SOME REFLECTIONS ON THE BRITISH POLICY TOWARDS MONOPOLY AND RESTRICTIVE BUSINESS AGREEMENTS.

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INTRODUCTION

(1) In 1891, shortly after the Sherman Act was passed in the United States of America, a decision of the (British) House of Lords made it clear that there were no effective legal constraints on the formation of monopolies and cartels in Britain and on the exercise of whatever market power they had. The decision in Mogul Steamship Co. v McGregor Gow & Co.[1] confirmed that the common-law doctrines concerning restraint of trade and trade conspiracy no longer could serve as a controlling or moderating influence on monopoly and restrictionism in industry and trade. The change during the nineteenth century in the tenor of judicial interpretation and application of these doctrines no doubt reflected a change in public opinion and attitudes.

The development of new public policies towards monopoly and restrictionism after the Second World War in turn largely reflect growing public concern about the exercise of market power, whether by dominant firms or by cartels. It is indeed interesting to note that the evolution of new policy measures since 1948 has rarely been the subject of party-political controversy, although there have been some differences of emphasis between the two major parties.

(2) Post-war developments were foreshadowed in the important statement on Employment Policy issued by the coalition

government in 1944. The creation and maintenance of full employment after the war were to be major objectives of government economic policy; and measures to deal with undesirable restriction of output and raising of prices were part of a collection of measures designed to achieve full employment. The relevant passages concerning monopoly and restrictive agreements in business are worth quoting in full, because they explain the general setting and also because they indicate the shape of things to come :[2]

> An undue increase in prices due to causes other than increased wages might similarly frustrate action taken by the Government to maintain employment. If, for example, the manufacturers in a particular industry were in a ring for the purpose of raising prices, additional money made available by Government action for the purpose of maintaining employment might simply be absorbed in increased profit margins and no increase in employment would result ...
>
> Employers, too, must seek in larger output rather than higher prices the reward of enterprise and good management. There has in recent years been a growing tendency towards combines and towards agreements, both national and international, by which manufacturers have sought to control prices and output, to divide markets and to fix conditions of sale. Such agreements or combines do not necessarily operate against the public interest; but the power to do so is there. The Government will therefore seek power to inform themselves of the extent and effect of restrictive agreements, and of the activities of combines; and to take appropriate action to check practices which may bring advantages to sectional producing interests but work to the detriment of the country as a whole.

From the second paragraph it is clear that it was not intended to introduce general prohibitions or condemnations, but that the preferred method of approach was to be the case-by-case investigation of individual monopoly situations or cartels, each to be considered and to be judged on its merits. It was all to be basically different from the more general condemnatory approach enunciated in the Sherman Act of 1890. Moreover, the relation between monopolies policy and employment policy is clearly indicated. In the event, this relationship has persisted; but in this respect the accent is on employment in particular regions rather than on the aggregate employment as was emphasised originally.

The first legislation was the Monopolies Act of 1948. Since then there have been five further pieces of legislation (in 1953, 1956, 1964, 1965, and 1968). Further changes in the law proposed by the last Labour government in 1970 were frustrated by the general election of that year. The present Conservative government had introduced a new bill, the Fair Trading Bill, some of the provisions of which I will note in passing. Thus, whatever may be the record of Britain's productivity in other fields in the post-war period, in the matter of output of monopolies legislation the British performance is probably a world record.

I will not attempt a detailed blow-by-blow recital of each of the successive pieces of legislation. Instead, I will begin with a brief outline of the present position, concentrating on the essentials and using a broad brush, and then consider certain selected aspects and implications of present arrangements and policy under three general headings, namely, cartels, dominant firms and mergers.

(3) At present the monopolies legislation places responsibilities upon the government (in the form of a government minister and his department), a court of law and an independent statutory authority, sometimes also described as a quasi-judicial "tribunal".

The court of law in question is the Restrictive Practices Court, dating from 1956. It is a division of the High Court.

Its jurisdiction covers registered restrictive agreements and arrangements (hereafter referred to also as cartels) in the supply of goods, and also resale price maintenance arrangements. The independent statutory authority is the Monopolies Commission, created in 1948, which investigates and reports on dominant firm "monopolies" in the supply or purchase of goods and services, cartels in the supply of services, and mergers between firms. However, the Commission has no power to initiate investigations : this is the responsibility of the government. Nor has it power to enforce its recommendations : this is the function of government, which is free to accept, modify or reject the recommendations made by the Commission. (In fact the recommendations have generally been accepted).

CARTELS

(4) The Restrictive Practices Court consists of judges and "lay" members (i.e. the are not professional lawyers). The latter are appointed by the Crown, and each is a person "appearing to the Lord Chancellor to be qualified by virtue of his knowledge of or experience in industry, commerce or public affairs".[3] It is the responsibility of the Registrar of Restrictive Trading Agreements, appointed by the Crown, to bring registered restrictive agreements individually before this Court for adjudication. Any agreement found by the Court to be contrary to the public interest is void; and the Court may make an order restraining the members of the cartel from giving effect to their agreement or from making any other agreement "to the like effect".

(5) The public interest is set out in a section of the Act of 1956 which specifies what have come to be known as the "gateways" and the "tailpiece". There is, first, a general presumption that a registered agreement is contrary to the public

interest. But this presumption can be set aside in an individual case where the Court is satisfied that the agreement produces favourable effects under one or more of six headings (the "gateways"). These gateways include the provision of "specific and substantial benefits or advantages" to customers; an increase in the "volume or earnings" of the export trade; and the avoidance of serious and persistent unemployment in the particular area or areas of the country in which the industry is located.[4] The Court has to be satisfied, further, that the restrictive agreement is "not unreasonable" having regard to the "balance" between the favourable effects and "any detriment to the public" flowing from the agreement. This is the "tail-piece", calling for the so-called "balancing act" to be performed by the Court. In economic parlance, the Court is required to do a kind of (non-quantitative) public-interest benefit-cost analysis, where the eligible categories of benefits are specified and limited, and where the eligible categories of cost are widely drawn.

(6) The question was hotly debated in Parliament whether a court of law was the appropriate type of authority for deciding on the effects of a cartel on the public interest. The question, more strictly considered, was whether Parliament, in the legislation, had made "justiciable" the issues to be decided by the Court - that is, in the context, whether the legislation gave such clear and specific guidance to the Court that the Court in fact would <u>not</u> have to make policy choices (outside a narrow range). It was strongly argued that the issues left to the Court were not justiciable. For example, with reference to the balancing act - weighing benefits to the public against costs to the public - a leading lawyer in Parliament said that it[5]

> is essentially a political decision. That is not a decision for a court of law at all - to decide whether, on balance, something or other is or is not contrary to

> public interest.... This is the place and the Government is the body to do it - to take decisions as to whether something is contrary to public interest. It is essentially a decision on the balance of advantage to the public as a whole and that, of course, is a political decision. We are not here applying a general rule that is laid down. We are not here dealing with a case in which a court is merely inquiring whether or not the case is within a general rule.... We have an entirely different function.

My own view is that the Act of 1956 did not succeed in limiting the issues before the Court to strictly "justiciable" issues. The Act, by its inclusion of several different gateways, stipulates a number of policy goals, and does not indicate any hierarchical ordering of these goals, or of the relative weight to place on any of these goals and on the detriments to the public interest. The multiplicity of policy objectives meant that it was necessary for the Court to establish its own system of weights, which necessarily implied the introduction of value judgments. Indeed, the peculiar nature of the issues to be determined by the Court was recognised in the mixed composition of the Court, with its combination of professional judges and "lay" members.[6] Moreover, when legislation was introduced in 1964 to control the specific practice of resale price maintenance, the public-interest section was drawn much more narrowly, possibly in an attempt to render the issues more nearly "justiciable". Both benefits and costs were confined to those affecting consumers of the goods in question. Consumer interests were to provide the only yardstick. The policy objectives were clearer, and more restricted than those expressed in the corresponding section of the Act of 1956.

(7) It was feared that the Act of 1956 could lead to decisions by the Court which would raise political issues or which would reflect inconsistency in the sense that the Court's "value judgments" might differ significantly from case to case.

In the event, however, these fears were not borne out. Many of the doubts and apprehensions were settled by an early decision, concerning a yarn-spinners' cartel in the cotton textiles industry.[7] First, the Court adopted a stringent interpretation of the presumption that cartels were against the public interest, whereas it was perhaps open to it to treat it rather more as a "procedural" presumption. Second it underlined the stringency of its interpretation by finding against a cartel even though it was satisfied that the dissolution of the cartel was likely to lead to substantial and persistent regional unemployment.[8] Third, the Court said that it was not enough, to save a cartel, to show that its particular restrictions produced the kind of public-interest benefit which could in principle be claimed for all restrictions of the same class. Thus it was not sufficient to establish that a particular price agreement introduced price stability of some sort, because all price agreements had that effect. It was necessary, instead, to show that in the particular cartel and industry there were special and peculiar circumstances which gave added importance to the benefit claimed. In other words, the Court interpreted that the promotion of competition was <u>the</u> policy objective of the Act, and that the presumed benefits of competition could not easily be held to be outweighed by any benefits of restrictions of the kind described in the gateways.

The strong line taken by the Court in the <u>Yarn-Spinners</u> case found widespread favour. It was naturally not welcomed in some quarters of industry and trade, although the clear-cut approach adopted by the Court made it easier for cartels to decide whether or not to incur the heavy expense of attempts to defend their agreements before the Court. Although the Court has gone out of its way to discourage "any tendency to treat its decisions in particular cases as binding precedents affecting decisions in subsequent cases"[9] - a corollary of the pragmatic, case-by-case approach already envisaged in 1944 - the *Yarn-Spinners* decision and a flow of succeeding decisions (in which the strong line of the *Yarn-Spinners* decision was not always followed closely) led to the voluntary abandonment of large numbers of restrictive agreements. And relatively few of the defended agreements have received the blessing of the Court.

(8) The possibility arose that the Court had done its work so well that it would run out of work. However, the jurisdiction of the Court has been extended progressively. In 1964 resale price maintenance arrangements were placed within its ambit; although here, too, most of the affected arrangements have been given up voluntarily without waiting for a judicial hearing.

New categories of agreements have been added to the list of registrable agreements, thereby extending the range of the Court's activities. Information agreements - for example, agreements to exchange information about prices without binding any party to any price - have been added quite recently. The present government's Bill proposes to require the registration of specified categories of restrictive agreements in the supply of services. (The present exclusion of services cartels has never been explained.) Not all services will be affected, however. Certain named services will remain within the scope of the Monopolies Commission. Thus while restrictions in the supply of commercial services will be registrable, those in the supply of certain professional services will not be treated in this way. (It may be noted, in passing, that while restrictions in the supply of the services of doctors and lawyers are to be exempted from registration (and hence scrutiny by the Court), restrictions (if any) in the supply of the services of economists are not to be exempted in this way. One might interpret this to mean that Parliament believes that economists are either too inefficient or too public-spirited to organise restrictive cartels : or less charitably, that any economist's cartel, as distinct from, say, lawyers' cartel, should properly be deemed to be against the public interest.)

(9) Despite the presumption in the Act of 1956 that cartels are against the public interest, the legislation envisages that some restrictive agreements may, nevertheless, be found to be in the public interest; and some twenty or so registred agreements have in fact been approuved by the Court. It is conceivable, however, that it might not be in the interest-in view of the costs insolved-for firms in an industry to continue or to create restrictive agreements which would be found to be in the public interest. The private benefit to the cartel members may be less than the cost of a successful defense of the agreement before the Court, and the public benefit may therefore be lost. The stricy logic of the case-by-case approach might seem to call for official machinery to promote "good" cartels or restrictive agreements, for example by exempting them from registration.

A government department was empowered to remove from the juridiction of the Court any agreement considered by it to be, inter alia, "calculated to promote the carrying out of an industrial or commercial project or scheme of substantial importance to the national interest", intended to "promote efficiency in a trade or industry or to create or improve productive capacity in an industry", and "on balance expedient in the national interest". The words used in this legislation suggest, at least, that an agreement might qualify for this special treatment and yet might not be capable of a successful defence under any of the gateways of the Act of 1956. But be that as it may, only one agreement has so far been granted exemption under the Act of 1968.

DOMINANT FIRMS

(10) The Monopolies Commission, which is not a judicial body,[10] is composed of up to 25 members. The present membership is drawn from a variety of fields : it includes barristers, a former senior civil servant, industrialists, management consultants, former trade union officials, a merchant banker, a philosopher, several academic economists.

From 1948 to 1956 the Monopolies Commission was required to investigate, on references made to it by the appropriate government department, both single-firm monopolies and also cartels in the supply of goods. Cartels in the supply of goods were removed from its scope in 1956, largely as a result of its reports on individual cartels and a general report (of 1955) on variety of collective restrictive arrangements : on the basis of this accumulating knowledge, the government decided that cartels warranted the special judicial treatment discussed above. Since 1956, cartels in the supply of services and mergers (affecting goods or services) have been added to the range of subject-matter which can be referred for enquiry to the Commission. I will limit my discussion to single-firm or dominant-firm monopolies and to mergers.

(11) A dominant firm or a single-firm monopoly - terms not used in the statutes - is a firm which supplies one-third or more of the category of goods or services which is the subject of the reference. (The market share is reduced to one-quarter in the present Fair Trading Bill.) In fact, most references have involved market shares well above the statutory one-third.

A referred dominant firm and the "things done" as a result of its large market share or for the purpose of preserving its large market share have to be assessed for their effects on the public interest. The public interest is very widely drawn, and in this respect differs from the public interest specification in the statute dealing with registered restrictive agreements. In de 1948 Act, the Commission is required to take into account "all matters which appear in the particular circumstances to be relevant". The public-interest section goes on to indicate that certain specific matters should be taken into account, namely, the need, "consistently with the general economic position of the United Kingdom", to achieve efficiency in production and distribution, the most efficient organisation of industry and trade, the fullest use of resources and the development of technical improvements and the expansion of markets including new markets. The present Fair Trading Bill, while still requiring that all relevant matters should be taken into account, changes the specific signposts. The maintenance and promotion of effective competition are mentioned, as also the promotion of the interests of consumers, purchasers and users of goods and services in the United Kingdom. Moreover, regional employment is mentioned : the Commission will be required to have regard to the desirability of "maintaining and promoting the balanced distribution of industry and employment in the United Kingdom".

(12) The open-ended and unrestricted "definition" of the public interest renders it virtually impossible to import into the legislation any <u>presumption</u> that a dominant-firm situation is against the public interest. And in fact there is no such presumption in the legislation or in the Fair Trading Bill.

One may go further and suggest that the inclusion of such a presumption would be difficult to sustain even if the public interest were more narrowly circumscribed than it is, say, by limiting the public-interest test exclusively to the promotion of the interests of the consumers of goods in question. Only a bold and incautious economist would claim that we, as economists, have a well-developed theoretically soundly-based and empirically tested set of propositions or hypotheses linking a dominant firm's market share and its economic performance (or that of its industry as a whole). In my view both the development of the theory of industrial structure and the accumulating body of empirical studies allow no stronger conclusion than that some dominant-firm situations (such as thoses referable to the Commission under the legislation) may well be against the consumer (and the public) interest, and that it is sensible to have some machinery for the investigation of such situations and for remedial action to be taken where, after enquiry, this is considered to be necessary. One may add that the process of case-by-case investigation and assessment is made especially difficult by the fact that there are no demonstrably-correct but simple propositions concerning any necessary, or at least highly probable, connection between a dominant firm's market share and economic consequences relevant to the public interest. It may be noted, also, that, although there has been much progress, economists have not yet come up with operationally manageable but reliable methods for ascertaining the optimum or the minimum efficient size of firms. Further, the large "unexplained" variance found in the numerous cross-industry studies relating, say, profitability or technical advance to industry concentration suggest, at least, the importance of the particularities of individual entrepreneurs, management teams, history and business policies.

The United States experience with single-firm monopolies supports the views just expressed. Despite the generalised condemnatory tone of the Sherman Act of 1890, monopoly and monopolization (as distinct from cartels) have in the event been dealt with in a more pragmatic case-by-case manner, with general presumptions and prohibitions playing no more than a minor role.

(13) In a dominant-firm reference, the Commission is required to address itself to two main questions : is the existence of the dominant firm (the monopoly "conditions") itself adverse to the public interest ? does the dominant firm do anything against the public interest as a result of its large market share or in order to maintain its large market share ?[11]:

As to the first question, the Commission has in a very few cases found that the existence of the dominant firm itself was, or was likely to be, against the public interest. It might be thought that in such cases the Commission would have recommended that the structure of the firm should be altered, for example, by the splitting-up of the firm into a number of smaller independent firms or by the splitting-off of the successive units of a vertically-integrated dominant firm where its vertical integration was found to be responsible for detriment to the public interest. The Commission, however, has on no occasion recommended such anti-monopoly surgery, and in several reports has explained why it has not done so in the particular case.[12]

The Commission has been criticised for its failure to recommend compulsory divestiture by a dominant firm of some of its capacity.[13] It is for the reader of its reports to decide whether the Commission has been lacking in boldness or inadequate in its economic analysis of the dominant-firm situations referred to it for investigation. Here I merely want to speculate whether the government of the day would have taken kindly to a recommendation for such a divestiture. Its implementation would require special legislation to apply to the specific firm. Moreover, it would run counter to a fairly powerful sentiment in certain influential quarters that British firms are, if anything, too small rather than too large in terms of international competition (a view which has not gone unchallenged but which serves as a cross-current complicating the formulation and operation of a policy concerning competition and monopoly).

Finally, a reference to the Commission relates to the supply of a defined category of goods or services, and not to a particular firm's activities as a whole. The remedy of a change in its structure would therefore involve an awkward jump from an assessment of one part of a firm's activities to an (implicit) assessment of the effects of the remedial change on the firm's total activities - the latter being a subject which could not have been investigated by the Commission under the reference.

(14) Although the Commission has rarely found that the dominant-firm situation is itself against the public interest, it has usually found that some of the things done by the "monopolist" have been detrimental. Summarising broadly, it may be said that the Commission has tended to be critical of such practices by dominant firms as tying discounts or contracts, predatory pricing and other exclusionary arrangements, discrimination among customers (especially where these might be expected to hinder the firm's competitors or inhibit new entrants), and the setting of unjustifiedly high prices. But each practice in each case has been judged on its merits in the particular circumstances of the firm and its industry. No doctrine has been developed or emerged to the effect that certain practices should be considered to be per se contrary to the public interest. On the other hand, a practice such as a discount to customers dependent for its rate upon the individual customer's total purchases over a period from the firm has almost invariably been bound to be against the public interest; and business firms must have a fairly good idea of the sorts of practices which will attract particularly critical attention.

A related generalisation about the contents of the Commission's reports on dominant-firm situations is that the Commission has been much concerned with practices which have the effect of inhibiting the activities of smaller competitors and discouraging new entry. It has also on occasion recommended that government-imposed restraints on new entry should be removed or weakened in order to release stronger competitive pressures upon the dominant firm. It is doubtful whether economists would find fault with this emphasis in the reports. In this context the question can be raised, however, whether the presence in the market of a firm with a preponderant market share might not itself sometimes constitute a so-called barrier to entry, even when that firm does not deploy any specifically entry-restricting practice or policy.

(15) So far I have concentrated on the dominant firm and its practices; and it has been implied that the other lesser firms in the industry serve as a constraint on its exercise of market power. But it is naturally conceivable that a dominant firm may take the lead in achieving some form of group profit maximisation in which all the firms in the industry share more or less non-competitively and harmoniously. The dominant firm may serve as the price leader for a willing group of oligopolists, or may adopt such terms of trading as elicit and facilitate non-competitive adaptive responses by the other firms in the industry.

Where such oligopolistic situations take the form of a registrable restrictive agreement, or arrangement, the Restrictive Practices Court will be the arbiter.[14] But where there is no registrable agreement, is the oligopoly situation as such eligible for reference to the Commission for investigation and report ? The answer to this question depends upon the interpretation of a subclause to a section of the Act of 1948. It seems clear that one of the principal architects of that Act, Mr. Harold Wilson, thought that the wording in question covered non-collusive price leadership :[15] "This [clause] authorises the Commission to go into conditions usually described as "price leadership", where a single firm, without being in a monopolist position, and without there being any formal cartel or price-fixing association, is in a position to influence price and other conditions of supply...." However, although in a few of its reports the Commission has recognised the presence of price leadership, it has not so far treated the resulting non-competitive pricing situation itself as a "monopoly condition" to be assessed independently of the dominant firm's existence and restrictive practices.[16] And so far no industry appears to have been referred to the Commission on the strength only of a suspected non-collusive, non-competitive oligopoly situation.

MERGERS

(16) Enquiries into and reports on dominant-firm situations seldom arouse much public interest. Merger enquiries, on the other hand, have sometimes aroused considerable attention. The reports appear soon after the reference was initiated. There is much publicity about large take-over bids, especially when they are contested or when there are two rival bidders.

Until 1965 mergers could not be referred for investigation by the Commission. This omission in the machinery for promoting competition may well have encouraged mergers and higher concentration in some industries, more so after 1959 when it seemed clear that the Restrictive Practices Court would be highly critical of cartels.

In 1965 the control of mergers began. Mergers could be referred to the Commission, at the discretion of the relevant government department, where the merger would create or intensify a monopoly situation (within the meaning of the Act of 1958) or where the target firm had assets in excess of £5 million. Thus eligibility for reference depends upon either of two features - the monopoly or monopoly-extension feature; and the absolute-size feature (with the modest lower limit of £5 million). The relevant government department can suspend a merger until the Commission has issued its report, within a time limit (of up to six months) imposed by the department. Some merger proposals have been abandoned shortly after they had been referred for investigation; others have been terminated on the issue of an adverse report by the Commission; and one merger was not completed, despite a favourable report, because of intervening changes in the stock-exchange values of the shares of the two companies. Apprehensions that a reference might be made have also brought about the discontinuance of merger negotiations. The impact of the merger legislation has thus been quite considerable, even though only a small proportion of all eligible mergers have been referred for investigation to the Commission.

(17) As with dominant-firm or monopoly situations, for merger enquiries the public interest comprehends all matters and considerations which are thought by the Commission to be relevant. Unlike with merger cases in the United States, the issues are not confined to those relating to monopoly and competition. Absolute size of firms; efficiency; aggregate concentration; employment in a region (via redundancies or the creation of new employment opportunities) - all these can in principle be regarded as relevant. (In fact, a reading of the Commission's reports on mergers will show that they tend to be concentrated largely, though not exclusively, on the issue of concentration and competition within the affected industry or trade, an issue which inevitably raises the question of the appropriate demarcation of the relevant market.)

(18) The fact that a merger can be referred for investigation even if no question of monopoly or competition is, or is likely to be, involved (so long as the modest size criterion is satisfied) has several implications, of which I note two.

First, it is possible that merger references could be made largely on political grounds, for example, if there is public concern over particular types of merger or mergers by particular categories of persons or firms. If this were to be done on any scale - and there is no suggestion that it has been done to date - it might well bring the machinery for the control of mergers into some disrepute, especially as public concern in these matters may be subject to short-term fluctuations in fashion.

The second implication reaches further and deeper. A merger is one type of investment decision. If the law provides for the public supervision of such investment decisions for purposes other than the prevention of monopoly situations or of their intensification, why should it not also provide for the public supervision of other investment decisions of similar scale ? If mergers are to be scrutinised for their likely effects on efficiency, exports, or regional and local employment, or for their implications for aggregate concentration in the economy, why are non-merger investment decisions not subject to comparable scrutiny ? For it is plain that in these respects merger decisions in principle do not differ from decisions by firm as to their internal growth and eventual size or as to diversification : the only differences seem to be that a merger takes place in public and necessarily means the elimination of one independent firm.

I am not in any way advocating that all investment decisions above a certain size by large companies should in fact be made subject, at the discretion of a government department, to a process of appraisal and control by a government department or by an independent body. The point I am making is that the extension of merger control to include situations in which monopoly is not at issue and to cover matters other than the effects of mergers on monopoly and competition seems logically to provide some justification for public enquiry into and control of ordinary investment decisions by private enterprises.[17] This logical implication of current policy raises the question of the desirability of the policy in these respects.

(19) In paragraph (9) above I said that it is an implication of the pragmatic case-by-case approach to cartels that there may be cartels which are in the public interest. Similarly, indeed a fortiori in the absence of any general presumption in the law relating to mergers, there is an implication that some mergers may be in the public interest. And then it is but a short step to conclude not only that such mergers should not be referred to the Monopolies Commission for investigation, but also that a public agency should be set up to promote or encourage them, with the help of funds provided by government.

In fact, for the period 1967 to 1970 such a public agency was in operation. The Industrial Reorganisation (IRC), endowed with funds by government, was empowered inter alia to bring about mergers, where, in its view, this would effect an improvement in the structure of the industries affected.[18] Its activities in this field were largely predicated on the belief that the managements of companies and financial intermediaries did not recognise sufficiently the advantages of certain mergers, and that some prodding, if necessary with the incentives of finance, should be applied.

It is not germane to this paper to attempt an assessment of the IRC experiment. But it is worth noting that, while the IRC was in being, it seemed incomprehensible to some observers that the government should have established two agencies, one to stop mergers where necessary, and the other to encourage mergers where necessary. But the apparent inconsistency is resolved, at least in principle, when the pragmatic nature of the British approach to monopoly and competition is recognised. The co-existence of the two agencies was indeed a graphic illustration of the logic of this approach. Nevertheless, there was something odd about a situation in which certain mergers were being encouraged officially at a time when there was both official and public concern over the rapid rate at which mergers were proceeding. Dowries given to certain unwilling marriage partners by a paternalistic government seemed surprising when the rate of unassisted marriages was the cause of some disquiet.

(20) My last point concerns a matter which relates not only to mergers but also to cartels, export cartels (which are referable to the Monopolies Commission) and monopoly situations. I have stressed the persistence from 1948 onwards of the case-by-case approach, with each case considered on its individual merits and in its particular circumstances and setting. This particularist approach makes it difficult for the assessing body to take account of more general considerations which reach out beyond the particular merger to the economy as a whole. It therefore complicates the assessment of - and perhaps even more the application of remedial measures to - economy-wide phenomena and trends of which any particular merger is no more than an independent incident.

This limitation of the case-by-case approach is brought out well in a recent report of the Monopolies Commission on a provincial newspaper merger.[19] Having referred to the general character of the three (separate) merger enquiries involving purchases of local weekly newspaper publishing companies by national newspaper groups, the Commission observed that if the process of acquisition were to continue, "the result might eventually be a press which consisted predominantly of a few large groups each running one or more national newspapers and a considerable number of local newspapers". It went on :

> While the Monopolies Commission can, and will whenever a merger involving local newspapers is referred to it, always be watchful for indications of such development, we recognise the difficulties in dealing adequately with the general problem within the ambit of a reference relating to a particular acquisition of local newspapers.

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This lecture has not attempted to cover all the major questions raised by British policy towards monopoly and competition. I have said little about policies and measures which, whether deliberately or otherwise, tend to restrain competition, and nothing about monopolies and restrictions in the labour market.[20] But I have monopolised your time and attention for long enough, and even a monopolist - a temporary one in my case - must have regard for the interests of his consumers.

FOOTNOTES

* The observations and views expressed in this paper are my responsibility alone, and do not necessarily reflect those of the Monopolies Commission of which I am a part-time member.

1. Mogul Steamship Co. v. McGregor, Gow & Co., et al., [1892] A.C. 25

2. Employment Policy, Cmd. 6527, 1944.

3. On the role of economists in the work of the Court, see Lord Wilberforce, Law and Economics, The Holdsworth Club, University of Birmingham, 1966, pp. 24-25.

4. The Act of 1968 added a further gateway, permitting as a defence that the agreement "does not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry...."

5. Sir L. Ungoed-Thomas, House of Common Debates, 12 April 1956, col. 406. For a more detailed discussion, see R.B. Stevens and B.S. Yamey, The Restrictive Practices Court, Weidenfeld and Nicolson, London, 1965, chs. 3 and 5.

6. "But if value judgments on matters of economics are to be made by a judicial tribunal it is evident that its composition should not be limited to judges whose experience is restricted to the profession of the law. It should include, either as members or assessors, persons with knowledge and experience of commerce and industry - persons who know how the economic system works in practice". W.J.K. Diplock, The Role of the Judicial Process of the Regulation of Competition, Oxford University Press, London, 1967, pp. 18-19.

7. Re Yarn Spinners Agreement, [1959] L.R. 1 R.P. 118.

8. After the decision in the Yarn Spinners, there was large-scale government assistance to the cotton textile industry.

9. Diplock, op. cit., p. 25.

10. The fact that the Commission is not a judicial body and does not use the adversary procedures which are employed in courts of law has at times led to criticisms of the legislation and of the Commission. It is interesting to note that the Commission's procedure was examined in the 1950s by the Lord Chancellor and the Attorney-General and pronounced to be satisfactory to all concerned. See also C. Grunefeld and B.S. Yamey, "United Kingdom", in W.G. Friedmann (ed.), Anti-Trust Laws, A Comparative Symposium, 1956, pp. 373-375.

11. The present legislation refers only to "things done" by the monopolist and not to any "omission" on his part. The Fair Trading Bill extends the scope of the enquiry to cover any "omission attributable to the monopoly situation".

12. See the following reports of the Monopolies Commission : Films, 1966, pp. 80-81; Man-made Cellulose Fibres, 1968, pp. 83-85; Beer, 1969, pp. 114-115; Metal Containers, 1970, p. 107.

13. "...Structural remedies, including the dissolution of monopolies, have been excluded without anything like a proper investigation of the economic case for or against them." A. Sutherland, The Monopolies Commission in Action, Cambridge University Press, Cambridge, 1969, p. 76.

14. "In three recent decisions of the Court of Appeal, ...a very wide construction has been given to the expression [registrable] 'arrangement . It has been held to include any conduct whereby any two persons intentionally arouse

in one another a mutual expectation that each will act in a particular way. The existence of a registrable 'agreement' or of terms of an 'agreement' additional to those which have been included in the written document may thus be inferred from the conduct of the parties." Diplock, op. cit., p. 12.

15. H. Wilson, House of Commons Debates, 22 April 1948, col. 2033.

16. For discussion, see B.S. Yamey, "The Monopolies Commission Report on Cigarettes and Tobacco", Modern Law Review, vol. 24 (1961), pp. 749-753.

17. For a more detailed discussion of the issues, see B. Hindley, Industrial Merger and Public Policy, Institute of Economic Affairs, London, 1970. This paper constitutes a critical analysis of British public policy towards mergers.

    For Labour Party views on the need for public control of private investment decisions, see The Times, 1 March 1973 and 2 March 1973. These statements (the second by Mr. Roy Jenkins) relate the need for such controls to objectives other than the promotion of competition.

18. According to W.G. McClelland, a director of the IRC during its existence, "The Corporation's principal purpose was to bring about mergers which would not otherwise have taken place". W.G. McClelland, "The Industrial Reorganisation Corporation 1966/71 : An Experimental Prod", Three Banks Review, June 1972, p. 23. This article reviews the activities of the IRC.

19. Monopolies Commission, The Berrow's Organisation Ltd. and The County Express Group, 1972, paras. 75-6.

20. The Fair Trading Bill breaks new ground. If enacted, it will enable the responsible minister to obtain reports from the Monopolies Commission on restrictive labour practices and their effects on the public interest. The procedures for applying remedies under the legislation will not, however, be applicable in such cases. Moreover, practices "relating exclusively to rates of remuneration" are excluded.