JURIDIFICATION IN THE UK:
The cases of the Office of Fair Trading and the Commission for Racial Equality

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Abstract

This thesis identifies a number of weaknesses and omissions in the literature on juridification and responds in four main ways. Firstly, it introduces and defends an empirical definition of juridification as the governance of political or regulatory relationships by law and legal considerations. Secondly, it proposes and utilises a method of testing juridification, through a qualitative approach to indicators, and explores the utility of these indicators. Thirdly, it seeks to understand, through an examination of two case studies (the Commission for Racial Equality and the Office of Fair Trading) why juridification sometimes occurs and sometimes fails to occur. Fourthly, it explores the implications of the findings for the literature dealing with regulatory strategy.

It is argued that the evidence of the case studies generally supports the regulatory strategy literature. Relationships between the regulatory agencies and their regulatees were generally characterised by informal contacts, with law remaining principally in the background. This general lack of juridification was, moreover, caused by the factors emphasised in the literature on regulatory strategies. However, this general support to the regulatory strategy literature is qualified by two exceptions – both areas of regulation which have been substantially affected by EC law. The exceptions suggest firstly that there may be cases in which juridification can occur despite a persuasive regulatory strategy, and secondly that persuasive regulatory strategy is not always the predominant strategy. The literature on regulatory strategies may thus require some revision.

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CHAPTER 1

Juridification

Introduction

In recent years, there has been a growing number of studies referring to the phenomenon of 'juridification', in such diverse areas as arbitration (Flood and Caiger 1993, Langer 1998, Brooker 1999), employment relations (Browne 1994), financial services (Vogel 1996), central-local government relations (Loughlin 1996), housing policy (Stewart 1996), utilities regulation (Scott 1998), competition policy (Maher 2000) and military law (Rubin 2002). These support previous studies arguing that processes of juridification were occurring in the areas of industrial relations (Simitis 1987), social welfare (Partington 1987), corporate structures (Kubler 1987) and antitrust (Hopt 1987). The literature is an international one, with juridification 'trends' being claimed for Germany,[1] Italy,[2] Ireland,[3] the US,[4] and the UK.[5]

This PhD thesis arises from a critique of this burgeoning literature. In this chapter the nature of that critique is set out. It begins by noting the variety of definitions of juridification, and the failure to understand how these definitions relate to each other. It tries to address this shortcoming, not only by arguing in favour of one definition that is particularly suitable for empirical investigation (*the governing of a political or regulatory relationship by law or legal considerations*), but by discussing some of the methodological issues that attaches to this definition. This also helps to address the fact that, in general terms, the juridification literature has been much stronger in the area of normative theory than in its treatment of how to measure and identify the phenomenon. Next, the analysis of the juridification literature turns to its treatment of causes, and it is

[1] Indeed, this is where the literature stems from – see Habermas (1986) and Teubner (1986, 1987).
[2] One example is Corsi (1987) who writes about the area of antitrust.
[3] See, for instance, Browne (1994) on the area of industrial relations.
[4] At least according to the definition that will be accepted: the legalisation of American politics has long been noted and discussed by academics – e.g. Vogel (1986), Kagan (2001).
[5] E.g. Loughlin (1996), Scott (1998), Rubin (2002). But not Latin America, according to Peruzotti (1995), who argues that low juridification has long been one cause of institutional weaknesses.

argued that there is a tendency either to provide very broad explanations of juridification or to examine juridification as part of a general theory, such that juridification is seen as an inexorable phenomenon rather than as a variable. Finally, it is noted that there is a failure to realise that the claims made in this literature have the potential to conflict with the predictions made in another body of literature that focuses on regulatory strategy.

The remainder of the PhD responds to the analysis in this chapter by aiming to fulfil three broad purposes, as follows:

a) Firstly, it aims to confront selected elements of the juridification literature with claims arising from work on regulatory strategies, focusing on the literature that is most relevant for regulatory agencies. It is argued that when the focus is on the conduct of regulatory agencies, and their relationships with regulatees, there are many reasons why we would expect law to be less important a driver than the juridification literature might suggest. The case studies are used to explore this question further, with the experiences of regulatory agencies used to explore the nature of any juridification trends or counter-trends.
b) Secondly, it aims to find a way of empirically examining juridification in the case of regulatory agencies. In this chapter, a definition of juridification is set out and defended. The chapter also proposes a method of testing juridification through a qualitative approach to indicators. These indicators are then used in the case studies before their utility is assessed in Chapter 7.
c) Thirdly, it seeks to examine in detail two selected cases and to use them inductively to add to our understanding of when and why juridification occurs (or does not occur) in regulatory relationships. The reason that an inductive approach is necessary is the lack of appropriate theoretical framework in the current literature on juridification.

Finally, it should be added that the findings of the case studies prompted this thesis to consider a fourth point: the impact of growing juridification on the regulatory strategy literature – especially its central prediction that regulatory strategy tends to be predominately persuasive in nature. This issue is discussed in the course of Chapter 7.

The juridification literature: in search of an empirical approach

Given the dramatic growth of the literature on juridification within the past fifteen years, it may come of a surprise that it has done so without reaching a consensus as to the appropriate meaning of the word 'juridification'. This section aims to address this difficulty, by settling on one definition that is particularly amenable to empirical investigation.

The section begins by looking at Teubner's approach - largely because the subject of juridification is so associated with his work. It is argued, however, that Teubner's analysis is not suitable for an empirical study of juridification for two main reasons: it does not allow for the treatment of juridification as a variable, and it focuses less on juridification itself than on the problems caused by juridification. Next, the section turns to the literature since Teubner, and picks out two main strands: one seeing juridification in terms of the reduction of autonomy caused by state intervention; the other defining juridification in terms of legalisation. It will be argued that the latter definition contains certain advantages as a focus of empirical analysis. The section then ends with a consideration of how this might work in practice, considering especially the empirical understanding of law that underpins the definition of juridification as legalisation.

Teubner and juridification

The term 'juridification' was first used in the context of labour relations in Weimar Germany - a polemical term, intending to point to the way in which the legal formalisation of labour relations served to neutralise genuine political class conflicts.[6] It was later developed in particular by two theorists: Jurgen Habermas and Gunther Teubner. For Habermas (1986), juridification denoted what he called the "colonialisation of the life-world", by which previously autonomous areas of social life became colonised by government through law. Habermas pointed to a series of juridification 'thrusts' with law used each time as the means of legitimating growing state intervention.

[6] See Teubner (1987: 9)

Teubner basically accepted this analysis but focused more on its ramifications. He began by rejecting three prior usages of the term. The first was the notion of juridification as the proliferation of law – the "flood of norms" definition. The second was juridification as the "expropriation of conflict", whereby human conflicts were formalised and distorted by being subjected to legal processes. The third related specifically to the legal formalisation of labour relations so as to neutralise genuine political class conflict – hence juridification as "depoliticisation through law".[7]

Instead of these, Teubner (1987) argued that juridification should be defined as the "materialisation of law". The word 'materialisation' relates specifically to Weber's distinction between two 'ideal' types of law: formal and material. The former implies the application of universal norms so that "in legal procedures, in both substantive and procedural matters, only unambiguously general characteristics of the facts of the case are taken into account". The latter implies the introduction of substantive values into law so that sociological, economic or ethical argument takes the place of legal concepts (Teubner 1987: 17). For Teubner, regulation inherently implies the materialisation of law: as it implies the intervention into areas of social life in which law has previously had little role. Paradoxically though, law is used by the state in the first place precisely because of its formal qualities - its appearance of neutrality. The result, according to Teubner, is a kind of regulatory failure – what he calls the 'regulatory trilemma'.

It is worth briefly noting what this 'regulatory trilemma' consists of. Teubner begins by separating out three fields: law, politics and the social field subject to state intervention. He then theorises that, in practice, these three fields conflict in one of the following three ways:

- They ignore each other in a kind of mutual indifference, such that the proposed intervention has no effect.
- Law becomes politicised, or socialised.
- Politics or the social field becomes legalised.

The rest of Teubner's article is then devoted to considering whether or not any solutions exist to this regulatory trilemma – what he calls "the problem of juridification" (Teubner 1987: 5).

[7] For the reasons why these definitions were rejected by Teubner, see Teubner (1987: 6-13).

Although it is not proposed here to discuss in detail the merits or otherwise of Teubner's analysis,[8] it is at least necessary to consider the applicability of his analysis for empirical purposes - if only because so many subsequent writers base themselves upon it.[9] In this regard though, his account is problematic on a number of levels.

One problem is the emphasis given to the effects of juridification on the law as opposed to political relationships. Partington, writing on the subject of social welfare, expresses what might be seen as the natural reaction of a political scientist (Partington 1987: 435):

> There is a danger that concentrating on law, the politics of welfare will be forgotten or, at least down-played... [S]ocial welfare must at base be a matter of politics, not of law. In so far as juridification suggests that there is a problem which is legal or jurisprudential in nature, it seems to me to be inappropriate.

A more fundamental difficulty with Teubner's analysis comes out of his proposed solutions to the problem of juridification. Take for instance, his treatment of the practice of 'bargaining in the shadow of the law', by which law essentially serves to regulate systems of negotiation (Teubner 1987: 34):

> Events regularly take the following course. First, law is primarily used to bring about a certain kind of behaviour by the threat of negative sanctions. However, enforcement deficits appear which oblige parties concerned to transform the enforcement systems into negotiation systems... Indeed, there are even interpretations of regulatory law which warn against taking the implementation of law too seriously. Strict enforcement of the book often appears unreasonable and endangers the precarious regulation situation (Bardach and Kagan 1982)... These strategies will not solve all the problems of juridification, nor will they reverse the process of juridification as such. On the contrary, the legal regulation of self-regulation can itself be seen as a continuation of the juridification trend, but - and this would be the crucial step forward - it would help steer the process into more socially compatible channels.

The reason that the legal regulation of self-regulation is seen as a continuation of the juridification trend is because it is one prong of the regulatory trilemma - the prong that says that law will be ignored. It is important to appreciate the implications of

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[8] Which in any case is tied to his theory of 'autopoeisis' or self-reflexivity of law – see Teubner (1988).
[9] Aside from the works included in his edited volume (Teubner 1987), many subsequent works begin by quoting Teubner, even if they do not directly utilise his analysis (see e.g. Loughlin (1996) and Scott (1998)).

this argument. For Teubner, essentially all regulation is juridification as it implies the introduction of law into areas of social and political life previously untouched by it. Juridification does not, however, imply a particular role for law once it is introduced. Law could be heavily influential in governing these areas of social and political life, or it could sit in the background, gently shaping and structuring what goes on. Or, as Teubner writes above, it could be deliberately ignored. In any case, Teubner's claim that there is an inexorable trend in juridification is easily indicated – indeed, every new regulation provides a fresh confirmation. At the same time, however, this precludes the possibility of examining whether juridification has occurred within a regulatory regime, or the possibility of examining variations in juridification.[10]

There is another difficulty with Teubner's account in terms of its applicability for empirical investigation. This is that his analysis is fundamentally concerned with the normative aspects of juridification. It begins by referring to juridification as "an ugly word, as ugly as the reality as it represents". The aim of most of the article is the "*definition of the problem* of juridification" (his emphasis). The remainder looks at possible solutions to this 'problem'. Partington's response in the same volume is to argue that "I think it is important that, at least in the first analysis, these value judgements about the phenomenon of juridification should not be accepted without question" (Partington 1987: 421). This would surely be right for an empirical analysis of the phenomenon of juridification, but this is not Teubner's subject which is the *problem* of juridification.[11] Teubner is less concerned with juridification as such than with its dysfunctional effects, and this should not come as too much of a surprise: the breadth of his definition of juridification lends itself to this focus.[12]

For these two reasons therefore - the breadth of definition used and the way in which value judgements about juridification are tied up with its definition - it is

[10] Although it might be possible to test Teubner's other empirical claims by looking at the *effects* of juridification within a regulatory regime – to see, for instance, if regulation always leads to one of the three prongs of the regulatory trilemma.

[11] This explains why Teubner's four 'definitions' are distinguished solely by the normative grounds upon which they focus.

[12] It is worth noting also that this is shared by other writers in the field – see, for instance, Voigt's assertion that "juridification is concerned with the conditions for, and limits of, the effectiveness of law as a steering mechanism" – quoted approvingly (and translated) by Simitis (1987: 113). The same point can also be made about Habermas, with the term 'colonialisation' in itself pointing to the critical nature of his account.

proposed to move away from Teubner and look at other approaches. In looking for a suitable empirical definition of juridification, it is proposed also to reject Teubner's opening premise - that "notions of juridification always contain a theory of the conditions which it developed, an evaluation of its consequences and a strategy for dealing with it" (Teubner 1987: 6). It is submitted that, on the contrary, it is essential to separate all these things from its definition. Those approaches which define juridification in terms of its causes or its consequences will thus be rejected.

Two approaches to juridification

The following table gives some indication of the range of definitions attached to juridification in the context of empirical studies since Teubner (1987):

Author	Policy Area	Definition of juridification
Simitis 1987	Industrial relations	Changing concept of state functions, with reformulation of legal framework
Clark & Wedderburn 1987	Industrial relations	A process by which the state intervenes in areas of social life, through the use of law, in ways which limit the autonomy of individuals or groups to determine their own affairs.
Flood & Caiger 1993	Arbitration	A process by which lawyers seek to dominate a field
Browne 1994	Industrial relations	Use of the law by the State to steer social and economic life in a particular direction, thus tied irrevocably to the concept of state intervention and limitation of autonomy to determine individual employment relationships.
Cooper 1995	Local government	The increasing centring of law in structuring social, political, cultural and economic life.
Vogel 1996	Financial services and telecommunications regulation	Putting informal rules into legal form.
Loughlin 1996	Central-local government relations	Tendency towards greater legalisation – the transformation from folk law to jurist law.
Stewart 1996	Housing law	The increasing spread of law and legal constructions into social life.
Scott 1998	Utilities regulation	A process by which relations hitherto governed by other values and expectations come to be subjected to legal values and rules – 'the tendency to formalise all social relations in juridical terms'.
Maher 2000	Competition policy	The replacement of discretionary political action with more juridical norms based on EU competition rules.
Rubin 2002	Military law	Adopts definition of Scott 1998.

What all these definitions have in common is the recognition of a changing role for law. Note also that none of them equate juridification with simply 'more law' or

even 'more complex law', although some of the definitions do attach a significance to what might be called the 'growing reach' of law. The differences between the definitions, however, are more striking than the similarities. In particular, it is possible to separate two main strands. On one side, Clark and Wedderburn (1987), along with Browne (1994), equate juridification with the limitation of autonomy through *state intervention.*[13] On the other side, writers such as Stewart (1996), Loughlin (1996) and Scott (1998) do not refer at all to a reduction in autonomy nor even to state intervention, but see juridification as a process of *legalisation.*[14]

The two definitions reflect the fact, already noted above, that there are different stages in the use of law. The first definition of juridification as the limitation of autonomy through state intervention suggests that law may now be used in an area which was previously unregulated.[15] It is less clear though as to what the actual role of law will be within this area of social life. It will be seen shortly how Clark and Wedderburn attempt to resolve this issue. On the other hand, the definition of juridification as legalisation is one that focuses directly on the role of law within a regulatory field. Juridification is thus firmly understood as the phenomenon of law being in the foreground of relationships.

Aside from this, there are some obvious practical differences between the two definitions. It has just been noted that juridification as the limiting of autonomy does not necessarily imply the use of law, but can include non-legal measures such as changes in tax incentives. On the other hand, neither does legalisation necessarily imply a reduction of autonomy - law indeed could have the effect of increasing autonomy.[16] It

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[13] A question worth considering is whether it is a coincidence that both these writers, as well as Simitis (1987) (who shares the basic definition, but focuses less on the reduction of autonomy aspect), are writing about the same policy area – industrial relations – or whether there is something inherent about this area of policy that makes a focus on government intervention particularly beneficial. If the latter is the case, then this constitutes another argument for adopting the other definition of juridification as legalisation.

[14] Of the others, Flood and Caiger (1993), by equating juridification with actions by lawyers, prejudice the discussion of what (and who) causes juridification, whilst the account of Simitis (1987) is fundamentally normative in nature, and thus neither are considered here.

[15] Although this is not necessarily the case – state intervention could also occur through means which do not require the use of law, such as the use of economic instruments. See Clark and Wedderburn (1987: 168).

[16] In fact, Clark and Wedderburn explicitly make this point, as follows: "All juridification involves state intervention, but not all state intervention necessarily involves juridification. It is thus possible to envisage state intervention which decreases the influence of the state and increases the autonomy of particular individuals and groups."

is clear then that there is a need to choose between these alternatives before moving forward.

For Clark and Wedderburn (1987:165), juridification is best defined as:

> a process (or processes) by which the state intervenes in areas of social life (e.g. industrial relations, education, family, social welfare, commerce) in ways which limit the autonomy of individuals or groups to determine their own affairs. In the most general terms, it is about the relationship between state and society, and the balance between the relative influence on the way human beings conduct their lives.

According to this definition, the key test of whether or not juridification has occurred lies in whether there has been a reduction of autonomy within a particular social sphere. As such, Clark and Wedderburn set out a scheme whereby juridification is measured according to the effects of law on at least three levels: the level of public policy, the symbolic level and the level of day-to-day industrial relations. The first level includes government policy, the policy of political parties and pressure groups and debate in the mass media - what might also be called the general parameters of debate. It is possible however, for major change to occur on this level, and be expressed through legislation, without impacting on either of the other two levels: the symbolic level, reflecting changes in perceptions within the social field, and the level of day-to-day conduct of industrial relations, described as "probably the most crucial". With respect to this third level, Clark and Wedderburn (1987:168) write:

> In sociological terms, the question being addressed here is how far the social behaviour and values of the actors in industrial relations are shaped by legal norms, and whether it is possible to discern a secular trend toward the juridification of the rules and processes governing the employment relationship.

This then is how Clark and Wedderburn try to resolve the issue above as to the actual role of law in relationships. They set up a scheme by which it becomes possible to talk about levels of juridification. Whilst juridification is indeed initially indicated by state intervention, the question is how far this has actually led the limitation of autonomy. It is thus possible for juridification to be implied by the initial intervention, but not actually experienced by actors within a social field.

The idea that it is necessary to look beyond merely formal change to see whether change is occurring in the nature of actual relationships within a particular social sphere, is an important one, and will be revisited in the context of works which adopt the definition of juridification as legalisation. It parallels the socio-legal emphasis on 'law in action' over the focus of mainstream legal scholarship on the content and style of laws. And the result is that Clark and Wedderburn (at 173) are able to argue that the Industrial Relations Act 1971 marked "a significant increase in the extent of juridification of collective bargaining at the level of public policy, but there was no significant increase in the juridification of collective bargaining at the level of day-to-day industrial relations."[17]

In the final analysis, though, it is submitted that the approach of Clark and Wedderburn should be rejected, for three main reasons. The first relates to the guideline set out earlier. By equating juridification with state intervention, their account already prejudges discussion of where juridification comes from (i.e. government). It thus precludes the possibility of, for instance, juridification caused by the courts. The second is more heuristic in nature. Whilst a focus on autonomy may appear attractive, it is capable of obscuring more than it reveals. This is well illustrated by considering the arguments of Browne (1994) with respect to Irish employment law, that the Unfair Dismissals Act 1977 actually made it easier for employers to dismiss employees, at the same time as making relationships more formalised and legalised. On the one hand, the autonomy of individual employers and employees to negotiate specific settlements was limited by the legalisation and codification of this area. On the other hand, however, the new legislation gave employers more scope than previously to dismiss employees. In this sort of case, a focus on autonomy would seem to be inappropriate, serving only to hide changes of power structures. Finally, even if it is possible to focus on the limiting of autonomy through state intervention, there seems little distinctive about such an approach. Its main questions: 'when and why does state intervention lead to a reduction

[17] This distinction would have been useful for Cooper (1995) in focusing on "local government legal consciousness in the shadow of juridification", where juridification is seen simply as structural legal change. Her account struggles with an ambivalence as to whether growing legal consciousness is better seen as part of the definition of juridification or as a result of juridification (consider, for instance, the sentence: "yet in identifying these changes, it is important not to overestimate the impact or extent of juridification..."). By adopting Clark and Wedderburn's framework, she could have better dealt with the

of autonomy', could easily be subsumed within the vast public policy and regulation literatures dealing with the more general questions of why governments choose to make policy in particular areas, and what the conditions are for successful regulation.[18] There thus seems to be little obvious benefit in the use of a separate term, juridification, for this purpose.[19]

Juridification as legalisation

For all these reasons, it is proposed to concentrate on the second definition of juridification as legalisation. Here though, we have a different set of problems, beginning with the most immediate - what is understood by legalisation? In the first place, there is an ambiguity inherent in the word: 'legal' has not one but two core meanings highlighted by its two antonyms: illegal and non-legal. If an action changes from being illegal to legal, it was always within the realm of law, but the law has changed. Legalised in this instance thus simply means that the law now permits this activity.[20] If the same action changes from being non-legal to legal, it simply was not within the realm of law previously, but has become so - whether through government legislation, or a court case, or administrative rule-making and so on.[21] Juridification relates to this latter meaning of legalised, but even from this basic starting point lie a host of difficult issues with which few writing on juridification have attempted to deal directly.

The issues become apparent when a work on the legalisation of international relations is considered - Goldstein et al (2001). They define legalisation as a particular

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relationship between cause and effect".

[18] For useful introductions to the public policy literature, see John (1998) and Parsons (1995); for introductory texts on regulation, see Baldwin et al (1998) and Baldwin & Cave (1999). Note that this way of phrasing the question also points to the normative questions inherent in Clark and Wedderburn's framework: essentially, the third level of juridification depends on the success of government in getting past the first level. Such questions of success and failure should not be mixed with the purely empirical questions of whether and why juridification is or is not occurring.

[19] Unless the discussion is normative, in which case (as with Teubner), the word juridification is specifically being used to imply the changes in law that occur, the regulatory trilemma and so on. In this context, it makes sense to talk about the implications of growing state intervention through the concept of juridification.

[20] As in discussions about the legalisation of cannabis or prostitution.

[21] The Concise Oxford Dictionary (8th ed.) offers the following definitions: "1) of or based on law; concerned with law; falling within the province of law. 2) appointed or required by law. 3) permitted by law, lawful." Here we emphasise the difference between the first and third meanings.

form of institutionalisation characterised by three components: obligation, precision and delegation. In doing so, they emphasise that legalisation is defined in terms of key characteristics of rules and procedures, not in terms of effects. Hence, the degree to which rules are actually implemented or the degree of compliance is not included in the definition. "To do so," they argue, "would be to conflate delegation with effective action by the agent and would make it impossible to inquire whether legalisation increases rule orientation or compliance" (Goldstein et al 2001: 18). The problem is that it could equally be argued that if rules are being ignored, then it makes more sense to conclude that relations have not been legalised in the first place. Indeed, the statement seems to conflict with their own definition of legalisation: what does obligation mean if the parties do not feel obligated, and why include precision if the researcher has no interest in the degree to which actions are actually governed by rules (as opposed to individual preferences and judgements)? Finally, as the authors note themselves, the degree of obligation, precision or delegation in formal institutions can be obscured in practice by political pressure, informal norms and other factors. If this is the case though, the danger of ignoring 'effects' seems fairly obvious: an empirical study that concentrates solely on the qualities of norms will fail to capture whether relationships are legalised in any real sense. In short then, without prejudice to the context of international law where it could be that the questions raised by Goldstein et al are of special importance, it seems undesirable to extend their definition to the context of political relationships generally.

Even so, their approach raises questions. Is it right to say that a decision is always more legalised if based on a precise rule rather than a general principle or standard? Is the complexity of law a relevant factor? To what extent does the concept of legalisation rest on court cases and judicial intervention?

In this regard, it is instructive to consider the arguments of Martin Loughlin. In concentrating on the nature of the political relationship between central and local government, he makes the following distinction (Loughlin 1996: 365):

> Though the nineteenth-century reformation may be understood as a process of 'statutorification' of local government. this was not accompanied by a juridification of the central-local government relationship. That is, even though the central-local relationship was placed on a legal foundation, the

> structure of positive law did not serve to define the character of the relationship. Statutorification did not, for example, result in the courts coming to play an active role in circumscribing the boundaries to local government's authority and in determining the character of the central-local relationship... These statutes should not be read as instituting a set of legal norms governing conduct: rather they should be viewed as establishing an interlocking administrative framework through which such understandings could evolve in the course of practice.

For Loughlin then, juridification, as legalisation, necessarily means something different than simply more law or more complex law. Instead, it implies a change in the nature of political relationships from one governed by *non-legal* considerations to one governed by *legal* considerations.[22] At its most extreme, a wholly juridified relationship - an 'ideal' type - would be one in which politics was replaced, with law supplanting power structures, decisions about competing resources, public opinion, pressure group lobbying and so on in determining the nature and content of that relationship.[23]

Scott (1998: 20), in the course of listing some indicators for juridification, implicitly makes the same point:

> Though the most visible indicators of juridification are instances of litigation, whether judicial review or other forms of action, they are just the tip of the iceberg. The seepage of law into the management of relationships... is also indicated by the more hidden but growing presence of lawyers at each stage of negotiating commercial and regulatory relationships, the increasing use of more formal processes of information gathering and enforcement, and the hidden growth of technical regulatory rules expressed in a variety of legal and sub-legal instruments.

Scott's phrase, "the seepage of law into the management of relationships",[24] puts him very close to Loughlin's approach. It is a definition of juridification that is neither based on any normative criteria, nor on any assumptions as to its causes or origins, and is thus well capable of empirical investigation. It is also a phenomenon that

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[22] For the definition of law that underpins this, see the below section entitled 'Testing for juridification as legalisation: methodological issues'.

[23] Actually, even in this extreme case, far more likely is that politics is displaced, so that in a completely juridified relationship, the arena of politics simply moves elsewhere. Examples of this would include when a regulated entity in the midst of a juridified relationship with a regulator lobbies MPs for a change in the law, or tries to exert pressure through the media. To suggest that politics could disappear is moreover hugely problematic from a jurisprudential standpoint, ignoring apart from anything else the political nature of law itself, and certainly it is not being suggested that Loughlin or Scott ever make this point. Rather, I put it this way simply to emphasise the logical implications and thus the power of their definition.

[24] Harlow and Rawlings (1997: 313) define juridification very similarly as the "seeping of legal values

ought to be of immense interest to political scientists: not simply because it is a possible cause of regulatory failure, but more basically because it goes to the heart of the nature of regulation and political relationships.

The key to the definition is the emphasis on relationships being "governed" or "dominated" by law and legal considerations. Whilst every regulatory relationship is based on law to some extent, the extent to which a relationship can be described as juridified thus depends on the extent of the dominance of law in that relationship. It is perfectly possible under this definition for relationships to be characterised by partial juridification, by stronger juridification in some aspects of the relationships than in others, and by changing levels of juridification over time.

The definition of juridification used in this thesis

To sum up: juridification in this thesis is defined as *the governing of a political or regulatory relationship by law or legal considerations*. As such it implies that law will govern or dominate – that it will be explicitly in the foreground of that relationship. It is thus a variable capable of empirical investigation.

It is now possible to respond to the questions posed earlier. Firstly, the extent to which juridification may be caused by increasing number of laws, increased rule specificity or complexity, reduced administrative discretion or court cases and judicial intervention is a matter for empirical investigation - but certainly, on their own, none of these things should be equated to juridification *per se*. A political relationship in which the key issue is one of deciding the legal meaning or scope of a particular rule is no more or less legalised because that rule is general as opposed to specific. A large area of administrative discretion is still capable of leading to juridification if it is filled through reference to legal judgments.

Secondly, dealing more specifically with instances of litigation and judicial intervention, it is perhaps worth separating between two types of juridification. In Type I, the political or regulatory relationship is governed or dominated by litigation or the reliance on formal legal processes. In Type II, the relationship is governed by law in contexts outside litigation – indeed, the parties to that relationship may even be in

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and culture into regulatory relations".

complete agreement. The main point though is that juridification does not necessarily imply litigation, and throughout this thesis, this point will be emphasised by continuing to separate between the two types of juridification when looking at the case studies.[25]

Testing for juridification as legalisation: methodological issues

Having now defined juridification, it is now necessary to turn to a more practical question: what evidence should be taken to indicate that juridification is occurring?

In order to address this question, it is first necessary to consider a preliminary issue: the empirical understanding of law that underlies the definition of juridification. The section then turns to the use of indicators. Whilst a number of indicators are suggested, it is suggested that the small number of case studies taken in this thesis allows for a more in-depth analysis. The question of the usefulness or otherwise of these indicators is still important, however, and it is addressed by using the indicators to sum up the findings of the case studies. Chapter 7 will then explicitly consider how accurately the indicators capture the evidence presented in the case studies.

The empirical understanding of law underlying the definition of juridification

When it is claimed that a political or regulatory relationship is being governed by law, what is meant by law? At the very least, it seems clear from those writers who have adopted this definition of juridification that law implies *state law*. Rubin (2002) is perhaps the most explicit. He emphasises that juridification (in the context of military relations) does not always replace a law-free zone, but that "it might replace informal arrangements or even systems of social control, reglementation, normative system of folkways which possess law-like characteristics". Note that by identifying juridification with state law, Rubin gets out of having to commit to a jurisprudential definition of law: he is prepared to accept that law may be defined widely, but specifically relates

[25] Indicators for each type of juridification are set out in the next section. At the end of each empirical chapter, these indicators are then used as a way of summing up the extent of each type of juridification in the case studies. See further in the below section.

juridification to a specified type of law. In this instance, a wider definition of law would have covered up the trends that were taking place in the area of military relations. It also would have made it difficult for Rubin to separate himself from the large literature on rules and discretion.[26]

Whilst Rubin may be the most explicit, other writers similarly assume that juridification relates to state law. Loughlin (1996) defines juridification as the transformation from folk law to jurist law. Vogel (1996) defines juridification as the putting of informal norms into legal form.[27] Other writers do not refer to this issue directly, but implicitly assume that juridification as legalisation relates to state law.[28]

Whilst there seems to be a consensus that law is to be understood as state law, this still leaves open another question: how widely the scope of state law should be defined. There are two possibilities here. One possibility is to define it narrowly as specifically primary and secondary legislation and case law. This is most commonly known as *hard law* – a term originating in international law, but now widely used in the European Union context and also rapidly forming part of the currency of domestic law. The other possibility is to define state law much more widely such that it would include quasi-legislative instruments such as guidelines, circulars, directives and codes of practice, referred to here as *soft law*, again to reflect its growing international usage in legal terminology.[29]

It can be argued that the answer to this dilemma lies in the actual definition of soft law, in its original context of international law. Snyder (1993), writing in the EC context, defined soft law as "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects." He then provided some examples, as follows:

> For instance, according to Article 189 EEC, recommendations have no binding force. However, the European Court of Justice has held that national courts are bound to take them into consideration in deciding disputes, in particular where the recommendations cast light on the interpretation of national measures adopted in order to implement them or when they are

[26] For an introduction, see Hawkins (1992).
[27] In terms of Hart (1964), this could be rephrased as the use of a rule of recognition so that the norms give rise to legal obligation.
[28] See, for instance, Scott (1998) and Maher (2000).
[29] Previous terminology has included 'quasi-law', 'quasi-legislation' and 'tertiary rules' - see e.g. Ganz (1987) and Baldwin (1995).

> designed to supplement binding Community provisions. Similarly protocols annexed to the treaties by common accord of the Member States are an integral part of the treaties. In contrast, declarations annexed to the treaties are generally considered to be political statements, but they too may influence Community practice.

In the context of international law, Wellens and Borchardt (1989: 274)) argued that soft law "concerns rules of conduct that find themselves on the legally non-binding level (in the sense of enforceable and sanctionable through international responsibility) but which in accordance with the intention of its authors indeed do possess a legal scope, which has to be defined further in each case".[30]

Both these definitions distinguish soft law from hard law in terms of legal bindingness. As such, they share a certain affinity with the definition of juridification that has been adopted: after all, if a relationship is being *governed* by law, it suggests that law is seen as having a binding quality (even if this is only in the sense of providing a binding framework within which to negotiate disagreement).

If the first reason for not accepting soft law as part of the understanding of juridification relates to the nature of its definition; the second reason lies in its uncertainty of its scope in practice. The problem lies with the difficulties of accurately delineating the boundaries of soft law as a category. At one end, soft law might be difficult to separate from mere political commitments; at the other end, it can achieve a binding status such that it becomes akin to hard law. And as Wellens and Borchardt (1989: 280) have argued in the field of international law, the legal status of any particular soft law cannot be known *a priori* from its legal form. This leaves the question of its status down to how it is interpreted in practice by primary actors.

Nor does it help to rely on the courts themselves to provide an authoritative solution to this dilemma. In the English context for instance, the courts have been notably inconsistent,[31] as highlighted by Baldwin's (1995) excellent study.[32] For

[30] They provide a number of examples: for instance, resolutions adopted by international organisations, codes of conduct and joint communiqués.

[31] The question of whether to give legal effect to soft law tends to arise in one of two contexts: firstly, where it is argued that the decision-maker is unlawfully fettering his or her discretion through the use of rules; secondly, where it is argued that the affected party had legitimate expectations that a particular decision would be made on the basis of rules. In both cases, the status of the rules is important, as if they are deemed to be merely administrative guidelines without legal effect, they can neither give rise to legitimate expectations nor can they be adjudged to be fettering discretion.

[32] See also Baldwin and Houghton (1986) and Ganz (1987).

example: in Bibi,[33] Roskill LJ argued that the Immigration Rules were to be considered as delegated legislation, specifically authorised in the parent statute. However, a year later in Hosenball,[34] Lord Denning MR and Geoffrey Lane LJ disagreed, arguing that the rules were "a practical guide for immigration officers... little more than explanatory notes in the Act itself." Ultimately, Baldwin (1995: 90-1) is unable to reach any firm conclusions, as follows:

> First, [tertiary] rules may have very different roles in relation to different legal issues and they may possess force only in limited aspects. Second. it could be argued (as by Allen) that courts tend to adopt an expedient approach to quasi-legislation, deeming it to be administrative where flexibility is required and tending to favour the administration. Challenges to the legality of such rules can accordingly be deflected with some ease by attributing informal status to them and thereby removing the obligation on the rule-maker to justify his/her action by statutory authority...

In the absence of any straightforward way of discovering the bindingness of soft law, it will be assumed in this thesis that this should be left open to empirical investigation.[35] Thus only if it appears that soft law is treated as legally binding by the parties will it be assumed that this constitutes evidence of juridification. In general therefore, it is references to and reliance upon hard law that is seen as constituting the more reliable evidence. This whole issue will then be revisited in the concluding chapter (Chapter 7) where the implications of the growth or otherwise of soft law to a study of juridification will be reconsidered in light of the evidence of the case studies.

Finding evidence of juridification

This leads on to the general manner in which juridification will be inferred from the evidence presented in this thesis. Scott (1998) generally favours an indicator-based approach, and he lists four: instances of litigation, the growing presence of lawyers, the increasing use of more formal processes of information gathering and enforcement, and the hidden growth of technical regulatory rules. For the reasons just set out, the last of these will not, in itself, be taken as evidence of juridification in this thesis. On the other hand, several indicators could be added to his list: references to

[33] R v Chief Immigration Officer Heathrow Airport, ex parte Bibi [1976] 1 WLR 979
[34] R v Secretary of State of Home Affairs, ex parte Hosenball [1977] 1 WLR 766
[35] This approach seems to be backed by Wellens and Borchardt who, for instance, describe the boundary

(hard) law by regulators and regulatees, a coercive regulatory strategy[36] and the adoption of overtly legal values (such as precedent and the rules of natural justice) by regulators.[37] The following two tables lists all the factors that are considered to be evidence and counter-evidence of Type I and Type II juridification respectively. In Chapter 7, the utility of these tables will be explicitly considered.

Type I juridification – relationship governed by litigation or legal processes

EVIDENCE	COUNTER-EVIDENCE
Frequent litigation	Most regulatory contact outside the courts
Coercive, inflexible regulatory strategy	Persuasive regulatory strategy
Reliance on formal, legal processes	Reliance on informal contacts and strategies
Frequent prosecutions in response to breach of law	Few prosecutions
High presence / involvement of lawyers	Few lawyers

Type II juridification – relationship governed by law in contexts other than litigation

EVIDENCE	COUNTER-EVIDENCE
Explicit legal argument	Explicit non-legal argument
Regulatory contact seen as setting legal precedent	Contact not seen as legally significant
High presence / involvement of lawyers	Few lawyers
References to law and legal cases	No references to law and legal cases
Explicit adoption of overtly legal values	Explicit adoption of non-legal values

The tables summarise the main empirical factors that are taken in this thesis as evidence of juridification or non-juridification. However, it is not proposed to use these indicators rigidly, as might be the case in a quantitative study. Whilst an indicator-based approach would clearly be a convenient way to compare a larger number of case studies, when only two case studies are taken it is possible to look at the evidence in more detail. And upon closer inspection, any one of these indicators might prove misleading. To take one example: an increase in lawyers working in a regulatory agency

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between soft law and commitment as a "pure matter of fact".

[36] For the reason why this will be taken as prima facie evidence of juridification, see the section further on in this chapter.

[37] This last indicator would open up a minefield though if take too far – after all, what would determine whether a particular value was a legal value? Even the rules of natural justice – a primary legal value – is also an important administrative value. What might appear to be obeying rules of precedence from one angle might well be described as path dependency from another. Thus the approach taken in this thesis is just to take the adoption of legal values as evidence where it has been articulated as such.

would not be evidence of juridification if it turned out that these lawyers were chosen less for their legal knowledge than for their analytical minds,[38] that they had a peripheral role in policy-making within the agency, and that overall the agency shied away from legalism. Thus the case studies themselves are not structured around these indicators, but focus, through a close qualitative look at the evidence, on the question of whether regulatory relationships really are being governed by law and legal considerations. Tables modelled on the above are then used as a way of summing up the evidence presented in each chapter. In Chapter 7, the question of the utility of these indicators is then considered in light of how well they capture the arguments made in the course of the case studies.

Having found an empirical concept of juridification and discussed the evidence that indicates its occurrence, it should be possible to test for the extent of juridification and to answer two simple questions: *when* does juridification occur and *why* does it occur. A normal method of answering these questions would begin with the existing literature, and use it to identify case studies that would provide a good test of its central predictions. It will be seen in the next section, however, that when it comes to the juridification literature, this is far from a straightforward task.

The causes of juridification

The current literature on juridification

The following table sums up the current state of the literature on the causes of juridification (as legalisation). Whilst several writers seem to agree that aspects of globalisation and liberalisation are important, it seems clear that there is little consensus as to why juridification is occurring.

[38] As Wilks (1999) argues was the case in his study of the Monopolies and Mergers Commission.

Author	Policy area subject to juridification	Cause(s)
Stewart (1996)	Housing law	Ideological intervention attempting to strengthen civil society
Loughlin (1996)	Central-local government relationship	Ideological intervention from government, piecemeal and ill-thought out nature of imposed change.
Vogel (1996)	Financial services regulation	Pro-competitive policies, belief in proper procedure
Kagan (1997)	General	Increasing competition, intensified international competition brought about by globalisation.
Harlow and Rawlings (1997)	Telecommunications regulation	Liberalisation of market. Globalisation. Influence of international competition law.
Scott (1998)	Utilities regulation	Processes of liberalisation
Maher (2000)	Competition law	Incorporation of EC law
Rubin (2002)	Military law	Influence of European Convention of Human Rights and EC Directives.

Before discussing where, in general terms, the juridification literature leads a researcher looking to explain the presence or absence of juridification, it is necessary to look at some of the above explanations in a little more detail. In this section, we focus on four explanations: liberalisation, globalisation, the impact on European law and the rationalisation of politics.

a) Juridification caused by liberalisation

There are a number of writers who discuss the link between the liberalisation of markets and juridification, including Vogel (1996), Kagan (1997), Harlow and Rawlings (1997) and Scott (1998).

Stephen Vogel describes the British pattern of regulatory reform as "pro-competitive disengagement", because it involves both the active promotion of competition and a further detachment of government from industry. One of the main features of this pattern of reform is that the government "codifies and juridifies regulation", as he writes (at 132-3):[39]

> David Vogel and others have characterised the British regulatory style as particularly informal and consensual, but regulatory reform in the 1980s has moved it distinctly toward a more "U.S.-style" approach based on neutral criteria, fixed procedures, formal debate and openness to appeal... In part this

[39] Later in this chapter, it will be seen how the central research question that this thesis seeks to answer relates precisely to the first part of this extract.

> trend follows naturally from the government's pro-competitive policy, which requires stronger and more sophisticated regulation to enforce competition. In addition, however, the belief in proper procedure and fair competition have made the United Kingdom particularly susceptible to the American disease: more lawyers and ever more complex and detailed rules...

More generally, he argues that juridical reregulation is used to cope with the growing complexity of markets, with regulations typically made more codified and legalistic as the number and variety of market players increases.[40] Kagan (1997) makes a similar link, quoting from Vogel in the process. But Scott (1998: 20), whilst also connecting the two, puts forward a different argument:

> The main factor in increasing the importance of law in the utilities sectors has been the processes of liberalisation which have been developed some years after privatisation in most of the utilities sectors. Liberalisation has had the effect of multiplying the number of players participating in each sector (both regulatory and commercial) and tended to threaten the consensual, bureaucratic models of provision and regulation which carried over from the era of public ownership. Increasingly these more numerous players are seeking to test their rights and obligations against the legal frameworks of each sector.

Thus, the authors emphasise different mechanisms by which juridification comes about. For Vogel and Kagan, juridification is government-led, via a more legalistic style of regulation. For Scott, a greater stress is placed on legal challenges by market players. Harlow and Rawlings (1997: 361), in the context of their case study of UK telecommunications regulation, accept both views, as follows:

> The recourse to such open, inclusive procedures can be seen to illustrate the process of juridification in the context of liberalisation. It is only natural that litigation should consequently grow, and recourse to lawyers increase, as interests in the industry diverge and the scope for consensus in the regulatory regime diminishes.

Finally, whilst all these writers suggest that liberalisation is a cause of juridification, it is worth noting that only Scott (1998: 56-7) tries to come up with a more general hypothesis of juridification. His suggested formula is that the more a market is liberalised, the more juridification there will be in the regulation of that market. He finds initial support for this hypothesis by noting that "the greatest incidence

[40] Juridical reregulation is defined as the putting of informal rules into legal form, putting tacit rules into written form, and the formalising of procedures.

of litigation has been in the telecommunications sector, where liberalisation is most advanced, and that there has been virtually no litigation in water, the least liberalised sector".

b) Juridification caused by globalisation

Another major explanation given for juridification is the phenomenon of globalisation. Such a claim is made by, amongst others, Kagan (1997) and Harlow and Rawlings (1997). In addition, the claims of other writers that juridification is caused by the influx of supra-national norms is linked to processes of globalisation, although they are treated separately.

Kagan argues that the key feature of globalisation is intensified international economic competition. This has led to falling trade barriers, improvements in international cargo transportation, increased mobility of capital, and sharper world-wide competition - all of which have tended to erode long-standing deterrents to litigation. In particular, Kagan draws attention to Donald Black's theorem that resort to law increases in accordance with the social distance between parties. Globalisation means not only that businesses are often dealing with strangers, but also that greater possibilities exist for alternative business partners. One further mechanism is mentioned: international competition between law firms generates pressures to be aggressive litigators, perhaps overcoming a predominant national legal culture of compromise. This argument is made especially in the field of international arbitration.[41]

In their case study of telecommunications regulation within the UK, meanwhile, Harlow and Rawlings (1997: 362) include elements of these arguments and make some further connections, as can be seen in the following extract:

> Globalisation of an industry necessarily affects the scope, direction and style of national regulation. There will surely be further pressures here for deregulation. OFTEL has in the European context already had occasion to review national policy on matters such as interconnection in the light of new supra-national requirements... General competition law will play a central role, more especially at the European level, where the institutional arrangements and jurisprudence are highly developed. Later, we examine steps recently taken to revamp OFTEL as a competition authority applying broadly-based EC norms. Globalisation will also reinforce the trend away

[41] Galanter (1992) is another who notes the spread of US litigation practices through multi-national companies, and see further Flood & Caiger (1993).

> from informal regulatory relationships characterised by a high degree of mutuality or trust. Reference need only be made to market entrants like AT&T, well-versed in the legal strategies typical of American regulation. Globalisation means juridification: in the shape of the corporate lawyer.

Thus overall, it is argued that globalisation has had a profound effect on regulatory relations, changing the style of regulation and making litigation more likely.

c) Juridification caused by the influx of EC law

An argument that perhaps applies more specifically to the UK context is one that focuses on the impact of EC law. This connection is made, in particular, by two writers: Maher (2000) and Rubin (2002).

In the field of competition policy, Maher argues that juridification reflected the dominance of EC law.[42] A key section of the Competition Act 1998 explicitly requires regulatory actors to act according to the requirements of EC competition law. Before this Act was passed, the conduct of competition regulation was largely administrative and discretionary. Since the Act, competition regulation has become juridified, with frequent reference to legal rules and judgments.

In the field of military law, Rubin points to the combined effect of the European Convention of Human Rights and EC directives, with judgments in UK courts revealing domestic inconsistencies with each. Previously, the structure of military law had been non-juridified, resting on informal arrangements or systems of social control and reglementation. The effect of EC law, however, was to open up these areas to civil law for the first time.

Taking both together, it emerges that conflicts of norms can be an important source of juridification in two ways: they provide increased opportunities for litigation, and give rise to pressures for legislative and administrative change. In the case of the latter, juridification is implied not directly, but indirectly. After all, it has already been argued that more legislation does not constitute juridification in itself, as the key is how relationships are affected by that legislation. It is implied indirectly though because if

[42] Maher's arguments are well-supported by policy arguments prior to the Act calling for a convergence between English law (which relied on largely discretionary and non-legalistic enforcement) and European law (based on a system of per se prohibition rules). See e.g. Wilks (1994), (1999), Whish (1993) and the relevant Green and White Papers on competition policy.

distinctive national approaches towards policymaking and implementation are being replaced, and if the country being examined is the UK (which, as will be seen, is widely claimed to have a distinctively informal and consensual style of regulation), then it seems likely that any such replacement would formalise and legalise regulatory relationships.[43]

d) The rationalisation of politics

The argument that juridification is caused by the 'rationalisation' of politics is made, in particular, by Martin Loughlin (1996), although his claims are echoed, in slightly different terms, by Stewart (1996).

The concept of 'rationalisation' is borrowed by Loughlin from Oakeshott and described in detail in his concluding chapter. Essentially, it refers to the tendency in modern politics for traditions of behaviour to give way to political programmes.[44] Loughlin describes this as an "inexorable trend" that, in the context of central-local government relations, has led directly to juridification, as follows (at 380):

> From the late 1970s then, the apparatus of government has been identified as being part of the problem of devising effective government policies and of maintaining innovation and responsiveness in government. The policies pursued since then have generally been founded on a set of individualistic values and, being based on the single-minding pursuit of efficiency, rooted in a means-end rationality. In short, the programme developed by the Government has been the epitome of Rationalist politics... [T]he implementation of this ideological programme has imposed severe strains on the traditional government arrangements based on the primacy of practical rather than scientific knowledge. As these self-regulatory frameworks have been undermined in the name of efficiency or consumer rights, the legal structures of government have increasingly been employed as normative frameworks. In Britain, rather than being identified as part of the problem of government effectiveness, the phenomenon of juridification has become a feature of the proposed solution.

In the course of this change, legislation has changed from being largely facilitative to instrumental in nature (at p381), there has been a tendency to legislate "on the hoof" as the centre has tried to force through ideological change (p388), and the ill-

[43] In Chapter 6, dealing with impact of the Competition Act 1998 which effectively incorporated EC competition jurisprudence into UK law, the nature of this transformation is shown clearly.

[44] As such, it reflects a particular epistemological premise: that knowledge is best based on reason rather than experience – hence the term "rationalisation".

thought-out and piecemeal nature of the imposed change has created a normative gap which has encouraged subsequent legal challenges.

The theme of ideological intervention from government imposed onto a social sphere has also appeared in other works. Stewart (1996) argues that juridification of rent relations in the UK resulted from the attempt by government to strengthen civil society. This ideological intervention also implied, however, a greater regulatory invasion of civil society, and thus the increasing spread of law and legal constructions into social life. Moreover, the claim that juridification results from imposed ideological intervention might be another way of interpreting the link between liberalisation and juridification: after all, the break-up and liberalisation of utility markets was also a profoundly ideological act – the same kind of Rationalist politics to which Loughlin refers.

Testing the claims of the juridification literature

In this brief survey, at least four different causes of juridification have been identified. In fact though, the number of potential causes of juridification could be seen as far greater than this. For Loughlin, juridification is caused by the rationalisation of politics. However, its more immediate cause was piecemeal change and a resulting normative gap. Kagan points to globalisation as a cause of juridification. But it could equally be said that he sees greater relational distances as a cause of juridification.

Moreover, when considering what causes juridification, it is not easy to compare different works – or even different aspects of a single work - directly. Frequently they operate on different levels of abstraction. Some writers are simply trying to explain the juridification of one particular policy area, and advance localised causes. Other writers look to explain the general phenomenon of juridification in terms of very broad trends. In some works, it is argued that juridification came about because of a specific mix of circumstances; in others, juridification emerges as an inexorable trend. Even if we try to focus on the more specific causal mechanisms by which juridification is supposed to come about, it transpires that juridification is posited to come from just about every source imaginable: from the courts, to regulated companies, to legalistic regulation by government, to international sources of law.

These difficulties pose a significant problem for researchers looking to test for the causes of juridification. On the one hand, some of the explanations seem too specific. The hypothesis, for instance, that juridification is linked to the degree of liberalisation in a market seems to have little to say about military relations or central-local government relations. On the other hand, other explanations seem too general to use. Indeed, taken to their logical conclusions, they imply that juridification is not only a general trend but an inevitable trend. Loughlin states that the rationalisation of politics is an inexorable trend and that juridification is one of its results. If this is true though, how can we explain variations in juridification? Similarly, given that globalisation is a grand historical trend, how could we explain the absence of juridification in a particular case?

In light of the many different possible causes of juridification as they emerge from the current literature, and the desire in this thesis to treat juridification as a variable rather than as a constant, it is proposed to concentrate on examining the causes of juridification through an *inductive* approach to the case studies. A hypothesis of when and why juridification occurs can then be developed in Chapter 7.

This leaves one final question: the question of how the case studies are going to be chosen. It seems clear that there is little scope to select case studies on the basis of a current empirical theory of juridification. Instead, it will be proposed that the most fruitful avenue of enquiry will lie in a separate but strongly related literature: the literature on regulatory strategies. In order to see why this is the case, we turn now to review the relevant features of this literature.

The regulatory strategy literature

Juridification and regulation

Before looking at the claims of the regulatory strategy literature, it is useful first to recall exactly what would be implied, in the area of regulatory relationships, by a claim that that relationship is characterised by juridification. Firstly, it implies that the style of regulation will change. From pursuing largely informal and consensual

regulatory styles, characterised by negotiation and bargaining and two-way education, regulatory agencies can be expected to move towards a focus on rules and process, a stricter, less flexible interpretation of these rules and processes, and a heavier use of prosecution when their regulatees are found to be in breach of those rules.

Then, it would be expected that regulatees, on their part, would respond to such a regulatory style either through legal challenges (Type I juridification) or else through another law-based response – whatever this may be (Type II juridification). Either way, this claim of the inevitability of juridification means that there will be a joint understanding that it is a legal matter at stake which falls to be resolved through legal means, and thus that law and legal considerations are governing that relationship.

It is significant then that the literature on regulatory strategies makes almost the exact opposite claim.[45] Its main predictions are that styles of regulation are most likely to be informal and persuasive in nature,[46] that there are important reasons explaining why formalistic and legalistic regulatory strategies are relatively uncommon, and that regulatees, on their part, tend either to co-operate with regulators, or else at least to see regulation as a kind of 'game' characterised more by bargaining than by legal obligation.[47]

In order to show that this is the case, it should be noted firstly that scholars of the enforcement strategies of regulators have frequently sought to distinguish between two ideal types of strategies: the persuasive and the coercive.[48] The persuasive strategy is informal, with a large reliance on the giving of information and advice. In place of rules, the regulator focuses on general principles; rather than assuming that the regulatee is trying to deceive, the regulator begins with a degree of trust. The use of incentives, self-regulation and a proactive focus are thus all further characteristics of this strategy. The coercive strategy is far more formal, on the other hand, with a stricter emphasis on enforcement, a general rule-focus, the absence of any inclination to trust regulatees, and

[45] For an introduction to this literature, see Chapter 6 of Baldwin and Cave (1999).
[46] This includes the enforcement pyramid model introduced by Ayres and Braithwaite (1992).
[47] See the special 1993 edition of Law and Policy 15(3), in which a series of articles use this metaphor of regulation as a game, and especially the article by Hawkins and Hutter.
[48] See e.g. Reiss (1984), Shover et al (1986), Braithwaite (1985), Grabosky and Braithwaite (1986), Hutter (1988). The two types of strategy are given varying names: the persuasive strategy is also called the 'compliance' strategy, the 'negotiation' strategy or sometimes the 'informal' strategy; whilst the coercive strategy is variably known as the 'deterrence', 'legalistic' or 'enforcement' strategy.

the use of command regulation that is reactive in nature, with penalties for unlawful behaviour (used both for specific and general deterrence purposes). Shover et al (1986: 10) put this distinction in terms which provides a direct link to the juridification literature:

> In its ideal-typical form, the enforced compliance style of regulation encompasses an overriding drive towards the rationalisation of all aspects of the regulatory process. Its components include the reliance on formal, precise, and specific rules: the literal interpretation of rules: the reliance on the advice of legal technicians: the quest for uniformity: and the distrust of and an adversarial orientation towards the regulated. The negotiated compliance style of regulation reflects a dominant orientation toward obtaining compliance with the spirit of the law through the use of general, flexible guidelines the discretionary interpretation of rules: bargaining between agency and regulated industry conducted by technical experts: allowance for situational factors in rule application: and an accommodative stance toward the regulated.

There thus seems to be a clear affinity between a regulator's choice of regulatory strategy and the subsequent presence or absence of juridification in the relationships with its regulatees. Put simply, the reliance on law and legal tools inherent in the deterrence strategy means that it is likely to both reflect and give rise to juridification – the dominance of law and legal considerations. On the other hand, if the persuasive strategy is used - with its reliance on bargaining and informal contacts - it is far less likely that juridification will be found to characterise that regulatory relationship.

It is this inherent link between regulatory strategy and juridification that explains why regulatory strategy was seen above as an indicator of juridification. It is also the reason why it is feasible for case studies to be selected according to criteria found within the regulatory strategy literature. But it is possible to go further than this. A final critique of the juridification literature is that it has failed to understand the tensions between its claims and those of the literature on regulatory strategy. Choosing case studies which explore these tensions is thus particularly desirable. We turn now to review the main claims of the regulatory strategy literature in order to show why this is the case.

The central predictions of the regulatory strategy literature

Despite the fact that researchers have identified two ideal types of enforcement strategy, and noted a number of variations in between, it soon becomes apparent that a more general trend has been observed. Indeed, researchers have become so confident of this trend that it is fair to describe it as the central claim of the regulatory strategy literature.

The basis of this claim is that whilst regulatory strategy can vary from agency to agency, there are very strong patterns within countries. In particular, whereas the style of regulation in the U.S. is close to a deterrence style, many countries outside the U.S. rely predominately on the persuasive strategy.

Many researchers have supported this conclusion. Bardach and Kagan (1982) argued that the dominant regulatory style in the U.S. is legalistic and 'unreasonable'. Vogel (1986) also maintained that the U.S. regulatory style is distinctively legalistic when viewed in a comparative sense. Braithwaite and Braithwaite (1995), comparing Australian nursing home inspectors to those in the US, found that those in the US were far more likely to have a rule-focus, whilst the Australian inspectorate relied more on general principles and standards. And Kagan (1997 and 2000) attached the concept of adversarial legalism to the U.S.[49]

Outside the U.S., there is quite substantial agreement that whilst regulators tend to use a combination of persuasive and coercive strategies, the vast majority of action occurs at the persuasive end of the spectrum. Dickens (1970) reached this conclusion with respect to local authorities, Cranston (1979) in relation to local consumer protection bodies, Hawkins (1983) referring to health and safety inspectors, and Hutter (1988) in the context of environmental regulation. It is worth noting also Grabosky and Braithwaite's comparative study of 96 Australian regulatory agencies, 78 of which said that education and persuasion were more important functions for them than law enforcement. "In short," they argue, "the policy of most Australian regulatory agencies is all about getting companies to 'do the right thing' by as informal and non-

[49] In light of these claims, it seems strange that Kagan (1994) suggests in his review article that regulatory strategy is difficult to predict and depends on a complex combination of variables. Whilst researchers have pointed to a number of variables that affect regulatory strategy (and these are taken up in this thesis in Chapter 2), they have also noted strong country-wide trends that make more general prediction possible.

confrontationalist a means as possible" (Grabosky and Braithwaite 1986: 190). And none of these conclusions are incompatible with Ayres and Braithwaite's well-known normative model of enforcement pyramids, by which regulatory action becomes increasingly severe when previously less severe measures are ignored by regulatees. The following example of an enforcement pyramid provides a good flavour of the nature of their argument (1992: 35-6):[50]

> Most regulatory action occurs at the base of the pyramid where attempts are initially made to coax compliance by persuasion. The next phase of enforcement escalation is a warning letter; if this fails to secure compliance, imposition of civil monetary penalties: if this fails, criminal prosecution; if this fails, plant shutdown or temporary suspension of a licence to operate; if this fails, permanent revocation of licence. This particular kind of enforcement pyramid might be applicable to occupational health and safety, environment or nursing home regulation. but inapplicable to banking or affirmative action regulation... Different types of sanctioning are appropriate to different regulatory arenas.

It is easy to add to the list of researchers reaching the same conclusion. Hawkins (1984) perhaps made the point most succinctly by entitling one of the chapters of his book, "Law as last resort". Meanwhile, Veljanovski (1984) argued that "it is a popular misconception that regulatory enforcement pursues such a penalty approach", citing economic reasons why a flexible enforcement strategy is to be expected. By 1997, Rock was claiming that the persuasive strategy was so widespread that "it probably deserves to be taken as the major pattern or archetype of formal social control in western society" (cited in Hutter 1997: 242). And Clarke (2000), in his survey, summarises as follows:

> Although it has been subject to extensive debate, the weight of the evidence confirms Reiss' (1984) view that the persuasive is likely to prevail over the coercive...

[50] Ayres and Braithwaite (1992: 38) also argue that "there is a more fundamental enforcement pyramid pitched at the entire industry. This is the pyramid of regulatory strategies". An example of such a pyramid begins with self-regulation, before moving up through enforced self-regulation to command regulation with discretionary punishment, before finally ending with the least common and most severe form of regulation – command regulation with non-discretionary punishment. With all these pyramids, the point emphasised here is how the bulk of regulatory action – represented by the bottom (wider section) of the pyramid – is informal.

The point can be made most strongly though by focusing on the country from which this thesis takes its case studies - the UK. In particular, consider the study of David Vogel, now some 15 years old. He argued that although the dominant style of regulation in the U.S. is generally considered to be distinctively legalistic and formal, researchers have often overlooked the fact that the dominant style of regulation in the UK is almost no less distinctive, as follows (Vogel 1986: 220):

> In sum, each nation does exhibit a distinctive regulatory style, one that transcends any given policy area. The British government regulates the impact of business decisions on the environment in much the same way it attempts to control a variety of dimensions of corporate conduct. Regulation of industry tends to be more informal in Britain than in the United States, more flexible, and more private. Regulatory officials are able to exercise considerable discretion and tend to make policy on a case-by-case basis rather than through the application of general rules and standards. Little use is made of prosecution and much reliance is placed on securing compliance through informal mechanisms of social control, including in many instances, self-regulation. Regulatory officials tend to have close working relationships with the members of the industries whose conduct they are responsible for supervising: the latter are closely consulted before rules are issued and regulations enforced. In America, on the other hand, regulation tends to be highly formalised: it proceeds on the basis of the application of broad rules that are made and enforced in accordance with strictly defined procedures. The entire regulatory process is subject to close scrutiny by the courts, the legislature. and the public as a whole. Fines are levied for violations relatively frequently and little reliance is placed on industry self-regulation.

In this passage, the tensions between the juridification and regulatory strategy literatures become clearly apparent. On the one hand, the central prediction of the regulatory strategy literature is that law is less important in the conduct of regulatory relationships than the juridification literature might suggest. On the other hand, if UK regulation really is experiencing a growth in juridification, this would pose a direct challenge to the previous consensus as to the nature of regulatory relationships in the UK. And more basically, it would pose a threat to the durability of the persuasive strategy itself. This is precisely why it is potentially so valuable to take case studies that can explore these issues further. We move now to the final section of this chapter, which sets out how these case studies are selected and how the thesis is structured.

Structure of the thesis

Research questions, methodology and case studies

The analysis in this chapter has suggested that whilst a definition of juridification can be found that is amenable to empirical study, there is as yet no empirical theory of juridification and its causes that is capable of being tested. It has also been noted that the growth of juridification has implications for the current literature on regulatory strategy that ought to be explored further, even though it is not clear from the literature just how widespread juridification is as a trend.

In response to these points, this thesis seeks to address the following central questions:

- How prevalent is juridification?
- What are the causes of juridification or its absence?
- What does a growth of juridification imply for the regulatory strategy literature?

The approach taken to answer these questions is to use the comparative case study method, with the experiences of two regulatory agencies examined in depth. In light of the above argument that it is not presently feasible to extract an empirical theory of juridification (as legalisation) from the literature, these case studies cannot be chosen according to a theory of juridification. Instead, they are chosen in relation to theories of regulatory strategy, so that their findings can be as relevant as possible to a consideration of the relationship between juridification and regulatory strategy. The question of what causes juridification will then be answered, as far as can be possible, by using an inductive approach to these case studies.

The regulatory agencies chosen are the Office of Fair Trading (OFT) and the Commission for Racial Equality (CRE). The OFT was set up under the Fair Trading Act 1973, and given regulatory duties and powers in two major areas: competition and consumer protection. The CRE was established shortly afterwards through the Race Relations Act 1976, with primary duties to eliminate racial discrimination and to promote racial equality. Both the OFT and the CRE are under-researched: there is no book-length study of the former at all and only one twelve-year-old partial study of the

latter.[51]

The two agencies are chosen according to a 'most different' design. It was argued earlier that juridification has a strong affinity with characteristics of the 'deterrence' strategy of regulation and thus that the claims made in the juridification literature have implications for the literature on regulatory strategy. As such, it is especially useful to take two case studies which differ along lines considered significant under the regulatory strategy literature. The reasons why the OFT and CRE are ideal for this purpose are set out in Chapter 2.

Chapter structure of the thesis

It remains to set out how each chapter of this thesis relates to the central research questions.

In the next chapter, the basis of comparison between the two case studies is fully set out. The chapter also serves to introduce the two regulatory agencies: their powers, duties, procedures and accountability structures at the point at which they were first established.

This is followed in the next four chapters by the main body of the thesis. Chapter 3 deals with the relationship between the Commission for Racial Equality and its regulatees from its establishment in 1977 to 2002, and is thus able to briefly consider also the impact of the Race Relations (Amendment) Act 2000. This is then followed by three chapters on the Office of Fair Trading: Chapter 4 dealing with its consumer protection side, Chapter 5 with its competition side up to the Competition Act 1998, and Chapter 6 with the competition side since the Act. The amount of space devoted to the OFT reflects the size of its remit which has steadily grown since its establishment in 1973, and the specific chapter on the impact of the Competition Act 1998 reflects the total change in the competition regulatory regime established by that Act. All of these chapters have a central question in common: the extent to which the relationship between the particular regulatory agency and its regulatees became juridified over a period of time.

[51] McCrudden et al (1991) which deals just with the work of the CRE's Employment Division.

Finally, in Chapter 7, the research questions will be revisited in light of the findings of the case studies. In the first section, the extent of juridification in the case studies will be discussed, with a particular look at the utility of the indicators in determining this question. This will be followed in the second section by looking at what caused juridification (or the lack of juridification) in the case studies, before finally the chapter concludes by considering the implications of the findings for the regulatory strategy literature.

CHAPTER 2

Mostly different: a comparison of the Commission for Racial Equality and the Office of Fair Trading

Introduction

In the last chapter, the basic framework for the selection of case studies was set out. It rested on two main arguments. Firstly, it was argued that it is not presently feasible to extract an empirical theory of juridification (using the definition that is adopted) from the juridification literature. The result of this is that the case studies cannot be selected according to a theory of juridification. Secondly, it was argued that the definition of juridification has a strong affinity with characteristics of the 'deterrence' strategy of regulation. This is important for two reasons: firstly, it implies that it is *feasible* to choose case studies on the grounds of predicted regulatory strategies whilst still using them to inductively derive causes of juridification; secondly, it implies that it is in any case *desirable* to choose the case studies on this basis, as it allows for a consideration of how the claims of the juridification literature might impact on the literature dealing with regulatory strategy (and vice versa).

Having established that the cases are to be chosen on the basis of theories of regulatory strategy, the main task of this chapter is to describe how this is done. The research design adopted is a 'most different' design: in other words, two case studies are chosen which are fundamentally different according to theories of regulatory strategies. We would thus expect variations in regulatory strategy between the case studies and, by extension, variations in the levels of juridification. One of the key functions of Chapter 7 will then be to assess how closely the actual findings reflected this expected pattern.

This chapter thus sets out how the two cases of the Commission for Racial Equality (CRE) and Office of Fair Trading (OFT) are 'most different' according to the claims of the regulatory strategy literature. It will be argued that, at the time at which they were established, the CRE and OFT differed in terms of many of the variables considered

important in the regulatory strategy literature. The Commission was given strong enforcement powers, with few controls; would face pressures from strong pro-regulation groups with which the staff in the Commission had close links; and had a task environment which was partially complaints-based, with a strong moral dimension. The Office on the other hand, was given relatively weak enforcement powers with strong political controls; was made up of civil service staff; faced a pro-business lobby that was substantially more powerful than the pro-consumer lobby; and was largely engaged in economic regulation without a significant moral dimension to it. As such, the literature would have predicted differing regulatory strategies for these agencies. They thus represent excellent case studies for the purposes mentioned above.

The chapter is divided into four main sections. In the first section, the two agencies are introduced, their main duties set out, and the background to their formation discussed. In the second and third sections, the main features of the CRE and the OFT respectively are described more fully, looking especially at their powers and relationships (both political and regulatory). In the course of examining these powers, there is a particular focus on the discretion left to each agency by the respective enabling statutes. This is an important step in subsequently determining the *source* of any juridification. If an enabling statute makes it mandatory for a regulatory agency to prosecute an offender in the courts every time an offence is committed, then that statute is the likely source of any subsequent juridification in the relationship between that agency and its regulatees. If on the other hand, the statute grants wide discretion to the regulatory agency, then the source of any subsequent juridification is likely to lie elsewhere. It is also important as it confirms that in neither case is the position of law predetermined – thus the possibility of either juridification or the absence of juridification is left open. In the final section, the main features of the agencies are related directly to the regulatory strategy literature, and it is shown that the two agencies differ in ways considered significant by that literature.

Background to the two agencies

- The Commission for Racial Equality

The UK has had a legal framework for dealing with racial discrimination since the first Race Relations Act in 1965. The first Act made incitement to racial hatred a criminal offence and established an administrative agency - the Race Relations Board - to investigate specified types of racial discrimination and secure compliance. But before the Board could refer the case to the Attorney-General who could then seek an injunction in court, there had to have been attempts to settle complaints with conciliation by local conciliation committees. McCrudden et al (1991: 9) noted the following about the Act:

> Neither the Board nor the local committees, however, had the power to summon witnesses, subpoena documents, require answers to questions or issue orders. Rather than being adopted as a more effective method of enforcement, conciliation was included, according to a government spokesman, "to avoid bringing the flavour of criminality into the delicate question of race relations". It was a continuing theme throughout the debate that the Government hoped that court litigation would not arise under the Act and actively wanted to prevent it.

This Act was followed three years later in 1968 by a second Race Relations Act, extending the scope of the anti-discrimination provisions to the fields of housing and employment. For all areas apart from employment, the Act retained the two-tier enforcement structure by which the Board had to try to resolve disputes before seeking court action. The Board was given an additional power to initiate investigations without a complaint where it was suspected that discrimination had occurred. In the area of employment, the Act required that industry dispute procedures should be used first, so that any complaints of discrimination in employment would be dealt with initially by the Department of Employment. Finally, the Act also established the Community Relations Commission with the main duty of promoting "harmonious community relations".[1]

There were several problems with the workings of the 1968 Act: it only covered direct discrimination, its enforcement was almost exclusively reliant on complaints, the Board's powers to obtain information were extremely limited, and the need for conciliation made proceedings cumbersome. All these and other problems led in 1976 to the passage of

[1] For a more detailed account, see McCrudden et al (1991: 8-14).

a third Race Relations Act in the space of eleven years, and the creation of a new body: the Commission for Racial Equality (CRE). Section 43(1) of the Act set out its main duties, as follows:

> a) to work towards the elimination of discrimination;
> b) to promote equality of opportunity, and good relations, between persons of different racial groups generally

Thus its primary duties[2] reflected those of the two bodies which the CRE replaced: the Race Relations Board and the Community Relations Commission. This reinforces the impression that these duties actually have quite different connotations. The elimination of racial discrimination is essentially backward-looking, dealing with an event that has already occurred. Promoting racial equality is forward-looking, however, and potentially more far-reaching. It includes, for instance, the possibility of positive or reverse discrimination.[3] McCrudden et al (1991) suggest that there is a further distinction between them: the former clause suggests an individualistic focus (the "individual justice model"), whilst the latter suggests a group focus (the "group justice model"). Thus they maintain that the Act incorporates two fundamentally different philosophies of dealing with racial disadvantage.[4] It will be argued shortly that this ambivalence was likely to have the effect of increasing the Commission's discretion to determine its style of enforcement.

The Race Relations Act 1976 fundamentally changed the structure of law enforcement in the field of race relations. For the first time, individuals subject to racial discrimination were able to bring their own cases to the relevant court or tribunal, without the need for prior conciliation. The Commission for Racial Equality was empowered to assist such individuals, but most of its other powers were not dependent on complaints. Its powers to initiate formal investigations, to launch codes of practice and, in some cases, to bring prosecutions could all be utilised to fulfil its primary duties irrespective of specific

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[2] Section 43 also required the Commission to keep under review the working of the Act and to draw up and submit to the Secretary of State proposals for amending it.

[3] Defined as providing advantages to minority groups so as to offset institutional barriers.

[4] This analysis is extended to other aspects of the Act. For instance, the individualistic nature of industrial tribunals, the concentration on the eradication of discrimination as the prime target of legal enforcement and the absence of group remedies or actions in the tribunals are all seen as suggesting individual justice strategies of dealing with discrimination. Suggestive of the group justice model is the prohibition of indirect discrimination, the powers of the CRE to launch strategic formal investigations, the recognition of the existence of social groups and the limited positive action permitted (McCrudden et al, 1991: 32).

complaints received. Thus the CRE can be seen as the first really strategic law enforcement agency set up in the UK in the field of race relations.

- The Office of Fair Trading

The Office of Fair Trading was created in the Fair Trading Act 1973, with duties in the areas of competition and consumer protection policy. Both areas of policy had already been subject to a lengthy legislative history. In the area of competition policy, the Fair Trading Act was the sixth major piece of legislation since the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948. In the area of consumer protection, enforcement had previously been carried out exclusively at local level by Trading Standards Departments under legislation largely relating to weights and measures offences, false descriptions and food safety standards.[5]

The joining together of the fields of competition and consumer protection was officially attributed to their functional similarity – the improvement of the position of consumers within the marketplace. However, Ramsay (1987: 179) suggests that political factors were of more significance:

> There were no plans for consumer legislation in the Conservative manifesto of 1970. Indeed, one of the first actions of the new Government was the abolition of the Consumer Council. The public resentment over this surprised the Government and sensitised it to the electoral advantages of pro-consumer legislation. The Government was faced therefore with the necessity of developing a consumer policy.

In this context, the newly created Central Policy Review Staff, drawing on international examples, persuaded the relevant political players to attach consumer measures to the competition legislation that had already been time-tabled. Crucially this coincided with the creation of a new Cabinet post of Minister for Consumer Affairs, filled by Sir Geoffrey Howe who had several ideas for consumer-law reform. Thus the combining of competition and consumer protection measures within the Fair Trading Act 1973 can be seen almost as a historical accident. Wilks (1999: 173) comes to a similar conclusion:

[5] For instance, the Trade Descriptions Act 1968, the Weights and Measures Act 1963 and the Food and Drugs Act 1955. See generally Cranston (1979).

> The Fair Trading Act could be portrayed as a gradual and almost inevitable policy development. Nothing could be further from the truth. It was the third of three radically different attempts at legislation and its genesis was marked by virtually every variety of political uncertainty, including elections, ministerial reshuffles, inter-departmental in-fighting, lobbying, expediency and accident. It constitutes a classic study in pragmatic policy making, of 'muddling through' in a process dominated and energised by officials in the DTI who responded, more or less ably, and more or less willingly, to the political pressures placed upon them.

Section 2 of the Fair Trading Act sets out the basic duties of the Director General of Fair Trading.[6] In both the fields of consumer protection and competition, he is essentially given a "watchdog" role, as follows:

> (1) Without prejudice to any other functions assigned or transferred to him by or under this Act, it shall be the duty of the Director, so far as appears to him to be practicable from time to time, -
>
> (a) to keep under review the carrying on of commercial activities in the United Kingdom which relate to goods supplied to consumers in the United Kingdom or produced with a view to their being so supplied, or which relate to services supplied for consumers in the United Kingdom, and to collect information with respect to such activities, and the persons by whom they are carried on, with a view to his becoming aware of, and ascertaining the circumstances relating to, practices which may adversely affect the economic interests of consumers in the United Kingdom...

Section 2(2) of the Act gives the Director General the same duty in the area of monopolies and uncompetitive practices, and section 2(3) adds the duty to inform the Secretary of State as to developments in either field and to recommend appropriate reforms.

In addition to these general monitoring duties, the Director General was given powers in a number of specific areas relating to competition and consumer protection policy. In the field of consumer protection, he was given a lawmaking power under Part II of the Act by which consumer trade practices that were found to be damaging to consumers could be made into criminal offences. He was also given certain enforcement powers against rogue traders under Part III of the Act, and the duty to encourage trade associations to adopt codes of practice that would benefit consumers. In the field of competition policy, the Director General took over the duties of the Registrar of Restrictive Trading

[6] Under statute (although the position has now been changed by the Enterprise Act 2002), officially the Office of Fair Trading does not exist. The legal creation was that of the Director General of Fair Trading, and all the powers and duties relating to the Office are legally vested in him. The legal source of the OFT is Schedule 1, section 7 of the Fair Trading Act stating that "anything authorised or required by or under this Act or any

Agreements,[7] and some of the powers of the Board of Trade to refer monopoly or suspected monopoly situations to the Monopolies and Mergers Commission. He was also obligated to advise the Secretary of State as to whether a reference should be made in the case of an actual or prospective merger.

At the time at which it was set up, it would have been misleading to see the Office primarily as a law enforcement agency. Ramsay (1989: 261) makes the following insightful observation about the Office's array of powers:

> The catalogue of the OFT's powers indicates that, with the exception of the powers conferred under Part III of the Fair Trading Act...[8] it has no general enforcement powers. Thus, for example, it has no power to make an immediate response to actual or expected violations of consumer law through the use of interim injunctions, the freezing of assets and so on. This limitation reflected the judgment that initial enforcement ought to lie with the local authorities, the OFT acting primarily in a 'back-up' role and in a monitoring and general law-reform capacity. In addition, no formal powers were conferred on the Director General to secure private redress. He cannot, for example, bring a 'substitute action' in a representative capacity on behalf of aggrieved consumer litigants, and breach of the Fair Trading Act gives affected consumers no entitlement to damages.

The position would gradually change during the next two decades, with new primary and secondary legislation providing the Office with several new enforcement powers and areas of competence. Only a year after the establishment of the Office, for instance, the Consumer Credit Act 1974 would give the Office important *ex ante* powers in the field of consumer credit. But at the time it was set up, it would have been slightly misleading to present the Office as an enforcement agency as such. As will be seen, even for those areas of policy over which it was given enforcement responsibilities, the Office was given few coercive powers. The Office was thus primarily established as a dedicated monitoring agency, with some ability to initiate law reform.

Commission for Racial Equality: powers, discretion, relationships

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other enactment to be done by the Director... may be done by any member of staff of the Director who is authorised generally or specially in that behalf in writing by the Director.

[7] Section 94 of the Act.

[8] The gap here is a reference to powers given to the Office under subsequent legislation.

- Introduction

The Race Relations Act 1976 granted a number of powers to the CRE in pursuance of its main duties, as follows:

SECTION(S)	DESCRIPTION OF POWER
44-5	Assistance for relevant organisations or research
47	Codes of practice
48-52, 58-61	Formal investigations
62-3	Prosecutions
66	Assistance for individual claims in employment tribunals

Some of these powers are relatively straightforward. Section 44(1) empowers the Commission to give financial or other assistance to organisations "appearing to the Commission to be concerned with the promotion of equality of opportunity, and good relations, between persons of different racial groups", and section 45 extends this to research for the same purpose. Meanwhile, section 62 empowers the Commission to seek an injunction in the case of persistent discrimination,[9] and section 63 provides the same power in cases where there have been breaches of sections 29, 30 or 31 of the Act, outlawing discriminatory advertisements,[10] instructions to discriminate[11] and pressure to discriminate[12] respectively.[13]

The remaining powers are more complex though. It will be shown how for each of the powers to launch formal investigations, to provide assistance to individual complainants under the Act and to issue codes of practice, there are significant gaps and ambiguities left

[9] The power comes into operation when it appears to the Commission that an unlawful discriminatory act is likely to be committed by a person within 5 years of being subject either to a non-discrimination notice or to a finding of discrimination by a court or tribunal.

[10] This is made unlawful by s29 of the Act. Section 29(1) states that "it is unlawful to publish or to cause to be published an advertisement which indicates, or might reasonably be understood as indicating, an intention by a person to do an act of discrimination...".

[11] Section 30 of the Act states that "it is unlawful for a person – (a) who has authority over another person; or (b) in accordance with whose wishes that other person is accustomed to act, to instruct him to do any act which is unlawful [under the Act].

[12] Section 31(1) states: "It is unlawful to induce, or attempt to induce, a person to do any act which contravenes [the Act]."

[13] McCrudden et al (1991: 22) outline the rationale behind giving this power to the Commission as opposed to private plaintiffs, as follows: "The logic behind such restrictions on the role of individual plaintiffs flowed from traditional legal thinking and in turn reinforced it. On this traditional view, the private plaintiff is someone who makes a complaint about an individual wrong, not one who acts 'in the public interest'. The intention of the legislators was that the Commission and only the Commission should perform that public interest function."

by statute. The result is not only that the Commission is left with a large degree of discretion as to the specifics of how these powers should operate in practice, but also more basic dilemmas as to how these powers should fit with its main duties of eliminating discrimination and promoting racial equality.

- The power of formal investigation

The introduction of a power to launch formal investigations was one of the most striking innovations of the 1976 Act. It was a power for which the Race Relations Board had campaigned, and is introduced in section 48(1) as follows:

> Without prejudice to their general power to do anything requisite for the performance of their duties under section 43(1), the Commission may if they think fit, and shall if required by the Secretary of State, conduct a formal investigation for any purpose connected with the carrying out of those duties.

However, a significant ambiguity is introduced in section 49:

> (3) It shall be the duty of the Commission to give general notice of the holding of the investigation unless the terms of reference confine it to activities of persons named in them, but in such a case the Commission shall in the prescribed manner give those persons notice of the holding of the investigation.
>
> (4) Where the terms of reference of the investigation confine it to activities of persons named in them and the Commission in the course of it propose to investigate any act made unlawful by this Act which they believe that a person so named may have done, the Commission shall -
>
> (a) inform that person of their belief and of their proposal to investigate the act in question
>
> (b) offer him an opportunity of making oral or written representations with regard to it...

Whilst it is clear that the Act provides for at least two types of investigation: one non-accusatory type in which the investigation is not being launched against any particular named persons (the 'general' investigation) and one targeting named persons suspected to have infringed the Act (the 'belief' investigation), it is unclear as to whether it allows also for a third type of investigation where the investigatee is specified but the Commission is not alleging any unlawful acts. Does the 'and' in subsection 4 imply that a named person investigation is *always* to be preceded by a belief that discrimination has occurred, or is it simply there to distinguish this case from the one at the end of subsection 3? Is section 49 in general meant to restrict the ambit of section 48, where it is stated that a formal

investigation may be launched "for any purpose connected with the carrying out of those duties", or simply to add requirements for certain types of investigation? The bottom line is that it is ambiguous.[14]

The two types of investigation that the Act definitely does provide for are very different from each other. In the case of a general investigation, no specific instances of discrimination are being alleged, and the Commission neither has the power to forcibly obtain information, nor the ability to issue a non-discrimination notice. As such, the investigation is not accompanied by the same safeguards. Investigatees do not need specific notice, nor do they have to be told of their rights to representation and counsel. In short, the general investigation is perhaps better seen as a research exercise than as an inquisitorial prosecution, even though the same term 'formal investigation' is used to describe it.

On the other hand, belief investigations (denoted for the rest of this chapter by the generic term, 'formal investigation') are far more coercive in nature. Under section 50(1),[15] the Commission can serve a notice on investigatees, requiring the provision of specified written information, at a particular time, in a particular manner and form. It can further require their attendance at an oral hearing, with the production of any documents relevant to the investigation.[16] Wilful suppression, alteration, concealment or destruction of a relevant document, or the making of false statements, are offences under the Act, punishable by a fine of up to £400.[17] In order to counter-balance the coercive nature of these powers, investigatees are specifically given rights of legal representation. Nonetheless, the late Lord Denning was not impressed, believing that this section of the Act effectively allowed the CRE to "interrogate employers and educational authorities up to the hilt and compel disclosure of documents on a massive scale... You might think that we were back in the days of the inquisition... You might think that we were back in the days of General Warrants...".[18]

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[14] It was also the cause of many subsequent problems for the Commission, as will be seen in the next chapter.
[15] Section 50(2)(b) limits this power to 'belief' investigations.
[16] Section 50(3)(a) excludes from the scope of this power any information or documents which the High Court could not compel to be produced in civil proceedings.
[17] Section 50(6)
[18] *Science Research Council v Nasse* [1979] QB 144, 172. It was felt by judges in the House of Lords that this was somewhat of an exaggeration.

At the end of a formal investigation, if the Commission finds that discrimination has occurred or is occurring, it is empowered to issue a non-discrimination notice. Section 58(2) sets out what this notice requires of the investigatee:

> (a) not to commit any such acts; and
> (b) where compliance with paragraph (a) involves changes in any of his practices or other arrangements –
> (i) to inform the Commission that he has effected those changes and what those changes are; and
> (ii) to take such steps as may be reasonably required by the notice for the purpose of affording that information to other persons concerned.

A non-discrimination notice can also require the investigatee to furnish the Commission with information to enable it to verify that the notice has been complied with, and the requirements of a notice can remain in effect for up to five years.[19] In the event of non-compliance, the Commission is empowered to seek a court order from the county court, a breach of which would be contempt of court.[20]

The Act includes several process requirements surrounding the issuing of a non-discrimination notice. The Commission must first give notice to the investigatee that it is minded to do so, and offer an opportunity to make oral or written representations or both within a period specified (a minimum of 28 days). It must then take account of any representations that are made.[21] On their part, investigatees subject to a non-discrimination notice are entitled to launch an appeal within six weeks of it being issued either in an industrial tribunal (if the investigation is in the field of employment) or a county court (if not).[22] This is a significant right, both because there is no requirement for leave, and because the tribunal or court has a strong discretion to quash any requirement of the notice.[23]

At the time of the Act, the power of formal investigation could have been conceived in at least two ways. On the one hand, it could have been seen as a neutral investigation - a process to determine the existence of a set of facts. According to this

[19] Section 58(4)
[20] Section 50(1). This power is also available for investigatees who fail to comply with the terms of the original notice at the point at which the formal investigation is initiated.
[21] Section 58(5)
[22] Section 59(1)
[23] The court or tribunal has to quash any term of the notice that it believes is "unreasonable because it is based on an incorrect finding of fact or for any other reason" – see section 59(2).

model, the 'punishment' for discrimination would occur at the point at which the non-discrimination notice was issued. Evidence in support of this view might have included the fact that an appeal could only occur once a notice has been issued, and that it was only non-discrimination notices which had to be published in a register by the Commission. On the other hand, however, the power could have been viewed very differently: there is a sense in which *the investigation itself* serves as the more striking sanction. It is, after all, triggered by the belief that discrimination has occurred. On this model, the purpose of an investigation would be partially to satisfy the legal threshold so that a non-discrimination notice could be issued, partially to punish the investigatee and partially to deter potential discriminators through the negative publicity which surrounds an investigation. Although the Act is silent as to whether the Commission should make public the initial launch of an investigation, it does require that the report of an investigation be published or at least be made available for inspection.[24] Thus even where the Commission does not issue a non-discrimination notice, any criticisms it chooses to make of the practices of its investigatees within this report are necessarily made public.

The ambivalence within the Act as to the purpose of formal investigations is best shown though by the way in which the power is introduced in section 48(1). The Commission is granted discretion to launch an investigation "for any purpose connected with the carrying out of [its] duties". As such, the Act leaves it to the Commission to decide whether formal investigations are better seen as a vehicle for eliminating racial discrimination or for promoting racial equality and good race relations or even for enabling it to keep under review the working of the Act.[25] There are important practical ramifications to this dilemma. Its resolution affects the decision as to when formal

[24] Section s51(4)
[25] Section 43(1)(c)

investigations should be launched,[26] how often,[27] against whom,[28] how they are to be conducted[29] and what type of follow up action should be taken.[30]

The Act thus leaves the most basic questions about the power totally to the discretion of the Commission. And in addition to this general lack of guidance, there is a lack of detail in the Act as to many more specific aspects of formal investigations. It is for the Commission to decide how widely the terms of reference are drawn up,[31] and it also has the option of altering them at a later point in the investigation. It is for the Commission to decide whether and how to be influenced by the company's representations during the course of the investigation.[32] The actual conduct of the investigation itself is left completely open by the Act, subject to certain limited process requirements.[33] The questions of which techniques should be used in an investigation, how long each one should be, how many people should be assigned,[34] the style of any oral hearings, and any other logistical question imaginable are left untouched by the Act. Finally, the issuing of a non-discrimination notice, even if the Commission has become satisfied that discrimination has occurred, is also discretionary and although the Commission has to "take account" of any

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[26] Should they be responsive to complaints, or to more general evidence of discrimination in a particular field? Or should they be chosen to shed light on particular issues, such as what causes inequality even where there is no intent to discriminate on the part of the investigatee?

[27] Should investigations be launched in response to every complaint of discrimination, or only some? If only some, what considerations should be used to decide what is an appropriate target?

[28] Formal investigations could be used to highlight high profile cases and/or the main causes of discrimination. Or they could be used as a mechanism for ensuring that any firm – big or small – is at risk of being punished for unlawful discrimination.

[29] If the investigation was chosen on the basis of a firm belief that unlawful discrimination has been committed by the investigatee, then it may be desirable to have highly formal proceedings, thus reinforcing the impression that the investigation is serving as a punishment. If, on the other hand, the investigation is seen as a vehicle for promoting more general change, then more informal proceedings might be more appropriate. Moreover, the model of formal investigations that is chosen would further affect the decision as to whether an investigation should be stopped in the event of the investigatee agreeing future compliance.

[30] The options could include just ensuring that the investigatee is compliant with the non-discrimination notice, or concentrating on using the findings of the investigation to promote wider change.

[31] The lack of guidance on this has caused the Commission particular problems in the courts, as will be seen in the next chapter.

[32] The Act does not impose a duty to consider any representations made at this stage of the investigation, although it does do so with respect to the issuing of a non-discrimination notice.

[33] These include the need to draw up terms of reference for the investigation, the requirement to offer the opportunity of oral or written representations (or both) before the investigation is launched, and the requirement to offer the same opportunity within 28 days of notifying the organisation that a non-discrimination notice may be served.

[34] Section 48(3) authorises the Commission to delegate the function to one or more Commissioners on its behalf, but this merely ensures that investigations do not need a quorum to utilise the powers connected with the investigation.

representations made by the company,[35] what exactly it should take into account is not specified.

- The power to provide assistance to individuals

The Race Relations Act 1976 introduced a new system for individual victims of discrimination. Whereas previously complainants had to go through the Race Relations Board and a system of conciliation, now they could take their claims straight to an industrial tribunal (if the complaint was employment-related) or a county court (if the complaint was in any other field). The Act still provided for the possibility of conciliation, but this could not be imposed on either party.[36] It is in this context that the Commission was given the power to assist individual complainants under section 66 of the Act. Assistance could include the giving of advice, attempts to settle the dispute, the provision of legal assistance, or legal representation by a solicitor or counsel, although the Commission could also provide any other assistance which it considered appropriate. The Act also specified certain process requirements connected with the power, such as the need to respond to an application within two months,[37] although the Commission was able to extend this to three months by giving notice to the applicant.[38]

Section 66(1) of the Act gives the Commission a broad discretion to decide when to provide assistance as follows:

> (a) on the ground that the case raises a question of principle; or
> (b) on the ground that it is unreasonable, having regard to the complexity of the case, or to the applicant's position in relation to the respondent or another person involved, or to any other matter, to expect the applicant to deal with the case unaided; or
> (c) by reason of any other special consideration.

Whilst the subsection at least suggests that assistance should not be given for every single application, and provides examples of grounds which would be particularly appropriate, it still ultimately makes the decision a matter for the Commission's judgement. Hence, as

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[35] Section 58(5)(c)
[36] The conciliation officer has the duty to try to promote a settlement of the complaint before it reaches the tribunal if he is requested to do so by both parties or if he thinks that he has a reasonable prospect of success – see section 55(1) of the Act.
[37] Section 66(3)

with the power of formal investigation, it again falls to the Commission to decide how this power should be used in fulfilment of its basic duties.

- The power to make administrative codes of practice

The Commission's power to make codes of practice, as its only lawmaking power, is of special significance to a study of juridification. Section 47(10) of the Act sets out the precise legal effect of these codes:

> A failure on the part of any person to observe any provision of a code of practice shall not of itself render him liable to any proceedings; but in any proceedings under this Act before an industrial tribunal any code of practice issued under this section shall be admissible in evidence, and if any provision of such a code appears to the tribunal to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.

Thus the case of a claimant under the Act would be strengthened significantly if it could be shown that the behaviour of the respondent was contrary to one of the provisions of a relevant code of practice. Nonetheless, the underlying purpose of such a code is not so obvious. Section 47(1) specifically gives the Commission discretion to issue a code for the purpose of fulfilling "either or both" of its primary duties. Again therefore, the basic decision as to how codes should be integrated within an overall strategy is left to the Commission.

The issuing of a code of practice is accompanied by a lengthy procedure that ultimately gives Parliament the right to veto any proposals made by the Commission. The following table indicates the steps that must be taken before a code of practice can come into force:

[38] Section 66(4)

HEADING	SECTION	DETAILS
Initial consultations	47(2), 47(3)	• Consultations made with organisations representative of employers or of workers, and any other bodies which the Commission believes to be appropriate. • No specification of how long consultations must last. • Left to Commission's discretion as to whether to modify code in light of representations.
Secretary of State's approval	47(4)	• Secretary of State has to approve the code, or to publish reasons for not approving it. • No time limit in place for this approval.
Consideration by Parliament	47(4), 47(5)	• The code is laid before each House of Parliament. • Parliament has 40 days to consider it.
Decision	47(5)	• Either House has the power to pass a resolution that the code should not be implemented. • If this is done, the Commission essentially has to start again.
Issue	47(7)	• If authorised by Parliament, the Commission issues the code. • The date on which it comes to force is determined by the Secretary of State.
Revision	47(9)	• The Commission has the power to revise a code, but has to go through all the above steps to do so.

In this way, the Act tries to ensure that any new codes have general support. The above table indicates the variety of bodies involved in the drawing up of codes: business groups, trade unions, "other appropriate bodies", the Secretary of State and Parliament, and we shall end this section by considering the nature of the Commission's political and regulatory environment in more detail.

- The political and regulatory environment of the CRE

As with any regulatory agency, the Commission was not set up in a vacuum and the manner in which it was to fulfil its statutory duties would necessarily depend on its relationships with others. Politically, its critical relationship was with the Home Office which, as we shall see, was given some important general levers of control over the Commission.[39] To a lesser extent, the Act also envisaged that the Commission would be accountable to Parliament, and would form relationships with key groups such as the trade unions and the CBI. In furtherance of its duty to promote racial equality, it might have been expected that the Commission would have to work closely with groups committed to improving the position of ethnic minorities, and this association can also be found in the

[39] Throughout this chapter, the term "Secretary of State" is used so as to reflect the terminology of the Act.

Act. Each of these relationships will now be taken in turn, before turning to the nature of the Commission's regulatees.

The most important political relationship of the Commission was to be with the Secretary of State. All eight to fifteen Commissioners were to be appointed by the Secretary of State, including the chairman.[40] Further control over decisions made by the Commission was likely to stem from the his control over both the Commission's budgetary[41] and salary[42] levels.[43] However, beyond that there is little in the Act pointing to the retention by the Secretary of State of day-to-day control over the Commission's decisions and procedures. Although the Secretary of State was responsible for hiring Commissioners, his ability to remove them was limited to cases where they were "by reason of physical or mental illness, or for any other reason, incapable of carrying out [their] duties".[44] The Commission's reporting duties to him were limited to an annual report[45] and the maintenance of proper accounts and records.[46] Meanwhile, whilst the Secretary of State had an important role in two of the Commission's powers,[47] he had no power of veto over formal investigations,[48] nor over any individual decision made by the Commission to prosecute under sections 62 and 63 of the Act or to provide assistance to individual claimants under section 66. Instead, he was given his own duties and powers under the Act: the duty to appoint racial equality experts to sit with a county court judge in any case that connects to the Act,[49] and the power to modify some sections of the Act

[40] Section 43. Appointments were for up to five years, with re-appointments possible – Schedule 1, section 3(2) and 3(6)The Secretary of State also has the power through statutory instrument to change the number of Commissioners.
[41] with the consent of the Treasury - Schedule 1, section 16.
[42] Schedule 1, section 5.
[43] Furthermore, whilst staffing levels could be set by the Commission, this was only after consultation with the Secretary of State and with the approval of the Minister for the Civil Service - Schedule 1, section 8.
[44] Schedule 1, section 3(5)(c).
[45] Section 46. This had to be presented to the Secretary of State, who would then lay it before Parliament and have it published.
[46] Schedule 1, section 17. The accounts had to be presented to the Secretary of State at the end of each accounting year, following which they were to be examined by the Comptroller and the Auditor General.
[47] These are the power to issue codes of practice, as can be seen from the table above, and the power under section 44 to provide financial assistance to organisations which also requires the Secretary of State's consent.
[48] Although under section 48(1) of the Act, he does have the power to require that the Commission launches one.
[49] Section 67(4).

through statutory instruments,[50] although this was not to be done without first consulting the Commission.[51]

In terms of the Commission's regulatory environment, the Act recognises a number of competing groups. Both business groups and trade unions are specifically mentioned as groups that must be consulted in the course of creating codes of practice. Moreover, as we have seen, the Commission is empowered to provide financial and other assistance to pressure groups and organisations committed to furthering the cause of racial equality.[52] This raises a certain dilemma for the Commission: the extent to which it should identify itself with the racial groups that it is obligated to protect. Should it present itself as a spokes-body for racial minority groups or as an impartial enforcement agency? The former position has the potential to get in the way of a more conciliatory style of enforcement, whereas the latter position carries the risk of the Commission losing its most natural body of support, accused of being 'soft' or 'captured'. Either way, the Act appears to be ambiguous on how this most basic of regulatory dilemmas should be resolved – indeed it fuels it by combining in one Commission the roles previously given to both the Race Relations Board and the Community Relations Commission.

Finally, if we consider the nature of the Commission's regulatees under the Act, what stands out is the sheer variety of possibilities. In the area of employment discrimination alone, the Act relates generally to any employment at "an establishment in Great Britain", and specifically to discrimination against contract workers,[53] with respect to partnerships of firms consisting of six or more partners,[54] within trade unions and professional and trade bodies,[55] bodies providing qualifications or vocational training,[56] and employment agencies.[57] Other provisions of the Act, prohibiting discrimination in the provision of goods and services, housing and education, have the effect of widening the Commission's regulatory remit towards (amongst others) hoteliers, restaurateurs, club owners and managers, insurance companies, banks, landlords, schools and health service

[50] Section 73(1).
[51] Section 73(2).
[52] Section 44(1).
[53] Section 7.
[54] Section 10.
[55] Section 11.
[56] Sections 12 and 13 respectively.
[57] Section 14.

providers. In short, the Commission's regulatees can come in virtually every size and shape, from huge multi-national companies to a single property-owning landlord. It is worth noting also that the nature of its contact with these regulatees can similarly vary – it can be frequent and regular or occasional and perhaps even one-off.

Office of Fair Trading: powers, discretion and relationships

- Introduction

Although the Office was conceived of primarily as a monitoring agency which could also engage in law reform, the Fair Trading Act 1973 did give a number of significant powers to the Office. The following table provides a summary:

SECTION(S)	DESCRIPTION OF POWER
s13-33	Lawmaking through references to the CPAC
s34-42	Prosecuting persistent rogue traders
s44-56	Acting on monopoly situations by making references to the MMC
s57-77	Advising the Secretary of State as to the need for merger references
s94-117	Performing the duties of the Registrar of Restrictive Trading Agreements
s124(1)	Publishing information and advice

In addition to these powers, section 124(3) of the Act imposes a further duty on the Director General "to encourage relevant associations to prepare, and to disseminate to their members, codes of practice for guidance in safeguarding and promoting the interests of consumers in the United Kingdom". How exactly such codes should be used in the context of a general strategy for safeguarding and promoting the interests of consumers is not specified, and it seems that this section was somewhat of an afterthought.[58]

In the following sections, it will be argued that not only is the degree of discretion given to the Office under the Fair Trading Act significantly less than that given to the CRE under the Race Relations Act, but also that there is much in the Act to imply that a non-legalistic strategy should be followed. This is partially due to the lack of strong

[58] See Ramsay (1987).

enforcement powers given to the Office and partially due to the nature of its political environment as set out in the Act.

- Consumer protection: the lawmaking power

As well as creating the Office of Fair Trading, the Fair Trading Act 1973 also created another dedicated consumer body: the Consumer Protection Advisory Committee. The Committee was to consist of between ten and fifteen people appointed by the Secretary of State. Under section 14 of the Act, the Director General as well as the Secretary of State or any other Minister was empowered to refer to the CPAC any "consumer trade practice", as defined in section 13. The Committee would then have to consider whether the practice adversely affected the economic interests of consumers within the UK and report back to the person who made the reference as well as the Secretary of State and Director General (if it was not their reference).[59]

Of more significance than this general power, however, was the power to make new regulations. Section 17(2) of the Act sets out the circumstances which entitle the Director General to begin the lawmaking process:

> Where it appears to the Director that a consumer trade practice has the effect, or is likely to have the effect, -
>
> (a) of misleading consumers as to, or withholding from them adequate information as to, or an adequate record of, their rights and obligations under relevant consumer transactions, or
>
> (b) of otherwise misleading or confusing consumers with respect to any matter in connection with relevant consumer transactions, or
>
> (c) of subjecting consumers to undue pressure to enter into relevant consumer transactions, or
>
> (d) of causing the terms and conditions, on or subject to which consumers enter into relevant consumer transactions, to be so adverse to them as to be inequitable,
>
> any reference made by the Director under section 14 of this Act with respect to that consumer trade practice may, if the Director thinks fit, include proposals for recommending to the Secretary of State that he should exercise his powers under the following provisions of this Part of this Act with respect to that consumer trade practice.

The procedure to make laws under the Act is as follows. Any proposals made by the Director General under this section have be submitted to the CPAC.[60] The Committee

[59] Sections 14(3) and 14(5).
[60] Section 18.

then has to decide whether the consumer trade practice adversely affects the economic interests of consumers and specifically whether it does so because of the section 17 effects propounded in the reference.[61] It can then choose whether to accept, modify or reject the proposals of the Director General in its report to the Secretary of State.[62] The Committee has to take into account any representations made to them by relevant parties.[63] Its report is then submitted to the Secretary of State[64] who has to lay it before Parliament and arrange for it to be published in an appropriate manner.[65] What happens after this depends on the content of the report. If the Advisory Committee has decided to reject the proposals, then the Secretary of State cannot act on them at all and the proposals are essentially dead.[66] In any other case, the Secretary of State is given substantial discretion. He can choose to accept the proposal contained in the initial reference, or the modified proposal made by the CPAC (if they have done so), or to ignore the proposals altogether.[67] He cannot, however, introduce anything new, such as a compromise between the initial and modified proposals. If he does decide to act, he does so through a statutory instrument which has to be laid to before and approved by Parliament. A breach of this order would be a criminal offence, punishable by a fine or imprisonment of up to two years.[68]

As well as the procedure necessary for a proposal ultimately to become law, the Act also contains a number of other requirements, all of which would have to be satisfied. The following table sums up these requirements:

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[61] Section 21(1)
[62] Section 21(2)
[63] Defined in section 81(1)(a) as "persons appearing to them to have a substantial interest in the subject matter of the reference or bodies appearing to them to represent substantial number of persons who have such an interest." The Advisory Committee have a degree of discretion as to their own procedures, although they have to act in accordance with general directions from the Secretary of State if he chooses to give any (sections 81(2) and 81(3)).
[64] Section 20 of the Act specifies a time limit of three months from the time of the initial reference for a report to be submitted to the Secretary of State. However, the Secretary of State can extend this by further 3 month periods after consultation with the Advisory Committee.
[65] Section 83.
[66] Section 22(1).
[67] Section 22(2).
[68] Section 23. The enforcement of any orders made under the Act falls to local weights and measures authorities (section 27). Sections 28 and 29 of the Act give substantial enforcement powers to these authorities, such as the power to enter premises and inspect and seize goods and documents, as well as the power to make test purchases.

REQUIREMENT	SECTION	DETAILS
Proposal has to relate to a 'consumer trade practice'.	13	• Section 13 sets out six types of consumer trade practice. • Consumer trade practice can relate to the supply of either goods or services.
Proposal has to be response to specific outcomes.	17(3)	• The proposal must specify which effect the consumer trade practice has or is likely to have. • The consumer trade practice has to have one of the four effects listed in section 17(2).
Proposal has to be sufficiently specific.	19(1)	• The proposal has to have regard for the particular respects in which it appears that the consumer trade practice may adversely affect the economic interests of consumers. • It also has to have regard for the class of relevant consumer transactions in relation to which it appears that the practice may so affect those consumers.

Thus, even though Sir Geoffrey Howe claimed in Parliament that the lawmaking power was "a reasonably swift and sensitive piece of machinery",[69] what emerges from the Act is an apparently quite lengthy prescribed process that tries to ensure that new criminal offences are not created lightly and without sufficient support.

- Consumer protection: Part III powers to deal with rogue traders

In considering this power, which is the only power of prosecution on the consumer protection side given to the Office under the Act, it is important to emphasise that it comes in the context of local enforcement. Ramsay (1989: 291) sets out the rationale behind this power, as follows:

> Part III of the Fair Trading Act originated in Sir Geoffrey Howe's idea of adopting in a consumer context the historical power of the Attorney General to secure an injunction where there have been repeated breaches of the criminal law. It was intended, therefore, to reinforce criminal enforcement of trading standards by local authorities, and was premised on the inadequacy of existing private-law and criminal-law prosecutions in controlling persistently unfair conduct.

The powers to deal with persistently unfair traders are introduced in section 34(1) of the Act:

> Where it appears to the Director that the person carrying on a business has in the course of that business persisted in a course of conduct which –
>
> (a) is detrimental to the interests of consumers in the United Kingdom, whether those interests are economic interests or interests in respect of health, safety or other matters, and

[69] Official Reports HC, vol. 848, col. 459, quoted in Ramsay (1989: 267).

> (b) in accordance with the following provisions of this section is to be regarded as unfair to consumers,
> the Director shall use his best endeavours, by communication with that person or otherwise, to obtain from him a satisfactory written assurance that he will refrain from continuing that course of conduct and from carrying on any similar course of conduct in the course of that business.

If the Director General is unable to obtain a satisfactory assurance or if the assurance has been breached, he is then able to bring proceedings before the Restrictive Practices Court[70] or a county court if the regulatee is small[71] or if the matter is not sufficiently specialised so as to justify the specific use of the Restrictive Practices Court.[72] The court is entitled to accept an undertaking from the person that he will refrain from continuing that course of conduct or any similar course of conduct. If the respondent refuses to do so, however, or if the court decides not to accept the undertaking and it is felt that it is likely that the course of conduct will continue, the court is empowered to make an order, the breach of which would be contempt of court.[73] Under section 42, the respondent can then appeal a court order on questions of fact or law to the Court of Appeal.

The one feature of this power that stands out is the way in which prosecution comes across as a last resort. Note that first of all, the power only becomes operative if there has been a "course of conduct" that is detrimental to consumers. In practice, this is likely to consist of a series of offences under other legislation, but even here the Director General must seek an assurance that the conduct will not continue. If the trader then breaks the assurance, however, he cannot be punished. The most that can be done by the Director General is to take the trader to court, at which time the trader can simply undertake to cease the conduct if the court believes that this will mark the end of the conduct. If the trader subsequently breaches his undertaking, even this does not constitute an offence under the Act though. The only thing that a rogue trader can be punished for is non-compliance with a court order. In short, it seems that the power is less about punishing rogue traders than about trying to find a non-confrontational way to end the conduct they are pursuing.

For both the consumer protection powers then, there are some common themes: lengthy, mandatory procedures, an emphasis on finding consensus, and a degree of imposed

[70] Section 35.
[71] Defined in section 41 as having a share capital of under £10,000.
[72] Section 41.

control over the ability of the Director General to act decisively and quickly due to his need to go through other institutions, political and legal. We shall see now whether the same points emerge in the context of his competition policy powers.

- Competition: restrictive trade practices

Originally,[74] policy in the UK towards restrictive trade practices was the same as for other areas of monopoly control, with references to the Monopolies and Restrictive Practices Commission (as it was then) which had to decide whether the practices operated against the public interest. The style and substance of policy was changed dramatically, however, with the Restrictive Trade Practices Act 1956. The basic structure of the Act was to have a form-based approach, whereby specified types of agreements had to be placed on a public register and were presumed to be unlawful unless the Restrictive Practices Court adjudged that they satisfied certain exemption criteria ("gateways") specified in the Act. There were, however, no sanctions contained in the Act either for the failure to submit details of an agreement to the Registrar or for the adoption of a restrictive trade practice in the first place.

Judge Bellamy (1999: 1-2) summarises the philosophy of the 1956 Act as follows:

> In 1950s Britain, the weapon used to dismantle the cartels of the 1930s (which incidentally, had also provided a war-winning contribution in the 1940s) was the RTPA, and that was based effectively on three principles. First, the system of registration based on a legal rather than an effects based test. In modern Eurospeak one would say that the principle of legal certainty had prevailed. *La sécurité juridique* was regarded by the legislators as more important than the effects of a particular agreement. Secondly, a public register which was based on what would now be called the principle of transparency, namely, that if people are to make or to be permitted to operate restrictive agreements that should be done in a public way so that everybody knows what is happening, and that there should be no possibility of hidden deals between the industry and the regulators... And thirdly, the possibility of justifying an agreement based on the public interest as defined in the various gateways in section 19 of the RTPA, which, when you read them, are not unlike Article 85(3) of the Treaty, even though they predate that provision by some 18 months.

Although the basic enforcement structure of the 1956 Act was retained, some of its details were altered by subsequent legislation. The Restrictive Trade Practices Act 1968

[73] Section 37. Sections 38 and 39 make similar provisions for people who have consented or connived with courses of conduct.

introduced three main changes: it rendered unregistered agreements void and gave third parties a right to sue if harmed by the agreements; it extended the scope of the Act to include some information agreements as would be specified in statutory instruments; and it relieved the Registrar from his normal duty to refer agreements to the Restrictive Practices Court where the restrictions in an agreement were of no significance. The Fair Trading Act 1973, meanwhile made two further important changes: it transferred the functions of the Registrar to the Director General of Fair Trading, and extended the scope of the original Act to the services sector, again to be specified in statutory instrument.

Unlike the system put in place for monopolies and mergers control, the regulatory process for dealing with restrictive trade practices was therefore both formalistic, as there was a mandatory formal procedure in place for any agreements of a form specified in the relevant legislation, and legalistic, as judgement on whether agreements were unlawful under the Act fell to the Restrictive Practices Court as opposed to an administrative body. The OFT was responsible for implementing this process. However, it is worth pointing out the limits of its powers in this area. It could not prosecute a firm for failure to register.[75] The most it could do was to send a notice requiring it to do so.[76] It had only weak investigatory powers for the purpose of discovering if an unregistered agreement was operating.[77] At the same time, the Director General's power to exempt agreements from adjudication by the Restrictive Practices Court where they were of 'no significance' was potentially a useful tool to circumvent the formalities of the procedure in many cases, providing a degree of discretion in the context of an otherwise heavily circumscribed procedure. The exercise of this power was, however, subject to the approval of the Secretary of State.[78]

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[74] I.e. from the time of the Monopolies and Restrictive Practices Act 1948.

[75] There were some consequences though for the failure to register: the agreement cannot be defended before the Restrictive Practices Court, the restrictive provisions are void and thus unenforceable, and third parties are entitled to sue for breach of statutory duty. See generally, Whish (1989: 196-8).

[76] This became section 36 of the Restrictive Trade Act 1976.

[77] In particular, as a result of a Court of Appeal decision prior to the Fair Trading Act 1973, the Office could only issue a section 36 notice in the first place if it had a strong prima facie case that the cartel was in existence. It also had to specifically apply to the Court for permission to cross-examine the parties on oath.

[78] This had been section 9(2) of the Restrictive Practices Act 1968, and became section 21(2) of the Restrictive Practices Act 1976..

- Competition: monopolies and mergers control

In his overview of the Fair Trading Act 1973, Wilks (1999: 172) argues that the Act was deceptive in the sense that whilst the creation of a new regulatory agency in the Office of Fair Trading was momentous, the actual change to the substance of competition policy was slight. "Essentially," he writes, "it was a consolidating statute which re-enacted the principles, methods and powers of the main extant legislation." Above, it has been shown how this was the case for restrictive trade practices; now we turn to monopolies and mergers control.

The overall structure of monopoly control retained under the Act can be summarised as follows. The Director General was given a general power to obtain information relating to monopolies and uncompetitive practices. If it appeared to him that a monopoly situation existed in relation to the supply of either goods or services, he could refer the case to the Monopolies and Mergers Commission. If the Commission reported that the monopoly situation operated or could be expected to operate against the public interest, the Director General had the duty to try to obtain a suitable undertaking from the relevant party so as to remedy or prevent the adverse effect specified in the report. He then had to report back to the Secretary of State the outcome of these consultations and to recommend an appropriate course of action, which could include the issuing of a statutory order. Each of these stages will now be examined in more detail.

The general power to require information is set out in section 44 of the Act. Section 44(1) premises the exercise of this power on there being grounds for believing that a monopoly situation may exist. The Director General can then require from the relevant supplier or producer any information considered necessary with respect to the value, cost, price or quantity of goods, the capacity of any undertaking carried on by that person to supply, produce or make use of goods of that description, or the number of its employees. There is a slightly different procedure in place for 'complex monopoly' situations,[79] where the Director General first has to submit proposals to the Secretary of State, stating why it is believed that a complex monopoly situation may exist and what information should be

[79] Defined in section 11 of the Act. Essentially, it refers to a situation where at least 25% of a particular good or service is being supplied by two or more companies who "whether voluntarily or not, and whether by agreement or not, so conduct their respective affairs as in any way to prevent, restrict or distort competition..." (see sections 6(2) and 7(2) of the Act).

required. The Secretary of State then has to approve these proposals for the Director General to proceed.[80] With respect to either simple or complex monopoly situations, the refusal or neglect to furnish required information is made an offence under the Act, punishable by a fine.[81]

Under section 50 of the Act, the Director General is given the discretion to make a monopoly reference if he believes that a monopoly situation exists or may exist.[82] The substance of monopoly references is set out in sections 47 to 49 of the Act, and references may be of two types: limited to the facts or not limited to the facts. Both types of reference require the Commission to investigate and report on the following questions:

> (a) by virtue of which provisions of sections 6 to 8 of this Act that monopoly situation is taken to exist;
> (b) in favour of what person or persons that monopoly situation exists;
> (c) whether any steps (by way of uncompetitive practices or otherwise) are being taken by that person or those persons for the purpose of exploiting or maintaining the monopoly situation and, if so, by what uncompetitive practices or in what other way; and
> (d) whether any action or omission on the part of that person or those persons is attributable to the existence of the monopoly situation and, if so, what action or omission and in what way it is so attributable...

Both types also have to include a description of the goods or services to which they relate, to state (if they relate to goods) whether they relate to the supply or export of goods (or both), and to specify which part of the United Kingdom they are limited, if they are indeed limited. The difference between them is that a reference not limited to the facts also requires a judgement as to whether or not the monopoly operates or may be expected to operate against the public interest.

If the Commission's report concludes that a monopoly situation exists and either operates or may be expected to operate against the public interest, the Director General continues to have a central role. Firstly, he is given a statutory duty to try to secure a satisfactory undertaking from the party concerned for the purpose of remedying or

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[80] He can also choose to modify the proposals - see section 45 of the Act.
[81] Section 46(2) of the Act.
[82] This power is subject to certain exclusions, specified in Schedule 5 and 7 of the Act. The list can be added to by statutory order.

preventing the adverse effects specified in the report.[83] Then he has to report back to the Secretary of State the outcome of his consultations, whether to provide details of an undertaking given, or to advise the Secretary of State that an appropriate undertaking has not been given nor would likely to be given within a reasonable time.[84] Finally, the Director General is given a monitoring role following either an undertaking or an order, both to ensure compliance and to advise as to whether the details of the undertaking or order continue to be appropriate.[85] The Secretary of State, on his part, has to take into account any advice given by the Director General before deciding whether or not to make an order under section 56.[86] It is crucial, however, to note that the Act does not prohibit monopolies per se, or even anti-competitive behaviour – it just makes them subject to investigation and potential, eventual statutory order. Firms engaging in behaviour already condemned by the MMC are thus not subject to any sanctions, and this was well in keeping with the tradition of UK competition policy since the Monopolies and Restrictive Practices Act 1948.[87]

Meanwhile, if we turn to merger control, the basic point to make is that there is one significant difference in the procedure: the Director General is not empowered to make a reference directly to the Commission, but instead has to advise the Secretary of State as to whether or not a reference should be made.[88] It then falls to the Secretary of State to make the decision. Thus if the transferring of the power to make monopoly references might be interpreted as a partial de-politicisation of monopoly control, the retention of the power in the area of merger control by the Secretary of State would seem to imply the opposite.

Overall, it can be concluded that many of the themes observed in the context of consumer protection are also a feature of the Office's role in competition policy. Thus the competition provisions of the Fair Trading Act 1973 reveal a similar institutional fragmentation, a lack of coercive enforcement powers given to the Office to back up its general powers, highly-specified mandatory procedures, and an emphasis (at least with

[83] Section 88(1). This reflected what had become the normal procedure following reports of the Monopolies Commission: to negotiate voluntary undertakings from the companies reported on, rather than to compel changes by Ministerial order. (Wilks??)
[84] Sections 88(2) and 88(3).
[85] Sections 88(4) and 88(5).
[86] Section 56(3).
[87] See Wilks (1999), chapter 6.
[88] Section 76 of the Act.

respect to monopolies and mergers control) on trying to find consensus before imposing an order.

- The political and regulatory environment of the OFT

In establishing the OFT, one of the justifications for having a separate regulatory agency as opposed to entrusting a governmental department was that it would be politically independent and enable a degree of continuity when different political parties came into office. However, there is much in the Act itself that points to the limits of this independence, and it will be further shown that this was very much intended.

The Secretary of State occupies a crucial position in the Office's political environment. It is the Secretary of State who hires the Director General in the first place, for fixed five-year renewable terms of office, but with a power to terminate the appointment if he is particularly dissatisfied.[89] The government of the day also has general control over budgetary and staffing arrangements.[90] But more striking than these features are the specific powers that the Secretary of State has in virtually every area of policy covered by the Act. Section 12 of the Act gives him general powers as follows:

> (1) The Secretary of State may give general directions indicating considerations to which the Director should have particular regard in determining the order of priority in which –
>
> (a) Matters are to be brought under review in the performance of his duty under section 2(1) of this Act, or
>
> (b) Classes of goods and services are to be brought under review by him for the purpose of considering whether a monopoly situation exists or may exist in relation to them.
>
> (2) The Secretary of State may also give general directions indicating –
>
> (a) Considerations to which in cases where it appears to the Director that a practice may adversely affect the interests of consumers in the United Kingdom, he should have particular regard in determining whether to make a recommendation to the Secretary of State under section 2(3)(b) of this Act, or
>
> (b) Considerations to which, in cases where it appears to the Director that a consumer trade practice may adversely affect the economic interests of consumers in the United Kingdom, he should have particular regard in determining whether to make a reference to the Advisory Committee under Part II of this Act, or
>
> (c) Considerations to which, in cases where it appears to the Director that a monopoly situation exists or may exist, he should have particular regard in

[89] Section 1(3) provides that "the Secretary of State may remove any person from that office [i.e. of Director General] on the ground of incapacity or misbehaviour".
[90] See sections 135 and 1(5).

> determining whether to make a monopoly reference to the Commission under Part IV of this Act.
>
> (3) The Secretary of State on giving any directions under this section, shall arrange for those directions to be published in such manner as the Secretary of State thinks most suitable in the circumstances.

This general legislative support given to political interference with the Office's decisions under the Act is well backed up by the role of the Secretary of State in virtually all the Office's areas of competence as set out above. With respect to the lawmaking power in Part II of the Act, the Secretary of State has the discretion to accept or reject the Office's proposals, even after they have been approved by the Advisory Committee. In relation to monopoly control, whilst the power to make references is ceded to the Office, the Secretary of State retains a veto over any reference through section 50(6) of the Act. In the context of merger control, the Secretary of State retains the power to make references completely. In both cases, any action following a Commission report is left to the discretion of the Secretary of State. Even in the heavily formalised area of restrictive trade practices, the Office has to seek the Secretary of State's approval when exempting an agreement of no significance. The only area in which there is no governmental involvement is with respect to the Part III powers against rogue traders. Significantly, this is the only power that has to be exercised through the courts, and is thus subject to legal controls. In all other areas, the conclusion must be that a large amount of political control was deliberately retained in both consumer protection and competition policy.

Wilks (1999: 186) confirms this impression of the legislation, quoting from an exchange of notes between the Department for Trade and Industry and the Civil Service Department that related to monopoly references:[91]

> *Should the Director be Completely Independent?* The arguments point two ways. You want to give him the appearance of considerable independence. In part this is to avoid any suspicion that the Department's 'sponsorship role' puts it in the pocket of the industries sponsored, and makes it more reluctant to embark on investigations. On the other hand you want to retain ministerial control over the making of References... Given this degree of control my own view – and I think you agreed when we discussed it – is that the appearance of independence can be adequately ensured by setting up a separate Office and there is no need to strengthen it unduly.

If we finally turn to the nature of the Office's regulatory environment, it is difficult to make a judgement from the Act alone. Both business and consumer groups are relevant parties for the purposes of references to the CPAC under Part II of the Act.[92] Except for this, there is nothing in the Act that specifically recognises a role for either in the implementation of consumer protection and competition policy. It is possible to speculate on the relative influence of each, however by considering their respective positions. In 1973, the business lobby was well-organised and concentrated in the form of the CBI. The consumer lobby, however, was diffused, with no central body to channel complaints. Thus whilst the Office was partially set up to offset the abolition of the Consumer Council, it was more likely to receive pressures from pro-business than pro-consumer groups. Meanwhile, its regulatees would be as least as varied in size and nature as those of the CRE. From the transnational company considering a multi-million pound merger to a small-time rogue trader, the Office of Fair Trading would have dealings with all types of businesses and, as with the CRE, its contact would similarly vary from occasional to regular.

Comparing and contrasting the two agencies

The regulatory strategy literature

Before considering the evidence presented up to now, it is necessary first to set out the main explanatory factors contained in the regulatory strategy literature. For this purpose, we can rely mainly on Kagan's (1994) review article, in which he sums up the different factors that have been found to influence regulatory strategies and discusses the relative importance of each. His findings are then neatly presented in a table, which is reproduced (although adapted slightly[93]) here:

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[91] Public Record Office, FV 60/57, IC3.460 Pt1, 'Monopolies and Restrictive Practices Bill: instructions to parliamentary counsel', exchange of correspondence with Civil Service Department (10 September 1971).

[92] It will be recalled that, in forming a judgement over a reference, the Advisory Committee have to take into account representations made by "persons appearing to them to have a substantial interest in the subject matter of the reference or bodies appearing to them to represent substantial number of persons who have such an interest." – see section 81(1)(a) of the Act.

[93] It should be noted in particular, that the stars indicating the importance of each cause are not included in Kagan's table, although they are based on the comments he makes in the article.

Level 1 cause	Level 2 cause	Level 3 cause	Relevant case studies	Importance of cause
Legal design factors	*Stringency of regulatory mission*		Church and Nakamura 1993	*
	Legal powers	Ex ante/ex post controls	Bardach 1989; Kagan 1991	*
		Potency and immediacy of sanctions	Ayres and Braithwaite 1992	*
		Legal rights of regulated	-	**
		Legal rights of complainants	Scholz et al 1991	**
	Specificity of legal standards and penalties		Day and Klein 1987	Not important
Task environment factors	*Visibility of violations*	Frequency of interaction with regulated entities	Scholz 1984; Grabosky and Braithwaite 1986; Hutter 1989	****
		Visibility of violations to complainants	Rees 1988; Sabatier and Mazmanian 1983' Scholz et al 1991; Reich 1992	*****
	Regulated entities' willingness to comply	Size and/or sophistication of regulated entities	Bardach and Kagan 1982; Grabosky and Braithwaite 1986	**
		Cost of compliance / economic resilience	Hutter 1989; Braithwaite 1985	**
	Seriousness of risks to be prevented		-	****
Political environment factors	*Strength and aggressiveness of pro-regulation interests*		Scholz and Wei 1986; Sabatier and Mazmanian 1979; Gunningham 1987	****
	Preferences of political authorities, as influenced by:	Recent catastrophes or scandals	Bardach and Kagan 1982	*****
		Economically urgent projects subject to regulation	Carson 1982; Kagan 1991	***
		Political controversy over enforcement style	Scholz et al 1991; Noble 1986; Shover et al 1986; Wood 1988	****
		Electoral shifts / changes in regulatory leadership	Hutter 1989; Wood and Waterman 1991	***
		Budgetary cutbacks	Wood 1988	***
		Government as regulated entity	Kagan 1986	**
Leadership factors	*If strong-minded regulatory leader...*	Leaders' policy beliefs	Shover et al 1986; Landy et al 1990	**
		Beliefs concerning enforcement style	-	**
	Degree of staff professionalism / internal culture		Melnick 1980; Katzmann 1986; Mashaw and Harfst 1991	**

Other factors might be added to his list. Hawkins (1984), in his study of environmental protection, emphasised the importance of moral judgements, arguing that enforcement officials tended to prosecute only in those cases where it was felt that the regulatee was morally in the wrong, such as where the infringement was flagrant or repeated. Hutter (1988), on her part, stressed the degree of social consensus as to the value of compliance. At the same time, new institutionalist accounts would want to

devote more attention to the structure and organisation of regulatory agencies, including factors such as management structures and the backgrounds of regulatory officials.[94]

Now let us return to the two regulatory agencies, considering how they compare in terms of some of these factors.

Comparing and contrasting the two agencies

In considering the evidence presented up to now, it is clear that – at the point at which they were established - there were some notable similarities between the two agencies. They were set up at similar times, in the context of the general industrial unrest and economic instability of the 1970s. They both would have to deal with a large, undefined and heterogeneous group of regulatees – an important similarity given that many researchers have pointed to a strong relationship between the nature of an agency's regulatees and its enforcement strategy.[95] They were both given an array of different powers – some more coercive than others – and both agencies would have to make important strategic choices as to where its priorities should lie. Moreover, some of these powers offer intriguing parallels: both agencies were given a lawmaking power requiring a lengthy procedure, both agencies had powers to prosecute persistent offenders, both agencies had general monitoring duties.

Overall, however, the differences between the two agencies are more striking. The first, and most difficult to interpret, is their institutional structure. The Office of Fair Trading was set up as a single-person regulator – a structure which, as Wilks (1999: 186) notes, was "momentous" in providing "the model of the 'single person' regulator which became such a distinctive feature of the British system of utility regulation". The Commission for Racial Equality, however, was to be a commission of between eight to fifteen Commissioners. In principle, the difference might be expected to impact on the nature of their respective discretion – after all, the very notion of a single-person regulator is one of a person with substantial personal authority. Without the constraints of a Board, it would be expected that such a person would have significant influence over the direction of

[94] For an excellent introduction, see Guy Peters (1999).
[95] See for instance, the studies by Scholz (1984); Grabosky and Braithwaite (1986) and Hutter (1989).

policy and areas of focus. The distinction can be exaggerated, however: a strong Chair of a Commission of like-minded individuals would also be likely to have substantial influence over the direction of policy.

More significant than the Commission/single-person regulator distinction then is the controls that would operate to curb the discretion of either. Thus following the general approach of the principal-agency literature, it should be possible to use a 'powers minus controls' approach to predict the level of discretion actually possessed by each agency. Thatcher and Stone-Sweet (2002: 5) put it this way:

> In the American literature the question of how best to define and operationalise the gap that (inevitably) develops between what principals want from agents and what agents actually do remains an open one. Underlying the debate are differing views of the nature of discretion. In this volume, we conceive of this gap in terms of a theoretical 'zone of discretion'. This zone is constituted by (a) the sum of delegated powers (policy discretion) granted by the principal to the agent, minus (b) the sum of control instruments, available for use by the principals to shape (constrain) or annul (reverse) policy outcomes that emerge as a result of the agent's performance of set tasks.

Pollack (2002: 202) summarises as follows: "*ceteris paribus*... we should expect agencies to be most responsive to their legislative principals when control mechanisms are extensive, and most autonomous when administrative procedures are few and oversight is weak".

The cases of the CRE and OFT appear very different when following this approach. The CRE was given substantial powers under the Race Relations Act 1976 and, except for its power to issue codes of practice in the field of employment, was subject to few controls. The use of its most coercive power for instance – the power to launch formal investigations - was subject to no direct political controls at all, and (as was argued in the above section) the Act was profoundly ambiguous as to how this power should operate in practice. This contrasts starkly with the case of the Office. In carrying out its general monitoring duties, the Office had substantial discretion to determine areas of focus and to set the agenda. In exercising any of its more coercive powers under the Act, however, the Office was nearly always constrained by external, political controls. Consistently, the Office had to go through other institutions, follow lengthy procedures, and face the prospect of being overruled by the Secretary of State. The Director General of Fair Trading was, moreover, personally at greater risk of being dismissed by the Secretary of State than

the Chair of the Commission for Racial Equality. Following the basic guidelines of the principal-agency approach therefore, the most straightforward implication to read into this contrast is that the Office would have to be more sensitive to prevailing political will than the Commission, and that an aggressive enforcement strategy would be more difficult to pursue - even if desired. It is submitted that these factors are far more significant than the Commission / single-person regulator distinction, which would otherwise have pointed to a different conclusion.[96]

There were other differences between the agencies. In general terms, the Office was given few coercive powers and was seen less as a law enforcement agency than as a monitoring and law-reform agency. The CRE, on the other hand, was given strong investigatory powers to back up its main enforcement power of formal investigation, and powers to prosecute a number of offences under the Act.

Next, there was an important difference in the nature of their respective areas of regulation: in particular, the regulation of racial equality carries a more obvious moral dimension than the competition work of the OFT for instance – compare an accusation of racial discrimination with one of carrying out a restrictive trade practice without placing it on the register. Their political environments differed also in significant respects. Whereas the business lobby would be present for both, there was a major variation in the forces that opposed it. In the areas of consumer protection and competition, the Office was set up in the context of a weak and diffuse consumer lobby, highlighted by the lack of a dedicated pro-consumer group following the abolition of the Consumer Council. In the area of racial equality, however, there were strong pro-regulation groups which, in particular, had both institutional and personal links with the Commission.

Before showing how these differences relate to the overall research design, it is worth dealing first with two other features of the agencies which, whilst relevant, are not to be found within the relevant Acts and thus have not yet been discussed. These are the respective staffing arrangements and initial leaders of the two agencies. Consider the Office of Fair Trading first. When it was established, it was intended that it would have an eclectic

[96] See, however, the discussion in Wilks (2002: 159-160). Wilks argues that the OFT was given "very considerable independence" – however, he subsequently qualifies this by noting that this independence was "limited".

mix of staff, and that specialist 'outsiders' would be appointed to key positions. Ramsay (1987: 181-2) observes that things did not work out this way, however:

> However, apart from the current Director General himself, Sir Gordon Borrie, the influx of outside expertise to the OFT was relatively small and of limited duration. Since 1976 only one position has been advertised outside the civil service... One reason for this situation has been the influence of the civil service unions, who have a 'strong understanding' with the Director General that posts will be filled from within the Civil Service...

Wilks (2002: 161) concludes that because of this, "a predisposition to conform to civil service standards and priorities was built into the Office". Meanwhile, the first Director General of Fair Trading was to be Mr John Methven – a man taken straight from industry (ICI Ltd), and a prominent industrial lobbyist, although he had also spent a year with the Monopolies and Mergers Commission.[97]

The Commission for Racial Equality had a different arrangement, recruiting its own staff who were not civil servants (McCrudden et al 1991: 50). Most of its staff was recruited from existing bodies: the Race Relations Board and Community Relations Commission. The transfer of staff was controversial: the majority of staff from the former body was white, whilst the latter had been largely run by staff from ethnic minority backgrounds, implying that from the start there might be additional pressures for tough enforcement (*ibid.*, 55). Its first Chairman was to be Mr David Lane – at that time the Conservative MP for Cambridge and previously the junior minister responsible for race relations, but also with prior jobs within industry and the Bar.[98] The fact that it was a Labour government that appointed him confirms the impression that he was likely to be considerably more independent from government control than the Director General of Fair Trading.

[97] Source: Who Was Who.

Conclusion

The following table sums up the main differences between the two case studies. Grey shading is used to indicate those features which would suggest *against* a coercive regulatory strategy.

Feature	CRE	OFT
Formal structure of agency	Commission	Single-person regulator
Background of first head of organisation	David Lane – previously Parliamentary Under-Secretary of State at the Home Office, with special responsibility for race relations.	John Methven – previously in industry.
Background of regulatory officials	Mixed – from outside civil service	Predominantly civil service
Complaints-based?	Partially – part of CRE's mandate to assist individual complainants	No – although complaints used to select strategic targets for enforcement
Strength and aggressiveness of pro-regulation interests	High – communal pressures + internal links with ethnic minority groups.	Low: pro-consumer lobby diffused and not as influential as pro-business lobby.
Breach usually seen as moral offence?	Yes	No, and never on competition side.
Political controls	Low	High
Strength of enforcement powers	Strong	Weak

The table highlights how, according to the guidelines of the regulatory strategy literature, it was likely that the two agencies were about to embark on very different courses.

The CRE, faced with pressure from pro-regulation groups to which it was strongly attached, and made up of staff also with a strong drive to pursue an aggressive regulatory policy, had the will to mount a tough enforcement strategy. It would further be relatively free to do so due to the general lack of direct legal and political controls included in the Act. And with strong investigatory powers, it certainly had the legal tools to carry out a deterrence-based approach.

The OFT, on the other hand, was faced with far stronger and better-organised pro-business groups than consumer groups, was staffed nearly exclusively from the civil

[98] He worked for Shell at senior level from 1959 to 1967, and was called to the Bar in 1955. See the obituary in the Times, 18th November, 1998.

service, and was subject to close controls from the Board of Trade. And its Director General was appointed from the business world. In comparison to the CRE, its enforcement powers were relatively weak – indeed, it was seen more as a monitoring and law-reform agency than as an enforcement body. There was little therefore to suggest that the OFT would be able to launch an aggressive enforcement policy, even if it wished to do so.

Add to these factors the institutional history to their respective regulatory fields - the Commission just given new enforcement powers for which it had campaigned under its former guise; the Office taking over the implementation of a competition policy that for many years already had been dealt with in as non-confrontational a manner as possible – and it is clear that the regulatory strategy literature would have predicted very different things for these agencies at the point at which they were set up.

In light of this, and the connections noted in Chapter 1 between choice of regulatory strategy and the level of juridification, a comparison of these two agencies provides a particularly good test of the extent and causes of juridification (or the absence of juridification), the impact of regulatory strategy for juridification and vice versa. We turn now to the case studies to begin this test.

CHAPTER 3

The Commission for Racial Equality and its regulatees: de-juridification in the regulation of racial equality.

Introduction

In the previous chapter, it was argued that the Commission for Racial Equality was left with a great deal of discretion under the Race Relations Act 1976. The nature of this discretion was such that the Commission was not only given freedom to interpret the specific details of how its powers should operate, but also more generally to work out how each power should fit into an overall enforcement strategy. It was further argued that, at the point at which it was set up, there were several factors that would have suggested that it was likely to pursue a tough enforcement strategy.

In assessing the nature of the Commission's enforcement strategies over a period of time, it is helpful to begin by reviewing the types of decisions it had to make about the operation of its powers. The following table indicates some of the choices open to the Commission, the resolution of which would necessarily impact on the nature of its relationships with its regulatees.

Power / Duty	Areas of discretion
Formal investigations	• What type of investigation should be used? • How often should they be launched? Against whom? • Should investigations form part of a wider strategy or should they be seen as action against specific offenders? • When should non-discrimination notices be issued?
Assisting individual complainants	• Should assistance be given as often as possible, or should it be based on strategic considerations? • Should the Commission look to take as many cases to court/tribunal as possible, or is settlement more economical? What form of settlement?
Prosecutions	• How often should court action be sought against offenders under the Act?
Codes of practice	• How do codes of practice fit into a wider enforcement strategy?

It is important to remember also that it is not only the manner in which each power is exercised that is important – it is also the question of which power is chosen in the first

place. A decision by the Commission to resolve a complaint through persuasion and education implies a different relationship from one in which the Commission decides to resolve the same problem through the launch of a formal investigation.

Moreover, this chapter further argues that two other levels are significant as well. Firstly, it is argued that the way in which the Commission fits the use of a particular power into its overall strategy has implications for the level of juridification. For instance, it will be argued that initially the Commission tended to see its powers in separation from one another – a fact highlighted by the use of the terms "promotion"[1] and "enforcement"[2] to describe its differing activities. When "enforcement" against a regulatee was decided upon, this was thus in itself a significant decision, suggesting a particular kind of relationship with that regulatee. Later however, the Commission began to focus more upon outcomes, and there was greater interplay between its different powers. It is argued that this increasing flexibility was evidence of de-juridification as it indicated the increasing importance of non-legal considerations over legal considerations. Secondly, the overall regulatory strategy pursued by the Commission itself connects with juridification. A more deterrence-based strategy links well with the "eliminating discrimination" duty of the Commission and is basically backward-looking. It focuses on past events, aims to rectify past wrongs and to punish regulatees guilty of these wrongs. As such, it tends both to imply and to give rise to a more legalistic relationship with regulatees than its alternative – a persuasive approach, which connects with the 'promoting equal opportunities' duty. This approach is less concerned with past events than with achieving change, and because of this is more flexible in nature. Prima facie then, a switch from a deterrence to a persuasive strategy would constitute some evidence of de-juridification, and it is argued that this was indeed what happened, for instance, with respect to the Commission's approach to formal investigations after 1983.

Both these examples point to the overriding claim of this chapter, that – in direct contrast to the juridification thesis – the relationships between the Commission and its regulatees became progressively *less* juridified over the course of 25 years. After an initial period in which the Commission either had formal relationships with its regulatees

[1] A term meant to imply informal processes of education and persuasion.

(frequently characterised by litigation, lawyers and references to legal rules) or informal relationships characterised largely by the provision of education and advice, with little in between, the Commission gradually became more flexible about its enforcement strategy, changing in the process from a deterrence-based approach to a persuasive approach. The result was progressively fewer formal contacts – a fact that this chapter aims to highlight by dividing the period under review into four separate policy phases, each less juridified than the last.[3]

First Phase: 1977-1982

- The relationship between enforcement and promotion

In order to understand the key characteristics of this first phase, it is important to recognise that initially, the Commission's approach was affected by its specific institutional history. Not only was it set up in formal terms as a combination of the Race Relations Board and the Community Relations Commission,[4] but there was a continuity in terms of the transfer of staff from the previous bodies. Moreover, the CRE was originally structured in two divisions – the Equal Opportunities Division and the Community Affairs and Liaison Division - each reflecting the activities of their respective predecessors.[5] McCrudden et al (1991: 56) conclude that between 1977 and 1982:

> none of the staff (apart from the Chief Executive) could be said to have had a foot both in the promotional camp and in the formal investigation camp. No forum,

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[2] The use of its formal powers (in particular, formal investigations, prosecutions, and assisting victims of discrimination with their cases in the industrial tribunals).

[3] The divisions made in this chapter are 1977-82, 1983-1988, 1989-1992 and 1993-1998. Several researchers have attempted divisions which are not dissimilar. McCrudden et al 1991 distinguished between two generations of formal investigations (1977-82 and 1983-9), whilst in a recent report commissioned by the CRE, Clarke and Speeden 2001 divide the CRE's strategies into 3 periods: 1977-1984 – enforcing the law; 1985-1992 – promoting equal opportunities; and 1993-2000 – campaigning for (e)quality.

[4] A graphic illustration of this is that its initial staff complement of 221 was approved by the Civil Service Department "subject to the proviso that the number of staff to be employed should not exceed the combined aggregate of the staffs of the two separate predecessor bodies" – see Evidence to the House of Commons Select Committee on Home Affairs (1981: 2)

[5] See Appendix 4. The EOD was responsible for formal investigations and litigation powers. The CALD was responsible for promoting equality of opportunity and good race relations, the administration of grant aid under section 44 of the Act, assisting the work of the local organisations such as the local CRCs and ethnic minority organisations, and liasing with police, ethnic minority organisations and so on.

> therefore, naturally existed where a choice between strategies could be made. The main concern of the EOD was whether or not to mount a formal investigation in the field; the main concern of the relevant promotional sections was whether or not to mount a promotional effort; nobody's main concern appeared to be the strategic choice between the two.

In assessing this claim, it should be noted that it contradicts what was said at the time by the Commission, keen to stress that it had a coherent strategy. In its evidence to the Home Affairs Select Committee 1981, for instance, the Commission was emphasising how it "recognised from the beginning that law enforcement and promotional work were interrelated parts of the same strategy for the elimination of discrimination and the promotion of equality of opportunity and good race relations" (at p3). Moreover, the exercise of all of its powers was "carefully co-ordinated", including "its work in law enforcement with its promotional and educative work generally, and with its research and the research which it finances under Section 45 of the Act. Already reports on some investigations have been major promotional documents and this will be true of many more reports in future" (p7). With regards to this last claim, indeed there were examples of reports being used for purposes beyond the specific enforcement action even at this early stage. Following the formal investigation into BL Cars, for instance, the CBI and the TUC were both urged to take action on the report through their race relations committees, and other motor manufacturers were approached and asked to supply information on their policies and practices for discussion with staff (AR 1981: 15). The Commission also followed up the formal investigation into Cottrell and Rothon, an estate agent, by holding discussions with the relevant professional associations.[6]

Nonetheless, these stand out as exceptional rather than typical of this early period. Not only was there nothing systematic about the promotional use of formal investigations at this point, but there was also a lot of promotional work that did not even relate to its enforcement strategy.[7] In all, the Select Committee reached the following judgement:

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[6] i.e. the Royal Institute of Chartered Surveyors, the National Association of Estate Agents, and the Incorporated Society of Valuers and Surveyors.

[7] This was sharply criticised by the Select Committee, which observed (at §79) that "while the Commission recognise that they should be operating centrally rather than locally, much effort is spent on unplanned local sorties in response to particular pressures or individual requests". Even more bluntly, it concluded that "the general pattern of the Commission's promotional work which emerges is of the propounding of ambitious and vague programmes, the commitment to undefined targets of limited staff resources, and final disappointment

> There sometimes seems to be little or no connection between the Commission's advisory and promotional work and its law enforcement duties; they should be complementary and to some degree inter-dependent... **We recommend that the Commission's dual role be continued provided that the promotional work is solely dictated by the need to eradicate racial discrimination.**[8]

And indeed, the Commission itself accepted the limitations of its strategic thinking at this time, in a later Annual Report (AR 1986: 6):

> In the early years of the Commission, it undertook a heavy weight of investigation work which the 1976 Act made possible. While this investigative work was being undertaken, inevitably much of the Commission's effort to persuade and to educate was detached from its law enforcement effort. There were not enough completed investigations, for example, to enable promotional work to be securely based upon their results.

This impact of this detachment between enforcement and promotion on the nature of the Commission's contacts with regulatees subject to enforcement action will be seen shortly. Before examining the Commission's approach to individual enforcement powers in detail though, it is necessary to consider which powers were being favoured in the first place. This is a fairly simple task. In the first four years of the Commission's existence, the Equal Opportunities Division placed an emphasis on its power to launch formal investigations that has not even nearly been matched since. In the CRE's first full year, it started 26 formal investigations. In the next year, it launched a further 10, followed by 6 more in 1980. In all, by the end of 1982, a total of forty seven formal investigations had been initiated[9] – an extraordinary, and ultimately unmanageable, number. McCrudden et al (1991: 56) describe how the decision was reached to launch an investigation:

> When EOD staff felt that a formal investigation was possible and desirable, a proposal went to the CRE's Equal Opportunities Committee. In the vast majority of cases the formal investigation was approved and this decision was handed on to the full Commission for formal endorsement. In effect the importance of an

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at the paucity of results flowing from this commitment of time and effort... Few local authorities, employers, trade unions or other bodies have been significantly affected by the Commission's promotional activities."

[8] Emphasis in original. This particular recommendation was later rejected by the Commission, and the Home Office accepted the Commission's stance that promotional work also had to be geared to improving equal opportunities and race relations, implying a far broader range of activities than the Select Committee had allowed for.

[9] One of these was discontinued due to the company going into liquidation.

issue to the CRE, when endorsed by the Committee, was translated directly into a decision to mount a formal investigation.

If formal investigations were central to the Commission's overall enforcement strategy, its other enforcement powers were of more peripheral importance. In comparison with subsequent years, relatively few people were turning to the Commission for assistance with their individual claims during this period due to a combination of low awards and low success rates.[10] More significantly, the Commission's approach was 'responsive' in nature – in other words, it tended to provide assistance in all the cases that matched the minimum criteria in the Act and carried a reasonable prospect of success.[11] At this stage therefore, there was no attempt by the Commission to integrate this power within its overall enforcement strategy. Meanwhile, complaints about discriminatory advertisements tended to be resolved informally, and although complaints of pressure to discriminate tended to result in the Commission bringing proceedings,[12] there were very few of these altogether.[13]

As its most coercive of legal powers, it might be suggested that the pivotal role of formal investigations during this early period was, in itself, indicative of juridification. However, it was pointed out in the previous chapter that the 1976 Act left open many particulars: when they should be launched, what procedures should be used, how flexibly they should be approached. We know that the Act gave investigatees the right of appeal, and that in any case there was the possibility of judicial review. We do not yet know whether court appearances were commonplace. All these aspects of formal investigations will now be examined in detail.

- <u>The conduct of formal investigations: 1977-1982</u>

This section begins by looking at some quantitative evidence to establish the main trends in the conduct of formal investigations over this period. It then takes one investigation clearly affected by juridification in more detail in order to illustrate how these general trends operated in the context of particular investigations, before finally turning to the general qualitative evidence.

[10] In 1980, this figure reached a low of 779 complaints. This compares with 1033 two years previously and a figure of just under 2000 for much of the 1990s (see later in this chapter).
[11] This worked out as approximately 15% of complaints.
[12] For instance, six out of seven such complaints were dealt with formally in 1981.

a) the quantitative evidence

The following table establishes those aspects of juridification which can be quantified: the extent to which lawyers were involved, the average length of investigations, and especially the extent to which investigations were subject to legal challenges or legal obstacles. The data used for these figures are recorded in Appendix 1.

Of the total number of investigations...	47
Number of 'belief'[14]	30
Number of 'strategic'	15
Number of 'general'	2
Number in which discrimination admitted during investigation	3
Number in which lawyers present	27
Number in which subpoena issued by Commission	7
Number in which further court orders sought by Commission	4
Number challenged through judicial review	5
Number challenged through appeal	10
Number affected by other legal cases[15]	12
Number in which non-discrimination notice could have been issued[16]	27
Number in which non-discrimination notice issued	24
Number in which non-discrimination notice quashed on appeal	4
Number in which non-discrimination notice changed following litigation[17]	7
Mean length (months)	*35.2*
Total number affected by litigation of any type[18]	**33**

Overall, the figures paint a picture of adversarialism, significant delays and frequent involvement of the courts. More than half the investigatees turned to their lawyers, but it is the final statistic that is the most extraordinary: 33 out of 47, or over 70%, of investigations being affected by litigation in one way or another.

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[13] All these powers will be dealt with in much greater detail later in the chapter.

[14] See the note in Appendix 1 about the classification of investigations.

[15] These mainly consist of those investigations which had to be either scrapped, restarted or changed into inquiries as a result of the Hillingdon and Prestige decisions. See further below.

[16] i.e. this excludes general investigations, investigations in the fields where the Commission only has the power to make recommendations (such as the field of education), investigations where no finding of discrimination was reached and investigations where the Commission were precluded from issuing non-discrimination notices for legal reasons.

[17] Either directly by a court decision or through settlement under threat of appeal.

[18] This includes all the investigations where the Commission was forced to use its legal powers to get hold of evidence, investigations where the non-discrimination notice was appealed or judicial review was applied for, and investigations affected by other judicial review cases.

Prima facie, the figures suggest that there was substantial juridification in this area. Before confirming this through the general qualitative evidence, it is proposed first to show more concretely the nature of juridification by focusing on one particular investigation. The case chosen is the investigation into the system of issuing Hackney carriage drivers' and vehicle licences in the city of Birmingham, and it is chosen because it constituted a clear case of juridification in practice. As will be seen, this proved to be a complicated case of indirect discrimination, as much about establishing law as facts.

b) the Hackney carriages investigation

In 1979, the Commission decided to launch a formal investigation into the system of issuing Hackney carriage drivers' and vehicle licences in Birmingham. The investigation was launched following complaints from Asians working as private hire car drivers that they were unable to obtain Hackney carriage drivers' licences because of a rule that applicants had to be sponsored by an existing Hackney carriage owner. This investigation was thus focusing on indirect rather than direct discrimination, in the field of employment, and it was directed against a public body.

The investigation was wide in scope. It included various surveys, interviews, ongoing contact with Birmingham City Council, and comparisons with the records of other local authorities. Much of the investigation, however, was less a matter of establishing the facts as of forming judgements over those facts. For instance, part of the definition of indirect discrimination is that the application of a requirement has to have a 'disproportionate' effect – this however, depended on whether the proportion of black persons in the city as a whole or just the proportion of black private hire drivers was to be considered. An even more difficult matter was whether or not the sponsorship requirement could be considered to be 'justifiable'. The council argued that it was justifiable because it was a reasonable way of controlling the demand for licences.

For all these questions, any decisions reached very closely resemble legal judgments, necessitating the interpretation of statutory phrases and their application to specific cases. The style of the report of the investigation reflects this fact, addressing each

element of the four-part definition of indirect discrimination in turn.[19] There is further a strong sense in the report that the Commission was very consciously laying down legal precedent in this investigation – setting out authoritatively how the Act was to be interpreted.[20] In this case, it would have been extraordinary had the Commission accepted the Council's representations: sponsorship requirements are virtually the paradigmatic example of indirect discrimination, and this was the first test of the Act. The Commission found that the sponsorship requirement constituted indirect discrimination under the Act and issued a non-discrimination notice.

The Council responded to such an overtly legal decision through legal channels. Following the non-discrimination notice, served by the Commission in April 1982, the Council decided both to appeal against the notice in an industrial tribunal and to seek judicial review of the decision. The basis of the application for judicial review was that whilst the Commission's findings of fact were not in dispute, it was impossible to find from these facts that the practices were indirectly discriminatory. In other words, the Council were very clearly recognising the decision for what it was - a legal decision – and they were challenging it through legal avenues.

As it turned out, in April 1983, the Council made an internal decision that the sponsorship requirement would be changed and withdrew its judicial review application. In response, the Commission consented to the industrial tribunal quashing the requirements in the notice that had been overtaken by events, and the appeal was settled on this basis in February 1984 – five years after investigation begun. The heavy involvement of lawyers and legal channels, the dominance of legal considerations in the exchanges, and the mutual awareness that the dispute centred around legal principle all constituted strong evidence of juridification, with the length of the investigation a direct consequence.

c) the general qualitative evidence

Whilst the quantitative evidence is significant, it is important also to consider more qualitative evidence. In this subsection therefore, a number of issues are discussed: the

[19] In fact, reports of later indirect discrimination investigations have done this much more overtly with specific sub-headings breaking up the separate legal aspects of the offence.
[20] The findings of the case were indeed referred to in subsequent investigations, one example being the *Handsworth* investigation.

reasons why investigations were launched, the extent to which legal procedures were adopted by the Commission, the extent to which legal values were assimilated by the Commission and the degree of its flexibility towards investigatees once the decision had been made to embark upon an investigation.

It was argued above that formal investigations operated at the heart of the Commission's enforcement strategy. They were not always chosen, however, for broad strategic purposes, as was made clear in the *Genture* investigation (at p1):

> In order to exercise this power most effectively, the Commission have devised a strategy of investigations and will be examining in depth those areas of activity where, in their view, it is most important that discrimination should be eliminated and equality of opportunity provided. Moreover, in addition to these broad, strategic enquiries, the Commission will conduct formal investigations if they receive strong evidence of particular acts of discrimination and it appears that an investigation would be the best way of tackling the matter... These investigations will not generally be extensive but sometimes they will have far reaching consequences and implications. They may, for example, identify unlawful practises which are used throughout the country; or they may bring home to other organisations in the same field of activity the need to ensure as effectively as possible that their practices are free from discrimination.

The extract suggests strongly that formal investigations were used as part of a deterrence-based approach to enforcement, and this claim is supported by the fact that there were several other narrow investigations into specific acts of discrimination during this period,[21] and by the Commission's general strategy of launching as many investigations in as many different sectors and geographical locations as possible.[22] As the above extract makes clear, the strategy rested on the belief that the more investigations launched, the greater the chance that organisations would be deterred from pursuing discriminatory practices.

In Chapter 1, it was noted that there is a clear affinity between the deterrence style of enforcement and juridification, primarily because a deterrence-based approach implies a focus on rules and legal processes over outcomes, and a legalistic inflexibility in dealings

[21] Examples include the *Antwerp Arms Public House*, *Rank Leisure* and the *Tottenham Trades and Social Club* investigations.

[22] Of the 47 investigations launched, 24 were in the field of employment, 11 in housing, 9 in the provision of goods and services, 2 in education and 1 in immigration. There were 15 investigations into public bodies. There was a diverse range of private sector firms investigated by the Commission, the products of which included such things as insurance, food, leisure, textiles, plastics, construction and electronics.

with investigatees. This affinity can be clearly seen in several aspects of the Commission's approach to formal investigations during this early period.

For instance, consider the degree of flexibility shown by the Commission in its approach to investigations. On very few occasions when the Commission was in the position to issue non-discrimination notices did it choose not to do so. Indeed, this happened in only three investigations, of which all were characterised by the positive attitudes of the regulatees and their prior adoption of policies which would have formed part of the non-discrimination notices had they been issued.[23] Except for these cases, the Commission's approach was basically inflexible. Non-discrimination notices gave the Commission the power to monitor the organisations in question and to require specific policies. Having chosen to go through a formal process, the Commission saw little reason to depart from it.[24]

This inflexibility is well illustrated by the postscript to the *Genture* investigation. The investigation attracted a lot of media attention, and Mr Weston Edwards (the owner of the restaurant concerned) gave several interviews. In some of these, he intimated that he aimed to maintain a racial balance at the club. On the basis of these comments, the Commission initiated correspondence with Genture's solicitors who replied that the club was not going to try to maintain a racial balance, and was not going to refuse admission to anyone on the grounds of race. An instruction was also sent to all members of staff that they were not to discriminate. Nonetheless, the Commission was not convinced and brought proceedings in the county court under section 62 of the Act. The judge refused to grant the injunction. On appeal, Lord Denning MR gave his verdict on the application:[25]

> It seems to me – as it must have to the judge – that in view of the letter of the 14th December, 1978 and in view of the undertaking which was offered, if the Commission sought an injunction, they ought to have given evidence of some

[23] See the *Allocation of Council Housing*, *Dunlop Ltd* and *Walsall MBC* investigations.

[24] This sense is strengthened by the fact that in these early investigations (in contrast to later investigations), reasons for issuing non-discrimination notices are rarely provided. Even where the contents of the representations of the investigatee is disclosed, there seems to have been an assumption that a non-discrimination notice should be the normal outcome if a finding of discrimination was reached. For instance, in the *Woodhouse Recreation Club* investigation, the Club's Committee (which was different from that which had instituted the colour bar at the basis of the investigation) expressed its support for changes in practice, and asked that a non-discrimination notice not be issued as this "could only cause resentment and friction". The argument was rejected by the Commission, with a non-discrimination notice seen as "the most appropriate and effective basis for ending the Club's discriminatory practices."

[25] Commission for Racial Equality v Genture Restaurants Ltd & Another (Court of Appeal) (Unreported)

> discriminatory acts subsequent to their notice. There is not a shred of evidence to show that over the last two or three years this club or its owners have been guilty of discrimination whatsoever. All the Commission relied upon were the statements which were made to the newspapers and the media long ago in November 1978 before Mr Weston Edwards had obtained legal advice. It seems to me that the statements to the newspapers and the media have been displaced altogether by the subsequent letters and the undertaking which have been given...

It is worth considering also the evidence contained in a slightly later case - R v CRE, ex parte Westminster City Council.[26] Although the Commission won this case, Woolf J concluded with the following comments:

> Before I leave this case I return to the forceful submissions Mr Irvine made about the injustice of this case, having regard to Mr Rolfe's admirable record with regard to race relations. Here I draw attention to the fact that in exercising their functions it is the duty of the Commission to work toward the elimination of discrimination, to promote equality of opportunity and good relations between persons of different racial groups generally. These functions of the Commission are difficult ones to perform and it is important to remember that the Commission have a discretion as to whether to serve a non-discrimination Notice and if so as to the terms of that Notice. On the material before me, I can only say that I have a reservation as to whether or not it was necessary as a matter of discretion to name Mr Rolfe in a Notice which was issued in March 1983 in respect of a decision he took in May 1980, when on any showing he was being subject to considerable pressure by the union and had a very difficult decision to make.

For our purposes, less important than the criticisms of the Commission are the facts that this constitutes further evidence of the rigidity of the Commission once it had made the decision to launch a formal investigation, and that this rigidity was an important cause of subsequent legal challenges. Moreover, Woolf J was perceptive in noting that the Commission was linking the power of formal investigation to its duty to eliminate discrimination at the expense of its other statutory duty. Its legalistic approach might have helped to deter those thinking of discriminating, but it did not sit easily with its duty to promote good race relations – to persuade.

Whilst the Commission's inflexibility during this period is suggestive of juridification, there is also more direct evidence. For instance, the Commission was very mindful of judicial review. This we know from various annual reports[27] and the

[26] [1984] ICR 770

[27] See e.g. AR 1983: 10 – "The Commission remains particularly concerned about the legal problems besetting formal investigations."

Commission's evidence to the Home Affairs Select Committee in 1981. McCrudden et al (1991: 67) add the following:

> The CRE staff, Commissioners and legal advisers developed internal procedures on the conduct of formal investigations with the possibility of judicial review very much in mind. In part this recognition was due to the experience of the Race Relations Board; in part it was due to the advice of counsel which was often sought.

The assimilation of legal values by the Commission is further suggested by the regular consultations with its legal advisers,[28] and evidence in several of the reports of specific legal phraseology being used. This includes not only those reports dealing with indirect discrimination, but also a handful of reports where a final decision is reached "on the balance of probabilities".[29] The Commission also attached clear value to precedent. Not only were the outcomes of formal investigations used by the Commission in industrial tribunal cases and in the course of formulating codes of practice, but there are also some examples of cross referencing between formal investigations,[30] especially those dealing with indirect discrimination.[31] An important function of formal investigations were thus to establish the law on the ground.

Finally, it is worth considering the extent to which legal procedures were adopted by the Commission. On one hand, investigations were not carried out in a manner akin to an adversarial legal trial. In the case of R v CRE, ex parte Cottrell & Rothon,[32] it was held that the Commission's refusal to allow the investigatee to cross-examine witnesses was not in breach of the rules of natural justice, with Lord Lane CJ describing the process as more administrative than judicial in nature.[33] On the other hand, the right of legal representation

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[28] The Equal Opportunities Division was assisted by a part-time legal adviser, the Legal Section consisting of four lawyers, and Counsel when required. See Evidence to the Home Affairs Select Committee (1981: 6). For two cases in which consultation with legal advisors is specifically mentioned, see the *Collingwood Housing Association* and the *Allocation of council housing with particular reference to work permit holders* investigations.

[29] I.e. the legal standard of proof for civil proceedings. See, for instance, the investigations into Antwerp Arms Public House and the Woodhouse Recreation Club.

[30] This might have been even more common was it not for the fact that the Commission generally tried to avoid launching investigations that would duplicate previous work.

[31] See for instance, its approach to handwriting requirements in the *Polymer Engineering*, *Massey Perkins*, and *Handsworth* investigations.

[32] [1980] 3 All ER 265

[33] It could be argued though that this presupposes a certain notion of what judicial proceedings are – namely adversarial rather than inquisitorial. Lord Lane CJ generally praised the Commission, arguing (at 272) that it

was specifically provided for in the Race Relations Act, and the Commission was accustomed to drawing attention both to this right and to the right to make written and oral representations.[34] The style of both terms of reference and non-discrimination notices was formal, and always contained references to the relevant provisions of the Race Relations Act.[35] Particularly revealing is the *Massey Ferguson* investigation, cited by McCrudden et al (1991: 58) The company had asked for a settlement instead of a non-discrimination notice. This was rejected by the Commission, however: counsel had advised that there was no legal basis for doing so.

Overall, the conclusion has to be that the conduct of formal investigations during this period was substantially juridified. The frequent presence of lawyers, the high percentage of investigations that led to legal action, the use of legal phraseology, the formality of some of the procedures used, and the inflexibility of the Commission with respect to non-discrimination notices - these all constitute strong evidence. Moreover, it is clear that, from the start, the Commission itself saw formal investigations in such terms: as necessarily a formal process with the authority of the law behind it, to be contrasted with informal dealings. In several reports, the Commission mentions the informal contacts that preceded formal investigations, commenting specifically that it was felt that a formal approach was necessary.[36]

This takes us back to the distinction made by the Commission between enforcement and promotion. In practice, the detachment between the two both implied and helped to cause juridification. It *implied* juridification because enforcement powers, when used, were chosen precisely because of their formal and legal qualities. It *helped to cause* juridification because it led to a focus on rules over outcomes. Regulatees, on their part, responded to this legalistic approach through legal challenges.

As we shall see though, this adversarial position was not self-sustaining. It generated strains that, by 1983, had forced the Commission to change track.

"undoubtedly went to very great lengths to investigate and examine all the voluminous evidence which was put before them...[n]o one can complain that this matter was not thoroughly investigated."

[34] This is specifically mentioned in all of the reports of formal investigations without exception.

[35] See Appendix 3 for an example of each.

[36] In the *Woodhouse Recreation Club* investigation, for instance, the Commission wrote that "in view of the Club's history of discrimination... we believed that it was essential for the law to be firmly enforced, and we had no hesitation, firstly in embarking on the investigation, and finally in issuing a non-discrimination notice..."

Second phase: 1983-1987

- The relationship between enforcement and promotion

The various pressures that led to the Commission's first major change of direction have been well-documented.[37] They include a much-publicised report from a Home Office Select Committee criticising the Commission's procedures and organisation,[38] a series of adverse legal decisions,[39] a severe backlog of formal investigations[40] and budgetary constraints.[41] Also important, however, was the fact that the Commission was maturing as an organisation. It had an expanding base of knowledge gained from previous formal investigations, tribunal cases and Commission-sponsored research, and had thus reached the position where it was able to make the changes that it did. It was also subject to a change of leadership, with Peter Newsam – previously the Education Director of the Inner London Education Authority - taking over from David Lane.[42]

The change of approach was signalled first by a change of organisational structure.[43] In place of the Equal Opportunities Division and the Community Affairs and Liaison Division, there were now four new divisions: Education, Housing and Services;

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[37] E.g. Munroe (1985), McCrudden (1987), McCrudden et al (1991)

[38] House of Commons, Home Affairs Committee, Race Relations and Immigration Sub-Committee, Session 1981-2, *Commission for Racial Equality,* (HC 46 1981). This was then followed in 1982 by a Home Office research report on formal investigations – see subsection below on formal investigations.

[39] In particular, the Hillingdon and Prestige cases are emphasised by commentators. Another significant case which has not received the same attention was Commission for Racial Equality v Amari Plastics Ltd (Employment Appeal Tribunal) [1982] QB 265, in which the findings of the Commission against Amari were overturned directly by the EAT. This decision may well have been more embarrassing to the Commission than the House of Lords decisions, as it was less a matter of the courts coming up with a different interpretation of the Race Relations Act than a damning verdict on the Commission's ability to investigate properly. The case also had legal ramifications: in Commission for Racial Equality v Amari [1982] IRLR 252, the Court of Appeal made it clear that tribunals were entitled to reconsider *de novo* not only the facts relating to the reasonableness of the requirement but also the findings of fact on which the non-discrimination notice was based.

[40] By the end of 1983, there were still 18 investigations to be reported on - see AR 1983: 11.

[41] The Commission cited these constraints in its evidence to the Home Affairs Select Committee (1981: 3-4, esp. §2.7), arguing that its original plans had been based upon the expectation of a substantial increase in its staff complement. The Home Office announced in May 1979 that there would be a freeze on all further recruitment and that its budget would be cut by £1m.

[42] Apparently, it was widely felt that had it not been for the Select Committee report, Lane would have remained in his post, even though he had reached the natural end of his period of tenure. See *The Times*, Wednesday 18th November 1998 (Features Section).

Employment; Field Services; and Legal. Hence, instead of the previous system with one division for enforcement and a separate division for promotion, the Commission now had divisions for specific target areas of its activities, and it would be for each division to decide upon the best approach to take to the fulfilment of its duties in these areas. The new legal division was responsible largely for dealing with individual complaints and for providing legal advice and services to the other divisions. In its 1983 Annual Report, the Commission argued that the restructuring was designed to achieve the "best possible balance between enforcing law and promoting best practices", and that "in each area of the Commission's work, the importance of achieving this balance was in the minds of Commissioners and Commission staff when decisions had to be made".

It took until 1986 for the Commission to be referring to a new emphasis on outcomes over processes[44] – a logical consequence of the structural change of 1983. It is possible, however, to spot the movement towards this in the years between. The first change was with respect to the number of formal investigations launched. Whilst there had been 47 launched between 1977 and 1982, between 1983 and 1989 fewer than half this number were launched.[45] It is important not to overstate the significance of this fact: the formal investigation was still very much seen as a legal power of central importance, as the Commission continued to argue up to the early 1990s. To some extent then, the reduced number was merely a reaction to the backlog that had been experienced in the first six years, a reflection of greater understanding of the resources required. Moreover, in some areas of its work – especially housing – the use of formal investigations still dominated its enforcement strategy. The following provides a typical example: "the Commission believes that discrimination should be dealt with firmly by the use of the law and in 1987 we continued to make greater use of our law enforcement powers in the area of housing."[46] (AR 1987: 49)

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[43] See Appendix 4.
[44] See AR 1986: 7.
[45] This was a controversial decision – see, for instance, the criticisms made by a former Deputy Chairman of the Commission in the course of the 1981 Runnymede Trust seminar (Sheth 1982: 94).
[46] The main reason for this was that whilst the Commission would do what promotional work it could with housing associations, building societies and local authorities, "because of the diverse and individual nature of these types of organisations, tackling discrimination in this area is difficult and we continue to rely heavily on individual complainants" (AR 1983: 27). Other reasons are provided by McCrudden et al (1991: 105-7).

Overall however, and especially with respect to the field of employment, the reduced number of investigations pointed to a changed relationship between enforcement and promotion. This assertion is backed up by the fact that during the same period, there was also a change in the *type* of formal investigation used. The catalyst for this was the legal case of Re Prestige plc[47], in which the House of Lords ruled that the 1976 Act did not enable the Commission to conduct named persons investigations without prior belief of discrimination (so-called 'strategic' investigations). At the time of the initial hearing of Prestige, the Commission had already launched 15 of these strategic investigations, seven of which were still outstanding. As a result of the final decision in the House of Lords, the Commission had to drop four of them;[48] in the other three cases, a report was published with the consent of the organisations involved.[49] Even without the Prestige case, however, the Commission may well have been forced to re-think its approach to strategic investigations. By the end of 1982, reports had been published in only one-third of the investigations started since 1977. As it later admitted, the Commission had "underestimated the practical and legal difficulties involved".[50] Moreover, internal pressures were being matched by external pressures. The Home Office Select Committee had quoted from companies complaining that the Commission "did not really know what it was looking for and therefore sought too much information",[51] concluding that the Commission had a "surviving amateurishness" and that it had "not yet developed that style of brisk and systematic investigation which might be expected of them".[52] There is a certain congruence then between this political verdict and the legal judgment of Prestige – after all, it was precisely the 'strategic' investigations declared unlawful by the courts that would be most exploratory by nature.[53]

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[47] [1984] 1 WLR 335 (HL). The House of Lords backed the judgment in the lower court made in 1983.

[48] Investigations of *Philips Electronics and Associated Industries Ltd.*, *Prestige Group plc*, *Smith and Nephew Associated Companies plc*, and *USMC International Ltd.* Two further such investigations were already subject to litigation and were settled.

[49] *National Bus Company*, *Unigate Dairies Ltd.*, and *Employment in the Metropolitan Borough of Kirklees.*

[50] AR 1989: 14.

[51] §54

[52] §60

[53] There is another example of the fit between legal and non-legal pressures: the Hillingdon case, in which the House of Lords ruled that the terms of reference before an investigation had to be drawn more precisely for natural justice reasons. Being forced to be more specific with terms of reference matched well the recommendation of the Select Committee of having a firmer idea of what it wanted to get out of an investigation. See Hillingdon LBC v Commission for Racial Equality (HL) [1982] AC 779.

In place of the named persons strategic investigations, the Employment Division of the Commission turned to its power of general investigation: six out of the twelve formal investigations it started from 1983-1988 were of this type. The first of these - the investigation into the Beaumont Leys Shopping Centre in Leicester – provides a good example of how these investigations could be used as part of a persuasive regulatory strategy. The target was chosen because it allowed an examination of equal opportunities in recruitment to about 1000 new jobs in an area of the job market upon which the Commission wished to have an impact.[54] Reasons for the different success rates of ethnic minority applicants were examined, and various recommendations were made in the report as to how equal opportunities could be promoted. But more significant were the detailed recommendations made to the individual companies involved, most of which were well-known high street retail chains such as Boots, Dixons and Tesco. Copies of the report were also sent to 40 other major retail companies with an offer to advise on the development of equal opportunities. The benefits of a general formal investigation were clearly illustrated by this: not only was it capable of providing the Commission with information about the mechanics of a particular job market, but it could also act as a springboard through which change could take place. And in the absence of confrontation and costly legal challenges, the report was completed less than a year after the investigation was launched. The Beaumont Leys investigation was thus followed by a series of further general investigations focusing on chartered accountancy, the abolition of the GLC, Cardiff employers, the hotel industry, and Bradford school leavers.

If the Employment Division's new use of general investigations was one way to provide a link between enforcement and promotional work, an even more basic way was the new Code of Practice in Employment that became operational in April 1984.[55] On the surface, the launching of a code would seem to be a strong sign of juridification. After all, this was a document which essentially codified all the Commission's experiences in employment discrimination. Christopher McCrudden's term, 'administrative rule-making',

[54] In this case, most of the jobs available did not need high levels of skill, experience or qualification.
[55] For a full account of the political manoeuvrings that led to the final acceptance of the code in Parliament, see McCrudden (1988).

also points to its specific legal implications as evidence in industrial tribunal proceedings.[56] And certainly this was important to the Commission, affecting its success in the provision of assistance to individual complainants under the Act.[57] In 1987, it observed that (AR 1987: 26):

> Since the Code of Practice came into operation in 1984 its use in industrial tribunals has been steadily developing. In the past three years there has been an increase in the number of references to its specific, detailed recommendations in areas such as training, reviewing selection criteria and ethnic monitoring. In particular, tribunals have stressed the ineffectiveness of equal opportunity policies that are little more than paper exercises, and have asked employers to adopt practical, remedial measures.

This would have significant implications in the longer term. Yet from the very beginning, the Commission saw the Code primarily as a springboard for its promotional efforts. In the drive to get the Code known, the Commission arranged a full press conference, a full page advertisement in the Financial Times in which 73 major employers and 23 unions stated commitment to making equal opportunities a reality, a series of public meetings, and the distribution of leaflets and 120,000 copies of Code. Nor did the use of the Code as a promotional tool end with these initial measures. The Commission approached at national level thirty of the largest private sector companies in 1985 and one hundred more in 1986.[58] Such approaches included the provision of education, such as a training seminar organised in 1984 for those companies which had just introduced equal opportunity policies (AR 1984: 12-13).[59] In continuing to push the Code throughout the 1980s, the Commission also

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[56] *Ibid.* The best-known example of a code with similar evidentiary effect is the Highway Code – see Road Traffic Act 1988, s38(7), cited in Baldwin (1995: 82-3)

[57] The low success rate of cases in the tribunals had long been a complaint of the Commission. It had been suggested for instance that tribunals were unprepared to make necessary inferences of racial discrimination. The code did appear to have an impact, however, and a decision by the Employment Appeals Tribunal in 1987 was especially significant, citing the authority of the Code in upholding the decision of a tribunal to order the disclosure of ethnic monitoring data by an employer - see West Midlands Passenger Transport Executive v. Singh [1987] IRLR 351, upheld in the Court of Appeal [1988] IRLR 186.

[49] Examples include GEC, EMI, ICI, ICL, Unilever, Allied Lyons, IBM, Trust House Forte, Woolworth, BP, Prudential Assurance, Legal and General Assurance Company, Halifax Building Society, the four clearing banks, WH Smith and British Aerospace.

[59] See also the 1986 Annual Report, where it was noted that more companies were developing systems to make sure that their policies were working, and that the Commission was increasingly being approached by companies wanting advice on how to increase the number of black applicants. In response, the Commission arranged a seminar through which companies could share experiences of equal opportunities policies (AR 1986: 25).

funded research on how aware companies were of its existence, thus indicating a strategic use of funding.[60]

This approach of the Commission towards the Code of Practice reflected the beginning of a concentration on outcomes rather than processes, as the following excerpt makes explicit (AR 1986: 7):[61]

> Increasingly, the questions asked of any set of practices or of an institution have been less concerned with how they have come to be in the situation they are in, or what procedures have or have not been adopted in the past, and more concerned with what can be done, within what time-scale, to put things right.

There were two initial consequences. Firstly, formal investigations were no longer seen as means of punishing past conduct, but as means of changing future conduct. This will be seen more clearly when the Commission's approach to formal investigations over the period is examined in detail. Secondly though, it also meant that greater value was now being attached to promotional efforts. If education, advice and persuasion was just as capable of achieving the end results, they were now preferred to law enforcement.[62]

Before turning to the Commission's approach to its enforcement powers, it is worth dwelling first on just how central to its activities this promotional work became during the 1980s. In particular, there are two main points to make. Firstly, the Commission was often achieving through negotiation and advice what it had previously tried to achieve through the use of its formal powers. For instance, regular contact with the BBC was established in 1984; this was followed in 1985 by advice being given on positive action;[63] then a report that outlined an equal opportunity programme for the next two years and set a framework for further action at corporate and directorate levels was approved by the BBC

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[60] It also reported to the House of Commons Employment Committee twice during 1985 on the progress made in implementing the code.

[61] Note how, in terms of one of the dilemmas posed in the previous chapter, this meant the beginning of the search for a synthesis between its primary duties: the elimination of discrimination and the promotion of equal opportunities.

[62] See also McCrudden et al (1991: 90-5)

[63] Positive action is not the same as positive or reverse discrimination. The latter describes a situation where individuals from ethnic minority groups are deliberately preferred over others for vacancies, promotions and so on. The former refers to action to try to redress inequalities, for instance the placing of job advertisements in ethnic minority community newspapers to encourage ethnic minorities to apply. See s38 of the Race Relations Act 1976, the 1985 Annual Report (at p15) and CRE (1985).

in 1987.[64] Secondly, there was now a significant degree of interplay between its enforcement and promotional activities. To take some examples from the work of the Employment Division: extensive contacts with the Manpower Services Commission led to an increase in the number of instructions to discriminate cases – from about 10 per year in 1982-4 to an average of 47 per year in 1985-7 (AR 1987: 30);[65] general contacts with Area Health Authorities and hospitals led to increasing concern as to the disproportionately low levels of ethnic minority doctors employed at higher grades in NHS hospital, the subsequent launching of two formal investigations[66] and the provision of assistance to an affected individual;[67] and – in the other direction – the Commission followed up a formal investigation into Bradford Metro by putting on a one-day seminar for senior officials of the eight Public Transport Executives and visiting all the passenger transport executives in the country (AR 1984: 19).[68] The Commission's promotional work was thus now an

[64] There are many other examples. For instance, the Commission also pressed for changes in the course of contact with the Civil and Public Servants Association (CPSA) following the release of a study indicating the extent of the under-representation of ethnic minorities in the civil service. And continuing correspondence with the Ministry of Defence finally yielded fruit when the Ministry of Defence agreed to the ethnic monitoring of applicants and new entrants to armed forces, although it declined to extend this to cover their posting to particular units or subsequent career patterns. In general, there was a large variety in organisations approached – from household name companies to the British Airport Authority, from trade unions to the Law Society.

[65] Contacts with the MSC also led to the general formal investigation into Bradford school leavers, and named persons investigations into Birmingham Colleges YTS and JHP Training Ltd. Much of the general contact related to the YTS scheme which was run by the MSC, as it became apparent that there was an under-representation of young black people in employer-based Mode A schemes. The Commission funded research in the area, alerting the MSC to the problem. The MSC then agreed to a series of Commission recommendations: firstly, on some positive action measures (twenty Development Officer posts were introduced for instance); secondly, on monitoring, introduced into career services in 1985; and thirdly on targeting, agreed in 1986.

[66] One of these related to applications in St. George's Medical School (1986), the other dealt with the employment and promotion of ethnic minorities in the Withington Hospital (1988).

[67] This was the case of Dr Noone, challenging the decision of the North West Thames Regional Health Authority not to employ her as a Consultant Microbiologist at the Ashford Hospital. She was awarded £5,000, and both the tribunal and the EAT criticised the appointments system. With the weight of these comments behind it, the Commission asked the relevant Secretary of State to revise the appointments system for NHS consultants, which is governed by Statutory Instrument (AR 1986: 27).

[68] Nor was it just the Employment Division that expanded its promotional work. The Education, Housing and Services Division also did so, maintaining extensive contacts with (amongst others) teachers' unions, relevant local authority departments, the media, police, prison authorities and Housing Corporation. The value attached to promotional work by this Division is indicated by the following excerpt – not a priority, but still important: "Given the Commission's limited resources, an important element in its policies has been to encourage others to take action. The Commission has established and maintained working relationships with a number of important national education bodies and organisations..." (AR 1984: 22).

essential part of its overall strategy both to eliminate discrimination and to promote racial equality.[69]

All this needs to be kept in mind as the Commission's approach to its enforcement powers is now examined in detail.

- The conduct of formal investigations: 1983-1988

In this section, it is argued that the new general emphasis by the Commission on achieving outcomes rather than following processes – a central feature of the persuasive strategy – had filtered through to the conduct of formal investigations. The increased flexibility of the Commission and the de-juridifying effects of this are highlighted by the following set of figures (which go up to 1998 to enable easier comparisons with the period prior to 1983):

Of the total number of investigations	(1984-1998) 43	(1977-1983) 47
Number of belief	31	30
Number of strategic	0	15
Number of general	12	2
Number suspended / terminated (other than due to litigation)	8	1
Number in which non-discrimination notice could have been issued	22	27
Number in which non-discrimination notice actually issued	13 (59%)	24 (89%)
Number in which presence of lawyers specifically mentioned	3	27
Mean length of investigation (months)	*23.9*	*35.2*
Number affected by litigation of any type	**5**	**33**

The table offers some striking contrasts, two of which are especially worth emphasising. Firstly, it was far less likely after 1983 for investigations to be affected by litigation. The figure of 5 out of 43 becomes even more notable when it is considered that

[69] Another aspect of the Commission's work that can be added to this list is its attempt to be a force for change in public policy. It was often unsuccessful in these efforts - sometimes spectacularly so, such as when the Government failed even to respond to the Commission's proposals for legislative change in 1985. But there were also some successes. For instance, there were important contacts with the Department for Education and Science, new powers secured to issue codes of practice in housing, and successful negotiations with the Department of Health to implement an ethnic monitoring system covering all those compulsorily detained under the Mental Health Act.

in only one of these was it the respondent appealing against the non-discrimination notice.[70] In all the remaining investigations recorded as being affected by litigation, it was the Commission which issued proceedings, after the investigation was completed, usually in order to secure compliance with a non-discrimination notice.[71] Secondly, the figures suggest that the Commission was far more flexible in its approach towards investigations after 1983. This is reflected especially in the increased number of investigations suspended or terminated, and in the sharp percentage increase in decisions not to issue a non-discrimination notice. In many of these cases, the Commission was prepared to accept a package of measures in lieu of a notice.[72] The increased flexibility was further reflected in the decisions as to whether to launch an investigation in the first place. In 1986 for instance, the Commission drew up three terms of reference, but decided not to proceed with the investigations following representations.[73] It is worth noting also that investigations were, on average, taking a year less to complete than they had done prior to 1983.

Moreover, whereas investigations prior to 1983 were often launched in response to specific acts of discrimination, the reasons for proceeding with investigations after 1983 were far more consistently strategic in nature. McCrudden et al (1991: 87), in their review of an internal paper written by the Director of the Employment Division, show clearly the non-legal nature of the considerations employed:

> A number of criteria were set out for deciding when it was appropriate to choose a formal investigation...
> - when there was a need to demonstrate a system of unlawful discriminatory practice;
> - when the institution was unlikely to want to effect change without an element of compulsion; or

[70] This was the *Handsworth Horticultural Institute* investigation. In one other case (*Norman Lester*), the respondent attempted to appeal but lodged out of time.

[71] In 3 cases, the Commission instigated proceedings to try to secure compliance with non-discrimination notices. In the remaining case, the Commission applied for judicial review of the Secretary of State's decision to ignore its recommendations in the field of education. The litigation essentially arose out of a conflict between the Education Act 1980 and the Race Relations Act 1976: in this case, the investigatee was actually in full agreement with the Commission but felt bound by the former Act.

[72] For two examples, see the *St George's Hospital Medical School* and *Oldham Housing Allocations* investigations. See generally McCrudden et al (1991: 84-5).

[73] This compares to two cases in the entire period 1977-83. The reasons varied: in one of the 1986 cases (dealing with planning), counsel advised that it was not covered by the Race Relations Act (an amendment to the Act was subsequently secured); in the second case, the offending practice had ceased by the time of the representations; in the third, the Commission was satisfied with negotiations over the provision of information. See AR 1986: 18.

- where the discovery and exposure of an unlawful discriminatory practice was likely to provide scope for a ripple effect.

According to the paper, the underlying principle was that, except in the case of individual complaints, persuasion tactics were preferable to those of coercion. Law enforcement would only be initiated by the Commission where it seemed likely that desired changes could not be secured as effectively and efficiently by other methods.

Overall therefore, many of the features of formal investigations that had suggested juridification prior to 1983 were no longer present since then. Court appearances were now far less common, judicial review no longer had a direct influence on the conduct of investigations, it was no longer unusual for legal processes to be set aside in favour of negotiated change, the focus was now less on past acts of discrimination than on how to secure future change and non-discrimination notice were no longer issued as a matter of course. The Commission's approach was more flexible and less dominated by legal considerations. Regulatees responded to a persuasive enforcement strategy by staying out of the courts. The conduct of formal investigations was thus substantially de-juridified after 1983.[74]

- The growth of individual complaints: 1977-1988

McCrudden et al (1991: 211) sum up well the dilemma of the Commission with respect to assistance to individual complainants, as follows:

> There has been considerable debate within the Commission over what the function of the Commission should be in assisting individual complainants. The power to grant assistance in individual cases may be viewed in one of two ways: as a way of helping individuals, or as a way of pursuing the Commission's strategic objectives as a law enforcement agency.

The dilemma is strongly linked with some of the themes that have been running through this chapter. The notion of this statutory power as being primarily a means of helping individuals (and by extension, of punishing discriminatory employers) closely reflects the deterrence style of enforcement, and the 'eliminating discrimination' duty of the Commission. It is basically backward-looking, focusing on past events, rectifying past

[74] It was not completely de-juridified though: representations tended to be heard in a relatively formal setting with a legal adviser present, and the legal adviser would normally then instruct the Commissioners as to the legal merits of a proposed investigation (McCrudden et al 1991: 82). Terms of reference and non-

wrongs. The alternative view, meanwhile, is closely related to a persuasive enforcement strategy and connects with the 'promoting equal opportunities' duty. It is less concerned with past events than with achieving change. This will be seen more clearly as the approach that the Commission took at various stages is examined in detail.

The power to provide assistance to individuals was capable of serving a number of different strategic objectives. One possibility was to use the power in order to test the scope of the law, thus focusing on cases that raised points of principle. Another was to link the power to the Commission's other activities. Under this strategy, cases would be chosen, for instance, because they most closely related to issues raised in formal investigations, or because they were likely to have the greatest impact on others (so that, for instance, cases against a company in an area highly populated by ethnic minorities would be prioritised). Moreover, its strategic objectives could be served not only through the *choice* of cases to support, but also through the *nature* of that support. For instance, the Commission's aim might have been to win as many cases inside the tribunals as possible for deterrence purposes, or it could have been to pursue settlements capable not only of satisfying the injured party, but also of leading to change inside the company concerned.

Up until 1988, the Commission saw the power of providing assistance to individuals primarily as one of helping individuals. It is true that there were certain basic strategic considerations employed. For instance, in its evidence to the Home Affairs Select Committee, the Commission drew attention to its care in avoiding duplication of formal investigations when providing assistance. Moreover, the Commission was always willing to support complainants when the case concerned raised a matter of legal principle (i.e. the first of the strategic considerations mentioned above). The basic policy, however, was one of responsive rather than strategic assistance. As such, the use of this power was not integrated with its other enforcement activities.

The implications for juridification of the policy of responsive over strategic assistance will be considered at the end of this section. Before this though, it is important to identify some trends of the first ten years so as to put the policy in context.

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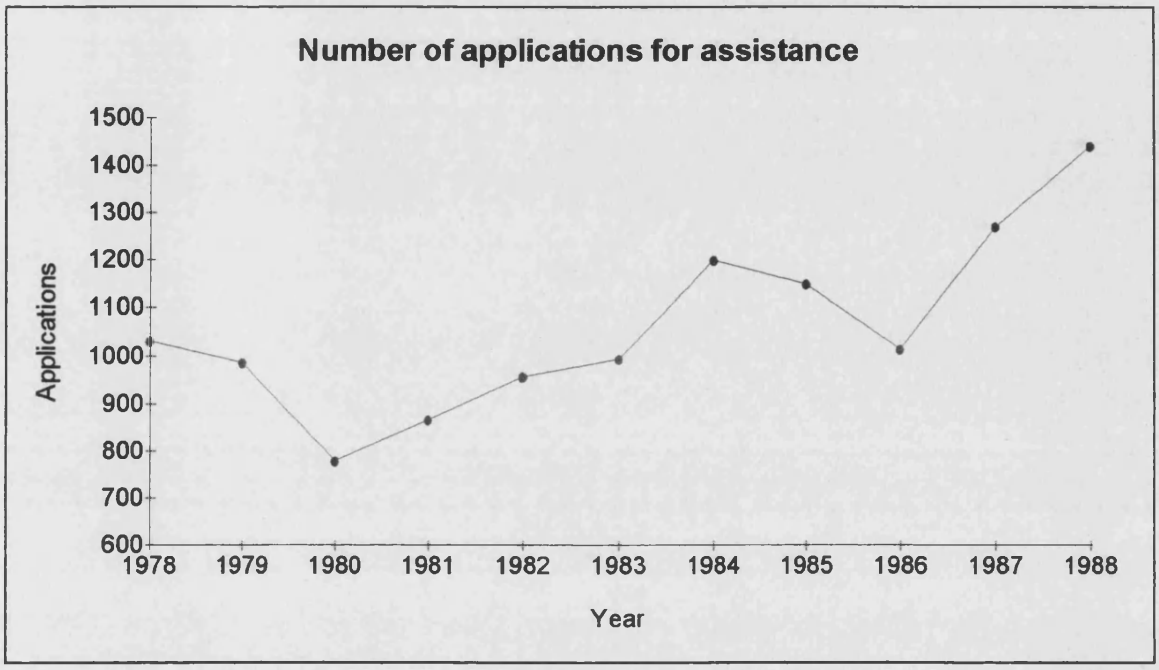
discrimination notice were also still written in a legal style, emphasising that use of the power still implied a relatively formal and coercive relationship between the Commission and the regulatee concerned.

The first thing to note is the growth of individual complaints from 1977 to 1988, as shown by Table 2 and the line graph below it:

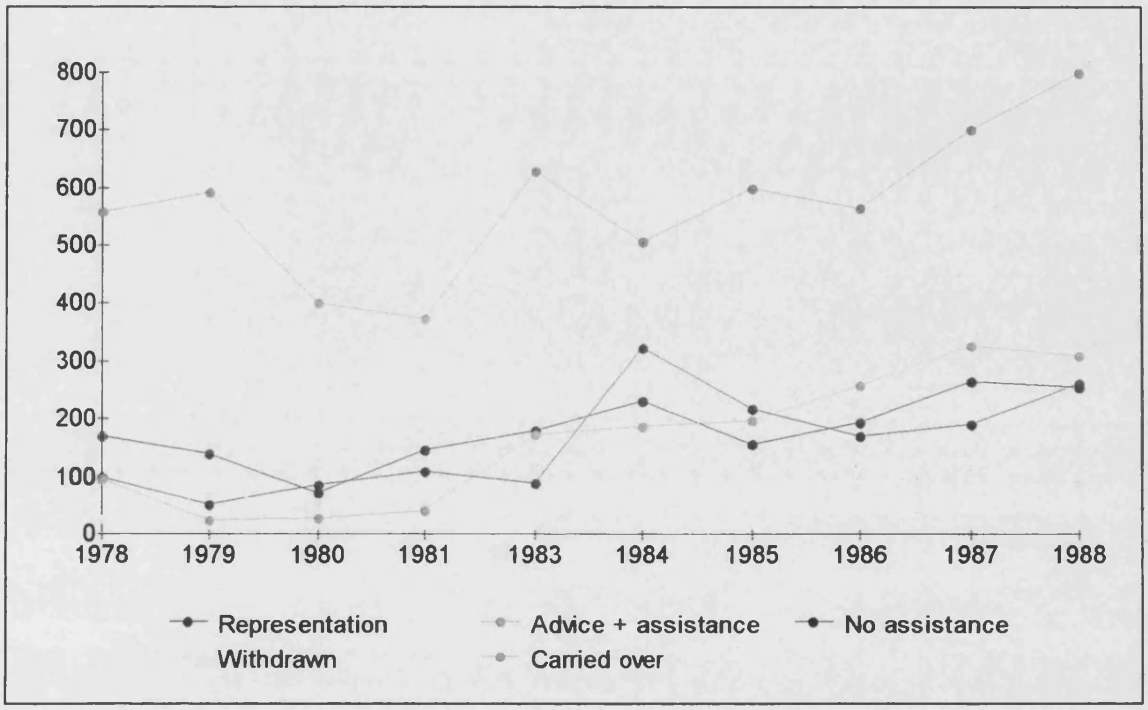
Year	Total	Employment	Other	Out of scope	% change
1978	1033	699	334	N/A	-
1979	986	619	367	N/A	-4.77
1980	779	458	321	N/A	-26.57
1981	864	547	317	N/A	+9.84
1982	956	595	361	N/A	+9.62
1983	994	567	427	N/A	+3.82
1984	1202	765	410	27	+17.30
1985	1150	734	402	14	-4.52
1986	1016	619	380	17	-13.19
1987	1271	827	428	16	+20.06
1988	1440	982	449	9	+11.74



Gradually, this increase in applications began to stretch the limited resources c the Commission, and the result is made clear in the graph below:

Year	Considered	Representation by CRE	Advice / assistance	No assistance	Withdrawn	Carried over
1978	854	170	557[75]	99	28	94
1979	853	141	591	52	69	23
1980	610	73	400	84	53	28
1981	682	147	374	110	51	41
1982	N/A	N/A	N/A	N/A	N/A	N/A
1983	1022	181	630	90	121	174
1984	1189	231	507	324	127	187
1985	1112	155	600	219	115	196
1986	1032	194	566	169	103	260
1987	1275	267	700	191	117	327
1988	1403	254	800	261	88	311

[75] The extent of advice and assistance given is unclear from the Annual Reports. In the earlier report separate figures are given for "initial advice only" and "extensive advice and assistance".



The graph illustrates well the strains that were starting to be felt by the Complaints Committee. Compare the lines of 1978 to 1988. The turquoise and blue lines (carried over, no assistance) jump to twice or three times their original level, overtaking the red (representation) line in the process. Increasingly unable to process all the complaints it was receiving, the Committee was having to be more selective.

Finally, the following table and the histogram below it indicate the outcome of the cases supported by the Commission. The histogram goes up to 1994 so as to indicate the trends more clearly.[76]

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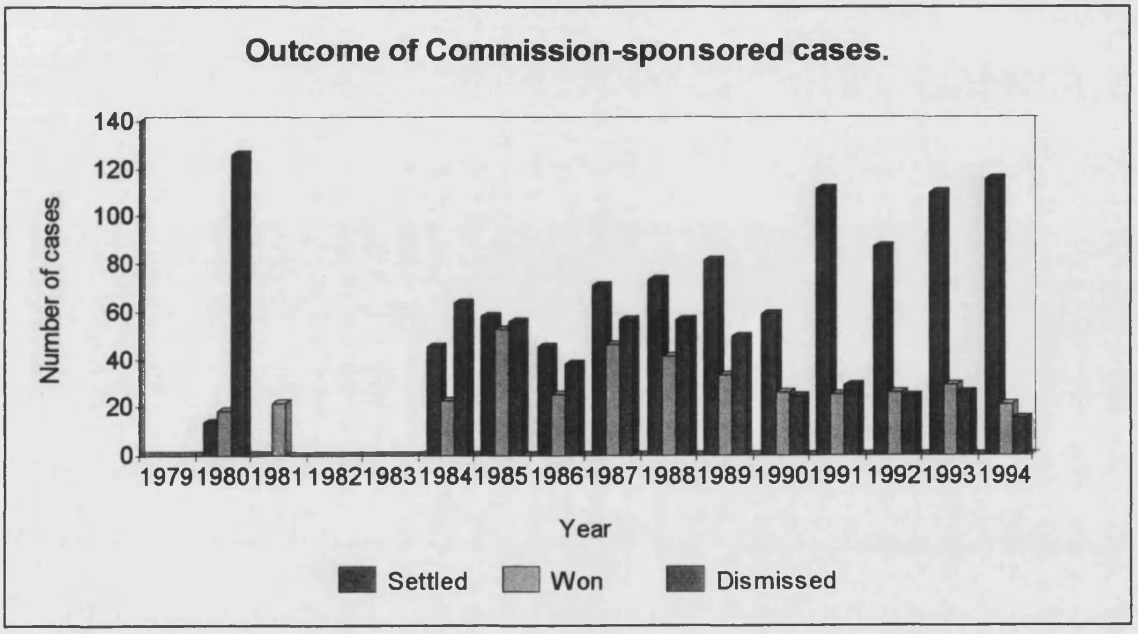
[76] The source for all these figures are Annual Reports. N/A is written where the figures are not available from the relevant Annual Report.

Year	Settled	Successful after hearing	Dismissed
1978	N/A	N/A	N/A
1979	N/A	N/A	N/A
1980	14	19	126
1981	N/A	22	N/A
1982	N/A	N/A	N/A
1983	N/A	N/A	N/A
1984	45	23	64
1985	58	53	56
1986	45	25	38
1987	71	46	57
1988	82	33	49



The two key changes during this period were thus as follows: the number of cases lost by the Commission gradually went down, whilst the number of cases settled went up - a trend that actually preceded the Commission's change of policy in 1989. Meanwhile, the number of cases won by the Commission was staying roughly constant: at all times, it was quite low, but from about 1985 onwards, it was roughly equivalent to the number lost by the Commission.

It can be suggested that, taken together, this evidence implies two main things about the nature of the Commission's relationship with its regulatees. Firstly, the increased number of settlements is another example of the increasingly flexible attitude of the Commission towards the relationship with its regulatees. Hence, it mirrors the findings made with respect to formal investigations. Secondly, the increasing proportion of Commission time spent on dealing with such complaints was impacting on its overall legal strategy. Writing about the period up to the end of 1988, McCrudden et al argued as follows (1991: 223):

> The effectiveness of the CRE in assisting individual applicants has deflected the intentions behind the 1976 Act in 2 ways. First, it has moved the emphasis away from strategic law enforcement towards processing individual complaints. Second, it has discouraged the development of alternative sources of support to individual complainants... [77]

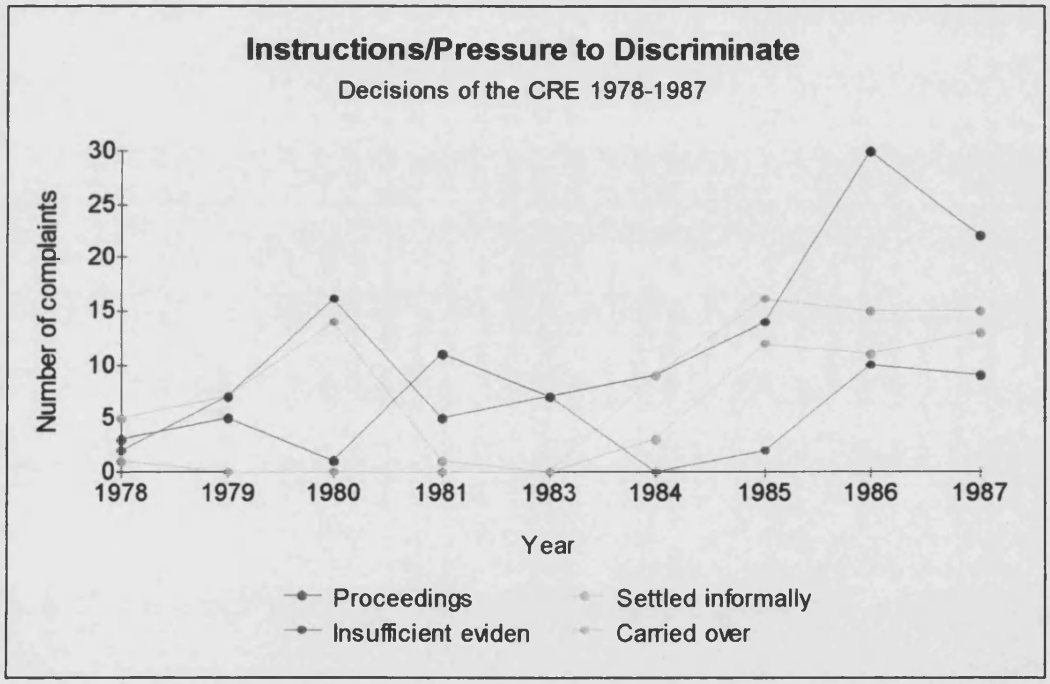
It is debatable how far the Commission had strayed from the intentions of the Act. After all, the Act gives no indication of the specific purpose of the power of assistance; indeed, the most plausible reading is that a mixture of purposes is served by the exercise of this power, including helping precisely those individuals who would be unlikely to win the case on their own. In short, it could be argued that the Commission had simply associated the power of assistance with one of its primary duties over another, preferring to promote equal opportunities through its informal contacts. This is significant in itself, however, pointing to a split in the fulfilment of its duties. The idea here is that the Commission primarily approached its duty to eliminate discrimination through its formal legal powers, whilst it tried to fulfil its duty to promote equal opportunities largely through persuasion, advice and education. It will be seen shortly how the Commission bridged that divide in the 1990s.

- Other enforcement actions: 1983-1988

In the three years from 1985 to 1987, the Commission had to deal with an average of 47 instructions or pressure to discriminate cases annually compared with average of 10 cases per annum in the previous 3 years. This was due largely to its increased level of

cases per annum in the previous 3 years. This was due largely to its increased level of contact with the Manpower Services Commission. The result can be seen in the sudden rise in the number of complaints carried over:

Year	Complaints dealt with	Proceedings	Settled informally	Insufficient evidence	Carried over
1978	10	3[78]	5	2	1
1979	19	5	7	7	0
1980	31	1	14	16	0
1981	17	11[79]	1	5	0
1982	N/A	N/A	N/A	N/A	N/A
1983	14	7	0	7	0
1984	12	9	3	0	9
1985	28	14	12	2	16
1986	51	30	11	10	15
1987	44	22	13	9	15



[78] Two of these were subject to formal investigations, one was the subject of Industrial Tribunal proceedings

[79] Four of these were subject to formal investigations rather than Industrial Tribunal proceedings.

There are several other points that can be made. Firstly, the overall figures indicate that legal action was taken in about half of the cases in which a complaint was made to the Commission. There were, however, more cases settled informally from 1985 onwards, perhaps reflecting the general increase in cases in those years. Overall, the Commission's approach to the pressure or instructions to discriminate cases during this period can be seen as further evidence of its preference for dealing with past acts of discrimination through formal channels.

This can be contrasted with the Commission's policy from the start towards discriminatory advertisements, which was nearly always to seek for informal resolutions such as apologies and undertakings of no repetition. The reason that it was rare for the Commission to prosecute in these cases was that unlawful behaviour was usually based on misunderstandings as to the scope of the exceptions incorporated in the Race Relations Act 1976,[80] as opposed to prejudice. Hence, the Commission's function in this area was primarily to educate rather than punish.[81]

Third phase: 1988-1992

- Introduction

From 1988 to 1992, there were many continuities with the previous five years. The basic approach to formal investigations remained the same, although general investigations were now being used in the field of housing. There was continuing contact with various elements of the criminal justice system, local authorities, employers, hospitals and government departments. Overall the relationship and balance between enforcement and promotional activities remained similar to the previous few years.

There were, however, a number of policy developments during this period with important implications for the degree of juridification between the Commission and its regulatees. The period is thus treated as a separate policy phase, with three changes singled

[80] In particular, there was often misunderstanding as to the scope of the phrase "does not apply to any employment where being of a particular racial group is a genuine occupational qualification for the job". There were also complaints about positive action provisions, exempt under s5(2)(d) of the Race Relations Act 1976. See generally sections 5 and 29 of the Race Relations Act.

out in particular: a new approach to individual complaints, a new policy with respect to prosecutions under the Act, and a change of emphasis towards non-employment sectors so that the work of the non-employment Divisions increasingly begun to mirror that done by the Employment Division. It will be argued that all of these changes were essentially de-juridifying.

In order to understand these changes though, and especially the fact that they were all inter-related, it is necessary first to consider the general context of organisational change within the Commission. Essentially, the period 1988-93 was a period of flux within the Commission, marked by a series of changes of organisational structure, by the introduction of new management techniques and by a changing approach towards ethnic minority communities.

By the time Sir Herman Ouseley took over as Commission Chair in 1993, the organisational structure of the Commission had changed significantly from that of the mid-1980s. The new Social Policy Division reflected the changing concerns of the times,[82] but also a more confident Commission explicitly concerning itself with all areas of government policy. The fact that the new Public Affairs Division (with responsibility towards the media) was now the biggest Division is further evidence of this.

The most significant general change during this period, however, was the emphasis on new management techniques. This emphasis is suggested by the reorganisation of the support divisions, and by the new jargon that was beginning to appear in the annual reports: "professionalism", "high-standards", "value for money" and so on. The catalyst for these changes was the 'Pliatzky review' carried out by Home Office officials and received by the Commission in 1986. McCrudden et al (1991: 52) point out the significance of this review:

> Since this review there has been something of a change in the relationship between the Home Office and the CRE, in that the Home Office now has to be satisfied that the CRE is providing 'value for money'. Since then the CRE has also been more closely involved in the bids which the Home Office has made each year to the Treasury for funding. There are now monthly meetings between the CRE Chairman and officials and Home Office Officials, in addition to ad hoc meetings when necessary.

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[81] See, for instance, AR 1984: 15.

[82] In particular, it reflected the fact that the nature of the contact between the police and ethnic minorities was becoming a central race issue.

A number of changes followed. In 1988, the Commission succeeded in changing the nature of its relationships with the Community Relations Councils (CRCs), now reconstituted as Racial Equality Councils (RECs).[83] Relationships between the CRCs and the Commission had frequently been fractious,[84] stemming from the fact that the CRCs were generally keen to guard their independence, and yet the Commission was a major source of their funding.[85] Under the Commission's proposals, the new RECs were to have the sole purpose of working to eliminate racial discrimination and of promoting racial equality and good race relations, with work programmes drawn up along three-year planning cycles and Commission grant-aid dependent on satisfactory progress towards agreed targets.[86] This was followed a year later by a changed approach to Project Aid (funding under section 44 of the Race Relations Act 1976),[87] with a decision to move from responsive funding to strategic funding for projects more closely related to the Commission's work plans.[88] Then in 1991, new planning procedures were introduced with the aim of ensuring that all of its activities would be both strategically directed and cost-effective, following consultation with the Home Office (AR 1991).

More significantly for our purposes though, this increased concern with cost-effectiveness was the main cause of two of the three de-juridifying changes considered in this section, to which we now turn.

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[83] The CRCs were bodies that worked in local communities in four areas relating to racial equality: policy development, public education, community development and community service. As their work was done at a grass-roots level, they were potentially of great use to the Commission, and from an early stage were the biggest source of referrals of individual applications for assistance.

[84] The developments in these relationships are well-documented in the Commission's Annual Reports.

[85] Whilst the bulk of CRC funding came from local authorities, this funding was rarely enough and often one of the casualties of reduced local authority budgets. The CRE thus supplemented the income of the CRCs under section 44 of the Race Relations Act.

[86] See CRE (1989). The Commission put considerable effort into securing these changes: not only did it have to persuade individual CRCs, the trade union of Community Relations Officers (MSF) and the National Association of Community Relations Councils (NACRC) as to the value of the reforms, but it also had to persuade local authorities to provide adequate funding to the new RECs.

[87] Section 44 funding had previously been given to a wide-range of organisations. Some examples from 1980 include the Asian Artists Association, the Bradford Law Centre, the Bengali Cultural Association, an Ebony Steel Band playing in the Notting Hill Carnival, the Polish Social and Cultural Association and Walsall Advice Centre. Clearly not all of these related closely to the Commission's primary duties.

[88] It can be suggested that if the Commission had been equivocal in the past as to whether it was an independent enforcement agency or a representative of ethnic minority interests, these two developments

- Assistance for individual complainants

Until 1988, the Commission's policy had been to provide representation to all cases with a reasonable chance of success where the section 66 criteria were met.[89] Towards the end of 1988, the Commission ran out of money, and the budgetary constraints meant that for the first time, the Commission had to turn away applicants with "otherwise meritorious cases". The graphs in the previous section highlighted the build-up of some of these pressures. The Commission then decided in 1989 to move to a policy of supporting only those cases with strategic importance. At the same time, the Commission tried to back up this new policy by reinforcing its long-standing policy of encouraging and actively developing other agencies to take up and support cases of racial discrimination. This included the trade unions, which the Commission had always thought ought to be the first point of call for applicants in employment cases, and the RECs as part of the new partnership.

The change to strategic assistance manifested itself in two main ways. The first was that the Commission was now highlighting certain priority areas in which it would provide assistance. In its 1989 Annual Report, for instance, the Commission specified seven priority employers against which assistance was more likely to be given[90] - areas which had long been of concern to the Commission on the basis of continuing informal contact.[91] The second was the increasing role of settlements: not only in terms of quantity[92] but also in terms of how they were fitting into the Commission's general strategy. In a case against the TUC, for instance, the complainant alleged that she had been treated less favourably on racial grounds when she went for her first interview for the post of Assistant Secretary, Equal Rights Department, and was excluded from consideration for the post. The

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implied that it was now firmly committing itself to being the former. Whether or not this is true however, it is difficult to prove that this led to changes to the Commission's enforcement strategy.

[89] Given that complainants were normally ill-equipped to fight cases alone, and that one of these criteria was the unreasonableness of expecting an applicant to deal with a case unaided in light of his or her position in relation to the respondent, there were few cases where the s66 criteria were not met.

[90] These were: the ambulance services, fire brigades, the construction industry, the civil service, H M Forces, the NHS and the police. See AR 1989, Appendix 6.

[91] Several of them were later subject to formal investigations

[92] The quantum of damages was significantly affected by the cases of Alexander v Home Office and Noone v North West Thames Regional Health Authority (both supported by the Commission), which established that awards for injury to feelings should not be nominal and could include both aggravated and exemplary damages. Raising the level of damages meant that more claims were made, and that for the first time, there

case was settled on the following terms: an apology, £2500 as compensation for injury to feelings and an undertaking, as part of a review of TUC employment procedures, to cease the practice of automatic final shortlisting of internal candidates (AR 1989: 117-8). Whilst still relatively infrequent at this stage, the success of these early cases would pave the way for the power of assistance to form the backbone of the Commission's enforcement strategy in the mid-1990s.

At its most fundamental level, this change of policy implied a change in interpretation of the purpose of this power. It was no longer only about the elimination of discrimination, no longer solely about a concern with punishing and compensating for past acts. For the first time, the Commission was considering also how the power could relate to its other duty: the promotion of equal opportunities and good race relations.

The switch from responsive to strategic assistance was moreover a de-juridifying decision. Previously, the questions asked by the Commission was whether a case had a reasonable chance of success and whether the section 66 criteria were met – both legal questions. If it answered those questions positively, then assistance would be given. Moreover, as was shown above, the form of this assistance was often to argue the case in tribunal, rather than to try to negotiate change with the employer. Now, however, the considerations made by the Commission were largely non-legal in nature, influenced by strategic considerations and driven by budgetary constraints. And when the Commission did decide to provide assistance, the form of this assistance was more likely to take the shape of a negotiated settlement. Even more importantly though, it was beginning to negotiate changes from employers that had nothing whatsoever to do with compensating individuals – in short, even the form of the legal settlement itself was beginning to be governed by non-legal values and considerations.

- Prosecutions under the Act

Above it was noted that between 1985 and 1987, there was a sharp rise in the number of cases involving instructions or pressure to discriminate. Previously, the

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was now a major financial deterrent against employers intending to discriminate. Importantly also, it increased the bargaining power of the Commission with respect to settlements

Commission had largely responded by seeking court action. In 1988, the Commission reviewed its policy (AR 1988: 26):

> Most of referrals by job centres and careers services involve very small employers, and the effect of action by the Commission is therefore limited. The only sanction normally available under the Race Relations Act is a declaration by an industrial tribunal that an unlawful act has taken place. In the light of this, we reviewed our policy in 1988 and decided that in future we would be more selective in authorising proceedings.

Thus whereas previously the Commission had looked to take offenders to court, now it was preferring to negotiate change outside court - a de-juridifying decision that was linked directly to its increasing concern with obtaining 'value for money'. From 1989 to 1999, proceedings were authorised in an average of only one-sixth of cases, and the vast majority of these cases were settled before they reached the courts.[93]

- Codes of Practice in Housing, Health and Education

During the mid-1980s, there was a clear divide between the Commission's Employment Division and its Education, Housing and Services Division. Whilst the Employment Division was concentrating on trying to get its Code of Practice known and implemented, the Education, Housing and Services Division was using formal investigations as the central plank in its enforcement armoury. In 1989, the newly named Social Policy Division continued to employ its law enforcement powers "as extensively as possible", and 60% of Housing Section's resources were still being devoted to the use of its law enforcement powers.[94] Five new formal investigations were started that year, three more in 1990, and one in 1991. Some of these were general investigations, thus mirroring the approach of the Employment Division in the mid-1980s. In any case though, this reliance on formal powers contrasts strongly with the Employment Division in the same period, which did not launch any new investigations at all in 1989 and only one in 1990.[95]

The emphasis of the Social Policy Division was beginning to change, however, away from its formal legal powers. As with the Employment Division, a key catalyst was

[93] Source: Annual Reports
[94] AR 1989: 18-20
[95] This was the investigation into T & T Personnel Ltd (an employment agency).

the introduction of codes of practice. The first of these codes dealt with the rented sector in housing[96] and this was soon followed by a code into the non-rented sector, as well as several non-statutory codes in the areas of education and health service provision. All of these codes were backed up with strong publicity and contacts with relevant organisations.[97] As a result, the work of the Division was becoming more closely aligned with that of the Employment Division, with its preference for persuasion and education over prosecutions and formal investigations.[98]

Fourth phase: 1993-2000

The year 1993 saw the arrival of a new Commission chairman, Herman Ouseley, with a background in local government and race relations.[99] Whilst Ouseley had a strong influence on the direction of the Commission, many of the changes he introduced were incremental, building upon previous developments. This section briefly outlines the main activities of the Commission in the years before the Race Relations (Amendment) Act 2000, focusing particularly on its enforcement activities. It will be shown that two aspects of the Commission's enforcement strategy in particular: the discarding of formal investigations except as a last resort and their replacement by negotiations in the context of individual complaints under the Act as the central component in its enforcement strategy led to a further de-juridification of relationships between the Commission and its regulatees.

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[96] Statutory backing for this was achieved by securing an additional clause in the Housing Act 1988. The Commission had to wait a little longer for a code into the non-rented housing sector as this could not be accommodated into the Long Title which defined the 1988 Bill. Instead, an amendment was secured to the Local Government and Housing Act 1989.

[97] For instance, in formulating the code dealing with the rented housing sector, the Commission distributed a consultation draft of the code to over 1000 relevant organisations. Following its launch in 1991, copies were sent to all relevant housing organisations in Britain. Accompanying the Code were leaflets and various posters to publicise its existence and contents, as well as a series of guides (see *A Guide for Estate Agents and Vendors*; *Training for Racial Equality in Housing*; *Race, Housing and Immigration* and *Positive Action in Housing*)

[98] Interestingly, this sense that the Social Policy Division was "catching up" with the Employment Division seems to have been felt within the Commission itself. See McCrudden et al (1991: 106-7).

[99] He was previously Chief Executive of Lambeth LBC, former chief executive of ILEA, background also in race relations.

It would be misleading however, to deal just with the enforcement strategies of the Commission, whilst failing to mention its new overall focus. In many ways, the CRE of the mid to late 1990s comes across as a body with a new-found confidence, deliberately setting out to foster a higher public profile and to make extensive use of the media. Hard-hitting and well-publicised campaigns were launched, such as the 'Let's kick racism out of football' campaign and the 'Leadership Challenge'. Meanwhile, the Commission was continuing to grow as a pressure group aiming to influence government policy. It was a particularly vocal force, for instance, at the time of the debates concerning racial harassment and violence, backing up its public arguments with private lobbying of the Home Office.[100] There was also a European dimension to this work, with the Commission emerging as a leading force for change in Europe.[101] Its biggest boost, however, came not so much from its own efforts but from a change of government in 1997. Whilst its previous reviews of the Race Relations Act had been either ignored or rejected,[102] the new government was far more sympathetic. The legislative reforms that the Commission had been pushing for went through Parliament in 1998, and came into force in the form of the Race Relations (Amendments) Act 2000. Amongst other things, the new Act extended the provisions of the 1976 by imposing a general duty upon public bodies (apart from a few specified exceptions) to promote racial equality and eliminate racial discrimination, enforceable by the CRE.[103]

The Commission's generally higher public profile was fostered by some internal changes, continuing processes that had begun in the previous policy phase. One of the new Chairman's first tasks was to merge the Employment and Social Policy Divisions, and this was followed by continuing management reforms. In 1993, Price Waterhouse was awarded a contract to undertake an internal audit of the CRE's practice and procedures, resulting in changes being made to many aspects of the CRE's approach to budgetary control, banking

[100] See, for example, AR 1996: 17

[101] See e.g. AR 1994: 36-8, AR 1997: 26, AR 1999: 29-30. Significantly, when the Race Directive on Article 13 was finally issued, it was to a large extent using the UK experience as a model.

[102] The Commission had tried twice: in 1985, when the Government failed even to respond to its recommendations for change, and in 1990, when the Government rejected the vast majority of its proposals.

[103] Further legislation is expected shortly in order to comply with the new EU Race Directive on Article 13. The new legislation is likely to incorporate a new and wider definition of indirect discrimination, a shift in the burden of proof once a prima facie case has been established and to abolish laws and regulations that are contrary to the principle of equal treatment.

arrangements and performance indicators.[104] And in 1994, an executive policy group and an enlarged executive office was established in order to provide the chairman, the executive director and the Commissioners with a flexible team, able to evaluate the need for new initiatives, and to co-ordinate and develop work on networking, research and information.[105] The policy group also handled the growing volume of speeches and briefings, thus highlighting the Commission's changing priorities.

- A new enforcement strategy

Meanwhile, the provision of assistance to individual victims of discrimination was now placed unequivocally at the centre of the Commission's enforcement strategy. This was indicated not simply by the sheer volume of complaints that were now handled by the newly formed Legal Committee – up to 1709 applications by 1993, and remaining at just under 2000 applications per year throughout the rest of the 1990s. Far more than this, it was the manner in which the Commission was now using these applications as a springboard for a persuasive enforcement strategy. This was highlighted by two elements in particular: the Commission's approach to applications when they were first received, and the new strategy of the Commission in following up respondents after racial discrimination cases had been concluded. Each of these will now be taken in turn.

Once an application for assistance had been received, the policy of the Commission in all cases was to try to secure a favourable settlement as early as possible. Significantly, many of the settlements secured contained commitments by the employer or service provider to work with the Commission to implement equal opportunity programmes. By 1997, nearly two-thirds of cases supported by the Commission were settled before a hearing, with compensation paid to the victims and a commitment made by those accused of discrimination to make changes to their policies and practice (AR 1997: 4).

[104] In addition, a review of the Commission's printing, publishing and marketing procedures was implemented, leading to the closure of an in-house print facility, the re-pricing of all titles and a reassessment of publications strategy.

[105] Other management reforms included a new commitment to implement charter standards specifying the standard of service the public could expect in its dealings with CRE staff, updating the computerised database and the introduction of a new system of performance pay.

Meanwhile, in 1995 the Commission introduced a new strategy of following up respondents after racial discrimination cases had been concluded.[106] The catalyst was again some internal changes: in 1994, a new unit was created within the Legal Division to co-ordinate the strategic aspects of the Commission's legal work. When this reorganisation was completed, the Commission immediately launched its new policy, identifying 65 cases for follow-up work. This increased to 163 in 1996, of which 64 follow-up initiatives were concluded with 37 of these (58%) resulting in all or most objectives being met (AR 1996: 6). In 1997, 150 cases were identified for follow-up work, 78 case projects were concluded and all or most of the Commission's objectives were met in 54 of these (69%). Mostly the follow-up was specifically focused on a single company, but on other occasions it was far broader. For instance, in 1996 there were 23 such case projects extending to the relevant sector or class of organisation.

The Commission's follow-up work quickly became as important as its actual legal case-work. In 2001, the Commission offered full legal representation in 81 cases, and more limited representation in 41 cases, making a total of 122 cases. Most of these were settled.[107] In the same year, the Commission also followed up 122 industrial tribunal cases.[108] Both elements implied a changed philosophy of enforcement: for the first time, the Commission had found a synthesis between its two primary duties: a way both to correct past wrongs and to secure future change.

The Commission's ability to pursue the strategy of negotiating change was aided greatly by two factors. The first was the increased success rate of cases when they did come to be heard in the tribunals. At the start of the 1990s, the success rate in tribunals was still low. Having long pushed for an increase in the number of ethnic minority chairs and members in industrial tribunals, the President of Tribunals and the Department of Employment finally agreed in 1993 that more ethnic minority chairs and members were needed, and that the Commission could assist in bringing this about. By 1995, the total number of ethnic minority members had increased to 115 - 4.6% of the total. Meanwhile, the level of awards was rising steadily. In 1997, the average total tribunal award in

[106] i.e. not just cases where the Commission had represented the applicants, but all the racial discrimination cases on record.
[107] In the same year, 66 cases were settled by CRE case officers.
[108] See AR 2001: 24

employment cases represented by the Commission was £7,405,[109] and the average settlement was £9,902. Much of this was due to the passage of the Race Relations (Remedies) Act 1994, in which the upper limit on compensation awards in racial discrimination cases was removed.

The second factor was the increasing role of other agencies in splitting the work-load of representing complainants. For several years, the Commission had been trying to establish other centres capable of providing legal representation and other assistance to individual complainants, with limited success. Fresh impetus was then given following the publication of 'Racial Justice at Work' – a Policy Studies Institute research study which concluded that a twin-track system was developing whereby complainants who were represented by the CRE were far more likely to succeed in the industrial tribunals. The Commission began systematically to make more demands on other organisations with complainant aid responsibility – including trade unions, the National Association of Citizen Advice Bureaux, local law centres and the RECs.[110] In the next few years, the Commission began more frequently to refer cases to other bodies, so that by 1997, 79 cases were referred for representation to other organisations, including 50 to trade unions and 16 to RECs (AR 1997: 6).

- The demise of formal investigations

As the benefits of focusing on individual complaints became increasingly apparent, so formal investigations appeared less and less attractive. In its 1993 Annual Report, the Commission was still referring to the benefits of formal investigations. "There are some who will still not respond to our efforts to persuade", it was argued. Four new investigations were begun.[111] In 1994, however, whilst a further two investigations were started, it was reported that formal investigations were now to be used as "a weapon of last resort", with an emphasis instead on persuading organisations to enter into voluntary

[109] This figure does not include two exceptional six-figure sum awards made during the year.
[110] In 1994, for instance, the Commission wrote to all the general secretaries of all the trade unions affiliated to the Trades Union Congress, to encourage them to give greater support to racial discrimination complaints brought by their members. Over half of the unions had accepted the Commission's points by the end of the year.
[111] These were the investigations into Mobile Doctors Ltd., Computacenter Ltd., Large Companies and Ministry of Defence (Household Cavalry).

agreements (AR 1994: 5).[112] In comparison to general negotiation based around settlements, to launch a formal investigation was an expensive and time-consuming way of achieving the same change.[113] The previous use of formal investigations as a source of information for the Commission, especially of the mechanisms of indirect discrimination, had moreover diminished as the Commission had matured. The Commission continued to operate the new policy of formal action as a last resort throughout the rest of the 1990s, and the following extract sums up the complete turn-around in the relationships between the Commission and its regulatees since the first policy phase (AR 1998: 4):

> We continued our strategy of using our formal investigation power as the ultimate sanction, preferring instead to pursue detailed preliminary enquiries into organisations, followed by negotiated agreements for change. This resulted last year in two widely publicised partnerships with the Ministry of Defence and Hackney Council.
> We used a similar approach in our legal casework, and it explains the high level of satisfactory settlements of complaints before they reached the tribunals and courts. We also continued to follow up respondents after tribunal and court hearings and worked closely with them to prevent further complaints. Only rarely do employers refuse to co-operate with the Commission.

The link between a deterrence-based regulatory strategy and an adversarial response from regulatees, as well as the converse – a persuasive regulatory strategy and a co-operative response from regulatees - is clearly discernible here.

Before looking briefly at the impact of the Race Relations (Amendment) Act 2000, it is necessary to consider finally a potential piece of counter-evidence: an extract that could be taken to suggest the beginning of juridification in the conduct of racial discrimination cases (AR 1998: 23-4):

> Racial discrimination cases are becoming increasingly complex. The law is developing rapidly as rulings from other equality jurisdictions and EC law are imported into the arguments; it will not be long, too, before human rights legislation, although welcome, introduces another factor. Compensation levels have also been rising continuously, compelling respondents to take allegations of racial discrimination more seriously, but, equally, making them more likely to turn to specialist firms of solicitors and counsel to represent them. Tribunal

[112] This approach was adopted, for example, with the trade union UNISON, who agreed to develop an extensive action plan to deal with concerns about union services to ethnic minority members, especially in relation to racial discrimination cases (AR 1996: 10).

[113] In a recent consultation regarding the Commission's proposed legal strategy, it is written: "Formal investigations can be effective in tackling institutional discrimination, yet they can be overly complex and resource intensive and neither clarifies the law nor, generally, provides compensation for victims."

> hearings are therefore no longer simple or informal affairs, and they are much costlier. All these developments have grave implications for applicants, particularly those who represent themselves or use lay representatives. At the same time, the resources available to the Commission and to other advice agencies, both in absolute and relative terms, have substantially decreased, while the demand for assistance continues as strong as ever.
>
> Despite these constraints, however, while fewer applicants received full representation from the Commission in 1998, the number who were granted limited representation increased threefold.

Whilst this may be interesting, and the growing formality and complexity of tribunal proceedings is widely observed elsewhere,[114] it is difficult to see how this affected relationships between the Commission and respondents under the Act. Even when tribunal proceedings were more informal, the decision to take a case to industrial tribunal was always the most juridified option the Commission had when dealing with a complaint under the Act. In terms of the relationships between the Commission and its regulatees therefore, of far greater significance was the fact that the Commission was consistently preferring to negotiate a settlement before a hearing took place, and regulatees were normally preferring to accept this option. In 2001, only 8 cases supported by the Commission actually went to a hearing – a remarkably small number.[115]

The impact of the Race Relations (Amendment) Act 2000

In 1998, Parliament passed the Race Relations (Amendments) Act 2000. The most significant innovation of the new Act was the imposition of a general duty upon public bodies (apart from a few specified exceptions) to promote racial equality and eliminate racial discrimination.[116] This was backed up in s71(2) by specific duties, to be imposed by the Secretary of State through secondary legislation. The Commission was given two main additional powers: a power to issue codes of practice[117] and the power to enforce a specific duty by issuing a "compliance notice". Such a notice would require the regulatee to comply

[114] See for example, Baldwin et al (1992:155) and Harlow and Rawlings (1997: chapter 14) in relation to social security tribunals.

[115] If anything then, the growing complexity of tribunal cases merely provided an additional incentive for parties to settle before a hearing.

[116] Section 71(1) of the Race Relations Act 1976 as amended.

with the duty imposed under section 71(2) and to inform the Commission within 28 days what steps were being taken to comply with the duty.[118] The Commission could also include in such a notice a requirement to provide information as reasonably necessary.[119] In the event of non-compliance with the notice, the Commission then had the power to apply for a court order.[120]

The new duties were imposed following a consultation, through the Race Relations Act 1976 (Statutory Duties) Order 2001, coming into force on 3rd December 2001. The main duty contained in the order was for specified public bodies to publish "Race Equality Schemes" indicating how the particular body was intending to fulfil its general duty under the Act. There were further specifications of what had to be contained within these Race Equality Schemes,[121] and a duty to review them every three years. There were also further specific duties in the areas of employment and education, including a requirement for regular monitoring and annual reviews. The Commission published a statutory code of practice and four non-statutory codes to assist organisations in complying with the amended Act.

The amended Act puts the relationship between the Commission and public authorities on a new footing, with contacts centring around Race Equality Schemes. Formal action though, such as the issuing of compliance notices under s71(D), is likely to be extremely rare, with the Commission's primary function in this area being one of education and advice, and occasional persuasion. Thus far, the Commission has not issued a single compliance notice under the Act.[122] The new legislation can thus be seen as a form of imposed self-regulation with the details of how best to comply with the general duty to promote racial equality left to individual public authorities. Even at this early stage therefore, it can be concluded that the Act has not led, and is unlikely to lead to juridification in the relationships between the Commission and public authorities.

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[117] Section 71(C). The procedures for any code under the new Act are identical to other codes under the original Act.
[118] S71(D)(2) of the Act.
[119] It could also specify the manner and form in which this information was to be presented, as well as a suitable time limit.
[120] Section 71(E) of the amended Act.
[121] For instance, a Scheme had to contain an assessment of which policies and functions were relevant to racial equality, an indication of how policies would be monitored to see how they were affecting racial equality and proposals for training of staff members.
[122] Correct as of 31st December, 2002.

Conclusion

The evidence presented in this chapter is striking. Not only does it confirm that juridification is far from inevitable, but it actually points to exactly the opposite conclusion. Over the course of 25 years, contacts between the Commission for Racial Equality and its regulatees were governed less and less by law and legal considerations. Following a period of heavily juridified contacts in the late 1970s and early 1980s, the CRE increasingly concentrated on informal processes until, by the mid to late 1990s, it had ceased to use most of its formal powers altogether, preferring to bargain in the shadow of the law. This chapter served to highlight this by dividing the Commission's activities into four separate policy phases, and the changing levels of juridification in each is summed up in the following tables:

Type I juridification between the CRE and its regulatees: 1977-2000

Period	Indicator	Evidence
1977 to 1982 ✔ (5/5)	Frequent litigation ✔	Many legal challenges to formal investigations. 'Responsive' approach to individual complaints under the Act meant that litigation the norm if the requirements of the Act had been met.
	Coercive, inflexible regulatory strategy ✔	Very little flexibility throughout the formal investigation process. Sharp distinction between 'enforcement' and 'promotion'. Strong evidence of deterrence strategy.
	Reliance on formal, legal process ✔	Yes: provisions of Act followed rigidly; formal terms of reference and non-discrimination notices.
	Frequent prosecution in response to breach of law ✔	The cornerstone of the CRE's strategy in this period.
	High presence / involvement of lawyers ✔	CRE lawyers heavily involved in conduct of investigations and decisions on individual complainants under the Act. Lawyers of investigated companies present in about two-thirds of cases.
1983 to 1987 ✔✖ (3/5)	Frequent litigation ✔✖	Fewer formal investigations and far fewer legal challenges in response. Still a responsive approach to individual complainants, and litigation still the norm with other breaches of the Act.
	Coercive, inflexible regulatory strategy ✔✖	More flexibility shown in the conduct of formal investigations, greater integration of different elements of strategy. Still a separation between enforcement and promotion, however – implying that inflexibility once enforcement decided upon.
	Reliance on formal, legal process ✔✖	Commission slightly less rigid in approach to formal investigations, focusing more on outcomes. However, it still relied on legal avenues with its other powers.

	Frequent prosecution in response to breach of law ✔	Still the norm with cases of persistent discrimination and pressure to discriminate. Legal action still the norm to help individual complainants under the Act. Fewer formal investigations launched.
	High presence / involvement of lawyers ✔✕	Lawyers had the same role as previously, but the far greater emphasis placed on achieving change through its promotional work meant that the work of lawyers was less important to the CRE as a whole.
1988 to 1992 ✕ (0/5)	Frequent litigation ✕	Far less litigation than previously: only one legal challenge to formal investigation, reliance on settlements rather than litigation with s26-28 actions, litigation used less to aid complainants under the Act.
	Coercive, inflexible regulatory strategy ✕	Far greater flexibility with integration of enforcement and promotional work. Persuasion and search for settlements now more common than prosecution.
	Reliance on formal, legal process ✕	Legal tools such as formal investigations still used; however, generally a greater reliance on settlements.
	Frequent prosecution in response to breach of law ✕	No longer true: fundamental change of strategy with respect to prosecutions under the Act, so that the norm was to search for a settlement if possible.
	High presence / involvement of lawyers ✕	Change of strategy meant that lawyers within the CRE were less important.
1993 to 2000 ✕ (0/5)	Frequent litigation ✕	Litigation avoided wherever possible: settlements seen as more fruitful and less expensive option.
	Coercive, inflexible regulatory strategy ✕	Commission's strategy the opposite of this: it was based on negotiation and flexibility to try to achieve change.
	Reliance on formal, legal process ✕	Bargaining in the shadow of the law far more common. Formal investigations barely used.
	Frequent prosecution in response to breach of law ✕	Settlements now at the centre of the CRE's strategy, with wide-ranging settlements aimed to promote change.
	High presence / involvement of lawyers ✕	As before.

Type II juridification between the CRE and its regulatees: 1977-2000

Period	Indicator	Evidence
1977 to 1982 ✔ (5/5)	Explicit legal argument ✔	Yes – legal argument recorded faithfully in reports of formal investigations. Very common especially in indirect discrimination cases.
	Regulatory contact seen as setting legal precedent ✔	Outcomes of formal investigations used by the Commission in industrial tribunal cases and in the course of formulating codes of practice. Some cross-referencing between investigations.
	High presence / involvement of lawyers ✔	CRE lawyers heavily involved in conduct of investigations and decisions on individual complainants under the Act. Lawyers of investigated companies present in about two-thirds of cases.
	References to law and legal cases ✔	Very common: reference to relevant sections of the Act the norm in formal investigations, frequent reference to legal developments in annual reports.

	Adoption of overtly legal values ✔	References to natural justice, and to the need to make a finding "on the balance of probabilities". Frequent consultations with legal advisers.
1983 to 1987 ✔ ✖ (3/5)	Explicit legal argument ✔	Still common, especially in indirect discrimination cases
	Regulatory contact seen as setting legal precedent ✖	Less applicable than previously, as Commission had now built up a body of 'case law' which it then used in formulating codes of practice.
	High presence / involvement of lawyers ✔ ✖	Lawyers had the same role as previously, but the far greater emphasis placed on achieving change through its promotional work meant that the work of lawyers was less important to the CRE as a whole.
	References to law and legal cases ✔	Same as previously, albeit that formal investigations used less.
	Adoption of overtly legal values ✔ ✖	Legal values still important; however, the new emphasis on achieving outcomes rather than sticking to legal processes indicates that achievement seen as more important than following the requirements of the law.
1988 to 1992 ✖ (1½/5)	Explicit legal argument ✔ ✖	Becoming far less obvious due to the decline in number of formal investigations and tribunal appearances. Legal argument used in the course of reaching settlements.
	Regulatory contact seen as setting legal precedent ✖	As in previous period
	High presence / involvement of lawyers ✖	As in previous period, but even more so because of changes of strategy in relation to individual complaints and prosecutions under the Act.
	References to law and legal cases ✔	As in previous period: references still made in the course of legal contacts.
	Adoption of overtly legal values ✖	If anything, Commission becoming keen to avoid the use of law wherever possible, preferring non-legal approaches and bargaining in the shadow of the law.
1993 to 2000 ✖ (1/5)	Explicit legal argument ✔ ✖	As in previous period
	Regulatory contact seen as setting legal precedent ✖	Legal precedent less important than achieving far-reaching change in the shadow of law.
	High presence / involvement of lawyers ✖	As before.
	References to law and legal cases ✔ ✖	Less common, due to use of formal investigation as a last resort only. Still used in the course of negotiating settlements, however.
	Adoption of overtly legal values ✖	As before.

The chapter has also highlighted some of the main reasons why de-juridification occurred. Strikingly, one of the most basic reasons is that the features of Type I juridification itself made the strategies that had caused it in the first place unsustainable. The frequent legal challenges, delays and general lack of co-operation from regulatees in response to an inflexible style of regulation by the Commission, had a direct effect on the Commission's capacity to launch further formal investigations, but also gave rise to

political and judicial intervention. The Commission was thus forced to change its strategy, as it was again towards the end of the 1980s when budgetary constraints and imposed management reforms led to a new focus on ensuring that contacts with regulatees achieved tangible benefits in the most cost-efficient manner. In short, the costs of juridification led the Commission to seek a way around it.

We turn now to the relationship between the Office of Fair Trading and its regulatees to see whether the same trends can be found in a case where a persuasive regulatory strategy might be expected.

Appendix 1

Full list of formal investigations 1977-83 with key characteristics

Information is listed as follows:

Name of investigation – year started – length of investigation – type of investigation – whether company co-operative/admitting charges – whether lawyers present – whether subpoena/court orders necessary – whether litigation - whether non-discrimination notice issued.

Notes:

- *Length of investigation.* In a few cases, the exact month in which the investigation was initiated or completed is unknown. The approach taken in these cases has been to provide the lowest possible figure (i.e. assuming December of the start year and/or January of the end year). This is so that the point made in the chapter as to the length of investigations can rest on the least-case scenario.
- *Lawyers present.* The presence of lawyers is only recorded here where this is mentioned specifically in the report of the investigation. The actual number is likely, however, to be higher than this – especially given that some companies will have been in a position to get legal advice internally.

1. Abbey National Building Society – 1981 – 34 months – belief, direct, employment – discrimination not admitted – lawyers – non-discrimination notice overturned on appeal b/c company introduced new evidence.
2. Allen's Accommodation Bureau – 1980 – 5 months – belief, direct, housing – discrimination admitted – lawyers – non-discrimination notice issued.
3. Allocation of council housing, with particular reference to work permit holders – 1978 – 43 months – strategic, indirect, housing – discrimination not admitted by some councils - lawyers – 2 councils agreed to change policies under threat of non-discrimination notice, hence notices not issued.
4. Amari Plastics – 1978 – 66 months – belief, direct, employment – discrimination not admitted – lawyers – non-discrimination notice overturned on appeal and replaced with more limited notice after an EAT and then a Court of Appeal decision upholding the right of the industrial tribunal to enquire into the facts of the investigation.
5. Antwerp Arms Public House – 1978 – 9 months – belief, direct, provision of services – discrimination not admitted – lawyers – non-discrimination notice issued.
6. Barlavington Manor Children's Home, Mr and Mrs John Ellis – 1977 – 16 months – belief, direct and indirect, provision of services – discrimination not admitted – lawyers – certain requirements of non-discrimination notice appealed, informal discussions led to change in some provisions and appeal dropped.
7. Birmingham AHA (teaching), St. Chad's Hospital – 1979 – 36 months – belief, direct, employment – discrimination not admitted - lawyers - subpoena notice and enforcement order necessary – non-discrimination notice appealed in industrial tribunal, but after the

Authority went out of existence as a result of reorganisation of NHS, the new AHA accepted liability for non-discrimination notice and withdrew the appeal.

8. Birmingham LEA and schools: referral and suspension of pupils – 1979 – 49 months – strategic, education – recommendations made.
9. BL cars Castle Bromwich – 1978 – 24 months – belief, direct, employment – discrimination not admitted – lawyers – subpoena notices necessary – appeal against non-discrimination notice withdrawn following settlement.
10. Bondina Ltd., National Union of Dyers, Bleachers and Textiles Workers, and Mr. Nutton – 1978 – N/A - strategic, employment - enquiries completed, but investigation discontinued following *Hillingdon* decision.
11. Broomfield Ltd – 1978 – 4 months – belief, direct and indirect, employment, discrimination not admitted – company's legal department – company co-operative + allegations not believed, so no non-discrimination notice. Recommendations made.

12-15. Brymbo Community Council, Rogers, Stapley, Greenaway (4 investigations) – 1980 – 7 months – belief, direct, housing – discrimination not admitted – lawyers - subpoena notice necessary for one case – three non-discrimination notices served.

16. Chubb & Sons – 1978 – 49 months - strategic, employment – company very co-operative - no non-discrimination notice - investigation delayed because of legal challenge in another case.
17. Collingwood Housing Association – 1978 – 49 months - strategic, direct and indirect, housing – discrimination not admitted – recommendations made, Commission's approach affected by *Percy Ingle Bakeries* decision.
18. Cottrell & Rothon estate agent – 1978 – 26 months – belief, direct, housing – discrimination not admitted – lawyers – respondent applied for injunction during course of investigation and judicial review following the issuing of the non-discrimination notice – unsuccessful, so non-discrimination notice stood.
19. Dunlop Ltd., Polymer Engineering Division – 1982 - 20 months, not including original investigation – belief, indirect, employment – discrimination not admitted – investigation had to be restarted with new terms of reference following *Hillingdon* – non-discrimination notice not issued for reasons given in paragraph 23.
20. Genture Restaurants and Mr Weston-Edwards – 1977 – 12 months – belief, direct, provision of services – discrimination not admitted – lawyers – no appeal/review – non-discrimination notice – suspicion of continuing discrimination led the Commission to seek further injunction, which was not granted by the court.
21. Hackney carriage drivers in Birmingham – 1979 – 49 months – belief, indirect, employment – discrimination not admitted – lawyers – appeal + judicial review both dropped, non-discrimination notice changed to reflect changed practice.
22. Hackney LBC, housing allocations – 1978 – 61 months – strategic, housing – full co-operation – non-discrimination notice issued, council agreed not to issue proceedings against Commission despite *Prestige* decision.
23. Hillingdon LBC homeless applicants – 1978 – N/A - strategic, housing – lawyers – judicial review challenge won by Hillingdon and investigation terminated.
24. Home Office immigration procedures – 1979 – 72 months – general, immigration – lawyers - judicial review case to establish whether or not investigation within scope of Commission's powers. Lengthy recommendations made.

25. Kirklees Metropolitan Borough Council – 1981 – 18 months – strategic, employment - published as study rather than formal investigation because of the *Prestige* decision.
26. London Drivers Supplied Services Ltd. – 1978 – 4 months – belief, direct, employment – discrimination not admitted – finding of discrimination not made, so no non-discrimination notice, but recommendations were made.
27. Massey Ferguson Perkins – 1978 – 49 months – belief, direct and indirect, employment – discrimination not admitted – lawyers – appeal against all requirements of non-discrimination notice dropped after agreement.
28. Mr G.D. Midda and DS Services Ltd – 1978 – 22 months – belief, direct, housing – discrimination not admitted – subpoena notice, court proceedings to enforce it and further proceedings to enforce court order necessary, non-discrimination notice issued and not appealed, but further court order necessary to enforce non-discrimination notice.
29. Mortgage allocations in Rochdale – 1979 – 49 months – general, indirect, housing – recommendations made.
30. Mount Pleasant United Working Men's Club – 1978 – 16 months – belief, direct – goods and services – non-discrimination notice.
31. National Bus Company – 1978 – 85 months – strategic, indirect, employment – recommendations made, original formal investigation changed into enquiry with consent of company following *Prestige* decision.
32. Pembroke & Pembroke employment agency – 1977 – 67 months – belief, direct, employment – discrimination not admitted – lawyers – original terms of reference revised following representations, subpoena notice + court order necessary, several documents missing – no non-discrimination notice b/c not enough evidence.
33. Percy Ingle Bakeries – 1978 – 49 months – belief, direct and indirect, employment – lawyers – appeal against non-discrimination notice delayed until decision in *Amari* had been reached, but then successful.[123]
34. Philips Electronics Ltd. – 1978 – N/A - strategic, employment - dropped because of *Prestige*, hence no report.
35. Prestige Ltd. – 1978 – N/A - strategic, direct and indirect, employment – lawyers – appeal against notice in industrial tribunal, followed by judicial review against non-discrimination notice, and investigation declared void.
36. Rank Leisure – 1979 – 49 months – belief, direct, provision of services – discrimination not admitted – lawyers – appeal against non-discrimination notice delayed pending outcome of another case and later withdrawn.
37. Secondary school allocations in Reading (Berkshire LEA) – 1978 – 49 months – belief, education - no finding of discrimination made, but recommendations.
38. Slough housing allocations – 1978 – N/A - strategic, indirect - discontinued following *Hillingdon* judgment.
39. Smith & Nephew – 1978 – N/A - strategic, employment - dropped because of *Prestige*, hence no report.

[123] i.e. it was held that requirement or condition had to affect disproportionate number of racial group in question + as proportion could not be 100%, this was not a case of indirect discrimination. Whilst this was presented by the Commission as a technicality + they used the case to try to achieve law reform, the case can be seen in another light: this was really a case of direct discrimination, but lack of evidence.

40. Tottenham Trades and Social Club – 1980 – 17 months – belief, direct, provision of services – discrimination not admitted – lawyers – some original terms of reference dropped following initial representations – non-discrimination notice not appealed.
41. Unigate Dairies – 1978 – 66 months – strategic, employment - recommendations made, original formal investigation changed to non-statutory enquiry with consent of company following *Prestige* decision.
42. USMC International – 1978 – N/A - strategic, employment - dropped because of *Prestige*, hence no report.
43. Walsall Metropolitan BC housing allocation practices – 1979 – 52 months – belief, direct and indirect, housing – discrimination not admitted – subpoena notice issued – original investigation had to be terminated due to *Hillingdon* case, new terms of reference issued – non-discrimination notice not issued because of progress made.
44. West Yorkshire Passenger Transport Executive (Bradford Metro) – 1979 – 41 months – belief, direct and indirect, employment – discrimination not admitted, but full co-operation – investigation restarted with new terms of reference following *Hillingdon* - non-discrimination notice issued.
45. Westminster CC, NUPE and 4 named NUPE officers – 1979 – 96 months - belief, direct, employment – lawyers - terminated and restarted due to Hillingdon decision, then judicial review at first instance and in Court of Appeal, then non-discrimination notice quashed on appeal in county court.
46. Woodhouse Recreation Club – 1979 – 11 months – belief, direct, provision of services – discrimination admitted + advice sought – lawyers – 'on balance of probabilities' – no appeal/review – non-discrimination notice unchanged
47. Zone Insurance Co. – 1978 – N/A – belief, indirect, provision of services – discrimination not admitted – lawyers – subpoena notice + court order necessary to get information - investigation discontinued when company went into liquidation

Appendix 2

Full list of formal investigations 1984-1998 with key characteristics

Information listed as follows:

Name of investigation – year started – length – type of investigation – whether company co-operative/admitting charges – whether lawyers present – whether subpoena/court orders necessary – whether litigation - whether non-discrimination notice issued

1. Abolition of the GLC – 1986 – N/A – employment, general – terminated, no reason given as to why.
2. Appointing NHS Consultants and Senior Registrars – 1992 – 37 months - employment, general – recommendations
3. Beaumont Leys Shopping Centre – 1985 – 12 months – employment, general – recommendations made.
4. Bradford School Leavers - 1988 – 36 months - employment, general – recommendations made.

5-7. Brook Street Bureau, Brittania Cards and Network Recruitment Agency (3 investigations) – 1992 – 19 months - employment, belief – non-discrimination notices issued against Network and Brittania

8. Calderdale LEA, teaching English as a second language – 1985 – 22 months – education, belief – recommendations made.
9. Cardiff Employers – 1987 – 49 months – employment, general – recommendations made.
10. Chartered Accountancy Training Contracts – 1985 – 18 months – employment, general – recommendations made.
11. Civil Service recruitment – 1992 – N/A - employment, belief – suspended pending internal inquiry.
12. Cleveland LEA – 1988 – 43 months – education, belief – yes, but LEA felt bound by Education Act 1980 – lawyers – Secretary of State rejected Commission's interpretation – Commission applied for judicial review to determine conflict between two statutes, lost at first instance – no non-discrimination notice because field of education.
13. Computacenter Ltd – 1994 – N/A - employment, belief – full co-operation – investigation suspended following agreement.
14. Construction Industry Training Board – 1992 – ? – employment, belief – full co-operation - no direct findings of discrimination – recommendations.
15. Council for Legal Education – 1993 – N/A - education, belief - investigation suspended as Council offered to fund an independent inquiry.
16. Hackney LBC – 1996 – 26 months - employment, belief – investigation suspended as independent inquiry commissioned – formal undertakings in lieu of non-discrimination notice.
17. Handsworth Horticultural Institute Ltd. – 1988 – 48 months – services, belief – company not responsive to persuasion prior to investigation - lawyers - non-discrimination notice – appeal in county court, dismissed.
18. Hertfordshire County Council, secondary school admissions – (Feb) 1989 – ? - education, belief, finding of indirect discrimination – recommendations made.

19. Hestair Management Services Ltd – 1988 – 36 months - employment, belief - investigation foreshortened when company reached out-of-court settlement with individual complainant, including an admission of discrimination – no non-discrimination notice.
20. Housing Associations in England and Wales – 1991 – 18 months – housing, general
21. Housing Associations in Scotland – 1991 – 18 months – housing, general
22. JHP Training Ltd – July 1987 – ? - employment, belief – general co-operation, although information not given at first because of confidentiality considerations.
23. Large Companies – 1993 – 18 months - employment, general
24. Lecturer appointments in Leicestershire – 1989 – 20 months - employment, belief – full co-operation – non-discrimination notice not issued due to changes in who was now responsible for recruitment.
25. Liverpool City Council – 1987 – 27 months – housing, belief – Council did not refute findings – non-discrimination notice, reasons given – court order later sought because of slowness of implementation.
26. Ministry of Defence (Household Cavalry) – 1993 - 30 months – employment, belief – formal agreement in lieu of non-discrimination notice.
27. Mobile Doctors Ltd – 1993 – 24 months - employment, belief – non-discrimination notice issued.
28. Norman Lester & Co, Oldham Estate Agency – 1988 – 9 months - housing, belief (although only after testing, no prior complaint) – non-discrimination notice – appealed in county court, dismissed because lodged out of time – company subsequently refused to comply with non-discrimination notice and Commission started further legal proceedings + OFT informed under Estate Agency Act 1979.
29. Oaklawn Property Developments, Leicestershire – 1987 – 16 months – housing, belief (strengthened by tests prior to investigation) – non-discrimination notice.
30. Oldham Housing Allocations – 1990 – 28 months – housing, belief – disagreed with findings, but co-operative – contract of agreement in lieu of non-discrimination notice
31. Psychiatric patients – 1991 – N/A - terminated following new Act – health, general.
32. Refugee Housing Association Ltd – 1990 – 10 months - housing, belief – company co-operative – non-discrimination notice issued – initial indications that company would appeal, but it decided not to.
33. Richard Barclay & Co., London Estate Agency – 1987 – 8 months – housing, belief (strengthened by tests prior to investigation) – non-discrimination notice.
34. Rail, Maritime and Transport Workers Union (RMT) – 1992 – N/A - formal investigation suspended on condition that the union took steps to implement agreed package of racial equality measures – services, belief.
35. Salford Van Hire – 1992 – 21 months - services, belief - company did not accept that discrimination had taken place, but co-operated with the investigation – non-discrimination notice issued.
36. South Manchester District Health Authority – 1985 – 28 months – health, belief – recommendations made.
37. Southwark LBC – 1989 – 12 months - housing, belief, indirect – full co-operation – lawyers + legal argument centring around concept of justifiability - non-discrimination notice mainly to impose discipline on racial equality policies.

38. St. George's Hospital Medical School – 1986 – ? - higher education, belief – full co-operation, internal investigation and admitting of discrimination - non-discrimination notice not issued despite finding of discrimination because of equal opportunity undertakings.
39. Strathclyde LEA – started ? - ended 1995 – education, belief – no finding of discrimination, recommendations made.
40. T&T Personnel Employment Agency – 1990 – 20 months - employment, belief - lawyers – finding of discrimination "on the balance of probabilities", non-discrimination notice
41. Testing in the Private Rented Sector – 1989 - 20 months – housing, general
42. Tower Hamlets LBC – 1986 – 28 months – housing, belief – discrimination partially admitted – non-discrimination notice – court order later sought because of failure to meet requirements in notice.
43. Working in Hotels – 1987 - 45 months – employment, general – recommendations made.

Appendix 3

Examples of terms of reference and a non-discrimination notice

(1) Terms of reference (*Genture* investigation)

The Commission believes that Genture Restaurants Ltd. and Mr J. Weston-Edwards, its Chairman, may have done or be doing acts of any or all of the following descriptions:

a. unlawful discriminatory acts in breach of section 20 of the Race Relations Act 1976;

b. contraventions of section 30 of the Race Relations Act 1976.

The investigation shall be confined to those acts.

(2) Non-discrimination notice (*Rank Leisure* investigation)

Non-discrimination notice
(Race Relations Act 1976, section 58)

To: Rank Leisure Limited
38 South Street
LONDON W1A 4QU

Whereas in the course of a formal investigation, the Commission for Racial Equality ("The Commission") have become satisfied that you had committed acts to which section 58(2) of the Race Relations Act 1976 ("the Act") applies namely:

that on 20 March 1979 and on diverse occasions since the 13th day of June 1977, you discriminated on racial grounds in the admission of members of the public to the Top Rank Suite, Station Hill, Reading, in contravention of section 20 of the Act,

and are of the opinion that further acts are likely to be committed unless changes are made in your practices or other arrangements as respects the admission of the public to the Top Rank Suite in Reading ("the Suite).

Now therefore, without prejudice to your other duties under the Act, you are hereby required, in pursuance of Section 58(2) of the Act, not to commit any such act as aforesaid or any other act which is an unlawful discriminatory act by virtue of Section 20 of the Act.

In so far as compliance with the aforesaid requirement involves changes in any of your practices or other arrangements, you are further required, in pursuance of the said Section 58(2), to inform the Commission as hereinafter provided that you have effected these changes, and what these changes are and to take the following steps for the purpose of affording that information to other persons concerned namely:

i. within 30 days of the date on which this notice becomes final, to notify in writing all employees or agents concerned with the admission of the public to the Suite, that the policy of the Company is not to discriminate on racial grounds in the admission of members of the public to the Suite;

ii. to reissue these notifications every 6 months for a period of two years.

You are further required in pursuance of Section 58(3) of the Act, to furnish the Commission as hereinafter provided with the following information to enable them to verify your compliance with this notice namely:

Verification that you have issued the notifications specified above and the date on which they were issued.

The information to be furnished by you to the Commission in pursuance of this notice should be furnished as follows, namely:

> By providing the Commission with copies of the written notifications referred to in (i) and (ii) above within 14 days of the date of issue, each copy bearing the signature of the person to whom the notification was issued in acknowledgement of receipt together with his/her full name and postal address in block capitals.

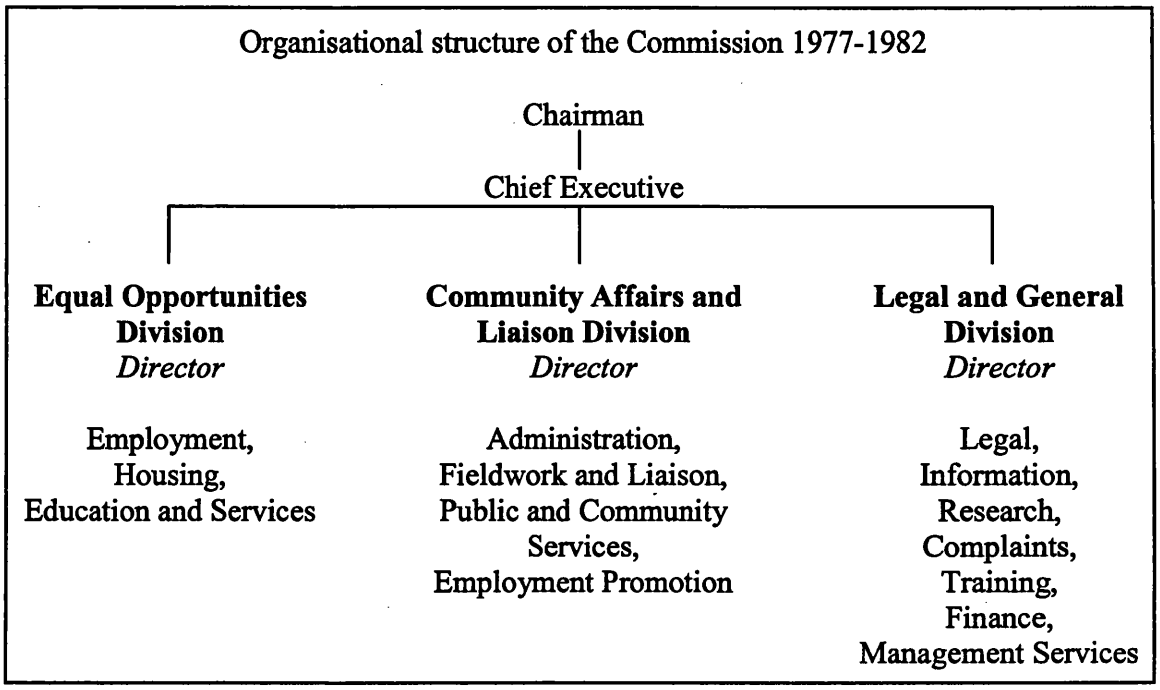
Dated the 20th day of March 1981.

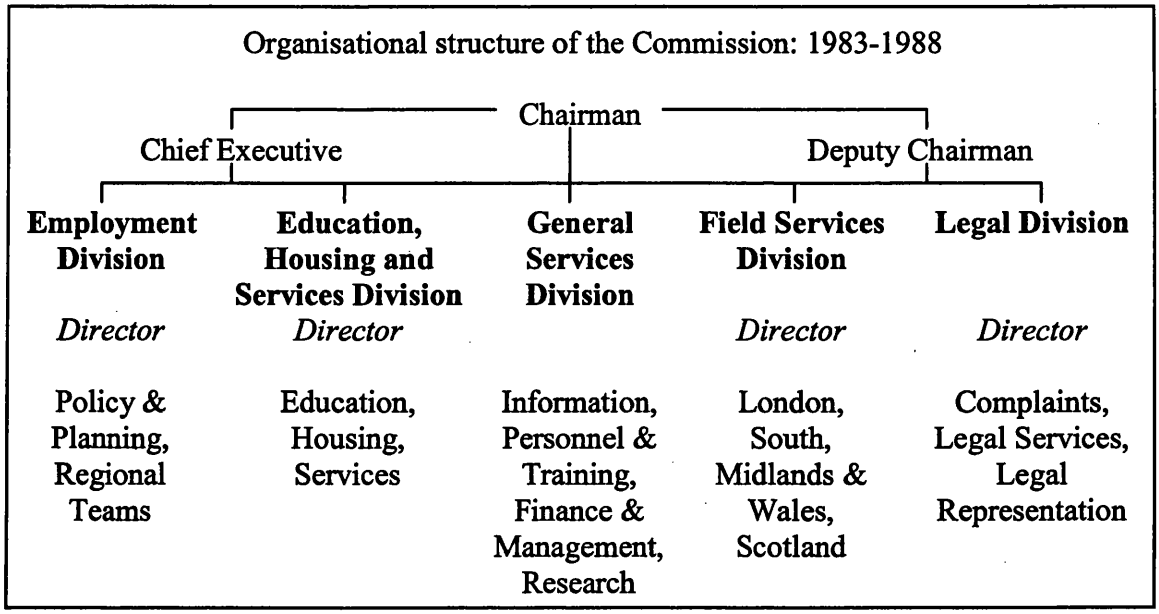
This notice was issued by the Commissioners, the provisions of Section 58(5) of the Act having been complied with.

[Signed by the Deputy Chairman.]

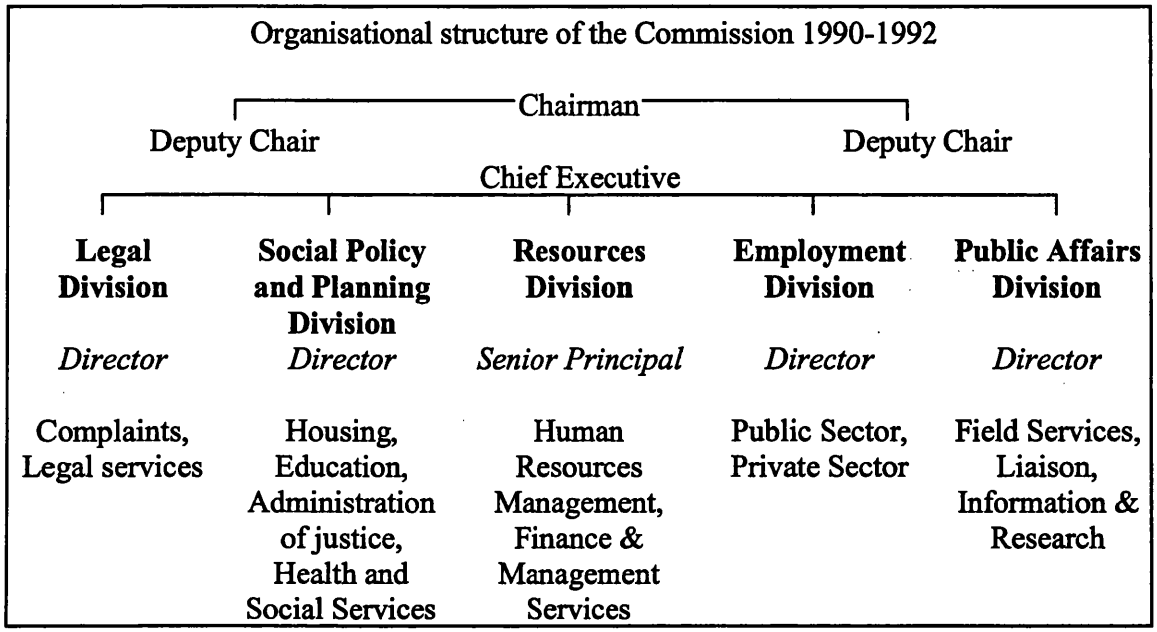
Appendix 4

Organisational structure of the Commission





Organisational structure of the Commission 1990-1992



Chapter 4

The Office of Fair Trading and consumer protection 1973-2002

Introduction

- Assessing enforcement strategies over time

In Chapter 2, it was noted that in establishing the Office of Fair Trading (OFT) through the Fair Trading Act 1973, policy-makers had intended to create a non-legalistic regulatory regime. This aim was reflected in specific features of the legislation: the strong involvement of the Secretary of State in many aspects of the implementation of competition and consumer protection policy, the open-ended and permissive language of the clauses outlining the powers of the Director General of Fair Trading (DGFT), indeed the very notion of a single person regulator which, at the time, was novel in the UK. For these reasons, and several others set out in Chapter 2, it was predicted that the Office of Fair Trading would be likely to follow a persuasive and non-legalistic regulatory strategy.

At the same time, it is also true that the OFT had both the range of powers and degree of discretion to make its own choices. The following table indicates some of these choices, the resolution of which would necessarily impact on the nature of its relationships with its regulatees. Moreover, one further power – the Part II power to make some consumer trade practices into criminal offences through references to the Consumer Protection Advisory Committee (CPAC) – provided a medium through which juridification might have occurred directly.

Power / Duty	Questions
Codes of practice	• Should they be standardised? • Should the Office continue to support them if not properly enforced?
Part III powers against rogue traders	• How much flexibility should be shown towards rogue traders? • What type of hearing should be given towards rogue traders? • Should there be an active prosecution policy, or should every effort be made to encourage change without court action?
Consumer credit licensing	• How much warning should there be before a license is revoked? • How strict should the Office be towards licensees?
Restrictive trade practices	• How often should the Office get round the formal provisions by recommending that an agreement is "of no significance"? • In particular, how far should it use negotiations to try to avoid court appearances?
Monopoly references	• How frequently should references be made? • Should the threat of references be used as part of a process of bargaining? • How much flexibility should be shown to companies post-investigation when trying to secure an undertaking?
Merger advice	• Should there be set guidelines on what makes the Office recommend a merger? • How interventionist should the advice policy be?

As was pointed out in the previous chapter, it is important to remember that it is not only the manner in which each power is exercised that is important – it is also the question of which power is chosen in the first place. A decision by the Office to resolve a problem through promulgating and monitoring a particular code of practice under s124(3) implies a different relationship from one in which the Office decides to resolve the same problem through a reference to the CPAC, with the intention of turning the detrimental consumer trade practice into a criminal offence.

Both this and the next chapter are divided into chronological sections, so as to break up what is a long period under review. Unlike the previous chapter on the CRE however, the use of these chronological breaks does not imply change in the degree of juridification. In terms of where to draw the boundaries, there are various suggestions in the secondary literature. Writing in 1987, Ramsay suggests dividing the OFT's consumer activity into two periods: the 'crusading' period from 1973 to 1978 and the 'transitional' period from 1979. Focusing on the competition side, Wilks (1999: 285) suggests that 1979-80 could be considered one useful dividing point, marking as it did the election of a new Conservative government and the passage of the Competition Act 1980, and 1989-92 a further transition, marking a period of notable budget and staffing increases. Wilks then makes a further suggestion: "to look at the OFT from the point of view of successive

Directors General", which he considers especially appropriate because "Gordon Borrie dominated the history of the OFT, and his period of office, 1976-92, over sixteen years, can almost be taken as a policy period in its own right" (*ibid.*). It is proposed to combine elements of these suggestions, taking three periods as follows. The first period will run from the establishment of the OFT to 1979-80 - an attractive break as both Ramsay (writing about the consumer side of the OFT) and Wilks (writing about the competition side) see it as a turning point in their respective focus. The second period runs from then until 1992 – the year of Gordon Borrie's retirement as Director General. The final period begins with the appointment of Sir Brian Carsberg as the new Director General and ends with the passing of the Enterprise Act 2002. On the competition side, however, the analysis stops with the Competition Act 1998, and there is a separate chapter on the impact of that legislation.

The next three chapters trace change in the level of juridification between the OFT and its regulatees over a period of almost 30 years, from its establishment in 1973 up to the passage of the Enterprise Act 2002. Before beginning this task though, it is first necessary to justify separating the two areas of consumer protection and competition policy into two different chapters.

- The relationship between the competition and consumer protection sides

Initially, much of the time of the first Director General, John Methven, was spent with organisational matters. The new Office was organised into five divisions: Monopolies and Mergers, Restrictive Trade Practices, Consumer Affairs, Legal and Information.[1] With the first two of these divisions, the Director General was able to draw upon staff from previously existing organisations.[2] The other three divisions had to be created from scratch, however, as did the new consumer credit division set up to discharge the duties that would arise under the new Consumer Credit Act 1974. The build-up of staff was initially slow,

[1] Wilks (1994: 21-2) points out that the limited number of lawyers that there were in the Office (an average of 10) were separated into a parallel support division, and thus – like economists – were consulted on decisions rather than being actual decision-makers.

[2] Hence, the staff of the Registrar of Restrictive Trading Agreements manned the Restrictive Trade Practices Division which took over its duties, and a small number of staff from the DTI including the Mergers Secretariat were transferred to the Monopolies and Mergers Division.

due to difficulties in finding people of the right calibre from a variety of backgrounds.[3] By the end of 1976 though, the number of people working at the Office had more or less settled at 324.

From the start, both John Methven and his successor, Sir Gordon Borrie, were arguing that the two main fields of activity of the OFT were not only compatible with each other, but complementary. Sir Gordon put it this way: the safeguarding of competition was a natural corollary to the protection of the economic interests of consumers for two reasons: firstly, because the restriction of competition involved a diminution of choices open to the consumer and therefore higher prices; and secondly because a well-informed buying public was a valuable stimulus for industry to remain alert to market requirements and in tune with changing needs (AR 1981:11). Ultimately these boil down to one basic point: that the ultimately beneficiary of competition policy is the consumer.

This does not alter the fact though that the two spheres of activity were always, to a degree, going to be competing for the tight budgetary and time resources of the OFT generally, and the Director General in particular. Hence, in his first Annual Report, John Methven admitted that "much of my time and attention over the past year has been given to the consumer affairs side of my Office since this was entirely new". Wilks (1999: 187-8) notes the neglect given to competition issues as a result, pointing out that it was not until July 1974 that the first monopoly reference was made to the MMC. Moreover, there are several areas where the two policy fields may conflict directly. Probably the best example is the introduction of a code of practice in an industry which, whilst providing certain benefits for consumers, might also constitute a new barrier of entry for potential market entrants. Hence although most codes of practice would normally have to be registered under the restrictive trade practices legislation, the practice was for the Director General to recommend to the Secretary of State that the agreement should be exempt from court proceedings (AR 1976: 10-11).[4] The 1982 Annual Report explicitly concedes the potential for conflict in this regard: "self-regulation can bring its own problems when it includes

[3] See the first Annual Report (AR 1974: 13). John Methven emphasised his desire to bring together a staff with a wide variety of experiences – "from manufacturing, retailing, consumer affairs, advertising, central and local government to take but a few examples", but his success was limited largely due to the influence of civil service unions (See Chapter 2, and generally Ramsay 1987).

restrictions on competition, such as those preventing members of a profession from publicising their services...".[5]

The justification for separating the consumer protection and competition work of the Office into two chapters is that, by and large, the two spheres have been kept separate. Throughout the period under review, despite several changes in the organisational structure of the Office, there have always been separate divisions dealing with these areas of policy. Moreover, as pointed out above, at least initially, the staff for the different divisions came from different sources. The staff for the competition side of the Office came from the Office's predecessors in the enforcement of policy – the DTI and the Restrictive Trade Registrar - whilst the staff for the consumer side were recruited separately from within the civil service.

This separation of roles was confirmed by Lord Borrie in an interview, who stated not only that there was little liaison between the two sides, but also that the statutory separation between the two made co-ordination difficult in practice. Civil servants in the Office tended to follow their own particular sets of statutes and instructions and, except for the Director General himself, no-one really had a wider perspective.[6] This is what Wilks (1999: 187-8) says about the institutional coupling of competition and consumer protection policy:

> In practice, however, the two activities have been administered in substantial separation from one another and it is not very clear that there are great benefits. Consumer protection policy is concerned with developing and applying quite detailed rules about commercial behaviour. There is no obvious or logical link with market structure or competitive conditions, and the clients tend to be the public, consumer groups and local authorities through their trading standards offices. In contrast, competition policy is about business structure and strategy, and the clients tend to be businesses, lawyers and economists. Clearly 'the consumer' should be the ultimate beneficiary but that statement verges on pious moralising. The downside of the marriage has been the diversion of energies, the consumer preoccupation of Directors General, and the diffusion of attention away from the competition brief.

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[4] Lord Borrie (interview – 21st January, 2003) provided an example in the other direction: he pointed to sectors such as the used car sector where there was a lot of competition, but regulation was difficult as a result.

[5] Rather strangely, this is contradicted in a later Annual Report in which the problem is described as "trivial".

[6] Interview with Lord Borrie, 21st January, 2003.

The two areas are thus taken separately: consumer protection in this chapter, competition in the following two.

This chapter thus deals only with the consumer protection side of the Office's work and it is argued that, contrary to the 'juridification thesis', relations between the Office and its regulatees have remained non-legalistic over a substantial period of time. Indeed, not all that much has changed in this regard since the general tone was set by the first Director General, John Methven, in his second Annual Report (AR 1975: 12):

> Over the whole area of the Office's activities, therefore, I would like to emphasise the importance I attach to securing improvements by negotiation whenever possible and, where it is necessary to use the statutory powers, to do so flexibly and not in any doctrinaire way.

Most of the chapter shows how this statement of intent has been translated into practice: how over a long period of time, the Office has regularly chosen informality and flexibility over legalism and rigidity. If there was any suspicion that, in the context of an Annual Report, the Director General had one eye on the need to reassure the business community, there can be little doubt in retrospect that the statement fits very closely with the approach actually taken by the Office in the subsequent 25 years.

This is, however, subject to two qualifications. The first is that there is evidence that regulatees have become more adversarial, more willing to pursue legal avenues. The second is that there is evidence of some change in the last few years as the result of EC Directives. The impact of new powers coming from these Directives will be considered towards the end of the chapter.

The Early Years: 1973-9

- Introduction: the balance struck between the consumer protection powers

In looking at the general balance struck between these different powers in the early years of the OFT, several points can be made. The first two relate to each other directly: that there was an early abandonment by the OFT of its lawmaking power under Part II of the Fair Trading Act, and that conversely there was an emphasis on the promotion of

industry-wide codes of practice. Hence, by 1980, there were 19 codes of practice in existence, but there had only been 4 references to the Advisory Committee. Prima facie then, this would seem to indicate a preference for a more consensual, less legalistic power over an imposed, formal and legal tool. We shall see shortly whether this was indeed the case. Next, in contrast to the early approach of the Commission for Racial Equality, 'promotion' and 'enforcement' were not seen as alternatives, nor were separate departments set up to deal with them – indeed the very terms do not generally appear in the Annual Reports. Rather, both enforcement measures and the provision of information and advice were always seen as necessary responses to a problem. Finally, both the power to secure undertakings from rogue traders and the power to refuse or revoke consumer credit licences were used as 'powers of last resort'. In other words, they were the exception that proved the rule that the vast bulk of the contact between the Office and its regulatees was informal and consensual, based on a process of persuasion and education that went in both directions.

- <u>The trial and rejection of lawmaking through the CPAC</u>

The speedy falling into disuse of this lawmaking power would have been a surprise to the legislators of the Fair Trading Act 1973, as well as to the staff of the Office. It was intended specifically as a fast-track procedure, without the costs associated with the introduction of new Parliamentary legislation (such as the difficulties of securing Parliamentary time and majority and the need for wide consultations). Ramsay records from an interview that "those within the agency viewed it as an important measure of output, success to be measured by the ability of the Office to obtain a string of Part II orders" (Ramsay 1987: 188). Yet within four years the last reference had been made, and within nine years the Consumer Protection Advisory Committee (CPAC) had been disbanded. As the use of this power represented the most legalistic alternative possessed by the Office, it is particularly important to examine the reasons for its demise in detail.

The procedure, set out under sections 13-33 of the Fair Trading Act 1973, was as follows. The Director General would initiate action by inviting the Advisory Committee to consider whether a particular trade practice adversely affected consumers' economic interests and had one or more of certain detrimental effects mentioned in the Act. He would also ask it at the same time to consider his proposals for curbing or regulating the practice.

If the committee was satisfied that the practice adversely affected the economics interests of consumers and did so in one of the particular ways mentioned in the Act (e.g. by misleading them about their rights), it then had to report to the Secretary of State, agreeing, rejecting or modifying the proposals. If the committee did not think the practice detrimental, the proposals could not go forward. Nor could an Order be made if the Committee disagreed with the Director General's proposals and suggested no modification of them.

The power was an extreme one for two main reasons. Firstly, it was supposed to be a fast-track procedure which, in particular, did not require Parliamentary approval. Secondly, the power was to create new *criminal* offences. Combined, it can be suggested that this implied a heavy-handed response to a problem that was at risk of being vulnerable to legitimacy concerns. In anticipation of this, the Director General set out to establish a consultation procedure before references to the CPAC were made. This involved sending a letter to approximately sixty trade, consumer and other organisations, detailing the trade practice which was of concern together with the proposed remedy, and inviting comment. It was also the practice of the Office to make available to the public and to those who may wish to make representations the dossier which was submitted to the Committee following a reference. Such a procedure ought to have been capable of strengthening the weight of its proposals in the eyes of the CPAC and the Secretary of State. It is also, however, evidence of the preference of the Office for consensus over confrontation even, or perhaps especially, for this most imposed of powers. As stated in his first Annual Report, John Methven was "anxious to make this procedure as open as possible" (AR 1974: 15).

An examination of the Annual Reports indicates how quickly the power was abandoned by the OFT. In 1974, two references were made: one relating to clauses purporting to exclude inalienable rights of consumers, the other dealing with the seeking of pre-payments from consumers without undertaking to return the money if the goods were not delivered within a specified period. In 1975, one reference was made concerning the practice of seeking to sell goods to consumers without revealing that the goods are being sold in the course of business.[7] Consultations were also made on two sets of tentative

[7] An example given in the Annual Report is an advertisement in the classified column of a newspaper offering goods without giving any indication that they are being sold by a trader. Having responded to the

proposals. In 1976, there were no references at all, then in 1977 a final reference was made relating to the practice of pricing goods and services exclusive of VAT. This was the last time the power was used, however, and the CPAC was disbanded in 1982 with the following, rather cryptic remarks, in the press notice (AR 1982: 45):

> References can only be made to the Committee in circumstances which are prescribed in Sections 13, 14 and in some cases 17 of the [Fair Trading] Act [1973]. It has proved difficult to identify practices which meet these requirements and which are suitable for references to the Committee.

Whether or not this was *a* cause of the lack of references, the evidence prior to 1982 points to more obvious reasons. In particular, what had been anticipated as a fast-track procedure was proving nothing of the sort. As early as 1975, the Director General was writing, "while I totally accept that any change in the law should not be undertaken lightly, I am nevertheless disappointed that changes in the law have not yet resulted from the References I have already made to the Consumer Protection Advisory Committee" (AR 1975: 9).[8] And the following table indicates well that this was not only a feature of the initial references:

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advertisement, members of the public may be left in their dealings with the trader with the mistaken impression that they are buying from a private individual.

[8] He did, however, note that the effect of the references were to provide an opportunity for airing views held by shoppers, traders, Trading Standards Officers and the media concerning trading practices, thus increasing general awareness (*ibid.*).

Subject matter	Date first considered	Date sent to CPAC	Date CPAC report sent to Secretary of State	Resulting Order
Clauses purporting to exclude inalienable rights of consumers	**Nov 1973**	May 1974	Dec 1974	**Nov 1976** The Consumer Transactions (Restrictions on Statements) Order 1976
Clauses seeking prepayments without undertaking to return money if goods not delivered	**Nov 1973**	May 1974	1976 [month unknown]	**Nov 1976** Mail Order Transactions (Information) Order 1976
Practice of seeking to sell goods without revealing that in course of business	**May 1974**	March 1975	June 1975	**Nov 1977** The Business Advertisements (Disclosure) Order 1977
Practice of pricing goods and services exclusive of VAT	**Dec 1975**	Jan 1977	May 1977	**March 1979** Price Marking (Food and Drink on Premises) Order 1979

Hence, the average time from when an issue was first considered by the Office to when the Secretary of State was issuing an Order through statutory instrument was 38 months, and the average time from a reference being made to the CPAC to the Order being issued was just under 30 months – some two and a half years.

The following statement given to Parliament in December 1974 by the Secretary of State provides some indication of why the process might have been taking so long:[9]

> The Committee has in general endorsed the DGFT's proposals that the purported exclusion of consumers' inalienable rights when buying or otherwise acquiring goods should be prohibited. The Committee has also, however, identified certain problems which will need further consideration in the preparation of a draft order.
>
> Subject to this I accept the conclusions of the report and intend to use my order-making powers under s22 of the FTA 1973 to make such an order as may be appropriate for giving effect to it. But because the procedure is new and the time available for representations has so far been limited, on a matter which is of wide concern to businessmen and consumers alike, I propose, exceptionally in this case, to ask interested parties to comment on the proposed provisions within a strictly limited period before inviting Parliament to approve an Order. This will also allow traders more time to amend guarantee and other documents which will be affected.
>
> Special consideration will need to be given to notices and statements such as 'No goods exchanged' which are not void in law but may seriously mislead the

[9] HC Deb. (1974-5) 882, 2nd Dec 1974, 367-8.

> customer as to his rights. Should it not prove possible to ensure that such statements are suitably qualified the DGFT has indicated that he would be prepared to consider making a further reference.

The statement is useful because it indicates well how the main institutional features of the process led to delays. First of all, it points to the delaying effect of the CPAC's input. Although the above table might be taken to indicate that the Committee was not delaying proceedings all that much (after all, in two out of the four references, the CPAC had submitted a report to the Secretary of State within four months), it is important to recognise that it modified the Director General's proposals in every case. Hence, with respect to the first reference, the Committee considered the proposed Order to be too widely-drafted and the ministerial response is indicated in the above excerpt; the statutory results of the second reference are described in the 1977 Annual Report as "very limited" (AR 1977: 17); and with respect to the last reference, the Committee modified some of the proposals and rejected others outright (*ibid*: 15). In the end, the final statutory order related solely to food and drink - enough of an indication that three and a half years of researching, consulting, referring and waiting had not achieved as much as the Office would have hoped. This points to the second aspect of the above statement: the ministerial discretion retained under the powers. In the case of this first order, such discretion meant that further consultations were made. Ramsay (1987: 189) describes in a little more detail what happened following the CPAC report in this case:

> In addition, after submission of the CPAC report to the Department the relevant civil servants reopened the consultation process. They felt that they could not adequately advise the Minister unless they were 'in touch' with the views of interested parties. The Minister after consultation with relevant groups ultimately made a decision on political grounds.

The effect of this retention of ministerial discretion was thus to make politicisation more likely. It was hardly easier to gain backing for a Part II order than it was to secure legislation. Together, the two institutional features combined so that even the procedures that had been introduced by the Director General in order to shore up the legitimacy of his references were insufficient.

Other institutional factors were also significant. A House of Commons debate on the Consumer Transactions (Restrictions on Statements) Order points well to the rigidities in the process:[10]

> MR ROGER SIMS: If the Department is not entirely satisfied with the proposals, is there no alternative to taking no action, or can it negotiate with the Director General about a form in which the proposals might be modified?
>
> MR FRASER: It is not open to the Government to negotiate. The process would have to start all over again with a new set of proposals, which would go to the Consumer Protection Advisory Council. In the debates on the Fair Trading Act, the Consumer Protection Advisory Council was described as a jury. Because the Orders create new criminal offences the CPAC is interposed as a jury. If the verdict of the jury is against the proposals, it is not open to the Government to introduce their own remedies, even for negotiation. The matter must then drop...
>
> I conclude by reminding the House that the Government are severely circumscribed by the provisions of the Fair Trading Act.

It is worth noting then firstly the inability of the Government to subsequently negotiate with the Director General if the CPAC disagreed with the original proposals – even if the point was largely technical in nature; and secondly, the reference to the Orders creating criminal offences which increased the caution of all involved. In light of these points, the factor mentioned in the press statement above (i.e. the difficulties of finding situations that matched the requirements of the Act) would seem to have been of secondary importance. After all, there were several examples of reviews that were undertaken with a reference to the CPAC in mind, but at the end of which the Office decided to use a different power.[11] Hence, in 1975, reviews were undertaken of one-day sales, doorstep selling and party-plan selling. In the case of doorstep selling, the Director General decided as a first step to concentrate upon the improvement of information to the public (AR 1975:13). Reviews of unfair contract terms, prepayments and bargain offer claims constitute other examples of areas that might have ended in references to the CPAC but did not. In the case of bargain offer claims, the Office had been inviting comments since 1975. Then in February 1978, two recommendations were made to the Secretary of State under s2(3) of the Fair Trading Act 1973, proposing a ban on a wide range of claims which may mislead

[10] Official Reports HC, vol. 916-1, cols. 1161-64, 30 July 1976, reproduced in Ramsay 1989: 279.

[11] This notwithstanding, Sir Gordon Borrie did point to areas in which he might have liked to use the power but was unable to. The specific example he gave was misdescriptions of house property "which often cause potential purchasers to waste time looking at unsuitable properties but the definition of 'consumer trade practice' covered only goods and services and not houses". (Borrie 1984: 127)

or confuse consumers. The result was the Price Marking (Bargain Offers) Order 1979,[12] accepting most, although not all of the recommendations.[13] But in finding alternatives to references to the CPAC, the Office had settled on its power to negotiate codes of practice and it is to this that we now turn.

- Codes of Practice – supervised self-regulation

The following indicates well the early preference of John Methven for the use of codes of practice (AR 1974: 10):

> I attach great importance to the use of powers of persuasion as well as to the statutory powers. I believe that it is greatly in the interest of trade and commerce in the UK to provide voluntary codes of practice and I have tried to encourage this. The more effective voluntary codes there are, the less need for statutory control. Regulations are too often negative and tell people what they must not do. Codes are positive and lead to a greater understanding of the problems which exist on both sides of the counter and the ways in which they can be dealt with.

At first glance then, it would indeed appear that the use of such codes is strong evidence of a preference for negotiated and informal relationships with regulatees over imposed, formalistic and legalistic relationships. Whether this really was the case, however, depends very much on the answers to a series of questions about how such codes actually operated: the degree to which they differed from each other (standardisation), their legal effect, the extent to which such codes were monitored and enforced, whether these codes changed over time and so on. In other words, to say that the OFT favoured codes of practice is not enough: it is necessary also to determine the flexibility, formality and legal nature of this regulatory device.

From the start, the Office was approving codes of practice for a wide range of industries. In 1974, three organisations launched codes of practice which had been prepared in conjunction with the OFT: the Association of Manufacturers of Domestic Electrical Appliances, the Association of British Travel Agents (ABTA) and the Croydon Chamber of

[12] SI 1979/364

[13] The order was eventually replaced by s20 of the Consumer Protection Act 1987. Another example of an Order made under s4 of the Prices Act related to the displaying of petrol prices by major oil companies and associations representing petrol traders. In 1976, the Office had negotiated an agreement, but a survey of its effectiveness indicated that adherence to the agreement was unsatisfactory, and the Order was a response to those results (see Annual Reports 1976:14, 1977:13)

Commerce. This was followed in 1975 by further codes from the Electricity Council, the Scottish Motor Trade Association, the Vehicle Builders and Repairers Association and the National Federation of Housing Associations. In 1976, codes were agreed that related to shoe repair, laundries and cleaners, footwear distribution, and radio, electrical and television retailers. One more code was agreed in 1977 (mail order publishers), two more in 1978 (furniture and mail order traders), and four further codes in 1979 (photographic industry, funeral services, postal services and telecommunications services). Overall then, this list of 18 codes represents a key output of the Office in the period, covering a diverse range of industries that varied both in size and with respect to the nature of the product. The following extract from a 1996 review paper summarises the Office's early approach to these codes:[14]

> Codes of practice were initially promoted as an alternative to legislation and adopted in problem sectors, such as travel, electrical goods and the motor trade. It was envisaged that all codes would be thoroughly monitored and reviewed every alternate year. By 1980, codes had been adopted in most of the problem areas in which there was a reasonably effective trade association....

In its 1976 Report, the Office set out the ways in which the monitoring was done. One way was to analyse complaints reported to the Office by trade associations and local authorities, as well as to scrutinise brochures and advertisements to see whether they complied with any relevant provisions of a code. Another way was to commission independent surveys – this was done, for instance, with respect to the code of the Association of Manufacturers of Domestic Electrical Appliances. In addition, some codes included the requirement for annual reports (in some cases independent), offering a further alternative for the Office.[15] Such monitoring exercises did sometimes lead to changes, although more changes would be evident in the 1980s as the Office concentrated on existing codes rather than new codes: the best example of revisions to a code agreed in the 1970s were those made to the ABTA code in 1975.[16]

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[14] Office of Fair Trading (1996: 5) at §2.3

[15] see, for instance, the Code of Practice of the Mail Order Publishers' Authority

[16] As the majority of holiday complaints were found to relate to problems of hotel overbooking and surcharges, ABTA introduced specific amendments in order to minimise the possibility of this type of complaint arising in the future.

Whilst it is true that the content of these codes were negotiated, an important question is the degree to which they were being negotiated from a position of strength, and the extent to which the OFT retained a measure of control over them once implemented. In other words, what kind of self-regulation was this?[17] After all, such codes were often very much in the interests of trade associations, not only as a means of deterring new entrants to the markets (see above), but also to raise a trade's public image (Ramsay 1987: 191). The answer to both questions would seem to be that even in this early period, when potential references to the CPAC were still plausible, the Office only had a limited amount of bargaining power. In an economic climate of growing industrial unrest and recession, legislation to control specific sectors was unlikely,[18] and in any case it was not open to the Office to threaten legislation directly.[19] The limitations of the Office's position were well-illustrated by how its reservations with particular elements of the ABTA code were not heeded – beyond simply withdrawing its support altogether, there seems to have been little that the Office could do.[20] This for a code that was later considered by the Office to be the biggest success of all.

As far as some of the other questions raised at the beginning of this section are concerned, there is little evidence of juridification through these codes of practice during this period. There was little if any standardisation of the codes: each code was negotiated individually and codes varied widely in a number of aspects: the dispute resolution established (if indeed one was established at all), the extent to which the code was mandatory for traders within the industry, the use of reporting, and the sanctions available for non-compliance. Black also points to variations in the quality of the rules in such codes, which were capable of being "general or specific, vague or precise, simple or complex" (Black 1996: 28). In terms of the legal effect of such codes, Methven wrote that it was an early objective for the OFT to encourage the courts to refer to the relevant codes of practice when considering whether a business had fulfilled a consumer contract (Methven 1975). An

[17] See especially Ogus (1995)
[18] The one major exception was the Estate Agents Act 1979.
[19] I.e. because the OFT was a non-ministerial government department.
[20] For instance, in its 1974 Annual Report (at p24), it is written that "The Director General made one reservation in welcoming the code. This was that the cost of arbitration could involve a family of two adults and two children with a maximum bill of £32 if the case goes against them. This point was discussed at length with ABTA and it is unfortunate that the Association felt unable to reduce the amount".

example of such a case was Woodman v Photo Trade Processing Ltd.,[21] in which the defendant lost the plaintiff's wedding photo negatives and wanted to rely on a clause limiting its liability to the cost of the negatives. In reaching his conclusion, the judge explicitly took into account the code of practice negotiated between the photographic industry and the OFT. The code envisaged the possibility of 'two-tiered service', where the consumer is given a choice between a cheaper service with limited liability and a service at a higher charge with full liability. Partly because no such choice was offered in this particular case, the judge ruled that the limitation clause was unreasonable and thus void under the Unfair Contract Terms Act 1977. In general, however, the codes were considered more of a substitute for hard law than as an additional source of it.[22] Overall then, the conclusion is that at this stage there was little evidence of juridification occurring through the promulgation of codes of practice, that on the contrary, such codes were primarily adopted because of their extra-legal qualities, and that the Office's preference for such codes is significant evidence of its preference for non-legal, informal relationships with its regulatees.[23]

- Other areas of the Office's consumer protection work 1974-9

In this section, we will deal with the two main remaining consumer protection powers of the Office: the Part III powers to seek assurances from individual rogue traders and actions under the Consumer Credit Act 1974 to refuse or revoke licences for particular traders. It will be seen how its approach towards these enforcement powers indicate that any action taken was the exception that proved the rule: such formal action was used only in extreme cases, thus confirming the general picture of informal and consensual relations between regulator and regulatee.

Part III of the Fair Trading Act enabled the Office to take action against traders or individual companies persisting in a course of conduct detrimental to the interests of consumers by breaking the civil or criminal law. The rationale for the power was that few consumers bring civil cases, and that even when such cases are brought, this may not deter

[21] Exeter County Court, Judge P.H.F. Clarke, May 7th 1981, unreported. Brought by Borrie in the first of his Hamlyn Lectures (1984: 14).
[22] See Scott & Black 2000: 44-5.
[23] For examples of cases where codes were not working – see Borrie (1984: 63), and later on in this chapter.

traders who regularly get benefit from breaching civil and criminal law. In his 1982 Report, the Director General argued that the aim of the provisions was "not to punish, but rather to bring about, wherever possible, improvements in trading standards" (AR 1982: 10), thereby echoing the judgment of Donaldson LJ in the previous year.[24] If such a course of conduct was identified, the Director General had the duty to 'use his best endeavours' to obtain an assurance from the relevant trader that he would refrain from the conduct. If an assurance was refused or subsequently broken then he had the power to obtain a court order, the breach of which would be a contempt of court. From the beginning, publicity was also given to this procedure, providing an additional deterrent.

By the end of 1979, the Office had obtained 170 assurances. A subsequent court order was necessary in 20 cases and there had not yet been a prosecution for contempt of court. In exercising this power, the Office was dependent on information provided by local Trading Standards Departments to such an extent that the increased number of assurances in the late 1970s was attributed almost totally to "the increased willingness of local authorities and Citizens Advice Bureaux to devote scarce staff time and effort to investigate complaints and prepare evidence" (AR 1978:19). It did not reflect therefore a change of policy or attitude within the Office towards persistent offenders. Instead, the Office was consistent during this period in distinguishing between the minority of rogue traders and the rest. Hence, from an early stage the Director General was writing as follows (AR 1975:10):

> I have always thought, and the past year's work has strengthened this conviction, that the vast majority of traders and shoppers wish to deal fairly with each other. It is the people operating on the fringe whose methods must be changed and in my view it would be quite wrong to propose changes in the law (notoriously a blunt instrument) when the number of people I wish to control is relatively small. Fortunately the Fair Trading Act has given me a variety of tools with which to do my job. For example under Part III of the Act...

This power was thus seen as a relatively extreme measure to be used only against persistent offenders, which in practice was taken as traders against whom there had been ten to fifteen well-documented complaints for small traders, and over thirty for large traders about a similar kind of misconduct over about a year (OFT 1985: 9). And just as the seeking of assurances was used sparingly, so was the commencement of legal proceedings,

[24] R v DGFT, ex parte F.H. Taylor & Co Ltd. (1981) ICR 292

described in the 1977 Report as "a last resort to be used only in cases where there is a clear breach of an assurance or a refusal to give an assurance" (AR 1977:14). Put together, this falls a long way short of an enforcement strategy which is capable of being described as legalistic or juridified. On the contrary, it is far closer to Braithwaite's notion of an enforcement pyramid in which informal action characterises the vast bulk of the contact between regulator and regulatees, with formal action being used only against a small minority.[25]

A very similar story can be told with respect to licensing under the Consumer Credit Act 1974. The Act is extremely complicated, its details fleshed out mainly through statutory instruments. Its aim was to control all traders involved in credit and hire through licences, which were issued by the Office. The primary sanction available to the Office was thus the power to refuse an application, or to revoke an existing licence. There were several similarities between the Office's approach towards this power and its approach towards its powers under Part III of the Fair Trading Act 1973. Firstly, it was similarly reliant on information from local sources such as local authority Trading Standards Departments. Secondly, the power to refuse or revoke licences was used sparingly: "the Director General is determined to weed out from the credit and hire industry those who are *manifestly unfit* to be in it" (AR 1975:16, emphasis added). Sir Gordon Borrie (1984: 88) provided an impression of what was meant by this phrase:

> After consideration of all the available material, some applications on which there is adverse information are granted on the basis that the material is not sufficient, or too old, to warrant refusal of the application. In other cases, a licence may be granted but a letter is sent warning the applicant that because of past misbehaviour he is in effect on probation and repetition of past misbehaviour is likely to lead to the institution of revocation procedures. Where material is sufficiently serious and up to date, a 'minded to refuse' notice will be issued.

By the end of 1979, there had been only 72 cases in which the Office had decided to refuse or revoke a licence out of over 85,000 licences that had been issued, or less than 0.1%.[26] Thirdly, even the procedure to revoke or refuse a licence was largely non-confrontational in

[25] See Braithwaite (1985), Ayres and Braithwaite (1992).

[26] See AR 1979: 23, 76. Refusal or revocation tended to be based on breaches of the Consumer Credit Act, such as convictions under the Act for issuing unsolicited credit cards to consumers, or on convictions under

nature. Its first stage was the issuing of a "minded to refuse or revoke notice", at which point the applicant was given the opportunity to make oral or written representations.[27] Quite often in the course of this process, the applicant undertook to change various practices that had been giving the Office cause for concern. Hence out of 290 'minded' notices, 135 resulted in favourable determinations, and there were 80 withdrawals. Applicants then had the right to appeal adverse decisions to the Secretary of State[28] and only after a further adverse decision from this political source did they have the right to appeal this decision in the High Court.[29] In short, the procedure was not highly legalised, and formal action was taken as a last resort. There had been no appeals to the High Court at all by the end of 1979.

Change and continuity under Sir Gordon Borrie: 1980-1992

- Overview

What was the context of the Office's work in the 1980s? It was a period of continuity, both in terms of there being only one Director General, Sir Gordon Borrie, reappointed twice in 1981 and 1986, and in terms of there being only one government – the Conservative government that was re-elected in 1983 and 1987. There was a degree of incremental change in competition and consumer protection policy, and no major changes in the structure of policy or in the Office's major tasks. Then there were some major changes: the increasing importance of the European Commission both as a source of policy initiatives and as a regulator, the privatisation initiatives of the mid and late 1980s giving the Office a new set of responsibilities, major changes in the financial services sector and the beginning of 'mega-mergers', which highlighted and exacerbated the trend of increasing concentration of firms that had been occurring for decades. Finally, this was a

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other Acts which indicated the trader's likely general behaviour (e.g. the falsification of mileage on used cars).

[27] During 1976, the procedure for such representations were agreed with the Council on Tribunals and the implemented through statutory instrument - the Consumer Credit Licensing (Representations) Order 1976.

[28] By the end of 1979, there had been a total of 25 appeals of which only 3 were upheld, with 6 still under consideration. The total of 25 thus represented about one-third of the total of adverse decisions, and the 3 successful appeals only 4% of the total.

[29] This appeal was on points of law only

period of severe public sector cutbacks, accompanied by imposed public management reforms, from which the Office was not exempt. The difficulties of resource allocation were a repeated theme in the Annual Reports of the period until the government finally relented and gave the Office budget and staff increases in 1987.

With the Part II law-making powers having fallen into disuse, the Office of Fair Trading concentrated on its other powers: the supervision of existing codes of practice (although not so much the negotiation of new ones), the reviewing of various industries, credit licensing, the securing of undertakings against rogue traders, the registration of restrictive trade practice agreements, its powers of reference to the MMC and its new powers of investigation under the Competition Act 1980. Of these, the processing of credit licensing was occupying an increasingly high proportion of its time and budget.[30] This, along with some of its other roles, meant that much of the Office's time and money had to be spent performing tasks which were essentially administrative or bureaucratic in nature: the processing of complaints, applications or agreements. This left few resources for its enforcement functions (despite the comments of the Director General in his 1986 Annual Report[31]), a difficulty exacerbated as weaknesses in the relevant legislation became increasingly apparent. Meanwhile, the difference made by the abandonment of its law-making powers was well-illustrated by the Office's response to the continuing practice of using exclusion clauses made void under the Unfair Contract Terms Act 1977. Five years earlier, the Office would probably have made a reference to the CPAC.[32] Its action in 1982 was simply to write to around 50 individual firms and several trade associations, asking them to stop the practice.[33]

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[30] Also time-consuming was its work under the Estate Agents Act 1979, which came into force in 1982. This chapter does not deal with this function at all.

[31] "When choices have to be made among competing priorities, I attach particular weight to the first role [i.e. the regulatory one] and the responsibilities which I have for directly regulating the consumer market-place" (AR 1986: 10).

[32] After all, a reference to the CPAC had already been made in this area: the very first reference that yielded the Consumer Transactions (Restrictions on Statements) Order 1976. Howells & Weatherill (1995: 505-6) write "The failings of such specific interventions are shown up by the anomaly that the Order does not apply to the wider range of terms made void by the Unfair Contract Terms Act 1977. It is interesting to note that the Director General preferred to tackle this new problem by voluntary persuasion and the use of his other regulatory powers, such as his licensing powers, rather than invoke Part II procedures again".

[33] To a certain extent, it was also able to insist on the removal of these terms where they appeared in registrable agreements under the Restrictive Trade Act 1976, such as when a trade association was using a standard form contract.

In many respects then, the approach of the Office towards its regulatees changed little during the 1980s. This is subject to one qualification: there was a trend of regulatees making greater use of legal rights and, in some respects, traders were beginning to become more adversarial in their dealings with the Office. Even so, the Office was still consistently preferring informal to formal approaches. It is enough just to glance through the Director General's introductions to his annual reports to see how big an emphasis was placed on this. Hence, in his 1985 report, Sir Gordon Borrie observed as follows (AR 1985: 11):

> Competition law in the UK has of course always been implemented in a pragmatic way. To some commentators, pragmatism is a term of abuse indicating lack of clarity and direction. But in my view, competition policy cannot be administered by reference to rigid rules or criteria; it must evolve to meet changing economic circumstances and to deal with new problems and situations...

And with respect to codes of practice, he observed in 1984 that:

> if a trade sector is willing... to 'do its own thing' for customers in the right way with some guidance and encouragement from my staff, I regard it as being worthwhile and cost-effective for the future to supply that back-up.

Time after time, the same backing to negotiation and bargaining over prosecution and legal measures is given, and it is this that continued to characterise the relationship between the Office and the vast majority of its regulatees throughout the 1980s. In his last Annual Report, Sir Gordon Borrie gave his final words of approval to a regulatory style which was flexible and pragmatic in nature, indicating also the popularity of this approach with business (AR 1991: 10):

> For lawyers and others seeking to know how the law is developing and what precedents are being created, there are disadvantages in behind-the-scenes negotiations as distinct from reported court cases, or for that matter published reports of the MMC, but I have observed time and again the preference and often keenness of businessmen to put their cards on the table, to negotiate and discuss round the table, to try and find a solution, rather than to undergo the full panoply of more formal hearings, whether adversarial or otherwise...

- Codes of practice and general law reform activity

In his 1982 Annual Report, for the first time, the Director General of Fair Trading wrote explicitly about the limitations of codes of practice. Whilst generally the twenty

codes negotiated up to that point had been useful, they had two principal weaknesses: they were unenforceable against non-members, putting member firms at a competitive disadvantage, and they were difficult to enforce – even against members (AR 1982: 11). The comments were made following two major reviews of codes of practice begun in 1980. The first concerned the scope and operation of existing codes to see how the aims of the Office might be realised, focusing especially on the adequate identification of problem areas, provisions to be sought in future codes, and generally, the most effective use of resources. The second dealt with conciliation and arbitration procedures which were an important feature of most codes.[34] The results of the surveys led to a change of approach within the Office, with greater emphasis being placed on the monitoring and reviewing of existing codes than on the negotiation of new ones – indeed, only one new code was agreed in the course of the next five years.[35]

A good example of the way in which continuing negotiations could work is the contact between the Office and the Association of British Travel Agents. A review of the ABTA code of practice in 1988 led to a revised draft code being published in July 1989. While this did not go as far as the Office would have liked, it was considered broadly acceptable. Following consultations between ABTA and its membership, a number of amendments were then made to the draft code leading to further negotiations between Office and ABTA which lasted into 1990. In May, ABTA published revised set of codes for both tour operators and travel agents, incorporating all the major recommendations that had been made in 1988 report (AR 1990: 24).[36]

There are several counter-examples though – cases where the ability of the Office to effect change was limited, despite lengthy processes of negotiation. Consider, for

[34] The report concluded that arbitration that was offered to consumers by many codes constituted a valuable alternative to court action but that both conciliation and arbitration procedures could be made more effective. It recommended that arbitration should be conducted without personal hearings, arbitrators should always give reasons for decisions and that there should be target times for completion.

[35] This was the code for the motorcycle industry. In the latter part of the decade, some new codes were agreed: two with the holiday caravan industry and three relating to consumer credit (thus backing up the legislation in the area).

[36] Consider also the Office's dealings with the furniture industry. A lengthy study by the Office led to the report being published in February 1990, identifying five main areas of concern, making 31 recommendations and warning that, if no progress was made within six months, "the Director General would be prepared to use whatever powers he had to enforce changes (including, if necessary, recommending legislation)" (AR 1990: 24). The threat seemed to carry some weight as by August the industry had formed an action group and presented its interim response, including a new code of practice. See also AR 1991: 21.

instance, the Office's experience with the motor industry.[37] In 1980, two surveys to monitor operation of Code of Practice for the Motor Industry were concluded, revealing that the general performance was disappointing. Discussions with the relevant motor trade associations led to a revised code being agreed in 1981, although there was evidence that compliance with the new provisions was not yet satisfactory (AR 1981: 15). The problem was that, despite strenuous efforts by staff of Motor Agents Association, only a minority of members were willing to comply, mainly because they felt that compliance would leave them in an unfair competitive position vis-à-vis non-members. Hence, the Director General argued that (AR 1982: 11):

> "It seems to me in this instance that self-regulation is not an effective substitute for law and that if, as I believe, there is a strong case for consumers to be given a more detailed written description of a used car at the point of sale than is common now, it must be done by law, and thereby be enforceable against all used car dealers..."

In its 1984 Annual Report, the Office noted that despite continuing to call for improvements in the protection available for purchasers of used cars, "little progress was made on implementation of the recommendations in its 1980 report" (AR 1984: 15). By 1989, the Director General was still expressing his disappointment at the lack of progress and no agreement on amendments to the code had yet been reached.[38] Finally in July 1990, the Retail Motor Industry Federation (RMI) introduced new standards, some of which "in effect" modified the motor code. The Director General told the RMI that he was prepared to continue his association with the code, subject to a review in a year's time. Ultimately though, these limited modifications could not make any impression on the principal problem, which was non-compliance with the code. In all, despite over ten years of negotiations, complaints relating to used cars "continued to feature strongly in the returns the Office receives from trading standards departments and citizens' advice bureaux" (AR

[37] This was a high priority for the Consumer Affairs Division as it consistently generated a disproportionately large number of complaints from consumers.

[38] Revisions were made, however, to the code on vehicle repairs, including the extension from six to twelve months of the minimum warrantee granted by member firms for repair work.

1992: 12). In the absence of legislation, or specific evidence of anti-competitive practices however, there was little else that the Office could do.[39]

All these examples point to the overriding theme of the Office's general consumer protection work: it was not an area where the use of law was all that important. On the contrary, the Office's work tended to be done behind the scenes, based on strategies of negotiation and bargaining. This does not mean, however, that the Office was always satisfied with this state of affairs. Sometimes it did push for new legislation that would alter the nature of its relationship with particular sectors of industry, although as the following table indicates, that this was done relatively infrequently and with only limited success:

Year	Legislation proposed	Successful?
1981	Bargain-offer claims – new general prohibition of misleading price statements (AR 1981: 17)	Eventually became law through the Consumer Protection Act 1987
1982	Used cars – consumers to be given a more detailed written description of a used car at the point of sale.	no
1983	Home improvements – new requirement of written evidence of contract + cooling-off period when signed at home (AR 1983: 12)	no
1985	Household insurance – legislation to deal with problems of tenants who frequently did not have the right to make sure that their landlords had insured their homes adequately.	no
1985	Resale of electricity by landlords – new offence to charge more for electricity, resold for domestic use, than the maximum charge published by the appropriate electricity board (AR 1985: 14)	Problems would be dealt with in proposed legislation on misleading price indications, not by making overcharging a criminal offence → became the Consumer Protection Act 1987.
1987	Banking services – statutory code of practice to cover relations between banks and their customers (AR 1987: 17)	Voluntary code of practice – no legislation.
1990	Timeshares – legislation to require full disclosure of information about timeshare resorts and a cooling-off period.	Timeshare Act 1992

In a recent interview,[40] one of the reasons for the infrequency of legislative proposals was given by Lord Borrie: there was an extremely high turnover of Ministers for Trade and Industry during this period – indeed, during his Directorship, he dealt with about

[39] Another example was a review of the code of practice for funerals that had suggested that it was working poorly. Negotiations with National Association of Funeral Directors (NAFD) led to a revised code being agreed in May 1990, but this did not include one of the Office's key recommendations that, in customer accounts, funeral directors should be required to itemise funeral's component costs.

[40] Interview, 21st January 2003.

a dozen different ministers. The result was that it was difficult to form effective relationships. Where a Minister did remain in the post for a longer period, then it was sometimes possible for a recommendation to be made as to the areas in which legislation would be beneficial (and also in the interests of Government). More generally, it might be suggested that securing new legislation was always likely to be difficult for the Office. It had a series of obstacles with which to contend: governmental will, the strength of opposition, space in the Parliamentary timetable and being one step removed from direct influence around the cabinet table.

In the rest of this subsection, some further reasons will be suggested through detailed examples. The examples also serve to provide further evidence of the nature of the relationships between the Office and its regulatees on the consumer protection side.

The difficulties faced by the Office are well-illustrated by its attempts to tackle unscrupulous used car dealers. A particular problem was the practice of 'clocking' – the deliberate turning back of car odometers to mislead buyers as to the true age of the car. Whilst the practice was illegal,[41] it was extremely difficult to detect. The Office set about trying to find ways of tackling it, making suggestions throughout the 1980s, and pressing for a variety of measures both to motoring associations and to the government. Eventually, a "working party" was set up, consisting of 16 bodies representing consumers, motoring organisations, the motor trade and local authority Trading Standards Departments. In 1988, the Director General wrote on behalf of this working party to the Minister for Roads and Traffic with a proposal. The Minister responded in March 1989, arguing that the proposed scheme would be too expensive and that there might be more accurately targeted alternative methods which could tackle the problem more effectively. In July, the Director General wrote back saying that the Minister's counter-proposals were not likely to be effective. No agreement had been reached by end of year.[42] In 1990, another proposal came – this time from HP Information plc. The Secretary of State responded that he was anxious to find a practical solution to the problem, although the Driver and Vehicle Licensing Agency (DVLA) did not want to proceed with any scheme which the working party did not find

[41] As such, persistent offenders could be dealt with by the Office under its Part III and consumer credit licensing powers.
[42] Proposals to enable Trading Standards Officers to enter garage forecourts to inspect cars for roadworthiness had also not been agreed.

acceptable (AR 1990: 25). Finally, in March 1992, the Government announced that the DVLA would be taking steps to combat the practice by revising vehicle registration documents to allow buyers and sellers to note a vehicle's mileage on change of ownership, although there would be no mandatory requirement to do so. Whilst welcoming the scheme, the Director General said that he was concerned that the effect of the proposals might prove small: a voluntary scheme was likely to be of only limited deterrence to determined 'clockers'.[43] But with the Minister saying that he wanted to see how the proposals progressed before considering alternatives, all the Office could do was to continue to monitor the area closely. The blocking effects of a government with other spending priorities is thus clearly in evidence here.

There are several other examples where the Office was pushing for legislation unsuccessfully: its recommendations with respect to home improvements and household insurance for instance. The reason that this is significant for our purposes is not only that these are further examples of the continuing informal relationships between the Office and many industry associations, but also that they point to a prominent reason why this was the case: in short, the Office frequently had little other option.

The point can be highlighted by contrasting the above cases with an example of an occasion where legislation was introduced, and relatively speedily. At the end of the 1980s, the Office was considering a review of the timeshare industry. This was brought forward, however, on the request of the Consumer Affairs Minister. The Director General began the review in July 1989, inviting comments and suggestions from interested parties. There was a large response from public, and the report was published in July 1990. Its conclusion was that although there were many satisfied consumers, there were several problems in the market.[44] The Director General therefore recommended legislation requiring a cooling-off period, clear prospectuses outlining details of agreements and several other measures (AR 1991: 19). The response was swift: in February 1991, the Consumer Affairs Minister accepted the report's key recommendations and sought to implement them through the

[43] A mandatory scheme was finally introduced in 1999 (AR 1999: 21).
[44] For instance, unexpected increases in maintenance charges and lack of fully-developed resale market were frequently mentioned.

EC.[45] He also accepted some other changes suggested to the Trade Descriptions Act, and in March 1991 the Timeshare Act 1992 was passed, providing for a 14-day cooling-off period for timeshare contracts. The differences between this case and the motor industry are fairly stark: here it was the government which started off the process of reform, there was large public interest, and little opposition from the industry involved.[46] Political will then was essential to the Office's chances of success.

In a couple of cases, the reason for lack of progress had nothing to do with political will, however, but was more technical in nature. One such case was the idea of a general statutory duty to trade fairly.[47] Such a duty was intended to supplement the Office's existing powers – especially its Part III powers to secure undertakings from persistent offenders. Following a series of seminars attended by academics and lawyers, a discussion paper was discussed in 1986. In the end though, the Office decided not to pursue the proposal in its original form: "it was felt that the original objectives were probably over-ambitious in attempting to address perceived deficiencies in existing criminal law, civil law and self regulation at the same time as seeking to improve consumer redress arrangements" (AR 1989: 25). A second example was the attempt to produce a standard form contract following a 1988 Department of Environment report entitled 'Beat the Cowboys'. A working party recommended that a model 'fair-deal' contract for small building work should be developed for use by consumers and building contractors. Law academics were commissioned to prepare the first draft of such a contract. Their proposals were submitted to the Office and a meeting arranged for 1990 to discuss terms with relevant trade organisations. Opinion was divided, however, as to the content of such a contract and how to promote its use. It became clear that certain points of detail needed to be considered further before widely acceptable form of contract could be devised. The consultants were therefore commissioned to produce a revised draft. After further consultations, the Office

[45] The reason was that as most timeshare properties were purchased by UK residents were in developments abroad, UK legislation could not on its own provide effective protection.

[46] A comparable example occurred in 1981, when the Minister of State for Consumer Affairs requested that Office looked at complaints about marriage bureaux and dating agencies. The Office found widespread concern about the suitability and number of introductions provided, and a general lack of information about the services on offer. The Director General subsequently urged bureaux to adopt code of practice covering these and a number of other issues, indicating that he might have to recommend legislation if trading practices did not improve (AR 1981: 15-16). Such a threat had greater weight due to the fact that the Minister had initiated proceedings.

[47] See AR 1983.

"concluded that the original aim of producing an all-purpose model contract that would be perceived by consumers and contractors as clear, comprehensive, fair and balanced, and which would be widely used, is unattainable", and work on it was abandoned.[48] It was decided to concentrate on publicity instead. In both cases, what could be seen as attempts by the Office to juridify an area of policy so as to increase its ability to deal with certain problem situations failed for technical reasons.

Finally, in some cases, more formal action was not pursued simply because the Office could not commit its limited resources to the area. Its relationship with the footwear industry provides a particularly striking example. In 1985, the Office decided to begin monitoring the operation of its code of practice, leading to a report in 1987. The surveys found that there had been some falling off in certain areas of service and the provision of information by retailers since a previous survey in 1980. It was also found that only 10% of consumers were aware of the code. The 1988 Annual Report provides details of the pursuant contacts between the Office and the relevant trade associations (AR 1988: 24-5):

> The sponsoring trade associations were asked to bring about improvements. While they were willing to seek better performance from their members in certain respects...the trade associations made it clear that general promotion of the code would need substantial expenditure which the trade was unwilling to commit. The Office regarded this response as inadequate. It, too, has limited resources and in all the circumstances concluded that it was unable to pursue the matter further with the footwear trade associations for the time being and would not publish a report on the monitoring survey.

Priority-setting is an inevitable part of the work of any regulatory agency, although in this case it seems strange that, having devoted resources for the surveys to begin with, the Office decided not to publish the report which at least might have had some effect in putting pressure on the relevant trade associations and in publicising a code which was so little-known. The answer may well lie in the massively increased proportion of the budget that was being spent on credit licensing processing, so that despite a general increase in the budget, only £1.32 million was spent on other consumer protection work in 1988 compared to £2.2 million in 1987.

The approach of the Office towards the footwear industry reflected a changing attitude towards codes of practice in general. A policy review in 1987 highlighted this

[48] See AR 1991: 21

growing disillusionment within the OFT. Its new approach was to put forward guidelines and offer a degree of endorsement, but to leave implementation, publicity and monitoring to the relevant associations. The problems identified by the review were manifold. Amongst other factors, negotiating, monitoring and revising codes was putting a heavy strain upon the Office's limited resources; codes appeared to be held in low regard by many other consumer protection bodies; there was a large amount of ignorance and apathy amongst both traders and consumers; there was an inherent conflict within codes, which expected traders to do voluntarily things which they would not necessarily see as being in their own commercial interests; there was too much divergence of substance and style amongst various codes and no obvious overall OFT coherence of approach; and there were few remaining trade associations with adequate membership and clout with whom it might have been worth developing new codes.[49]

These difficulties and others, led to new guidelines for the support of individual codes being published in 1991. Essentially, these guidelines meant that a degree of standardisation was being introduced by the Office for the first time: Scott and Black (2000: 43) describe it as "in effect, giving a blueprint for those drafting codes...". For a code to be accepted, it had to be mandatory on members of the trade association and that association had to have the resources and disciplinary sanctions available to deal effectively with cases of non-compliance. The trade association also had to be able to demonstrate that its members were prepared to observe its provisions, consumer organisations had to have been adequately consulted in the preparation of the code, and the Office's competition policy division must have been consulted before an application for support was received. The content of the code had to offer "specific and worthwhile benefits beyond those which might be expected as a result of legal requirements and normal practice in the industry", and the guidelines then set out the specific areas which a prospective code ought to address - including an appropriate complaints mechanism. Finally, for a code to be accepted by the Office, the trade association had to publish an annual report on the operation of the code, with a copy provided to the OFT. It also had to be adequately publicised.[50] It might be argued that the introduction of these guidelines constitutes limited evidence of

[49] See Office of Fair Trading 1996 – *Voluntary Codes of Practice: A consultation paper*, especially §2.6-2.8.
[50] Office of Fair Trading 1991 – *Guidelines for Support of Individual Codes.*

juridification, as the attempt to make codes of practice look more like legal instruments indicates a certain preference for this form. However, this overlooks the voluntary nature of codes of practice, and the fact that they were used in place of more formal regimes governed by legal rules.[51] Nor did these new guidelines threaten the central place of negotiations in determining the contents of codes. In short, the importance of codes of practice in the work of the Office of Fair Trading continued to indicate an absence of juridification in this area.

As well as monitoring existing codes of practice, the Office also devoted much attention to other areas of concern to consumers. Its extended study of home improvements lasted for most of the decade. Towards the end of the 1980s, it also started to agree a number of new codes of practice.[52] Perhaps most importantly though, the Office began to focus more of its attention on consumer information. In 1987, the Office spent over half a million pounds on publications – double the previous year; and in 1991, this jumped further to a massive £1,593,000 – 17.5% of the total budget. The implication is that the Office was coming to the view that it was more economical to concentrate on enabling consumers to help themselves than to intervene through regulation - in any case, such a move can be taken as further evidence that it did not perceive a legalistic enforcement policy to be the most effective way of achieving change.

- The use of Part III enforcement powers

In 1980, the Director General faced his first judicial review challenge in R v Director General of Fair Trading, ex parte FH Taylor & Co Ltd.[53] T Ltd were the importer of toys and electrical equipment and had been convicted on 13 occasions under the Consumer Protection Act 1961. They gave a written assurance to the Director that they would refrain from continuing its unlawful conduct. The Director General issued a press release recording that T Ltd had only given the assurances after being warned that proceedings would be begun and the number and nature of the convictions including the

[51] Compare, for instance, all the industries governed by codes of practice with the financial services sector, which Vogel (1996) concluded had become significantly juridified. However much these codes conformed to guidelines recommended by the Office, they were still ultimately a way in which trade associations and companies within a particular sector could avoid being governed by highly legalised external regulation.

[52] These included a new code on mail order protection schemes, a mechanical breakdown insurance code, codes relating to the holiday caravan industry and a code of banking practice.

fines and costs to be paid. T Ltd complained that when asked to give the assurances they were not warned that the Director General would make their compliance the subject of a press release, and the press release involved an abuse of the Director's powers under s124 (publication of information and advice) and a breach of s133 (general restrictions on disclosure of information). The complaint was dismissed, however: if a press release was justifiable, there was no reason why the Director General should have warned T Ltd. In order to make good the complaint, T Ltd should have alleged that they were in some way misled into giving assurances. T had been given an opportunity to make amendments to the draft press release but had not done so, nor did they suggest limiting its circulation. The court did, however, raise some questions which the Director might wish to consider in framing press releases on assurances. For most of the rest of the decade, the Office expressed its caution by giving little publicity to assurances.[54]

Such a case represented the exception rather than the rule. Very few Part III actions were ending up in the courts although it will be seen shortly that the perceived *threat* of legal challenges by regulatees did increase. On its part, however, the Office's policy continued to be to use its Part III powers in exceptional circumstances, and to take legal proceedings only where assurances were refused or where there had been a breach of existing assurances. Such proceedings included contempt of court cases, where an undertaking to court had been breached. The first such action occurred in 1982, when the court accepted an undertaking from the trader concerned. Within months however, he had been successfully sued by a consumer for failing to carry out work as promised and for failing to return the consumer's money. This was a breach of his undertaking and following an application by the Director General, he was sent to prison for 14 days with the warning that any continuation of his conduct would lead to lengthy imprisonment. Contempt cases were rare: in all, there were nine contempt cases in the 1980s including one in 1989 in which the company was fined £50,000, and two of its directors were fined £10,000 and sentenced to three months imprisonment, suspended for two years.

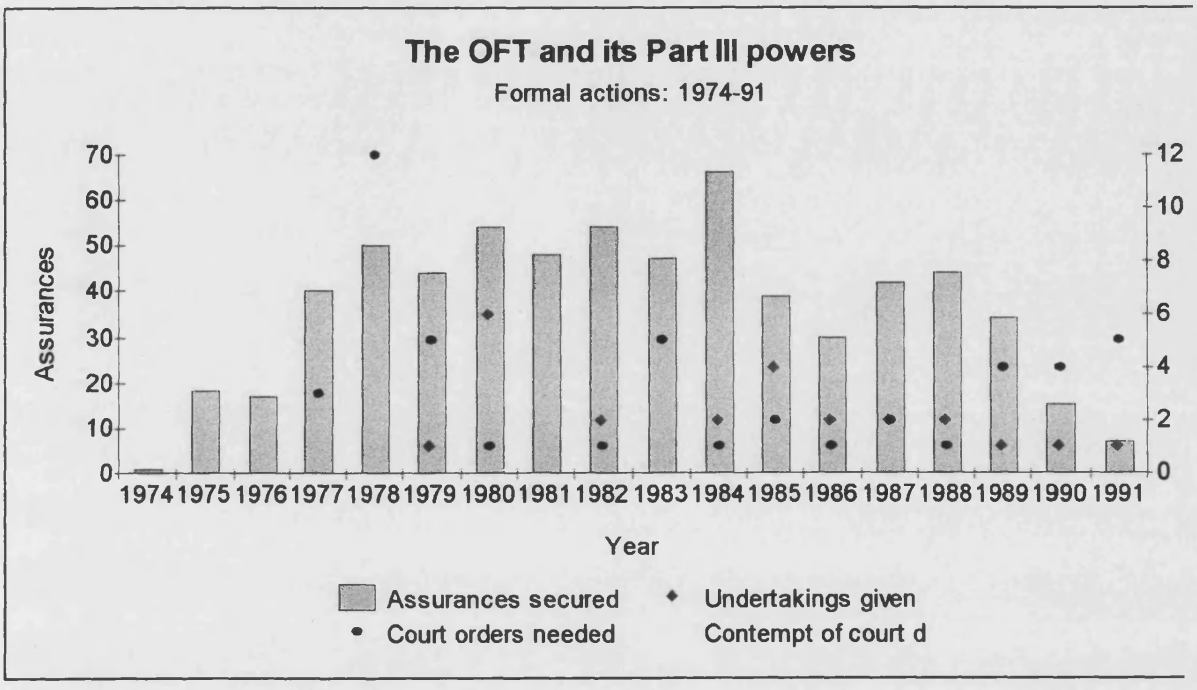
The below table and graph charts the use of the Part III powers. It is difficult to see any real trends, except that the proportion of action in the court compared to the total

[53] [1981] ICR 292

number of formal Part III action against traders remained low throughout, and that the use of the power began to decline in the latter part of the 1980s into the 1990s.

Year	Assurances secured	Undertakings given in court	Court orders needed	Contempt of court decisions
1974	1			
1975	18			
1976	17			
1977	40		3	
1978	50		12	
1979	44	1	5	
1980	54	6	1	
1981	48			
1982	54	2	1	
1983	47		5	1
1984	66	2	1	
1985	39	4	2	1
1986	30	2	1	
1987	42	2	2	
1988	44	2	1	2
1989	34	1	4	5
1990	15	1	4	
1991	7	1	5	
TOTAL	650	24	47	9

[54] See especially the 1985 guide which specifically stated that press enquiries would be met with a firm "no comment".



In 1985, the Office published its first guide of how it approached the pov intended specifically for the benefit of Trading Standards Departments. In the guide, s of the reasons for the low number of prosecutions under Part III of the Act bec apparent. In particular, two statutory requirements mitigated against speedy action: "best endeavours" requirement, and the "persisted in a course of conduct" requirem Each of these will now be considered in turn.

Under s34(1) of the Fair Trading Act, the Office had to use its "best endeavo to seek an assurance before any formal legal action could be taken. In practice, this m not only the original "package"[55] being sent to the trader in question, and the chasing u any initial problems,[56] but also – depending on the specific circumstances of the case - to two written reminders, a possible personal approach to the trader, and occasio

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[55] This consisted of a letter to the trader, the particulars of the alleged course of conduct, draft assuranc signature and return by the trader, draft assurances to be retained by the trader, a cross-reference betwee particulars of the alleged course of conduct and the paragraph of the draft assurances they support to e the trader to see exactly which item in the particulars supports each paragraph of the draft assurances, a extract from Part III of the Fair Trading Act 1973.

[56] Such as when the trader has moved address, or if the trader refuses the approach documents, in whicl they are delivered by hand.

extensive and detailed legal discussions if the trader contested the particulars of the conduct specified or the wording of the assurance.[57] The Office made the following comment about its policy of what constituted "best endeavours":[58]

> In determining his policy of what constitutes "best endeavours" the DGFT is bound by the Act, the requirements of natural justice, the possibility that his actions will be subjected to judicial review, and the possibility of a referral to the Parliamentary Commissioner for Administration.

Other details of the legislation also mitigated against quick action. In particular, the need to show that a trader "persisted in a course of conduct" required a careful case to be prepared before an approach was made. In the 1985 guide, the quality of evidence necessary for successful Part III action to be taken was set out: in the case of a small trader, with well-documented evidence, over a short period of time, with deliberate behaviour concerning serious breaches of the same aspect of the law – about 3 or 4 incidents; where the case was not strong, at least 10 incidents; and in a less well-documented case, over a long period of time, with deliberate behaviour and serious breaches of the same aspect of the law – 20-30 incidents. In the case of a larger trader, there might need to be evidence of up to 50 incidents before an approach could be made. Overall, even though these approaches were frequently described by the Office as "informal", their policy was that "approaches under section 34 of the Act to a trader must always be made with the possibility of later court action in mind". In the event of an assurance not being given, the Office would then take two factors into account when deciding whether or not to initiate court action: firstly, whether it was still felt after discussions that the trader had persisted in a course of conduct under the meaning of the Act and that, without court action, it was likely that the conduct would continue; and secondly, whether the available evidence would satisfy a court.

The concern of the Office to avoid possible legal challenges is strongly evident in these guidelines. In an interview, Lord Borrie confirmed that there was an increasing concern within the Office about the risk of legal action – especially due to the need to establish a persistent course of conduct. The aversion to legal action was based on at least

[57] OFT (1985: 40) at §13.12.
[58] OFT (1985: 41) at §14.2.

three elements: firstly, there was a degree of general embarrassment in losing a court case, damaging the credibility of the Office; secondly, it could force a change of policy – in the case of the Part III powers, it was feared that a judicial attack could make the power useless; and thirdly, it could lead to criticism from the DTI and also the Treasury – after all, cases were expensive to fight. It was conceded that such concerns had made staff within the Office more cautious and defensive, and later we will see the same phenomenon with respect to its credit licensing powers.[59]

The contents of these guidelines thus do indicate a degree of juridification: perceiving an increased threat of legal challenges, the Office begun to base its approach on legal considerations. The irony, however, is that in doing so, many traders who might have been approached formally were left alone. As the Office continued to prefer strategies of persuasion, using its Part III powers only as a last resort, it is difficult to reach any firm conclusion of juridification in this area. Moreover, it is going too far to claim that the mere fact that the guidelines were produced is itself evidence of juridification. Whilst they did point to policy, they were essentially an administrative rather than legal measure, designed to enable local Trading Standards Departments to work better with the Office.[60]

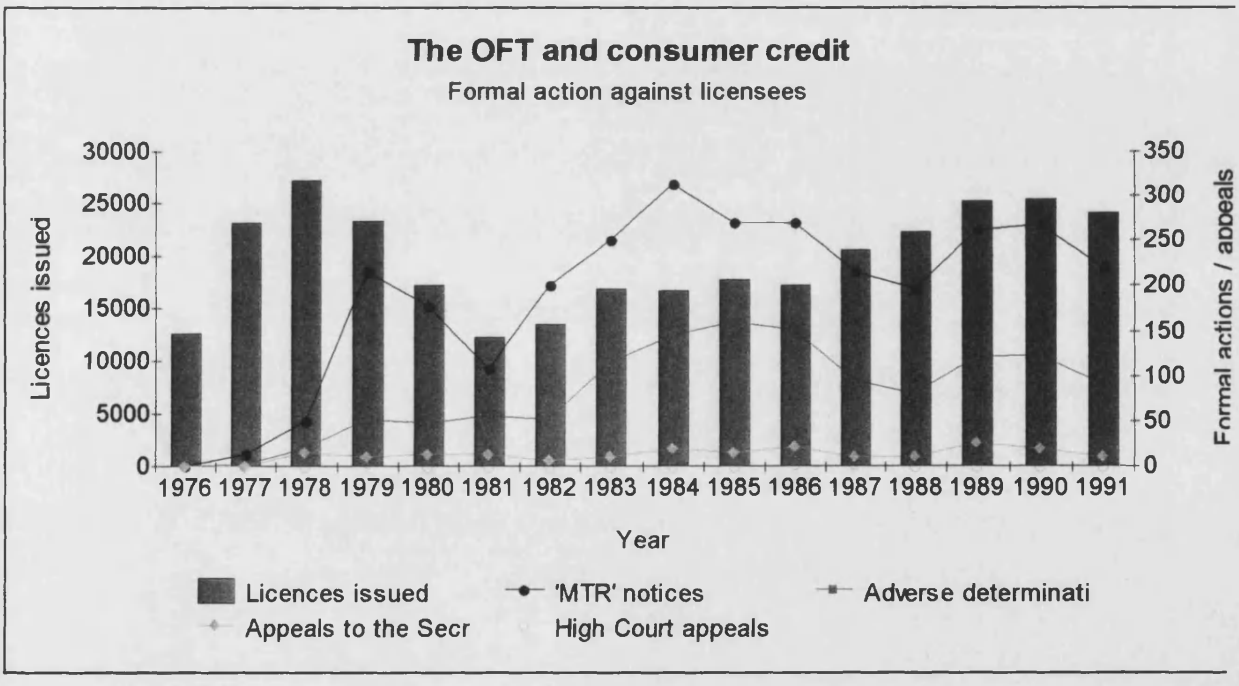
- Licensing under the Consumer Credit Act 1974

It will be recalled that the Office had some ex ante powers to control traders offering consumer credit under the Consumer Credit Act 1974. The following table and graph indicates how the Office used its powers to refuse or revoke credit licences up to 1991 and the number of subsequent appeals by licensees.

[59] Interview with Lord Borrie, 21st January, 2003

[60] Ramsay (1987: 195) commented as follows: "These guidelines are merely one example of the pervasive need which all bureaucracies have to clarify broad discretionary mandates by creating concrete rules which can be understood and administered with relative ease. If the Office is effectively adopting a selective enforcement policy then ought the guidelines to be set out in a formal instrument and consequently give rise to justiciable issues in a court of law?..." It can be suggested that it is precisely because the Office wanted to retain flexibility that it did not do so – these guidelines were specifically not meant to be legal in nature, and indeed Trading Standards Departments were told to keep their contents confidential.

Year	Licences issued	'MTR' notices	Adverse determinations	Appeals to the Secretary of State	High Court appeals
1976	12,559	0	0	0	0
1977	23,204	14	2	0	0
1978	27,134	50	20	16	0
1979	23,261	216	52	10	5
1980	17,221	178	48	12	1
1981	12,282	107	57	14	0
1982	13,531	202	52	7	0
1983	16,815	250	114	10	0
1984	16,683	313	145	19	0
1985	17,756	270	160	16	0
1986	17,287	270	152	21	3
1987	20,645	217	96	10	2
1988	22,198	196	79	11	0
1989	25,167	261	120	27	0
1990	25,367	267	124	20	0
1991	24,136	220	91	11	0
TOTAL	**315,246**	**3031**	**1312**	**204**	**11**



retain flexibility that it did not do so – these guidelines were specifically not meant to be legal in nature, and indeed Trading Standards Departments were told to keep their contents confidential.

The figures confirm that the Office's use of its licence revocation or refusal powers mirrored its use of Part III powers against 'rogue' traders as a power of last resort. This expressed itself in three ways. Firstly, in comparison with the total number of licences issued by the Office, the number of licences refused or revoked remained very small. Overall, fewer than 1% of licensees or potential licensees even received an MTR notice. Secondly, even amongst those companies which did receive an MTR notice, almost two-thirds were subsequently either given a favourable determination by the Office or chose to withdraw the application themselves. Thirdly, of those companies which did have a licence refused by the Office, fewer than one in six chose to appeal to the Secretary of State, and very few indeed ended up appealing to the High Court. This was not an area in which the courts had much role.

Over the period as a whole, it is possible to detect two main trends: one which impacted on the Office's general regulatory strategy, another which reflected it. The first trend is the steady rise of applications throughout the 1980s following the initial drive with the legislation first coming into force. This rise, accompanied by an increase in work connected with existing licence-holders was to put a large strain on the Office's resources reaching a peak of 54% of the total in 1988.[61] As the vast majority of this time and money was spent on processing acceptable applications, the ability of the Office to pursue a more forceful regulatory role in other areas was constrained by this.[62] The second trend is that during the first half of the 1980s, there was a sharp rise in the number of MTR notices and a parallel increase in the number of adverse determinations made by the Office, indicating perhaps a greater interest by the Office in the day-to-day conduct of business by licensees, but also the growing realisation that the licensing provisions could become important in correcting unfair practices and raising trading standards generally (AR 1979: 29). In other words, the licensing powers were starting to be seen as a substitute for Part III actions – a contention that is supported by the fact that the Consumer Affairs Division and the

[61] It was not normally quite as high as this: the additional expenditure in 1988 and 1989 was due to the one-off costs of computerisation. But it still regularly used up over 35% of the budget in other years.
[62] Above it was suggested that this might have affected the Office's ability to follow up a monitoring exercise of an existing code of practice.

Consumer Credit Division were merged in 1980, alluded to in the 1982 Annual Report,[63] and expressly stated in the 1985 guide on its Part III powers.[64] The usefulness of this power as part of a more general regulatory strategy against traders adopting unconscionable practices was shown up in 1989 when a 'minded to revoke' notice was issued to Allied Collection Agencies Ltd. Enquiries by the Office followed a number of complaints alleging that the group's employees had used various improper methods to collect debts. The complaints were well-founded and the subsequent decision not to revoke licences was taken only in light of a thorough review by the Allied management of training and collection procedures, backed up by 17 written undertakings (AR 1989: 31).

The suggestion that the Office saw formal action as a last resort is backed up well by its approach towards actual hearings, the right to which was increasingly being taken up by creditors facing the possibility of losing their licence (AR 1993: 15):

> When a notice is issued, the Adjudicating Officer's preliminary view is based only on the case against a trader. The legislation requires that recipients of notices must have an opportunity to submit through written and/or oral representations, their side of the story. Oral hearings are held in private and are as informal as possible. No one is sworn or cross-examined, and questioning is restricted to what is necessary to clarify the facts and to exclude irrelevant material. If new matters come up, the hearing can, if the trader wishes, be adjourned and reasonable notice given of any fresh matters which the Adjudicating Officer may propose to take into account...

Mr Anthony Inglese adds that the Office did not usually turn to its in-house lawyers unless particularly complex issues were raised, and that usually the hearings centred on the facts of a case (and especially the attitude of the trader concerned) rather than technical legal issues.[65] Meanwhile, the Office also spelt out what it saw as the objective of its regulatory functions under the Act (AR 1993: 15):

> The objective, under the law, is not to punish past misdeeds, but to judge impartially the current fitness of those concerned in relation to their activities, and to decide whether there is an ongoing risk of detriment to consumers. In one

[63] The Report recognises that powers under Consumer Credit Act to revoke consumer credit licence and revocation may, depending on nature of business, have the effect of stopping the firm from trading or impose serious restrictions on future trading.

[64] See §4.8: "When a submission is made to the OFT that a Part III assurance should be sought, one of the first checks that OFT carries out is whether or not the trader is licensed under the Consumer Credit Act 1974. If he is, consideration is given as to whether action should be taken under that Act, instead of, or as well as, under Part III...."

[65] Interview, 13th February, 2003.

> early appeal case, the appeal tribunal held that a system of licensing is effective not only when a licence is revoked, but when remediable defects are brought to light and are remedied. An Adjudicating Officer will of course weigh very carefully any claims that a trader with a record of malpractice has reformed. If, however, he considers that such claims are well-founded (for example, if a company has passed into new hands), then the right decision within the law will be to determine in favour of the trader.

This was an approach far-removed from rigid legalism.[66] It was motivated, in the main, by the recognition that for a trader to lose his credit license was effectively to put him out of business. Such a blunt tool was seen as inappropriate for all but the most clear-cut of cases.[67]

The OFT in the 1990s

- Anticipating legislative reform

The 1990s were an extremely unsettling period for the Office. It was marked by a succession of Directors General, and a long, frustrating wait for legislative reform in key areas. During the course of the 1980s, the Office had criticised the existing systems with respect to codes of practice, its Part III powers and restrictive practices, not to mention its calls for legislation in more specific sectors. During the 1990s, these calls continued with reviews of credit licences and constant calls for reforms to the competition regulatory regime, including an extraordinary appeal for an institutional merger between the OFT and the MMC by Sir Bryan Carsberg.[68] Despite reviews, Green and White Papers,[69] and promises of space being made in the legislative timetable,[70] however, no major changes actually occurred until the new Labour government came to power. In terms of competition policy, the reform process thus took an extraordinary fifteen years in total, as documented in almost painful detail by Wilks (1999).

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[66] One area where the Office was less flexible was its attitude towards unlicensed credit lending, which nearly always resulted in prosecution. The prosecutions normally resulted in convictions, so that, for instance, out of 32 traders prosecuted in 1985, 29 were convicted.

[67] Interview with Lord Borrie, 21st January, 2003.

[68] See Wilks (1999: 313)

[69] For instance, a Green Paper on restrictive trade practices was published in 1988, followed by a White Paper a year later, then in 1992, a Green Paper was published on abuse of market power.

Having pointed to the shortcomings in its powers under Part III of the Fair Trading Act again in a 1993 report, the Office turned its attention to the complexities of the Consumer Credit Act – deemed an appropriate target particularly in light of the government's deregulation initiative. A series of recommendations was published in a report in June 1994, which were broadly accepted by the government but, in the absence of legislative time, not acted upon. Meanwhile, the Office had been looking inwards at its own procedures. A process of restructuring, begun in 1991 and completed in 1993, meant that all the regulatory work of the Consumer Affairs Division were now combined in a single Regulatory Section. The Section had six regional teams with contacts to local trading standards departments, and dealt with the Office's responsibilities under Part III of the Fair Trading Act 1973, and the regulatory work under the Consumer Credit Act 1974, the Estate Agents Act 1979 and the Advertising Regulations 1988.

In 1994, the new Regulatory Section referred to difficulties in both its credit licensing function and its Part III powers suggesting a continuing degree of juridification. In terms of its approach towards licensing, the Section had begun to issue more warning letters as opposed to Minded to Refuse or Revoke (MTR) notices, and the 172 notices issued in 1992 compared to 220 in 1991 (AR 1992: 18). Where notices were issued, however, the Office noted the following trend (AR 1994: 28):[71]

> The proportion of traders making representations has now been rising for several years, and the complexity of representations also seems to be increasing. On some occasions they can take several days, and may involve legal representatives, including Queen's Counsel.

This was not reflected, however, in High Court appeals which remained very rare. In the period 1992-2000, there were a total of only two such appeals.[72]

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[70] See for instance AR 1993: 11 on powers to deal with problem traders and AR 1995: 12 for the Government's intention to review the need for competition law reform.

[71] Lord Borrie confirmed that this was a trend that he had noticed during his time as Director General also (Interview, 21st January, 2003).

[72] Mr Anthony Inglese observed that an unhelpful approach by licensees would often do them little good. He recalled one case in which the licensee attended the hearing but did not say a single word, evidently advised by his lawyer not to speak. However, as the decision to take a licence away was not punitive but based on the need to protect the public in future, this was very counter-productive, merely creating a bad impression. (Interview, 13th February, 2003)

Meanwhile, it also noted how the increasing complexity of Part III cases was slowing down the process of obtaining assurances and orders. Then in 1996, a clearly frustrated Office referred again to the difficulties of establishing 'persistence' in using its Part III powers. The remarks followed a county court case in which the judge ruled that 20 repetitions of an unfair trading practice was insufficient. The decision was then upheld by the Court of Appeal.[73] The decision "reinforced the OFT's long-held view that Part III of the Fair Trading Act provides an inadequate means to achieve the objective of countering traders who pursue unfair or improper business practices but whose behaviour, in itself, is not unlawful" (AR 1996: 29). Moreover, the weaknesses in the legislation were having a knock-on effect, so that staff in local Trading Standards Departments often would not refer a case to the Office, thinking that the extra work to which they would be put would not be justified by a sufficient prospect of success. In both areas then, there was limited evidence of juridification: increased complexity of cases, increased presence of lawyers, some legal appeals. The evidence has to be set against the continuing informal style of enforcement, the fact that formal action remained very rare, and the fact that it was still only a small minority of those prosecuted who were pursuing legal avenues. Lord Borrie summed up the situation as follows:[74]

> It was not a case of there being *either* more lawyers *or* behind the scenes negotiations – they were both going on at the same time. Formal challenges were used more often, reflecting perhaps a change of culture – a growing "Americanisation" (if I can use that term) in the use of legal advisers and litigation. Whereas previously, behind the scenes negotiations tended to take place *instead* of these things, often now both were present.

This is a significant observation, according with the evidence presented and amounting to an important challenge to some aspects of the juridification thesis. By recognising the possibility of increased litigiousness *without* an accompanying increase in legalism on the part of the regulatory body, the comments highlight the limited value of focusing on court cases and legal challenges in the attempt to make out a claim of juridification. They also question the proposition that juridification is an inexorable process

[73] See Director General of Fair Trading v Diwan [1996] (Unreported). The Court of Appeal actually didn't consider the 'persistence' ruling, but focused on whether a failure to pay damages or other redress following a breach of contract could itself be described as a breach of contract or other civil duty (so as to fall within the scope of section 34(3) of the Fair Trading Act).

or vicious circle. Instead of a model in which increasing regulatory unreasonableness leads to an increased number of legal challenges which leads to increasing focus on law by regulators and so on, it might be necessary to consider a model where regulators try to limit juridification through informal contacts and regulatees react diversely – some through their lawyers notwithstanding, some without.

On the consumer side, the Office remained heavily involved in pushing for reforms in the used car sector, it launched inquiries into the provision of pensions, health insurance and care homes for the elderly, and it again began approving new codes of practice.[75] By December 1996, the Office had negotiated codes of practice with 46 separate trade associations in 21 different areas of industry.[76] The most important changes, however, came through directives from Europe, and it is to these that we now turn.

- The impact of European directives

In his final Annual Report, Sir Gordon Borrie commented that the biggest change there had been during the time he had spent at the Office was the new European dimension to his work. The most obvious aspect to this was in the competition side of the Office's work, with many competition cases having a European aspect to them. However, there were also a number of significant European initiatives on the consumer protection side that not only had the effect of expanding the role of the OFT but also contained the potential to change the nature of its relationships with some regulatees. These directives dealt with a variety of matters including misleading advertisements,[77] doorstep selling,[78] unfair contract terms[79] and distance selling,[80] and a variety of specific areas such as timeshares,[81] package holidays[82] and medical products.[83] In many of these areas, the Office was given a key enforcement role – for instance, the Control of Misleading Advertisements Regulations

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[74] Interview, 21st January, 2003.
[75] See generally the OFT Annual Reports of this period.
[76] As listed in OFT 1996: *Voluntary Codes of Practice – a consultation paper*
[77] Control of Misleading Advertisements Regulations 1988
[78] Consumer Protection (Cancellation of Contracts Concluded Away From Business Premises) Regulations 1987
[79] Unfair Terms in Consumer Contracts Regulations 1995
[80] Consumer Protection (Distance Selling) Regulations 2000
[81] the Timeshare Act 1992
[82] the Package Travel, Package Holidays and Package Tours Regulations 1992
[83] Medicines (Advertising) Regulations 1994

1988 gave the Office the power to apply to the High Court for an injunction against companies breaching the regulations, although this was only once other bodies had tried to stop the advertisements outside the courts.[84] In practice, most complaints which reached the Office were either referred to one of these bodies or dealt with outside the courts through informal assurances or written undertakings.[85] In this section though, we focus on the two directives which had the most impact on the Office's relationships with its regulatees: the Unfair Terms in Consumer Contracts Regulations 1995[86] and the Stop Now Orders (EC Directive) Regulations 2001.

Lying at the centre of the EC Directive on Unfair Contract Terms is Article 3, reproduced exactly in the UK Regulations. It consists of two provisions, as follows:

> 1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
> 2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

Article 5 adds a requirement for consumer contracts to be drafted in "plain, intelligible language", and a lengthy Annexe provides a non-exhaustible "grey-list" of examples of terms that would be in breach of the Directive.[87]

In the UK, the enforcement of these regulations was given to the OFT. The Office was given the duty to consider all consumer complaints relating to contract terms and take measures to ensure that any unfair terms were changed. If necessary, it could apply to the courts for an injunction to prevent the terms being used. In the first Unfair Contract Terms bulletin,[88] the Office described this power as "a last resort, but where it does prove necessary to warn suppliers that proceedings will be started, that warning will invariably be followed through." The next paragraph then goes into further detail:

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[84] The main bodies were the Advertising Standards Authority and local Trading Standards Departments
[85] See also the Consumer Protection (Distance Selling) Regulations
[86] These implemented the 1993 EC Directive on Unfair Contract Terms and have since been replaced by the Unfair Terms in Consumer Contracts Regulations 1999.
[87] The reason that the examples are not blacklisted is because much depends on context, such that a term which would be unfair within one contract may be fair in another.
[88] Unfair Contract Terms bulletin (Issue no 1, May 1996) at p3

> The Director General may 'have regard' to undertakings about the use of unfair terms. But this does not mean that a supplier with unfair contract terms faces the stark choice between formal undertakings or legal proceedings. We seek voluntary change. While we aim to be robust in applying the Regulations, we are not inflexible in our dealings with suppliers. We pursue a fair administrative process of negotiation. We open dialogue with the business involved and only when this proves unsuccessful and unconstructive will we move on to the formal legal process...

This stated approach has been well borne out by later statistics. Three years after the Regulations had come into force, the Office had investigated about 3000 complaints and taken action in around 75% of cases leading to the dropping or revision of over 1200 contract terms, indicating the Regulations' wide impact. Yet no trader had fought a case all the way to court.[89] The first time this happened (and still the only example to date) was the First National Bank[90] case a year later, which ultimately went all the way to the House of Lords. In its magazine, *Fair Trading*, the Office pointed to the success of the Regulations, before explaining the absence of court appearances as follows:

> Results like these have been achieved without resort to court, but not without the threat of it. The OFT's ability to end the use of terms that confer a real benefit on suppliers, such as long cancellation periods in mobile phone contracts, depends upon it being seen as willing to use its powers. The fact that cases have ultimately been settled is explained partly by the prospect of court costs and attendant bad publicity. Probably more fundamental, however, is the risk of terms being forbidden altogether rather than rewritten. Unfair terms normally give business a benefit that is excessive, rather than wholly unwarranted, and often the firm's underlying interest is a vital one. Suppliers can avoid losing all the protection offered by, for instance, a 'boilerplate' exclusion clause, by agreeing to narrow it and accept liability (as fairness requires) for negligence.

The fact that the Regulations did not lead to court action does not mean, however, that they did not lead to a degree of juridification between the Office and its regulatees. It is true that they did not lead to Type I juridification, in which regulators and regulatees have an adversarial relationship battled out in the courts. However, it seems clear from the bulletins that the Regulations did cause *Type II juridification*, where both parties clearly understand the contact to be legal in nature and proceed on that basis. Some evidence for this can be found in the nature of the Office's bulletins themselves – very explicitly meant

[89] See the article in the OFT's quarterly journal, *Fair Trading* (Summer issue 1998).
[90] Director General of Fair Trading v First National Bank plc (HL) [2002] 1 AC 481. The Director General ultimately lost this case, with the House of Lords overturning the Court of Appeal's ruling.

as a vehicle through which the cases dealt with by the Office could be published and made accessible to other companies, as the following extracts make clear:[91]

> The task currently facing us is more one of education, rather than doing battle in the courts, and there is still a long way to go. This Bulletin aims to push the process forward by providing an insight into our thinking about what constitutes unfairness, and by giving practical examples of terms that traders and their legal advisers have themselves devised which we regard as likely to be considered fair.
>
> The OFT believes that publishing information about its enforcement of the Regulations is particularly important. Lack of awareness of the legislation and its radical impact on contract drafting has made for some difficulties in getting contracts improved. It is only fair to say that, in the past, solicitors who have wished to draft fairly have had to navigate largely without maps. The OFT has been attempting to meet the need for guidance and precedents in various ways, for instance by organising two conferences, but chiefly through a series of bulletins which explain its approach, report on each case, and provide numerous examples of terms considered fair and unfair.

The examples contained within these bulletins thus served as "case law" - this despite the note contained at the start of each bulletin that the opinion of the Office as to what constitutes an unfair contract term is not binding as this is a decision that ultimately rests only with the courts. The technical legal nature of most of the cases cited in the bulletins confirms the impression that relationships generated by these Regulations have tended to be dominated by legal values and expectations such that they can be accurately described as juridified. The fact that, in the main, companies and trade associations have tended to accept that changes have needed to be made does not detract from this.[92]

Quite different in nature from the Unfair Contract Terms Regulations were the Stop Now Orders (EC Directive) Regulations 2001. Instead of creating new obligations in a particular areas, these Regulations created a new enforcement system under which the Office (and other enforcement bodies) had strengthened powers to prevent businesses from breaching a wide range of existing UK consumer protection laws – the ultimate sanction

[91] Unfair Contract Terms Bulletin 3 (March 1997), at p5 followed by extract from an article in *Fair Trading*, Summer issue 1998.

[92] Ironically, it could be that the action by the OFT under these regulations has decreased the incidence of litigation in affected sectors – see Scott (1998: 51).

being an injunction from the High Court. In its Guidance, published in December 2002,[93] the Office set out its approach to these new powers:[94]

> 2.7 Through this guidance the OFT seeks to ensure that business and all Qualified Entities are aware of its own general principles for the enforcement of the provisions of the Stop Now Regulations. The principles that the OFT will itself apply and will encourage others to follow are that:
> • action will only be taken where there is evidence of a breach of the relevant consumer protection law and the resulting consumer harm stemming from the infringement,
> • business will be given a reasonable opportunity to put matters right by negotiation,
> • wherever possible court action will only be taken after voluntary cessation or undertakings have been sought,
> • proceedings will be brought by the most appropriate body...
> • when the same business activity results in infringements of more than one of the pieces of legislation covered by the Stop Now Regulations, the OFT will ensure that any action is coordinated so that the business concerned is not subjected to unnecessary multiple approaches, and
> • in line with the OFT's general approach to putting information into the public domain, publicity on Stop Now cases will be accurate and balanced, fair to the trader, and in accordance with the performance of the OFT's functions.

This approach thus mirrored the previous approach of the Office to its other powers, with formal action taken as a last resort.[95] Nonetheless, there are two things about the Stop Now power that are worth noting. The first is the language of the Office in describing this approach – that of 'proportionality'.[96] As a term taken directly from EC jurisprudence, this points to the influence of general European law in the context of specific directives. Secondly, it is worth emphasising again the wide application of the Stop Now power. As a general power, it quickly became apparent that it was to have a major impact on the Office's general consumer protection work with Stop Now orders or assurances and

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[93] (OFT 382)

[94] See also the comments at the OFT web-site: http://www.oft.gov.uk/Business/Legal+Powers/stop+now+regulations+general+enforcement+approach.htm

[95] As of 31st December, 2002, there had only been 8 formal actions by the Office under the new powers, resulting in 5 assurances (4 relating to the same matter), 1 undertaking and 2 Stop Now Orders. The figures have to be treated with a degree of caution though as other bodies also have the same powers. On its web-site, the Office stated that it would generally leave enforcement to other bodies, unless there was the need to clarify the law or set a precedent, a business practice extended across more than one economic sector or the activities of the business had an international dimension.

[96] See for instance http://www.oft.gov.uk/Business/Legal+Powers/Stop+Now+Regulations.htm: "We will try to ensure that any action that we or other enforcement partners take is necessary and proportionate to the circumstances. The necessity for action will depend on the proof of or potential for harm to consumers, as a result of a business's behaviour. Proportionality will be best served by efforts to get a business's voluntary agreement that they will put things right before legal action is taken against them."

undertakings under the Regulations being used in conjunction with breaches of the Unfair Contract Terms Regulations, the Consumer Protection (Distance Selling) Regulations, the Control of Misleading Advertisements Regulations 1988, the 1978 Estate Agency Act and other areas of civil law. In short (AR 2001: 33):

> The introduction of the Stop Now Regulations in June 2001 represents a major advance against businesses that engage in unfair trading practices. The Stop Now powers provide an effective mechanism to enforce a wide range of consumer protection legislation against traders who are harming consumers' interests. We always give businesses a fair chance first to halt unfair trading practices. But if they fail to do so, we now have the means to take prompt action to protect consumers.

Conclusion

The Office of Fair Trading has been involved in an extraordinary range of policy areas in the course of its thirty years. It has had a major role in the reform of influential economic sectors including estate agency, financial services, broadcasting and the legal and medical professions. It has played a central part in the reform of consumer protection laws, including the key area of unfair contract terms.

Overall, the balance of the evidence is against a conclusion that relationships between the Office and its regulatees have become juridified. The vast majority of its contact with regulatees has been dominated by non-legal considerations such as the impact of complaints and public opinion, budgetary constraints, and the influence of central government and pressure groups. The Office's regulatory strategy has been predominately persuasive, as reflected in the flexible use of its enforcement powers against individual traders, and its keenness to try to effect change without resorting to the formalities of legal processes. The demise of the power to create criminal offences through Advisory Committee references and the general lack of legislation to redefine the relationships between the Office and its regulatees also points against a conclusion of juridification.

There is some evidence of an increasingly adversarial approach on the part of regulatees targeted by the Office under Part III of the Fair Trading Act and the Consumer Credit Act. Whilst the Office has used both these powers sparingly and in a flexible

manner, there have been some companies which have responded through lawyers, and occasionally the threat of judicial review and appeal. Nonetheless, whilst this may be true, the trend does not point to a process of juridification as the Office has not responded through more overt legal considerations. Nor have there been many challenges that have actually reached court. And even with the recent introduction of the Stop Now Orders, the vast majority of contact has remained outside the courts. Instead, the only clear-cut case of juridification has been Type II juridification – evident in the regulation of unfair contract terms following the 1995 Regulations.

The following tables use the juridification indicators to highlight these trends.

Type I juridification between the OFT and its regulatees (consumer protection): 1973-2002

INDICATOR	EVIDENCE
Frequent litigation ✗	No – although litigation threatened more often in the 1990s.
Coercive, inflexible regulatory strategy ✗	No – the exact opposite: the Office was as consistently flexible and informal as possible.
Reliance on formal, legal processes ✗	No – informal processes nearly always preferred.
Frequent prosecutions in response to breach of law ✗	Prosecutions rare, with negotiations preferred. If anything, fewer prosecutions relating to rogue traders and licensed creditors in 1990s.
High presence / involvement of lawyers ✓ ✗	Lawyers relatively unimportant, and did not occupy influential roles in the organisation. However, regulatees beginning to make greater use of lawyers in the 1990s, and greater role within the OFT in relation to unfair contract terms.

Type II juridification between the OFT and its regulatees (consumer protection): 1973-2002

INDICATOR	EVIDENCE
Explicit legal argument ✔ ✖	Became more common during 1990s, not only in the context of unfair contract terms, but also in relation to problem traders.
Regulatory contact seen as setting legal precedent ✔ ✖	Generally not relevant, with the important exception of unfair consumer contract terms.
High presence / involvement of lawyers ✔ ✖	Lawyers relatively unimportant, and did not occupy influential roles in the organisation. However, regulatees beginning to make more use of lawyers in the 1990s, and greater role within the OFT in relation to unfair contract terms.
References to law and legal cases ✔	Common as a basis for bargaining strategies.
Adoption of overtly legal values ✔ ✖	Preference for more bargaining strategies in the shadow of law indicated by demise of Part II power and a willingness to reach agreement without resorting to prosecution. However, natural justice considered important in hearings under Part III of the FTA and under the Consumer Credit Act.

We turn now to see whether the same has been the case on the competition side.

CHAPTER 5

Keeping Lawyers Out: the OFT and the implementation of competition policy 1973-1998

Introduction

Having considered the Office's approach to consumer protection policy from its establishment in 1973 to the passage of the Enterprise Act in 2002, we turn now to the competition side of its work. However, this time the analysis ends in 1998, and a separate chapter is devoted to the period 1998-2002. This is because the Competition Act 1998 gave rise to such a substantial change in the nature of competition policy in the UK that it requires separate analysis.

It will be argued in this chapter that many of the same themes found in the consumer protection side of the Office – a preference for negotiation over imposition, for informal over formal procedure, and discretionary judgements over legalistic formulae – were also to be found in its implementation of competition policy up to 1998. As such, like the consumer protection side, the Competition Divisions of the Office hardly ever had to prepare for court appearances or legal appeals.

This chapter, like the previous one, is arranged chronologically, with breaks made in 1980 – the year of the passage of a new Competition Act – and 1992 – the end of the long Directorship of Sir Gordon Borrie and his replacement by Sir Bryan Carsberg. As with the last chapter, the breaks are not meant to imply changes in the dependent variable (juridification), but are simply made for convenience. Before reviewing the Office's work over this period, however, we begin with a brief background as to the nature of the implementation of competition policy in the UK. This is useful not only to provide context to the post-Fair Trading Act period, but also to explain many aspects of the approach taken by the Office which, after all, inherited staff directly from its predecessors and, in the case of restrictive trade practices, simply took over the duties of the Registrar.

Background

In Chapter 2, it was noted that in terms of the substance of UK competition policy, the Fair Trading Act 1973 was largely a consolidating piece of legislation. Before considering the approach of the Office towards the implementation of competition policy, it is thus useful to provide at least a sense of the themes that had dominated prior to 1973. To begin with, consider Wilks' comments about the 1948 Act:[1]

> In the 1948 legislation the initial choice was made of an administrative system. Debate within the Board of Trade during 1944 argued that the proposed Board should "avoid legalistic procedure" and proceed in an informal fashion to discuss the public interest. This judgmental approach, wary of law and rejecting the adversarial implications of a judicial avenue was wholly in keeping with British practice. It envisaged a pattern of informal negotiation and self-regulation on the part of industry which Vogel's excellent study has identified as an abiding feature of British industrial regulation. Consistent with this approach, the 1948 Act embodied virtually no sanctions...

This initial decision had a major effect on the subsequent style of competition regulation in the UK. The following examples in each of the areas of monopolies, mergers and restrictive trade practices provide a good indication of how this worked in practice.

In the area of monopolies, it became normal procedure to follow up reports of the Monopolies Commission by negotiating voluntary undertakings from the companies concerned rather than by compelling changes through a Ministerial order. Orders were exceedingly rare, and perhaps the most instructive example of this was the case of Hoffman La Roche. The investigation related to the pricing of Valium and Librium, and the company was uncooperative from the start, with the Monopolies Commission threatening evidence-gathering orders – an exceptionally rare threat in the history of the Commission. In 1973, the Commission produced its report, which was damning. Hoffman La Roche responded by applying for judicial review, claiming breach of natural justice, and in order to prevent the company from securing an advantage whilst the legal challenge was ongoing, the government implemented the main recommendations of the Commission through a

[1] Wilks (1994: 15)

statutory order. An application for the appointment of a Select Committee to enquire into the Order was rejected, leading Hoffman La Roche to seek judicial review also of the government. The following ministerial statement takes up the story:[2]

> In April 1974, out-of-court negotiations began about the price of the drugs in question to see whether settlement could be reached. It was desirable to bring Roche back into the Voluntary Price Regulation Scheme of the DHSS as early as possible. During the course of the negotiations we obtained from the Company a great deal more information than they had given to the Monopolies Commission. I am glad to inform the House that agreement has now been reached as a result of which:
>
> 1. The Company will repay to the Government the sum of approximately £3.75m...;
> 2. The Company will come back into the VPRS for all its ethical pharmaceutical products;
> 3. The Company have accepted that the new prices of Librium and Valium will be put at approximately half the 1970 level...;
> 4. The Company have informed us that they intend to continue their research and investment in the UK and that they plan to spend several million pounds on improved research, production and administration facilities...;
> 5. The Company has undertaken to withdraw its legal action against the Crown and the Monopolies Commission together with any allegation of impropriety.
>
> This Agreement is clearly incompatible with the continuance in force of the Order and consequentially is subject to its effective revocation...

Even in this case then, where the MC report was particularly critical and where the company involved was unusually obstructionist, the government was keen for resolution to take place outside the courts, with number 4 on the above list providing a good example of the way in which industrial policy was capable of impacting upon competition policy.

With respect to merger control, Freyer (1992: 311) records that of the 350 mergers which might have been referred to the Monopolies and Mergers Commission by 1969, the Board had referred only 10 – this despite the intense merger activity of the late 1960s. Freyer concludes by quoting Fairburn's comments approvingly that "relatively few mergers were thought to give rise to public interest concerns, and saw the parallel operation of a policy clearly antagonistic to merger control".[3] Shortly, we shall see whether the same trend was continued after the enactment of the Fair Trading Act.

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[2] HC Deb. (1975-6) 899, 12 November 1975, c. 1543-1547

[3] Fairburn in Fairburn and Kay (1988: 195)

Finally, in relation to restrictive trade practices, Victor Morgan (1987: 22) emphasises the low rate of agreements actually coming to adjudication - an aspect of policy that predated the creation of the OFT by over ten years:

> By the early 1960s it had become clear that there was little chance of an agreement surviving a court action unless the activity concerned had unusual features that would help it to pass on the gateways, and was free from any major detriments. As a result the vast majority of registered agreements have been abandoned (or modified so as to remove restrictions covered by the Acts) either before reference to the court or at an early stage of the proceedings.

The words in parentheses point to the practice of the Registrar of Restrictive Trading Agreements to try to negotiate the removal of objectionable features from restrictive agreements. Once this was done, he could then recommend to the Secretary of State that the remaining restrictions did not call for an investigation by the Restrictive Practices Court due to the 'of no significance' clause.[4]

All these examples point to the overriding themes of UK competition policy prior to the creation of the Office – that it was largely consensual, based on negotiation and bargaining rather than prosecution and imposition. The example relating to restrictive trade practices is especially instructive: even in the context of a regulatory regime where any qualifying agreements had to be placed on the register and taken to a court for adjudication, there was still scope for flexibility and this scope was utilised whenever possible. We turn now to see whether the Office continued with a similar style of implementation.

The Office and competition policy: 1973-9

- Monopoly control

It is convenient to take the Office's approach to monopolies first, focusing in particular on its two main duties: making references to the MMC and following up the MMC reports. From 1974 to the end of 1979, a total of 17 monopoly references were made

[4] See OFT Annual Report 1975: 11.

to the MMC.[5] This compares to 79 areas in which monopoly-related complaints were made *in 1974 alone*, implying that the vast majority of complaints did not result in referral to the MMC. Sometimes the complaints were found to be unsupported, yet this was not always the case. In 1975, for instance, the Office received a number of complaints, both from MPs and from members of the public, that building societies were not allowing borrowers a choice of insurer with their mortgage. Its response was as follows (AR 1975: 18):

> The Director General was concerned that arrangements were unnecessarily restrictive and had reason to think that there was a complex monopoly situation in relation to the lending activities of building societies. However, he decided that a solution lay in direct negotiations with the Building Societies Association.

The result of the negotiations was that borrowers were now to be offered a choice of three insurance companies. The arrangements were voluntary, although it was expected that most, if not all, members would follow them. The case illustrates perfectly the Office's general approach to making references: in the words of Wilks (1999: 286), "Methven's approach had displayed a positive commitment towards negotiation in monopoly and mergers cases, with a view to avoiding a reference to the MMC where possible".[6] Lord Borrie added that a reference would *never* be made without the Office's concerns being discussed first with the companies involved – the idea of surprising a monopolist with a reference was inconceivable.[7]

It is clear also that when the Office did decide to make a reference, this was based little on legal considerations. Dr Martin Howe provided the following overview:[8]

> When the Office was first set up, it had been hoped that the process would become more transparent and the reference criteria more obvious. A database was set up to try to analyse the market sector by sector. However, there proved to be very few markets that could be picked out just through desk-work, and complaints remained a prominent source of investigations. Later, an attempt was made to combine the two, through a kind of informal checklist. A reference was

[5] Wilks (1999: 278-8) characterises the nature of references as follows: that Methven had referred some significant intermediate product industries whose efficiency had a potential impact on industrial productivity – such as petrol, bricks and cables, whereas Borrie seemed to display a consumer bias by referring industries that supplied the final product, with high consumer visibility and potential retail price effects – such as ice cream, credit cards and domestic gas appliances. This was backed up by Dr Howe, arguing that the reliance on complaints led to an emphasis on end products (Interview, 12th February, 2003).

[6] For a full list of monopoly references made by the Office, see Appendix One.

[7] Interview, 21st January, 2003.

[8] Interview, 12th February, 2003.

> more likely if it related to a prominent market (in terms of size), if the issue would have a wide effect on other sectors, if there was an overlap with other areas (such as if there had been a flurry of mergers in that particular sector), and if it was likely that a remedy would be available at the end of the process.
>
> Ultimately though, there were very few investigations indeed that did not have complaints as a catalyst. This was not because of judicial review worries, but just a feeling that to do otherwise would be an unreasonable approach to take. And, of course, any public agency finds it difficult to ignore complaints because of their potential political impact.

Both Lord Borrie and Dr Howe added one further factor: an awareness of the work-load of the Monopolies and Mergers Commission. It was seen within the Office almost as its duty to supply the MMC with some work, but it also had to be wary of overburdening it. A steady supply of about two monopoly references per year was considered about the right amount. Together, these things add up to strong evidence that reference policy was based upon non-legal considerations: some economic analysis, a notion of what was "reasonable", political and administrative factors.

The Office's follow-up work had a similar emphasis on negotiation, and statutory orders were extremely rare – thus continuing the trend prior to the Fair Trading Act. The first step following an adverse decision by the MMC was normally to negotiate undertakings on the request of the Secretary of State. Undertakings tended to relate mainly to pricing, although they normally included also the arrangements by which the Office could monitor compliance.[9] Once undertakings had been secured, the Office played a monitoring role, surveying price policies and profit levels.[10] In the course of this continued monitoring, there were sometimes negotiations to change the terms of the undertaking or to review the need for monitoring in response to changed circumstances. There were, however, no statutory orders at all made during the 1970s. The first case in which the Director General had to report to Ministers that he was unable to obtain satisfactory undertakings was in 1980, relating to the supply of architects' services with reference to

[9] Examples included the areas of primary batteries (Ever Ready Ltd. and Mallory Batteries Ltd.), clutch mechanisms for road vehicles (the Automotive Products Group) and cinema film

[10] Early examples included Procter & Gamble and Unilever, following the Monopolies Commission 1966 report on household detergents, Automotive Products Group in the area of clutch mechanisms for road vehicles, and Kelloggs following the MC's 1973 report on ready-cooked breakfast cereals.

scale fees (AR 1980: 40). Here also no order resulted, however. Instead, continuing negotiations eventually led to agreement being reached in 1983.[11]

Why was there so little formal action towards monopolists? Sir Gordon Borrie emphasised how the whole structure of monopoly control discouraged formal sanctions (Borrie 1981: 306-7):

> It is in no way illegal for firms to adopt practices that the Commission has condemned time and again. The only deterrent is that predatory conduct may lead to a reference of the products affected to the Commission, thus bringing considerable trouble and expense to the firms involved. During the inquiry the need for a favourable report is likely to moderate the conduct of the firms concerned; but the Commission's recommendations after the inquiry have no binding force. Their condemnation merely enables the government to make a statutory order forbidding certain types of conduct. Usually no order is made, but the firm concerned gives undertakings to the Minister and a long period may elapse before the terms of the undertaking are agreed.

Other factors might also be added to this. The Office was unable to make a reference where there was no monopoly situation (as defined by statute) even if a dominant firm was engaging in anti-competitive practices. The whole process was slow,[12] which must have had the effect of discouraging the Office to make references if it was believed progress could be made through more informal channels. Next, as was pointed out earlier, the Office had to be mindful of how much the MMC could cope with. Too many references would lead to administrative gridlock. Finally, it is clear that the institutional fragmentation in this area of competition regulation was also significant. Even where the MMC had delivered an adverse report, the government of the day still had a key role. Usually, the imposition of a confrontational statutory order would be politically less attractive than the option of asking the Office to find a mutually acceptable formula.

- Merger references

If monopoly control in the 1970s could be characterised as flexible and non-legalistic in nature, merger control was undoubtedly even more so. This was largely

[11] See AR 1983: 26, 78-9. The result was that architects' fee scales were no longer mandatory and that the published fee scales of both architects and surveyors carried an indication that they were for guidance only. Hence, members of both professions were now free to compete on fees.

[12] A good example was the very first reference made by the Office, on the supply and export of insulated wires and cables. The MMC report was only completed in 1979 – five years later.

because of the main difference between them: that whilst in the case of monopolies the Director General had the power to make a reference to the MMC directly, in the case of mergers, he could only make recommendations to the Secretary of State who then had the final decision of referral. If the main idea behind getting the Director General to initialise monopoly references was to take politics out of process (Borrie 1981),[13] then the retention of ministerial discretion in the case of mergers reflected precisely the opposite. Even though, in practice, it was rare for the Secretary of State not to follow the advice of the Director General,[14] it will be shown that the fact that the Office was providing advice rather than itself making references also increased the politicisation of merger control prior to this final stage of the process.

Before looking at the approach of the Office towards its regulatees in this area, it is worth taking a moment to consider the position of these regulatees. The main point to make is that in the area of mergers, it is not possible to lump all regulatees together. Whilst prospective bidders would never want the cost and uncertainty of a reference to the MMC, in certain circumstances the target company may not share the same view. Frazer (1992: 72) provides an example:

> In addition to formal pre-notification, many firms will voluntarily seek the opinion of the OFT on a proposed transaction in order to keep the risks of a reference to a minimum. However, in the case of 'unfriendly' mergers, the attitude of the firms to the prospect of a reference may not be the same. The target firm may actively campaign for a reference to be made in order to frustrate or at least delay the proposal. Many proposals have been frustrated in this way, even where the MMC has ruled in their favour. The delay allows for a 'white knight' to be found to purchase the target shares in the place of the bidding company, or for the bidder to lose interest for some other reason...

The Office's procedure for deciding whether or not to advise to the Secretary of State that a merger or proposed merger should be referred was as follows.[15] The first step, as soon as a proposed merger within the scope of the Act had come to the attention of the

[13] Although as was shown in Chapter 2, even in the area of monopolies, a degree of political involvement was deliberately retained by policymakers.

[14] By 1980, it had happened only five times. The third time that it happened – with respect to the take-over of J.B. Eastwood by Imperial Tobacco – Sir Gordon Borrie expressed his annoyance in the Annual Report. Wilks (1999: 289) comments that this indicated that "the OFT was exhibiting an increased confidence and independence".

[15] The source for this section is the 1978 guide published by the Office.

Office,[16] was to approach the financial advisers of the companies concerned, or the companies directly, so as to establish the main facts of the case.[17] The Office would then make a preliminary assessment as to whether the merger appeared to come within the scope of the Act using two tests:[18] the *assets* test[19] and the *share of market* test.[20] If neither test was satisfied, the Office would take no further action. If the merger did fall within the scope of the Act, the Office would seek an early meeting with the parties – separately when dealing with a contested merger, but sometimes together in the case of a friendly bid.[21] The purpose of the meeting was to enable the parties to put forward their views about the public interest implications of the merger. Often, the Office would also receive comments from other companies affected by the merger, and sometimes would actively seek out customers, suppliers or competitors of the parties as well as relevant trade associations and trade unions. Through all of this, confidentiality was emphasised as being of primary importance.

After receiving views, the OFT officials would come to a decision on the public interest implications of the merger or proposed merger. The 1978 guide expresses well its approach (at pp13-14):

> Each case falling within the scope of the Act is looked at on its own particular merits and not in accordance with any fixed rules or assumptions; the aim in each case being to assess and balance the advantages and the disadvantages to the public interest. Although the maintenance of adequate competition is one of the important considerations in selecting mergers for reference, judgements on the

[16] Proposed mergers would come to the attention of the Office either directly through the parties themselves or through press reports. Companies and their financial advisers did not have the duty to inform the Office, but in practice most did so.

[17] Later in the 1978 guide, the Office sets out some of the questions it would ask at this stage. Firstly, it would ask about the companies involved – their main operating figures, profits, turnover and so on, their main suppliers and customers. It would then find out about the industry or market affected by the merger, before turning to the merger itself: what kind of merger it is, the motives behind it, the extent to which the two companies supply similar goods or services. It would also ask about the future plans of the companies merging, including the implications in terms of redundancies.

[18] There is a further criterion which would have to be satisfied: once made public, there is a time limit of six months after which time a merger is immune from reference.

[19] Section 67 of the Act – a reference to the gross value of the assets of the target company. According to Whish (1993: 682), most mergers references are made on the basis of this test as it is easier to calculate.

[20] Section 68 of the Act: the share of market test is only satisfied if the merger itself creates or enhances a monopoly situation (defined as a combined share of over 25%).

[21] Sometimes, companies would apply to the Office for confidential guidance at an early stage. This would often be beneficial, for instance, for companies considering a target and wanting to know whether it is likely that a bid would be referred to the MMC. When asked for guidance, the Office would normally try to provide it within six weeks, although it would always insist that it could not be bound by the guidance as, due to the confidential nature of the approach, it would not yet have been able to gather the views of other interested parties.

> competition aspects are made in a practical and not a theoretical way, in the light of actual market conditions and expectations; and weight is given also to other significant economic and social aspects.
>
> With this approach it is not possible to publish a few simple rules from which it can be readily determined whether or not a particular merger is likely to be referred... The advantage of having published criteria of this sort would be outweighed by the disadvantages of rigidity...
>
> From time to time, in statements in Parliament or in public speeches, Ministers may wish to stress particular aspects of their approach to this pragmatic system of merger control as being particularly apt in the circumstances of the time, and to bring it in line with their general industrial policies. And it is for the Government of the day to decide how stringently the legislation is to be operated. When the Director General considers the advice he should give to the Secretary of State, he naturally takes account of the Government's known policies...

This was thus the exact opposite of a juridified approach – "not in accordance with any fixed rules or assumptions", "pragmatic", and influenced by political statements.[22] And in the above quotation, it is also possible to find the main reason why juridification was deliberately avoided – so as to avoid "rigidity". This was to be a recurring theme: the flexibility of the mergers regime was put forward as its chief strength in each of the following two decades.[23]

The political and discretionary nature of merger control was further both reflected in and enhanced by the existence of the Mergers Panel. The Panel pre-existed the Office, created following the Monopolies and Mergers Act 1965, although it was not a creature of statute. Its main purpose was to enable other government departments with particular interest in a merger's implications to offer their views. Following the creation of the Office, the Panel was chaired either by the Director General or, more often, by the Deputy Director General. It convened at what was clearly a crucial stage in proceedings: separating the preliminary decision of the Office staff from the final advice given to the Secretary of State by the Director General (or Deputy Director General on his behalf). Little however is known about the operation of the Merger Panel: as Whish (1993: 685) pointed out, "it is not publicly accountable and the reasons for its decisions are not disclosed". Frazer (1992: 73)

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[22] Indeed, Dr Howe went even further than this, describing the process of merger advice as "more often than not, a second guessing exercise" – Interview, 12th February, 2003. The approach of the Director General was criticised by the Trade and Industry Committee, arguing that "by accepting that he does choose to operate within stated government policy, Sir Gordon Borrie is, in our view, both limiting his independence and compromising the integrity of the advice he gives" – Trade and Industry Committee, Takeovers and Mergers, 1990-1 HC 226 xi London, HMSO, para 254.

[23] See later sections in this chapter.

wrote similarly: "[t]his committee is shrouded in mystery, neither its working methods nor its recommendations being made public."[24]

The following table indicates the number of mergers that were eventually referred to the MMC in comparison with the number that were considered by the Office from 1974 to 1979 (for a full list up to 1997, see Appendix two):[25]

Year	Number considered	Number referred
1974	159	7
1975	157	4
1976	171	4
1977	187	8
1978	229	3
1979	257	3

Hence out of a total of 1160 mergers or potential mergers considered, only 29 (or 2.5%) were referred to the MMC.[26] Considering that in some of these cases the judgment of the MMC was that they would not be expected to operate against the public interest, these figures indicate a remarkably low level of intervention, thus continuing the trend that had started with the 1965 Monopolies and Mergers Act. It is necessary to be a little cautious: it could be that unfavourable confidential guidance led to the abandonment of several potential bids that otherwise would have been referred – even so, the figures well-support Fairburn's comment quoted above that "relatively few mergers were thought to give rise to public interest concerns". Whish (1993: 679) stated it equally succinctly: "the system of control is benign and is essentially predisposed in favour of mergers". In 1980, the minimum threshold for qualifying mergers was raised from £5 million to £15 million gross assets, thereby excluding a still greater number of mergers from direct control.[27]

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[24] Indeed, for a while, OFT officials were not even allowed to admit that the Mergers Panel existed – if asked, they were told to deny any knowledge of it (Interview, Dr Martin Howe, 12th February, 2003).

[25] It is slightly misleading to compare the number of mergers considered by the Office year-by-year, as the effect of inflation of the assets acquired criterion of £5 million or more meant that over time the legislation was impinging on an increasing proportion of the total number of mergers taking place in the economy. The threshold was subsequently raised to £15 million in 1980 and again to £30 million in 1984.

[26] N.B. the figures exclude newspaper mergers. For an account of the policy and practice of newspaper merger control, see Whish 1993: 672-8

[27] Subsequently increased to £30 million in 1984. It should be noted that in focusing on regulatory relationships, this thesis excludes other areas where juridification might have occurred. Although he does not use the term, Freyer (1992) does provide a more general consideration of juridification in the area of merger control, describing amongst other things the increasing use of the legal profession in an advisory role.

- Restrictive trade practices

If we turn finally to restrictive practices, it is clear that even in this area there was room for flexibility and this was used by the Office as much as possible. In particular, the power of the Office to apply to the Secretary of State for exemptions on the basis that the agreement concerned did not raise sufficient public interest grounds was used extensively. Indeed, John Methven made his intentions clear in his very first Annual Report (AR 1974: 11): "I intend to use this power as widely as is consistent under the terms of section 9(2)."[28] By the end of 1980, 345 representations had been made to the Secretary of State by the two Directors General and directions had been given in respect of 335 of them. This compares with 32 cases which actually went to the Restrictive Practices Court between June 1972 and the end of 1978. And most of these were not defended as they had been secret agreements – kept secret precisely because they were known to be unlawful under the Act.

The ability of the Office to exempt agreements from reference to the Restrictive Practices Court was a useful bargaining tool. By stating to parties that an agreement was currently of too much 'significance' for any exemption, the Office could negotiate for agreements to be modified in return for a representation being made. This was a power underlined by the large degree of discretion that lay in the interpretation of the word 'significance',[29] and there is little evidence that the Office tried to temper this discretion by adopting clear guidelines. On the contrary: the Office insisted that each agreement was considered on its merits, and that its approach was pragmatic (AR 1980: 50).

It is arguable that some of the judgements that the use of this power entailed meant that the Office was making the kind of complex calculations that were supposed to be the province of the Restrictive Practices Court.[30] It has already been seen in the previous chapter how approved codes of practice would be exempted from reference to the court. The following indicates the Office's approach towards one further type of agreement (AR 1980: 51):

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[28] This subsequently became section 21(2) of the Restrictive Trade Practices Act 1976.

[29] The Act provides for the Secretary of State to give directions to the Director General, on his representation, discharging him from taking proceedings in the Restrictive Practices Court in respect of an agreement on the grounds that the restrictions in it are not of such significance as to call for investigation by the Court.

> The recommendation by trade associations of standard terms and conditions for the supply or acquisition of goods and services is a common practice. Standard terms and conditions may often be desirable in the interests of both supplier and customer, especially where comparatively small firms with little or no legal expertise are concerned, as otherwise many contracts might be entered into which are not enforceable at law. The 1979 report stated that the recommendation of standard terms and conditions by an association is not regarded as necessarily having a significant effect on competition but, to ensure there is no likely detriment, the terms should be fair and reasonable to all concerned, not likely to mislead those who will use them, and not unnecessarily exclude variation to meet special circumstances and requirements. The benefit to customers of having standard conditions must be balanced against any detriment to them of being deprived of the freedom to secure more favourable terms than those likely to result from the restrictions imposed by them. In general, mandatory standard terms and conditions are not regarded as suitable for section 21(2) since they are not variable to meet special circumstances. In all cases the recommended terms and conditions are looked at clause by clause.

There is clear indication here that, despite some protestations to the contrary, the Office was not always restricting the scope of the term 'significance' to the effect on competition.

Thus within the context of an apparently inflexible regulatory regime, the Office still aimed to retain as much flexibility as possible. Its relationships with parties to a registrable agreement were further characterised by discussion and advice rather than formalism, as indicated by the following extract (AR 1978: 9):

> In many cases the parties to these agreements have preferred, after discussions with my staff, to abandon or modify significant restrictions rather than defend them before the Restrictive Practices Court. Reference to the Court can be a lengthy proceeding – with good reason, since both sides (the parties and my Office) must be allowed reasonable time to do full justice to them. The alternatives however – abandonment or modification of restrictions so that I can invite the Secretary of State in a particular case to relieve me of my statutory duty to refer an agreement to the Court – can themselves also be time consuming. Particularly when long-standing practices are at stake, the parties to an agreement need to think through the consequences of giving up restrictions. This calls for much patient discussion between the parties and my staff, and a readiness to understand our respective positions – which I am glad to say is commonly the case.

[30] When presented with this suggestion, Lord Borrie thought that it was probably true but added that, rightly or wrongly, businesses were only too glad for matters to be resolved this way if it meant that they avoided an appearance in the Restrictive Practices Court (Interview, 21st January, 2003).

Such discussions occupied most of the Office's time in this area, and suggests that overall, there is a need to separate the context of the restrictive practices regulatory regime from the Office's relationship with its regulatees under the Act. Whereas the former was both formalistic and legalistic, the latter was neither. This is highlighted by the fact that the vast majority of work under the Restrictive Trade Practices Act 1976 was handled not by lawyers, but by administrative staff within the Office.[31]

The OFT's approach to the Competition Act 1980

In 1980, a new Competition Act was passed in Parliament. It came in the wake of the Liesner Green Papers, in which attention was drawn to the types of practice typically criticised in MMC reports and proposals made to strengthen the existing competition policy regime. Frazer (1992: 194) explains why this was necessary:[32]

> The regulation of anti-competitive practices cannot be undertaken solely through monopoly control or the control of restrictive trade agreements. Both policies have limitations which may make them unable to cope with certain commercial behaviour which damages the competitive equilibrium. In monopoly policy, there is the need to show the existence of a dominant position, in either structural or effective terms. In the control of restrictive trade practices, there is the need to show the existence of an agreement, even though the concept of agreement is loosely defined. In UK and US policy there is therefore legislation which fills in the gaps left by other aspects of competition law...

From the point of view of the Office, the most important aspect of the Act was the introduction of a new procedure for control of anti-competitive practices. Under s3, the Director General had the power to carry out an investigation where it appeared to him that any person had been or was following a course of conduct which may amount to an anti-competitive practice. Most cases originated from complaints.[33] Where a complaint was

[31] Interview with Mr Anthony Inglese, 13th February, 2003.

[32] Although undoubtedly there was a degree of overlap between this Act and the Fair Trading Act 1973 – a matter considered by Whish (1993: 119-20). He argues that the monopoly provisions of the Fair Trading Act tended to be used by the Office for industry-wide problems, whilst Competition Act investigations tended to be used for local cases or in cases where the issue was specifically the conduct pursued by the company concerned.

[33] The reliance on complaints in a number of areas is problematic, as several commentators have pointed out: it is reactive, and it runs the risk of ignoring vulnerable groups which are less likely to make a complaint. A

received, it was not always clear which of the Director General's competition powers represented the most appropriate response to the particular problem, so preliminary enquiries had to be made of the persons concerned and sometimes with other interested parties. If the Director General decided to make use of Competition Act powers to initiate a formal investigation, he had to serve notice on the person to be investigated and on the Secretary of State. There was no time limit and a report was published at the end of it. Where anti-competitive practices were found, the report also had to state whether it was appropriate for the company to be referred to the MMC. In other words, the OFT investigation was only concerned with whether a practice existed and whether it was anti-competitive – it was then for the MMC to decide whether this was against public interest.

Faced with an incremental change in UK competition policy, the Office pursued an approach to this power of investigation that was similar to its other competition powers. This was highlighted at an early stage when the Director General emphasised two instances[34] where he was able to resolve difficulties without having to launch an investigation (AR 1980: 12):[35]

> I was content to accept assurances from the organisations that they would be instituting early changes to obviate the cause of discontent... This informal method of removing bars to proper competition seems to me to have the twin virtues of effecting speedy removal of uncompetitive practices without the necessity of a formal investigation by my Office and, perhaps, a subsequent inquiry by the MMC.

The first stage therefore, once the Office had decided that that the complaint received was important enough to justify further action,[36] and once it had established that

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1984 survey by the Office attempting to find out whether the complaints statistics received were representative of consumer dissatisfaction generally, suggested that the TSD/CAB returns were a fairly reliable guide to the relative importance, as cause of complaint, of different categories of goods and services (AR 1984: 16).

[34] One concerned soda ash contracts of Imperial Chemical Industries (ICI), the other concerned the refusal of the BBC and Independent Television Publications Ltd to supply details of television programmes to free newspapers. The latter was however subject to a formal investigation, with the report published in 1984.

[35] This is comparable to the Office's approach to the Resale Prices Act 1976, not dealt with in this chapter. In 1980, constructive contacts between the Office and companies also resulted in undertakings given concerning resale price maintenance by 3 manufacturers of toilet preparations – Shulton (GB) Ltd., Revlon International Corporation and Lanvin Parfums Ltd (1980: 13). According to Dr Howe, this policy of avoiding prosecution was controversial within the Office, with some officials preferring a more deterrence-based approach.

[36] The power was thus used responsively by the Office, rather than as part of some general strategy to increase competition.

the complaint had substance to it,[37] was to try to negotiate matters with the company concerned.[38] Often agreement was reached successfully, with companies preferring to cease the anti-competitive practice rather than go through the expense and potential embarrassment of an investigation. On other occasions, however, companies either disputed the facts in the complaint or disputed that these practices could be interpreted as 'anti-competitive'. On this basis, the Office would then proceed with the investigation.

How juridified were these investigations? Certainly, there is virtually no evidence at all of Type I juridification. Companies were very rarely obstructive or confrontational, and indeed, it was the practice of the Director General to express his appreciation of the companies involved in the investigation reports.[39] It is also worth noting that there was only one judicial review challenge in the eighteen years in which the Act was in force, a technical case relating to the Office's terms of reference which had minimal impact on the Office's procedures. Nor were the Office's procedures adversarial: on the contrary, investigations were described as largely informal in nature, not dissimilar from Fair Trading Act investigations. Indeed, internally there was almost no difference: it was "the same sort of officials doing the same sort of interviews in the same sort of way".[40]

There is some evidence that might be taken to suggest the existence of Type II juridification. Firstly, the Director General stressed that "in procedural terms, my Office should always be beyond criticism", perhaps with the natural justice requirements of public law at least partially in mind. Secondly, the following comments from the Director General, made when the Act first came into force, indicates the original importance he attached to the value of precedent (AR 1980: 13):

> It is also worth pointing out that no law can be effective, or understood by those it affects, if it is enforced in secret. If the practice of a company in a particular sector is found to be anti-competitive, others in the same sector are entitled to know. Over the course of time, a body of Competition Act 'case law' will be built

[37] Before an investigation was started, the Office staff always made preliminary enquiries with the people or firm concerned to check that the complaint was factually correct and to give them the opportunity to put their side of the story. There was no requirement in the Competition Act 1980 to do this.

[38] Many examples are listed in the Annual Reports, including Grey-Green Coaches' decision to withdraw a free travel offer which might have had the effect of eliminating new competition; the British Gas Corporation's agreement to provide more published information about the operation of its central heating activities; and the agreement by Halifax in response to general complaints about the practice of arranging their mortgagors' insurance cover on mortgaged property. The majority of other societies then followed suit.

[39] Every report issued by the Office contains this kind of statement normally within the first page or two.

[40] Interview, Dr Martin Howe, 12th February, 2003.

> up by successive reports from my Office and the Commission and by undertakings given by companies, so that firms will be able to see what practices have been found to be unacceptable and to review their existing methods of business to avoid the possibility of investigation for a possible anti-competitive practice.

This has distinct parallels with the CRE's notion that formal investigations could establish on the ground the types of cases that constituted indirect discrimination. Finally, in at least one case – the *Ford Motors* investigation - some legal considerations did appear. Ford had patented the design to the replacement body parts on its motor vehicles and argued that this should override the anti-competitive effects of enforcing the patent so as to exclude independent manufacturers from reproducing these parts. The Office argued in particular that as there was a way in which Ford could get compensation for the investment put into the designs (i.e. by charging independent manufacturers for use of the designs), the refusal of Ford to allow any competition in this area was unjustified – an argument ultimately accepted by the MMC. Following this decision, Ford finally reached an agreement, although it continued to press its claims in court ultimately up until a House of Lords ruling that it did not have design rights in the various body parts (at which point the Director General also released the company from its undertakings).[41] Thus competition and intellectual property laws collided and it was up to the courts to find a path between them.

This case proved to be the exception rather than the rule, however, and ultimately, the balance of evidence points against any conclusion of juridification. Indeed, on closer inspection, each of the above points turns out to be positively misleading. Firstly, whilst it is true that the Director General referred to the need for procedural propriety, investigations (as noted above) tended to be carried out informally and were certainly not adversarial or court-like in nature. Thus the intent to be "beyond criticism" can be seen simply as reflecting a desire for good administrative practice as opposed to the prominence of legal considerations. Secondly, the notion that investigations under the Act might act as case-law was somewhat undermined by subsequent claims that each case was decided on a

[41] Actually it was another case: British Leyland Motor Corporation Limited v Armstrong Patents Company Limited [1984] FSR 591 that decided the matter. The Ford Motor action against Erik Veng (UK) Ltd was stayed whilst that case was decided, and following the House of Lords decision, the case was discontinued. See Ford Motor Company Limited v Erik Veng (UK) Limited and another, 6th May 1986, Chancery Division (unreported).

pragmatic basis,[42] and also by the unsystematic way in which cases were selected for Competition Act investigations.[43] It is further undermined by the fact that very few reports of investigations refer to previous decisions – to be precise, four in the first twelve years of the Act.[44] Even in these cases, reference to previous investigations serve as a statement of policy rather than as a commitment to binding precedent. And looking back on it, Lord Borrie seriously doubted that a body of case law was ever actually achieved, although Dr Howe was slightly less negative.[45] Finally, on closer inspection, even the *Ford Motor* case was dominated largely by economic rather than legal discussion. The legal cases that are quoted are merely to give a background to the intellectual property background to the claims made by Ford. But this law is effectively excluded by the Office, insisting instead that its only task is to decide whether Ford's behaviour is anti-competitive under the Act. And in making *this* decision, there is no reliance on legal cases at all.

All the remaining evidence confirms this lack of juridification in the relationships between the Office and its investigatees under the Competition Act. Even though investigatees quite frequently turned to lawyers for advice, the arguments put forward were rarely legal in nature. Rather, competition lawyers became familiar with the jargon of economics, and were used more for their general expertise than their specifically legal knowledge.[46] On the side of the Office, a glance through the reports of the investigations reveals that, the Ford Motor case apart, not a single legal case is quoted – there is not even reference to European case law. When asked whether its approach was characterised by economic rather than legal considerations, Dr Martin Howe replied, "Absolutely".[47] Put another way, the key question for the Office under the Act was as follows: as all firms aim

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[42] See, for instance, AR 1985: 11

[43] See Utton (1993), who criticised the Office's choice of cases as follows: "Approximately half of the cases involved 'local' or 'regional' markets rather than 'national'. While some of these are important and may raise questions of wide applicability (e.g. competition in local bus services following deregulation) others have involved very small markets and appear to have little general importance for competitive issues (e.g. British Railways Board). Where resources devoted to competition policy are limited it can be argued that they should be deployed in those areas where the gains to consumers are potentially the largest. Judging by the size of some of the markets involved in the anti-competitive practice enquiries it is not clear that such considerations have played a prominent part in the selection process."

[44] These were: Highland Scottish Omnibus Ltd, Southern Vectis Omnibus Co. Ltd, Kingston upon Hull City Transport Ltd and South Yorkshire Transport.

[45] Dr Howe pointed to the *Ford Motors* and *Black and Decker* cases as examples of investigations which had the effect of developing the law.

[46] Interview, Dr Martin Howe, 12th February, 2003.

[47] Interview, 12th February, 2003.

to improve their competitive position, at what point does legitimate practice become 'anti-competitive' practice? This is a matter of judgement and the Office could have treated it as a legal question, but never did so.

Finally, it is worth noting that, whatever the conduct of individual investigations, it is clear that the Competition Act 1980 had only a peripheral impact on competition policy as a whole. The following table indicates the investigations launched by the Office during the 1980s and their outcomes:

Year	Company investigated	Anti-competitive practice found?	Referral to the MMC?
1980	TI Raleigh Industries Ltd	Yes	Yes
1980	Petter Refrigeration Ltd	Yes	No
1980	Arthur Sanderson & Sons Ltd	No	No
1981	Sheffield Newspapers	Yes	Yes
1981	London Electricity Board	Yes	Yes
1981	W M Still & Sons Ltd	Yes	No
1981	British Railways Board	Yes	No
1982	Scottish and Universal Newspapers Ltd	Yes	No
1982	British Railways Board	Yes	No
1983	Essex County Newspapers Ltd	Yes	No
1983	Thames Television Ltd	No	No
1983	Ford Motor Company	Yes	Yes
1983	British Airways Authority	Yes	No
1984	BBC	Yes	Yes
1984	BT	No	No
1984	Independent Television Publications Ltd	Yes	Yes
1985	Holmes McDougall Ltd	Yes	No
1986	The World's Fair Ltd and Marcus Publishing plc	Yes	No
1986	Sealink Harbours Ltd	Yes	No
1987	Southern Vectis Omnibus Co. Ltd	Yes	No
1987	Becton Dickinson UK Ltd	No	No
1988	W Stevenson and Sons	Yes	No
1988	UniChem Ltd	Yes	Yes
1988	South Yorkshire Transport Ltd	Yes	No
1988	West Yorkshire Road Car Company Ltd	No	No
1988	Black and Decker	Yes	Yes
1989	Highland Scottish Omnibuses Ltd	Yes	Yes
1989	Kingston-upon-Hull City Transport Ltd	No	No
1989	Oracle Teletext Ltd	No	No
1989	Wales Tourist Board	No	No

1990	British Coal Corporation	No	No
1991	none	-	-

To sum up: in the first twelve years following the coming into force of the Competition Act 1980, the Office launched 31 investigations, in which 22 uncovered anti-competitive practices, and in only 9 of these cases was there a subsequent referral to the MMC. Normally, where a referral was not made, this was because an undertaking was accepted instead.[48] In any case, this figure of nine MMC references in ten years compares to the figure of around 1000 complaints about anti-competitive behaviour received by the Office *each year*. Frazer (1992: 198-9) speculates as follows:

> This low number may indicate that the earlier [Competition Act] reports have had a modifying effect on the behaviour of UK firms, or that informal processes are proving successful. It may equally be a reflection of choice with respect to resource allocation within the OFT generally.

Whish (1993: 114-5) does not consider the first (rather optimistic) possibility, but he does pick up on the other two and offers some suggestions of his own: caution following on from initial criticism of early reports, a limited number of complaints from the public, a lack of guidance from the MMC as to the behaviour which was to be considered anti-competitive, and the impact of Article 86.[49] Of these explanations, the one based on a limited number of complaints seems slightly implausible given that the Office was receiving over 1000 complaints per year (albeit that many of these may have not related to the type of behaviour outlawed in the Act). The impact of initial criticism of early reports is also open to question, given that even in the first few years of the new regime, the Office never launched more than four investigations per year. The most plausible explanations therefore are the two upon which both commentators are agreed: administrative resources and the reliance on informal processes. This proposition is reinforced by the fact that both

[48] This happened in nine cases. Out of the remaining four, two were thought to have an insignificant effect on competition, in one the practice had ended, and in the other one, other companies were pursuing the same course of conduct.

[49] Whish makes two arguments here: firstly that as Article 86 included sanctions for the abuse of a dominant position, many firms would try to comply with its provisions – thereby incidentally complying with the Competition Act 1980; secondly, that for the same reasons, victims of an abuse of dominant position would be more likely to bring an action based on Article 86 than to campaign for the Director General to launch a Competition Act investigation.

of these very much fit with the general pattern of competition regulation pursued by the Office. It is worth recording what Whish (1993: 114) writes in relation to these two factors:

> The DGFT is often able to effect quick informal settlements of disputes without launching a formal investigation; as already noted, several examples of this having happened are given in his Annual Reports, and one can only guess how many potential investigations have been rendered unnecessary by a stern letter or an appropriate telephone conversation... [In addition,] there is the important point that investigations of anti-competitive practices involve a considerable administrative burden and both the OFT and the MMC are handicapped by a lack of resources....[50]

Due largely to both these factors therefore, the Act did not lead to juridification: it was rare for the Office to utilise its powers under it, and it still relied predominately on informal approaches to achieve its policy goals. The actual conduct of investigations was dominated completely by non-legal values and considerations. Ultimately, the Competition Act 1980 was a disappointment to the Office. Enormous amounts of resources were spent on potential cases that were never followed through, and it quickly became clear that the Act had done little to solve the problems identified in the 1978 Liesner Report.[51]

Monopolies and mergers 1980-1991

Despite broader macro-economic changes, in terms of the Office's approach to monopolies and mergers during this period, little changed from the 1970s. The Office continued to make or advise references sparingly in both monopoly and merger cases, and its follow-up work continued to be based on securing appropriate undertakings, even if an agreement took several years to reach.[52] In the case of mergers, this continuity of approach occurred despite the appearance of mega-mergers and the 'merger-mania' that accompanied them. The response of the Director General was that "the fact that the assets of a target

[50] The Deregulation and Contracting Out Act 1994 attempted to address the problem of lengthy procedures by enabling binding undertakings to be accepted by the Secretary of State in lieu of an MMC monopoly reference. The Act did not, however, increase the Office's powers of investigation, nor did it increase the deterrent effect of existing legislation. And the undertakings, once agreed, could not quickly be reopened in the light of subsequent experience of their effect. In practice, therefore, these powers were not exercised. See AR (1997: 11)

[51] Interview with Lord Borrie, 21st January, 2003.

company amounted to more than a billion pounds was almost irrelevant – what was more to the point was whether a merger might have adverse effects on the public interest and, in assessing the public interest, my primary concern...has been whether competition would be adversely affected" (AR 1985: 12). Meanwhile, the low level of intervention continued – a feature of merger control that was very much Government policy, as the 1988 DTI report or so-called "Blue Paper" made clear.[53]

As such, it is proposed not to devote further space to the Office's monopolies and mergers work in the 1980s except to make the following four points. The first is the way in which the Office increasingly was able to secure change informally by threatening a reference to the MMC. A good example of this was the reviews of restrictions in various professions which had been announced by Minister of Corporate and Consumer Affairs in 1985. Four reports were then published in 1986. The Minister welcomed the reports and asked the Director General to discuss the recommended changes to the rules with the relevant professional bodies concerned. Such discussion closely resembled the contacts between the Office and various trade associations in its consumer protection work, the major difference being perhaps the ability of the Office to use a reference to the MMC as a bargaining counter. Indeed, with two of the professional bodies – the bodies representing osteopaths and consulting civil engineers, a reference was the eventual outcome. Bodies representing chiropodists and physiotherapists, however, did agree to relax their rules in accordance with the Director General's recommendations. In related work concerning advertising restrictions, the General Dental Council agreed to amend its rules, whilst the General Medical Council refused and was thus also referred to the Commission. Such contact indicates well how the Competition Division shared the same basic approach to its contact with regulatees as the Consumer Protection Division.

The second is the following practice that developed with respect of prospective mergers, as described by Whish (2001: 815-6):

> A practice grew over a number of years of companies negotiating undertakings with the DGFT to remedy any possible detriments to the public interest, in

[52] A full list of the Office's monopoly references can be found in Appendix I.

[53] See e.g. at p6 – "intervention by public authorities in lawful commercial transactions should be kept to a minimum, since broadly speaking the free commercial decisions of private decision-makers in competitive markets result in the most desirable outcomes for the economy as a whole."

> consequence of which a recommendation would be made to the Secretary of State to refrain from referring the merger to the Commission. This 'plea-bargaining' or 'fix-it-first' approach to merger control had no statutory basis, but this was provided by sections 75G to K of the FTA, introduced by section 147 of the Companies Act 1989 and amended by section 9 of the Deregulation and Contracting Out Act 1994. These provisions enable the Secretary of State to accept binding undertakings in lieu of making a reference to the Commission. The Companies Act 1989 provides for the possibility of structural undertakings, and the 1994 Act for behavioural ones. Undertakings in lieu of a reference can be used only where the DGFT has recommended that a merger should be referred to the Commission, and only to remedy or prevent the adverse effects that he has identified.

The irony in this informal practice subsequently being crystallised in legislation[54] should not obscure the fact that it is yet another good example of the generally non-legalistic and flexible nature of the relationship between the Office and its regulatees in this area.[55]

Thirdly, it is worth noting that in the 1988 DTI report on mergers, the Government explicitly responded to criticisms from some companies about the vagaries of the reference process. It had been argued that there was a "lack of clarity and predictability in reference decisions" and thus that there should be published guidelines explaining in what circumstances a merger was likely to be challenged. The arguments were rejected, however on the following basis (DTI 1988: 6-7):

> It is not possible to set out rules of thumb which can be straightforwardly or mechanically applied to all cases: there is an irreducible element of judgement involved in assessing the likely effect of a merger on competition, which cannot be captured in formulae or statistics, and flexibility is essential in dealing with the unique circumstances of each case.

For the time being at least then, there were to be no guidelines on what would prompt the Office to advise in favour of a merger reference. This was subsequently backed

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[54] As a result of the 1988 Review. It was made so largely because under the law as it stood, if a company then went back on an undertaking, the only thing that the Secretary of State could do was to withdraw his clearance on the merger and make a reference after all. However, this was a "cumbersome" procedure: "it is always better to remove the objectionable features of a merger from the start than to unscramble the merger after the event because it is unacceptable". The legislation also gave the Director General the ability to initiate the proposals for structural change rather than just respond to the proposals of prospective bidders. See DTI (1988: 16-17)

[55] The other main recommendation made in this paper was for there to be a system of voluntary pre-notification of mergers to the Office. By 1991, Sir Gordon Borrie was reporting that 20% of referable mergers were being voluntarily pre-notified to the OFT under this new law.

up in a 1991 Trade and Industry Committee report,[56] in which it was acknowledged by DTI officials that there was "a long-standing debate between the relative advantages of predictability and flexibility in any competition or anti-trust system", but concluded that "the remaining flexibility of the system [was] very much to everyone's advantage, rather than having a mechanistic system which could lead to unnecessary references at enormous burden to industry as well as to the authorities concerned".[57]

The final point to make is that as with some aspects of its consumer protection work, the Office did perceive an increasing threat of legal challenges by its regulatees during this period.[58] It is important though not to exaggerate the level of this threat. The only actual judicial review application during the 1980s was the Lonrho case,[59] in which a rival bidder for the House of Frazer attempted to influence the reference process. The attempt was unsuccessful, however, and appears to have been used more as a delaying tactic than as part of a genuinely adversarial legal relationship with the Office. More generally, the failure of this application reflected closely the fate of all the other judicial review applications in the field of competition policy, whether directed against the DGFT, the Secretary of State or, most commonly, the MMC. In the end, the discretionary and non-legal structure of the reference process was such as to make it virtually immune from successful legal challenge, and this knowledge on the part of OFT officials meant that worries of judicial review played little role in their decision-making.

Tackling restrictive practices: the move towards legislative reform

In the previous section on the Office's approach to restrictive agreements, it was pointed out that the Office was prepared to be as flexible as the legislation allowed. This manifested itself in the extensive use of its power to ask the Secretary of State for a

[56] Trade and Industry Committee, First Report on Take-overs and Mergers, HC Paper 90, Session 1991-92, §90

[57] In the same report (§77), the evidence of OFT officials was recorded as follows: "The Office of Fair Trading has told us 'the UK system is... an administrative one with a considerable degree of discretion for the DGFT, the MMC and the Secretary of State'..."

[58] Interviews with Lord Borrie, Dr Howe and Mr Inglese bore this out.

[59] Lonrho plc v DGFT [1986] ICR 550

direction to discharge him from its duty to refer all restrictive agreements to the Restrictive Practices Court. During the 1980s, this trend continued. In the 1986 Annual Report, it was indicated that normally an offer was made to discuss with the parties to an agreement how restrictions could be modified to allow this course of action to be taken, and that "in practice, most agreements are dealt with this way" (AR 1986: 29).[60]

Occasionally, it was not the flexibility of the Office so much as politics that got in the way of an agreement reaching the Restrictive Practices Court. The most striking example was the government decision to exempt the Stock Exchange from the Restrictive Practices legislation in 1983, thus bringing to a premature end preparation for the case that had been ongoing since 1979. The reaction of the Office was initially one of extreme disappointment (AR 1983: 9-10):

> I cannot pretend that the Government's decision to relieve me of my duty to bring the case to court was not a blow to the Office. The views of a wide range of other financial institutions, industry and investors had been sought... The court hearing... would have brought out all the various public interest issues – the advantages of competition, the needs of investor protection, the imperatives of international competitiveness and so on. The court's considered judgment would have provided a highly informed basis for the future organisation of the Stock Exchange.

However, it soon became clear that most of the existing restrictions would go anyway in continuing political contact, to the extent that the Office was able to point to the loosening of restrictions on competition taking place in the Stock Exchange as "a telling example of what my Office has been achieving – and will continue to seek – in manufacturing and service industries generally" (*ibid.*).

This aside, the Office continued to show a great deal of willingness to exploit any flexibility in the restrictive practices legislation so that registered agreements could be modified through negotiation rather than through the Restrictive Practices Court. Such an approach stood in contrast, however, to its attitude towards unregistered agreements or secret cartels. As this is something that came increasingly to the fore towards the end of the 1980s, we will focus on its approach to such agreements in this section.

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[60] Whilst this does point to the degree of flexibility of the Office, it also points to the how the restrictive practices legislation was not targeting the agreements that it needed to target. Too much of the Office's time was spent processing agreements which had been registered but were of little significance. For more on this, see below.

Essentially, the Office only had limited powers in respect of unregistered agreements. Normally, the catalyst for any investigatory work was a complaint. Its first available step, if it was suspected that an unregistered agreement might be operating was to issue a Statutory Notice under s36 of the Restrictive Trade Practices Act 1976, requiring that the particulars of the agreement be furnished. It could also make an Order under s35(3) of the Act, restraining the parties from giving effect to the agreement without first submitting particulars for registration. Breach of this order constituted a contempt of court, and the first such contempt finding was reached in 1980 against four suppliers of concrete pipes, with fines totalling £185,000. One of these suppliers then had an appeal dismissed by the Court of Appeal.[61] This is what Sir Gordon Borrie thought about these procedures (AR 1986: 12-3):

> The current restrictive practices law dates back to 1956. It has some serious shortcomings, which are inherent in the legislation. Its procedures are complex, cumbersome and time-consuming. In some respects the legislation is also less effective than I would like. There are no penalties proscribed for those who ignore the law's requirement that I should be notified of restrictive agreements: it is not uncommon for me to find that such agreements have been quietly practised for years. My powers to investigate suspected price-fixing or market-sharing cartels are, to say the least, modest. With almost Gilbertian absurdity, I find myself having to possess sufficient evidence of a cartel's existence to convince a court before I can issue a formal notice to the parties enquiring if they have cartel agreement between them. The procedure for remitting a cartel to the Restrictive Practices Court is slow, stately and expensive for all concerned. The court's powers (unless contempt of court has been committed by the breach of earlier orders) are confined to a judicial 'Don't do it again'.

Such concerns led to a review of policy being announced by the Secretary of State for Trade and Industry, Paul Channon, in 1986, and resulting Green and White Papers being published in 1988 and 1989 respectively. The papers proposed that the existing registration requirement should be abolished, and that instead, agreements and concerted practices with anti-competitive effects or objects would be prohibited, but with provision for exemption of agreements which would improve efficiency, technical or economic progress. These proposals were accompanied by calls for fines to be levied on both organisations and individuals who infringed the prohibitions. The proposals were not

[61] This was not the only case that would come to court regarding concrete. Action against suppliers of ready-mixed concrete also resulted in contempt rulings and a series of subsequent appeals in the higher courts in the

accompanied by a legislative timetable, however, and ultimately the Office had to wait until 1998 for the reforms to be enacted. Its frustration was increased with a Court of Appeal ruling, striking down a contempt of court decision. In DGFT v Smiths Concrete Ltd.,[62] it was held that Smiths had not been party to the Bicester agreement subject to a previous order from the Restrictive Practices Court, that the company had taken all reasonable steps to prevent its employees from making such unlawful agreements and that its local manager had acted outside the scope of his authority. The Director's reaction to the decision was as follows (AR 1991: 16):

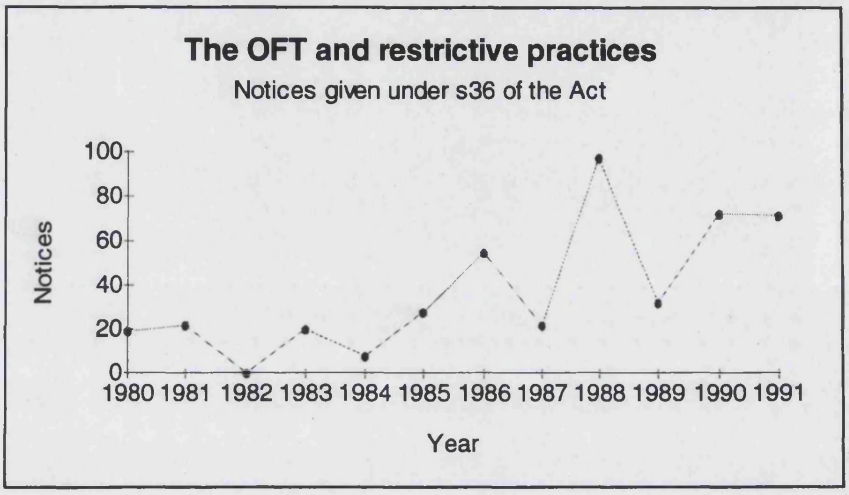
> Consequently, as things now stand, the law has the effect of requiring the Office to establish not only that individual employees have participated in a registrable agreement – often difficult enough in itself – but also that, in so doing, they were acting within the scope of their authority. That is bound to depend largely on what arrangements a company makes to secure compliance with the Restrictive Trade Practices Act 1976. The judgment makes even more urgent the need to reform and strengthen UK restrictive practices legislation.

Despite the Director General's opinion of his powers to deal with secret cartels, he was increasingly willing to use them. The following table indicates the increase in the number of statutory notices issued under s36 of the Act from 1980 up to 1991, although the figures are a little deceptive as often several notices would relate to a single agreement:

Year	Notices of Reference
1980	19
1981	22
1982	-
1983	20
1984	8
1985	28
1986	55
1987	22
1988	97
1989	32
1990	72
1991	71

early 1990s. The appeals were based on the decision of the Director General to prosecute for contempt not just the company but also some of its employees.

[62] [1991] 4 All ER 150



The figures perhaps mask the true level of increase in the Office's investigatory work which resulted in an unprecedented 62 new investigations being launched in 1991 – twice as many as in the previous year. The increase was partially the result of a conscious decision within the Office to divert its resources away from section 21(2) work. Unlike section 21(2) agreements, cartels had "no redeeming features" – there was no question normally of there being any justifications that could be raised in the Restrictive Practices Court.[63] Moreover, it was felt within the Office that as the law was not backed up with a financial penalty, there were good reasons for believing that cartelisation was widespread.[64] Meanwhile, its ability to focus on unregistered agreements had been aided by the implementation of the Restrictive Trade Practices (Sale and Purchase and Share Subscription Agreements) Orders in 1989 which aimed to remove from the scope of the Act certain agreements that had no significant effect on competition.[65] The effect of the Orders was to reduce the number of agreements sent to the Office by 28% from 1989 to 1990, in the backdrop of a previously steady growth in the number of agreements being sent to the Office. This, accompanied with some streamlining of its internal procedures, increased the

[63] However, Dr Howe would not go so far as to say that there was a "moral dimension" to the prosecution of secret cartels – rather, he preferred to say that there was "no social justification".
[64] Interview with Dr Martin Howe, 12th February, 2003.
[65] In particular, they excluded agreements for buying a business or more than 50% of a company's shares, or which provided for share subscriptions in an issuing company, from registrability.

ability of the Office to concentrate on agreements with potentially significant effects on competition.

The increase in investigatory work was accompanied by an increase in prosecutions, so that the same flexibility shown by the Office towards companies which registered agreements was not being shown towards companies which kept agreements secret. Discovery of covert cartels through complaints or MMC investigations nearly always resulted in the Office issuing an interim order under s35(3) of the Act, and making a subsequent referral to the Restrictive Practices Court. In nearly all of these cases, the referral in the Restrictive Practices Court was undefended – not surprisingly, as usually the agreements were being kept secret in the first place precisely because they were known to be unlawful under the Act. In 1990, the Office's hardening line resulted in four contempt orders against ready-mixed concrete suppliers,[66] a mixture of court orders against and undertakings from 41 companies involved in price-fixing agreements in the glass manufacturing and distribution industries, a section 3 interim order (used for the first time) to prevent the Institute of Insurance Brokers from giving effect to the restrictions in an agreement until a full hearing could be arranged,[67] and undertakings from eight manufacturers of steel reinforcing bars who had admitted to a price-fixing agreement. The Office was also preparing seven further court cases with respect to suspected unlawful agreements. This was a significant expansion in the Office's enforcement action, and was legalistic in style, based around court appearances and legal argument.

The decision of the Office to allocate greater resources to the investigation and prosecution of secret cartels thus led to a corresponding increase in juridification. The legislation was unchanged and the Office's attitude towards unregistered agreements was unchanged. But more resources meant the possibility of more prosecutions, and thus an increase in relationships governed by law and legal considerations. It should be emphasised though that this approach continued to stand in contrast to the Office's attitude towards the

[66] In re Supply of Ready Mixed Concrete [1991] ICR 52. Out of these four suppliers, three were advised that they were liable for the actions of their employees and admitted contempt. The fourth – Smiths Concrete Ltd - appealed against the order in a case referred to above (Smiths v DGFT [1992]). The case was subsequently appealed by the Director General and is described later in the chapter.

[67] In re Agreement between members of the Institute of Independent Insurance Brokers; Director General of Fair Trading v Institute of Independent Insurance Brokers and others [1991] ICR 822.

vast majority of restrictive agreements that had been registered: juridification within this area of regulation remained the exception rather than the rule.

The build-up to the Competition Act 1998

The arrival of Sir Bryan Carsberg, previously the Director General of OFTEL, was marked by an immediate emphasis on the central importance of competition policy. In his first year in office, both the number of monopoly references and the proportion of mergers referred to the MMC (out of the total number considered) were the highest on record.[68] The Office also launched 50 new investigations into suspected cartels. With his successor, John Bridgeman, also stressing the virtues of competition (and especially the need for the elimination of cartels – described as the "number one priority"),[69] the whole period up to the passage of the Competition Act 1998 saw a steady increase in the proportion of work undertaken by the Competition Division to the extent that in 1997, for the first time, it was allocated a higher proportion of the overall budget than the Consumer Affairs Division.

The increased focus on competition policy was accompanied by the first ever judicial review case actually to be heard[70] against the Office in its competition work.[71] The application was made by Southdown bus services, following a Competition Act investigation and a subsequent referral to the MMC. Southdown argued that the terms of reference were too wide in that they extended beyond the two routes specified in the Director General's initial report. Its argument was accepted by the court and the reference to the MMC was modified accordingly. The case came soon after an unsuccessful judicial review attempt by two of British Airways' competitors. In accordance with advice from the Director General, the Secretary of State had decided not to refer the British Airways bid for

[68] In terms of monopoly reference, there were 3 main types under Sir Bryan Carsberg: competition in the recently liberalised bus industry, vertical restraints, and intellectual property cases. All of these areas tested controversial areas in competition law and policy.

[69] The new emphasis was underlined by the establishment of the OFT Cartels Task Force in 1994, the main aims of which were to raise awareness of the pernicious effects of secret price-fixing and market-sharing agreements on business and consumers, and to encourage people to inform the OFT about existing agreements.

[70] I.e. to clear the hurdle of leave being granted. In Lonrho plc v DGFT [1986] ICR 550, referred to above, leave was refused.

Dan Air. The applicants argued that the merger raised issues in the UK under Article 86 of the Treaty of Rome which the Office had failed to address in its consideration of the case, but the application for leave was successfully contested - both at first instance and appeal.[72] In response to the cases, the following comment was made in the Annual Report (AR 1992: 24):

> Only time will show whether the Office is seeing the start of a new tendency towards the use of litigation under judicial review procedures, a trend with which other government departments have already become familiar. It should be said, however, that the Office acts on the basis that a great deal of what it does necessarily lies within the field of judicial review, and it has always paid particular attention to this consideration in its decision making.

The reference to the effect of the threat of judicial review is interesting, but the challenges of 1992 were not to be repeated. The 10% of the overall budget spent on legal services in that year was not matched in subsequent years (it fell to 6% a year later), and there were no further judicial review cases up to the passage of the Competition Act 1998. Moreover, the number of legal advisers working in the Office remained constant at twelve for the next four years, out of a total staff of over 400.[73] In many respects, these figures are extraordinary. Consider, for instance, the increased volume and complexity of merger activity during the period, a complexity that for the Office was added to further by the Deregulation and Contracting Out Act 1994 which – by allowing for the possibility of behavioural as well as structural undertakings being given in lieu of a reference to the MMC – effectively transferred a great deal of decision-making to the Office. Consider also the increased number of investigations into unregistered restrictive agreements, as well as all the Office's consumer protection work, including the new work under the Unfair Terms in Consumer Contracts Regulations. It is remarkable under these circumstances that the number of legal advisers employed by the Office remained constant, and the statistic supports the contention that the Office's approach was far more administrative than it was legal.

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[71] R v Director General of Fair Trading and Others [1993] 12 Tr Law 90

[72] R v Secretary of State for Trade and Industry, ex parte Airlines of Britain Holdings Plc and Another [1992] The Times 10 December 1992. Mr Anthony Inglese described the case as a good example of law being resorted to as a tactic (Interview, 13th February, 2003).

[73] The total level of staff was gradually declining during this period: in 1993 there was a total staff of 428, in 1994 – 420; 1995 – 410 and 1996 – 402, after which the numbers started to rise again.

Mr Anthony Inglese, legal director of the OFT during the 1990s, backs up this observation with a few additional comments about the role of law and lawyers within the Office. Lawyers had little impact on policy development within the Office - indeed several thought that they should have more influence, especially in relation to consumer protection policy. Their role therefore was largely to provide legal support to the administrative work of the Office staff. In 1992, for the first time, some legal training was introduced for Office staff. However, this did not reflect a growing prominence given to law and legal considerations – rather, it was designed to ensure that Office staff knew when they needed to turn to the lawyers and, just as importantly, when they did not need to do so. It was felt that occasionally there had been a degree of sloppiness in passing work to the Legal Division which should have been dealt with elsewhere. The training itself was short,[74] and not designed to turn the administrators into lawyers, but simply to enable them to know when and how to work with lawyers. Finally, in terms of court appearances, Mr Inglese confirmed that the Office would never try to take a case to court in order to test a legal position: this way of using the law simply was not considered an option.

This does not mean that there was no action taking place in the courts. The legal battle over the Bicester ready-made concrete cartel dragged on and on, for instance. Eventually, in DGFT v Pioneer Concrete (UK) Ltd. and another,[75] the Lords overturned the Court of Appeal's decision,[76] ruling that companies are indeed legally responsible if their employees participate in unlawful secret cartels in the course of their employment, whether or not these companies forbid their employees to enter into such agreements. This was a victory for the Office, which commented that the decision "served to strengthen the hand of the OFT in renewing its efforts to uncover and deal with secret price-fixing or market-sharing cartels".[77] Meanwhile, occasional contempt cases continued to be brought to the Restrictive Practices Court, one of the most dramatic again relating to ready-made concrete agreements. In imposing record fines totalling £8,375,000 on 17 companies, the President of the Restrictive Practices Court, Mr Justice Buckley, said "Such behaviour is intolerable. This blatant disregard of court orders strikes at the rule of law and public interest". Five

[74] The governmental guide "The Judge Over Your Shoulder" was there for people who wanted to read it, but the training itself was only a couple of pages of material.
[75] [1994] 3 WLR 1249
[76] DGFT v Smiths Concrete Ltd [1992] – see above.

individual directors of the companies left with further fines and warnings of custodial sentences if the collusion continued (AR 1995: 11). Thus marked the culmination of almost twenty years of the Office chasing price agreements relating to concrete.[78]

These cases and some important legal work under the Resale Prices Act apart though,[79] there was extremely little evidence of juridification prior to the passage of the Competition Act 1998. The vast majority of the competition work of the Office was being done by non-lawyers, without recourse to the courts, and influenced by non-legal factors. Thus in overseeing changes in the milk market and in the financial services sector, in its heavy involvement with the restructuring of the broadcasting industry,[80] and in its consideration of high-profile bids and acquisitions, the contacts between the Office and its regulatees remained non-legalistic and based around negotiations and informal contacts. At the time of the debates over the contents of the new Competition Bill in the two Houses of Parliament, this was the overriding theme.

Conclusion

Up until 1998, the evidence overwhelmingly points to an absence of juridification between the Office and its regulatees in the field of competition policy. In the area of monopolies and mergers, original choices made as far back as 1948 in favour of an administrative rather than legal style of enforcement were still heavily influential. In many ways little had changed since then. The Competition Act 1980 also failed to lead to juridification, despite the hope that it might lead to a body of case law. Even restrictive trade practices were largely dealt with through administrative means. A legalistic, formalistic system was interpreted as flexibly as possible by an Office keen to avoid

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[77] See AR 1994: 34.

[78] The concrete cartels became Lord Borrie's favourite examples when referring to the weaknesses of the competition regime in the course of the debate on the Competition Bill 1998.

[79] In particular, the Office succeeded in striking down the Net Book Agreement by which publishers had been able to set the minimum price for retailers, and later it also succeeded in getting the 1970 Court Order which had allowed resale price maintenance on branded over-the-counter medicines discharged by the Restrictive Practices Court.

[80] This included working closely with BSkyB as the competition implications of cable and satellite became apparent

confrontational relationships with its regulatees. On the part of regulatees, there were very few legal challenges and only one successful challenge against the Director General in 25 years – a telling statistic. The following tables sum up this lack of juridification on the competition side of the Office's work.

Type I juridification between the OFT and its regulatees (competition): 1973-1998

INDICATOR	EVIDENCE
Frequent litigation ×	No – extremely little litigation over this period.
Coercive, inflexible regulatory strategy ×	No – the exact opposite: the Office was as consistently flexible and informal as possible.
Reliance on formal, legal processes ×	No – informal processes nearly always preferred.
Frequent prosecutions in response to breach of law ×	No, although secret cartels prosecuted more frequently in the 1990s.
High presence / involvement of lawyers ×	No – at least not on OFT side.

Type II juridification between the OFT and its regulatees (competition): 1973-1998

INDICATOR	EVIDENCE
Explicit legal argument ×	Generally unimportant.
Regulatory contact seen as setting legal precedent ×	Generally not relevant. Hope expressed that this would happen in the implementation of the Competition Act 1980, but not done in practice.
High presence / involvement of lawyers ×	No – at least not on the OFT side.
References to law and legal cases ×	Not used as structure of monopoly, merger and restrictive practices control non-legalised.
Adoption of overtly legal values ×	No – for instance, in relation to merger controls, option of introducing guidelines resisted.

Things were, however, about to change. In October 1995, John Bridgeman took over from Sir Bryan Carsberg.[81] In his first Annual Report, he stressed that "education goes hand in hand with regulation. The most responsible piece of legislation is worthless if nobody knows about it". It was with this adage in mind perhaps that he supervised a mass of promotional activity from the passage of the Competition Act 1998 until it came into force in March 2000 – a necessary step since the new Act was to give effect to the biggest change in UK competition policy since the Second World War.

Nor did the Competition Act 1998 only change the substance of UK competition policy. As we shall see in the next chapter, the 1998 Act was also to have a decisive impact on the style of its enforcement, and by extension on the nature of the relationship between the Office and its regulatees.

[81] Sir Bryan resigned in May 1995 to take up the post of Secretary-General to the International Accounting Standards Committee.

Appendix one: monopoly references and outcomes 1974-9

YEAR OF REFERRAL	DESCRIPTION	OUTCOME
1974	Supply and export of insulated wires and cables	Report published August 1979. Investigation uncovered unregistered agreements, leading to four cable-makers agreeing to repay £9 million to the Post Office.
1974	supply of 'diazo' sensitised copying materials	No adverse public interest findings (report published March 1977)
1975	pet foods	No adverse public interest findings (report published July 1977)
1975	ceramic sanitary-ware	No adverse public interest findings (report published August 1978)
1976	wholesale supply of petrol	No adverse public interest findings (report published January 1979). However, review suggested of extent to which oil companies are owners of retail petrol outlets so as to determine whether future reference would be appropriate. Disappointment expressed by DGFT as to MMC's narrow interpretation of terms of reference.
1976	wholesale supply of national newspapers (England)	No adverse public interest findings (report published June 1978)
1976	wholesale supply of national newspapers (Scotland)	No adverse public interest findings (report published June 1978)
1976	ice cream	Report published August 1979. Found that complex monopoly existed operating against the public interest. Discussions between the Office and 26 monopolists resulted in undertakings being announced in 1982.
1976	metal fasteners	No report published – time extension not granted by Secretary of State and reference ceased to have effect.
1977	supply and export of electricity supply meters	Report published August 1979. Existence of price notification agreement between manufacturers found to operate against public interest. Commission also considered that buying policies of area electricity boards could usefully be reviewed to inspire a more competitive atmosphere in the supply of meters. At request of Secretary of State, Office entered into discussions with parties concerned as to what action should be taken to implement MMC's findings.
1977	supply of credit card franchise services	Report published September 1980. Found that 'no discrimination' policy operated against the public interest. Undertakings agreed with credit card companies over provision of information so that DGFT could keep market under review.
1977	supply of domestic gas appliances	Report published July 1980. Found that gas appliance retailing monopoly of the British Gas Corporation operated against the public interest. Government decided that British Gas would be required to cease selling domestic appliances and dispose of their showrooms over a five-year period and that legislation to enforce this would be introduced if necessary.
1977	supply of trading check franchise services + trading check financial services	Report published December 1981. Provident Financial Group plc gave undertakings that, with certain exceptions, it would not preclude any retailer trading with the Group's subsidiaries from acquiring such services elsewhere.

1978	supply of roadside advertising services	Report published July 1981. British Posters Ltd gave undertakings to cease trading, and the two trade associations gave undertakings to delete clauses precluding a member from bidding for sites occupied by a fellow member of either association.
1979	supply of tampons	Report published October 1980. Held that pricing policies of Tampax Ltd and Southalls (Birmingham) Ltd operated against the public interest. Undertakings agreed over provision of information as third company entered the market.
1979	supply of concrete roofing tiles	Report published November 1981. Held that scale monopolies operated against the public interest. Long negotiations led to undertakings being agreed in 1984, largely relating to the provision of information.
1979	supply of ready-mixed concrete	No adverse public interest findings (report published September 1981)

Appendix two: merger references

Year	Number where advice given	Number referred to MMC
1974	159	7
1975	157	4
1976	171	4
1977	187	8
1978	229	3
1979	257	3
1980	182	5
1981	164	8
1982	190	10
1983	192	9
1984	259	4
1985	192	6
1986	313	13
1987	321	6
1988	306	11
1989	281	14
1990	261	25
1991	183	7
1992	125	10
1993	197	3
1994	238	8
1995	274	8
1996	276	11
1997	229	10

CHAPTER 6

The OFT and the regulation of competition since the Competition Act 1998: juridification imposed by legislation

Introduction

In Chapters 4 and 5, it has been argued that the Office's approach to the regulation of competition and consumer protection remained largely non-legalistic over a substantial period of time from its establishment in 1973. Far from exhibiting signs of juridification, the regulation of competition and consumer protection was largely persuasive in nature, and dominated by non-legal considerations.

In 1998, however, Parliament passed a new Competition Act: a statute which not only changed the substance of competition law and policy, but which also changed dramatically the style of its enforcement. The Act was modelled upon existing European law, primarily to ensure consistency between overlapping competition regimes. Maher (2000) argued that the changes introduced a "process of juridification", largely because the interpretation of the Act relied on European competition law, and thus the OFT's detailed guidelines to the Act drew on and necessarily cited case law and decisions of the European Courts and Commission. However, Maher's article was written before the Act had come into force and thus before the Office had launched investigations. Moreover, its focus is not on juridification as such (which, incidentally, is left undefined), but on the details of the legal provisions of the Act. Therefore, in this chapter, Maher's account is both updated and focused more specifically on the question of whether the Act has led to juridification between the Office and its regulatees in the field of competition.

This chapter is divided into three main sections. In the first section, some of the main features of the Competition Act 1998 are set out, so as to provide a sense of the extent

of the changes that have been made to UK competition policy.[1] Also considered in this section is the extent to which the Office of Fair Trading, as the body with primary responsibility for enforcement of the new regime, is given discretion within the Act. In the second section, the approach taken by the Office of Fair Trading to the interpretation of these provisions is described, with evidence taken first from the guidelines published by the Office and then from the Director General's procedural rules. In the third section, an assessment is made as to the extent to which the Act has led to juridification of the relationship between the Office and its regulatees in the field of competition policy. The section begins by focusing on a specific case study in detail, before looking generally at the Office's enforcement of the Act since it came into force.

An outline of the Competition Act 1998

- Key features of the Act

Perhaps the best way to appreciate the changes introduced by the Competition Act 1998 is to recall the main aspects of the previous regime. Neither anti-competitive behaviour by individual companies, nor anti-competitive agreements between companies, were offences. Indeed in both cases, there was quite a lengthy process before even the possibility of punishment arose. In the case of anti-competitive behaviour, it would have been necessary for there to have been a preliminary investigation by the Office, a full investigation by the MMC, and subsequent action by the Office with the agreement of an appropriate undertaking or imposition of a statutory order. Meanwhile, in the case of secret cartels (registrable agreements that had failed to be registered with the Restrictive Practices Court), the Office would have had to have reasonable suspicion that a registrable agreement was operating, so as to be able to furnish a statutory notice requiring that the details of the agreement be registered and an order restraining the parties from giving effect to the agreement without first submitting particulars for registration. In both cases, breach of the order or undertaking constituted a contempt of court, which could lead to a fine or even

[1] Fuller expositions can be found in competition textbooks such as Whish (2001) and Rodger (1999).

imprisonment. Even so, anti-competitive behaviour *per se* was neither illegal nor punishable.

Compare this state of affairs with the Competition Act 1998. The Act states that both anti-competitive behaviour by companies and anti-competitive agreements between companies are offences, punishable by heavy fines. The key ingredients of each offence were taken from Articles 85 and 86 of the Treaty of Rome,[2] and are worded as follows:

> 2(1) ...[A]greements between undertakings, decisions by associations of undertakings or concerted practices which –
>
> a) may affect trade within the United Kingdom, and
> b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
>
> are prohibited...
>
> 18(1) ...any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

The offence set out in section 2 is known as "the Chapter I prohibition", and that of s18, "the Chapter II prohibition", the names reflecting their EC law parallels.[3] Examples of agreements that would breach the Chapter I prohibition (provided in s2(2) of the Act) include agreements to fix prices, to limit or control production and to apply dissimilar conditions to equivalent transactions with other trading parties. Examples of conduct that would breach the Chapter II prohibition (s18(2) of the Act) include the imposing of unfair prices, limiting production to the prejudice of consumers and adding terms to contracts which have no connection with the subject of the contracts.

The Act places primary responsibility for enforcement of the new competition regime on the Office of Fair Trading.[4] Although, there is no requirement for parties to notify the Office about agreements or conduct, the Act does provide certain incentives to do so.[5] Thus, notification provides parties with provisional immunity from financial penalty from the time of notification until the guidance or decision has been given.[6] The guidance

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[2] These have since been renumbered Articles 81 and 82 under the Treaty of Amsterdam.
[3] The names are actually contained in the Act itself – in sections 2(8) and 18(4) respectively.
[4] This although the Office itself does not actually appear in the Act – formally, it is the Director General of Fair Trading who has the powers and duties of the Act.
[5] The Office has provided further incentives through its "leniency programme". See below at X.
[6] The parties can apply for either. The main differences between them are that decisions are published, and that with respect to favourable guidance, the Director General can take further action if a complaint is made

or decision may indicate whether or not the agreement or conduct would be likely to infringe the relevant prohibition,[7] with favourable guidance or decisions providing subsequent immunity from any financial penalty.[8] Moreover, once the favourable guidance or decision has been given, the case cannot be reopened unless certain conditions are met.[9]

The increase of powers given to the Office only become apparent, however, with respect to undisclosed agreements or conduct. Subject to having reasonable grounds for suspecting that an undertaking[10] is infringing either of the prohibitions, the Office has the power to require the production of any specified documents or information, at a time and place, and in the manner or form specified, take copies of any documents produced and require explanation of such documents.[11] In certain circumstances, it is also empowered to enter the premises without a warrant and require production of any relevant documents.[12] Furthermore, for those cases where it is suspected that relevant documents would likely be concealed, removed, tampered with or destroyed, the Office has the power to seek a High Court warrant and subsequently enter and search the premises without notice, using such force as reasonably necessary.[13] The Act also makes any interference with an investigation and failure to comply with any requirement imposed under investigatory powers an offence, punishable by a fine or even imprisonment in some cases.[14]

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by a third party about the agreement or conduct in question. See generally sections 12 to 16 (agreements) and sections 20 to 24 (conduct).

[7] Section 13(2) for guidance and 14(2) for a decision.

[8] Sections 13(4) and 14(4) respectively. This is unless and until the Director General has reasonable suspicion that there has been a subsequent change of circumstances, and financial penalty can also be imposed retrospectively if it is later found that the original information was incomplete, false or misleading.

[9] There has to be a reasonable suspicion either of a material change of circumstances or that the guidance or decision was based on incomplete, false or misleading information. As pointed out above, in the case of favourable guidance, the case can also be reopened if a complaint about the agreement or conduct is made by a third party. Moreover, for an agreement, the case can also be reopened if one of the other parties to the agreement subsequently applies to the Director General for a decision.

[10] This is a term imported directly from European law, and is more precise than "company" as it has been defined by the ECJ in a number of cases. The effect of this was apparent recently, when a complainant appealed the Office of Fair Trading's decision that it could not investigate the behaviour of a local authority as it was not an "undertaking" within the meaning of the Act. This decision was overturned by the Competition Commission Appeal Tribunal.

[11] Section 26. This power is an extensive one, applying to any document relevant to the investigation and thus not necessarily only directed towards the party (or parties) suspected of having infringed one of the prohibitions.

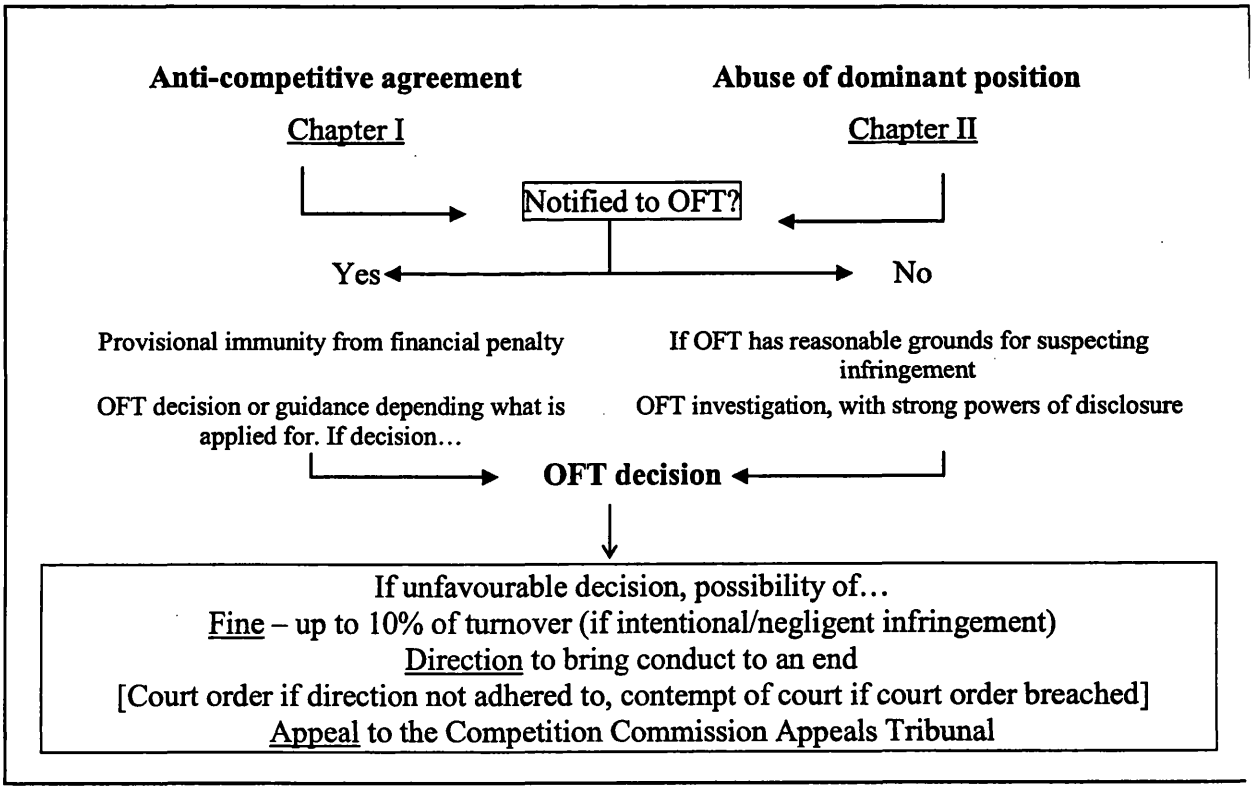
[12] Section 27. Two days written notice is required when the occupier of premises is not party to the agreement or conduct under investigation.

[13] Section 28. Force may not be used against any person – the intention behind this section was to enable officers to break padlocks and so on in order to access relevant buildings and files.

[14] Sections 42 to 44.

If the Office finds that a breach of either prohibition has occurred, it may give a direction to the parties concerned to bring the infringement to an end – including a direction to modify or terminate the agreement or conduct.[15] Subsequent failure to comply can then lead to a court order to enforce the direction,[16] a breach of which would be punishable as contempt of court. Meanwhile, financial penalties of up to 10% of the UK turnover of an undertaking can be imposed for intentional or negligent infringement of either of the prohibitions.[17] Finally, investigatees are able to appeal an adverse decision in the Competition Commission Appeals Tribunal, with appeals possible on both the substance of decisions and on any penalties imposed.[18] Decisions of the Competition Commission can be appealed with leave to the Court of Appeal on points of law and levels of penalty only.[19]

The following diagram sums up the structure of Act as described thus far:



[15] Sections 32 and 33.
[16] Section 34.
[17] Section 36. Under section 38, the Director General must prepare and publish guidance as to the appropriate amount of any penalty under the Act, and must refer to this guidance when setting a penalty. The Secretary of State's approval is needed before the guidelines are published or modified.
[18] Section 46. Under section 47, third parties can also appeal a decision.
[19] Section 49.

It was noted above that the main provisions of the Act were taken straight from EC law. The Act goes further, however, with section 60 reading as follows:

> (1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part 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.
> (2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between –
> a) the principles applied, and the decision reached, by the court in determining that question; and
> b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.
> (3) The court must, in addition have regard to any relevant decision or statement of the Commission.
> (4) Subsections (2) and (3) also apply to –
> a) the Director; and
> b) any person acting on behalf of the Director, in connection with any matter arising under this Act.

Hence, the Act directly places a responsibility on the OFT to operate its powers in as compatible a way as possible with the EC competition regime. It is important to bear this in mind as we now consider the extent to which the Act leaves areas of discretion to the Office.

- Areas of discretion left by the Act

The question of how much discretion is given to the Office under the Act is important for one main reason. This is that it allows us to separate between those aspects of the Office's approach towards the interpretation and enforcement of the Act that are forced upon it by the Act and those aspects that are the result of other factors. It will be argued in this section that the Act imposes certain requirements on the Office that very significantly reduce its discretion to determine its style of enforcement. In particular, there are provisions within the Act that make juridification of the relationship between the Office and its regulatees not only likely, but perhaps even inevitable.

This does not mean that the Act does not leave significant discretion to the Office. Indeed, many areas of discretion have been left to the Office without specifically being

mentioned. Thus, as with any enforcement agency, it ultimately falls to the Office to decide which information is acted upon and which allegations are pursued – in short, how vigorous an enforcement policy to pursue. As section 25 of the Act states, the Office has power of investigation if there are reasonable grounds for suspecting that the Chapter I or Chapter II prohibitions have been infringed – note then, this is a *power* not a *duty* to investigate. There is further discretion inherent in the enforcement powers of the Office: discretion as to whether or not to impose a fine or directions, discretion as to whether to follow up non-compliance with a court order, and discretion as to whether to give directions before the investigation is completed in those cases where it is considered a matter of urgency for the conduct or agreement to cease. From a legal perspective, all these aspects of discretion stem from the fact that the Act provides the Office with powers rather than duties. From a political science viewpoint, however, such discretion is the only solution to limited resources of budget, staffing and time, enabling what would in any case have been essential: the setting of priorities.

Furthermore, there are some areas of discretion that are more specifically granted by the Act. Probably the most important of these is set out in section 4. The section empowers the Director General to exempt agreements from the Chapter I prohibition, with such conditions or obligations as he considers it appropriate to impose.[20] These are called 'individual exemptions', to be contrasted with 'block'[21] and 'parallel'[22] exemptions. Section 9 of the Act limits this discretion somewhat by detailing the criteria which need to be fulfilled for individual exemptions to be granted. Exemptions can be made for any agreement which contributes to improving production or distribution or promoting technical or economic progress while allowing consumers a fair share of the resulting benefit. However, the agreement also has to be examined to ensure that it does not impose restrictions which are not indispensable to the attainment of these objectives, and the Director General further has to be satisfied that the agreement will not give the participating undertakings the possibility of eliminating competition in respect of a substantial part of the

[20] He further has the power to cancel an individual exemption he has granted, to vary or remove any of its conditions or obligations, or to impose additional conditions or obligations (s5).
[21] which can be made by the Secretary of State following a recommendation by the Director General.
[22] i.e. parallel to exemptions within EC competition law made by the European Commission.

products in question. Even so, the power to make exemptions enables the Office to make the sort of judgments which had previously been made by the Restrictive Practices Court.[23]

Yet at the same time as the Act increases the ability of the Office to make important judgements about the enforcement of competition policy, it also imposes constraints on both the process and the style by which these decisions are made. At first glance, section 51 of the Act, providing the Director General with the power to make rules about "procedural and other matters" in connection with the Act might appear to be an important area of discretion:

> (1) The Director may make such rules about procedural and other matters in connection with the carrying into effect of the provisions of this Part as he considers appropriate.
>
> (2) Schedule 9 makes further provision about rules made under this section but is not to be taken as restricting the Director's powers under this section.

Even without subsection 2, Schedule 9 would have suggested that there is a wide scope for such rules. Rules can be made specifying the form and manner in which notice of any decision is to be given, the procedure to be followed if the Director General takes further action with respect to an agreement or conduct after having decided that it does not infringe the Chapter I or II prohibitions, the circumstances under which the Director General will consider an extension to an individual exemption and the manner in which an application to do so is to be made, the circumstances in which the Director is required to give notice before disclosing information given to him by a third party and the procedure to be followed when the Director takes enforcement action under the Act. In total, Schedule 9 sets out 14 aspects of the Act about which the Office has the power to make rules.

On closer inspection, however, it becomes apparent that section 51 is more accurately interpreted as fettering the Office's discretion than as adding to it. This is for two main reasons. Firstly, the rule-making powers themselves are subject to certain restrictions. The Director General has the duty to consult "such persons as he considers appropriate", and no rule can come into operation until it has been approved by an order made by the

[23] In fact, even before considering whether an individual exemption should be granted, the Office has a further area of discretion – it has to decide whether the effect on competition is "appreciable". Although this is not contained within the Act, it is an important principle of EC competition law, and in practice, this excludes far more agreements from the scope of the Act than the power to make exemptions. See below, the section on the Chapter I prohibition.

Secretary of State.[24] Moreover, the Secretary of State is specifically empowered to modify any rules submitted, although he does have to inform the Director General and to take into account any comments made. And if the Director General wants to make any changes to the rules, he has to go through the same process all over again. Thus there are political controls curtailing the freedom of the Director General to determine the contents of these rules. Secondly, and more importantly though, by recommending that procedural and other matters are formalised in rule-form and turned into legal rules through the use of secondary legislation, section 51 in effect serves to juridify all these aspects of the Office's policies, significantly reducing its flexibility to deal with them on a case-by-case basis. Indeed, the Act does more than recommend the creation of such rules. Schedules 5 and 6 specify areas where the Director General has to refer to his rules, such that, for instance, "an application must be made in accordance with rules",[25] and that "when making a provisional decision, the Director must follow such procedure as may be specified",[26] and that "if the Director determines an application for a decision he must publish his decision, together with his reasons for making it, in such manner as may be specified".[27] Thus what appears from section 51 to be a power, emerges from Schedules 5 and 6 as an important duty

The juridification implied within section 51 of the Competition Act is, in any case, greatly increased by section 60 which, it will be recalled, establishes a duty for the Director General to exercise his powers in a manner consistent with European competition law.[28] In terms of his approach towards the substantive provisions of the Act, the effect of this section must be dramatic. A glance through any competition law textbook reveals that European case law has interpreted virtually every major term contained in the Act.[29] Hence, just with respect to the Chapter I prohibition, there is European case law on the meaning of

[24] See sections 51(3) and 51(5).
[25] Schedule 5, section 2(1)
[26] Schedule 5, section 3(3)
[27] Schedule 5, section 6. It is worth noting also that some procedural requirements are already specifically mentioned in the Act itself – such as the requirement for the Director General to give written notice to the people likely to be affected by any proposed decision and to give those people an opportunity to make representations.
[28] Lord Simon explained the purpose of section 60 as follows: "to ensure as far as possible that the UK and EC prohibitions are interpreted and develop consistently with the EC competition law system. This is of critical importance in minimising burdens on business. The problems for business in having two similar, but in their detail different, prohibitions interpreted according to two different bodies of case law could be very burdensome."
[29] See, for instance, Whish (2001), Korah (2001), Korah (2000).

"undertaking", "object and effect", "prevention, restriction or distortion of competition", "participating undertaking", "agreement" and "concerted practice". Moreover, the European Court has also looked at types of agreements specifically mentioned in the Act: agreements to share markets, to limit production, to limit or co-ordinate investment, bid rigging agreements, information sharing agreements, and the scope of the exemption of agreements which "contribute to improving production or distribution, or promoting technical or economic progress". At the very least then, section 60 requires the Office to be cognisant of European law and to seek an authoritative legal interpretation of the provisions of the Act.

Whilst consistency with EC law may seem like a straightforward enough principle, section 60 has already excited a great deal of debate. Willis (1999: 314) writes the following:

> It is clear what section 60 is intended to achieve, namely consistency with EC case law, but its detailed application in practice promises to raise almost as many questions as answers; so much so that it has been dubbed the "Klondike clause",[30] in an allusion to the rich pickings predicted for lawyers.

The notion that legal complexity is one cause of litigation (and, by extension, Type I juridification) is intuitive, and has long been noted by theorists.[31] Put simply, where the law is settled and its meaning clear, there is less likelihood of a dispute reaching the courts. Litigation is normally pursued only when the outcome is uncertain. Section 60 thus implies more for the Office than just the need to interpret clauses in line with EC law - it also implies that the Office might need to justify its interpretation of these clauses in the courts.

One of the main ambiguities in section 60 is that its true scope is uncertain. Does it apply just to substantive competition law issues, or does it extend to the Office's procedures? There is already quite a substantial literature on this question,[32] with the answer largely depending on how widely the phrase "in relation to competition" is

[30] The Klondike was the name given to the American gold fields that were the location of last great gold rush in the 19th century.

[31] See Posner's cyclical model of litigation whereby legal uncertainty gives rise to a rash of lawsuits, the outcomes of which then clarify the legal position thereby stopping the flow of cases, before a change in environment begins the process again. [reference unknown]

[32] E.g. Willis (1999), Goodman (1999), Maher (2000).

interpreted.[33] The question is further complicated by the fact that the European Commission's procedures are in a state of flux.[34]

In the introduction to its draft procedural rules (made under s51), the Office wrote as follows:

> The obligation to ensure consistency only reaches to the extent that this is possible having regard to any relevant differences. Section 60 does not require the UK authorities to follow the procedural practices of the EC Commission. The DGFT's procedural rules therefore do not need to be consistent with the procedural practices of the EC Commission.

This reflected a statement of Lord Simon in the House of Lords that "in making the procedural rules, the DGFT is not obliged to secure that there is no inconsistency with EC procedural law since he will not be "determining a question" under Part I...".[35] However, certain ambiguities remained, partially because in another statement[36] Lord Simon made clear that section 60 had deliberately not been limited purely to the meaning of Articles 85 and 86 in isolation, so as to include "high level principles" of EC law.[37] Willis (1999: 315) sets out the nature of the problem as follows:

> It is clear that section 60 imports the "high level principles", or basic procedural safeguards, but not necessarily the Commission's procedural rules. The DGFT is therefore not required to adopt procedures identical to those laid down in Regulation 17... But it is not so clear whether the high level principles" imported under section 60 merely fill any gaps in the DGFT procedural rules, or impose an irreducible template for the rules.

In the next section, we will see how the Office has answered this question. Willis himself argues for the latter possibility. In any case though, the key point to be made here is that the question is a *legal* question, and therefore that the answer depends on legal considerations. This further points to the limits of the Office's discretion in enforcing the Act in a non-legal, behind-the-scenes and flexible manner.

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[33] Due to the principle established in Pepper v Hart, the answer also depends on how a statement on the subject given by Lord Simon of Highbury in the House of Lords is interpreted. This idea is explained and more fully explored below at p13.

[34] See Korah (2001), chapter 5.

[35] 25 November, 1997, Col. 961. More of his statement is quoted below at p15.

[36] 15 March, 1998, Col. 1363/1364.

The OFT's approach to the Competition Act

- The evidence of OFT guidelines

Section 52 of the Act imposes a duty upon the Office to "prepare and publish general advice and information" about the application of the Chapter I and Chapter II prohibitions and the enforcement of those provisions as soon as was "reasonably practicable" after the passing of the Act. The obligation to produce these guidelines can be interpreted in a number of not necessarily incompatible ways: as a way of easing the regulatory burden on the regulatees affected by the Act, of increasing compliance by setting out in clear terms the demands of the Act, or as a means of increasing the Office's bottom-up accountability to its regulatees through greater transparency. In any case though, it will be shown that the guidelines do more than merely summarise the provisions of the Act.

The Office has now published some 22 guidelines, most of which were completed before the Competition Act came into force.[38] A consideration of all these would not be useful here – instead, two examples will be taken as representative. With each of these, we are in search of the same thing: evidence that the Office's approach to the Act has been informed by legal values and expectations. The two examples to be taken are the guidelines on the Chapter I prohibition and the Office's powers of investigation – the former because it is typical of the approach of the Office towards substantive provisions of the Act, the latter because it relates directly to how the Office would deal with its regulatees. After looking at these guidelines, we will consider the Director General's procedural rules which came into force with the Act on 1st March 2000.

a) Guideline on the Chapter I prohibition

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[37] Examples given of such "high-level principles" included the principle of legal certainty and the principle of fairness in administrative action.

[38] These are: Major Provisions, Chapter I prohibition, Chapter II prohibition, Market definition, Powers of investigation, Concurrent application to regulated industries, Transitional arrangements, Enforcement, Trade associations, professional bodies and self-regulatory organisations, Assessment of individual agreements and conduct, Assessment of market power, Exclusion of mergers and ancillary restrictions, Telecommunications sector, Vertical agreements and restraints, Land agreements, Water and sewerage sectors, Guidance as to appropriate amount of penalty, Energy sector, Railway services, Guidance notes on completing Form N, Northern Ireland energy sectors

After some introductory remarks, and having set out the definition of the Chapter I prohibition, paragraph 2.2 of the guideline says the following:

> To be caught by the prohibition, although it is not expressly stated in the Act, an agreement must be implemented within the UK and it must have 'an appreciable effect on competition', because of the principle established by the European Court of Justice in the case of *Volk v Vervaecke* that "an agreement falls outside the prohibition where it has only an insignificant effect on the market"...

The paragraph makes clear the degree to which the Competition Act 1998 simply cannot be understood without reference to EC law. The duty imposed by section 60 (explicitly set out in paragraphs 3.1 and 3.2 of this guideline) informs the Office's entire interpretation of the Act. Moreover, it is clear from the Hansard debates during the passage of the Act that this was very much intended by government. There are several examples of proposed amendments being left out, deemed unnecessary as the point was already covered by EC law.[39] In terms of the particular content of paragraph 2.2, the following observation can be made. It was noted in Chapter 5 that:

> [t]he ability of the Office to exempt agreements from reference to the Restrictive Practices Court was a useful bargaining tool. By stating to parties that an agreement was currently of too much 'significance' for any exemption, the Office could negotiate for agreements to be modified in return for a representation being made. This was a power underlined by the large degree of discretion that lay in the interpretation of the word 'significance', and there is little evidence that the Office tried to temper this discretion by adopting clear guidelines. On the contrary: the Office insisted that each agreement was considered on its merits, and that its approach was pragmatic...

Now, however, the Office's approach to essentially the same question had to be informed by European case law. Whereas the "significance" of an agreement had been judged on a pragmatic basis, the decision as to whether an agreement had an "appreciable effect on competition" was from the beginning treated as a legal question, and the decision made on legal grounds. The test, laid out in the third section of the guidelines, therefore reads like a series of legal tests: does it satisfy the market share criterion?, what is the nature of the agreement?, does it qualify for exemption?, is it specifically excluded by the Act? For all of

[39] A good example is the government's argument that it was unnecessary to define "abuse of dominant position" in the Act as this was covered by European case law. See generally Borrie (1999).

these questions, it is the approach of the European Commission and courts that guides the Director General's decision in any particular case.

The rest of the guideline is divided into several sections with subheadings as follows: terms used in the prohibition, the scope of the prohibition, examples of anti-competitive agreements, exemptions, and the relationship between the Chapter I prohibition and Article 85.[40] Every one of these sections is littered with references to decisions of the ECJ or the CFI and sometimes also relevant statements or decisions of the European Commission. In total, the guideline contains 23 footnotes. All of them provide either a case citation or the reference for a Commission statement.

b) Guideline on the OFT's powers of investigation

In the course of looking at this guideline, two things can be emphasised: firstly, as with the guideline on the Chapter I prohibition, the influence of EC law; secondly, the importance of the Pepper v Hart[41] judgment. The latter needs some elucidation: essentially, the judgment established the principle that where the meaning of a particular statutory provision is ambiguous, the courts are entitled to look at the Parliamentary debates in the course of the passage of the Act so as to establish its intended meaning. Maher (2000: 552) points out the effect that this judgment had on the nature of the Parliamentary debates themselves, with questions sometimes asked specifically to try to pin down a certain interpretation of the Act. It will be shown how the judgment has also affected the Office's approach to the Act.

The guideline on the Office's powers of investigation is partially a summary, partially an interpretation of sections 25 to 29 of the Act. Here, we consider two examples of the latter: how the Office understands what constitutes "reasonable grounds for suspicion" and the scope of exclusions from these powers.

The requirement for there to be reasonable grounds for suspecting that either of the two prohibitions have been infringed is contained in section 25 of the Act. Paragraph 2.1 sets out how the Office interprets this requirement:

[40] As it was then (now Article 81)
[41] [1993] 1 All ER 42 (HL)

> The Director can carry out an investigation if there are reasonable grounds for suspecting that either the Chapter I prohibition or the Chapter II prohibition has been infringed. The formal powers of investigation cannot be used unless this requirement is met. Whether there are reasonable grounds for suspicion will depend on the information available and the judgment of the Director. Examples of information that are sources of reasonable grounds for suspicion include: copies of secret agreements provided by disaffected members of a cartel; statements from employees or ex-employees; a substantiated complaint; and economic evidence demonstrating that prices have moved in a particular way. A reference to anti-competitive behaviour in a newspaper alone is not sufficient to satisfy this requirement.

On its own, this may seem unremarkable. On closer examination, however, it transpires that *virtually every phrase* is taken from the Parliamentary debate on the issue. The debate concerned a proposed amendment moved by Lord Kingsland that "reasonable grounds for suspicion" should be replaced with "reasonable grounds for belief" – a stiffer test. In the end, the amendment was rejected,[42] but not before Lord Simon had been urged to clarify the precise meaning of the phrase. He responded with the following:

> What is reasonable cause to believe? What is reasonable cause to have suspicion? It is the reasonableness and the nature of the data that are pertinent. In general terms those are matters of judgment for the Director. We will never be able to be absolutely certain as to precisely where lines of judgment are drawn. They are lines of judgment. But the following areas have had common currency of sources of reasonable grounds for suspicion: copies of agreements which are usually supplied secretly by people who have been members of cartels who are disaffected and who have grounds for wanting to pass on confidential information; statements from employees or ex-employees, the so-called "whistle-blowing test" with which we are all coming to terms in industry; a substantial complaint by a competitor who has been refused entry into a cartel; and perhaps economic evidence of prices moving in a specific way. All those in the past have existed and had judgments taken about them as being reasonable grounds. The one I find least convincing is, "My Lord, I read it in a newspaper".

Thus we see that every one of the examples presented in the guideline is taken from Hansard which, in light of Pepper v Hart, itself becomes part of the legal definition of "reasonable grounds for suspicion". Moreover, it is clear that members of Parliament were themselves aware of this when discussing particular clauses of the Bill. In the course of this debate, for instance, Lord Peston expressed his scepticism that the proposed amendment was genuine rather than simply being a method "to make clearer than might otherwise be

[42] Apparently, the Director General had lobbied for this amendment not to go through – see Hansard 19th February 1998, Column 332 (Lord Haskell).

the case why the Bill is drafted in its present form".[43] There is thus a clear reference here to the influence of the Pepper v Hart judgment in the process of drafting the Bill in Parliament, and this was repeated in other contexts within the debate.[44]

The use of authoritative legal interpretation is equally clear in another part of the OFT guideline, dealing with limitations on the use of its powers of investigation. After noting section 30 (excluding privileged documents from the power), the guideline states the following:

> §6.2 - The category of communication which attract privilege under the Act is wider than the category of communication that the European Court of Justice has recognised as being privileged. The definition in the Act refers to 'a professional legal adviser', which has been interpreted by the UK courts as including 'in-house' lawyers as well as lawyers in private practice. When the powers of investigation set out in the Act are used to investigate suspected infringements of the Chapter I and Chapter II prohibitions the interpretation of privileged information under EC law will not apply.
> §6.3 - The defence against self-incrimination which has been recognised under EC jurisprudence will apply. Applying EC jurisprudence, the Director may compel an undertaking to provide specified documents or specified information but cannot compel the provision of answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Director to prove. The Director will request documents or information relating to facts, for example, whether a particular employee attended a particular meeting.

Again, the importance of EC law is clearly visible here. The second paragraph, in particular, supports Willis' claim that section 60 imports "high-level principles" as a template for the Director's procedures. But also in the first paragraph, clearly EC law is still the Office's initial point of reference even if only to make distinction from it. Again though, it is the influence of Hansard that is more striking. Compare the wording above to an answer given by Lord Simon in relation to the scope of section 60 of the Act:[45]

> The clause will, subject to one qualification I shall discuss further, require those determining questions under Part I to avoid inconsistency with Community law. They are also to have regard to the decisions and statements of the Commission. This will also apply to interpretation of the rules made by the DGFT under Clause 49.[46] This importation extends not only to the substantive law but also to the general procedural safeguards developed under EC law; for example, the right against self-incrimination. That right developed by the European Court of Justice

[43] 17 November 1997, Col. 369
[44] See, for example, Lord Simon HL Deb 9 February, 1998, Col. 909 – an example brought by Maher (2000: 552)
[45] 25 November, 1997, Col. 960/961
[46] In the end, this became section 51 of the Act.

> in *Orkem v Commission* will be available to individuals who are asked by the DGFT for an explanation of a document under the powers in Clauses 26 to 28. However, this principle of Community law importation will apply only to the extent that the provision of Community law in question is not inconsistent with the provisions of the Bill or the rules made by the DGFT under Clause 49. Let me give an example of a departure on the face of the Bill. Clause 29[47] confers a greater degree of legal professional privilege against production of documentation than exists under EC law. This is deliberate. Indeed, such an approach has a wide-ranging support in this House as we debated earlier.

Overall then, at least two conclusions can be drawn from study of this guideline. The first is that, even though the guideline does not relate to a substantive aspect of the Act (i.e. competition law *per se*), EC law is still influential. Secondly, the guideline offers specific further evidence of juridification in the use of Hansard as a source of authoritative legal interpretation. The Office's approach to interpreting the Act is thus a long way from a case-by-case, discretionary, administrative-political approach.

There is one further aspect about the guideline to note though: that it frequently refers to the Director General's own procedural rules, and it is to these that we now turn.

- <u>The Director General's procedural rules</u>

It will be recalled that section 51 of the Act gave the Director General the power to make rules connected with procedural and other aspects of the Act. In fact, the Office began work on this very soon after the passage of the Act, sending out draft rules for informal consultation on 10th August 1998. The draft rules were then amended to reflect comments received before being sent out again, this time for formal consultation so as to comply with section 51(3). In February 2000, the final draft of rules was approved and crystallised by the Secretary of State in a statutory order,[48] and the rules came into force with the Act on 1st March 2000. The rules were not debated in Parliament and were accepted by the Secretary of State, Kim Howells, without modification.[49]

As suggested by Schedule 9, the rules cover a wide area. They begin and end with Form N – the form which companies have to fill out when making an application under the Act – including the layout of the form and the documents which need to be enclosed for a complete application. In between, they detail aspects of the Director General's response

[47] Now section 30.
[48] Competition Act 1998 (Director's rules) Order 2000 – SI 2000 No. 293.
[49] Recorded in the introduction to the Order.

(including time limits for processing application), the level of fees for applications,[50] procedural rules in relation to provisional and final decisions and guidance. They also set out the duty to consult the public if an exemption is granted and the discretion to do so if a decision is made that the Chapter I or II prohibition has not been infringed.

A detailed analysis of many of the draft rules has been done by Willis (1999) and will not be repeated here.[51] Instead, it is enough to summarise his main points before considering more directly the relevance of these rules for a study of juridification.

In his article, Willis puts forward two main arguments. The first is that although section 60 does not obligate the Director General to replicate all of the procedures of the European Commission, it does require his procedural rules to be compatible with high-level EC law principles. This is adduced both from statements made by Lord Simon in the House of Lords and the judgment in the *Air Inter* case,[52] supporting the contention that high-level principles impose an irreducible template for the rules. Willis' second main argument is that this is indeed the interpretation of the Office, which has taken notice of EC case law in drafting its procedural rules, making the same separation between ordinary procedural rules (which do not have to be followed) and rules giving practical application to high-level principles (which do). Willis also provides evidence in favour of this proposition. For instance, applying the high-level principle that defendants in competition cases have the right to be heard, the Court of First Instance ruled that the Commission had to issue a statement of objections in relation to the conditions attached to an individual exemption.[53] "This principle underlies the extension, in the most recent draft of the DGFT's rules, of the statement of objections procedure in rule 14 to a proposal to grant conditional exemption", Willis writes.[54]

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[50] £5000 for guidance under s13 and s21, £13,000 for a decision under s14 and s22.

[51] There are some minor differences between the draft rules and the final set approved in Parliament, but not enough to justify doing a separate analysis.

[52] Case T-260/94 *Air Inter v Commission* [1997] ECR II-997

[53] Case 17/74 *Transocean Marine Paint Association v Commission* [1974] ECR 1063. A statement of objections is a statement by which the undertaking is given all the information necessary to enable it to defend itself properly before a final decision is adopted.

[54] Willis (1999: 318). This was an extension of the original list provided in Article 19 of Regulation 17, and the ECJ has also extended the right in other areas, such as a preliminary decision withdrawing the immunity from fines conferred by notification. Willis' reference to rule 14 actually became rule 14(2) when implemented. However, a statement of objections issued by the Office is known generally as a "Rule 14 notice" and often referred to as such in actual decisions.

Another example provided by Willis is the right of investigatees to have access to the file of the case. In *Solvay*,[55] the Court of First Instance made it clear that the right of access to the file is a fundamental right and not merely a function of the Commission's procedures – the right is "thus one of the procedural safeguards intended to protect the right of the defence". As a result, section 60 imports this right into the procedures of the Office, and Rules 14 and 18 implement the principle. Rule 14 provides for the DGFT to offer the parties a reasonable opportunity to inspect the file, with the exception of confidential information and documents internal to the Office.[56] Rule 18 gives the same right to parties subject to a direction under section 35 under which the Director General can apply for interim measures to restrain anti-competitive agreements or conduct whilst an investigation is ongoing.

Willis' arguments help to substantiate the main points made in this chapter. This is because they suggest that even in the area of its procedures, the Office has had to have technical knowledge of European law and practice and, in many cases, to duplicate it. Put another way, as opposed to being based on, for instance, principles of good administration or perhaps on previous organisational practices,[57] many of its procedural rules have been based on principles established in a court of law. This backs up a more basic and obvious point: almost every detail that could be contemplated in this area has been crystallised in the form of binding legal rules. The effect of sections 51 and 60 combined has thus undeniably been to juridify the Office's procedures.

Juridification in the regulation of competition

The Competition Act came into force on 1st March 2000, with a lengthy period deliberately left from its passage through Parliament so as to give businesses a chance to prepare for the new regulatory regime. In this section, we consider two main sources of

[55] Case T-30/91 *Solvay v Commission* [1995] ECR II-1775

[56] The scope of "internal to the Office" is also informed by European law – in particular, a European Commission Notice "on the internal rules of procedure for processing requests for access to the file pursuant to Articles 85 and 86", which lists documents falling in this category.

[57] This is a common argument found within historical institutionalism, based on the notion of path dependency.

evidence to establish the nature of this regime: reports of decisions made under the Act and the OFT annual reports of 2000 and 2001. It will be argued that the Competition Act has indeed heralded a change in the Office's enforcement style, and that there is further evidence of juridification to be found in its staffing arrangements, the reaction of regulatees to adverse decisions and the style of decisions once made.

As it is difficult to appreciate the true nature of the enforcement process in the abstract, this section begins by taking a specific example in detail – the first infringement decision made by the Office under the Act, made against Napp Pharmaceuticals. It then looks at some general evidence to establish whether or not the evidence that comes out of this example is typical of relations generally between the Office and its regulatees under the Act.

- The *Napp* decision

The facts of the case were as follows. Napp was the dominant supplier of sustained release morphine, and indeed had held a patent on it from 1980 to 1992. During the 1990s, however, faced with competition from alternative suppliers, Napp aggressively reduced its prices for the product to the hospital sector to below cost price, offering discounts of well over 90 per cent in tendering for hospital contracts. This tactic enabled Napp to retain a market share in hospitals of more than 90 per cent, and drove its leading competitor out of the market. At the same time, however, Napp was selling the same product to the community sector for an amount more than ten times higher than that charged to hospitals. Because GPs were rarely cost-conscious in the same way as hospitals, and because GPs' prescriptions tended to be strongly influenced by the brands used in hospitals, Napp was able to secure a similarly high share of this sector which in fact was a much larger market.

An investigation was begun into the pricing policies of Napp following a complaint in March 2000.[58] In May, representatives of Napp attended a meeting at the Office of Fair Trading to discuss the market and the allegations made by the complainant and they provided additional information at that meeting. A notice under section 26 of the Act was

[58] In fact, an enquiry had already been commenced under the Competition Act 1980 in July 1999, with Napp providing information in response to requests from the Director in September and October of that year. The investigation was then restarted once the Competition Act 1998 came into force.

then sent to Napp and to other companies on 7 July 2000.[59] On 25 August 2000, a notice was issued to Napp under the Act in accordance with rule 14 of the Director's procedural rules. In accordance with the Director's rules, Napp was given the opportunity to submit written and oral representations on the Notice to the Director which it did on 16th and 20th October respectively. Napp submitted further written representations on 27th October. The report of the Director General's decision then records that "In coming to this decision, the Director has given full consideration to these representations." On 2nd February 2001, a supplementary notice was issued to Napp also under rule 14 of the Director's rules. Napp submitted written representations on 6th March and oral representations on 12th March respectively. Again, it is stressed that in coming to the final decision, "the Director has also given full consideration to these representations on the supplementary Notice." On 13th March 2001, a further supplementary notice was issued to Napp, concerned with directions which the Director proposed to make under section 33 of the Act, and once again we are told that written representations subsequently made by Napp on 27th March 2001 were taken into account in the course of assessing the level of penalty imposed under section 36 of the Act.

In his judgment, the Director General ruled that Napp had infringed the Chapter II prohibition and abused its dominant position. The judgment rested on three main premises, as follows:

a. The relevant product market was a narrow one – oral sustained release morphine products only. It was noted that other painkilling products were rarely seen as alternatives to this drug – instead, the specific drug prescribed tended to be on the basis of the needs of the particular patient. Cost was rarely a factor in the decision, hence substitutability was particularly low in this area.
b. Napp held a dominant position in this market. The main evidence relied on here was a market share of over 90%, although there were also significant barriers to entry deterring potential competitors from challenging Napp's market position.

[59] The Director also received information from the Department of Health (DoH), NHS Supplies, NHS Purchasing and Supplies Agency (NHS PASA), Medicines Control Agency (MCA), the Office of Health Economics, clinicians and relevant trade and professional bodies (British Medical Association (BMA), British National Formulary (BNF), Medicare Audits).

c. Napp abused its dominant position not only by pursuing conduct designed to eliminate competition in the hospital sector, but also by charging excessive prices in the community sector. A number of comparisons were used to reach the verdict that the prices were excessive.

Napp was fined £3.21 million, and directed to cease the infringements by reducing the price of MST tablets to the community and limiting the degree to which community prices could exceed hospital prices. In response, the company decided to appeal the decision in the Competition Commission Appeals Tribunal. After three preliminary hearings,[60] the final judgment was given in January 2002. The Tribunal upheld the original decision of the Director General, although it reduced the level of the fine by approximately one-third, identifying certain mitigating factors. Napp then applied for leave to appeal this decision in the Court of Appeal, but was denied twice – first by the Appeals Tribunal (26th March), then by the Court of Appeal (8th May).

There are several aspects to the Napp decision that are striking. Firstly, the decision is very long – 72 pages in all – pointing to a general thoroughness, but perhaps also to a certain defensiveness faced with the prospect of an appeal. The facts of the case are strongly backed up throughout, often with references to academic articles.[61] Secondly, it is notable how the account of the investigation emphasises the procedural propriety of the Office: three times in the course of the description of the investigation, it is insisted that all Napp's representations have been taken into account.[62] This is well backed up by the fact that virtually all the arguments made by representatives of Napp are responded to specifically in the course of the decision. Thirdly, the decision is replete with references to EC case law. In the course of defining the relevant market alone, there are references to thirteen separate cases. Quotations of Commission statements and Notices and EC case law run all the way through the decision. Next, and more generally, the decision reads like a legal judgment and especially like a European legal judgment. Aside from the references to European case law, and the fact that the main section is entitled "Legal and economic assessment", it is the methodical presentation of the facts, and the application of legal

[60] One initial hearing, one asking for extra time, and one asking to strike out part of the defence.
[61] For instance, in arguing that other similar products to oral sustained release morphine were in fact not real substitutes, seven academic articles were cited, as well as a variety of quotes from the British Medical Association and Napp's own experts.

principles to those facts that stand out. There is further a specific stylistic resemblance to a European judgment through the structuring of the decision in numbered paragraph form.[63] Finally, the fact that Napp chose to appeal the decision further points to the legal nature of the process.

Moreover, there is even more striking evidence of juridification in this appeal. The actual judgment of the Appeals Tribunal runs to 155 pages – this not all that much more than the combined lengths of the skeleton arguments of Napp and the Director General, who provided documents of 80 and 35 pages respectively. The arguments presented by both sides are technical and legal in nature, with frequent citing of legal cases. Napp was represented by Herbert Smith, a major firm of City solicitors, although its in-house legal department had also been involved in preparing the submissions. The Office's case was prepared by its Legal Services Department. In the preparations for the proceedings, there appear to have been attempts by Napp's solicitors to overwhelm the Tribunal with legal arguments (p18, para 76):

> On 11 July 2001 the Tribunal returned to Napp a voluminous bundle of authorities relating to the Human Rights Act which had been sent by Napp on 2 July 2001 without any satisfactory accompanying argumentation and without having regard to the *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001.

It seems that this reflected a more general pattern, criticised in the judgment as follows (p27, para 88):

> We comment, for the benefit of those conducting future appeals, that the procedure in this case did not go entirely according to the plan envisaged in the Tribunal's *Guide to Appeals under the Competition Act*, probably for three reasons: the notice of appeal was not as focussed as we would have wished, the Director sought to introduce a good deal of material and argument that was not in the Decision, and some of the supplementary materials supplied by Napp on such matters as the Human Rights Act and PCGs/PCTs were not in a form which we could easily absorb. We entirely appreciate the difficulties of the subject matter, the pressure of time, and the fact that all concerned are on a learning curve as regards the procedures to be followed in appeals under the Act, but we hope that the principles of the *Guide* can be closely followed in future cases.

The proceedings lasted for four days with oral submissions on both sides. Mr John Brogden (the Managing Director of Napp) gave evidence on oath and was cross-examined,

[62] As noted above.

as requested by the Director General. Both sides were represented by QCs: Mr Peter Roth QC on behalf of the Director General and Mr Nicholas Green QC on behalf of Napp. The judgment itself dissects the original decision to the extent that even though it upholds virtually all of its main claims, it still sees fit to strike out one paragraph on the basis that the claims made in it had not been sufficiently established. This despite the fact that the argument made in the paragraph was not material to the overall outcome. There is also explicit recognition of the Tribunal's role in setting precedent, noting that the guidance given on penalties would "no doubt" be reflected in the Director's Guidelines over time.

Overall then, the Napp case displays all the features of a legal process: investigation using the procedural rules under the Act, decision, appeal, lawyers, court appearances, applications for further appeals, long legal judgments, frequent legal case citations and explicit legal argument. The entire process took just over two years – nearly three years if the pre-Competition Act enquiry is included. In short, there can be no doubt at all that the relationship between the Office and Napp was heavily juridified. The question now is whether this case is typical or an exception in this respect, and for this purpose we turn now to more general evidence.

- General evidence

A convenient place to begin is with the Office's selection of competition investigations. In the previous chapter, it was argued that the Office often negotiated with companies so as to make an investigation under the old Competition Act unnecessary. It only tended to be when companies disagreed with the Office that their conduct was anti-competitive, or otherwise refused to modify their behaviour, that the Office sometimes launched investigations. With the *per se* prohibition system introduced by the 1998 Act, however, the Office has often launched investigations irrespective of negotiations. The Annual Reports of both 2000 and 2001 indicate this change, and also the central role of the "reasonable suspicion test". Here are the relevant sections of each:

> During the period from 1 March, there were nearly 40 cases where there were reasonable grounds for suspecting an infringement of one or both of the two prohibitions in the Act. In these cases, over 300 written notices were issued requiring the production of specified documents and information. The on-site

[63] This is now also the norm in English legal judgements.

> investigation powers were used in two of them. At the end of the year, over 20 of these cases were still under investigation. The others had either been dismissed or resolved informally. (AR 2000: 23-4)
>
> In 2001, our competition enforcement division opened 1,298 complaint cases. Of these, 63 gave us reasonable grounds to suspect an infringement of the Act had taken place, leading to a formal section 25 investigation. At the end of the year, 44 such cases were under active consideration (including one case under the Fair Trading Act's monopoly provisions). We estimate that around a quarter of these will result in formal decisions. (AR 2001: 46)

Thus we see how the "reasonable suspicion" test has had to be satisfied before an investigation could be launched – a legal test that effectively has been responsible for excluding 95% of complaints from the ambit of the Act. Still, the above figures mean that in the first two years of the new regime there have been nearly three and a half times more investigations than there had been in the first *twelve* years of the old Competition Act. Once the threshold has been satisfied, however, non-legal considerations can become important. In another context, it is reported that the Office from the start has tried to discourage notifications by companies worried that they might fall within the Act, so as to allow its resources to be focused "on more serious cases of actual or suspected infringements" (AR 2001: 47).[64] This provides some indication that its resources might not allow an investigation in every case where there is reasonable suspicion that an infringement has taken place, and it will be recalled that the Office has a power not a duty to launch an investigation.

Once an investigation has been initiated, it appears that the Office has made extensive use of its array of investigatory powers. During the course of 2001, for instance, 1040 section 26 notices were issued, and 15 "raids" conducted (involving the use of both section 27 and 28 powers).[65] Some of these raids covered multiple sites though, so that in all, the Office visited 27 sites using its powers under s27 and 37 sites with High Court warrants under s28.[66] Meanwhile, whether or not a raid has been carried out, lawyers have

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[64] The success of the policy can be gauged by the fact that the Office only received 3 notifications in 2001. The policy was most likely influenced by the experience of the European Commission which was overwhelmed by requests for so-called "comfort letters". The Office has also had an open door however, under which companies worried about falling within the ambit of the Act can come to the Office for informal advice.

[65] Section 26 enables the Office to require the production of specified documents or information, section 27 empowers the Office to enter premises without a warrant and to require the production of documents, section 28 authorises the Office to enter and search premises with a warrant.

[66] AR (2001: 47)

tended to be heavily involved in the actual conduct of investigations. Once an investigation is under way, competition lawyers advise case officers on the strength of the evidence gathered and what else might be required to prove wrongdoing, and they also help to present the case to the company concerned. Then, if the case progresses beyond a decision to an appeal, they instruct barristers to act on the OFT's behalf and provide ongoing advice right through to the final conclusion of the case.[67]

Since the Act came into force, the Office has published twenty formal decisions.[68] Of these, thirteen have been non-infringement decisions,[69] five have been infringement decisions with fines imposed, and in the other two, individual exemptions were granted (one subject to conditions and obligations). Ten of these decisions were made in 2001, ten more were made in 2002. The decisions are listed in Appendix 1 below.

It might be thought that some counter-evidence of juridification can be found in the Office's "leniency programme". Under this programme, members of an illegal cartel who admit to the agreement and provide information about it ("whistle-blowers") may be granted total immunity from financial penalty (if this company is the first to come forward) or have the penalty significantly reduced. In 2001, the Office received 13 applications for leniency in 2001 and agreed to leniency in 6 cases, with the other investigations still outstanding by the end of the year. However, whilst this programme might seem to suggest a degree of flexibility in the way in which the Office has dealt with its regulatees, it would be misleading to see it this way. This is because of the nature of the decision as to what penalty to impose: under s38(8) of the Act, the Director General must refer to the guidance in force when setting the amount of the penalty - guidance which must previously have been approved by the Secretary of State (s38(4)). In this way, the Guideline on Penalties must itself be seen as a source of law,[70] and the leniency programme is precisely laid out in it.

Already, legal challenges under the Act have been commonplace. Of the five infringement decisions, two have been appealed.[71] Of the other three, one was a remitted

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[67] See the March 2002 edition of the *Fair Trading* magazine.
[68] Correct as on 27th October 2002.
[69] In one of these, amendments were agreed to an agreement so as to prevent an infringement decision.
[70] Failure to follow the rules laid down in it would thus be grounds for appeal to the Competition Commission Appeals Tribunal.
[71] The *Napp* and *Aberdeen Journals* decision.

decision,[72] in another the companies benefited from the leniency programme,[73] and the other decision related to a price-fixing agreement for which the evidence was clear-cut.[74] There have also been two further appeals to the Competition Commission Appeals Tribunal: one by third parties objecting to a non-infringement decision,[75] the other by the original complainant also unhappy with an OFT decision – this time that the entity concerned was not an "undertaking" within the meaning of the Act.[76] Furthermore, each appeal has tended to be accompanied by a number of surrounding hearings, such that the Appeals Tribunal has actually given a total of 13 judgments to date. The result of one of these preliminary hearings in particular – the Bettercare judgment[77] – has made future appeals more likely by ruling that a letter from the Office to complainants advising that the Office will not go through with an investigation counts as a "decision" under the Act and is thus appealable. The Office had argued that the rejection of a complaint is not an appealable decision under section 47 of the Act, but merely notification to the complainant that the Director does not deem it appropriate to proceed to a decision as to whether there has been an infringement.[78] This admissibility judgment must have been a bigger blow to the Office than the subsequent hearing, which it also lost,[79] as it increased the likelihood of complainants – having been informed by the Office that their complaint would not be investigated – taking their case to the Appeals Tribunal.[80] It also meant that some letters sent to complainants explaining why the Office was not going to proceed with an investigation under the Act were subsequently published as "decisions".[81]

In light of all the information brought in this chapter thus far, it would be surprising if the Office had not changed its staffing arrangements since the passage of the Act. It will

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[72] The second *Aberdeen Journals* decision.
[73] The *Arriva and First Group* decision.
[74] The *John Bruce* decision.
[75] The *General Insurance Standards Council* decision.
[76] The *Bettercare* case.
[77] Bettercare Group Ltd v DGFT [2002] CAT 6
[78] As such, it was argued that whilst a rejection may have given grounds for seeking judicial review, it was not appealable under section 47.
[79] The Tribunal ruled that a local authority as a purchaser of care homes was an "undertaking" within the meaning of the Act, overruling the Director's submission that it was not engaging in economic or commercial activity. The judgment meant that the case was handed back to the Office for investigation.
[80] Indeed, one of the arguments put forward by the Office was the "floodgates" argument – familiar to lawyers – that if this appeal was allowed, it would open up the floodgates to many other complainants, and both the Tribunal and the Office would be swamped in the process.
[81] E.g. the Harwood Park Crematorium decision – consisting of a two-page letter.

be recalled that in 1996, there were still only 12 lawyers working for the Office (out of a total of 402 staff). This increased to 15 in 1997 and to 19 in 1998. In 1999, the number of lawyers was marked down as 16, but there were also 14 professionally qualified staff appointed as Case Officers or Assistant Case Officers in the Competition policy Division. In 2000, there were 21 lawyers and 20 legally qualified staff,[82] whilst by the end of 2001, the overall figure had jumped to 50 (out of a total of 493).[83] In addition, it is reported that (AR 2001: 89):

> Around 70 staff from our competition enforcement division began a distance-learning course on the Competition Act and its application. Developed in conjunction with Nottingham Trent University, the course leads to a postgraduate certificate in competition policy. Ninety-seven OFT staff now hold this qualification.

Moreover, not only have several important positions within the Office been occupied by lawyers,[84] but the organisational structure is such as to emphasise the importance of legal issues – with the main divisions (Competition Enforcement and Consumer Regulation Divisions) having two legal directors each specifically to oversee the legal dimensions of their work. This in addition to the separate Legal Services Division.

Overall then, there is substantial evidence of juridification in the manner in which the Act has been enforced, although not all the features of the *Napp* case have been common to other investigations. There have not always been appeals, for instance. Nor have all the decisions been as lengthy – they have varied in length depending on the complexity of the issue involved and the clarity of the evidence. However, all the cases have had frequent legal case citations and explicit legal argument in common, there have been frequent investigations using the procedural rules under the Act, and further evidence of juridification has been found in the role of the 'reasonable suspicion' test as well as the growth in both number and importance of lawyers working at the Office.

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[82] The distinction here is between lawyers working in the Legal Services Division and lawyers working in the Competition Policy Division.

[83] It is impossible to record accurately the percentage of resources spent on legal work during this period, due to changes in its accounting system. In 2000, it was reported that 10.7% of the Office's resources was spent on legal services; in 2001 the figure is recorded as 6.4%.

Conclusion

The Competition Act 1998 substantially juridified the relationship between the Office and its regulatees in the field of competition policy. The evidence for this is not only to be found in the way in which the Act has been enforced since March 2000, but also in the Office's interpretation of the Act which has been dominated by legal considerations. The following tables use the indicators set out in Chapter 1 to demonstrate the substantial presence of both Type I and Type II juridification:

Type I juridification between the OFT and its regulatees post-Competition Act 1998

INDICATOR	EVIDENCE
Frequent litigation ✔	Litigation much more common than previously with frequent appeals – in some cases even by third parties
Coercive, inflexible regulatory strategy ✔	Indicated by the widespread use of prosecution, and the absence of negotiation during a prosecution.
Reliance on formal, legal processes ✔	OFT's procedures now determined by legal rules and followed rigidly
Frequent prosecutions in response to breach of law ✔	Far more prosecutions than previously – more investigations launched in two years than in the first twelve years since Competition Act 1980.
High presence / involvement of lawyers ✔	Large increase in OFT lawyers, who also occupied important positions within the organisation

Type II juridification between the OFT and its regulatees post-Competition Act 1998

INDICATOR	EVIDENCE
Explicit legal argument ✔	As indicated by OFT decisions and the content of appeal submissions
Regulatory contact seen as setting legal precedent ✘	Less important perhaps as large EC case law already followed.
High presence / involvement of lawyers ✔	Large increase in OFT lawyers, who also occupied important positions within the organisation
References to law and legal cases ✔	Frequent references to EC law mandated by section 60. Legal argument crucial in determining outcome.
Adoption of overtly legal values ✔	Rigid adherence to legal procedure and due process norms with appeals in mind. Legal tests applied.

[84] For instance, in 2001, Vincent Smith, a bilingual lawyer, was appointed Director of Policy Co-ordination in the OFT's Competition Enforcement Division, and Simon Priddis was appointed Director of Mergers after

It has also been argued that the source of this juridification can be found in the Competition Act itself, as opposed to decisions made by the Office or its regulatees or the courts or any other actors. Put simple, sections 51 and 60 have imposed a legalistic enforcement style on the Office and encouraged legal appeals by regulatees. The only other source of juridification was the Bettercare decision. The decision is likely to encourage still more legal appeals, thereby sustaining a process of juridification under the Act.

five years working for an American law firm in Brussels and Washington.

Appendix

Investigations under the Competition Act 1998: 2001-2002

Date	Subject of investigation	Decision
Jan 2001	General Insurance Standards Council	No infringement
Apr 2001	Napp Pharmaceutical Holdings Ltd	Infringement of Chapter II prohibition – fine imposed.
Apr 2001	Swan Solutions Ltd/Avaya ECS Ltd	No infringement
Apr 2001	DSG Retail Ltd/Compaq Computer Ltd/Packard Bell NEC Ltd	No infringement
May 2001	BT Surf Together and BT Talk & Surf Together pricing packages	No infringement
June 2001	Consignia and Postal Preference Service Ltd	No infringement
July 2001	Aberdeen Journals Ltd	Infringement of Chapter II prohibition – fine imposed
July 2001	ICL/Synstar	No infringement
Oct 2001	LINK Interchange Network Ltd	Individual exemption granted
Oct 2001	Memorandum of Understanding on the supply of oil fuels in an emergency	Individual exemption granted, subject to certain conditions and obligations.
Feb 2002	Market sharing by Arriva plc and FirstGroup plc	Infringement of Chapter I prohibition – fines imposed
Feb 2002	Film Distributors' Association Ltd	Amendments agreed so as to ensure compliance with Act.
Mar 2002	BT's wholesale DSL products: alleged anti-competitive pricing	No infringement
Apr 2002	Vodafone's distribution agreements for pre-pay mobile phone vouchers	No infringement
Apr 2002	The North and West Belfast Health and Social Services Trust	No infringement
May 2002	John Bruce (UK) Ltd, Fleet Parts Limited and Truck and Trailer Components	Infringement of Chapter I prohibition – fines imposed
July 2002	Alleged anti-competitive agreement between a number of telecommunications network operators	No infringement
Aug 2002	Harwood Park Crematorium Ltd	No infringement
Sept 2002	Aberdeen Journals Ltd – remitted case	Confirmation of original decision
Oct 2002	Companies House	No infringement

CHAPTER 7

Conclusion

Introduction

In Chapter 1, three main questions were asked. Firstly, what is the extent of juridification in the UK – how far has law begun to govern the conduct of its political and regulatory relationships? Secondly, what are the causes of juridification and of the absence of juridification? And thirdly, what would the growth of juridification mean for existing theories of regulatory strategies? Chapter 1 further outlined a preliminary aim of the thesis: to establish a methodology for studying juridification.

In this chapter, these questions are addressed, as far as is possible, in light of the evidence of the case studies. The chapter is divided into four sections – one for each of these questions. In the first section, the evidence of the case studies as to the extent of juridification is set out. It is argued that, apart from a few exceptions, law has tended to remain in the background of regulatory relationships. At the end of this section, these findings are compared to more general evidence, and it is noted that they are very much compatible.

In the second section, the methodological questions that were specifically left open in Chapter 1 are revisited and considered in light of the case studies. The first area of consideration is the utility of the indicators of juridification: what they are capable of revealing, what they tend to obscure, how closely they reflect the qualitative analysis of the case studies. In the second part of this section, the question of whether soft law should be included in an analysis of juridification is reconsidered, again in view of the evidence of the case studies.

In the third section, the causes of juridification, and its absence, in the case studies are set out. It is argued that, in general, the lack of juridification can be explained through reference to the literature on regulatory strategies. Moreover, one of the cases in which juridification did occur can also be explained by reference to that literature, as can the fact

that in this case juridification did not last – it gave way to a persuasive regulatory strategy. However, in a second type of case, juridification occurred for reasons other than those advanced in the regulatory strategy literature. Significantly, in this type of case, juridification is not showing any signs of being a temporary phenomenon.

In the final section, the implications of the findings of the case studies for the regulatory strategy literature is considered. On the basis of the evidence of the case studies, it is argued that this literature may require revision in two respects in particular. The first is its claim that juridification is linked to the deterrence strategy, and that the absence of juridification is linked to the persuasive strategy. The second is the claim that the persuasive strategy will ultimately be predominant. Whilst both these claims remain generally accurate, the case studies have revealed some important exceptions.

The extent of juridification

In this section, we consider the question of how far regulatory relationships were governed by law and legal considerations in the cases of the CRE and the OFT, before taking a look at more general evidence relating to juridification within the UK.

The Commission for Racial Equality

The evidence brought in Chapter 3 was striking. Not only was there no trend of increasing juridification, but actually there was a pattern of de-juridification of the relationships between the Commission and its regulatees. This was highlighted by dividing the period 1977-2002 into four policy phases, each less juridified than the last.

The first policy phase was characterised by a strong detachment between the CRE's law enforcement work and its promotional work, and a heavy reliance by the CRE on its power to launch formal investigations. It was argued that the detachment between these two areas of its activities implied juridification because enforcement powers, when used, were chosen precisely because of their formal legal qualities. It also helped to cause juridification by leading to a focus on rules over outcomes. Both these aspects were strongly evident in the Commission's approach to its power of formal investigation, which

was characterised by a general rigidity as part of a general deterrence-based strategy. Regulatees, on their part, responded to this through adversarialism. A heavy reliance on lawyers, legal challenges (both appeals and judicial review applications), and generally obstructive attitudes were typical responses. Often the lack of co-operation from regulatees led to the Commission having to issue subpoena notices and to seek further court orders. Overall then, the frequent presence of lawyers, the high percentage of investigations leading to legal action, the use of legal phraseology in reports of investigations, the formality of some of the procedures used and the inflexibility of the Commission with respect to the issuing of non-discrimination notices all constituted strong evidence that relationships between the Commission and its regulatees were substantially juridified.

The problems generated by juridification – judicial and political intervention, and an organisational inability to continue with this initial strategy - led the Commission into a major change of approach. In this second policy phase, whilst formal investigations were still used by both of its policy divisions, the Employment Division was beginning to use them in a different way, with greater use of general investigations as part of a persuasive regulatory strategy. Partially due to an internal restructuring, the Commission began to link its enforcement and promotion work more closely, and this led to a greater focus on achieving outcomes rather than following legalised processes. In practice, this meant that if education, advice and persuasion were just as capable of achieving a desired result, they were now preferred to the use of legal powers. Under this policy, several formal investigations were discontinued, with the Commission more willing to try to reach agreement with its regulatees rather than to impose a solution. Nonetheless, some of the Commission's other policies – especially its policies of providing responsive assistance to individual complainants under the Act and of prosecuting individuals who had pressurised or instructed others to discriminate - suggested that it still had a preference for fulfilling its duty of eliminating discrimination through its law enforcement powers and its duty of promoting racial equality through general promotional work.

Again though, the Commission was forced to change track – this time partially because of budgetary constraints and a rising number of cases under the Act, and partially because of management reform imposed by the Home Office. In its quest to ensure that all of its activities were cost effective, the Commission changed from a policy of providing

responsive assistance to individual complainants to one of strategic assistance, and it also discontinued its policy of looking to prosecute offenders under the Act. Both decisions were essentially de-juridifying, replacing contacts based on legal considerations with contacts based on non-legal considerations. In the case of providing assistance to individual applicants, the Commission's policy of increasingly looking to settle rather than go to a full tribunal hearing was also evidence of de-juridification. Finally, the changing emphasis of the Education, Housing and Services Division, later renamed the Social Policy Division, and especially its greater focus on education that centred around new codes of practice, was further evidence of the de-juridification of regulatory relationships.

In the final policy phase, the Commission stopped using formal investigations altogether except as a last resort. Instead, it focused on hard-hitting and well-publicised media campaigns and general lobbying, as well as on the persuasion of individual regulatees using tribunal cases as a springboard. It did this in two ways: firstly, by looking for wide-ranging settlements in those cases where it agreed to provide full legal representation to complainants; secondly, by trying to negotiate change with companies subject to adverse tribunal decisions. As a result, formal legal action became extremely rare, and relationships between the Commission and its regulatees were usually characterised by negotiation and mutual co-operation.

The following tables, reproduced from Chapter 3, summarise these developments with specific reference to the indicators of Type I and Type II juridification.

Type I juridification between the CRE and its regulatees: 1977-2000

Period	Indicator	Evidence
1977 to 1982 ✔ (5/5)	Frequent litigation ✔	Many legal challenges to formal investigations. 'Responsive' approach to individual complaints under the Act meant that litigation the norm if the requirements of the Act had been met.
	Coercive, inflexible regulatory strategy ✔	Very little flexibility throughout the formal investigation process. Sharp distinction between 'enforcement' and 'promotion'. Strong evidence of deterrence strategy.
	Reliance on formal, legal process ✔	Yes: provisions of Act followed rigidly; formal terms of reference and non-discrimination notices.
	Frequent prosecution in response to breach of law ✔	The cornerstone of the CRE's strategy in this period.
	High presence / involvement of lawyers ✔	CRE lawyers heavily involved in conduct of investigations and decisions on individual complainants under the Act. Lawyers of investigated companies present in about two-thirds of cases.

1983 to 1987 ✔ ✘ (3/5)	Frequent litigation ✔ ✘	Fewer formal investigations and far fewer legal challenges in response. Still a responsive approach to individual complainants, and litigation still the norm with other breaches of the Act.
	Coercive, inflexible regulatory strategy ✔ ✘	More flexibility shown in the conduct of formal investigations, greater integration of different elements of strategy. Still a separation between enforcement and promotion, however – implying that inflexibility once enforcement decided upon.
	Reliance on formal, legal process ✔ ✘	Commission slightly less rigid in approach to formal investigations, focusing more on outcomes. However, it still relied on legal avenues with its other powers.
	Frequent prosecution in response to breach of law ✔	Still the norm with cases of persistent discrimination and pressure to discriminate. Legal action still the norm to help individual complainants under the Act. Fewer formal investigations launched.
	High presence / involvement of lawyers ✔ ✘	Lawyers had the same role as previously, but the far greater emphasis placed on achieving change through its promotional work meant that the work of lawyers was less important to the CRE as a whole.
1988 to 1992 ✘ (0/5)	Frequent litigation ✘	Far less litigation than previously: only one legal challenge to formal investigation, reliance on settlements rather than litigation with s26-28 actions, litigation used less to aid complainants under the Act.
	Coercive, inflexible regulatory strategy ✘	Far greater flexibility with integration of enforcement and promotional work. Persuasion and search for settlements now more common than prosecution.
	Reliance on formal, legal process ✘	Legal tools such as formal investigations still used; however, generally a greater reliance on settlements.
	Frequent prosecution in response to breach of law ✘	No longer true: fundamental change of strategy with respect to prosecutions under the Act, so that the norm was to search for a settlement if possible.
	High presence / involvement of lawyers ✘	Change of strategy meant that lawyers within the CRE were less important.
1993 to 2000 ✘ (0/5)	Frequent litigation ✘	Litigation avoided wherever possible: settlements seen as more fruitful and less expensive option.
	Coercive, inflexible regulatory strategy ✘	Commission's strategy the opposite of this: it was based on negotiation and flexibility to try to achieve change.
	Reliance on formal, legal process ✘	Bargaining in the shadow of the law far more common. Formal investigations barely used.
	Frequent prosecution in response to breach of law ✘	Settlements now at the centre of the CRE's strategy, with wide-ranging settlements aimed to promote change.
	High presence / involvement of lawyers ✘	As before.

Type II juridification between the CRE and its regulatees: 1977-2000

Period	Indicator	Evidence
	Explicit legal argument ✔	Yes – legal argument recorded faithfully in reports of formal investigations. Very common especially in indirect discrimination cases.

1977 to 1982 ✔ (5/5)	Regulatory contact seen as setting legal precedent ✔	Outcomes of formal investigations used by the Commission in industrial tribunal cases and in the course of formulating codes of practice. Some cross-referencing between investigations.
	High presence / involvement of lawyers ✔	CRE lawyers heavily involved in conduct of investigations and decisions on individual complainants under the Act. Lawyers of investigated companies present in about two-thirds of cases.
	References to law and legal cases ✔	Very common: reference to relevant sections of the Act the norm in formal investigations, frequent reference to legal developments in annual reports.
	Adoption of overtly legal values ✔	References to natural justice, and to the need to make a finding "on the balance of probabilities". Frequent consultations with legal advisers.
1983 to 1987 ✔ ✕ (3/5)	Explicit legal argument ✔	Still common, especially in indirect discrimination cases
	Regulatory contact seen as setting legal precedent ✕	Less applicable than previously, as Commission had now built up a body of 'case law' which it then used in formulating codes of practice.
	High presence / involvement of lawyers ✔ ✕	Lawyers had the same role as previously, but the far greater emphasis placed on achieving change through its promotional work meant that the work of lawyers was less important to the CRE as a whole.
	References to law and legal cases ✔	Same as previously, albeit that formal investigations used less.
	Adoption of overtly legal values ✔ ✕	Legal values still important; however, the new emphasis on achieving outcomes rather than sticking to legal processes indicates that achievement seen as more important than following the requirements of the law.
1988 to 1992 ✕ (1½/5)	Explicit legal argument ✔ ✕	Becoming far less obvious due to the decline in number of formal investigations and tribunal appearances. Legal argument used in the course of reaching settlements.
	Regulatory contact seen as setting legal precedent ✕	As in previous period
	High presence / involvement of lawyers ✕	As in previous period, but even more so because of changes of strategy in relation to individual complaints and prosecutions under the Act.
	References to law and legal cases ✔	As in previous period: references still made in the course of legal contacts.
	Adoption of overtly legal values ✕	If anything, Commission becoming keen to avoid the use of law wherever possible, preferring non-legal approaches and bargaining in the shadow of the law.
1993 to 2000 ✕ (1/5)	Explicit legal argument ✔ ✕	As in previous period
	Regulatory contact seen as setting legal precedent ✕	Legal precedent less important than achieving far-reaching change in the shadow of law.
	High presence / involvement of lawyers ✕	As before.
	References to law and legal cases ✔ ✕	Less common, due to use of formal investigation as a last resort only. Still used in the course of negotiating settlements, however.
	Adoption of overtly legal values ✕	As before.

Over time therefore, relationships between the CRE and its regulatees became less adversarial, less formal, less governed by rule-based considerations and less influenced by specifically legal questions.

The Office of Fair Trading

In the case of the Office of Fair Trading, the story was slightly different. Rather than policy phases characterised by changing levels of juridification, there was generally a consistent picture of a lack of juridification between the Office of Fair Trading and its regulatees. This was subject though to a couple of exceptions, one major one in the field of competition policy, and a more minor one in the field of consumer protection.

In Chapter 4, it was shown how, in the field of consumer protection, the vast majority of the contact between the Office and its regulatees between 1973 and 2002 was informal and flexible in nature, dominated by behind-the-scenes negotiations. The enforcement powers of the Office were rarely used, often because a punitive approach was seen as unreasonable – a feeling exacerbated by the bluntness of some of the tools available. In many cases, to revoke or refuse a consumer credit licence for instance, was effectively to put a trader out of business. This was not done lightly, and thus the level of intervention by the Office was low, and when it did decide to use its enforcement powers it did so flexibly. Where it was possible to find a solution without resorting to the formalities of law, it was nearly always taken.

Meanwhile, on a more general level there was further evidence of a lack of juridification in the demise of the power to create criminal offences through Advisory Committee references and the general lack of legislation to redefine the relationships between the Office and its regulatees. The Part II power to create new criminal offences was used only four times by the Office before being abandoned. It was seen as being too slow and too costly, and the political process necessary for a proposal to become law was inflexible. At the same time, it was argued that the general lack of legislation was significant largely because it highlighted the more consensual and less juridified nature of the alternative - codes of practice. It is notable, for instance, that few sectors were subject to legislation similar to the Estate Agents Act 1979, which put the relationship between the OFT and estate agencies on a statutory footing and provided the Office with powers to

withdraw the licences of individual estate agents. Instead, relationships were based on the negotiation of changes to the terms or implementation of codes of practice.

There was some evidence of an increasingly adversarial approach on the part of regulatees targeted by the Office under Part III of the Fair Trading Act and the Consumer Credit Act. Whilst the Office used both these powers sparingly and in a flexible manner, there were some companies which responded through lawyers, and occasionally the threat of judicial review and appeal. In the case of its Part III powers, this did have an effect on the Office's approach, making it more cautious and defensive. Nonetheless, very few legal challenges were actually brought, and the Office's use of its enforcement powers as powers of last resort runs counter to a firm conclusion of juridification. It is worth recalling also Lord Borrie's comments about the trends in credit licensing hearings, in which he argued that despite increasing adversarialism, this did not lead to a *process* of juridification as the Office still preferred to maintain informal contacts wherever possible. As was pointed out in Chapter 4, instead of an inexorable process of juridification, this evidence suggested a more mixed picture whereby the Office was doing its very best to avoid juridified contacts, and regulatees reacted diversely – some in an adversarial manner, attempting to make use of technical legal arguments, others preferring to co-operate and to try to reach consensus without the use of law.

In the area of unfair contract terms, however, regulations implementing a European Directive did have the effect of leading to the juridification of relationships between the Office and its regulatees. This was Type II juridification – law and legal considerations governing regulatory relationships outside the context of litigation or other formal and legal processes. This stands out as the only clear-cut case of juridification on the consumer protection side.

With the exception of unfair contract terms, the vast majority of relationships between the Office and its regulatees in the area of consumer protection were governed by non-legal considerations. In no area did the courts have much of a role, even after the introduction of the Stop Now Orders. The relationships between the Office and its regulatees in the field of consumer protection thus confirms the sense that law tends to contain only a background importance in the conduct of regulatory relationships.

Moreover, up until 1998, the evidence overwhelmingly points also to an absence of juridification between the Office and its regulatees in the field of competition policy. In the area of monopolies and mergers, original choices made as far back as 1948 in favour of an administrative rather than legal style of enforcement were still heavily influential. In many ways little had changed since then. Merger control, in particular, was characterised by a total lack of juridification, with the deliberate retention of as much flexibility in the system as possible. The temptation to introduce merger guidelines was consistently avoided, and the Office's approach to merger advice was consistently dominated by non-legal considerations – for instance, the likely political response to its advice in any particular case. Monopoly control was similarly informal and non-legal in nature, with the courts effectively bypassed because of the wide discretion available to the Office and other decision-makers under the Act. In both areas, the actual proportion of monopolies and mergers controlled by the Office of Fair Trading was very low.

The Competition Act 1980 also failed to lead to juridification, despite the expectation that it might lead to a body of case law. The way in which targets were chosen for investigation, the manner in which investigations were conducted, the absence of legal challenges, and the total absence of references to law and legal cases all indicated a lack of juridification.

Perhaps the most striking area of competition policy in which juridification was absent, however, was in the area of restrictive trade practices. The system, originally established in 1956, was legalistic and formalistic, based around the legal form of an agreement and requiring compulsory registration followed by adjudication in the Restrictive Practices Court. In practice, however, the Act was implemented largely through administrative means. Most of the Office's work in this area centred around getting agreements exempted from the formalities of the Act through section 21(2) of the Restrictive Practices Act 1976 - the "of no significance" clause. Sometimes, there would be much negotiation between the Office and parties to an agreement so that appropriate modifications could be made that would enable a section 21(2) exemption. The result was that only a tiny fraction of cases were actually heard in the Restrictive Practices Court, with the rest dealt with informally by the Office. Only in the case of the discovery of a secret cartel did the Office consistently make use of the formal provisions of the Act.

For 25 years therefore, the relationship between the Office and its regulatees in the field of competition policy was non-juridified. This changed, however, with the advent of the Competition Act 1998. The Act was important in impacting not just on the substance of UK competition policy, but also on the style of its enforcement, and it substantially juridified the relationship between the Office and its regulatees. The evidence for this was found not only in the way in which the Act was enforced since March 2000, and not only in the response of regulatees, but more basically in the Office's interpretation of the Act which was dominated by legal considerations.

It was also argued that the source of this juridification was to be found in the Competition Act itself, as opposed to decisions made by the Office of Fair Trading or its regulatees or the courts or any other actors. Essentially, sections 51 and 60 imposed a legalistic enforcement style on the Office, and invited investigatees to respond through the Competition Commission Appeals Tribunal. The only exception to this general proposition was a decision of the Appeals Tribunal, likely to increase further the juridification between the Office and complainants by increasing the number of replies that counted as decisions under the Act, thus necessitating more publications and enabling more appeals. Except for this Bettercare decision, juridification was entirely the direct result of provisions of the Act.

The following tables sum up the findings in the case of the Office of Fair Trading:

Type I juridification between the OFT and its regulatees (consumer protection): 1973-2002

INDICATOR	EVIDENCE
Frequent litigation ✗	No – although litigation threatened more often in the 1990s.
Coercive, inflexible regulatory strategy ✗	No – the exact opposite: the Office was as consistently flexible and informal as possible.
Reliance on formal, legal processes ✗	No – informal processes nearly always preferred.
Frequent prosecutions in response to breach of law ✗	Prosecutions rare, with negotiations preferred. If anything, fewer prosecutions relating to rogue traders and licensed creditors in 1990s.
High presence / involvement of lawyers ✓ ✗	Lawyers relatively unimportant, and did not occupy influential roles in the organisation. However, regulatees beginning to make greater use of lawyers in the 1990s, and greater role within the OFT in relation to unfair contract terms.

Type II juridification between the OFT and its regulatees (consumer protection): 1973-2002

INDICATOR	EVIDENCE
Explicit legal argument ✔ ✖	Became more common during 1990s, not only in the context of unfair contract terms, but also in relation to problem traders.
Regulatory contact seen as setting legal precedent ✔ ✖	Generally not relevant, with the important exception of unfair consumer contract terms.
High presence / involvement of lawyers ✔ ✖	Lawyers relatively unimportant, and did not occupy influential roles in the organisation. However, regulatees beginning to make more use of lawyers in the 1990s, and greater role within the OFT in relation to unfair contract terms.
References to law and legal cases ✔	Common as a basis for bargaining strategies.
Adoption of overtly legal values ✔ ✖	Preference for more bargaining strategies in the shadow of law indicated by demise of Part II power and a willingness to reach agreement without resorting to prosecution. However, natural justice considered important in hearings under Part III of the FTA and under the Consumer Credit Act.

Type I juridification between the OFT and its regulatees (competition): 1973-1998

INDICATOR	EVIDENCE
Frequent litigation ✖	No – extremely little litigation over this period.
Coercive, inflexible regulatory strategy ✖	No – the exact opposite: the Office was as consistently flexible and informal as possible.
Reliance on formal, legal processes ✖	No – informal processes nearly always preferred.
Frequent prosecutions in response to breach of law ✖	No, although secret cartels prosecuted more frequently in the 1990s.
High presence / involvement of lawyers ✖	No – at least not on OFT side.

Type II juridification between the OFT and its regulatees (competition): 1973-1998

INDICATOR	EVIDENCE
Explicit legal argument ✖	Generally unimportant.
Regulatory contact seen as setting legal precedent ✖	Generally not relevant. Hope expressed that this would happen in the implementation of the Competition Act 1980, but not done in practice.
High presence / involvement of lawyers ✖	No – at least not on the OFT side.
References to law and legal cases ✖	Not used as structure of monopoly, merger and restrictive practices control non-legalised.
Adoption of overtly legal values ✖	No – for instance, in relation to merger controls, option of introducing guidelines resisted.

Type I juridification between the OFT and its regulatees post-Competition Act 1998

INDICATOR	EVIDENCE
Frequent litigation ✔	Litigation much more common than previously with frequent appeals – in some cases even by third parties
Coercive, inflexible regulatory strategy ✔	Indicated by the widespread use of prosecution, and the absence of negotiation during a prosecution.
Reliance on formal, legal processes ✔	OFT's procedures now determined by legal rules and followed rigidly
Frequent prosecutions in response to breach of law ✔	Far more prosecutions than previously – more investigations launched in two years than in the first twelve years since Competition Act 1980.
High presence / involvement of lawyers ✔	Large increase in OFT lawyers, who also occupied important positions within the organisation

Type II juridification between the OFT and its regulatees post-Competition Act 1998

INDICATOR	EVIDENCE
Explicit legal argument ✔	As indicated by OFT decisions and the content of appeal submissions
Regulatory contact seen as setting legal precedent ✘	Less important perhaps as large EC case law already followed.
High presence / involvement of lawyers ✔	Large increase in OFT lawyers, who also occupied important positions within the organisation
References to law and legal cases ✔	Frequent references to EC law mandated by section 60. Legal argument crucial in determining outcome.
Adoption of overtly legal values ✔	Rigid adherence to legal procedure and due process norms with appeals in mind. Legal tests applied.

The case of the Office of Fair Trading thus shows up mixed results. In general, there was a lack of juridification that related to the Office's persuasive regulatory strategy. However, in the area of unfair contract terms, a persuasive regulatory strategy was accompanied by a focus on law and legal considerations. And in the area of competition policy, a new legal framework completely changed the nature of relationships between the Office and its regulatees, to the extent that they were now characterised by substantial juridification.

General evidence relating to the extent of juridification

As this thesis only takes two case studies, and especially as it was not possible to select these case studies on the basis of a current theory of juridification, it is difficult to use

them to make valid generalisations as to the extent of juridification generally within the UK. Nonetheless, it remains interesting to see how these findings compare with the more general evidence of juridification as it has been defined in the course of this thesis.

In Chapter 1, it was noted that there have recently been several studies claiming trends of juridification (defined narrowly) in the context of a number of political and regulatory relationships. These include the areas of utilities regulation, the central-local government relationship, financial services regulation, military relations and competition policy. However, it was also apparent that studies tended either to focus on juridification in a particular field, without considering any general trends, or to see juridification as a constant rather than as a variable. We were left then with little sense of how widespread this phenomenon has become.

In addressing the general question of the importance of law in politics, legal scholars might wish to focus on the dramatic development of public law since the 1960s, emphasised in many textbooks. McEldowney (2002: 7), for instance, argues that "public law of the UK has come of age". Fordham (2001: 536) states that "it is axiomatic that the law of judicial review is shifting, as it develops and matures", whilst Supperstone and Goudie (1997: vii) note that "during the last three decades administrative law in the United Kingdom has been transformed". The expert commentary in these practitioners' texts is, moreover, matched by that of leading judges: for instance, Lord Diplock, argued that the rapid development of a rational and comprehensive system of administrative law was the greatest achievement of the English courts in his judicial lifetime,[1] and Lord Bingham MR wrote that "judicial review was the boom stock of the 1980s. Unaffected by recession, the boom has roared on into the 1990s".[2] There are many other examples.[3] Some commentators also back up their claims with figures, such as Bradley and Ewing (2003: 631) who support their comment that "during the last 25 years, there has been, and continues to be, a remarkable growth in litigation seeking judicial review of the decisions of public

[1] R v Inland Revenue Commissioners, ex parte National Federation of Self Employed [1982] AC 617, 641.
[2] In the introduction to Gordon (1996).
[3] For a list of similar judicial comments, see Fordham (2001: 536-7)

authorities", with the fact that 5298 judicial review applications made in 2002 compares to 3739 in 1997 – an increase of over 40% in five years.[4]

It is noticeable though that the few legal textbooks that actually discuss the *impact* of this increase in judicial review applications tend to be somewhat equivocal. Supperstone and Goudie (1997: 1.15-1.16) assert that "the growth of judicial review, though it still exercises what de Smith characterised as a 'sporadic and peripheral' influence on public administration, has begun to have significant impact on the consciousness of administrators." Harlow and Rawlings (1997: 530) first note that "litigant-driven, judicial review is indeed sporadic. A minority of cases concern central government and these are limited to a minority of departments. Its outreach too is limited by cost and chance." Further on though, it is suggested that "statistics only tell part of the story. They cannot measure the 'ripple' effect of one decision on, perhaps, thousands of similar cases: a familiar premise of the test case... [L]itigation has radiating effects, underpinning negotiation 'in the shadow of the law' in multiple venues outside the courts." Yet later, it is thought that "a more realistic hypothesis is that judicial review has only a sporadic, peripheral and temporary impact on government policy".[5] Bradley and Ewing (2003: 638-9) concur with this latter view, extending it to the general status of law within governance as follows:

> It is not possible to describe the administrative process in terms of law alone. There are many tasks (for example, budgeting, co-ordination and planning) to which law is not of primary relevance. Many politicians and administrators are likely to view law instrumentally as a means of achieving social or economic policies...
>
> By contrast with taxation, in many areas of government the nature of the legal framework is deliberately skeletonic, so as to allow for wide discretion on the part of the government concerned in promoting policies that are nowhere laid down in statutory rules... In principle, discretionary powers are subject to control by the courts. In practice, the exercise of discretion is often closely controlled through policy decisions taken by ministers or by departmental rules which lay down how officials should exercise their powers. At one time, such policies and rules were often protected from publication outside Whitehall, but the more open approach to government that now exists requires disclosure of all policies and rules that are relevant to decision-making in individual cases.

[4] For trends in judicial review applications generally, see Bridges et al (1995) and (2000). In the latter article, they note that whilst applications have been rising steadily, this has not been accompanied by a similar rise in the number of cases actually heard, due to the increasing use of settlements as a regulatory mechanism.

[5] The uncertainty here can be attributed directly to the general paucity of evidence relating to judicial review, especially its impact on the decisions and procedures of public bodies. See generally Richardson and Sunkin (1996) and for an exception, Halliday (2000).

> Many officials are therefore concerned with administering government policies rather than with administering law as such...

Thus it can be seen that there is substantial disagreement between commentators.[6] The debate has a certain resonance with the discussion in Chapter 1 as to the proper definition of juridification. Defined widely, it is possible to see the influx of law everywhere. For instance, it is now common for law firms, especially the big law firms, to have regulatory departments.[7] There is evidence also of a general "enlargement of the legal world",[8] with increases in litigation,[9] lawyers[10] and legal rules.[11] Defined more narrowly as law in the foreground, governing and dominating relationships, suddenly law does not always seem quite so important.

We turn next to the main methodological points arising from the case studies: the value and utility of the indicators and the empirical understanding of law that underpins the definition of juridification.

Methodological points arising from the case studies

It will be recalled that one of the principal aims of this thesis was to develop an empirical approach to juridification. In Chapter 1, a definition of juridification was defended and adopted, and some of the empirical issues relating to that definition were

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[6] Halliday's (2000: 119) conclusion, on the basis of three case studies relating to housing allocation, is that "even if the structural contexts of administrative law permitted a flourishing legal conscientiousness, the limited focus of judicial review substantially reduces its potential to influence the multiple exercises of discretion which the administrative process entails", and thus that the effect of judicial review on bureaucratic decisions is extremely limited.

[7] Source: www.legal500.com which recommends virtually all of the biggest law firms in the UK in the area of regulation. Firms listed include Clifford Chance, Herbert Smith, Lovells, Allen & Overy, Freshfields Brukhaus Deringer, Simmons & Simmons, DLA, SJ Berwyn, Ashurst Morris Crisp, Norton Rose, Linklaters Baker & McKenzie and Dechert.

[8] See Galanter (1992)

[9] "In England and Wales, original proceedings in the High Court increased from 140,003 in 1963 to 261,761 in 1988... There were comparable increases in civil appeals and 'a striking growth in the numbers and caseload of tribunals'" – Galanter (1992: 8).

[10] In 1960, there were 20,988 lawyers in England and Wales. By 1985, there were a total of 51,857.

[11] Galanter (1992: 6) points out that the average number of pages added annually to the statute book almost doubled from the 1950s to the early 1980s.

outlined. The chapter also set out some indicators of juridification. In Chapters 3 to 6, these indicators were used to summarise the empirical findings of the case studies. In this section, these indicators are considered in light of how well they were able to capture the evidence of the case studies. The discussion then moves on to the question, first asked in Chapter 1, as to whether the growth of and reliance upon soft law should be considered as evidence of juridification.

Indicators of juridification

In order to assess the utility of the indicators, we start by putting the results into an overarching form, as follows:

REGULATOR / INDICATOR	CRE 1977-82	CRE 1983-87	CRE 1988-92	CRE 1993-2000	OFT (consumer protection)	OFT (competition) 1973-98	OFT (competition) 1998-
Frequent litigation	✓	✓✗	✗	✗	✗	✗	✓
Coercive inflexible regulatory strategy	✓	✓✗	✗	✗	✗	✗	✓
Reliance on formal, legal processes	✓	✓✗	✗	✗	✗	✗	✓
Frequent prosecutions in response to breach of law	✓	✓	✗	✗	✗	✗	✓
High presence / involvement of lawyers	✓	✓✗	✗	✗	✓✗	✗	✓
Explicit legal argument	✓	✓	✓✗	✓✗	✓✗	✗	✓
Regulatory contact seen as setting legal precedent	✓	✗	✗	✗	✓✗	✗	✗
References to law and legal cases	✓	✓	✓	✓✗	✓	✗	✓
Adoption of overtly legal values	✓	✓✗	✗	✗	✓✗	✗	✓
OVERALL (out of 9)	9	5½	1½	1	3	0	8

The table confirms that there were two clear-cut cases of juridification: the CRE between 1977 and 1982 and the OFT in the field of competition policy since the 1998 Act. There were also two cases of partial juridification: the CRE between 1983 and 1988 and the OFT in the field of consumer protection – although the latter is misleading in that many of the positive findings relate specifically to unfair consumer contract terms rather than to

consumer protection as a whole. In all the other cases, law was effectively not governing regulatory relationships.

In very general terms then, these indicators can be seen to give quite an accurate impression of the place of law in regulatory relationships. Their utility may be limited, however, by the ease with which they can be applied. Whilst the data for some of these indicators may be obtainable without detailed qualitative study (for instance, the extent of litigation and the number of prosecutions), most of the remaining indicators would require detailed qualitative study to use. This would suggest generally that several indicators would need to be used, accompanied by a consideration of how they operated in practice, in order to establish whether or not law is dominating or governing a particular relationship.

It is possible to explore this further however, by focusing in on specific indicators. In order to consider the accuracy of the indicators and the way in which they inter-relate, consider now the same table, but this time with a horizontal rather than vertical focus:

INDICATOR \ REGULATOR	CRE 1977-82	CRE 1983-87	CRE 1988-92	CRE 1993-2000	OFT (consumer protection)	OFT (competition) 1973-98	OFT (competition) 1998-	OVERALL (out of 7)
Frequent litigation	✔	✔✕	✕	✕	✕	✕	✔	2½
Coercive inflexible regulatory strategy	✔	✔✕	✕	✕	✕	✕	✔	2½
Reliance on formal, legal processes	✔	✔✕	✕	✕	✕	✕	✔	2½
Frequent prosecutions in response to breach of law	✔	✔	✕	✕	✕	✕	✔	3
High presence / involvement of lawyers	✔	✔✕	✕	✕	✔✕	✕	✔	3
Explicit legal argument	✔	✔	✔✕	✔✕	✔✕	✕	✔	4½
Regulatory contact seen as setting legal precedent	✔	✕	✕	✕	✔✕	✕	✕	1½
References to law and legal cases	✔	✔	✔	✔✕	✔	✕	✔	5½
Adoption of overtly legal values	✔	✔✕	✕	✕	✔✕	✕	✔	3

The table is interesting, as it suggests that the Type I indicators tend to go together far more than the Type II indicators. In other words, there seems to be a particular connection between litigation and the type of regulatory strategy followed, the presence and

involvement of lawyers and the number of prosecutions. In the case of the Commission for Racial Equality (1977-82), the nature of these connections was shown clearly: a coercive regulatory strategy led directly to a high number of formal investigations, an adversarial backlash and the central involvement of lawyers on both sides. It would seem that the converse is also true: a persuasive strategy with few prosecutions is less likely to generate litigation, and lawyers are less important in the contacts between the sides. This was generally the case, for instance, with the Office of Fair Trading and its regulation of consumer protection. Thus in terms of Type I juridification, the table implies that even one or two factors may serve as accurate indicators. It can be concluded then that indicators could be used relatively easily in a large-scale study of Type I juridification.

With Type II, however, the table reveals a more complex picture. References to law and legal cases are extremely common – highlighting the fact that even in those regulatory relationships which are not being governed or dominated by law, there can still be an important structuring role for law. Thus even when the CRE moved away from a deterrence strategy, it still used law as one lever for reaching settlements. By contrast, the perception of regulatory contact as setting legal precedent is relatively rare. However, this does not mean that it is of minor importance: it was, for instance, the key distinguishing feature of the juridification of unfair consumer contract terms regulation. Finally, it should be said that the Type II indicators are generally more difficult to apply, relying generally on more subjective interpretations of evidence, and the variations within the table imply that there are unlikely to be shortcuts. The Type II indicators are thus unlikely to be of much use in the context of a large-scale study. Instead their use rests in providing a focus for qualitative studies.

The above table is useful for another reason though, in addition to what it says about the indicators themselves. This is that it serves as a way of emphasising some of the patterns in the case studies. For instance, it highlights the fact that juridification is not an either / or category: there are levels of juridification, and it is perfectly possible for law to play an important role in some respects but not others. In the case of the OFT and its contacts with "rogue traders" under Part III of the Fair Trading Act, there was a reliance on informal processes and a general absence of litigation, with prosecutions rare. Yet there was also a trend during the 1990s of regulatees making greater use of lawyers and relying

on legal argument. Thus whilst law was not governing the regulatory contacts, it was occasionally brought to the foreground of these relationships. Next, whilst the table confirms the link between the deterrence strategy of regulation and Type I juridification, it indicates that Type II juridification is possible even under a persuasive strategy. This is an important point, to which we will return before the end of this chapter. Finally, it confirms that the categories of Type I and Type II juridification are indeed useful ones. The theoretical argument made in Chapter 1 that it is perfectly possible for juridification to exist without litigation or the use of formal, legal processes, has been confirmed by the case studies, with the most important example being the regulation of unfair consumer contract terms.

Soft law and juridification

Should a growing reliance upon and use of soft law be taken as evidence of juridification? In Chapter 1, this question was discussed and the provisional answer given that:

> In the absence of any straightforward way of discovering the bindingness of soft law, it will be assumed in this thesis that this should be left open to empirical investigation. Thus only if it appears that soft law is treated as legally binding by the parties will it be assumed that this constitutes evidence of juridification. In general therefore, it is references to and reliance upon hard law that is seen as constituting the more reliable evidence.

It is submitted, on the basis of an examination of the evidence of the case studies, that this approach was a useful one, and that researchers should, in general, be cautious about assuming that the growth in soft law implies juridification. This is because tools such as codes of practice or guidelines are often viewed less as legal instruments governing regulatory relationships than as a starting point for negotiations or as informational tools.

Consider some of the specific examples of the use of soft law. In the case of the Commission for Racial Equality, codes of practice in the areas of employment and housing were used primarily as a springboard for a new promotional strategy. Whilst the codes did have a clearly defined legal effect, they were not binding and rather than govern the relationships between the Commission and its regulatees, they provided a reference point for negotiations. In the case of the Office of Fair Trading, codes were used as a substitute

for legalised regulation, and indeed the preference for negotiations based on these codes was strong evidence of the Office's non-juridified relationships with its regulatees.

The case of the OFT also tells us much about the insignificance of the name of an instrument. Merger guidelines produced during the 1970s and 1980s may have been called guidelines; yet they prescribed virtually nothing, merely outlining the normal administrative procedures employed and the types of considerations taken into account. In sharp contrast, the guidelines produced by the Office under the Competition Act 1998, were very evidently intended as binding legal documents: they set out rights and duties, relevant case law, and relied upon statements made in Parliament in a fascinating application of the Pepper v Hart rule.[12]

The case studies thus highlight the need to be cautious in assuming that the use of soft law implies juridification. When codes of practice are viewed as an acceptable form of self-regulation that obviates more legalised and coercive alternatives such as legislation, it is positively misleading to see them as evidence of juridification, and falls into the trap of equating juridification with simply more law. In general, the growth of such instruments may reflect trends other than juridification. For instance, Bradley and Ewing (2003: 639) argue that the increasing appearance of such instruments may be less a sign of juridification than of increasing transparency. According to this view, what has changed is not so much the amount of soft law but its visibility. On the same lines, it has also been suggested that the growth of soft law may simply relate to computerisation, such that what might previously have been conveyed in meetings can now be distributed electronically.[13] In any case, the crucial point is that it is the way in which soft law operates in practice, how it is seen by the parties and whether it is treated as legally binding, that matters – not its mere presence.

[12] Another example that can be added to this list is the set of guidelines produced by the Office for Trading Standards Departments as to the proper implementation of Part III of the Fair Trading Act. See the arguments in Chapter 4, emphasising how these guidelines were not intended to be legally binding.

[13] This was suggested to me by Professor Carol Harlow, who pointed out that in a university setting what used to be agreed in departmental meetings was often now circulated in rule form through e-mail – less a sign of legalisation than of a new and convenient method of communication.

Explaining juridification and its absence in the case studies

Why, in general, did juridification fail to occur, and what do the cases characterised by juridification have in common?

In the case of the Commission for Racial Equality, it should be recalled that a coercive, deterrence-based regulatory strategy was initially predicted by the regulatory strategy literature – indeed, it was because of this that the case study was chosen in the first place. A number of factors gave rise to this prediction: the close contacts with pro-regulation groups, the make-up of its staff, the lack of direct legal and political controls and the strong investigatory powers under the Race Relations Act for which the Commission's predecessor – the Race Relations Board – had campaigned. The initial enforcement strategy of the Commission was thus consistent with the claims of the regulatory strategy literature, as set out in Chapter 2.

In practice, the Commission's deterrence-based approach implied substantial juridification. Consistent with the claims of the regulatory strategy literature,[14] the evidence confirmed the intimate connection between this strategy and a focus on legal rules and on processes over outcomes. The rigidity of the Commission once a formal investigation had been launched was highlighted by a number of cases where, had the Commission's primary objective been to promote racial equality and good race relations, it might have considered reaching settlements and discontinuing the investigations, and yet the Commission did not do so. Evidence was also presented to indicate that, in the early years of its work, the Commission refused to accept binding undertakings in lieu of non-discrimination notices largely because it believed that this would be unlawful under the Race Relations Act.

Moreover, the Commission's strategy also led to further juridification. Its regulatees responded through legal adversarialism, and this recourse to the courts encouraged the Commission to focus still further on strict legal interpretations of its powers in an attempt to make its decisions "court-proof".

However, in the case of the CRE, there were counter-reactions to juridification that led directly to a process of de-juridification. The new process was sparked off by some

[14] See Chapter 1 and the next section of this chapter for a more detailed consideration of where this claim appears within the literature.

catalysts: in particular, the legal cases of Hillingdon and Prestige and the political judgement of the Home Affairs Select Committee, as well as the appointment of a new Commission Chairman. But these events did not occur by chance: they all had common roots in the effects of juridification. Two-thirds of all formal investigations started by the Commission were affected by litigation – this extraordinary statistic caused organisational paralysis: a backlog of cases, low morale amongst staff, and a general lack of confidence in conducting further investigations. Thus the Commission's de-juridifying decisions with respect to formal investigations was caused by the effects of (Type I) juridification itself.

What explains the subsequent further de-juridification of relationships between the CRE and its regulatees? In this case, the factor that stands out is the need to justify activities in terms of their cost effectiveness. This was due to two complementary factors: the general push from government for public management reform, and the accompanying budgetary cutbacks. In this context, the costs of juridification simply could not be afforded: formal legal contacts were expensive in comparison with the use of informal approaches, and litigation was a further cost that was to be avoided. On the part of regulatees, the possibility of avoiding formal action was a significant incentive which, in itself, encouraged a non-confrontational stance. Formal legal contacts were thus replaced by negotiation and bargaining in the shadow of the law.

To sum up: in the case of the Commission for Racial Equality, the costs of juridification proved too high to be sustainable, especially within a context of political pressures and budgetary constraints. There was also an element of learning from experience: informal approaches often proved more productive than heavy-handed, legalistic contacts.

In the case of the Office of Fair Trading, some similar themes were present: the costs of juridification meant that it was deliberately avoided, and there were other incentives to maintain informal contacts. First though it is necessary to recall the arguments in Chapter 2 that the regulatory strategy literature predicted an initial lack of juridification due to a combination of factors: the institutional history of competition policy prior to the Fair Trading Act 1973, the civil service staffing arrangements of the Office, the strength of pro-business groups relative to consumer groups, the institutional fragmentation of many aspects of policy, and the high level of political oversight possessed by the Secretary of

State. All these factors were influential in the subsequent nature of regulatory relationships. With respect to competition policy prior to 1998, the Office continued with a style of regulation that was very much in keeping with pre-1973 policy. It could be – although this was not demonstrated in Chapter 5 - that the predominance of civil servants working in the Office, and especially the number of secondments from the Department of Trade and Industry, was an important factor in this continuity. What was shown clearly in Chapter 5, however, was the central role of the Secretary of State: effectively this ruled out an interventionist approach on the part of the Office. In the case of merger control, the advice given by the Office even tended to be based partly on the anticipated decision by the DTI.

Legal design factors also limited the scope for juridification in many policy areas. The Part II powers to create criminal offences became useless to the Office because of the delays and inflexibility of the whole process. In this case, institutional fragmentation combined with certain weaknesses in the legal design, such as the inability of the Secretary of State to renegotiate the details of a proposal. The Part III powers to prosecute rogue traders were also used rarely, because of the reliance on Trading Standards Departments and the need to prove "persistent conduct" in the courts. Gradually, the delays and risk of losing a case meant that the Office tried to resolve matters without using the power at all, except as a latent threat. In competition policy, the structure of control with references to the MMC introduced further limitations on the Office's ability to choose its own style of enforcement. With respect to restrictive trade practices, the desire on all sides to avoid lengthy, expensive proceedings in the Restrictive Practices Court was the driving force behind negotiations between the Office and parties to agreements in lieu of juridification. Weaknesses in the legislation, such as the requirement for the Office to have evidence of a secret cartel before it could begin investigating it, further limited the possibility of a more interventionist regulatory policy.

Thus in the case of the Office of Fair Trading, the structure of the regulatory system militated against juridification. Whilst the discretion of the Director General to set the policy agenda was high, his coercive powers were relatively weak, and his political controls strong. In addition though, especially in the area of competition policy, by the time the Office was created, there was already a long and established tradition in terms of the nature of government intervention. Wilks (1999) has argued that competition policy itself

can be considered an institution with "regulative, normative and cognitive dimensions" and having a "long-term, systematic and predictable effect on human behaviour".[15]

It should be added that, as with the case of the CRE, resource constraints were also important in the case of the OFT, constraining its ability to prosecute more widely – even had it wished to do so. There were several examples of this noted in Chapters 4 and 5: the low budget given to enforcement in the late 1980s due to the concentration on processing credit licensing, and the low number of investigations under the Competition Act 1980. Chapter 5 also saw a converse example: a decision by the Office to increase the proportion of its budget devoted to investigating secret cartels in the early 1990s led directly to an increase in prosecutions under the Restrictive Trade Practices Act 1976 and thus to an increase in the number of relationships between the Office and its regulatees that were characterised by juridification.

Finally, it is interesting to note also the interaction effects of certain causal variables. Legal design weaknesses may not, in themselves, have prevented the regulatory agencies from trying to utilise their powers extensively – however, when combined with budgetary constraints, they became of crucial importance. A favourable political environment (in terms of support for strong regulation) tended also to lead to further resources, as was the case with the OFT following the Competition Act 1998, and the converse was also true, as the CRE found in the 1980s.

The following table sums up the main causes of the lack of juridification in the two case studies. It can be seen that there are some common themes: budgetary constraints, legal design factors, political environment factors and the apparent success of the persuasive approach to regulation. As the table in Chapter 2 (reproduced from Kagan (1994)) indicates, all of these are flagged up in the regulatory strategy literature as significant. More basically though, the general absence of juridification and its connection to the predominance of the persuasive regulatory strategy, has confirmed key predictions of this literature, as set out towards the end of Chapter 1.

[15] Wilks (1999: 159, 339-340)

CASE	CAUSES OF NON-JURIDIFICATION
CRE (1983-2000)	Legal and political pressures, budgetary constraints, apparent superiority of persuasive strategy.
OFT (consumer protection)	Persuasive regulatory strategy in turn influenced by a combination of staffing arrangements, strength of pro-business groups relative to consumer groups, legal design factors and budgetary constraints
OFT (competition prior to 1998)	Persuasive regulatory strategy in turn caused by institutional history of competition policy, staffing arrangements, strength of pro-business groups, legal design, budgetary constraints, success of informal processes.

The case of the Office of Fair Trading did also, however, offer up two clear cases of juridification: unfair contract terms and competition policy post-1998. Unlike juridification in the early years of the Commission for Racial Equality, these two areas of regulation have, moreover, remained juridified. Strikingly, they share an immediate cause: both cases were the direct result of legislation that harmonised the UK position with EC law. In the case of competition policy, this was done to such an extent that a special clause, section 60, was included in the Act to ensure that EC law would be a central consideration for regulators and regulatees alike. In the case of unfair contract terms, the requirements of the EC directive led directly to overtly legal exchanges, and the incentives for the law to be worked out on the ground rather than in the courts hardly detracted from the need for consistent legal interpretations and thus a body of case law.

The regulatory fields of both unfair contract terms and competition thus had something in common. Juridification did not stem from the Office's style of regulation, it did not stem from the attitude of regulatees, and it did not stem from decisions of the courts. Rather, juridification was *imposed* on both regulatory fields through the introduction of EC jurisprudence into UK law.

The causes of juridification in the case studies can be summed up by the following table:

CASE	CAUSES OF JURIDIFICATION
CRE (1977-82)	Deterrence regulatory strategy (caused by institutional history, staff make-up, and close links with pro-regulation groups), and poor legal design.
OFT (unfair contract terms)	Legal demands of transposing EC law into UK law, the structure of legal control.
OFT (competition policy from 1998)	Legal demands of transposing EC law into UK law, legal design factors.

The Office of Fair Trading and Commission for Racial Equality were only two case studies, and thus it is necessary to be cautious about making generalisations without further testing. Nonetheless, it is also noteworthy how many of the causes of juridification and its absence within these case studies match the causes of variations in regulatory strategy as they appear in that literature. To that extent, and subject to the arguments in the next section, the case studies serve to confirm the importance of this literature in understanding the phenomenon of juridification.

Implications of the findings for the regulatory strategy literature

The regulatory strategy literature contains many findings that are relevant to a study of juridification. In this particular study, it successfully predicted the trends in the case of the Commission for Racial Equality: both the initial juridification and the subsequent dominance of the persuasive strategy and the lessening in importance of law in the relationships with its regulatees. In the case of the Office of Fair Trading, it successfully anticipated the general dominance of the persuasive strategy and the general lack of juridification that ensued. These predictions were set out in Chapter 2 of this thesis, and subsequently confirmed in the case studies.

However, with respect to two particular claims, the findings of this thesis suggests that the literature may need revision. The first of these is the connection made between regulatory strategy and the presence or absence of juridification. The second is the dominance of the persuasive regulatory strategy. In the next two sections therefore, each of these claims are reviewed in turn.

The claim of the connection between regulatory strategy and juridification

The regulatory strategy literature assumes that, in practice, there tends to be a connection between a deterrence-based coercive regulatory strategy and a general focus on legal rules. This is because the coercive strategy tends to be rigid in outlook. If particular prosecutions are intended to "send a message" not only to the particular violator concerned

but also to other potential violators, there is little that is likely to persuade the regulator to drop the prosecution. The key question is whether or not the rules have been broken. This association is made by, amongst many others, David Vogel (1986: 21) claiming that "on balance, the American approach to environmental regulation is the most rigid *and rule-oriented* to be found in any industrial society; the British, the most flexible and informal", and Hawkins and Thomas (1984: 13) who state that "in a deterrence system... the enforcement style tends to be accusatory and adversarial, leading to *routine reliance on formal legal processes*".[16]

The persuasive regulatory strategy, on the other hand, is unlikely to have such a reliance on rules and formal, legal processes. On the contrary: the defining characteristic of this approach to regulation is its focus on outcomes rather than processes. As it focuses less on past acts (whether the law has been broken) than on future goals (how to secure future compliance), it is intrinsically more flexible. Moreover, the place of law is inherently different under this model: it becomes facilitative, a way of structuring negotiations, a latent threat to be used only in the final resort. Indeed, it is even argued (Reiss 1984: 24) that the use of law is seen as a sign of failure in such a strategy, emphasising the inability of the regulator to secure compliance through other means.

Thus, as the passage quoted in Chapter 1 from Shover et al (1986: 10) made clear, there is a natural connection in practice between the deterrence strategy and juridification, and between the persuasive strategy and its absence. The deterrence strategy encompasses "an overriding drive towards the rationalisation of all aspects of the regulatory process".[17] It tends to imply "the reliance on formal, precise and specific rules; the literal interpretation of rules, the reliance on the advice of legal technicians, the quest for uniformity and the distrust of and an adversarial orientation towards the regulated". The persuasive strategy, on the other hand, has a "dominant orientation towards obtaining compliance with the spirit of the law". Under this strategy, there is a tendency towards "general, flexible guidelines, the discretionary interpretation of rules, (and) bargaining between agency and regulated industry conducted by technical experts".

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[16] emphases added.

[17] Note how this reflects one of the main arguments put forward by Loughlin (1996) to explain juridification – the trend in modern society to rationalise.

It is assumed therefore that different regulatory strategies imply very different roles for law. Yet the case of the Office of Fair Trading throws up an intriguing possibility: that it is perfectly possible for a persuasive regulatory strategy to be accompanied by substantial juridification. The particular field where this has occurred is in the regulation of unfair consumer contract terms. Contact between the Office and its regulatees in relation to unfair terms has been based undeniably around a persuasive strategy, characterised by continuing discussions and the general absence of litigation. At the same time, however, contacts have been extremely legalistic and technical, focused on the interpretation of rules and very self-consciously intended to establish the law on the ground. That the regulatory strategy literature has not picked up on this combination reflects the fact that it is relatively new – a direct result of the increasing clash of UK-style regulation and the need to incorporate the requirements of an EC Directive.

The claim of the dominance of the persuasive regulatory strategy

In Chapter 1, it was shown that one of the main claims of the regulatory strategy literature was the dominance of the persuasive strategy. Importantly, this was more than a descriptive claim: it was linked to a number of other claims, including the claim that the persuasive strategy is a superior strategy, and claims that there were inherent reasons why it was likely to be far more common than the deterrence strategy. Before showing how the empirical findings of this thesis might impact on this, it is worth setting out these arguments in a little more detail.

One of the main reasons why the persuasive strategy was assumed to prevail was a normative reason – that it was simply more effective. For instance, Veljanovski (1991: 175) argues that "discretionary enforcement shifts the cost-effectiveness decision out of the rule-making phase of the regulatory process onto the enforcement official who can be expected to have more detailed knowledge of the compliance potential of different classes of offenders". He further argues that the use of prosecutions as a threat offers the violator incentive for compliance. Meanwhile, Ayres and Braithwaite (1992) consider a number of disciplinary perspectives to argue that a 'tit-for-tat' or responsive regulation approach is the most rational. Under this approach, the bulk of regulatory contact is persuasive, with

sanctions only used if this strategy is failing to secure compliance. Hutter's (1997) 'insistent' strategy is in a similar vein.

There are a number of other reasons advanced through the literature to arrive at this prediction that the persuasive strategy would dominate, some attracting greater empirical support than others. These include claims based on budgetary constraints – for instance, Clarke (2000) argues that the predominance of the persuasive strategy is explained at least partially by "the impossibility of using coercion extensively enough to achieve success given the imbalance of resources between most regulators and regulatees". And in Chapter 1, the influential work of Vogel (1986) was cited – a piece claiming that the differences in styles of regulation between the US and the UK are explained by different institutional histories and different historical relationships between government and business. Both of these claims have found support in this thesis, as was summarised in the last section.

Despite this general support however, there is one case in this thesis that fails to conform to the prediction of the literature that the persuasive strategy will be predominant. This is the case of the Office of Fair Trading and its regulation of competition since the Competition Act 1998, in which a persuasive strategy has given way to a strategy which is contains most of the features of the deterrence strategy: frequent prosecutions, a relatively rigid and rule-orientated approach to those prosecutions, and generally heavy reliance on law and legal processes. The most proximate cause of this was legal design: sections 51 and 60 which essentially forced juridification onto the Office. More generally though, the emergence of juridification and the resulting deterrent strategy again stems from the inherent difficulties of incorporating EC law into a UK context.

The impact of EC law on the nature of UK regulation thus emerges as a significant finding of this thesis. In both of the recent cases in which it was discovered, juridification came directly from Europe. Juridification in the case of the CRE proved not to be sustainable. It was caused by a deterrence strategy and soon gave way to a persuasive strategy with far less of a reliance on law. But recent juridification in the case of the OFT may well be here to stay: it differs from the juridification in the CRE case as rather than being caused by a deterrence strategy, it has helped to give rise to it.

Conclusion

In general, this thesis has provided support to the existing literature on regulatory strategies in two main ways. Firstly, it has confirmed that juridification, defined as the governing of regulatory relationships by law and legal considerations, does not occur as often as a cursory glance through the juridification literature might suggest. Instead, the place of law in regulatory relationships is often complex, and it varies – sometimes dominating relationships, sometimes remaining in the background. Most of the time though, relationships are not governed or dominated by law to the extent that they should be described as juridified. Secondly, it has confirmed that the causes of this general absence of juridification are in line with previous studies of regulatory strategy. Legal design factors, resource constraints, political constraints, institutional history and the apparent success of the persuasive regulatory strategy often combine to push law to the background, with regulator and regulatee either preferring or being compelled to concentrate on extra-legal contacts.

However, this general support is qualified by two specific findings. The first of these is the finding that regulatory strategy is not always connected to juridification in the way claimed by the regulatory strategy literature. The second is the finding that the persuasive strategy is not always predominant, and in particular can be threatened by juridification imposed from the outside. The common factor in each of these findings is that they stem from the recent need to import EC norms into UK regulation. If the link between this process and juridification is confirmed through further testing, we might be seeing the beginning of a trend in UK regulation, with law appearing far more regularly in the foreground of regulatory relationships.

outlined. The chapter also set out some indicators of juridification. In Chapters 3 to 6, these indicators were used to summarise the empirical findings of the case studies. In this section, these indicators are considered in light of how well they were able to capture the evidence of the case studies. The discussion then moves on to the question, first asked in Chapter 1, as to whether the growth of and reliance upon soft law should be considered as evidence of juridification.

Indicators of juridification

In order to assess the utility of the indicators, we start by putting the results into an overarching form, as follows:

REGULATOR / INDICATOR	CRE 1977-82	CRE 1983-87	CRE 1988-92	CRE 1993-2000	OFT (consumer protection)	OFT (competition) 1973-98	OFT (competition) 1998-
Frequent litigation	✓	✓ ✗	✗	✗	✗	✗	✓
Coercive inflexible regulatory strategy	✓	✓ ✗	✗	✗	✗	✗	✓
Reliance on formal, legal processes	✓	✓ ✗	✗	✗	✗	✗	✓
Frequent prosecutions in response to breach of law	✓	✓	✗	✗	✗	✗	✓
High presence / involvement of lawyers	✓	✓ ✗	✗	✗	✓ ✗	✗	✓
Explicit legal argument	✓	✓	✓ ✗	✓ ✗	✓ ✗	✗	✓
Regulatory contact seen as setting legal precedent	✓	✗	✗	✗	✓ ✗	✗	✗
References to law and legal cases	✓	✓	✓	✓ ✗	✓	✗	✓
Adoption of overtly legal values	✓	✓ ✗	✗	✗	✓ ✗	✗	✓
OVERALL (out of 9)	9	5½	1½	1	3	0	8

The table confirms that there were two clear-cut cases of juridification: the CRI between 1977 and 1982 and the OFT in the field of competition policy since the 1998 Act

[11] Galanter (1992: 6) points out that the average number of pages added annually to the statute book almo doubled from the 1950s to the early 1980s.

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