990s the CBI's position had altered, and it came to favour a Europeanization of the existing rules. The proximity of the Conservative Party to the big business community made it difficult for the Tories to implement the reforms that even they realised were necessary. Unable to resist the industry lobbying, the delay in initiating reform may simply reflect the power of big business to divert or water down (if not to set) government policy. One of Suzuki's main points, however, concerns the role played within the UK regime by the Office of Fair Trading, and by the officials working within that agency. Suzuki charts the changing role of the OFT (from consumer to competition policy), and the extension of the Office's 'administrative scope', which reflected broader concerns about competition within the UK of the 1980s and after. 'From the 1990s… competition policy officials look more active and influential in the policy-making process of competition policy' (Suzuki, 2000: 14).

It may also be the case that the example set by the competition regime (as a successful 'model' regime) increased the 'anxiety of Euro-sceptics (Suzuki, 2000: 13) within the Conservative Party. Indeed, even if the regime were not successful, there may well have been a more general reluctance within the Party to any reform that suggested the import of a European model to the UK.

> In the UK, the long process until the final acceptance of the prohibition approach was mainly caused by the Conservative Government being torn between its preference for a non-discretionary approach as part of its neo-liberal economic policy agenda and the hostility against adopting anything "European" (Eyre and Lodge, 2000: 76).

This was clear, for example, in John Redwood's opposition to the prohibition approach as 'too European' when the Green Paper of 1992 was being drafted (Eyre and Lodge, 2000: 68). It also, however, directs us to consider the importance of ministerial leadership and preferences in this field. While in the case of the 1984 pro-competition 'Tebbit Doctrine', the Europeanization – or possibly more accurately, the convergence process was unintentional, under Michael Hestletine, and his more activist interpretation of industrial policy, reform of competition policy was deemed not to be a particular priority (see Eyre and Lodge, 2000: 69). It might be argued convincingly, then, that the Europeanization of the Labour Party, that is, the Party's commitment to playing a more positive role in European affairs, eschewing the knee-jerk euro-scepticism of much of the Conservative Party, was a necessary condition for the reform of UK competition policy. More generally, then, Eyre and Lodge (2000: 76) identify the drivers of the 1998 reform as 'the case of an old DTI agenda, often using the CBI to test its proposals, which met the neo-liberal economic policy agenda of the Conservatives and Labour's desire not only to fulfil demands expressed by business associations, but also to make "New Labour" more credible by reducing ministerial discretion in competition issues'

It may also be possible to identify an international dimension to the timing of the reform. There has been much discussion in the competition sphere about international convergence and of the creation of a global competition policy. This has been driven by concerns regarding the competition effects of massive growth in cross-border trade and direct investment (Suzuki, 2000: 7). The influence of international organizations in this debate has been important (especially the OECD and the WTO), and though one might expect this agenda to have been led by the United States, in fact the US preferences in this policy domain is much to in favour of bilateral agreements, rather than multilateral ones. Indeed, it has been the EU's competition officials who have been most active in setting up new initiatives, such

as the Global Competition Forum website and the International Competition Network (see Murphy, 2002). The international context may have been a lesser factor in explaining the timing of reform, but it is hard to see a convincing argument in favour of attributing too much to the changing international context, which may be seen more as a backdrop to reform than a driver of it.

More convincing perhaps is an argument that equates changes in European competition policy to the timing of reform. It is now generally accepted that the European Commission underwent a metamorphosis in the mid-1980s, which allowed it to pursue a more activist competition policy. This did not arise from any change in the legal framework, but rather was a consequence of the influence and rise of neo-liberal ideas (see below) within the Commission, and the role of specific competition Commissioners in operationalizing those ideas through a more robust enforcement of the existing regulations (see for example Cini and McGowan, 1998). The argument, in short, is that it was not until the credibility of the European regime rose that the arguments for competition reform in the UK became convincing. Coming at the same time as the discrediting of the UK framework, it seemed obvious that the UK legal community would turn to the increasingly successful EU model as offering an alternative tried-and-tested approach.

Trying to attribute the timing of the reform to a limited number of discrete factors might seem an impossible task, given the interconnected nature of many of the points raised above. At the very least, though, this paper goes further than Suzuki who claims that specific internal factors, as well as the EU, were in shaping the timing of reform, to identify a range of factors that (might have) mattered.

*Substantive Influences: Explaining the Form of Reform*

This part of the paper shifts the focus onto the substance of reform, and identifies factors that influenced the form that the new UK competition regime has taken in the reforms of 1998 and 2002. It begins, inevitably by looking at the EU's impact on reform. It then turns to the question of American influence. Thirdly, it looks at the role that economic ideas played, both generally (i.e. neo-liberal ideas) and

specifically (i.e. with regard to competition regulation). Finally, we look at how Labour's own policy preferences in the field of industrial policy and in it approach to the measurement of regulatory goals has also played a role in the new UK competition policy.

At the outset it should be stated that there is no evidence that the European institutions played an active role in promoting a particular type of reform within the UK competition regime (Eyre and Lodge, 2000: 70), so that if the Commission did so, it was done subtly and informally. Conventionally, the EU institutions do not 'interfere' in this way in what are considered as domestic matters, very much in line with general understandings of what the concept of subsidiarity is all about. However, even if this is indeed the case, this does not undermine an argument which supports a Europeanization thesis.

It is also worth noting at this point that at the same time as the UK were reforming their legislation, the EU was also initiating its own reform (or 'modernization') process. This has taken the reform of a complete review of policy enforcement, with emphasis particularly placed on the issue of decentralization. With this new emphasis has come serious concerns at EU level about the degree of variation that still exists across the member states, particularly with regard to the consistent application of Community norms in the enforcement of competition regulation. If there has been little *pressure* to change existing systems in line with certain aspects of the EU system, there has recently been a fair amount of encouragement to do so. It is fair to claim that the timing of these developments post-dates the UK's reform, and this is certainly true. But what is also clear is that the interest in decentralization began well before the DG Competition's 2000 White Paper on Modernization, as it was in the mid-1990s that the Commission began to draft Notices which dealt with the relationship between national courts and national competition authorities (the so-called 'competent' authorities), and a broader reform agenda was being actively debated at this time. Thus, the European-level agenda provided part of the context for reform. Increasingly, DG Competition was expecting national competition regimes to act as part of a federalized system of competition regulation. And in that system, issues of (in)compatibility had to be

addressed if the system as a whole were to remain effective. For governments keen to maintain a strong pro-competition regime, one might argue then that there was little choice but to adapt home-grown systems in line with European principles, norms and rules.

Moreover, a supplementary, yet important point that can be made here is that for the UK government to be able to influence the EU's policy (as it engaged in its own reform process), it needed to have a policy compatible with the European level. A post-1998 example of how this might happen can be gleaned from the *Napp Pharmaceuticals* case. In this case, the new UK regime not only allowed the UK to deal with the case in a way that was compatible with the EU regime, but it also allowed the UK to make a contribution to the shaping of the EU policy (Kon and Turnbull, 2003: 70). It was able to do this, as the case dealt with the issue of excessive/predatory pricing, a phenomenon on which there is little existing case-law at European level. The DGFT, in its decision, elaborate the traditional EU test for predatory pricing (which involves a case-by-case approach, as well as a careful and thorough examination of the market and the pricing practice, stressing the importance of pro-competition intentions by the undertaking concerned (Kon and Turnbull, 2003: 86). As Kon and Turnbull (2003: 86) note, 'Overall, the *Napp* judgement should be seen as a major contribution to European jurisprudence on predatory and excessive pricing'. In this instance, it can be argued that reform has provided the potential for a bottom-up influence for UK decision-takers, influence which was previously impossible.

The best evidence for an EU effect on reform comes in looking at the legislation itself. There is little doubt that there are quite staggering similarities between the new UK regime and the European system of competition regulation and that reforms do deal with the issue of compatibility. As such it is virtually impossible to deny that Europeanization of a kind has occurred. (To do so, one would have to argue that the supposedly European elements of the reform came about coincidently, something that would be exceedingly difficult to do).

Competition lawyers point to three ways in which the EU model was imported in to the UK (Barr, 1998: 139)

1. the prohibitions, which are closely based on Articles 81 and 82
2. the European principles clause, which provides for the interpretation of the UK prohibition in a manner which is not inconsistent with the principles and case law which would apply in a like manner under EC law.
3. the 'parallel' approach, with provision for the automatic application of EC exemptions in the UK (parallel exemptions), and the obligation on the DGFT to consider fines imposed at EC level in assessing domestic penalties.

However, as Barr adds, 'In some senses, the Bill is even more European in approach than a straightforward description of these three areas might suggest' (1998: 140). She points to the following as being of relevance: the lack of domestic definitions which will allow the introduction of European legal language into domestic law; the import of European (e.g. single market) policy objectives into a domestic context; and the provision of positive assistance to be given to the Commission carrying out an investigation in the UK. Yet, Barr's point is that despite all this Europeanization evidence, the UK's approach differs substantially from the EU model, in that it has been 'tailored to meet the U.K.'s own special requirements … [and] designed to improve upon the problems encountered at EC level…' (Barr, 1998: 141).[17]

Part of this 'tailoring' would appear to involve lessons drawn from the American case. This is evident particularly in the case of the most recent reforms (of 2002) which serves to criminal competition law enforcement. Andrews (2002) suggests that one reason for this adoption of a US-style approach to penalties may be the example set by the Americans in recent (successful) crackdowns on hardcore cartels in America. The new provisions allow for the imprisonment of those who operate or condone cartels. Not surprisingly, the reaction of the business community to this development has been negative. But, as Joshua (2002) has pointed out, aside from this expected opposition, there are also important legal and political reasons why this new approach should have been treated cautiously.

[17] Barr (1998: 141-3) sets out precisely how the EU-inspired provisions differ from the EU model.

Joshua identifies four linked issues that are likely to be crucial to the viability of the new UK legislation (not yet in force), two of which are directly linked to implications for the wider EU competition regime and which are touched on below.[18]

First comes the questions of the compatibility of the planned UK law with the EU's competition enforcement approach. Here, it is clear that 'the United Kingdom's go-it-alone attempt to deter cartels with jail sentences may yet be thwarted by concurrent E.C. legislative developments in Brussels to which the British Government has already in principle signed up' (Joshua, 2002: 231). The Commission's 'modernization' agenda, which recommends the implementation of a single system of competition control for transnational cartels at the European level may well 'inhibit or even preclude separate criminal prosecution' (Joshua, 2002: 231). Second, even if it does not preclude the criminalization per se, Joshua wonders whether

> the British Government have really considered fully the implications of operating a separate system of criminal law investigations in tandem (or competition) with the E.C. administrative enforcement measures in the same case. If the criminal regime in Britain hampers or impedes the uniform operation of E.C. competition rules, it could still run foul of obligations under the Treaty' (Joshua, 2002: 232).

Important questions raised, such as these, about the compatibility and consistency of the UK and the EU regimes make it clear that the UK reform process does not simply imply a Europeanization of the national policy. It can quite easily be seen at one and the same time as involving an Americanization of competition control – at least in the sphere of cartel policy. This begs the question whether it is possible for the UK to both Europeanize and Americanize its competition policy at one and the same time. Not only is the issue of whether it is possible to import US-style

[18] The other two points not mentioned in the text concern, first, the 'jurisdictional outreach' of the UK legislation, that is, whether it is intended to imply the prosecution and imprisonment of foreign residents (as is the case for the US legislation), and how the limits on non-UK-based evidence-gathering might be overcome. The final concern that Joshua has is that 'while buying into robust U.S.-style control of cartels, the U.K. authorities seem to eschew the conspiracy approach of the Sherman Act which has proved so successful in the United States, preferring to import an element

solutions to large cartels into the EU[19], but the question becomes all the more resonant when one remembers that the EU (at least at the present time) does not have the power to introduce a European-level criminal law, precluding the import of a 'criminalization' approach, for the moment, within the Commission. As a consequence, '[t]here are …valid concerns that the Government's plans suffer from a lack of "joined-up thinking" (Joshua, 2002: 245).

Stepping back for a moment from the specifics of the competition reforms, the form that the new UK system has taken has been strongly set in the context of neo-liberal assumptions about economic management, assumptions that entered the mainstream in the 1980s, and which have taken a specific form in the case of competition regulation. There is evidence to suggest that these ideas were transmitted to policy makers via a competition law epistemic community (van Waarden and Drahos, 2002: 933). To be sure, these ideas have influenced both European level and UK thinking about competition policy, helping to bring the two regimes together. One manifestation of this convergence is in the newly developed role of economic analysis in European competition decisions, a development which is now supported in European Court judgements (Hildebrand, 1998).

The alignment in economic thought between the European and British models began, it has been argued, in the mid-1970s on. 'Both systems changed from a structural approach for judging the effects of monopolies on markets towards stressing the importance of entry barriers and competitive process' (Eyre and Lodge, 2000: 68). This alignment was accelerated in the 1984 by Norman Tebbit when he redefined the notion of 'public interest' along competition lines in merger cases, although in this instance, any Europeanization was purely an unintended consequence. 'Further factors facilitating similarity were the evolving close

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of "dishonesty", a notion which has proved elusive and troublesome in other areas of the criminal and civil law.' (Joshua, 2002: 232).

[19] Joshua (2002: 245) doubts whether this would work in Europe. He makes his case in the following way: 'In those countries which have introduced some form of criminal penalties, the legislation is enforced with all the vigour of the ban on smoking in French restaurants'. See also Andrews (2002) for some comparative insights into the Irish case where 'a dizzying cocktail of US-style penalties and EU-inspired powers' (p. 469) have been introduced in a new Act (Competition Act 2002). The new Act also changes Ireland's merger control regime, abolishing the EU inspired notification system for non-structural arrangements.

relationship between UK and European Community (EC) officials, joint exercised on advisory committees in both mergers and restrictive practices cases, secondments to DG IV by UK officials and increased communication flows between various competition authorities' (Eyre and Lodge, 2000: 68). One might see this as a form of Europeanization, or as a consequence of much broader transnational ideational transformations that impacted both on the EU and the UK.

On institutional questions too, the implications of new economic ideas were crucial. This is most obvious when we look at the declining ministerial role in competition decisions within the UK, and the fashion for independent agencies (see for example Wilks and Bartle, 2002). This is clearly in line with conventional mainstream economic thinking on questions of political involvement in economic decision-making, and is also in line with theories of delegation and agency (principle-agent relations). The arguments here are, loosely, that governments delegate regulatory decision-making to agencies to ensure that commitments are credible (that is, depoliticized).[20]

Finally, it is also possible to argue that the reform of UK competition policy under Labour since 1997 has as much to do with the Government's industrial policy preferences as with any direct emulation of the EU, or indeed the American models. Perhaps, however, it is incorrect to focus on 'preferences' as such, as Beath (2002) has demonstrated how similar current Labour Government's industrial policy is in the context of UK policy over the last 50 years. Rather, he stresses that what has really changed is not the substantive policy, but the instruments or tools available or used to pursue what are very similar aims. He points to two such instruments: technology policy and competition policy.

Picking up Beath's point with regard to competition policy, an interesting perspective on the Government's policy on competition matters springs from a peer review of the UK regime produced on behalf of the DTI by PriceWaterhouseCoopers in April 2001 (DTI, 2001b). The Peer Review stemmed

[20] There are, of course, other reasons for delegation. These are not dealt with here, however.

from a Public Service Agreement (PSA) target agreed by the DTI with the Treasury. The target was one of the UK having

> the most effective competition regime in the OECD, as measured by peer review. The DTI has commissioned … [a] peer review to ascertain whether it is meeting this target, and to identify the implications for policy going forward. This will also provide a benchmark, by which the UK competition policy regime can be assessed if it is to move up the pecking order to become the "best in class" across the OECD (DTI, 2002b).

The Review establishes methodology (Competition Regime Performance Index) on the basis of which it is able to rate the UK regime in its peer group. It concludes that as of 2001, the UK sits in the top half of the group, but is not (yet) at the top of it. The US and Germany, and maybe also a couple of others (Australia, for example) rank above the UK.

It is pertinent to note, however, that the report claims that the 'UK regime is also seen to be more effective than the EU but not by a wide margin'. Applying a sort of league-table mentality to competition regimes, this suggests that it is to the US and German models that the UK is now looking, viewing them as competitors in the 'best in class' game. Not surprisingly, the Review also considers some policy implications of its findings, namely that the merger reform embodied in the Enterprise Bill would enhance the UK's standing, as would the introduction of criminal sanctions, and a strengthening of the OFT's role. In other words, the Review served to confirm the approach adopted in the 2001 White Paper. It sought to justify a 'toughening up' (or 'modernization') of the UK's competition policy.

**Conclusion**

This paper has tried to identify factors or influences which have shaped recent reform of UK competition policy. Whereas on first sight the policy reform appears to be a rather straightforward case of Europeanization, a closer look at the context and substance of the reform suggests a gamut of additional factors that have been important, and that can explain why, despite the adoption of some of the EU rules, the UK regimes is likely to continue to differ substantially from that at the European

level. ‘Where there has been, at a superficial level, convergence towards and utilization of the European model, detailed and qualitative evidence of the domestic policy processes provide a picture of limited “fungibility” leading to a “hybridization” of policies’ (Eyre and Lodge, 2000: 77). It was not by accident that the question asked at the start of this paper was not ‘Has UK policy been Europeanized?’ but ‘What factors are likely to have been important in shaping recent reforms of the UK’s competition regime?’ The choice of question was important, given the assumption that new insights about Europeanization can come from addressing broader questions about domestic (political) change, as much as from going out to search for examples of Europeanization.

In this case, the paper raises (albeit implicitly) some interesting questions about the causal relationship between EU and domestic policy, and how Europeanization relates to the theme of convergence.[21] Even the DTI was conscious not to draw too sharp a causal line between the EU model and the UK reform. Discussing the 1998 Competition Act, the DTI’s Peer Review exercise states that:

> The Act has strengthened the UK competition policy significantly with respect to horizontal practices and agreements, and has brought UK competition law much closer to EU competition law, building also on the experience of other well-respected competition policy regimes. These changes indicate a clear shift towards greater political independence, clarity of process, a US-style leniency programme for whistle-blowers and the provision for potentially large fines for those who break the prohibitions (DTI, 2001b: 6).

Beath (2002: 234) now sees that since the 1998 Competition Act came into force, there is now ‘some consonance between US, UK and EU competition law’, again shirking any assumption of causality, whilst claiming convergence. Eyre and Lodge (2000: 75-80) too state that ‘it is difficult to find a “European” cause’ for the reform, though the ‘European “theme” was used to propose alternatives to perceived domestic weaknesses in competition policy’. They do all the same identify a process of Europeanization.

[21] I accept that while the paper may raise these questions, it does not answer them.

On the basis of the factors examined above, it is possible to argue convincingly that two main agendas motivated the UK Government's post-1998 reform of competition policy. The first was a discretely European agenda. This was about the *compatibility* of the UK regime with the EU's system of competition regulation. The second was a broader Modernization agenda. Whilst incorporating a European dimension, this agenda was really about *effectiveness* or perceptions of effectiveness. The two agendas are (as these things often are) inter-related in the sense that the first is a necessary condition of the second. In other words, the modernization of the UK regime could not be successful if there was an awkward mismatch between UK and EU levels. But to talk about 'lesson-drawing', as do Eyre and Lodge (2000), is to say something different. My point here is that, in striving for a 'modernized' UK competition policy, lessons may drawn from a number of different sources: in our case, not just from the EU experience, but also from recent US experience. Lesson-drawing may even mean that some elements of the old system (on the regulation of complex monopolies, for example) ought to remain in place, even if they are out of step with the EU. With the DTI accepting that the EU model is no more effective than the post-1998 UK regime, the UK now have to look beyond the EU – to the US, or possibly in future to Germany - for ideas on how to toughen up the UK policy, assuming that the Government's goal remains that of being 'best in class'.[22] This raises the interesting question of what happens where the two agendas of (EU) compatibility and modernization come into conflict. [23] It is only with the implementation of the Enterprise Act after June 2003 that it will be possible to answer that question.

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[22] The UK has identified key weaknesses in the European regime, for example, its inability to criminalize the penalty system.

[23] A rather premature answer to a similar question was given by Barr (1998: 144) when she suggested that the 1998 reform created a hybrid system, which failed to reconcile the European dimension with the aim of creating a more economics-oriented competition regime.

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