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COMPARATIVE ASPECTS OF RESTRICTIVE TRADE PRACTICES

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TABLE OF CONTENTS

PREFACE

THIS report is the second in the series of supplementary publications distributed to subscribers to *The International and Comparative Law Quarterly* and also available to the general public. The articles printed in this volume are revised versions of papers read at a Colloquium, organized by the United Kingdom National Committee of Comparative Law and supported by The British Institute of International and Comparative Law, which was held in Glen Eyre Hall, University of Southampton, on July 18 and 19, 1960. Apart from the contributions here printed, the Colloquium had the advantage of a paper on United States law and a summing-up by Professor Eugene V. Rostow, Dean of the Yale Law School. It has unfortunately not proved possible to include these contributions in the present volume, but reference may be made to Chapter 11, entitled " Some Notes on the Law of Market Organization " of Professor Rostow's book *Planning for Freedom* (Yale University Press. 1960).

In the preparation of the papers for the press, The British Institute of International and Comparative Law is much indebted to Dr. Andrew Martin of the Middle Temple, Barrister-at-Law, Reader in Comparative Law in the University of Southampton, who also took the chair at the Colloquium.

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UNITED KINGDOM LEGISLATION ON RESTRICTIVE TRADE PRACTICES

By

G. V. Rogers *

In their work on *Restrictive Trade Practices and Monopolies* [1] Mr. (now Mr. Justice) Wilberforce and his fellow authors show that in this country, as in most others, the story of legislative and, one may therefore assume, popular disapproval of restrictive trade practices is a long one: indeed it appears that the sense of injustice or frustration and the irritation and envy to which, in varying degrees, these practices give rise are very widespread, and that means of regulating or at least of discouraging traders who, as it is thought, misuse a dominant position which they alone, or together with their fellow traders, attain, have been sought by societies even in early stages of their economic development.

A reflection of this attitude is still to be found in the Ordinances of Corporations Act, 1503,[2] which recites the following words of 15 Hen. 6, c. 6, against unlawful statutes made by corporations:

> " . . . for that the master wardens and people of guilds, fraternities and other companies corporate dwelling in diverse parts of the realm, often times by colour of rule and governance to them granted and confirmed by charters and letters patent of diverse kings, made among themselves many unlawful and unreasonable ordinances as well as in prices of wares as other things for their own singular profit and to the common hurt and damage of the people. . . . "

and provides (section 1):

> " No master wardens and fellowships of crafts or mysteries, or any of them, nor any rulers of guilds or fraternities, take upon them to make any acts or ordinances, nor to execute any acts or ordinances by them aforemade, in disinheritance or diminution of the prerogative of the King, nor of other, nor against the common profit of the people, but if the same acts or ordinances be examined and approved by the chancellor treasurer of England and Chief Justices of either bench or three of them. . . . "

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[1] R. O. Wilberforce, Q.C., Alan Campbell and Neil P. M. Elles, *Restrictive Trade Practices and Monopolies*, Sweet & Maxwell, Ltd., 1957.

[2] 19 Hen. 7, c. 7.

This paper is not the occasion for a discussion on the development of the law against restraint of trade and monopolies in this country, nor of the development of informed and objective views as to the value of organisation in trading activities: it will suffice to note that the preamble to the first modern Act dealing specifically with monopolies and restrictive trade practices, the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948,[3] recognised the need for both research and effective action. The Act of 1948 was:

> " To make provision for inquiry into the existence and defects of, and for dealing with mischiefs resulting from, or arising in connection with, any conditions of monopoly or restriction or other analogous conditions prevailing as respects the supply of, or the application of any process to, goods, buildings or structures, or as respects exports."

The subject (which I will assume to be relatively unfamiliar) may be approached on the basis of an analysis of the types of practice against which legislation is now directed, or directed in so far as the practices can be said to work to " the common hurt." Such an analysis must be prefaced by the observation that our legislation is directed solely towards trade in goods (" goods " being very widely defined so as to include buildings, structures, animals and gases) and processes of manufacture. No United Kingdom legislation on this topic seeks to regulate or investigate the practices of professional organisations, properly so called, or the provision of services such as banking, insurance, hire-purchase, cleaning, repairing, transport and entertainment.

Within the field, practices may be analysed into those which involve action by two or more traders on the one hand, and those which can effectively be employed by single traders on the other. The practices involving action by two or more traders can be further subdivided into those which involve concerted action on the part of the traders on the one hand and, on the other, identical or similar action taken by the traders concerned as a matter of their independent judgment. The practices of single traders may usefully be subdivided to distinguish between practices dependent on the trader's dominant position in the market on the one hand and, on the other, practices which do not depend on the achievement of a dominant position.

For the purpose of illustration it may be useful to mention certain of the practices which fall within the four categories mentioned above. Within the first category (concerted action by

[3] 11 & 12 Geo. 6, c. 66.

traders) fall the price-rings, agreements imposing standard terms and conditions, quota and standardisation agreements, boycotts and zoning agreements, with which this paper is primarily concerned and which will be referred to as " restrictive trading agreements." Within the second category (identical or similar actions taken by traders as a matter of their independent judgment) fall those features in economic life which we have come to know as " price leadership " and " conscious parallelism." The practices of single traders dependent on the achievement of a dominant position include the maintenance of artificially high selling prices, the refusal of supplies and the unrealistic depression of prices paid to the dominant enterprise's suppliers. Practices of single traders which neither necessitate a dominant position in the trade, nor necessarily depend on the adoption of a similar course of conduct by other traders for their efficacy, include the restraint of competition by the use of sole agency agreements and resale price maintenance clauses, and the making of recommendations to other traders as to certain methods of enforcing those clauses. (If these last-mentioned methods were agreed as between traders the agreement, it should be noted, would be unlawful.)

Parliament, which in this country is unfettered by any written constitution, has regulated the adoption and continuance of these practices as follows. With certain reservations, it has delegated the power to deal with unconcerted action on the part of traders and with purely export agreements to administrative departments, after reference to the Monopolies Commission; as regards concerted action taken by traders it has prohibited a very limited class of agreements and given the task of pronouncing upon other agreements concerned with the home market to a judicial body, the Restrictive Practices Court, laying down in some detail the criteria which that court is to apply in reaching its decision on the merits of an agreement, but leaving the court little discretion as to the consequences which must follow its decision once reached. Notes on these bodies follow.

The administrative department chiefly charged with the oversight of the restrictive trade practices of monopolists and oligopolists is the Board of Trade. As regards these practices the Board of Trade has power, certain conditions being fulfilled, to refer " matters " to the Monopolies Commission for investigation and report, either on facts or on facts and merits; the Commission having reported on merits the Board of Trade (as a " competent authority " in common with other government departments) has power to make orders, not necessarily in conformity with the Monopolies Commission's findings or recommendations. The Board has similar powers in relation to certain export agreements. It has

assumed the responsibility for the oversight of prohibited agreements, and is given the responsibility (now discharged) of deciding which of the restrictive trading agreements that are not prohibited outright but are to be subject to judicial review should be called up for registration and published, and, from among the agreements called up for registration, which agreements should be first referred to the Restrictive Practices Court. On the representation of the Registrar of Restrictive Trading Agreements the Board has power to authorise the removal of restrictive trading agreements registered under the Restrictive Trade Practices Act, 1956, if they are of no substantial economic significance.

The Monopolies Commission is an " independent " administrative authority consisting of a permanent chairman and a maximum of ten members. The Commission has no power to institute inquiries on its own initiative or to extend the scope of the reference of a matter to it by the Board of Trade. The Commission's reports are made to the Board of Trade, and the Board decides the extent to which the Commission's report should be made public.

The Registrar of Restrictive Trading Agreements is an official who is not responsible to any departmental Minister. His functions under the Restrictive Trade Practices Act, 1956, are to prepare, compile and maintain a register of restrictive trading agreements, and to take proceedings before the Restrictive Practices Court in respect of the agreements he has registered. Save in the exercise of this latter duty the Registrar has no function to perform in regard to the merits of an agreement, but he is given the power to make representations to the Board of Trade with a view to the removal of an agreement from the register as of no substantial economic significance.

Finally, the Restrictive Practices Court; a superior court of record. This court consists of five judges and not more than ten other members qualified by virtue of their knowledge of or experience in industry, commerce or public affairs, and sits in England, Scotland and Northern Ireland. The court has its own rules of procedure, which broadly follow those appropriate to a civil action, and proceedings in the Restrictive Practices Court also resemble those of a civil action, with some relaxation as to the rules of evidence.

The court delivers a single judgment which is subject to appeal on points of law only. As noted above, the court is not given complete freedom in judging the merits of an agreement brought before it by the Registrar, and the consequences of its adverse decision (the avoidance of the agreement in so far as the condemned

restriction is concerned) are automatic. The court has some discretion as to the extent to which the future conduct of the parties shall be regulated.

Practices Involving Action by Two or More Traders

Practices involving concerted action by two or more traders (Practices dependent on restrictive trading agreements)

As noted above, different provisions apply to these practices depending on their nature and the area of their operation. Practices carried on in the home, or in both the home and export markets, are either prohibited outright or made subject to registration and judicial review. Practices relating to exports are to be reported ("notified") to the Board of Trade and may become the subject of a reference to the Monopolies Commission. The Monopolies Commission may also be asked to consider certain other agreements relating to foreign markets: no kind of agreement confined to the export market is prohibited outright. The relevant statutory provisions are to be found in the Act of 1948 and, mainly, in the Restrictive Trade Practices Act, 1956,[1] which has made a substantial, and in the international field largely original, contribution to the problem posed by collaboration among traders.

Agreements affecting the home market

(1) *Prohibited agreements.* Part II of the Restrictive Trade Practices Act, 1956, prohibits certain agreements for the collective enforcement of conditions as to resale prices, making it unlawful for two or more persons carrying on business as suppliers of goods in the United Kingdom to make or carry out any agreement by which they undertake to boycott dealers in the home market who have sold in breach of resale price conditions or to discriminate against such dealers or their intermediate suppliers. Part II of the Act further makes it unlawful for United Kingdom dealers to agree to boycott or discriminate against suppliers in the home market who have either not imposed resale price conditions or failed to enforce those they have imposed.

The prohibited agreement needs little further consideration: it is sufficient to remark that the making or carrying out of the prohibited agreement is not a criminal offence, but the prohibited acts may be proceeded against by way of injunction. In practice this procedure has been instituted, or threatened, by the Board of Trade.

[1] 4 & 5 Eliz. 2, c. 68.

(2) *Agreements made subject to registration.* The great majority of restrictive trading agreements relating to the home market have to be considered in the light of Part I of the Restrictive Trade Practices Act, 1956. In that Part of the Act " agreement " is defined very widely so as to include any arrangement, oral or written, and whether or not it is intended to be enforced by legal proceedings. The problem of identifying " the agreement " and " the parties " (details of the " whole of the terms " of an agreement have to be registered, as do the names of all those who are parties) is often a difficult one. By inference the Act indicates that such matters as price lists and lists of merchants are part of the " whole of the terms " of an agreement. In conformity with the definition and these indications the Registrar has taken the view, which industry has accepted, that the agreements required to be registered comprise the totality of the terms agreed from time to time between the parties so that, for example, such diverse matters dealt with by a trade association as the constitution, recommended price lists, provisions relating to a research organisation and other matters indifferent to the Act all form part of one " agreement." On the other hand, the Registrar has accepted the view that the mere habit of frequent consultation by traders, not bound together in any other way, should be reflected on the register by a series of " agreements " recording separately the matters from time to time agreed upon.

Some limits of the conception of " agreement " in Part I of the Act of 1956 are indicated by the judgment of the Chancery Court in the *Austin Motor Company's* case,[5] where it was decided that the numerous similar agency agreements involving the acceptance of a number of restrictions, including area restrictions, by Austin's distributors and dealers were not together registrable, notwithstanding the resemblance of those agreements to earlier registrable agreements and notwithstanding the complementary nature of the restrictions accepted by the distributors and dealers in the absence of proof of mutuality as between parties other than as between each of them and Austins. Nevertheless in certain circumstances the Act proceeds on the basis of the existence of agreement where none exists: thus, the members of a trade association who are recommended by their association as to the action they should take in respect of their prices or terms of trade, or the quantities or kinds of goods they shall trade in or their choice of customers, or areas of operation, are deemed to have agreed to comply with those recommendations: (Part I of the Act applies in relation to the agreement for the

[5] *Re Austin Motor Co. Ltd.'s Agreements* (1957) L.R. 1 R.P. 6.

constitution of the association as if it contained a term by which members agreed to comply with the recommendations.)

The agreements which, either by reason of their express terms or by reason of the " deeming " provisions of the Act, including the implied term referred to above, are brought within Part I of the Act of 1956 are those to which two or more persons carrying on business in the United Kingdom as producers or suppliers of goods, or as processors of goods, are party, and under which restrictions (that is to say negative obligations, express or implied) are accepted by two or more parties (whether carrying on business in the United Kingdom or not) as to the matters set out at section 6 (1) (*a*) to (*e*) of the Act—in practice mainly the matters as to prices, etc., described in the preceding paragraph. Sections 7 and 8 of the Act result in the exemption of certain agreements, among them the great majority of ordinary contracts of sale, sole agency agreements and agreements relating to workpeople, export agreements, agreements relating to foreign trade and patent licences and agreements for licences; section 6 (8) exempts agreements to which the only parties are interconnected bodies corporate. On the other hand subsections (4) and (5) of section 6 bring within the Act agreements under which incentives to certain courses of trading are provided otherwise than by the acceptance of prohibitions: thus, an agreement conferring a benefit on a party who complies with conditions as to prices, etc., or an agreement requiring the payment of money if a quota is exceeded, is to be treated as containing a restriction accepted by the parties concerned. Further, section 6 (6) of the Act requires that an agreement to which a trade association is party shall be considered as an agreement to which all the members of the association are parties.

At the commencement of the Act the Board of Trade had a discretion as to the kind of agreements on which, if Part I applied to them, action was required to be taken, and the Board exercised that discretion by differentiating as to the nature of restrictions accepted under the agreement. At no time, therefore, had the Registrar or the parties to agreements within the Act, whose duty it is to send the appropriate particulars to the Registrar for registration, to consider the problem of registration on the basis of the merits of the agreement or of its importance. Good, bad or indifferent, significant and insignificant, all restrictive trading agreements which the parties decide to maintain after a period allowed for consideration were and are required to be sent to the Registrar and registered by him. What had and has to be considered are the status of the parties, the terms of the agreement, and the obligations accepted, or deemed to be accepted, thereunder.

This latter task (that of considering the obligations stated or deemed to be accepted by parties) has provided many interesting problems, particularly with regard to trade associations and interconnected bodies corporate: the nature of these problems will become readily apparent on reading sections 6, 7 and 8 of the Act of 1956.

In the main these problems have been settled without recourse to section 13, which empowers the High Court (*i.e.*, the Chancery Division) to declare, on application by the parties or by the Registrar, whether or no an agreement is registrable. The Registrar has not yet found it necessary to ask for the " penal " condemnation of any agreement under section 18 on the ground that a failure to send particulars thereof was " wilful " (there is no sanction, criminal or civil, for a failure to register which is not " wilful "), neither has he instituted criminal proceedings under section 16, which proceedings may be instituted when the Registrar is deliberately misinformed or deprived of information or documents he receives, or should have received. (He has power, in certain circumstances, to require the production of documents and information.) The general compliance with the Act which this absence of enforcement litigation indicates has meant that the interesting question whether the " wilful failure " to furnish particulars, which may result in the condemnation of an agreement under section 18, necessarily involves the " wilful suppression " of documents so as to constitute a criminal offence under section 16 (2) (*c*) is not yet resolved.

The Act makes no provision for any kind of summary of agreements, either of the officially prepared kind or emanating from the parties. The Act and Regulations made thereunder require the Registrar to be provided with either the original or copies of the whole of the terms of written agreements, or with memoranda setting out such agreements, or terms of agreements, as have not hitherto been reduced to writing: these documents constitute the register of restrictive trading agreements. Parliament envisaged that in exceptional circumstances the public interest required a degree of secrecy as regards some agreements and accordingly, at the discretion of the Board of Trade, not every document submitted to the Registrar is available to the public. The register is kept up to date so far as its terms and the names of the parties are concerned, but such incidental matters as changes in lists of prices and terms do not have to be registered unless called for by the Registrar. At the end of last year some 2,240 restrictive trading agreements had been entered in the register, and particulars of their variation

or determination showed that 770 of them had ceased to operate as restrictive agreements within the meaning of the Act.

The problem posed by the fairly complicated legal tests which determine the issue of registrability once answered, the adoption of legal, as distinct from economic, tests is seen to result in the presence of a number of trifling agreements on the register. The Act (section 12) provides that the Board of Trade may, on the representation of the Registrar, authorise the removal of agreements of no substantial economic significance. " Removal " is not an unmixed blessing, since any alteration in the terms or parties involves a complete reregistration of the agreement in its varied form.

Agreements not removed from the register under section 12 are to be brought before the Restrictive Practices Court in an order, at first determined by the Board of Trade, but now at the Registrar's discretion: this discretion he has, of course, exercised so as to give priority to " representative," or leading, agreements, as well as to agreements of importance in themselves.

The reference of an agreement to the Restrictive Practices Court

On the decision to refer an agreement to the Restrictive Practices Court the Registrar is obliged to cause a notice of reference to be issued, and it is his practice to warn the parties of his intention to do so: this warning has frequently resulted in the determination of the agreement, or its variation so as to abandon the restrictive practices. Where the case is to be contested the Registrar investigates the facts, and if necessary presents evidence to the court. He discharges his duty to the court, so far as possible, in conjunction with the parties; and he has found it necessary in the majority of cases to engage the services of expert witnesses—particularly accountants and economists.

A notice of reference in some ways resembles a writ, and the rules of the Restrictive Practices Court are designed so as to make possible the service of proceedings not only in bipartite and other agreements of limited numbers, but in the case of agreements having numerous parties—sometimes as many as 200,000, and those constantly changing; in these latter cases the parties almost invariably agree to the appointment of a representative respondent, usually the trade association.

The clarification of the issues proceeds by way of the delivery of a statement of case by the respondents (the trading parties to the agreement), which statement of case identifies the restrictions accepted under the agreement other than those which fall to be disregarded under one of the subsections of section 7 of the Act,

and contains a statement of the facts and arguments on which the parties will rely related to the relevant sub-paragraph of section 21 (1) of the Act, which subsection indicates those propositions which must be established before a restriction can be given judicial approval.

In order to succeed in their litigation the parties must show that the restrictions accepted under the agreement:

(a) are essential for the public safety, or confer specific and substantial benefits on the public, or are reasonably necessary to counteract measures restrictive of competition taken by a non-party, or are necessary to enable the parties to deal with a preponderant customer or supplier, or are necessary to prevent serious unemployment in an area, or are necessary to prevent a substantial reduction of export trade, or are necessary to support some restriction already found to be in the public interest; and

(b) that the restrictions are not unreasonable having regard to the balance between the circumstances set out in (a) above and any detriment to the public or persons not party to the agreement but being purchasers, consumers or users of goods sold by the parties, or wanting to be engaged in such trade. (It is usual for the parties to admit the existence of no such detriments: and it accordingly falls to the Registrar, in the appropriate circumstances, to lead evidence of them.)

The Registrar's " case " is pleaded in an " Answer " and the respondents may make reply to it. Rules of the court make provision for the normal processes of discovery, a summons for direction, and a preliminary hearing for the resolution of legal questions.

The Restrictive Practices Court having a status equal to that of the High Court, all hearings involve the employment of counsel and solicitors and the examination of witnesses on oath. Since Parliament, in passing the Act, accepted the proposition that restrictive agreements are contrary to the public interest an agreement, or rather the restrictions which give rise to the need to register an agreement, will be avoided unless the parties can establish one or more of the " justifications " for such an agreement previously summarised. The onus of proof before the Restrictive Practices Court thus lies on the respondent parties to the agreement, who have consequential rights to open, and in England (though not in Scotland) usually have the last word: the proceedings being civil in character this onus requires to be discharged not " beyond all reasonable doubt " but on a reasonable balance of probabilities. These two last-mentioned circumstances will appeal to practising

lawyers, but the circumstance that the onus of proof lies on the parties to an agreement has given rise to some adverse comment from lay clients.

The judgments of the Restrictive Practices Court so far delivered are probably of little interest to lawyers not engaged in restrictive practices work, since they have involved no restatement of any general propositions of law: there have, of course, been discussions of the meaning of the words " the public " and " substantial," of the kind which might be anticipated, but the Restrictive Practices Court is probably remarkable for the scarcity of citation of authorities, even of previous decisions of the court itself. Having regard to the fact that the majority of " justifications " which the Act offers to the parties are related to the public interest, and to the fact that agreements among traders may be expected to be made primarily for their own benefit rather than for the benefit of the public at large, it is scarcely surprising that the court has not been overburdened with work, and with the exception of three agreements has condemned the majority of restrictions brought before it. Some seventy-eight cases have been before the court. Eighteen [6] have been defended and in sixty others [7] consent orders have been made: in no case has the court refused to accept undertakings by the parties (to the effect that they will give the Registrar notice of their intention to resume a condemned practice) in lieu of an injunction. In two cases undertakings were not offered by the parties and injunctions were granted by the court.

Effects of the court's decisions

One effect of these decisions is to be seen in the very large number of agreements now registered as abandoned. The economic consequences of the decisions of the court, and of the consequential abondonments, vary between trade and trade; in some trades there is a general lowering of price, in others a period of fierce competition, in others there is no discernible change in price or terms. The factors which determine the results are, of course, infinitely various, and include " outside competition," the relative size of enterprises, the margins previously adopted, and so on. It is probably too early to say whether the operation of the Act has been a prime or sole cause of amalgamations.

[6] A list showing the Law Reports references to the first fourteen of these cases is to be found in Appendix " A " to this paper, the fifteenth, sixteenth, seventeenth and eighteenth concerned cement, glass bottles, transformers and linoleum.

[7] A list of these agreements is to be found at Appendix " B " to this paper.

Agreements affecting the export market

Restrictive trading agreements which would be registrable but for the fact that every restriction accepted by the parties relates to goods supplied by export from this country, are required to be " notified " to the Board of Trade in the order and form appropriate to agreements sent for registration: these agreements are not made available to the public.

The Board of Trade may refer " export " agreements (not only those " notified ") to the Monopolies Commission for investigation and report. Such reference to the Monopolies Commission involves the Commission first in the task of ascertaining whether the " conditions to which [the Act of 1948] applies " exist. In relation to export agreements these conditions prevail if an agreement or agreements operate on one-third of the goods of a certain description which are produced in the United Kingdom and prevent or restrict competition in, or in relation to, the export of those goods from the United Kingdom or the supply of those goods to a particular market. The Commission may, as previously noted, be required to report on whether the agreement or agreements operate, or may be expected to operate, against the public interest.

No " export " agreement has yet been referred to the Monopolies Commission, but a short account of the responsibilities and procedures of the Monopolies Commission will be found below under the heading immediately following.

Practices made Effective by Identical or Similar Action taken by Traders as a Matter of their Independent Judgment

In many trades where prices, channels of distribution and markets have never been " administered," as in a number of trades which had, before or after the passing of the Act of 1956, been regulated by agreement, it is the policy of those concerned to follow a known or ascertainable pattern of commercial behaviour. These policies obviously spring from a variety of considerations, including fear of or respect for a competitor (which notably results in price leadership) and the need to maintain goodwill of customers (which may result in parallel action in the choice of channels of distribution) as well as from inertia. Such policies may give rise to, or be supported by, arrangements other than arrangements for concerted action in the commercial field. Among the products of generally non-competitive policies are profit-sharing schemes and certain price information services, but since agreements as to the destination or division of profits once earned, and agreements to exchange information, do not necessarily involve the express or implied acceptance

of " restrictions " within the meaning of the Act of 1956, " price leadership " and " conscious parallelism " may continue without the opportunity of judicial review.

These last-named practices may, however, fall within the Act of 1948, since the " conditions " to which that Act applies include, both in relation to supply and in relation to processing, the situation in which one-third of the U.K. supply or processing in question is in the hands of two or more persons who, whether voluntarily or not, and whether by agreement or arrangement or not, so conduct their affairs as in any way to prevent or restrict competition in connection with the production, supply or processing in question. The " competition " thus sought to be maintained is competition between the parties and between their customers or suppliers, and it would seem that among the very large field of practices covered by these last-mentioned provisions of the Act of 1948 would fall such " offensive " measures as the use of jointly owned " fighting " companies.

If the Board of Trade considers that the conditions noted above prevail or may prevail, the matter may be referred to the Monopolies Commission, for its inquiry and report.

The following paragraphs of this part of this paper contain a short account of the scope and some procedural features of a Monopolies Commission investigation, and of its possible consequences. As regards procedure, it should be noted that the Commission has in fact complete freedom; as regards the consequential action of the " competent authority " it will be noted that the account given below contains reference to the various powers appropriate to deal with agreements and monopolies situations considered under the preceding and next following heading, as well as those appropriate to the practices dealt with under this heading.

The Commission is first required to satisfy itself of the existence of the " conditions " to which the Act of 1948 in various circumstances applies, and in addition the Commission is usually required to report as to whether the practices or, as the case may be, agreements or situations, operate, or may be expected to operate, against the public interest. It will be recalled that the conception of the public interest to which the Restrictive Practices Court is directed is narrowly defined by section 21 of the Act of 1956: by contrast the conception of " public interest " which the Commission is to consider is very wide and is to include " all matters which appear in the particular circumstances to be relevant " and in particular, in relation to the general economic position of the United Kingdom, the need to achieve efficient, economical and adequate means of

production, treatment and distribution, the efficient and progressive organisation of industry, the full use of the country's manpower, industry and industrial capacity, technical progress and the expansion and creation of markets.

The Commission is given power under pain of penalty to summon or interrogate witnesses and to examine records and accounts; these powers apply to parties and to others. The practice it has adopted for the investigation of monopoly and oligopoly positions is, basically, as follows: it first asks the parties for a written statement of the history and operation of their activities. The parties' records and accounts are examined and at the same time evidence is collected from others in the industry. Two " hearings " take place, the first to clarify any point left in doubt by written evidence, the second to deal with the issues of public interest: this latter hearing proceeds on the basis of a statement of the provisional conclusions of the Commission and a list of the comments and criticisms of other persons, the statement and list having previously been communicated to the parties.

The Commission may be asked to include in its report recommendations as to the action (ministerial, official or by the parties) which seems advisable in order to remedy any unsatisfactory position which the investigations have disclosed.

If the Commission's report [8] shows that " conditions to which the Act applies " prevail, and either the Commission, or Parliament on the review of the Commission's report, decide that the " conditions " or any things done by the parties concerned as a result of, or for the purpose of preserving, those " conditions " operate, or may be expected to operate, against the public interest, the Government Department chiefly concerned (the " competent authority ") is given very wide powers indeed. It may, whatever the Commission has recommended:

(a) declare it to be unlawful to carry out any agreement;
(b) require any party to an agreement to determine it wholly or in part;
(c) declare it to be unlawful to withhold, or agree to withhold, or threaten to withhold, or procure others to withhold, supplies from the public generally or from specific persons;
(d) declare it to be unlawful to give or procure others to give preference in the provision of supplies; and
(e) declare it to be unlawful to require as a condition of the supply of goods the buying of any other goods or the making of payment in respect of any service.

[8] A list of the Commission's Reports will be found in Appendix " C " to this paper.

These powers are exercisable against any British subject or company or any foreigner or foreign company carrying on business here. As in the case of orders by the Restrictive Practices Court, orders of a " competent authority " are enforceable by injunction and not by criminal proceedings.

Practices of Single Traders

Practices dependent on the achievement of a dominant position

The true " monopoly " is a rarity in this country, and the Monopolies Commission may, in the manner and with the consequences already noted, be asked to consider whether, and with what result in the context of public interest, conditions falling far short of a complete monopoly exist. The Act of 1948 applies to conditions in which one-third of the United Kingdom trade in supplying particular goods or applying a particular process is in the hands of one company or group of companies: it should be noticed that this test of " conditions " to which the Act applies is purely factual and quantitative, and that it is not a prerequisite for administrative action in monopoly conditions as so defined that competition should be restricted or prevented. An undertaking which attains one-third of any United Kingdom trade is therefore in danger of administrative review—a circumstance which is no doubt present to the minds of those concerned with the organisation of commercial enterprises of scale; the task of such persons is made no easier by the circumstance that the Board of Trade can define the " description " of goods to which its reference relates, and the Board of Trade and the Monopolies Commission have a similar latitude in relation to the aggregation of various forms of " supply."

The powers of the competent authority in relation to an abused monopoly position are comparable in one respect with those of the Restrictive Practices Court in relation to a restrictive trading agreement: its sanctions are remedial rather than punitive. Thus the Restrictive Practices Court can condemn the restrictive terms of an agreement but cannot prohibit collaboration in other matters not restrictive within the terms of the Act of 1956; and the competent authority, although it may order a monopolist to desist from abusing his position by the exercise of discriminatory practices such as withholding of supplies, granting of preferences and making conditional sales, has no power under the Act of 1948 to divest the monopolist of any property or otherwise to jeopardise the continuance or consolidation of his existence in a dominant capacity. If the Commission finds that a monopoly position has been abused by

means for which existing legislation provides no remedy the publication [9] of its findings to that effect may, of course, exert some pressure of public opinion in the desired direction.

Practices not dependent on the achievement of a dominant position

Not the least " restrictive " of the practices of modern industry are those which in no way depend on the securing of agreement or uniformity as between competitors, or on the achievement of a dominant position in a trade. Yet if a principle can be discovered in the legislation it seems to be that the freedom to make a contract for the supply of goods shall be preserved, together with any attendant rights customarily reserved, so long as competitive alternatives remain as regards the majority of the trade. Thus a " non-dominant " supplier may impose resale price conditions on his goods, and apply varying rates of discount, and refuse supplies, and prohibit his trade customers from dealing in similar goods without fear of the Restrictive Practices Court and, unless suppliers who, with him, account for one-third of the trade do likewise, without fear of the Monopolies Commission.

A very striking departure from this recognition of the rights of the individual is provided by section 24 of the Act of 1956, which, in addition to prohibiting certain forms of agreement for the collective enforcement of resale price conditions prohibits any trader from recommending any other trader to enforce, or assist in enforcing such conditions in those ways. Apparently words such as " I wouldn't give him (a price-cutter) trade terms if I were you " may lead to an injunction if uttered by one trader to another.

General Observations

There are perhaps a few general observations with which this paper might conclude.

1. United Kingdom legislation is (although with important exceptions) based on the " abuse " principle rather than the " prohibition " principle: that is to say, the public verdict on most practices is suspended, pending investigation of some kind into the operation of those practices. Consequently the penal provisions of our legislation are directed in the first instance rather against the withholding of information as to restrictive practices than against the practices themselves. Conformably with this approach both the Act of 1948 and that of 1956 make provision for review of a matter

[9] A list of the Commission's Reports will be found in Appendix " C " to this paper.

previously investigated: the Monopolies Commission can be directed to inquire whether its, or the competent authority's, recommendations have been carried out, and the Restrictive Practices Court can be moved to vary its earlier declaration or order (on proof of a material change in the relevant circumstances), or to adjudicate on a proposed agreement in apparent contravention of an order made by a competent authority under the original provisions of the Act of 1948 (which applied the Monopolies Commission procedure and powers to restrictive trading agreements covering one-third of the home trade).

2. Since the carrying on of an unregistered and uninvestigated restrictive trade practice is not in itself a crime the various administrative and judicial authorities are in the fortunate position of looking always rather to the present and future than to the past, and indeed the Act of 1956 in particular contains possibilities for the " burying " of the past on abandonment of the practice. A degree of co-operation between industry and administrators is thus encouraged.

3. That co-operation on the part of industry, for which opportunity is afforded by United Kingdom legislation, is obviously an important element in the successful treatment of the problem, for competition necessitates a certain attitude of mind no more readily inspired or encouraged by the imposition of sanctions than by the acceptance of restrictions.

4. It can probably be said of the Acts of 1948 and 1956 that they have provided industry with a very effective stimulus for the reconsideration of habits contracted in earlier and different economic circumstances, and have led to the abandonment of quite a number of practices; in particular the boycott, the " blacklist " and the secret court (none of which can be effective in the absence of agreement) appear to have disappeared from the commercial scene. The reports of the Monopolies Commission and the judgments of the Restrictive Practices Court may have encouraged the view that competition, and competition in price in particular, need not be disastrous, and that its adoption as a matter of policy is something of a public duty. Certainly the public has been given far more information on the climate and organisation of industry than it had twelve years ago.

Appendix "A"

Reports of Cases decided by the Restrictive Practices Court

	L.R. 1 R.P. page	L.R. 2 R.P. page
1. Chemists' Federation Agreement ...	43	
2. Yarn Spinners' Agreement	118	103
3. British Constructional Steelwork Association's Agreement	199	
4. Blanket Manufacturers' Agreement ...	208, 271	
5. Water-Tube Boilermakers' Agreement	285	
6. Scottish Association of Master Bakers' Agreement	347	
7. Wholesale and Retail Bakers of Scotland Association's Agreement ...	347	
8. Federation of Wholesale and Multiple Bakers' (Gt. Britain and Northern Ireland) Agreement	387	
9. Federation of British Carpet Manufacturers' Agreements	472	
10. Phenol Producers' Agreement ...	1	
11. Black Bolt & Nut Association's Agreement	50	
12. Doncaster & Retford Co-operative Societies Agreement	105	
13. Wholesale Confectioners Alliance's Agreement	135	
14. Motor Vehicle Distribution Scheme Agreement	173	

Appendix "B"

Schedule of Consent Orders

91 Tuyere Makers' Association

106 Associated Manufacturers of Domestic Electric Cookers

185 Association of Steel Drum Manufacturers

176 North Eastern Group of Flour Millers

210 British Constructional Steelwork Association

269 Cotton Yarn Doublers' Association

278 Federation of Master Process Engravers

308 Pneumatic Tool Association

313 British Radio Valve Manufacturers' Association

354 Galvanised Tank Manufacturers' Association

393 Dyers and Finishers

440 Coal Asphalt

478 Twist Drill Association

486 Light Edge Tools and Allied Trades Association (and others)
499 Wood Free Paper
508 High Conductivity Copper Association
512 Associated Paving and Kerb Manufacturers
548 Baths
556 Association of Corrugated Paper Makers
579 Electric Light Fittings Association
595 Mid-Scotland Washed Sand and Gravel
599 North of England Building Brick Association
603 Semi-Rotary wing pumps
610 Rusks
617 Hard Fibre Rope
618 Trawl Twine Manufacturers' Association
619 Hard Fibre Cord and Twine Manufacturers
626 Agricultural Twine Manufacturers' Association
640 United Kingdom Glycerine Producers
693 Fractional Horse Power Motors
759 Northern Ireland Coal Importers
776 Scottish Flour Millers' Association
782 Inc. National Association of British and Irish Millers Ltd.
783 South Eastern Group of Flour Millers
784 Inc. National Association of British and Irish Millers Ltd.
793 Garage Equipment Association
818 Electric resistance furnace plant and equipment (and others)
821 Plate Glass Association
837 Glass Benders' Association
880 Road Roller Manufacturers' Association
914 Rubber Proofing Association
943 Scotland. Washed Sand and Gravel
958 Concrete Mixer Manufacturers' Association
961 Midland Bottlers' Association
1031 Wire Nails
1068 The Reinforcement Conference
1132 Spring and Interior Springing Association
1209 Leicestershire Granite Association
1226 Metal Bedstead Association
1301 Portable Air Compressor Association
1317 Federation of British Carpet Manufacturers (and others)
1318 Federation of British Carpet Manufacturers (and others)
1319 Federation of British Carpet Manufacturers (and another)
1599 Scottish Flour Deferred Rebates
1652 Belfast Flour Millers' Association
1712 Sand and Gravel (Scotland)
2045 Zinc Oxide
2115 British Radio Equipment Manufacturers' Association
2373 Concrete Mixer Manufacturers' Association

Appendix "C"

Table showing matters referred to the Monopolies and Restrictive Practices Commission for Investigation and Report, and where applicable dates on which the Reports were published

	Referred	*Report Published*
1. Dental goods	March 1, 1949	December 14, 1950
2. Cast-Iron rainwater goods	March 1, 1949	April 4, 1951
3. Electric Lamps	March 1, 1949	November 13, 1951
4. Insulated electric wires and cables	March 1, 1949	July 1, 1952
5. Matches [1]	March 1, 1949	May 13, 1953
6. Match-Making machinery	March 1, 1949	
7. Insulin	December 12, 1950	October 28, 1952
8. Semi-manufactures of copper and copper-based alloys [1,2]	December 12, 1950	September 5, 1955
9. Process of calico printing	April 16, 1951	April 14, 1954
10. Imported hardwood and softwood timber and plywood	October 8, 1951	October 27, 1953
11. Electrical and allied machinery and plant [1]	April 4, 1952	February 22, 1957
12. Pneumatic tyres [1]	September 19, 1952	December 9, 1955
13. Collective discrimination: Exclusive dealing, collective boycotts, aggregated rebates and other discriminatory trade practices [2]	December 17, 1952	June 29, 1955
14. Buildings in the Greater London Area	March 27, 1953	September 27, 1954
15. Hard fibre cordage	July 31, 1953	June 8, 1956
16. Linoleum	September 3, 1953	September 18, 1956
17. Sand and gravel in Central Scotland	December 24, 1953	March 23, 1956
18. Certain industrial and medical gases	February 1, 1954	January 2, 1957
19. Standard metal windows and doors	February 24, 1954	January 8, 1957
20. Certain rubber footwear	April 9, 1954	July 31, 1956
21. Electronic valves and cathode ray tubes [3]	December 4, 1954	February 14, 1957
22. Equipment and fittings for electrical street lighting (excluding electric lamps) [4]	June 17, 1955	—
23. Steel frames for buildings [4]	June 30, 1955	—
24. Tea	September 7, 1955	January 10, 1957
25. Electric batteries [4]	September 14, 1955	—
26. Chemical fertilisers [5]	October 29, 1955	July 24, 1959
27. Common prices and agreed tendering [2,4]	October 29, 1955	—
28. Cigarettes and manufactured cigarette and pipe tobacco [6]	November 29, 1956	—
29. Machinery for the manufacture or packaging of cigarettes or of cigarette or pipe tobacco [6]	November 29, 1956	—
30. Imported timber [7]	February 14, 1957	July 31, 1958
31. Electrical equipment for mechanically propelled land vehicles [6]	April 18, 1957	—
32. Petrol	September 27, 1960	—

1 Cover "exports" as well as "supply in the United Kingdom."
2 General inquiry under s. 15 of the 1948 Act.
3 Varied to factual reference.
4 Allowed to lapse on September 2, 1956, following the passing of the 1956 Act.
5 Varied so that the inquiry should be continued as if the reference had been made after the passing of the 1956 Act.
6 Reference made after the reconstitution of the Commission.
7 Requirement under s. 12 of the 1948 Act to report whether and to what extent the parties have complied with earlier recommendations by the Commission.

THE U.K. APPROACH TO RESTRICTIVE BUSINESS AGREEMENTS: SOME OBSERVATIONS

By

B. S. YAMEY *

IT is a commonplace that there is a vast difference between the United States and the British attitude and approach to restrictive business agreements, as embodied in the legislation of 1890 and 1956, respectively. It would be interesting to consider and speculate on the reasons for this difference: how much is it due to national differences, or to changes in the thinking of economists between the two dates, or to differences in ideas about the economic and social objectives to be served by official controls over restrictions on competition? But on this occasion I do not wish to talk about those matters. Rather, I want to look at some of the broad implications of the (British) Restrictive Trade Practices Act of 1956, as it affects restrictive agreements. I am not concerned so much with the developing case-law as with the approach to restrictive agreements contained in the legislation itself, and with its relation to general economic policy.

I

The United States approach—to begin with this by way of contrast—is straightforward. Agreements between firms in restraint of competition are against the public interest. The policy objective is the promotion of more competitive markets, which is presumed to confer advantages not only on the users of the goods in question, but also on the economy at large in terms of improved economic efficiency (better deployment of resources). Both specific consumer interests and the interests of the economy as a whole are promoted. So runs the explicit or implicit argument. (And few economists in the 1890s or the succeeding three decades would have cavilled at this general proposition.) Thus all that is necessary is for the courts to decide whether particular arrangements or patterns of behaviour constitute restrictive agreements: if they do, they are against the public interest and illegal. The matter is straightforward, with few complications, and no issues arise which are not

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fairly and squarely within the special province and special competence of courts of law and the judicial process.

The United Kingdom legislation of 1956, on the other hand, is more complex in every respect. In the first place, it allows specifically for the possibility that unrestricted competition among firms may not always serve the best interests of the relevant consumers. It postulates that restrictions on competition among sellers may be advantageous and beneficial to their customers. (The Restrictive Practices Court has on two occasions—*Black Bolt and Nut Association's Agreement* [1] and *Cement* [2]—held that price agreements have this effect.) Already issues are raised which do not trouble the American courts—the economic effects of an agreement are drawn into the ring.

But this is a relatively minor matter; there are further and more significant complications. The legislation allows specifically for weight to be given to other objectives of economic policy—objectives, that is to say, which are different from the promotion of the interests of the relevant consumers and of the " efficiency " of the economic system, and the pursuit of which may possibly conflict with these " traditional " objectives of anti-monopoly policy. These objectives are, broadly, the prevention of serious and persistent regional unemployment, the maintenance of exports, and the equalisation of economic position between dominant firms and their less powerful individual suppliers, competitors or customers.[3] It will be noted that these objectives are partly economy-wide (balance of payments) and partly confined to interests within a particular economic sector (bargaining positions), with the employment objective falling between the two.

II

Thus the Restrictive Practices Court has not only to probe into the economic effects of restrictive agreements and of their elimination; it also has to assess these effects in the light of a multiplicity of specified policy objectives or goals.[4]

While it may be agreed that restrictive agreements may be capable in particular circumstances of contributing to the promotion

[1] (1960) L.R. 2 R.P. 50.

[2] (1961) L.R. 2 R.P. 241.

[3] It will be seen that the objectives go well beyond those possible economic consequences of monopolistic market structures which fall within the scope of the " rule of reason " employed by the U.S. courts in their handling of single-firm monopolies (but not, of course, restrictive agreements).

[4] In *Re Water-Tube Boilermakers' Agreement* (1959) L.R. 1 R.P. 285 the court seemed to recognise a further objective, the furtherance of the " national interest " (at p. 341). See comment in (1960) 23 M.L.R., pp. 83–84.

of the various objectives,[5] it requires no intricate argument to show that different disinterested observers might not necessarily arrive at the same assessment of a particular agreement in terms of section 21 of the 1956 Act, which sets out the seven justifications for restrictive agreements and the possible detriments flowing from them. The mere fact that the legislation does not—and could not be expected to—assign the relative weights to be given to the various policy objectives ensures this result. Even if there might be agreement on the economic effects of a particular agreement and of its hypothetical removal, the weighing of meritorious effects against the inimical effects obviously must involve judgment and subjective appraisal. Moreover, the establishment of the effects of an agreement and of its removal is often not simply a matter of drawing inescapable conclusions from obviously applicable premises with the help of ascertained facts. It is true that the *general presumption* in the legislation that restrictive agreements are against the public interest narrows somewhat the range of possible assessments; but this range remains wide for many types of agreement in practice.

Is a court of law the most appropriate place for such assessments to be made, even when the court in question includes lay members versed in industry, trade or administration? When the legislation was going through the parliamentary process, much was made of the question whether or not the issues before the proposed court were "justiciable." I do not wish to become entangled in the semantics of that elusive word. Nor do I wish to suggest that a court of law is necessarily less competent to assess economic situations than others who would have to do this if an alternative non-judicial procedure were to be used. (I would, however, make three points, in parentheses. It may be a deficiency that the court is not able to make investigations of its own, but has to decide the matters before it on the basis of materials introduced in evidence by the contending parties. Secondly, it is not likely that the expertise of witnesses such as accountants and economists is most helpfully deployed when their contributions take the form of evidence as part of a courtroom conflict. Thirdly, the judicial process, whatever its virtues, does not seem to have any special value in yielding insights or producing skills and procedures for eliciting information and argument which are denied to non-judicial arrangements, such as those of the predecessor Monopolies and Restrictive Practices Commission.) The point I wish to make is that the court

[5] See, for example, discussion of possible types of situation in my "Restrictive Agreements and the Public Interest: A Critique of the Legislation" [1960] *Public Law*, pp. 152–169, *passim*.

is willy-nilly involved in economic policy-making. This is not a novel point, and derives from the nature of our approach in this country to the control of restrictive agreements and monopoly. Again, I see little point in arguing whether or not a court *ought* to be given such responsibilities and functions. I merely wish to show that the court's decisions may impinge directly on general economic administration. This is partly true in respect of the exports justification, but is particularly clear for the employment objective.

III

The regional unemployment provision of section 21 of the Act says that a restrictive agreement acquires merit if the court is satisfied that the removal of the agreement would be " likely to have a serious and persistent adverse effect on the general level of unemployment in an area. . . ." Now one can think of situations in which the removal of a restrictive agreement might cause a marked contraction in the particular industry in a particular area. So far the matter is no more difficult—and no more easy—than determining the likely effects on consumers of the removal of an agreement. But whether the workers who might be expected to lose their jobs would remain " persistently " unemployed in significant numbers depends on many things, among which government action or inaction is one of the most important. The court, in adjudicating an agreement, is not apprised of what the government might do to alleviate any local unemployment consequential on an adverse decision—though, no doubt, the court is judicially aware of the general legislation providing for official aid to areas with high unemployment. The court, in assessing the results of abolishing an agreement, presumably either has to take a view about possible administrative action, or else has to ignore a factor which in fact might be material.[6] In any event, the court is in the dark about

[6] The employment justification was central to the arguments before the court in *Re Yarn Spinners' Agreement* (1959) L.R. 1 R.P. 118. For the Registrar of Restrictive Agreements it was argued that " under paragraph (*c*) [of s. 21] it is material for the court to have regard to the declared policy of both political parties to achieve and maintain a state of full employment which, since the war, has been successful, and to the fact that the areas here in question are within a development area under the Distribution of Industry Act, 1945, and eligible for Government grants " (at p. 163). For the Association, it was argued that the court should not take account of the fact " that the areas are development areas . . . or [of] the possibility of remedial measures by the Government. . . . Paragraph (*c*) was inserted for the express purpose of avoiding any adverse effect on the level of unemployment, and the legislature must be presumed to have inserted it in order to prevent the Government in these difficult times from being embarrassed by any sudden increase in unemployment and being forced to take remedial measures " (at p. 172). The judgment of the court does not refer to these opposing lines of argument.

what the government might do in a particular situation, since the government department concerned with these matters is not a party to the proceedings.

A decision by the court against an agreement may force the government to take remedial measures, almost certainly involving the expenditure of public funds. Yet the expenditure of the funds need not (or possibly could not) have entered into the court's assessment of the advantages and disadvantages flowing from the abrogation of the agreement. It is surely unusual for legal decisions to carry with them the possibility of such implications for public expenditure. Perhaps this has some bearing on the " justiciability " of the issues before the court; it certainly has some bearing on the question of co-ordination in the sphere of economic policy and economic administration. The " overlapping " of functions seems odd, more especially as the legislation of 1956 deliberately aims at preventing any overlapping between the activities of the court, on the one hand, and those of the non-judicial Monopolies Commission, on the other (on matters where some overlapping may have something to commend it).

The general point can be put another way. The government has powers to alleviate regional unemployment. A decision to extend official aid to an area involves the consideration, by the responsible government department, of the seriousness and likely persistence of the unemployment, of the costs to the Treasury, and of the effects of the aid on the interests of workers in other areas, consumers, exports, and so on. The issues are in some ways similar in nature to those in a case, involving regional unemployment, before the Restrictive Practices Court. Yet in the implementation of policy towards regional unemployment we rely on administrative assessment and action, subject to scrutiny, review and criticism in the legislature, and not on the judicial process.

IV

In conclusion, I wish to turn to a different aspect or implication of our approach to the control of restrictive agreements. Our legislation implies that there are or may be restrictive agreements which have the effect of maintaining regional employment, or maintaining exports, or of neutralising the strong economic position of dominant firms, or of advancing the interests of consumers—all regarded as desirable effects, to be weighed against the detrimental side of such agreements. One may presume that the provisions of section 21—the introduction of the multiple policy objectives—would not have been so elaborate if it were not thought that the justifications would

apply to a material number of cases. The provisions were certainly not introduced to protect the interests of parties to restrictive agreements: as is apparent from the wording of section 21, and as has been clearly stated by the Restrictive Practices Court, in the eyes of the law an agreement acquires no merit because it serves the interests of the parties to it, even where there is no detriment from the agreement to the public interest.[7] We may infer that the elaborate section 21 was made elaborate because it was thought that the meritorious consequences of those agreements judged to be in the public interest would be significant in the aggregate,[8] so that a blanket prohibition of all restrictive agreements would have involved the unnecessary sacrifice of material public benefits.

Now in practice, to some extent at least, the establishment and effective enforcement of restrictive agreements are accidental. For example, there are obvious difficulties about getting a largish number of competing suppliers to act in concert and to accept restrictions, and, even more so, to adhere to these restrictions. In short, competing suppliers may be unwilling or unable to have (effective) restrictive agreements even when this might be in their collective interests, let alone when this might mainly or solely promote the interests of consumers, preserve the pattern of regional employment in the industry, or promote export earnings.

If it be accepted that restrictive agreements can yield the laudable results listed in section 21, and that elaborate arrangements are necessary to ensure that "good" agreements are not eliminated together with the "bad," does it not follow that the introduction and enforcement of restrictive agreements is too serious a matter to be left to business firms? Should the government not establish machinery for the investigation of industries in which appropriate restrictive agreements would promote export earnings or confer specific and substantial benefits on consumers, and for the introduction and enforcement of these agreements (especially as such agreements, as distinct from direct government aid, are no burden on the public purse)? If it is said, in answering these questions in the negative, that the benefits are not likely to be material in total,

[7] See especially, *Re Blanket Manufacturers' Agreement* (1959) L.R. 1 R.P. 208.

[8] In defending the exports justification, Mr. Thorneycroft, then President of the Board of Trade, seemed to argue in terms of the *aggregate* effect of restrictive agreements when he said: "The total export position of the country is made up of exports from often quite small industries, and it would be very damaging to the country if that particular argument [s. 21 (f)] were not admitted" (*House of Commons Debates*, May 3, 1956, col. 693). For a fuller discussion of this point, see article cited in note 5, above, pp. 164–166.

the same criticism might be applied to our treatment of voluntary restrictive agreements.[9]

I should not, of course, be understood to be advocating the setting up of machinery for the official promotion of virtuous restrictive agreements in situations in which the firms in question fail to take the initiative or are unable to reach and enforce the required agreement. I have merely tried to make explicit what seems to me to be implicit in our approach. If uncontrolled competition between independent firms is not regarded as promoting the public interest in every case, it would be quite accidental for the best possible results to be obtained by leaving the imposition and enforcement of the controls to business firms (subject to the approval of some adjudicating body). Given that too much competition may not be in the public interest—a premise of our legislation—is it not the responsibility of government to see not only that beneficial restrictions are not abolished but also that desirable restrictions are introduced? If it is fair to put the issue in these terms, I imagine that one may be inclined to look more critically at our whole approach.[10]

[9] If it is argued that it is one thing for government to allow a voluntary arrangement to continue, but quite another thing for it to impose arrangements on industry, the answer is that—as already noted—our legislation deliberately disregards the interests of the firms who are parties to restrictive agreements. It would surely be incorrect to interpret the legislation as implying that voluntary restrictive agreements are permissible unless they are against the public interest.

[10] For a critique of the provisions of s. 21 (1), see my article cited in note 5. above.

SOME OBSERVATIONS ON BRITISH RESTRICTIVE PRACTICES LEGISLATION

By

C. P. Cottis and J. R. M. Whitehorn *

Background

1. British restrictive practices legislation, like that of most other countries, is directed against those restraints on competition which act as harmful limitations on the freedom of the market. It is confined to the production, processing and supply of goods. It goes further than most in assuming that agreements limiting that freedom are prima facie harmful, and most of industry's criticisms of the present law are criticisms of the lengths to which that assumption is carried.

2. While it may be accepted that it is for the Government to say how far combination should be allowed, the degree of combination which is desirable is in essence a matter of economic policy rather than of clear economic principle. Nor is it one of morality. Moral standards may rightly be applied to the actions of combinations, but this is not the same thing. This point is worth emphasising because the popular image of a cartel certainly involves moral disapproval of it. In Adam Smith's well-known words, " People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or some contrivance to raise prices." This attitude is mistaken. The balance between the need to compete and the need to co-operate, between individual and collective action, is not static; the same restrictions may be good or bad according to the surrounding circumstances; and the balance varies at different times and in different fields.

3. In the thirties, for example, many inside and outside industry were very worried about " cut-throat competition "; and fixing prices for the purpose of " rationalisation " was not only respectable, but was in many cases positively encouraged by authority. During, and for some time after, the war a very large range of prices was controlled, and a number of price agreements now registered

* The authors are members of the staff of the Federation of British Industries, but their paper is not an official statement of the Federation's policy. It was separately printed as an F.B.I. Occasional Paper in October, 1960, when the paper originally delivered at the Southampton Colloquium in July, 1960, was revised

under the 1956 Act (*e.g.*, that of the English Bakers) were continuations by the trade associations of schemes set up and operated by the Government during the war. Since then, economic policy has changed, and unfettered competition is held up again as the ideal—at least in the industrial field. Not unnaturally many industrialists, most of whose working life has been spent in a different atmosphere, find great difficulty in reorientating their habits of mind in this new direction.

4. The same principles are not applied, moreover, to the supply of labour and services, to the professions, to the marketing of agricultural produce by the various statutory Marketing Boards, or indeed to the nationalised industries. Similarly in the international commodity markets the United Kingdom is a member of several organisations, such as the Tin Producers' Buffer Pool and the International Wheat Agreement, whose avowed purpose is to regulate prices and output. There may be good practical reasons for reaching a different point of balance between competition and co-operation in these fields, but it is understandable that industrialists tend to lose patience with trade union leaders and members of the learned professions who lecture them on the wickedness of cartels. There is a comparable distrust of academic economists, who are often felt not to understand the problems of industry, and so wish to change industry to fit their theories rather than vice versa.

5. Then, too, the widely held view that governments now have the knowledge and the power to prevent slumps of the pre-war kind—one of the underlying although unstated assumptions of the 1956 Act—is regarded, Keynes notwithstanding, as fallacious or at best non-proven by many industrialists and economists. For them restrictive agreements often seem a necessary insurance against the hazards to which any individual industry is exposed and so also against the shocks to which an economy, so dependent on international trade as ours and so susceptible to the policies of other countries, is open.

Methods of Control

6. Given, however, that it is considered necessary, for the economic health of the country, to restrain various limitations on free competition, the question arises of what should be restrained and how the restraint should be applied. Believing that this is a matter of expediency, industry has favoured an empirical approach. The right thing to do is to take each limitation and examine it to see whether in the particular circumstances the harm it does by decreasing competition is greater than the benefits it produces for other reasons. Industry would be very much opposed to any

attempt to prohibit whole classes of agreement, whether defined by form or by effect. The Monopolies Commission's Reports and the cases in the Restrictive Practices Court—to look no farther—have made it quite clear that the important factor is not so much the form of the agreement as the way it is administered and its results in practice, and that in some cases the ill-effects of a substantial restriction on competition are more than counterbalanced by the advantages it brings to all concerned. An example of the variations in form are the price systems of the English Bakers,[1] which set a maximum price; the Phenol Producers,[2] which set a fixed price; and the Blanket Manufacturers,[3] which set a binding minimum price. One might expect the first of these to be the least harmful and the last the most. In fact, the Restrictive Practices Court found that the second scheme kept prices up; the first probably kept some prices up and others down; and the third had no effect at all (it was a stop-loss scheme, and the price was set so low that virtually no blankets were sold at it). An example of real but beneficent restriction is found in the Monopolies Commission Report on the Supply of Metal Windows.[4] Here there was a common price agreement which undoubtedly did reduce competition, but which was part of a wider arrangement which the Commission considered did more good than harm—particularly because it was found to have increased the efficiency of the member firms so that costs had been reduced and quality increased.

7. If, then, each case is to be judged on its own merits, two questions arise: by whom, and by what criteria. The answers given to these questions vary widely in different countries. The United States system is, of course, in a class by itself, since free competition is there regarded as part of the American way of life to be defended on moral and political as well as economic grounds. Such an attitude has little appeal to industrialists in the context of the very different economic circumstances and philosophies of Europe. Most of the Continental countries have some sort of administrative authority which decides according to fairly loose criteria. In the Netherlands, for example, the Minister concerned exercises his powers "where the general interest so requires." This sort of imprecision coupled with wide discretion seems to be generally acceptable to industry there, probably because this is part of the general tradition of Continental administrative law. Their procedures are well worked out, and there is usually the safeguard of appeal in case of abuse of power.

[1] L.R. 1 R.P. 387.
[2] L.R. 2 R.P. 1.
[3] L.R. 1 R.P. 208.
[4] H.M.S.O., 1956.

8. The initial approach in this country was rather similar. The Monopolies Commission, set up in 1948, is an administrative body making recommendations to Ministers in the light of very widely-drawn principles. By section 14 of the Monopolies Act, 1948, it has to take into account, when deciding on the public interest, " all matters which appear in the particular circumstances to be relevant," though the section does go on to particularise matters which should be specially taken into account. The Commission had produced fourteen reports on particular trades by August 1956, and was generally disliked in industry. One main ground for this was the Commission's procedure, which left the industry under review groping in the dark. Its representatives would be told of complaints in general terms only and without being told who made them; they would be told that the Commission thought certain activities might be against the public interest without being told why it thought so; and some of them at least felt that the Commission was combining the functions of detective, prosecutor and judge. There was also in some cases a feeling that the conclusions and recommendations of the Commission were not well based in their own factual findings: they rarely found evidence of harm or abuse having occurred, but often made far-reaching proposals lest it might in the future. Moreover, the whole process of investigation was and is extremely burdensome, as the Chairman of Imperial Chemical Industries Ltd. said in his last annual report.[5] Under the circumstances, the prospect of a formal issue, formally presented with full regard to the rules of evidence before an impartial tribunal with no preconceived notions, was very attractive; and there can be little doubt that this preference in industry contributed to the decision in 1956 to turn restrictive agreements over to a court.

Section 21

9. Experience of the court as constituted today has not, by and large, altered that view. The main criticisms are not of the court as such but of the criteria it has to apply (though not unexpectedly there are minor defects in the machinery of registration [6]). Here the decision to have a court had unfortunate consequences. It followed—or was held to follow—that precise criteria had to be laid down in order to give the court a justiciable issue and not to present it with the unsuitable task of deciding questions of policy or principle. Partly for this reason, and partly because the Monopolies Commission Reports were thought to have shown that restrictive

[5] *The Financial Times*, May 13, 1960.
[6] See Appendix.

agreements took many forms and that the great majority of them were harmful, the registration sections (6–8) of the Act were drawn very wide and the exemption section (21) very narrow. Just how narrow the section is was not generally appreciated when the Act was before Parliament. Many M.P.s as well as industrialists seem to have thought that the court would examine an agreement, decide whether it was a good or bad one, and then, if it were a good one, give it their approval; and that section 21, especially subsection (1) (*b*), gave them adequate latitude for this process. As most lawyers had expected, Devlin J.'s judgment in the first case before the court [7] disposed of that notion. As he said,[8] " Our task is the ordinary task of a court of law to take the words of the Act according to their proper construction and see if, upon the facts proved, the case falls within them." The fact that the form of the judgment was a pronouncement on the public interest was irrelevant. The important factor was the words of section 21, which laid down the seven sets of circumstances within one of which the restriction had to be brought, and the general requirement that the restriction should not be unreasonable having regard to the relevant circumstances and any detriment to the public resulting from the restriction.

10. These seven sets of circumstances—the " gateways "—are the heart of Part I of the Act, and industry's criticisms are directed principally at them, since they are felt to be so narrowly drafted that hardly any agreements have any prospect of passing them.

(a) *Public safety*

11. This test has been considered only in the *Chemists'* case, where Devlin J. said [9]: " We have to ask ourselves whether a reasonable and prudent man who is concerned to protect the public against injury would enforce this restriction if he could. He would not do so unless he was satisfied, first, that the restriction afforded an adequate protection and, secondly, that the risk of injury was sufficiently great to warrant it." This defence is further limited by the principle that a restriction will not be acceptable if it is wider than is strictly necessary for the purpose put forward as justifying it (*cf.* below, under (d)); and it is clearly of rare application.

(b) *Public benefit*

12. This is by far the most important of the gateways, because it is the only one which is drafted in general terms. It has been

[7] *Re the Chemists' Federation Agreement (No. 2)* (1958) L.R. 1 R.P. 75.
[8] At p. 103.
[9] At p. 106.

pleaded in every case fought so far, with one minor success.[10] Its major defect, from the point of view of parties to an agreement, is that it is concerned only with benefit to the public. This puts them in a false position from the outset: for it is obvious, and needs no apology, that the main origin and object of agreements must be the benefits the parties expect thereby for their own industry. Benefits to others, however great, come second: yet those alone are considered relevant. It is not suggested that benefit to the industry should be the only, or even the dominant, criterion: but it is surely hard to resist the contention that it should be possible for the court to take it into account, at least in cases where there is no, or no significant, detriment to the public.

13. Moreover, the " public " is limited to " the public as purchasers, consumers, or users of any goods." This may well make it impossible to bring in benefits to the nation as a whole (*e.g.*, that the agreement kept down the prices of imported raw materials and thus saved foreign exchange); or the benefit of the nation of having a strong and healthy industry. By contrast the court is required to consider detriments to the public as a whole, under the " tailpiece." In the *Yarn Spinners'* case, indeed, the main detriment found to the public was the national one—that the scheme had kept the industry too large and had impeded exports. Yet any non-statutory scheme designed to get a smaller and more efficient industry would have to be considered, under the section as now drafted, entirely for its effect on the customers.

14. This limitation to purchasers and consumers is likely to rule out most schemes affecting prices, since it has been held in the *Scottish* [11] and *English Bakers'* [12] cases that a steady and reasonable price is not of itself a benefit to consumers. It is necessary to prove either that there is some other benefit inseparable from the price scheme or else that the scheme keeps or is likely to keep prices down rather than up. The times of shortage, in which the latter result was not uncommon, are now largely over; and in the present state of the economy it would be very hard to prove that any scheme had that effect in the short term. The time-scale is important here, and the longer the term in view the harder it is to *prove* the effect of an agreement: yet it may well be the case that in the long run the

[10] Since this paper was written, judgment has been given in the *Black Bolt and Nut Case* (1960) L.R. 2 R.P. 50, in which a price scheme was approved by the court on the grounds that it conferred a specific benefit on the stockholders and large buyers who were the industry's principal customers. This major success must therefore be added to the minor one of the Blanket Manufacturers' minimum quality provisions.

[11] L.R. 1 R.P. 347 at p. 376.

[12] At pp. 470–471.

stable price brought about by the agreement would be on the average lower than the fluctuating one, if only because of the extra costs of frequent and rapid changes in the rate of production.

15. The phrase seems likely to cause even more difficulty in the case of those industries which do not deal at all with the public at large but only with other industries. The point was considered but not decided in the *Yarn Spinners'* case,[13] but the court in the *Carpet Manufacturers'* case [14] considered possible benefits both to the " general public " and to the " retailer section of the public." All this suggests—although the point has not yet been definitely decided [15]—that the words " the public as " are in fact meaningless, and it is really only benefit to any " purchasers, consumers or users " that is relevant.

16. Having once proved that the users are benefited, it is necessary to prove that the benefit is " specific and substantial." This again is a serious limitation, especially for restrictions which do not directly affect the ultimate consumer (*e.g.*, recommended terms of sale), for the more remote he is from the impact of the restriction, the more onerous become those adjectives. Yet such restrictions may be the most sensible and economic method of trading for the industry and good for its morale.[16]

(c) *Outside competitor*

17. This defence has not yet been used, and it is not likely that it will ever be very important. There can be few industries in which there is one firm powerful enough to prevent or restrict competition unless the other firms combine against it, and there can be even fewer in which such a policy is being followed.

(d) *Predominant supplier or customer*

18. This was pleaded in the *Boilermakers'* case, where it was held [17] that if there was a predominant customer and it would for

[13] L.R. 1 R.P. 118 at p. 190.
[14] L.R. 1 R.P. 472 at p. 539.
[15] Since this paper was written, the point has been decided by the judgment in the *Black Bolt and Nut* case. It was there held what had to be shown was benefit to the generality of any one class—purchasers or consumers or users—rather than benefit to all members of each class, as the Registrar's counsel contended, or to some of the members of one class, as the defendants' counsel claimed. It is thus now clear that benefit to another industry can be pleaded.
[16] This point was vividly illustrated by the *Blanket Manufacturers'* case: their terms of sale failed although the court found that several of them were reasonable and useful; and their stop-loss price scheme failed although almost all blankets were sold above the minimum price. Thus both these provisions failed although—indeed because—they did not affect the public at all.
[17] L.R. 1 R.P. 285 at p. 340.

any reason be impossible to negotiate fair terms without the restriction, then it was not necessary to prove anything more: the customer did not have to be abusing his power in any way. However, the defence was not successful, because the agreement applied to all tenders, not just to those to the predominant customer, and thus was held to be wider than was reasonably necessary. As the Central Electricity Generating Board—the predominant buyer—placed 83 per cent. of the total home orders and 56 per cent. of all the orders in the area covered by the agreement, it was not unreasonable to use the defence; and it failed on what laymen at any rate would regard as a technicality.

(e) *Unemployment*

19. This defence was established in the *Yarn Spinners'* case, though the agreement failed because the harm to the public if the agreement continued was held to be greater than that of the increased unemployment if it were terminated. Few industries will be sufficiently important in one geographical area to take advantage of the defence.

(f) *Exports*

20. This defence was pleaded successfully by the Boilermakers, and unsuccessfuly by the Carpet Manufacturers. It has the advantage that the nation's interest coincides with the manufacturers', and a restriction may be defended on the grounds that it does what it was meant to do. It remains to be seen in how many cases this defence will be of avail. Meanwhile it may be noted that for obvious reasons the interests of the consumer—in this instance abroad—are not at issue.

(g) *Subsidiary*

21. This has not yet been considered by the court, and it will never be of importance.[18]

Suggested Improvements

22. Industry, then, wants a judicial procedure, with two sides, a judge and known rules. This it has. It also wants tests which give beneficial or harmless restrictions some prospect of being approved. These it largely lacks. The kind of reforms necessary to achieve this would be:

[18] It was applied, without being considered in any detail, in the *Black Bolt and Nut* case. The comment stands.

(a) to allow the court to consider benefit to the nation (see paras. 12–16 above),

(b) to allow it to consider benefit to the parties to the agreement (see paras. 12–16 above),

(c) to give the court in general a somewhat wider discretion.

23. So far as (a) and (b) are concerned, it may be objected—as it was when the Act was before Parliament—that the court is not capable of deciding such wide issues. Experience does not support this view. Already the Act requires the court to decide whether a restriction which has passed one of the gateways is not unreasonable having regard to the balance between the relevant circumstances and any detriment to the public or to persons not parties to the agreement. This clearly requires a judgment of just this nature. So far, the court has had to make this kind of choice in three cases,[19] and in none of them did it find any difficulty in deciding where the national interest lay, despite the theoretical impossibility of balancing a benefit to one class against a different detriment to another.

24. So far as (c) is concerned, the question arises how far it is either desirable or possible to give discretion to a court to apply what might be called the spirit rather than the letter of the statute. Put like that the question is doubtless a heresy. The concept, however, of importing a little more flexibility into the court's determination of its judgment, while preserving the fully judicial nature both of the court and of the procedure, may not be incapable of translation into statutory wording. Simply by way of illustration, the court might be required to consider not only whether on the facts the circumstances specified in the gateways obtained, but also whether any similar circumstances obtained; or, more widely, to take into account not only the particular factors specified but also any other factors it considered relevant. There is clearly plenty of room for debate here, and it will be interesting to see whether English law can solve the problem.

Other Matters

25. This paper is primarily concerned with collective agreements and the Restrictive Practices Court, for it is in this field that policy and thinking are most developed. It is as well, however, to note that there are three other areas to which no doubt more attention will be given in the future.

[19] Now four—the *Yarn Spinners'*, the *Blanket Manufacturers'*, the *Boilermakers'* and the *Black Bolt and Nut Manufacturers'*.

Monopolies

26. Single-firm monopolies are the chief remaining field for the Monopolies Commission.[20] The process of applying the wide criteria of the 1948 Act to the single firm would appear even more difficult and vague than that of applying them (under the former dispensation) to collective agreements. Nor is there in this field either the public concern or the prima facie evidence of shortcoming that would justify the hazardous attempt to define more precise criteria for the running of large businesses. Big companies whose position makes them liable to the attentions of the Commission are already conscious of their wider responsibilities and of their public posture; and the possibility of review one day by the Commission may perhaps be one element in this. Meanwhile it is to be hoped that we in this country will not become infected by the notion that " bigness is bad ": our dependence on international trade and the expansion of markets make such a philosophy particularly inappropriate to our present-day needs.

27. Future policy will no doubt be influenced by the findings of the Commission on cases already or in the future referred to them. Here it is significant that the Commission's latest Report, on Fertilisers, gave I.C.I. a completely clean bill and recommended that Fisons should pursue a pricing policy which they had already adopted before the Report was published.

Resale Price Maintenance

28. As to resale price maintenance, there has been a fresh outbreak of public debate in the last few months, and a disposition in some quarters to question the new dispensation brought about by the 1956 Act. This, of course, forbade collective enforcement (s. 24) and provided a new right of individual enforcement against third parties (s. 25)—the lack of which had led to the systems of collective enforcement now prohibited. From the point of view of manufacturers, the new right has much to commend it, for it leaves it entirely to the manufacturer's discretion whether or not to make use of it. Some do (though they are very rarely obliged actually to go to court): many do not, and resale price maintenance has largely gone, for example, in the grocery trade. The object of the Board of Trade's present fact-finding inquiry is to assess the extent and effects of resale price maintenance in today's circumstances—which are very different from those of a decade ago when the Lloyd-Jacob Committee reported.

[20] Together with export agreements and practices not within the purview of the court, on which however no references have yet been made.

The International Scene

29. Internationally, the prospect for the British exporter is confusing. As more and more countries bring in restrictive practices laws of varying scope and effect, it becomes both harder and more necessary for international traders to adapt their trading methods to them; and the liability to investigation, the need for permission and above all the uncertainty have a permanent nuisance value. A particularly troublesome problem is that of the extra-territorial application of the United States anti-trust laws, over which the behaviour of the United States has provoked much resentment in Canada and in Europe. The Dutch provision (in their Economic Competition Act) prohibiting compliance with the decisions of another State in matters of competition without the permission of the Minister concerned is an interesting reaction. We have by no means heard the last of this problem, which may well arise in future apropos the anti-trust laws of other countries —perhaps, for example, the rule of competition in the Treaty of Rome.

30. Meanwhile it may be noted that almost all national laws in this field, being concerned primarily to protect the interests of the home market and the domestic consumer, ride export agreements with a lighter rein [21]; and even in countries where there is no explicit exemption, authorities administering the law are likely to feel a less tender concern for the interests of foreigners.

31. In the Common Market, Articles 85–90 of the Treaty of Rome seek to protect and promote freedom of trade between the members, and so import this criterion also into the national policies and laws of the Six. The Stockholm Convention goes less far: its declaration against practices which " frustrate the benefits " to be expected from the reduction of tariffs and import restrictions in the Free Trade Area is accompanied by what amounts to a government-to-government complaints procedure; and there is provision for review of these provisions in the light of experience. Meanwhile, the governments concerned in many cases do not possess—and the Treaty puts them under no obligation to take—powers to take action (other than by persuasion) against practices which might be found to offend against the principles laid down in the Treaty. Thus the approach is empirical, policy is left to be developed in the light of experience, and leaps in the dark are eschewed. To the industrialist in the Seven this caution is the more welcome by contrast with the perplexities to which Articles 85–90 of the Treaty of Rome are

[21] *Cf.* U.K. 1956 Act, ss. 8, 21 (i) (*f*) and 31; the German Cartel Act of 1957, s. 6; and the Webb-Pomerene Act in the U.S.A.

giving rise and which are exercising the mind of every Continental lawyer in this field.

32. The prospect, then, of a multiplication of authorities, definitions and procedures is somewhat daunting—the more so if proposals for a world-wide system of supervision (such as those put forward some years ago by an *ad hoc* committee of the Economic and Social Council of the United Nations, which were rejected; or those now under discussion in the G.A.T.T.) were to find favour. The industrialist, if he is to do his job, is entitled to expect, at the least, reasonable certainty; safeguards of fair and judicial procedure; and protection from " nagging." Whether he will get them is another matter.

APPENDIX

Some Procedural Defects in the 1956 Act

Registrable agreements (sections 6, 7 and 8)

1. The definitions of what is registrable are widely drawn and as a result some " restrictions " have been caught up which are far from the mischiefs at which the Act is aiming. Certain arrangements for subscriptions to trade associations, having no other purpose or effect, are an example. Any definition is probably bound to result in some anomalies; and in so far as free use is made of the power to remove insignificant agreements from the register (s. 12), and the procedure for this is improved, the problem becomes to that extent less troublesome.

2. A particular difficulty is that caused by section 6 (7), whereby in the case of trade association recommendations, it is the agreement for the constitution of the association which is deemed to be registrable. This results in the association itself as opposed to the particular activity in question being caught up in registration; and so, unless the association is wound up, its constitution remains live on the register even if all registrable activities have been abandoned, and it has to continue to lodge particulars of changes, *e.g.*, in membership. This could be mitigated by better provision for " dead " agreements (see para. 7, below). But in any case it would be better if, when association activities require registration, the requirement that the basic agreement is deemed to be the constitution should be done away with (except where the restrictions are in fact incorporated in the constitution). Instead there would be deemed to exist an agreement between the members as to the recommendations, and this notional agreement would be registered. (Consequential changes, *e.g.*, in the Registrar's Regulations, would no doubt be necessary. The constitution could of course still be put in evidence before the court.)

3. One particular difficulty—and there may be others—affecting normal commercial transactions between companies is that of restrictions necessarily consequent on the sale of good will by one company to another—*e.g.*, restrictions on the area of trading. These appear prima facie registrable, if both sides accept them: yet without them good will could rarely be sold, and a useful form of transaction which is the reverse of restrictive would be inhibited. Yet if such restrictions should be referred to the court it is hard to see how they could be justified in the terms of section 21.

Agreements of no substantial economic significance (section 12)

4. The Registrar has stated his intention of making use of the powers under section 12 more freely, and has referred to some two hundred agreements as possible candidates. However, the section is faulty in at least two respects.

5. First, it refers to " agreements " and not to " restrictions." No distinction therefore is possible between separate restrictions in the same agreement; they must stand or fall together. On the other hand were it not so the Registrar would in effect have a wider discretion to judge and determine the fate of restrictions: if he could dispose of certain restrictions in an agreement under section 12 while referring others in the same agreement to the court, he would then in effect be exercising in advance some of the functions of the court. If the suggestion in paragraph 2 above were adopted the problem would be solved, since separate activities by an association could be treated separately throughout. (They could still of course be brought before the court together, if all concerned thought that most convenient, under section 23 (2) (*b*).)

6. Second, the section is so drafted as to bring about the procedural nonsense that any change in an agreement that has been removed under it (including a change in the parties) requires the agreement to go back on the register and be put through the procedure afresh. In case of associations with a constant turnover of membership this would be particularly troublesome.

Dead agreements

7. There is no provision in the Act whereby " dead " agreements —that is agreements that have been wound up, or from which all registrable restrictions have been removed—can ever be removed from the register. (As the Act stands their ultimate fate is not clear, but sections 1 (2) and 20 (1) might require them in due course to be brought to the court, when presumably a formal declaration that they are contrary to the public interest would be made.) This is widely resented, and is recognised on all sides to need correction.

THE LAW RELATING TO RESTRICTIVE TRADE PRACTICES IN WEST GERMANY AND IN THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY

By

RUDOLF GRAUPNER *

I. INTRODUCTORY OBSERVATIONS AND HISTORICAL SURVEY

IT seems hardly necessary to emphasise for the student of comparative law and practitioner in international legal matters the great importance of becoming acquainted with what is commonly called the German Cartel Law and those provisions in the Treaty establishing the European Economic Community which are termed "Rules governing Competition." This follows from a variety of reasons. The German Cartel Law, which has been characterised as the Basic Law for the (West) German economy, forms part of the law of a country which ranks second (after the United States) in the volume of exports of goods. In view of both the numerous legal relations coming into existence through international commerce and the increasing co-operation and interdependence of German and non-German corporations and traders, knowledge and observation of this Law is of paramount importance for every lawyer who has to act in this sphere. The same applies to the aforementioned provisions of the Common Market Treaty which regulates the economic life of a community of great economic strength whose combined volume of export is the greatest in the world. Secondly, the German Cartel Law, which would seem to be the most comprehensive enactment on this subject-matter, deserves to be studied as a serious effort of a State which, after a twelve years' period of disregard for ethical and legal values, tries to re-create a *Rechtsstaat* (a State acknowledging the rule of law) and, on the economic side, a community based on the rights of the individual to take part freely in the economic life subject to the rights of the dependent classes to be protected against exploitation and abuse of economic power concentrated in the hands of a few.

Incidentally, the present state of German economy would at least not seem to speak against the expediency and salutary effects of this Law.

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The Cartel Law of 1957 completes a development in legislative efforts to exercise control over cartels which started with the Cartel Order of 1923. Not long after the enactment of the *Gewerbeordnung* (Statute on Trade Regulations) of 1869 which introduced the principle of freedom of trade—as distinct from the quasi-monopolistic rights of the guilds—cartels and other forms of restrictive trade practices became apparent. Under the principle of freedom of contract, which was interpreted in the light of nineteenth-century conceptions of *laissez-faire*, cartels were almost unconditionally upheld. It has rightly been observed that by 1914 Germany had become the classical country of cartels.

The economic situation in which Germany found itself during the First World War made a planned economy imperative; the State readily used the cartels (and other trade associations) as its instruments for carrying out its policy. After Germany's defeat the previous policy of virtually unqualified *laissez-faire* in the field of industry and trade was not resumed, chiefly because the socialist parties which participated in the Government aimed at increased State intervention. Even though their demands were generally not realised, a limited interventionist policy in the economic sphere carried the day. As regards the cartels, the first legislative measure occurred in November 1923 by the enactment of the Cartel Ordinance (*Kartell-Verordnung*), through which it is aimed to control the abuse of economic power. It should, however, be noted that by this law the existence and even usefulness of cartels was recognised and only abuses were to be prevented.

The Ordinance provided for the prohibition (by a decree of a special court) of such cartels as were to be considered economically unacceptable and, further, by giving members of a cartel the right of withdrawal therefrom. In the following years the Government repeatedly intervened in the field of price-fixing agreements.

The National-Socialist régime used the great number of strong cartels for its policy of planned economy and autarchy and ultimately for the preparation and prosecution of the war. The cartels were transformed into organs of State-planned economy whereby their character as private associations was in effect abolished. There was in fact no need for private cartels in the last stages of that régime as free competition had virtually ceased to exist.

When the Allied Powers took over the government of Germany in 1945 a German Cartel Law in the proper sense did not exist. Whereas the Soviet Union soon began to impose the Communist economic system in its Zone of Occupation the Western Powers took measures for the building up of a free economic order which

included the deconcentration of the big concerns and the decartelisation of industry and commerce. The original aims of these measures were the weakening of German economic power with a view to preventing Germany from starting another war and at the same time the laying of the foundations of a sound economic order on a democratic basis, in which each individual should be able to play a part on the principle of unrestricted competition. The United States in particular, relying on experience of its cherished Anti-Trust Law, was the protaganist in this field. For this purpose the Western Allies issued Laws and Ordinances in the first months of 1947 which contained far-reaching prohibitions of cartel agreements and understandings as well as of other arrangements by which free competition might be disadvantageously affected. However, these Orders provided for exemptions to be granted by the Allied Powers, and by the wise and considerate policy of the administration of this cartel legislation the basis for the rebuilding of a sound economic order was laid. The German courts which had to administer this law readily co-operated—a task often not without difficulty on account of the fact that the Allied legislation originated from a foreign legal system, that of the United States, and was therefore rather alien to German legal thinking. Nothing better proves the soundness of the Allied legislation than the acceptance of its basic ideas and to a considerable extent also of its specific provisions in the German Cartel Law of 1957 which replaced it.

II. The Law against Restraints of Competition of July 27, 1957

(1) After deliberations lasting for seven years in which not only the German Parliament and the representative bodies of trade and industry but also a host of legal and economic writers took part, a comprehensive statute consisting of 109 sections was enacted which came into force on January 1, 1958. The scope of this Law which is designed to cover all spheres of economic life in which restrictions of competition both in respect of the sale of goods as well as commercial services may occur, and the complexity of its provisions which are intended to be made adaptable to nearly all foreseeable economic situations makes it impossible to give in this paper more than a short survey of its basic provisions. Only certain more important aspects and especially those of international significance will be emphasised and discussed in greater detail.

(2) We have so far referred to this Law as the Cartel Law. We shall continue to do so but it must be borne in mind that this description is incorrect—although this statute is also in Germany unofficially called *Kartellgesetz*—because it deals with a variety of

other sets of facts which restrict or may restrict free competition. The official name of the Law is therefore more correct, yet again not quite accurate, because the Law itself contains many provisions which constitute exemptions from this principal aim and, further, provide for restrictions of competition subject to obtaining the permission of the so-called Cartel Authorities. The statute might therefore have been better termed "Law *On* Restraints of Competition."

(3) (i) Before we deal with the substantive and procedural provisions of the Law itself, we have to define the scope of the application of the Law. First, the general principles of private law on the invalidity of contracts *contra bonos mores*, the prohibition of action against good faith, the Law against unfair competition which is designed to protect fair competition, and the Laws relating to patents, registered designs and trade marks remain in force beside the Cartel Law. The same is true of those branches of public law which relate to limitation of rights inherent in property, to the exercise of trades and professions, industrial law, the law of social insurance, currency and exchange control. Secondly, rights and duties created by international treaties and the provisions contained in the supranational agreements are as a rule not affected although the relation of the Cartel Law to certain Articles in the Common Market Treaty raises difficult questions.

Even though the legislator intended by the Cartel Law to secure the widest possible freedom of competition of enterprises and individual traders, the Law itself enumerates various and large sectors of industry, commerce and agriculture to which it is either not applicable at all or to which it only applies in part. The first group comprises the Federal German Bank, the Land Central Banks and the Reconstruction Loan Corporation, and also the activities relating to services and tariffs of the Spirits Monopoly and the Matches Monopoly as well as the agreements of the Federal Post Office, the Federal Railways and other public railways and kindred enterprises. The second group consists of enterprises to which (with certain exceptions) the substantive provisions of the Cartel Law do not apply but which are subject to supervision with a view to preventing abuse of their position of power. They are the sector of the banking and insurance business (on which special supervisory authorities have been in existence for a long time), further enterprises engaged in sea, coastal and inland water transportation as well as airlines in regard to international transportation, the activities of public utilities and, lastly, the sector of agriculture and forestry. However, several of these enterprises are obliged to register with

the Cartel Authority such agreements entered into by them as intend to restrain competition.

(ii) As distinct from previous attempts to prevent undesirable restriction of competition, *e.g.*, by the Cartel Ordinance of 1923, the Cartel Law tries to cover the whole subject-matter of restrictive trade practices either by laying down positive rules with appropriate procedure for their enforcement or—as we have just mentioned—by excluding certain sectors of the economic life from its application. Thus the Law first deals with cartel agreements and cartel resolutions (sections 1 to 14). As a matter of principle such agreements and resolutions, to which we shall subsequently for the sake of brevity only refer to as agreements, are declared invalid subject, however, to manifold exceptions. Secondly, under the heading " Other Agreements " (sections 15 to 21) so-called individual agreements, *i.e.*, agreements between enterprises by which a party to them is restricted in its freedom to establish prices or terms of contracts which it concludes with third parties in regard to goods or commercial services, are declared null and void. Yet again, several types of agreements are expressly exempted from this prohibition. Thirdly, as distinct from this disapproval of the establishment of undesirable legal relationships, the Law can intervene if such a state of facts exists that one or more enterprises have a market-dominating position as defined by the Law. Similarly, another chapter of the Law (sections 25 to 27) forbids such bodies to threaten or cause disadvantages or grant advantages to other enterprises in order to induce them to engage in activities which under the Cartel Law must not be made the subject of a contractual obligation or join or form a market-dominating enterprise or to adopt a uniform attitude with the intention to restrain competition. Into the same category falls the prohibition of measures of causing a boycott and other discriminatory treatment directed against third enterprises.

As distinct from all these prohibitory clauses, sections 28 to 33 allow for the apparent purpose of furthering fair and preventing unfair competition the establishment of rules of competition by trade associations and professional associations; such associations, but no others, are entitled to ask for their registration in the Cartel Register. Agreements by which enterprises bind themselves to adhere to such registered rules are not treated as (prohibited) cartel agreements in the meaning of section 1. This substantive part of the Cartel Law is sanctioned by penal provisions in the nature of administrative criminal law—as distinct from the ordinary criminal law—in which contraventions are punished by fines only (sections

38 to 43). In one respect section 38, subsection (3) contains substantive law, inasmuch as it stipulates that a contravention is also committed by any person who has made recommendations which, through uniform conduct or concerted acts, have resulted in an evasion of the prohibitions set forth in the Cartel Law or of Orders issued by the Cartel Authority, subject however to certain permitted recommendations relating to demanding, offering or fixing prices especially by medium-sized enterprises by way of defence against large-sized ones. The latter exemption aims at giving a special protection to the middle class trader.

The next chapter of the procedural part of the Law deals with the Cartel Authorities. It is impossible to give in this paper even a very brief survey of the functions of the Cartel Authorities, the proceedings before them and remedies against their decisions by appeal to the ordinary courts. We therefore have to confine ourselves to a few observations. The Cartel Authorities are (a) as the chief Authority the Federal Cartel Office in Berlin, an administrative body which is under the jurisdiction of the Federal Ministry of Economics; (b) the Federal Ministry of Economics which is the only authority to act in the special case provided for in section 8 to which we shall refer later; it has no jurisdiction in any other instance; (c) the Higher Land Authorities, *i.e.*, generally the Ministries of Economics of the various Länder (sections 44 to 86). The Cartel Office has the widest jurisdiction. It has power to permit cartels, to issue Orders in regard to them, it is the authority with which cartels and agreements in regard to certain types of cartels (which we shall mention later) and price-fixing agreements relating to trade-marked goods and to the book-selling trade are to be registered. Its functions also extend to supervision and control of market-dominating enterprises. Lastly it has residuary jurisdiction in respect of all cases in which the effects of the influence on the market, or of the activities in restraint of competition or of discriminatory activities or of a competition rule extend beyond the territory of a Land. It is obvious that the great majority of all issues which arise under the Cartel Law will have to be dealt with by the Cartel Office so that the competency of the Land Authorities which are restricted to cases of mere regional importance will in practice be a rather limited one.

The Cartel Authorities, when giving their rulings, must observe the Basic Law of the German Federal Republic and German law generally, but within these limits they are free to act according to their discretion as determined by the prevailing principles of economic policy and expediency. The rights of the parties concerned are safeguarded by far-reaching legal remedies, the administration of which has been entrusted to the ordinary courts, namely the Appeal

Courts (*Oberlandesgerichte*) with further appeal to the Federal Supreme Court. Thus appeals against the decisions of the Cartel Office lie to the *Kammergericht* in Berlin. It may be observed that this jurisdiction of the ordinary courts constitutes a certain anomaly in German law since legal remedies against decisions of administrative authorities are, as a rule, by long tradition dealt with by the hierarchy of administrative courts; the reason for this deviation was the consideration that the issues which may be contested will raise questions of both private and public law so that their determination by ordinary courts and especially by the Supreme Court will avoid divergent decisions which might occur if both ordinary courts—*e.g.*, incidentally—and administrative courts were to judge upon the same problem. Also appeals against levying fines are to be heard by ordinary courts.[1]

(4) After this very brief survey of the main provisions of the Cartel Law a few observations on the principal sections and lastly on some problems in the field of private international law appear to be necessary.

During the long parliamentary struggle about this Law, two schools were opposed to each other—the advocates of declaring cartels invalid as a matter of principle, subject only to permitted exceptions, and those who would allow them and would only permit the State to intervene if a cartel abuses its power (the so-called *Missbrauchsprinzip*, the principle of abuse of a position of power). The legislator adopted the first alternative but, as a matter of compromise, the law enumerates a large number of exceptions to this principle. The basic rule of prohibition is set forth in section 1 which reads as follows:

> (1) Agreements made by enterprises or associations of enterprises for a common purpose and resolutions of association of enterprises are invalid in so far as they are apt to influence, by

[1] Whereas it has been the long-established principle in German administrative law that the administrative courts in their review of decisions by administrative authorities may examine, apart from violations of binding legal provisions, whether such authority has exceeded or abused the discretion conferred upon it by law, s. 70, subs. (4) of the Cartel Law deviates therefrom in that the reviewing court may revoke a decision "if the Cartel Authority has exercised its discretion erroneously, if it has . . . exercised its discretion in such a way as to violate the purpose of this law." Thus the exercise of the discretion itself is also open to review if the authority's ruling, without constituting an excess or abuse in the classical sense, is based on considerations that are incompatible with the true appreciation of the purpose of the Cartel Law. Yet as the Orders of the Cartel Authorities are, and are intended to be, politico-economic decisions, the last sentence of the subsection stipulates that "the appraisal by such authority of the general economic situation and development is not subject to review by the court." This restriction is meant to ensure that the courts shall not become policy-makers.

restraints of competition, the production or the market conditions with respect to the trade in goods or commercial services. This does not apply as far as this law provides otherwise.

(2) The term "resolution of associations or enterprises" includes resolutions of meetings of the members of a juristic person, provided that such members are enterprises.

This provision calls for a few short comments. First the Law speaks of enterprises (*Unternehmen*) or associations of enterprises. An enterprise in this meaning is an economic unit organised for this purpose of a gainful activity of one or more persons; the legal form is immaterial so that not only companies but also an economic establishment in the form of a partnership or even belonging to one individual fulfils this requirement. Enterprises in the hands of the State or communes or other non-privately owned are within the section, provided of course that none of the exemptions mentioned earlier apply. Secondly, the section explicitly refers not only to trade in goods but also to commercial services (*e.g.*, transport businesses), an activity which is not within the scope of the English law against restrictive trade practices. Thirdly, although only agreements (and formal resolutions) can be declared invalid as a matter of law, the well-known gentlemen's agreements, *i.e.*, understandings or arrangements which are not binding in law are also indirectly caught by virtue of section 38 of the Law, a section dealing with penal sanctions. The exceptions to the prohibition in section 1 are numerous. They are far from being uniform; they have been made subject to conditions varying almost from instance to instance, a casuistic method generally alien to the German legal system. We shall now refer to the more important types of cartels which fall into this category.

(i) *Cartel agreements and resolutions.* These are cartel agreements and resolutions which deal (a) with the uniform application of terms of trade, of deliveries or of payments including discounts—provided they do not relate to prices or components thereof; further: (b) cartels on rebates on goods supplied subject to certain limitations; further: (c) cartels exclusively dealing with the uniform application of standards and types, specifications and calculations; and: (d) cartels which serve to protect or promote export, in so far as they are limited to regulating competition in markets outside the area to which the Cartel Law applies. Yet these agreements and resolutions must be filed with the Cartel Office in order to be valid and will—with the exception of the export cartel agreements—be

registered. It must be emphasised that even these cartels are subject to the rule that the Cartel Authorities may exercise their power of intervention by altering or even invalidating agreements or resolutions or request the enterprises concerned to abstain from relying on an objectionable clause if the agreements are used for purposes which are unjustified.

Whereas the cartels just mentioned come into existence on mere notification to the Cartel Authority, a second group of cartels requires permission by this Authority in order to become valid. In these cases the Authority shall have the possibility to examine whether the formation of the particular cartel is justified under the aspect of economic and general policy. They are:

(a) Cartels formed for the purpose of overcoming difficulties in the special branch of production or trade in time of an economic crisis (section 4).

(b) Cartels with the aim of effecting rationalisation of economic processes (section 5, subsections (2) and (3)). If this object can only be achieved by price-fixing agreements or by setting up a syndicate, *i.e.*, a joint purchasing or marketing organisation, the special necessity and usefulness for the general public has to be scrutinised.

(c) Enlarged export cartels, which also comprise the trade in goods and commercial services within the area of the Cartel Law, possibly even including vertical price-fixing arrangements in so far as they are necessary for insuring the desired competition abroad. However, such a cartel must not violate international treaties or reduce internal competition substantially to the disadvantage of the predominant principle of preserving free competition.

(d) Subject to the same reservations, cartels relating to the import of goods or services if the German purchasers are faced with no or only insignificant competition on the side of the suppliers. These import cartels between German importers are thought to be entitled to be formed as defence against possibly collective or individually monopolised offers on the foreign supply market towards which German importers, if acting individually, might be rather helpless unless they build up countervailing powers.

In spite of this elaborate system of prohibition of cartels subject to numerous exceptions, the legislator has seen fit to add the general clause set forth in section 8, according to which the Federal Minister of Economics has power to approve and make valid every cartel agreement or resolution if the restriction of competition ensuing therefrom is, in exceptional circumstances, necessary in consideration of the general economic situation and of the public interest.

Concluding this chapter we may quote a very apt summary of the legal position: " There is no permitted cartel agreement that cannot be prohibited on account of abuse, and no prohibited cartel agreement that could not be permitted if certain conditions are present. Cartels as such are neither good nor bad, neither a panacea nor an arch-evil. They are merely means to ends which the legal order either approves or condemns, guided by the general political basic conception of the relation between the State and the national economy and influenced by the economic policy which the Government of the day and its supporting parliamentary majority find at a given time suitable to institute and pursue." [2]

(ii) *Individual agreements.* As we mentioned earlier, the Cartel Law also deals with other agreements by which competition is sought to be restrained (sections 15 to 21). These are those agreements in vertical direction or, to use the English *terminus technicus*, which relate to resale price maintenance. Again, such agreements are null and void in so far as they restrict a party in making agreements with third parties, *i.e.*, wholesale or retail purchasers as the case may be, in relation to the goods supplied or other goods or commercial services. Two important exceptions have however been made, namely (a) for trade-marked goods (including agricultural products) and (b) for publishing enterprises in respect of sales of their books and other publications. The reasonableness of these qualifications is obvious. But if price-fixing in this privileged trade sphere is abused or becomes economically unbearable the agreements can be declared invalid in accordance with the principle of prevention of abuse. Furthermore, agreements by which one party is bound to observe restrictions in the use of the goods supplied or commercial services rendered or in the making of certain agreements with its customers, as, *e.g.*, by attaching conditions providing for exclusiveness of trade with a certain supplier or for purchasing another kind of goods the acquisition of which is not usual according to the custom of the trade, can be declared invalid if competition is thereby unreasonably restricted.

Two sections in this group, namely 20 and 21, are of particular importance and deserve more than many others the attention of the non-German legal adviser. Agreements concerning the acquisition or the use of patents, registered designs (*Gebrauchsmuster*) or protected brands of cultivated plants as well as the transfer or exploitation of legally unprotected inventions, manufacturing processes, technical designs and other achievements of a technological character or in the field of plant breeding are invalid if they impose upon

[2] Ernst E. Hirsch, *Kontrolle wirtschaftlicher Macht*, Bern, 1958, p. 18 *et seq.*

the acquirer or licensee any restrictions in his business conduct which go beyond the proper contents of these protected rights or technical achievements. Even though this rather strict rule is qualified to a considerable extent, it is still of importance for agreements granting a licence for the use of a patent, the parties to which are frequently of different nationality and residence. Thus, to give an example: an English company grants to a German enterprise an exclusive licence for a patent (registered in England and Germany). The German enterprise makes an invention in the nature of an improvement to this patent. Whereas under section 20, subsection (2) No. 3, obligations of the licensee to exchange experience, or to grant licences for improvements or related inventions, are permitted, if these correspond to similar obligations of the patent owner or licensor, an obligation on the part of the licensor to transfer the patent concerning the improvement or the related invention is not covered by this exemption and is therefore invalid. In a decision rendered by the Bundesgerichtshof when a very similar rule in the Decartelisation Order was still in force,[3] the court held that the licensor was only entitled to an exclusive licence for which he may be obliged to grant a non-exclusive licence to the original licensee. Although this case was one in which the parties were German enterprises, there is no doubt that this ruling also applies to an international licence agreement. I have mentioned this case because such far-reaching transfer clauses are frequently found in licence agreements.

In view of the rather severe restrictions set forth in this section which may prove to be unnecessary in an individual case, section 20 gives the Cartel Authorities the power to approve such or other prohibited agreements of this category upon application.

(iii) *International aspects.* Lastly a few remarks on the international aspect of the Cartel Law would seem to be appropriate. The *sedes materiae* is section 98, subsection (2), according to which the Cartel Law applies to all restraints of competition effective in the area in which the Law is in force, *i.e.*, in the German Federal Republic and in West Berlin, also if these restraints result from acts done outside such area. This means that even if parties to an agreement have stipulated that it is to be governed by a foreign law or if the parties are partly German residents and partly not or even if they are all non-German residents and/or non-German nationals, the Cartel Law nevertheless applies to all agreements or acts if the effect thereof extends somehow or other to the aforementioned area. There seem to exist no court decisions on the interpretation of this

[3] BGH(Z) Vol. 17, 41 and NJW 1955, 829.

point and it will have to be seen whether German courts will follow the decisions of the American courts which have gone to great length in answering in the affirmative the effect of foreign agreements containing restraints of competition on the American market. Whereas under the Decartelisation Orders Germany was barred from joining international cartels, there is no such prohibition in the Cartel Law and many German enterprises have become members of international cartels. In so far as such participation has an effect on the German market, the Cartel Law applies. In regard to section 15 *et seq.*—these are the provisions relating to the so-called individual contracts—it is noteworthy that these prohibitions are only aimed at transactions on the home market. Concluding our observations on the international aspect, it has to be borne in mind that according to section 101 the Cartel Law shall not apply to the Treaty Constituting the European Coal and Steel Community of April 18, 1951, in so far as it contains special provisions. Lastly, in relation to the other Common Market countries the Rules Governing Competition in the E.E.C. Treaty have to be taken into account. We shall presently deal with this subject.

II. The Rules Governing Competition in the Treaty establishing the European Economic Community of March 25, 1957 [1]

It is not our intention to give to any extent a detailed account of these Rules. Although the part of the Rules with which we are concerned number only six (Articles 85 to 90) and are as such not too complicated, an examination of their relation to the national laws on restraint of competition bristles with difficulties. A very superficial treatment must therefore suffice.

In order to understand the inclusion of and necessity for these Rules in the Treaty, it has to be recalled that the Member States (France, Italy, Federal Republic of Germany, Belgium, the Netherlands and Luxemburg, including their overseas territories) have agreed to establish a Common Market with the further aim of the gradual harmonisation of their economic policies. This is to be achieved by increasing integration of their economies by free trade, commerce and services. In the field of the coal and steel industry and the use of atomic energy, considerable headway has been made through the conclusion of two special treaties. One of them, the Treaty constituting the European Coal and Steel Community of 1951 contains rather detailed provisions on Cartels and Restraints of Competition but in view of its limited sphere of applicability a

[1] See also Verloren van Themaat, "Rules of Competition and Restrictive Trade Practices," I.C.L.Q. *Supplementary Publication* No. 1 (1961) p. 76 *et seq.*

discussion can safely be omitted from this survey. However, the Rules Governing Competition in the Common Market Treaty are of much greater importance inasmuch as they cover virtually the whole field of industry and commerce in the Member States.

It appeared imperative to include these Rules in the Treaty because free competition was intended to be one of the basic principles in the new economic community. Their embodiment was thought all the more necessary because several Member States did not have Cartel Laws at all or only rudimentary ones and, moreover, only a uniform law on this subject could fulfil the desired purpose. The substantive law is laid down in Articles 85, 86 and 90. Article 85 largely corresponds, *mutatis mutandis*, to section 1 of the German Cartel Law in that it is directed against agreements, resolutions and concerted practices of or between enterprises which are likely to affect the trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market. The Article then lists particular instances of such practices. Such agreements, etc., shall be invalid. However, according to subsection 3, certain agreements of this character can be declared unobjectionable if they can be considered as beneficial to the economy of the Community.

Article 86 prohibits abuse of a position of power by one or more market-dominating enterprises and instances for such contingencies are given.

Article 90 limits the application of the foregoing Articles to public enterprises or such as have been granted special or exclusive rights (*e.g.*, monopolies) or have been entrusted with the management of services of general economic interest. The remaining provisions are of a procedural nature. Article 87 authorises the Council of the E.E.C. to issue Orders and Directions for the purpose of ultimately creating a comprehensive law on restraint of competition for the Community that is to be administered by its organs. So far no such Orders or Directions have been made but is understood that the first two Orders are in preparation.

The question now arises whether these Rules are mere programmatic pronouncements or are already and, if so, to what extent, law, that is to say legal provisions binding upon the Member States and applicable to present transactions carried out between enterprises concerned in so far as the economy of the Common Market is affected. According to Article 88 the Authorities of the Member States shall, until the expected Orders and Directions have been issued, in accordance with their respective municipal law and Articles 85, 86 and 90, decide upon the admissibility of agreements,

resolutions and concerted practices as well as on any improper advantage taken of a dominant position in the Common Market. It is this Article on which those courts, authorities and writers rely who express the opinion that these Rules are already applicable. This is today the prevailing view in Germany which has also been adopted by the Cartel Office. It is also shared by the Commission of the E.E.C. and the two Conferences on Cartels held by experts of the Member States in January 1959. Yet there remains the problem as to whether the nationals of the Member States can avail themselves of these provisions or whether the prohibition can only become effective by virtue of a decision in accordance with Article 88.

The opposite opinion has gained prevalence in Holland and apparently also in France.

If one ascribes to these Rules an immediate effect, the relationship between the Rules and the municipal law requires close examination. In regard to Germany, we cannot do better than to quote the observations on this point in the leading commentary on the Treaty.[5] As distinct from some writers who think that recognition of the immediate applicability of the Rules must have the result that the German Cartel Law becomes *pro tanto* obsolete, the authors of the commentary hold that the two legal systems are effective at the same time since each of them is meant to give protection to differing interests. They say:

> " If a transaction is covered both by Articles 85, 86 and by the municipal law, a permission in accordance with the provisions of both laws is necessary before it can be carried out. . . . The Authorities having jurisdiction to administer Articles 85 and 86 are allowed to give their permission without being compelled to have regard to the requirements of a permission which may be necessary under the respective municipal law. Conversely, the municipal Authorities will not be entitled to give permissions without having regard to these Articles since the latter are of importance for the home market of the Member State too. Therefore the authorities in the Member State must be taken to be obliged to refuse permissions required by the municipal law if permissions which are necessary in accordance with Articles 85 and 86 have been refused; if no decisions on applications for the latter kind of permissions have been rendered, the Authorities of the Member State have either to leave their decisions in

[5] *Die Europaeische Wirtschaftsgemeinschaft. Kommentar zum Vertrag*, by Min Rat Ernst Wohlfarth, ORRat Dr. Ulrich Everling, LGRat Dr. Hans Joachim Glaesner und Dr. Rudolf Sprung. Berlin-Frankfurt/M., Verlag Franz Vahlen G.m.b.H, 1960, pp. 247, 259.

abeyance or they may give them subject to reservations. The Council is entitled to issue Orders on the basis of Article 87, subsection (2) (*e*), relating to the delimitation of the law of the Community from the municipal law."

Commenting on Article 88, they say as follows:

"It is necessary to bring about a synthesis between Article 85 and 86 and the municipal law. Such synthesis will treat the municipal law as a formal framework within which Articles 85 and 86 become substantively applicable. According to Article 88, such system must also be valid pending the issue of Orders on the basis of Article 87, even if one takes the view that the two spheres of law are to be strictly separated on account of their purposes of protecting different spheres of interest."

It may be added for the sake of clarity that the provisions contained in Article 85 *et seq.* will only be applicable in cases in which agreements, etc., concern industrial and commercial activities reaching across frontiers between the Member States.[6]

[6] The Stockholm Convention on the Establishment of the European Free Trade Association (E.F.T.A.) contains similar provisions in Arts. 15 and 31 but there are essential differences between these and those in the Common Market Treaty. Whereas Art. 88 speaks of the agreements which are likely to impair the trade between Member States, Art. 15 deprecates only such practices as frustrate the benefits expected from the removal or absence of duties and quantitative restrictions on trade between the Member States; as distinct from Art. 89 which provides for official mutual assistance in an official investigation procedure by the Commission of the E.E.C., Art. 31 leaves it to a Member State to raise a complaint, whereupon the Council, if considered suitable, shall by referring it to an Examining Committee make arrangements for examining the matter. This difference appears to be due to the fact that the E.F.T.A. Treaty is not designed to create law which shall automatically become municipal law in the Member States. See also Andrew Martin, "Restrictive Trade Practices in the European Free Trade Association," I.C.L.Q. *Supplementary Publication* No. 1 (1961) p. 89 *et seq.*

THE LAW RELATING TO RESTRICTIVE TRADE PRACTICES IN SWITZERLAND

By

X. M. SPECKERT *

SWITZERLAND has a comparatively large number of cartels [1] in all branches of her economy. There is no compulsory disclosure or registration for cartels so that their number can only be estimated. The most reliable basis for such estimate is to be found in the 31st publication of the Committee dealing with price regulation, instituted by the Federal Economic Department. This committee was appointed in 1926 by the Federal Economic Department at the instigation of the Council of Swiss Employees' Unions, for the purpose of investigating prices in Switzerland. In 1936 the Committee was specially charged with an investigation of cartels in Switzerland. Being dependent on voluntary information furnished by the various branches of industry, no complete statistics of all such branches could be supplied. No information whatever was obtained with regard to the widespread "Gentlemen's Agreements," however important these must be. Nor do figures in this field say anything about the intensity of the restrictions and market manipulations, which is dependent on their contents and the degree of their being observed.

A circular inquiry among such associations as are registered in a list of Swiss vocational and industrial organisations yielded the information that about two-thirds of them are almost certainly concerned with restrictive trade practices.

Industry shows the greatest number of cartels having an organisation of their own. Such cartels contain not only restrictions as regards prices but also as regards quantities of goods to be produced, distribution of orders amongst manufacturers or distribution of markets. There are also cartels dealing solely with prices and terms of delivery and informal gentlemen's agreements. Apart

* Dr. jur. (Zürich).

[1] The word "Kartell" is in this paper translated by the English word "cartel," although this is not a word occurring in English legal usage or in the Restrictive Practices Act, 1956. A translation as "Restrictive Trading Agreement" would perhaps not accurately reflect the approach of Swiss law which considers these agreements not so much as a simple contract but as agreements constituting some sort of partnership or association, as will be shown later in this paper.

from cartels, the market is often influenced by vertical financial and personal interlocking of interests.

Trade and crafts show cartels on a more regional or local basis, mostly agreements concerning prices and terms of delivery.

In *commerce* cartels are mostly aimed at securing concentration of demand and linking successive stages in distribution. Cost and sales prices are tied. The forms of these cartels are mostly loose organisations called " community of associated interests," agreements for " most favoured rebates," or agreements for exclusive supplies.

Swiss *agriculture* shows a closely knit system of associations and co-operative societies. Statutory regulations dealing with agricultural markets create a special position for cartels in agriculture. According to the agricultural product concerned, prices are subject to regulation by Parliament, Federal Council or the Federal Economic Department. Sometimes, as in the case of cheese, an organisation of private law exercises the relevant functions. Government-fixed prices are supported by an equalisation of prices throughout the seasons and other measures securing sales. Private cartels are to be found within the market organisation for fruit, vegetables, wood, etc., whilst the tobacco industry has a compulsory cartel under State protection.

Cartels amongst *banks* are not clearly visible to the public, but are most important. They deal mostly with prices and terms, *e.g.*, the mortgagees' gentlemen's agreement, the cartel of Swiss banks, and the Association of Swiss Cantonal Banks, the latter exercising a strong influence on all public issues of State and local authorities in Switzerland.

Transport is regulated by the goods haulage regulations in force since 1952, being a mixture of horizontal and vertical agreements between the Federal railways and road haulage, regulating competition between rail and road.

It was social need that created such multiplicity of cartels in Switzerland, being a country which is strongly decentralised as regards commerce and industry. Fortunately, Switzerland has no large cities with slums—cities are mostly mixed farming and commercial or farming, commercial and industrial communities. This decentralised distribution of the community has as its basis a far-reaching system of cartels dealing with trades and industry. It would easily be possible to cover the entire need of Switzerland in some products by running one or two factories, but that would be in contradiction to the Swiss policy of preserving small-sized towns. The 31st Report of the Price Investigation Committee observes that long experience shows that without cartels Switzerland would have

developed an industrial concentration which in some cases would have been prejudicial to the decentralisation which is aimed at for social, political and cultural reasons; and the Report further remarks that the community formed by cartels has effectively checked the trend towards expansion of large industries.

Historically, the development of cartels in Switzerland came into full swing only since the industrial revolution after the First World War, dictated more by the great difficulties of economic survival against severe competition rather than by a desire for greater profits to be derived from monopolies. I would not go so far as to say that the position is still the same today.

I do not propose to give an exact definition of the word " cartel." There is a large literature on this point. We are more interested in the practical side of the matter. It is, however, an essential feature of a cartel that it is concluded between independent individuals, firms or corporations. This distinguishes them from entities like " concerns " or " trusts " representing but one sole person, firm or corporation. In his article on " Limits on the Binding Force of Cartels " [2] (to which I am indebted for many of the following observations), Dr. Hans Merz takes the view that not only agreements between various enterprises but also between individuals and associations of individuals should be included. This would cover cases where trade unions supplement cartels between enterprises by restricting employers to the employment of trade union members, and on the other hand restricting members of trade unions to take work only from members of the corresponding employers' association.

As Swiss law does not provide a special type of contract for cartels the general forms of contract have to be adapted. The most simple form is an agreement between two parties concluding with a so-called " convention " concerning prices and restriction of production, etc. Swiss law considers such a simple agreement as already constituting an ordinary partnership. Dr. Merz points out that legal writers often deny that such a simple agreement goes so far as to constitute a partnership, because there is no partnership business. The author, however, rejects that view by saying that the obligation of restraint contained in such agreement is enough to constitute an obligation of partnership type, and he points out that, failing another legal conception, such cartels must be considered as an ordinary partnership. As early as 1926 the Supreme Federal Court considered as a partnership the cartel between fifteen members of the Swiss cigarette industry.[3] It is not even necessary that all

[2] Über die Schranken der Kartellbindung. Abhandlungen zum Schweizerischen Recht, Bern, Verlag Stämpfli, 1953.

[3] B.G.E. 52 II 370.

members sign a common agreement; single mutual contracts suffice. Other legal forms are a co-operative society, a " G.m.b.H. " (a limited liability company), and the so-called Double Partnership in which the same individuals or firms or companies form two partnerships, the one being the dependent executive subsidiary organ of the other. These forms make it possible to create relatively strong ties amongst members, as for instance the provision governing a co-operative society imposing a restriction on the right to withdraw, which right may be excluded by the Articles for a period not exceeding five years. Likewise, the tie of a member of a " G.m.b.H." is tight inasmuch as the statute does not give him a right to leave the company. The ordinary partnership is, of course, not a legal entity, such as the G.m.b.H. and the co-operative society. This has its advantages and disadvantages. It may not always be desirable to publish the articles of association. In each case, however, member firms have a certain amount of economic independence, whilst in the case of combines there is a coherent economic unit and there are no independent parties to an agreement so as to lay the legal relationship open to scrutiny as to its legal validity from the point of restrictive trade practice.

Whether or not there is a cartel can, of course, be decided only in the light of the ultimate object and factual efficiency of the relationship, but not from the legal form of the association chosen by the parties.

Dealing, then, with the essence of our problem, that is to say, the legal validity of an agreement restraining competition between the parties to the agreement under Swiss law, the first fact to be stated is that Switzerland has not yet a Restrictive Trade Practices Act. There is a draft for such statute which will be dealt with separately below. Failing such statute, the limits as to legal validity must be found in the general provisions restricting a private individual's right to make agreements. At the same time it must be borne in mind that the restrictions, being in most cases obligations not to do certain things, which are imposed on parties to cartels, can assume such importance as to affect third parties' right freely to engage in trade and commerce. Account must, therefore, be taken of limitations to contract on the part of the parties of the agreement on the one hand, and of the general liberty to compete on the other. This means an internal problem (the internal cartel tie) on the one hand and the external problem (the relation to outsiders) on the other. Such outsiders may be individual enterprises, raising questions of boycott, or the relationship to the public at large.

The limits of the liberty to contract in Swiss law are mainly determined by provisions of the Civil Code regarding " immorality " (something like public policy—derived from the Roman *contra bonos mores*) or dealing with the infringement of personality rights. The relevant Articles of the Swiss Federal Code are the following [3a]: Article 19—Within the limits of the law the contents of a contract are at the discretion of the parties. Contracts containing arrangements differing from the legal provisions are only valid in cases where the law lays down no invariable rule or if the differences do not offend against public policy, good morals or individual rights. Article 20—Contracts containing provisions which are impossible, illegal or *contra bonos mores* are invalid.

The provision dealing with personal liberty is contained in Article 27 of the Swiss Civil Code reading, " No person can resign, either wholly or partly, his or her capacity to be the bearer of rights and duties or his or her capacity to act. No person can resign his or her liberty, or accept restrictions in the use of such liberty, in a degree which offends law or morality."

Liberty to compete in trade is guaranteed by Article 31 of the Federal Constitution which provides that freedom of trade and industry is guaranteed throughout the Confederation, except in so far as it is restricted by the Constitution itself or by laws made under it. A constitutional amendment added in 1947 contains various provisions on this subject, of which in particular the following is of interest to our problem: When the public interest justifies it, the Confederation has the power to make provisions infringing, if necessary, the freedom to engage in trade and industry in order to prevent harmful social or economic effect of cartels or similar organisations.

The essence of the question is to examine agreements contained in cartels as to their legal validity from the point of view of internal and external compulsion, and the effect they have on the community as a whole, in order to ascertain whether the restriction in question is valid in view of the provisions imposing limits on the legality and morality in Swiss law.

As regards internal compulsion, the limits on the liberty to contract are decisive. If a party is so minded as to accept restrictions of his economic liberty to trade, there is nothing to prevent him from doing so, in particular if he derives profits from such restriction, such as economic security. It must also be borne in mind that these limitations of personal liberty are reduced by the possibility of giving notice. In 1936 the Federal Court construed a cartel

[3a] Translation by Dr. Georges Wettstein, Zurich.

concerning prices by implying an option to give notice, and said that the defendant cannot be assumed to have accepted such a far-reaching restriction as was contained in the agreement, without the possibility of regaining liberty of action, as this would have been a limitation of personal liberty irreconcilable with Article 27 of the Swiss Civil Code and, therefore, void. In one case [4] the Federal Court accepted the possibility of an economic advantage as a justification for the acceptance of limitations on freedom to act. Dr. Merz observes that this leaves the door open to further developments in this line of legal practice. He submits that trade restrictions would be irreconcilable with the individual liberty to act where the restrictions are not clearly defined. By way of analogy he refers to the line of cases in which the Federal Court declared as void a general agreement on the part of a surety to accept any principal debtor whom the creditor might choose to substitute for the original debtor because the court considered it as inadmissible that a surety should undertake an obligation with regard to a situation which he cannot foresee or gauge at the time when he makes the contract. This, Dr. Merz submits, could also happen in the case of cartels where important future suppliers or customers are to be excluded. This would not be a particular obligation on the part of the party to the agreement, but would concern an uncertain number of future contracts and, therefore, touch upon the liberty of the individual in trade and industry.

Undertakings to omit certain actions such as occur in cartels are, in most cases, directed towards restraint of competition, and the question arises whether this limitation touches upon the liberty of the individual to engage in trade and commerce. The general view is that this liberty referred to in the Federal Constitution is one that exists between individual and State, but not between two private individuals. This means that a party trying to get rid of its cartel obligations cannot rely on this provision in the Federal Constitution, because the general principle there proclaimed is not affected if a particular individual can no longer partake in the general liberty of trade and commerce.

When this article of the Constitution was drafted, nobody thought that it would be possible to restrict competition as far as is the custom today, and it was thought then that it could be left to private individuals to agree what they liked. When a revision of the economic articles of the Federal Constitution came under discussion in 1947, the following amendment was suggested.

[4] B.G.E. 40 II 240.

> "Liberty of trade and commerce is also guaranteed in the face of enterprises which by their monopolistic effects in practice reduce free trading in certain sectors of economic life."

This amendment might have given a legal remedy against other private individuals. However, it was defeated, and the matter of protection from monopolistic enterprises was left to a new and special law which, however, has not yet been enacted. The liberty of the individual in trade and commerce must, therefore, be derived from the general liberty of the individual guaranteed by private law. This is also the view of the Federal Court, which has always rejected reliance on the relevant provisions in the Federal Constitution where contractual relations between private individuals were in issue. It is, however, interesting to observe a line of reasoning on the part of the Federal Court to the effect that, since the introduction of the new economic provisions, it could not be said that agreements keeping out new competitors were illegal, because, according to the Federal Constitution, the Swiss Federation is authorised to impose limits on the liberty of trade and commerce in order to preserve important branches of the economy. This, the court reasons, might lead to the conclusion that it must be similarly admissible for private organisations to introduce such limitations.[5] This suddenly suggests the introduction of a right of private individuals where hitherto rights were created between State and citizen only. But this is meant to be a mere incidental observation. From a legal point of view, the question of the limitation of the validity of internal obligations between members of a cartel is exclusively to be derived from the proper construction of Article 27 of the Swiss Civil Code dealing with the rights of the individual, and is not a problem the solution to which can be found in the Swiss Federal Constitution.

Questions concerning boycott and other effects as regards third parties, as well as relating to the public at large, are to be solved by the application of the provisions relating to tort (sections 19 and 41 of the Swiss Federal Code of Obligations) and also of the provisions dealing with infringement of the right of personality.

Before dealing with outsiders, a few words may be said about the application and legal protection of *internal* enforcement.

Neither the Federal Court nor the prevailing view amongst legal writers considers restrictive trade practices dealing with limitation of competition as illegal or as *contra bonos mores*, not even if these limitations *de facto* lead to a monopoly. It is often said that far-reaching limitations are often justified by an equivalent economic *quid pro quo*. Amongst the means for the practical application of

[5] B.G.E. 76 II 292.

cartel restrictions, agreed penalties take first place. The Swiss Federal Code of Obligations provides expressly that such penalties can only be imposed if they are not against the law or *contra bonos mores*. A cartel restriction which cannot be enforced in law can therefore not be enforced by way of a penalty. An obligation not to determine membership in a restrictive trade practice organisation was declared to be illegal and void. Likewise, a general waiver of all legal remedies was declared void. Very often these problems of internal restraint and sanctions are kept behind closed doors by the wide-spread introduction of special domestic tribunals. (Partly to be eliminated in the draft statute.)

External enforcement. As we have said already, the internal relationship between the parties to the cartel is mostly justified by certain advantages accruing to the parties of the cartel. This does not apply to outsiders. The means of excluding outsiders from competition is boycott. Much weightier justification is required for such a limitation upon the general liberty to compete.

A boycotted person or enterprise can find a remedy by legal action only if he can prove the prerequisites of a claim for an injunction because of interference, or for damages. Dr. Merz gives a detailed account of these prerequisites. The boycotted person has to prove:

1. An infringement of his personal connections.
2. The act complained of must be against law and *contra bonos mores*.
3. The act complained of must be the adequate cause of the infringement, *i.e.*, must not be too remote.

And as regards to damages:

1. Proof of damages, *i.e.*, the infringement of personal connections.
2. That the action complained of was illegal and *contra bonos mores*.
3. The act must be the adequate cause of the damage.
4. Intention or negligence on the part of the defendant.

Considering that the boycotted person is always in a weaker position, this is a very heavy onus to discharge. The illegality of the action of boycott can be derived from various facts. The means can be *contra bonos mores*, in which case it is not a case of protection of the liberty of the individual but of the fairness of the means employed. Illegality can also be derived from the object pursued, or from the fact that there is an obvious disproportion between the damage done to the boycotted person and the benefit intended by the boycotter. Where, however, is the criterion of illegality? It is not easy to deduce it from the decided cases. There is an infinite

variety of means in boycott, some of which are often not of an economic, but of a political, character. Federal Judge Bolla once said: " The border line between what is permitted and what is not permitted will always be drawn as the result of numerous factors which are not capable of being expressed in a mathematical formula. It follows from the nature of the matter that a fairly large discretion must be left to a wise judge who is used to apply legal terms, such as ' good faith,' ' damage ' for illegal acts, the implications of which reach out as far as divine providence."

The boycotted person has several remedies. In the first place, he has an action for damages and satisfaction. He can also claim a declaration to the effect that the boycott is illegal and *contra bonos mores*. More useful to him is the claim for an injunction to stop the interference. Dr. René de Gouttes deals with these various remedies and the practice in his Swiss publication for the Swiss Legal Card Index. He points out that several views have been expressed regarding the action for an injunction to stop the boycott. The action can be based on Article 28 of the Swiss Civil Code providing that a person unlawfully damaged in his personal connections can claim an injunction to stop the interference. Federal Judge Bolla, on the other hand, is of the opinion that a general action for damages for tort can be brought because the judge has power to decide upon the " kind of damages," and damages could result in the restitution of the *status quo ante*, or, in the case of a threatened interference, in the preservation of the existing state of affairs. According to the Federal Court, the judge can, therefore, be called upon to prohibit further application of the boycott, and can even make an order to the effect that all parties to the cartel are to be informed that they are permitted to supply the boycotted person. Likewise, publication of the judgment can be claimed. It has happened that the Federal Court has imposed an obligation on the parties to the cartel to let the boycotted person accede to it. Such a claim to be admitted to the cartel contract or the trade association presents a novel problem. Accession to a cartel or a trade association is based on contract. Imposed accession amounts to a compulsory agreement. As a result, the Swiss courts have so far shown much hesitation in regard to compulsory accession. Reference should, however, be made to a decision of the Federal Court dated June 5, 1956,[6] concerning a case of boycott in the watch industry. The facts were as follows: The defendant, an association with the object of furthering the sale of Swiss watches of high quality, and having as members manufacturers and wholesalers, had concluded

[6] B.G.E. 82 II 292.

an agreement with the central association of Swiss watch makers comprising retailers. The agreement was known as the Swiss Convention for the Watch Trade. The plaintiff, a watch manufacturer and dealer, required admission to the association, but was refused. He brought an action claiming that this refusal, in connection with the effect of the Swiss Convention, was tantamount to a boycott expelling him, and also other competitors, from the trade. The Federal Court said: " Weighing the opposing interests, the court finds that the defendant has no interest deserving legal protection in refusing the plaintiff, whilst this refusal means a very grave, if not ruinous, restraint on the introduction and sale of the plaintiff's products in the Swiss market, and elimination from free competition. In these circumstances, the non-admission of the plaintiff to the defendant association is *contra bonos mores* and an infringement of the economic personality right of the plaintiff under Article 28 of the Civil Code because of the disastrous consequences which bear no relation to the advantage which such action could have for the defendant's members. The boycott is, therefore, inadmissible, and the plaintiff is entitled to have it lifted."

Restrictive trade agreements also affect the general public as consumers. As Dr. Merz says, they are the unorganised " forgotten factor " of Swiss economic policy and economic legislation, who have no secretary or parliamentarian to represent them. In 1936 the Federal Court said [7] with regard to restrictive trade agreements in the tobacco industry the following:

> " A cartel regarding prices is, according to the practice of the Federal Court, illegal only if its intention is to keep prices high artificially and without justification and in order to exploit consumers by holding them to ransom. This applies with particular force where essential food stuffs are concerned. These conditions, however, are not fulfilled in this case: Tobacco is not essential and indispensable for life, but a luxury, and the aim pursued by the trade association concerned is not to hold consumers to ransom, but merely to control certain abuses of free competition."

Other judicial decisions are based on similar lines of thought, but I do not know of any decision which declared a cartel void on the ground of public interest. It will remain very difficult to attack the abuse of economic monopolies by the ordinary means of private law.

In conclusion it is interesting to examine the draft Swiss Cartel Law in this respect.

[7] B.G.E. 62 II 100.

Fundamentally, the draft adopts the conclusions of the above-mentioned Federal Price Investigation Committee. They propose a short Act containing no more than sixteen Articles. This at once opens up wide fields for conflicting interpretations of these general provisions, which are shortly as follows:

> The application of the Law is not confined to cartels properly so called, but applies to " similar organisations," but not to terms of employment or to agreements affecting foreign markets.
>
> In general, such agreements have to be in writing.
>
> An action is to lie for relief from obligations entered into in case of an essential deterioration of the legal position of the party concerned, a contractual restriction placed on such relief being declared null and void.
>
> Blacklisting as regards supplies or workers, imposing of disadvantages as regards prices and terms, and certain price cutting practices, are declared illegal if third parties are thereby excluded from competition. There is also a general prohibition against boycott, with the proviso that this is to be admissible in the case of special branches of the economy having overriding interests worthy of legal protection. Likewise, vocations and organisations dealing with foreign markets are excluded, as are agreements incompatible with the general good. A further provision lays down that such measures must not be unreasonable, having regard to the object pursued and to the manner of their execution.
>
> Penalties upon members of the cartel are declared admissible if and so far as they are reasonable, having regard to the object pursued and the manner of their execution.

The person aggrieved by inhibition of free competition has the following remedies:

1. An action for declaration of illegality.
2. An injunction against the measure contemplated or taken by the cartel and for the elimination of the illegal state of affairs.
3. Damages.
4. Satisfaction in the case of damage done to personal connections.

In certain circumstances the draft provides for compulsory admission to the cartel and for publication of the judgment.

As a matter of administrative law, the draft provides for a committee for cartels, the members of which are to be appointed by the Federal Council from academic and economic experts. Their

terms of reference are confined to statistical information regarding cartels and similar organisations in Switzerland, and their publication. It is provided that the committee should also have certain advisory functions. In the case of special inquiries, the committee can compel certain persons to give information, by means of fines. The Federal Economic Department is to be informed of the result of such statistical inquiries and is empowered pursuant thereto to bring an action within one year in the Cartel Court, a special court to be formed under the draft Statute.

The position of this draft Statute within the framework of Swiss law which already provides for certain protection of trade monopolies and copyright, has been discussed by Dr. H. P. Zschokke in a comprehensive report rendered to the Swiss Group of the International Union for the Legal Protection of Industrial Property. There is also a report of the Swiss Group of the I.A.P.I.P.[8] concerning this subject, which I take as a basis for the following observations.

Industrial property is so far protected by the following laws: Patents, Trade Marks, Factory Marks, Marks of Origin of Goods, Trade Distinctions and Medals, Industrial Designs and Models, Unfair Competition. These laws have, within their own respective fields of application, dealt with the relation between free competition and monopolies.

The Patent Law has it own limitation of monopolies as to time and subject-matter, and also provides for compulsory licences in case of non-user, and for revocation of patents in case the inland market is not sufficiently supplied in spite of compulsory licences having been granted. It also provides for compulsory licences in the public interest. Similar limitations of the monopolies are to be found in the laws relating to copyright and trade marks. These special laws are not to be affected by the new Cartel Law. The former are negative limitations of cartel law and do not say what can be restriction or competition within the meaning of the Cartel Law, by regulating the problem in their respective field completely, and thus do not leave room for the application of cartel legislation. The Swiss Group of the I.A.P.I.P. demands that an express reservation to this effect be included in the draft.

Other requests aim at a clearer definition of what is a cartel. Simple licence agreements are not to be considered as a cartel, but agreements for the exploitation of patents may contain elements of partnership or company law, and may, therefore, come within the cartel law, because they are capable of being used in exercising

[8] International Association for the Protection of Industrial Property.

pressure with a view to influencing the organisation of the market. Reference is made in this connection to further rationalisation of the Swiss economy, to which it may be forced by international competition, in particular by the plans for further European integration. Associations pursuing such rationalisation are to be excluded from the definition of cartels.

A further demand requests the limitation of the definition of " organisations similar to cartels " so as not to include all and every agency that may *influence* the market. A somewhat narrower definition is demanded than is contained in the American anti-trust legislation. Dr. Zschokke maintains that in Switzerland the *pure* exploitation of rights of trade monopolies (patents, trade marks, etc.) is not to come under the definition as a cartel or an " organisation similar to cartels."

Some also request a limitation of the illegality of boycott to such measures as have the obvious object to force certain conduct upon somebody, or to eliminate him from the market. An intention to discriminate is postulated, as otherwise, it is said, the draft would in practice amount to an entire prohibition of cartels.

Criticism is also levelled at the possible compulsory admission to a cartel, and a compulsory licence on the American pattern is being opposed.

On the administrative side of the question, State interference is reduced to a minimum. There is no Cartel Office, no administrative preliminary sanction for restrictive trade agreements, nor does the draft provide penalties for any kind of economic behaviour. The object of the Law is to be achieved by means of private law and of similar procedure. These remedies are to be reinforced by measures under Administrative Law (Cartel Committee).

There is a distinct danger that the creation of a special court for cartels would be a threat to the consistency of judicial practice in the field of trade monopolies (patents, trade marks, unfair competition, etc.).

The draft as it now stands will, no doubt, require further refinements and changes of wording. In particular with regard to the limitation of its province as compared with the province of the law relating to trade protection, or trade monopolies (patents, trade marks, etc.), and with a view to avoiding conflicting judicial decisions of the last instance in case a special court for cartels is created. Further, the somewhat undefined notion of " similar organisations " has a certain danger. The essential novelty of the draft, however, consists in the general prohibition of a boycott. As it would appear that the Federal Court has so far been unable to curb the abuses of

private monopolies in a sufficient manner, a new law based on the principles embodied in the draft would, therefore, have to be welcomed.

Fundamentally, the draft stands for a recognition of the cartel and for the prohibition of the boycott. This is in line with the Cartel Initiative 1957 adopted by Parliament and setting out to promote new legislation based on the prevention of abuse of monopolies, but not on the prohibition of cartels.

In conclusion, I would like to quote Dr. Zchokke's own words, as they so well describe the special position of Switzerland in these matters. He points out that the Swiss standard of living would be ruined if the market would be thrown open to free competition in prices. The special situation of Switzerland has always demanded two things of her economy—and this demand will only be increased in view of the appearance of the Common Market; these desiderata are: highest quality and far-reaching specialisation. The line of action can, therefore, not be in the direction of increased price competition. The task is not to produce cheap goods but goods of highest quality of a most special character, which by reason of these two qualities create a special position for themselves commanding high prices and thereby yielding the means for further scientific and technical advance. From the point of view of national economy, the Swiss attitude to competition cannot help being otherwise than monopolistic in character. Specialisation in quality means aiming at a special position in the market which will have to hold its own against other competing positions in the market generally.

DUTCH AND BELGIAN LEGISLATION ON RESTRICTIVE PRACTICES

By

G. DE GROOTH *

THERE is not—nor has there been—either in Holland or in Belgium any repression or check on covenants in restraint of trade exercised by the civil law courts in the application of the Civil Code rules of private law. The code-concept of " public order," avoiding a contract if considered as opposed to it, has never found a court prepared to find a contract in restraint of trade illegal. In consequence thereof Dutch and Belgian civil law—and as a matter of fact this is true of all continental civil code law—do not know of such a doctrine of illegality of contracts on the ground of unreasonable restraint of trade, as is of very old date applied in British courts. It is not before the present century that the public mind in Holland and Belgium became aware of the dangers of the phenomena of cartelisation and monopoly in industry and trade for the public, and thereupon began to insist upon legislation to intervene by way of Acts of Parliament in the domain of public law.

LEGISLATION IN HOLLAND

In Holland the need of intervention became very acute in the deep economic depression of the early thirties. On account of that depression the market for manufacturers and trade turned into a perfect buyers' market, causing a ruinous and destructive competition between sellers. This led to the introduction of a Bill in Parliament leading to an Act of 1935. This Act authorised the Minister of Economic Affairs to make binding upon all enterprisors, or, as the case might be, to declare not binding any covenant or stipulation between enterprisors regarding their economic relations in their branch of manufacturing or trade. Under this Act the Minister of Economic Affairs could extend the binding force of the covenant concerned to every enterprisor in the field covered by the agreement, though not a party to it. Such an extension was to be made whenever the covenant under consideration, in the judgment of the Minister, was of paramount interest for the branch involved and the overall binding force of it was required in the public interest.

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Section 6 of the Act empowered the Minister alternatively to deprive an enterprisor's covenant of its binding force if such a ruling was, in his opinion, required in the public interest. No judicial control was provided for one or the other of the alternative rulings of the executive. The only safeguard—if safeguard it may be called—was found in the provision that the Minister had to take the advice of the standing committee of the Economic Council, without being bound to follow it.

The Act of 1935 was superseded by the cartel decree of 1941 under the German occupation. The rulings of the Act of 1935 were therefore limited to a period of an only very slowly receding economic depression. The buyers' market was so one-sided that the application of the Act of 1935 was practically limited to the endorsement of the covenants of the enterprisor by way of extension of their binding force as provided for in the Act.

With the outbreak of the Second World War the picture of the market changed radically into a sellers' market. A rigid system of price restrictions was introduced before and during the occupation, making manufacturers and tradesman more or less dependent upon the executive to such a degree that the principle of free enterprise could be said to have been superseded by a system of dirigism on dictatorship principles. In these circumstances there was no room for the application of the cartel decree, built upon the same two pillars as was the Act of 1935, and imbued with the leadership ideas of Hitlerism. It was evident that this last feature of the decree of 1941 made certain that a new and really national statute, achieved in accord with democratic principles of government, had to take the place of the cartel decree, itself provisionally maintained with some changes to abolish dictatorial elements. This general opinion developed into a conviction of necessity when, some five years after the Liberation in 1945, price control and further dirigistic rulings of the occupation period were gradually abolished, and the free enterprise principle gained ground again.

In 1953 a bill was introduced proposing an Act on economic competition. It was debated and amended in the House, and at last accepted by both Houses in 1956. The considerable time that elapsed from the date of introduction of the bill and its becoming a statute is in great measure due to a point of difference between the government and Parliament regarding a matter of principle. The bill as proposed by the government followed the previous Act and decree in the matter of judicial control of the rulings of the Minister of Economic Affairs. The government argued that such control could not possibly be accepted as the appreciation whether a ruling should or should not be issued by the executive would rest on purely

economic grounds, and therefore was an act of economic policy, for which the government could only be responsible politically, that is to Parliament. The House could not accept this viewpoint, arguing that judicial control had of course to be limited to points of law, and neither could nor should degenerate into control of the question whether the discretion exercised by the government was acceptable as an act of pure management, but that such limited control was a *conditio sine qua non* for a favourable vote on the bill. The government finally had to give way in face of a House almost unanimous on this controversial issue. The bill was passed with a new clause (28) providing that appeal to an independent judicial tribunal should be arranged by a special statute, which itself should determine its date of coming into force. This special statute passed the Houses and its rulings as to judicial control were embodied in the Act of 1956, which then came into force on November 1, 1958.

The principles and the general scheme of the Act on Economic Competition

The Dutch Act starts from a point of view opposed on principle to that of the American Sherman Acts. These Acts take the original common law doctrine on contracts in restraint of trade as a starting point:

> " In Elizabethan days all restraints of trade whether general or partial were regarded as totally void because of their tendency to create monopolies." [1]

The Sherman Acts forbid and avoid any covenant between enterprisors in restraint of trade and veto any monopolising of trade. Both are treated as punishable offences. This system of absolute prohibition—which, it may be said, could not be fully enforced either in the common law courts or in American anti-trust practice—is rejected by the Dutch Act of 1956. This Act does not recognise either a rebuttable or irrebuttable presumption to the effect that a covenant between competitors to restrict competition in one way or another is presumed or deemed to be dangerous to the public interest. On the contrary, it begins by admitting the validity and binding force of such covenants and it does not vitiate a factual position of monopoly in a given manufacture or trading business. The Act, in taking this view, only gives the executive the means and tools to intervene in special cases where, in the opinion of the Minister of Economic Affairs, a cartel or group of enterprisors by their agreements go contrary to the economic policy applied by the executive in the public interest.

[1] Cheshire and Fifoot, *Law of Contracts*, 4th ed., p. 309.

For this purpose wide powers indeed are given. In applying these powers in any special case it may well be said that principles of administrative law could be violated by the executive. It is to correct such violations that a special administrative tribunal is appointed to deal with the appeals of those who are prejudiced in this respect. The contents of the Act in outline may now be given.

The powers entrusted to the executive to intervene in specific cases focus upon two phenomena:

Section 1 (*a*) on covenants regarding competition between enterprisors;

(*b*) on concentrations of economic power in enterprises, in cases where a *de facto* position or a legal relation suggests a paramount influence of one or more enterprisors on the market of goods or services in the Netherlands.

It should be understood that a covenant falling under (*a*) may also fall under (*b*). In order to provide for the full control of covenants as defined under section 1, sections 2–5 of the Act prescribe the communication of these to the Minister of Economic Affairs, and give rulings for exemptions and for the consequences of non-compliance with the duty of communication. The Minister can (ss. 6–7):

(i) on the request of one or more of the parties to the covenant, provided it is entered into by the vast majority of the branch concerned either in turnover or number of participants, make the covenant binding on all enterprisors in the branch, if the general interest requires him so to do. Before taking this step the Minister has to ask the advice of the advisory commission (as prescribed in s. 29 of the Act) on the request made;

(ii) declare the covenant not binding either wholly or partially—and either unconditionally or conditionally—if in his opinion it is wholly or partly against the public interest;

(iii) in case of imminent danger to the public interest, suspend the covenant wholly or partly during further consideration of definite measures (s. 23);

or (iv) publish data on the covenant or a part of it if in his opinion it is against public interest or is being applied in a way inconsistent with that interest (s. 19). This may induce those concerned to make changes in the text or in its application in order to avoid further rulings of the executive.

These steps cannot be taken if there is a concentration of economic power not based on, or not the consequence of, a covenant regarding competition. If this is the case, the executive, if of opinion that the public interest is involved, may:

(a) publish data concerning such concentration, or,
(b) direct those with power to exercise an influence upon the market resulting from the concentration to refrain from specified acts;
(c) charge the concentration to sell and deliver specified goods or to render specified services to persons to be specified by the Minister, both goods and services to be against cash;
(d) give directions as to prices of specific goods or services, conditions for the sale of specified goods, the rendering of specified services and the payment thereof.

These powers are given only for the home market, whereas those regarding the covenants on competition have no such limitation. Measures against export cartels are therefore possible.

It will be evident that interference by the Minister in covenants on competition is of a purely casuistic character. Every covenant that can be listed under the definition of section 1 of the Act is treated on its own specific merits and no general line of division between irreproachable covenants and covenants to be avoided is drawn. Section 10 of the Act, however, gives the possibility of the Crown issuing ordinances, if so required, to promote the public interest, in which specified stipulations of a defined character are overruled as not binding. The development of executive practice will, in years to come, give occasion for a kind of codification by way of these ordinances and the rulings in the cases dealt with. It may well be that the consequence thereof will lead to an approach to a system of objective rules of prohibition to cover much of the field of objectionable stipulations in restrictive covenants.

The application of the cartel decree in the after-war years up to the promulgation of the Act of 1956 has already shown many instances of the development of such objective rules through their application in the casuistic approach from case to case by the Minister. I mention *inter alia* the rule which states that no member of a branch of manufacture or trade may be excluded from entering into a covenant between the members simply because of the fact that it is a co-operative body, or a department store, or because it entered the branch after a certain time. Furthermore, the rule that a fixing of minimum prices can only be allowed in certain special

conditions—such as a ruinous market—and even then with regard being paid to the level of costs of an enterprise efficiently run and with full employment.

I must say a word on the judicial control of the management of the Ministry, based on the Act of 1956. As already mentioned, the government had to give in on this matter when Parliament in 1956 was unwilling to pass the proposed bill without such special control. The government thereupon formed a commission of expert lawyers in the field of administrative law to find a suitable solution for the opening of an appeal to an independent tribunal against the acts and decisions of the executive. According to the advice given by this Committee an appeal is now given to an administrative tribunal already in existence to hear appeals against rulings of the executive in the field of trade organisation laws and ordinances. Section 4 of the Act on administrative jurisdiction in trade organisations created this tribunal and it was now given an extra division, the " cartel division." Section 33 of the Act of 1956 enumerates the acts and decisions of the executive which are open to appeal. An appeal can only be based on one or more of the following grounds:

(a) that the decision or act of the executive violated a generally binding precept of law;

(b) that the executive, acting or deciding as it did, exercised its power for a purpose other than that for which it was granted (*détournement de pouvoir*);

(c) that according to the test of reasonableness the executive could not have come to the act or decision appealed against.

(d) that the executive decided or acted against a principle of fairness, recognised in general principles of justice. (The " natural justice " concept of British administrative law.)

It is submitted that this attribution of a limited jurisdiction to a special administrative court may give rise to a serious conflict of judgments between it and the ordinary law courts. The fact is that the Act applies only to covenants and agreements complying with the definition in section 1 of the Act. For example, the executive, in the conviction that such is the case with regard to a specific agreement, decides to declare the agreement not binding (s. 19). The parties to the agreement appeal and move:

(i) that the agreement is not one of the character defined in the Act;

(ii) even if this does not hold, the Minister, in declaring it not binding, is guilty of *détournement de pouvoir*.

The question then arises: has the special tribunal jurisdiction on the first issue? I submit that a negative answer must be given. The tribunal has only to consider the character of the ministerial act or decision and to test that decision or act. It is not qualified to decide upon issues of interpretation of the Act itself, as it is only given control of the legality of the acts and decisions of the executive in accordance with the four tests mentioned above. The question whether a given agreement comes under the definition of section 1 is therefore to be decided by an ordinary court; the special tribunal has no authority on this point. The tribunal had to face this question in its first case under the Act in 1959. Some thirty owners of premises in a shopping centre, formed exclusively by their properties, and appointed by the town planning scheme as the only shopping centre in the surrounding residential area, had come to an agreement between them by which each party undertook only to use his property for the exploitation of a specific trade: *e.g.*, greengrocery, butchery, bakers, outfitters, etc. This agreement obliged therefore every separate owner, when leasing his property to a tradesman, to limit the lease according to his undertaking in the agreement. The Minister, relying upon section 19 of the Act, declared that the agreement was not binding, taking it for granted that it came under the definition of section 1. The parties denied this and also argued that no public interest was involved, and that the Minister, in holding to the contrary, had given a ruling violating natural justice. They appealed to the special tribunal. The tribunal held, contrary to what was submitted above, that it had authority to decide the first issue, and that the Minister was right in taking the view that the agreement at stake was one caught by section 1 of the Act. On the second issue it rejected the objections brought against the Minister.

The question arises: what will happen if a party to the agreement brings an action for a declaration in the civil court, asking the court to find that the agreement, declared not binding by the executive, is nevertheless good, being outside the definition of section 1 of the Act of 1956? In my opinion the court will then be qualified to decide whether the special court had competence on the issue of section 1, and would have to answer that question in the negative. Supposing that the court, contrary to what I have suggested, decides this question in the affirmative, is it then bound by that decision as *res judicata*? If so—and one could scarcely come to a negative answer—then the same applies if the tribunal finds that the agreement does not fall under the definition. Therefore, if the judgment of the tribunal on the issue is to be final, then the ordinary court will be ousted from an interpretation of section 1 of the Act? If the

tribunal finds that an agreement declared not binding by the Minister is outside the statute, it must annul the order (s. 37). The effect of this annulment however is very limited; by it, says section 37, the agreement is not revived: the only effect is that the carrying out by the parties of the undertakings stipulated is no longer a punishable offence. The agreement does not regain its binding force and no action for breach of it can be brought in a civil court, notwithstanding the annulment. This consequence makes it evident that the finding of the tribunal as to its competence on the issue of the interpretation of section 1 of the Act cannot be accepted. This question will be very important whenever the executive and the tribunal find that agreements regarding proprietary rights, such as real property or monopoly rights concerning trade marks, patent rights or copyrights, were agreements under the Act and therefore liable to be declared not binding. The borderline between cartels and suchlike covenants and agreements, made in pursuance of proprietary rights and other monopoly rights, should be drawn by the courts with general jurisdiction, and cannot be deemed to be entrusted to a special tribunal to which a limited and enumerated jurisdictional power has been given.

Legislation in Belgium

It was not until 1960 that Belgium promulgated a statute against abuses of monopolistic market positions. This statute is dated May 27, 1960, and its title is: " An Act to protect against the abuse of economic power." Unlike the Dutch Act it does not deal with cartels and monopolistic market positions separately. Section 1 of the statute gives the possibility of attacking any individual or collective entity or group which has acquired such a position of monopoly:

> " A position of economic power under this Act exists where an individual person or body or group of such persons or bodies is in the position to exercise a predominant influence on the supply of the market with commodities or capital, or on the price or quality of a specific commodity or specific service."

Section 2 goes on to say that there is an abuse within the meaning of the Act if one or more individuals, placed in a position to exercise economic power, injuriously affect the public interest by way of practices that falsify or restrain the normal function of competition, or bar either the economic freedom of producers or the development of production and free trade. Chapter 2 deals with the ways and means to investigate whether there is abuse of an economic position of power in a given case and prescribes the procedure necessary to

evidence it. It provides for the appointment, by the Crown, from the members of the prosecution department of the ordinary criminal courts, of a commissioner-reporter and two substitutes, to serve the existing Council for Economic Disputes. These prosecuting officials have to investigate the complaint of those aggrieved, if there is serious circumstantial evidence of the abuse of economic power in a specific market, and the Minister for Economic Affairs may require such investigation. At the end of the investigation the commissioner deposits the file at the registry of the Council unless he thinks that there is no case for the Council. If he thinks that there is a case, he notifies the Minister of Economic Affairs, who may order that proceedings be continued within thirty days of that notification. If the commissioner decides to continue or is ordered to continue, the Council for Economic Disputes hears the case with a contentious procedure. If it finds that there is no abuse, the initial complaint of those prejudiced is dismissed. If an abuse is found the Council advises the Minister of Economic Affairs on the recommendations to be made to the wrongdoers. The Minister then decides the issue and if he agrees with the advice given he approves the recommendations which he considers necessary to end the abuse. Anyone not complying with these recommendations commits a punishable offence.

One is inclined to conclude that the Belgian Act does not give a very efficient and quick remedy for the evils it seeks to extirpate. It remains to be seen whether the multiplicity of instances and formalities will enable the executive to wage a successful fight against monopolistic tendencies. It is clear that it will not be possible to answer this question until the Act has been in operation for some years.

A BRIEF SUMMARY OF THE LAW FOR THE PREVENTION OF RESTRICTIVE PRACTICES IN FRANCE

By

PIERRE A. PICARDA *

BEFORE speaking about French law, I should like to say a word about the Roman law on restrictive practices. This branch of the law is not merely a modern institution. In fact, as far back as the *Lex Julia de annona* [1] the Roman legislator provided for the punishment of traders who committed acts or formed associations by which the price of provisions was raised. The *Lex de Monopoliis*,[2] passed by the Emperor Zeno some fourteen hundred years before the Sherman Act of 1890, forbade monopolies of goods and fixing of prices. Monopolists were punishable by deprivation of property and perpetual exile. Price fixers in a position to influence the market (*caeterorum primates professionum*) were subject to a fine of forty pounds of gold.

During the whole of the Middle Ages and up to the French Revolution, coalitions or contracts in restraint of trade were deemed to be monopolies; this applied in particular to the cornering of goods by a certain number of traders who thereby controlled the market, and to secret agreements between traders whereby they would not sell their goods before a given date or would only sell them at a certain price. The penalties were confiscation and banishment, as under Emperor Zeno's law, and indeed, to some extent, as under the 1958 Act in France.

In France, the principle of freedom of trade was laid down by the Acts of March 2 and June 14, 1791, and Article 4 prohibited all coalitions of workmen, employers and traders.

During the Revolution, an Act of July 27, 1793, made the offence of cornering (*accaparement*) an offence punishable by death. At the same time, the Act on the Maximum Price (*La loi du Maximum*) which purported to stabilise prices also punished by death anyone who attempted to sell above the price fixed by statute.

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[1] Dig. 48. 12. 2.

[2] Cod. 4. 59.

These measures had, as was seen again during the last war in France, an effect which was the very reverse of what was expected. Goods disappeared from the shops. Flour no longer arrived in Paris, and there was widespread starvation.

The Convention sent to the guillotine a number of flour dealers, meat wholesalers and wood merchants; but this attempted enforcement of the Act of July 27, 1793, was of no avail. Food still disappeared until the Maximum Law was repealed.

On the other hand, the Act of June 14, 1791 (commonly called the *Loi Chapelier*) which had declared unconstitutional any coalition of persons of the same profession for the purpose of refusing their services or charging for their services a certain price, remained in force.

On February 12, 1810, Napoleon promulgated the Penal Code, which is still in force with amendments. By its Article 419, as amended by the Act of December 3, 1926, the Penal Code provides as follows:

> " Whoever (1) knowingly by the spreading among the public of false or slanderous facts or by offers thrown on the market in order to disturb price quotations or by higher bids made over and above the prices asked for by the sellers or by any other fraudulent means or methods; or
>
> (2) either individually or by means of a combine or group influences attempts to influence shares on the market in order to obtain a gain which would not be the natural result of supply and demand shall either directly or through a third party bring about or attempt to bring about an artificial rise or fall in the prices of foodstuffs or goods or public bonds or private securities, shall be liable to imprisonment for between two months and two years and to a fine of not less than 7.200 NF and not more than 360.000 NF."

The court may also prohibit a person from residing in a certain district (*interdiction de séjour*) for a period of not less than two years and not exceeding five years.

It was held by the Court of Cassation (Criminal Section) on March 13, 1952, that a coal merchants' syndicate which, by threatening not to sell to retailers who refused to sell on at a price fixed by the syndicate, attempted to impose a price for coal was guilty of an offence under Article 419 of the Penal Code, although the price so fixed by the syndicate was below the maximum price fixed by statute.

It was also held by the Court of Appeal of Paris that a syndicate which forbade its members to sell to such non-member traders as

had not resold at the prices imposed by the syndicate was liable in damages.[3]

An agreement whereby bakers in a certain city undertook to discontinue the delivery of bread to their customers, the breach of which being made subject to the payment of a penalty, was held null and void and the syndicate was held to have no right of action for the payment of such penalty.[4]

Fishermen preventing the unloading of fish by blocking traffic in the harbour made themselves guilty of an offence under Article 419 of the Penal Code.[5]

Price-fixing regulations

At the outbreak of the Second World War, a number of price-fixing regulations were passed by the French Government in order to safeguard the currency and to maintain prices. After the collapse of France, this policy was continued by the Vichy Government. The central committee for fixing prices which was appointed consisted of representatives of the Ministries of the Interior, Finance, Supply, and Industrial Production, four representatives of consumers (one of whom was to have a large family) and a representative of traders. Regional Price Marketing Boards and in each Department Marketing Boards were set up. Prices were to be posted in all shops.

Under the German occupation, the whole system collapsed. As the occupying Power was commandeering all it required, goods became very scarce indeed. Traders were expected to sell at the official price. However, they could not obtain goods at the prices fixed by the Government because the fixed prices lagged behind the ever-increasing inflationary current prices; and further had they sold their old stock at the prices fixed by the Government, they would have been ruined: the money they would have received for such stock would not have enabled them to buy an equal quantity of stock, so that they were better off by not trading at all. Very soon, the price in fact paid by the consumer was ten times, even twenty times, the official price. While the authorities actively pursued the unfortunate traders, goods disappeared from the shops: under the counter the pharmacist sold butter, the coal merchant sold meat. In order to do business, goods were invoiced and their official prices entered in the books, but an additional price or secret commission had to be paid surreptitiously, called " *le sous la table.*"

[3] Paris, June 23, 1953, D. 1954, 365.
[4] Poitiers, July 2, 1954, D. 1954, 771.
[5] Douai, November 28, 1951, D. 1952, 13.

By the time the de Gaulle Government took over, the currency had depreciated very considerably: the franc was worth only one-twentieth or even one-thirtieth of its pre-1939 value. In an attempt to stabilise the economy, Order No. 45-1483 of June 30, 1945, was passed; this laid down that prices were not to exceed those charged in 1939 or subsequently fixed by the authorities. This is the basic order punishing the infringement of economic laws, in other words: black market offences.

By Article 35 of the Order, an illegal price was defined as (1) a price above the maximum price fixed by the Marketing Board; (2) a price below the minimum price; (3) a price which had not been reduced in accordance with the regulations.

The possession of stocks by non-registered traders (Art. 41) and the sale of goods in respect of which a trader was not registered were made criminal offences. (A chemist could no longer sell butter and the coal merchant could no longer sell chops.)

Penalties were very high. Failure to exhibit the price: imprisonment for one month to six months; hoarding food: imprisonment for two months to twenty years. The fine has now been increased to six million New Francs. An order can also be made for the confiscation of the whole of the offender's assets, both present and future (Art. 46). Other offences are: the ostensible sale of goods at a lower price than that actually paid; the sale of goods of a quality inferior to that shown in the trader's books or invoices; the sale of a smaller quantity of goods than the quantity invoiced or shown in the trader's books.

By Article 37 of the Order of 1945, the refusal to sell goods which are in stock was also made an offence. Similarly, it was an offence to sell certain goods during certain hours when the shop remained open for the sale of other goods.

It was also an offence to make the sale of goods conditional on the buyer purchasing other merchandise or a stipulated amount of the goods or performing some other service.

The purpose of the Order of June 24, 1958, was the punishment of all disguised attempts at refusing to sell, as for instance by demanding terms which are not customary in the trade; the sale must be made in conformity with the usual trade terms or with the particular trader's trade practice, and not at higher prices which are unjustified by corresponding increases in costs.

Economic control officers and police officers are charged with the detection of offences under the Order.

The *Directeur Départemental* may (1) compromise and settle; (2) impose a fine; or (3) refer the matter to the Minister of Economic Affairs.

Article 19 provides that where the offence has come to the notice of the judicial authorities by way of an information laid before an Examining Magistrate (*Juge d'instruction*), proceedings must be taken against the accused in the normal way but the *Procureur de la République* must inform the *Directeur Départemental*; the *Directeur* must thereupon within three days indicate the action he proposes to take on the offence.

If the offence is detected by administrative authorities (*Controle Economique*) they must consult the Departmental Commission; thereafter they may either compound the penalty or inflict a fine and order the confiscation of the offender's assets.

Further, the Minister or the *Prefet* of the *Département* may, on the advice of the *Directeur Départemental* of Economic Investigation, order the closing down of an offending trader's shop and prohibit him from continuing his trading activities. The Minister may order the closing down of the shop for a period of two years and the *Prefet* for a period of six months.

So far as the organisation of the court is concerned, the Economic Chamber consists of one High Court Judge (*Juge du Tribunal de grande instance*) and two assessors who are selected by ballot from a list of 300 jurymen, fifty of whom must be mothers of families with more than two children.

In practice, it is always advisable to avoid going before the court. Judges in France are poorly paid and when they hear about the profits made by speculators, neither they nor the mothers of families with more than two children are likely to show too much mercy. An accused may always ask to be tried by court, but practitioners may find that not only will their client have to pay the fine recommended by the Administration but he may have to go to prison.

The Price Order of 1945, as supplemented by the Order of June 24, 1958, must now be read subject to Order No. 59-1004 of August 17, 1959. By Article 59*bis* " every concerted action, convention, combination, whether express or implied, or trade coalition in any form or upon any grounds whatsoever which intends to interfere or has effectively interfered with unrestricted competition by hindering the reduction either of production costs or of selling prices, or by encouraging the artificial increase of prices shall be prohibited. Any contract or agreement relating to such prohibited practice shall be absolutely void."

By Article 59*bis* all disputes not settled by compromise between the Administration and the offender must be sent for trial to the ordinary courts (*Tribunaux correctionnels*).

The defence will be that the effect of the combine has been to improve or extend the market for its products or that it was intended to ensure further economic progress by means of rationalisation. These highly technical issues thus raised are investigated by a Technical Commission on Combines; the Commission may consult experts and prepare a report, which is made available to the parties who are entitled to reply thereto.

The composition of the Technical Commission on Combines is laid down by Order No. 54-97 of January 27, 1954. It is presided over by a member of the *Conseil d'Etat* (*Conseiller d'Etat*) or of the *Cour de Cassation*. The other members of the Commission are: five members of the *Conseil d'Etat*, and of the *Cour de Cassation*, six lawyers and two economists selected for their professional qualifications. They are appointed for a period of five years.

The matter is brought before the Technical Commission on Combines by the Minister responsible for Economic Affairs. A Rapporteur is appointed; a copy of his report is sent to the Minister of Economic Affairs. By Article 9, the parties have one month in which to answer the Rapporteur's report. The Technical Commission on Combines may hear anyone whom they deem it desirable to consult (Art. 13). By Article 16, the Opinion delivered by the Technical Commission on Combines is forwarded to the Minister responsible for Economic Affairs. Under Article 17, before reaching his final decision, the Minister of Economic Affairs invites the parties to take such action or do such things as may appear necessary to him for the maintenance or restoring of free industrial and commercial competition.

Summary

Until recently France was mainly an agricultural country. Its industry consisted mainly of small family businesses.

Nowadays the development of science makes small businesses unprofitable. A small business cannot afford to buy the expensive machinery which has now become essential. On the other hand, markets have been too small to enable big business to prosper.

With the advent of the Common Market, it may be that one day in the near future large combines may take over the whole of a trade or industry and create monopolies; but that time has not come yet. It may be wise, however, to provide for such an eventuality. I believe that the French Government is wise in acting carefully. France does not want, and ought not, to make life more difficult for her investors. The medicine administered in advance might be far worse than the prospective disease.

RESTRICTIVE TRADE PRACTICES IN ITALY

By

MARIO G. FIORE *

1. A survey of the Italian law concerning restrictive trade practices is much more a problem *de lege ferenda* than one of the *lex lata*: in point of fact remedies against practices in restraint of trade are not yet on the Statute Book and so far, for one reason or another, Italian legislation has proved unable to supply the legal implements which are necessary to cope with this problem.

Accordingly, instead of reciting in detail the rules found in the various Bills which have been introduced in Parliament, I will deal with the problem in general terms.

2. The task would seem to call much more for the attention of the jurist than that of the lawyer and as I belong to the latter category, I strongly feel the inadequacy of my approach; I must also confess to a sense of uneasiness for trespassing upon a field which is not that of my calling.

3. The guiding principle of my subject-matter is found in the Italian Constitution, which came into force on January 1, 1948—six momentous years after the enactment of the Italian Civil Code. A chronology which poses problems of construction and of adaptation.

Article 41 of the Italian Constitution reads:

> " Private enterprises in the economic field shall be free.
>
> " They may not be developed so as to conflict with the public interest, or in a manner prejudicial to safety or liberty or to the dignity of man. The law shall set up appropriate schemes and controls so that public and private economic activities can be directed and co-ordinated for the benefit of society."

4. This rule is far from being exhaustive; but, I submit, it is meant to provide only the foundation-stone, to lay down directives and guiding principles for future legislative action.

The inadequacy of this drafting was particularly felt by Mr. Luigi Einaudi, M.P. (as he then was), who moved for the enactment of an additional paragraph in the following terms:

* Member of the Italian Bar; Legal Adviser to H.B.M.'s Agent in the Anglo-Italian Conciliation Commission.

> " The law is not an instrument for the formation of monopolies; and when they exist, the law subjects them to public control by means of delegated or direct public administration."

The reports of the discussion which ensued upon the amendment introduced by Mr. Einaudi throw little light on the aims which the learned drafters of the Italian Constitution wished to attain: from the reports it appears that the problems created by agreements in restraint of trade were not considered to be a matter to be dealt with in the Constitution; and Mr. Ruini, M.P. (as he then was), pointed out that, in the views of the Commission entrusted with the drafting of the Constitution, the existence of monopolies was relevant only in so far as it amounted to a just cause for expropriation. The views of the prevailing opinion were thus expressed in Article 43 of the Constitution:

> " For purposes of public utility, the law can *ab initio* reserve for, or transfer by means of expropriation subject to compensation to the State, public bodies or communities of workers or users, certain undertakings or categories of undertakings concerned with essential public services, or with sources of energy or those which are in a monopoly position, and are of exceptional importance."

The problems connected with restrictive trade practices were, in the eyes of the Italian legislator, still in their infancy.

5. The late Professor Ascarelli pointed out [1] that the constitutional rule amended and improved the text of Article 2595 of the Italian Civil Code which reads:

> " *Legal limits to competition*
>
> Competition shall be carried on in a manner which is not prejudicial to the interests of the national economy and is within the limits laid down by law (and by the rules governing corporations)."

It is apparent that the legal philosophy which was expressed in the Civil Code formula " interests of the national economy " is negatived by the leading ideas of " social utility," etc., expressed in Article 41.

No statute was ever enacted in further implementation of the rule contemplated in Article 2595, though this rule, as applied and construed by the courts, has shown a tremendous vitality. I should like to mention in this connection that rules like that in Article 2595 are of extreme interest to the comparative lawyer as evidencing a point of singular resemblance between common law systems and

[1] Ascarelli, *Teoria della concorrenza*, Milan, 1957, p. 75.

codified systems, the distinctive features of which are not so strikingly different as is sometimes thought. This proves the need for " judge-made law " even in codified systems.

6. In order to give an account of the present state of affairs in Italy, I will deal first with the international setting, namely the Treaty of Rome of 1957, and ascertain whether the relevant provisions of the Treaty are part of the law of the land.

The provisions of the Treaty of Rome are well known: Article 85 (1) and (2) defines the actions which are " incompatible " with the Common Market and thus prohibited; Article 85 (3) contains an escape clause; Article 86 deals with the " taking of improper advantage of a dominant position within the Common Market or a substantial part of it "; Article 91 covers dumping practices.

It is of interest to recollect that the European Commission in its general report expressed the opinion that the Treaty provisions are part of the law of each of the signatories; that these provisions are compulsory legal rules: rules which are not mere statements of economic principles that each State should later adopt, but rules that command obedience.

To some extent the experts of the signatory States who attended two meetings in November 1958 and January 1959 shared the view of the European Commission.

With due respect I am rather reluctant to give to such opinions the wider meaning which is sometimes attributed to them; I submit that they are of no particular significance in the solution of a problem which is chiefly one of interpretation of the several domestic systems of law.

Admittedly none of the learned bodies to which I have referred is competent to give a ruling upon a question of interpretation of the domestic law of a Member State. We can, I submit, do no more than to accept the Commission's opinion as a recommendation, and that of the experts as an undertaking.

The answer to this problem is—I submit—most emphatically in the negative.

7. The Treaty lays down rules of law which create particular obligations for the Member States, chiefly an obligation to bring domestic legislation into line with the international rules. From the point of view of Italian domestic law, the Treaty's implementation in Italy does not necessarily mean that *all* Treaty rules are part of the law of the land. Admittedly, the Italian legislator is under an international obligation to enact the necessary statutes: it is regrettable that this obligation has not so far been discharged and it is

sincerely hoped that it soon will be. In a certain sense Italy finds herself at an advantage by benefiting from the experiences in this field of other States.

To round off this subject I would add that a few authors who hold the opposite view, namely that the Treaty rules are already part of Italian law, have relied on Article 10 of the Italian Constitution which reads as follows:

> " The Italian juridical system shall conform to the generally recognised rules of international law."

The correct meaning of this Article as elucidated by leading international academic lawyers is that the system referred to in the first paragraph of Article 10 of the Constitution is the one generally called the " automatic adaptation of domestic law to international law," namely the third system which is available for the recognition of international law. It applies accordingly only to customary international law which is generally acknowledged, and not to international law which stems from a treaty.

But Article 10 has a further meaning: it imposes a constitutional duty upon all State agencies concerned to take such action as is necessary to implement international rules. Italy has thus a twofold obligation of carrying out the provisions of the Rome Treaty: one obligation which is international in character and one which is constitutional.

Thus one is driven reluctantly to the conclusion that (save for certain rules of the Civil Code to which reference will be made at the end of this paper) there is a legislative vacuum in Italy and this has not yet been filled by the provisions of the Treaty.

This solution seems to be supported by the very words of the Treaty: Article 87 makes it quite clear that " appropriate regulations " shall be issued with a view to the application of the principles set out in Articles 85 and 86; moreover, Article 88 speaks expressly of State legislation in this matter, and Articles 101 and 102 provide a special procedure to eliminate or prevent the enactment of " legislative or administrative provisions by the Member States which distort the conditions of competition in the Common Market." Though it is hardly logical to find an argument for the solution of a problem of domestic law in an international rule; and granted that some of the Treaty rules indicated above have very little impact upon the question under consideration, it must be agreed—I venture to submit—that the entire system as contemplated in the Treaty is incapable of immediate application and the obligations arising therefrom can be discharged only by means of appropriate legislative action.

8. To the best of my knowledge, the official view of the Italian Government is that the Treaty rules concerning agreements in restraint of trade are not capable of immediate application in Italy. In this connection I should perhaps draw attention to a very important document, namely to the opinion expressed by C.N.E.L.[2] upon the request of the Italian Cabinet, such request having been made by a letter of the Minister of Industry and Commerce dated December 7, 1959.

C.N.E.L. is a constitutional body which acts as a consultative agency to the Government on economic matters.

C.N.E.L. is of opinion that it is unrealistic to try to re-establish the conditions necessary for a perfectly fair competition and feels that the legislator should take cognisance of the fact that monopolies are the unavoidable result of advanced industrial techniques.

Accordingly, in C.N.E.L.'s view, the aims to be achieved are:

(i) to protect such degree of competition as is compatible with the dimensional characteristics which are imposed by progress, and

(ii) to prohibit abuses on the part of enterprises which are in a monopolistic position.

C.N.E.L. has drawn the attention of the Italian Government to the fact that this twofold problem does not necessarily entail the adoption of the so-called *per se* rule or of the system of prohibiting abuses.

C.N.E.L. has strongly recommended a realistic approach to the problem and has pointed out that what really matters is not so much the principles to which future legislation will aspire, but rather the actual contents of the rules.

In the view of C.N.E.L. the Italian Government should approach this problem not so much to protect individual interests (consumers' interests; the " good morality " approach) but to:

(i) foster employment to the point of reaching full employment;

(ii) reduce the difference of the standard of living between Northern and Southern Italy;

(iii) adapt the Italian economy to the situation created by the European economic integration.

The problem is thus put in its true light, both from the economic and the legal point of view, and can be envisaged only as that of the impact of the Treaty of Rome as a whole upon the Italian situation.

[2] Consiglio Nationale dell' Economia e del Lavoro.

C.N.E.L. has not ignored Italy's international obligations and has gone so far as to suggest that the very drafting of Treaty rules can in certain cases be adopted.

I would add that the conclusions of C.N.E.L. do not show a marked preference for any of the Bills introduced in Parliament: it is my considered opinion that the decision of the Italian Government might quite well be to appoint a Commission and entrust it with the investigation of this matter and the preparation of a further report. I understand that a Bill which was introduced in Parliament (*Proposta di legge* No. 582 dated November 21, 1958) to this effect is likely to find its way to the Statute Book.[4]

It would be of little interest to go into the details of the several Bills introduced in Parliament.[3] The several Bills differ chiefly in (i) the technique of setting out either very detailed rules or only broad principles; (ii) granting exclusive jurisdiction to administrative tribunals or to the ordinary courts of law; (iii) providing or not providing for the compulsory registration of agreements; and (iv) imposing criminal or non-criminal sanctions.

De lege lata

The Italian Civil Code contains a few rules which, for technical reasons, never came into force, covering restrictive trade practices either directly or indirectly. Article 2596 prohibits any agreement for the limitation of competition if it is to run for more than five years and if it covers the whole of the territory of the Italian State.

Article 2618 provides that all agreements which may in fact adversely affect the market of the goods forming the subject-matter of the agreements will be subject to the prior approval of the Government.

Moreover, under Article 2619, the Government has ample powers of control over any groups of enterprises; it can wind up such groups and any company that violates Article 2618. Apart from other rules which concern unfair competition and do not fall within the scope of this paper, I would add that the provisions of the Civil Code were meant to protect and foster a given economic policy rather than to prevent restrictive trade practices. This was only a secondary goal.

Knowledge of the antecedents of Italian legislation shows that the present approach to this problem is utterly different and that domestic problems and international obligations seem sometimes to

[3] *Proposta di legge* No. 248, September 12, 1958; *proposta di legge* No. 333, March 12, 1959; *proposta di legge* No. 1172, May 9, 1959; *proposta di legge* No. 1714 and *disegno di legge* November 28, 1959, this last being a Government-introduced Bill. This Bill has been recently passed by Parliament.

conflict or, at least, to point to different solutions. The practitioner feels that the entire problem of restrictive trade practices can hardly be solved by domestic legislation. The wide economic aspects of the problem ignore the limits of State frontiers. Its legal aspects entail problems of enforcement of judgments, of jurisdiction, of concurrent jurisdiction, etc.

Everything points—I submit—to a solution by means of an international agreement. I accordingly express the hope that the entire subject will be considered again from all angles, with a realistic approach to all related problems, with a view to solving them—at least so far as the Six are concerned—at an international level.