National Competition Law and the Guidance on Article 82 EC: the UK Experience

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- The treatment of unilateral conduct in the UK: the historical context
  - Monopolies and Restrictive Trade Practices Act 1948
    - Discretionary power given to the Government to refer 'monopoly situations' (and 'complex monopoly situations') to the Monopolies and Restrictive Practices Commission
    - The Commission's remit was to determine whether conduct was occurring that could be harmful to 'the public interest'

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- The treatment of unilateral conduct in the UK: the historical context (continued)
  - The Commission could make recommendations for remedies
  - The Commission reported to the Government, which had the power to decide what to do
  - **Note: a purely prospective system, to change future behaviour**
  - **No sanctions for past conduct; no damages actions for past conduct**

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- The treatment of unilateral conduct in the UK: the historical context (continued)
  - Fair Trading Act 1973
    - Continuation of the same system
    - The Office of Fair Trading (as well as the Government) could make references to the Commission
    - The Commission (at this stage called the Monopolies and Mergers Commission) still reported to the Government
    - The Government still was the decision-maker

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- Competition Act 1998
  - Radical transformation of UK domestic competition law
  - Article 81 EC adopted as the model for the control of anti-competitive agreements ('the Chapter I prohibition')
  - Article 82 EC adopted as the model for the control of abuse of dominance ('the Chapter II prohibition')
  - The Office of Fair Trading was given the power to investigate, decide and impose fines
  - Full appeal 'on the merits' available to a specialist tribunal, the Competition Appeal Tribunal

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- Enterprise Act 2002
  - The provisions on 'monopoly' and 'complex monopoly' situations were replaced by new provisions on 'market investigation references'
  - The Government was removed from the reference system, except in cases of exceptional public interest
  - The Office of Fair Trading (or the sectoral regulators, such as OFCOM) make references to the Commission (now called the Competition Commission)
  - The substantive test is whether there is an adverse effect on competition, **NOT** whether there is harm to the public interest
  - The Competition Commission is now the decision-maker with the power to impose remedies (including divestiture)
  - The Competition Act and the Enterprise Act co-exist: the same conduct could be examined under both pieces of legislation

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- Case-law: Competition Act 1998
  - The provisions came into effect in 2000
  - The OFT has found four infringements of the Chapter II prohibition
    - *Napp Pharmaceuticals* (predatory pricing and excessive pricing)
    - *Aberdeen Journals* (predatory pricing)
    - *Genzyme Ltd* (margin squeeze)
    - *Cardiff Bus* (predatory pricing)

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- Case-law: Competition Act 1998 (continued)
  - One non-infringement decision of the OFT was appealed by the third-party complainant to the Competition Appeal Tribunal, which concluded that there had been an abuse of a dominant position: *JJ Burgess v OFT* (refusal to supply)
  - The Office of Rail Regulation held that a railfreight undertaking had abused its dominant position, *EW&S* (long-term exclusive agreements and analogous pricing practices)

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- Case-law: Competition Act 1998 (continued)
  - The Gas and Electricity Markets Authority held that National Grid had abused a dominant position in the supply of gas meters: *National Grid* (pricing practices tending to exclusivity)
  - One non-infringement decision of the Office of Water Services was appealed by the third –party complainant to the Competition Appeal Tribunal which concluded that there had been an abuse of a dominant position: *Albion Water v OFWAT* (margin squeeze, excessive pricing)

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- Case-law: Competition Act 1998 (continued)
  - **Note: a large number of complaints have been rejected by OFT and the sectoral regulators**
  - Examples:
    - *BSkyB*
    - *Claymore*
    - *E.I.Pont du Nemours*
    - OFCOM cases, for example against BT
  - Why were they rejected? Often because the conduct was unlikely to produce anti-competition effects

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- The European Commission's *Guidance* in the UK
  - See previous comment: the competition authorities in the UK were applying an effects approach before the adoption of the Commission's Guidance
  - An early Guideline of the OFT in 2000 had adopted an 'effects' approach
  - The OFT adopted fresh Guidelines on most aspects of competition law at the time of Modernisation (2004)
  - But it did not adopt a Guideline on unilateral behaviour in deference to the Commission's review of Article 82
  - Relevant authorities in the UK are strongly supportive of the Commission's effects approach

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- Case-law: Enterprise Act 2002
  - Provisions came into effect in 2003
  - Most market investigation references were of oligopolistic markets, where the behaviour of several firms, falling short of a cartel contrary to the Chapter I prohibition (or Article 81 EC), was under investigation
    - *Home collected credit*
    - *Store cards*
    - *Northern Ireland Banking*
    - *Payment protection insurance*

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- Case-law: Enterprise Act 2002 (continued)
  - But note *British Airports Authority* (2009)
    - BAA's near monopoly of airports in the south-east of England has an adverse effect on competition
    - So too does its position in Scotland
    - Remedy:
      - BAA must sell Gatwick and Stanstead airports
      - BAA must sell one of Glasgow or Edinburgh airports
    - Appeal about to be lodged with the Competition Appeal Tribunal