In either case whether failure to comply with a statutory provision renders the contract illegal is a matter of construction of the statute and is for the judge to decide.

If, in the opinion of the judge, the Act was designed to protect the public then the contract will be illegal. Thus in *Cope* v *Rowlands* (1836) 2 M&W 149 an unlicensed broker in the City of London was held not to be entitled to sue for his fees because the purpose of the licensing requirements was to protect the public against possibly shady dealers. Furthermore, in *Anderson Ltd* v *Daniel* [1924] 1 KB 138 a seller of artificial fertilisers was held unable to recover the price of goods which he had delivered because he had failed to state in an invoice the chemical composition of the fertilisers which was required by Act of Parliament.

On the other hand, if in the opinion of the judge the purpose of the legislation was mainly to raise revenue or to help in the administration of trade, contracts will not be affected. Thus in *Smith* v *Mawhood* (1845) 14 M&W 452 it was held that a tobacconist could recover the price of tobacco sold by him even though he did not have a licence to sell it and had not painted his name on his place of business. The purpose of the statute involved was not to affect the contract of sale but to impose a fine on offenders for the purpose of revenue. In addition, in *Archbolds* (*Freightage*) *Ltd* v *Spanglett Ltd* [1961] 1 QB 374 a contract by an unlicensed carrier to carry goods by road was held valid because the legislation involved was only designed to help in the administration of road transport.

Express statutory prohibition

Sometimes an Act of Parliament may expressly prohibit certain types of agreement. For example, the Competition Act 1998 in s 2(2)(a) prohibits agreements, decisions or practices that directly or indirectly fix purchase or selling prices, and this would include resale price maintenance agreements. *As regards the remedies* available to an organisation affected by an anti-competitive practice, it may complain to the Office of Fair Trading or if the infringement has a European Union dimension it may complain to the EU Commission in Brussels. Interim relief may be asked for in urgent cases. However, the final outcome will be an infringement decision and a large fine on the offending organisation. *This will not produce damages for the organisation if it has lost profits because of the offending organisation's activities*.

Organisations wishing to pursue claims against the offender may go through the ordinary courts of law. Actions for damages and injunctions are clearly available to those who have suffered loss as a result of infringements of the 1998 Act (see *Courage* v *Crehan* [2002] QB 507: a ruling of the ECJ).

Organisations suffering loss may wait for the OFT to investigate and make a finding of infringement. When the appeals process has been exhausted the organisation may rely on the infringement decision and this will be beneficial because there will be no need to produce evidence that there has been an infringement to the court again. Obviously, matters of causation and quantification of damages may arise but the claim will be made easier. These are called '*piggyback' claims* and have been introduced by the Enterprise Act 2002 inserting a new s 58A into the Competition Act 1998.

Finally, if there is difficulty in pleading before the ordinary courts because of their unfamiliarity with competition issues the Enterprise Act 2002 has expanded the jurisdiction of the Competition Appeals Tribunal (a specialist tribunal) so that *it can hear actions for damages following domestic competition infringement decisions by the OFT and the EU Commission regarding infringements of EU law*. These will be 'piggyback' claims.

Wagering contracts: insurance and dealing in differences

In essence, for a wager to exist it must be possible for one party to win and one party to lose and there must be two persons or two groups opposed to each other in their views as to a future event. Thus, where S, Y and Z each put £5 into a fund to be given to the party whose selected horse wins a given race, there is no wager. The only commercial importance of the concept of wagering and the only reason why it is introduced in a book of this nature relates to insurance and dealing in differences (see below). A contract is not a wager if the person to whom the money is promised on the occurrence of the event has an interest in the non-occurrence of that event, e.g. where a person has paid a premium to insure his house against destruction by fire. Such an interest is called an *insurable interest* and is not a wager. However, to insure someone else's property would be a wager and not a valid contract of insurance.

The Gaming Act 1845 renders wagering contracts void so that there is no action for the bet or for the winnings. However, it should be noted that if the bet or the winnings have actually been paid over they cannot be recovered. Payment operates as waiver of the Act and the payment over of the money confers a good title to that money upon the person to whom it is paid.

It has become more common in recent times for persons to deal in differences, i.e. to bet on the future rises or falls in selected stock exchange indexes. No securities are bought or sold, the only transaction being the payment by one party to the other of the eventual difference in the indexes according to the accuracy or otherwise of the gambler's predictions.

It was decided in *City Index Ltd* v *Leslie* [1991] 3 All ER 180 that such a contract was validated by s 63 of the Financial Services Act 1986 so long as it was made 'by way of business'. The claimants offered clients a differences service and recovered £34,580 plus interest from the defendant whose predictions of rise and fall had not been successful.

Competition law

Competition law has become extremely complex and a detailed study of it can only be of benefit to the specialist practitioner. Nevertheless, it is important for all students in those disciplines that require a grounding in the law to have an environmental knowledge of current competition law. The following materials are designed to provide that environmental knowledge.

Setting the scene

Current competition law is based mainly on the Competition Act 1998, the Enterprise Act 2002 and Arts 81 and 82 of the EU Treaty of Rome.

We begin with the Competition Act 1998 the major provisions of which came into force in March 2000. It contains a system of public regulation of competition law that mirrors to a large extent EU competition law. Section 2 of the CA 1998 introduces the Chapter I Prohibition which has the objective of preventing co-ordinated market behaviour between undertakings, e.g. to fix prices. This policy was formerly carried out by the repealed Restrictive Trade Practices Act 1976 and the Resale Prices Act 1976. Prohibition I is modelled closely upon Art 81 of the Treaty of Rome.

Section 18 of the CA 1998 introduces the Chapter II Prohibition which controls any conduct in a market by one or more undertakings that amounts to an abuse of a dominant position in that market. Prohibition II is modelled closely upon Art 82 of the Treaty of Rome.

Finally, s 60 of the CA 1998 provides that in the absence of any relevant differences interpretation of the Prohibitions should be designed to achieve consistency with EU law.

Practices and provisions which infringe the Chapter 1 Prohibition

The 1998 Act sets out in s 2 a non-exhaustive list of practices and provisions that will infringe Prohibition I. There is a similarity with Art 81. The list is as follows:

- directly or indirectly fixing purchase or selling prices or other trading conditions. This includes attempts to fix resale prices (or resale price maintenance);
- limiting or controlling production markets, technical development or investment;
- agreements to share markets or sources of supply or doing so in practice;
- discrimination by applying different conditions to equivalent transactions with other trading parties so that they are at a competitive disadvantage;
- making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which are unconnected with the subject matter of those contracts either by their nature or according to their commercial use.

Chapter 1 exclusions

These include:

- Mergers which have been cleared under previous legislation such as the Fair Trading Act 1973 which are allowed to continue.
- Agreements controlled by other legislation such as the acquisition of a controlling interest in a public listed company. This is controlled by the Financial Services Authority as the UK Listing Authority under the Financial Services and Markets Act 2000 and the City Code on Take-overs and Mergers. The same is true in regard to the general control of contracts between a company and its directors under the Companies Act 1985.
- Agreements which under previous law were not sent for investigation by the Restrictive Practices Court by the Secretary of State because they were not considered significant. There is, however, a 'claw-back' provision under which the Office of Fair Trading can reconsider them if they appear to infringe the Chapter I Prohibition which is unlikely.
- Vertical agreements are excluded so long as they are not price-fixing agreements. A vertical agreement is one entered into by organisations operating at different levels of the market such as an agreement between a manufacturer and a distributor. A horizontal agreement is normally one made between organisations operating at the same level in the market as in the case of an agreement between manufacturers or an agreement between distributors.
- Agreements concerning land, i.e. agreements that create or transfer estates in land such as restrictive covenants over land restricting its use. A major effect is to exempt leases where, for instance, there is a covenant restricting use of the property and forbidding car-breaking on the premises by the tenant. However, covenants protecting the landlord's *business* as distinct from the *land* may be affected by the Chapter I Prohibition as where a landlord leases property for use as a shop but includes a covenant forbidding the sale of goods that are sold by his own shop that is nearby. The Chapter II Prohibition does apply to land as where the owner of an airport refuses to grant a lease at the airport to a bookseller in order to protect a rival bookseller.

The Secretary of State has order-making powers that may be used to prevent adverse effects on competition in terms of access to facilities such as marinas and taxi-ranks.

Reform

Although the exclusion for vertical agreements is still in force European developments are to the effect that vertical agreements are within Art 85. Therefore, s 209(3) of the Enterprise Act 2002 gives the Secretary of State power to remove the exclusion as soon as it is reasonable to do so. In addition, the rules of professional bodies such as the Law Society were excluded under the Competition Act 1998. Now s 207 of the EA 2002 repeals that provision and professional rules are no longer excluded.

Chapter I exemptions

There are three exemptions as follows:

(*a*) an individual exemption granted by the Office of Fair Trading (OFT) where it can be shown that the agreement will contribute to improving production or distribution or promote technical or economic progress and allows consumers a fair share of the resulting benefit. Furthermore, any restrictions must be indispensable and there must be no elimination of competition. Potentially exempt agreements should be notified to the OFT and the OFT may also give guidance without formal notice as to whether the agreement might or might not be exempted;

(*b*) a block exemption given by the Secretary of State on the recommendation of the OFT covering particular classes of agreement which satisfy the criteria for individual exemption;

(*c*) agreements which are the subject of individual or block exemption under Art 81 are automatically exempt under the 1998 Act.

Abuse of a dominant position – the Chapter II Prohibitions

The prohibition on the abuse of a dominant position appears in Chapter II of the 1998 Act and is closely modelled on Art 82 of the EC Treaty of Rome.

Chapter II prohibits:

- any conduct on the part of one or more undertakings;
- which amounts to an abuse;
- of a dominant position in the market; and
- which may affect trade within the UK or *any* part of it.

In the same way as Art 82, the 1998 Act sets out a non-exhaustive list of the types of conduct which can amount to an abuse. The list includes:

- the imposition of unfair purchase or sale prices, e.g. unfairly high selling prices or unfairly low purchase prices and predatory pricing;
- the limitation of production, markets or technical developments to the prejudice of consumers, such as restricting output with a resulting rise in prices or refusal to supply;
- the imposition of unfair trading conditions over and above pricing, e.g. quality of products and service;
- applying dissimilar conditions to equivalent transactions thereby placing some organisations at a competitive disadvantage;
- tying, i.e. making the conclusion of a contract depend on the acceptance by other parties of obligations which have no connection with the subject matter of the contracts, e.g. A, a manufacturer, requires a retailer not to stock the products of a rival manufacturer, B. Conversely, a retailer might prevent a manufacturer from supplying rival outlets.

Article 82 is not followed entirely since the Art 82 provision refers to a *substantial* part of the Community, whereas Chapter II refers to *any part* of the UK, so that localised markets are covered, e.g. the provision of bus services in local areas.

What is dominance?

The 1998 Act does not set out thresholds for defining dominance but EU law cases will apply and these show that dominance has been found to exist where market shares have been in excess of 40 per cent in some cases and 45 per cent in others. This is also the Commission's view. The OFT Guidance note, however, quotes a lower market share, i.e. 20–40 per cent.

Exemptions and exclusions

As with Art 82, there are no exemptions from Chapter II. There are exclusions which are similar to the exclusions provided in regard to the Chapter I Prohibition.

It is possible to notify the OFT in regard to conduct that may amount to a Chapter II Prohibition for guidance or decision as to whether the prohibition does or does not apply.

Monopolies and mergers

This area of competition law was covered by the Fair Trading Act 1973. The Competition Act 1998 left the provisions of the 1973 Act in place. A major feature of the 1973 Act was that monopolies and mergers in terms of their undesirability had to be evaluated in terms of a 'public interest' test, i.e. did they operate or could they operate against the public interest? Section 84 of the FTA 1973 (now repealed) gave matters to which regard must be paid, e.g. the desirability of promoting, through competition, the reduction of costs and the development of new techniques and new products. The test was imprecise and was criticised for that. Control was by the Monopolies and Mergers Commission. This became the Competition Commission under the CA 1998. The Competition Commission, as the Monopolies and Mergers Commission before it, continues under the Enterprise Act 2002 but originally could be required to investigate and report in relevant areas of business following a reference to it by the Director-General of Fair Trading (a position that is now defunct). There were two types of monopoly situation as follows:

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- ***the scale monopoly*** where one company or other organisation supplied or purchased 25 per cent or more of all goods or services of a particular type in the UK; or
- ***the local monopoly*** as above but the purchase or supply was only in a part of the UK; or
- ***the complex monopoly*** where a group of organisations acting together controlled 15 per cent of the market.

The Competition Act 1998 retained the above monopoly provisions.

The Enterprise Act 2002 changes

The main changes made by the Act of 2002 are the removal (with some exceptions, e.g. public interest cases affecting e.g. defence contracts) of the Secretary of State's role and the substitution of a 'substantial lessening of competition' test for the former general 'public interest' test.

There are also *new monopoly tests* called jurisdictional tests that replace the earlier tests. The primary requirements are:

- that two or more enterprises cease to be distinct; and
- that the value of the turnover in the UK of the enterprise being acquired, i.e. the target enterprise exceeds £70 million; or
- that in relation to the supply of goods or services of any description at least one-quarter of all the goods or services of that description that are supplied in the UK are supplied by or to one and the same person.

The first test is referred to as the '*turnover test*' and the second the '*share of supply test*'. The supply test means in practice that the merging parties will together supply or receive the relevant percentage of goods and services.

Media mergers

The most important of these are newspaper and TV channel monopolies and mergers. These are left untouched by the Enterprise Act 2002 and are dealt with by the Communications Act 2003. Part V of the Act applies and gives the Office of Communications (OFCOM) concurrent jurisdiction with the OFT under the Competition Act 1998 in relation to the application of the Chapter I and II Prohibitions to the relevant industries. It also has power in regard to market investigation references (see below).

The institutional structure in competition law

As we have seen the CA 1998 abolished the Restrictive Practices Court but the central authority in the enforcement of the CA 1998 was the Director-General of Fair Trading supported by the Office of Fair Trading's staff. The decisions of the Director-General, e.g. that a Prohibition of the Act had been infringed and any penalty imposed were capable of appeal to the Competition Commission Appeals Tribunal and from there to the Court of Appeal on matters of law. The Director-General also intitiated monopoly inquiries. The CA also reconstituted the Monopolies and Mergers Commission as the Competition Commission.

The EA 2002 abolishes the office of Director of Fair Trading and his functions become those of the Office of Fair Trading. The office is under the governance of a chairman and four other members appointed by the Secretary of State for Trade and Industry. Appointment is for a period of five years. There is also a chief executive appointed by the Secretary of State for Trade and Industry after consultation with the chairman of the Commission. References in legislation to the Director-General are to be taken as a reference to the OFT. The Competition Commission becomes the Competition Appeals Tribunal.

Civil remedies of third parties to recover loss

As regards the remedies available to an organisation affected by an anti-competitive practice, it may complain to the Office of Fair Trading or if the infringement has a European Union dimension it may complain to the EU Commission in Brussels. Interim relief may be asked for in urgent cases. However, the final outcome will be an infringement decision and a large fine on the offending organisation. *This will not produce damages for the organisation if it has lost profits* because of the offending organisation's activities. Organisations wishing to pursue claims against the offender may go through the ordinary courts of law. Actions for damages and injunctions would seem to be available to those who have suffered as a result of infringements of competition law (see *Courage* v *Crehan* [2002] QB 507: a ruling of the ECJ). The House of Lords has said that damages are available 'in an appropriate case' but were not required to give damages in the event because they ruled that pub beer-ties were not in the

Crehan case contrary to Art 81 of the Treaty of Rome (see *Inntrepeneur Pub Company* v *Crehan* [2006] 4 All ER 465 at p 371).

Organisations suffering loss may wait for the OFT to investigate and make a finding of infringement. When the appeals process has been exhausted the organisation may rely on the infringement decision and this will be beneficial because there will be no need to produce evidence that there has been an infringement to the court again. Obviously matters of causation and quantification of damages may arise but the claim will be made easier. These are called 'piggyback' claims and have been introduced by the Enterprise Act 2002 inserting a new s 58A into the Competition Act 1998.

Finally, if there is difficulty in pleading before the ordinary courts because of their unfamiliarity with competition issues, the Enterprise Act 2002 has expanded the jurisdiction of the Competition Appeals Tribunal (a specialist tribunal) so that it can hear actions for damages following domestic competition infringement decisions by the OFT and the EU Commission in regard to infringements of EU law. These will be 'piggyback' claims.

Complaints

Under the provisions of the CA 1998 any person may complain to the OFT in regard to alleged breaches of the CA 1998 Prohibitions. These provisions are retained but the EA 2002 makes provision for designated consumer bodies to make 'super complaints' where there are market features that may be harming consumers to a significant extent. An example is provided by certain complaints made by the Consumers' Association asking for an investigation into practices in the private dentistry market. The complaint must relate to the market as a whole and not merely the conduct of individual businesses.

Relationship with EU law

The prohibitions set out in the Competition Act 1998 mirror more directly Arts 81 and 82 of the Treaty of Rome. The Articles are in general directly effective in the UK where there is in, say, the case of a restrictive practice 'an effect on trade between member states'. In the absence of such an effect, EU law is not applicable. Where the practice called into question affects only trade in the UK it is the UK Prohibitions of the CA 1998 that apply but even here UK law is required to be interpreted in line with European Law (see s 60, CA 1998). Thus UK courts will be expected to reach similar conclusions in UK cases to those reached in the European Court EXCEPT where there is a 'relevant difference'.

Other main changes and innovations of the Enterprise Act 2002

Part 4 provides for market investigations by the Competition Commission (CC). This regime is designed to inquire into markets where the structure of the market or the conduct of the suppliers or customers is harming competition. The OFT may make references as may other regulators such as the Rail Regulator.

Part 5 provides for rules of procedure in the Competition Commission.

Part 6 has been the cause of much controversy in that it sets up a new *criminal offence for people engaged in cartels* and gives the OFT investigatory powers. A person is liable to criminal prosecution if he or she dishonestly engages in prohibited cartel activities, e.g. price-fixing or limitation of supply or production. The OFT can issue no-action letters to those who although they have been involved in the cartel give the OFT information about it. A kind of reward for whistleblowing. The maximum term of imprisonment where trial is on indictment is five years. Instead or in addition to this term there may be an unlimited fine.

Part 7 importantly gives a new power to disqualify company directors for serious breaches of competition law.

Part 8 deals with procedures for making 'super-complaints'.

Part 9 is concerned with disclosure of information by public authorities; *Part 11* is concerned with the bringing into force and application of the Act. *Part 10* makes significant changes to insolvency law that are not relevant here.

The European Community approach to restrictive practices

Under Articles 81 and 82 of the Treaty of Rome all agreements between business organisations which operate to prevent or restrict competition in the Market are void.

Restrictive trading agreements and the Treaty of Rome generally

We have already considered the position under English domestic law with regard to restrictive trading agreements. Some consideration must now be given to the position under Community law.

Policy and source of law

The provisions of the Treaty, which have been part of our law since January 1973, are based, as UK law is, on the protection of the public interest. The basis of the competition policy is to be found in Arts 81 and 82 of the Treaty. These ban practices which distort competition between members of the Community (Art 81), and prohibit the abuse of a monopolistic position by an organisation within the Market (Art 82). There is an additional aim of raising living standards.

Application of Arts 81 and 82, Treaty of Rome

It is perhaps inappropriate in a non-specialist book of this nature to go through the many illustrative cases on the above articles of the Treaty of Rome which have been heard by the European Court of Justice. However, by way of illustration and to show the application of the Articles in English cases before English courts we can consider the following.

When doing so, it is worth noting that, following the judgment of the European Court in *BRT* v *SABAM* [1974] ECR 51 that Arts 85 (now 81) and 86 (now 82) have direct effect in the UK, our courts have shared responsibility for the enforcement of Community competition law, as the cases illustrate.

They also provide examples of situations that might come before UK courts under Prohibitions I and II of the 1998 Act. Now under the Competition Act 1998 UK courts are dealing with the Prohibitions set out in Chapters I and II of the 1998 Act and so are applying English law which is now substantially the same as the Treaty of Rome provisions. In addition, the interpretation of the prohibitions will follow the line taken by European courts so that there will be a fusion of rulings. (See the governing principles provision (above) of s 60 of the 1998 Act.)

Article 81

Of interest here is the case of *Cutsforth* v *Mansfield Inns* [1986] 1 All ER 577. C supplied coin-operated machines to 57 Humberside public houses owned by Northern County Breweries. M acquired Northern and requested all the tenants of the old Northern public houses to operate equipment supplied by M's list of nominated suppliers. M refused to put C on that list. This was held to be an infringement of Art 81 and an injunction was granted preventing M from interfering with C's agreements with the tenants of the 57 public houses and from taking any action to limit the freedom of those tenants to order machines from C. M was not infringing Art 82 because they were not in a dominant position in the market.

Article 82

An illustration of the use of Art 82 in an English court of law is provided by *Garden Cottage Foods Ltd* v *Milk Marketing Board* [1983] 2 All ER 770. Garden Cottage (the company) was a middle-man transferring butter from the Board to traders in the bulk market in Europe and the UK taking a cut of the price. In March 1982 following some packaging problems which the company appeared to have overcome, the Board refused to supply direct. It said that supplies must be obtained from one of four independent distributors nominated by the Board.

These distributors were the company's competitors. The company would have to pay more to them for its supplies than if it bought direct from the Board. Therefore, it could not compete on price, and would be forced out of business.

The company alleged that the Board was in breach of Art 82 of the Treaty of Rome. This provides: 'Any abuse by one or more undertakings of a dominant position when in the Common Market or in a substantial part of it, shall be prohibited as incompatible with the Common Market in so far as it may affect trade between Member States . . .'.

The Court of Appeal, and later the House of Lords (see *Garden Cottage Foods Ltd* v *Milk Marketing Board* above), decided that there had been a breach of Art 82.

As regards remedies the court was asked to grant an injunction restraining the Board from refusing to maintain normal business relations contrary to Art 82. The case was dealt with on that basis. However, the House of Lords was of the opinion that the remedy of damages was available for breach of the Treaty but there is still some uncertainty about this. UK courts have not as yet clarified precisely what remedies are available in this area.

It will be recalled that more recently the Court of Appeal decided in *Leyland Daf Ltd* v *Automotive Products* (1993) that Automotive was not in breach of Art 82 when it refused to supply goods to Leyland unless Leyland paid £758,955 which Leyland owed to Automotive (see also Chapter 13).

Enforcement by European Commission

The responsibility for enforcement of the Articles lies with the European Commission. The Commission is able to levy fines of up to 10 per cent of worldwide turnover as a penalty for infringement. The classic decision of the Commission was in the *Tetra Pak II* (1992 OJ L72/1) case where the Commission levied a fine of 75 m ECU (£52 m) on an organisation for abuses of Art 86 (now 82).

EC Merger Regulation

Mergers which potentially set up monopolistic undertakings are dealt with under UK competition rules where the merger has only a UK dimension. Where there is an impact on other European states, the rules of the EC must be taken into account.

Under the EC Merger Regulation, which came into force on 21 September 1990, 'concentrations' (mergers) involving a combined worldwide turnover of more than 5 billion ECU (£3.9 bn), and in which at least two of the parties also have a European turnover exceeding 250 million ECU (around £200 m), and not more than two-thirds of the aggregate Community-wide turnover of the undertakings concerned are in one and the same member state, fall to the European Commission for assessment as the *exclusive* competition authority. Such mergers must be formally notified to the EC Commission not more than one week after the conclusion of the agreement or the announcement of the public bid or the acquisition of a controlling interest (whichever of these is the earliest). Article 223 of the EC Treaty allows member states to take measures to protect essential security interests and remove such mergers from the Commission's jurisdiction. In recent times a proposed acquisition of British Aerospace was removed from the Commission's jurisdiction by the UK government.

Changes were made to the above regulations by Council Regulation No 1310/97, which came into force on 1 March 1998. The old system, as outlined above, remains in place but the notification requirements have been extended to a wider category of transactions and, in addition to the above thresholds, mergers must also be filed in Brussels if:

- the aggregate combined worldwide turnover of the undertakings concerned is more than 2.5 billion ECU;
- in each of at least three member states the combined aggregate turnover of all the undertakings involved is more than 100 million ECU;
- in each of at least three member states identified above, aggregate turnover of each of at least two of the undertakings involved is more than 25 million ECU; or
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than 100 million ECU. However, if each of the undertakings involved in the transaction achieves more than two-thirds of its aggregate Community-wide turnover in one and the same member state, the EC Merger Regulation will not apply and the parties will have to make any required filings under national law.

EU merger reform

EU merger rules are currently undergoing reform. Major features of the reform that will be by way of a new directive are:

- a proposal for companies to request a 'cooling off' period of two weeks before probes into mergers and takeovers. This extra time will enable companies to discuss and present concessions that could help to get mergers and acquisitions approved.
- The concept of 'dominance' is to be replaced by the US and UK test of 'substantial lessening of competition'.

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DISCHARGE OF CONTRACT

In this chapter we shall consider the four methods by which a contract can be discharged or terminated.

The discharge of a contract means in general that the parties are freed from their mutual obligations. A contract may be discharged in four ways: *lawfully* by agreement, by performance or by frustration, and *unlawfully* by breach.

Discharge by agreement

Obviously, what has been created by agreement may be ended by agreement. Discharge by agreement may arise in the following ways.

Out of the original agreement

Thus the parties may have agreed at the outset that the contract should end automatically on the expiration of a fixed time. This would be the case, for example, with a lease of premises for a fixed term. Alternatively, the contract may contain a provision entitling one or both parties to terminate it if they wish. Thus a contract of employment can normally be brought to an end by giving reasonable notice. This area of the law is, of course, subject to statutory minimum periods of notice laid down by s 86 of the Employment Rights Act 1996. They are one week after one month's service, two weeks after two years' service and an additional week for each year of service up to 12 weeks after 12 years' service. Section 86 provides that the employee must, once he has been continuously employed for one month, give at least one week's notice to his employer to terminate his contract of employment. This is regardless of the number of years of service. Individual contracts may provide for longer periods of notice both by employer and employee.

Change of control clauses

When entering into a contractual arrangement many companies will have carried out research into the ability of the other party to carry through the contract in terms of finance and general stability. These matters can, of course, be badly affected by a change in the shareholder control of the other party particularly where the contract is a continuing one for, e.g., the supply of goods over a period. Therefore, the contract when made could be drafted to