Some Developments and Differences in the Operation of Competition Laws

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Some Developments and Differences in the Operation of Competition Laws†

I. Developments

A. The Changing Pattern of Laws

The past twenty-five years have seen a remarkable development of national competition laws,¹ the introduction of supra-national controls in the European Coal and Steel Community, the European Economic Community and the European Free Trade Association and attempts to introduce international controls on a broader basis. Unlike other fields of law which may originate from generally accepted common principles, competition laws reflect the particular political, economic and social concepts of each country and although there has developed a considerable amount of agreement as to what restrictive business practices may be harmful, attitudes vary considerably as to how they should be controlled and hence the machinery for control differs widely from country to country.

There is, or perhaps one should say that there should be, nothing fixed about the patterns of control, for since competition laws form part of the general economic machinery of a country and cannot be considered in isolation, so attitudes must necessarily change as to what is desirable in the public interest or what may be harmful to it in the light not only of national but also of international developments.

In the application of competition laws the enforcement authorities gradually acquire a much more precise knowledge of commercial and industrial behaviour than they had previously and this knowledge may necessitate adjustments both to the scope of the controls and to the machinery itself, which may be too rigid, too loose or too cumbersome, as the author intends to illustrate.

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†This article is a revised version of a paper presented in September 1973 to the Tokyo Conference on International Economy and Competition Policy and the author wishes to thank the Council of that Conference for permission to reproduce that paper. (See Mr. Sigmund Timberg's report on that Conference immediately preceeding this article.—Ed.)
¹For convenience the term “competition laws” will be used to cover laws relating to the control of monopolies, mergers and restrictive trade practices.
The application of the laws may themselves create new situations. Thus the banning of price-fixing agreements may lead to the conclusion of price information agreements which do not fall within the scope of the law; or the prohibition of these and other restrictive practices may be partly responsible for more mergers and perhaps excessive concentration of industry, which in turn needs to be controlled.

Other structural changes in industry may create new problems, or at least may change the emphasis of what is regarded as requiring closer scrutiny or control. Thus whilst a 90 percent share of a particular market has been found unobjectionable in one investigation, in another, where none of the four leading companies had a market share of more than 17 percent, the existence of dominant market power was deduced from the lack of substantial competition on the market, which revealed itself in particular with a strong tendency to parallel price movements.

Oligopolies have come more into the focus of enquiry during the past few years as have, with the growing diversification of many companies, conglomerate mergers. The nature of the problems raised both by oligopolies and conglomerates and whether and how they can be tackled under competition laws continues to be the subject of much debate.

With the growth of international trade and the development of economic communities of States, the interrelation of national laws becomes closer and in the EEC for instance Community law may itself affect the application or influence the development of the national laws of Member States. In any consideration of international trade aspects, it is also necessary to consider not only restrictions in the private sector but Governmental barriers or aids which may distort competition.

From this picture it is evident therefore that a periodic review of national and international developments is necessary to assess whether national and Community competition laws are fulfilling their function satisfactorily. This indeed is one of the main objects of this Conference and it is the author's purpose to contribute what must necessarily be a very broad assessment of the nature of some of the developments and of the problems which they raise.

B. The Growth of National Competition Policy

To illustrate the changing pattern of laws, the experimentation and adjustments to which reference has been made, as well as the comparison of approaches with which the author shall deal later, the author should like now to outline the growth of competition laws in a number of countries. There shall be examined rather more fully the position in the U.K. and the U.S. and merely

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2German Petrol Price Case; BKA Activity Report 1967. 41-42.
highlighted certain aspects of the laws of Australia, Canada, the European Economic Community and India.

Canada introduced its first legislation in this field even before the Sherman Act appeared in the U.S.\(^4\) and Australia was to follow in the early years of this century,\(^5\) but neither these nor the very few other competition laws which existed before the Second World War were particularly actively applied and "antitrust" tended to be regarded essentially as a United States institution.

Of the considerable number of laws which have appeared in the past 25 years, most were initially introduced through U.S. influence, as a condition of economic aid or following the inclusion of provisions against restrictive practices in bilateral treaties of friendship, navigation and commerce. Notwithstanding this influence they have developed in many different directions and only to a very limited extent have they followed U.S. concepts, as the author's examples will show.

1. U.K.

Starting in 1948 with the Monopolies and Restrictive Practices (Inquiry and Control) Act, which set up the Monopolies Commission to conduct inquiries into the existence and effects of monopoly situations, there began a series of extremely lengthy investigations of particular companies or sectors of industry to establish whether the monopoly (one-third of the production or market of the goods in question) or the practices of the companies were or might be contrary to the public interest. Not knowing at the start of an inquiry what might be relevant, the Commission looked into the whole range of activities of the enterprises being investigated, going back to when they were founded. As a result the inquiries have lasted from two to four years before the publication of a report which usually concludes with some recommendations as to the abandonment or modification of certain practices. These recommendations, which are submitted to the Department of Trade & Industry (D.T.I.), are normally followed by the securing by the D.T.I. from the companies investigated of voluntary undertakings to comply with the recommendations. In several instances, however, the recommendations of the Commission have not been accepted by the D.T.I., particularly where they were not limited to the termination of the detrimental conduct itself.\(^6\)

Obviously little progress could be made by having only this procedure and in 1956 it was supplemented by the Restrictive Trade Practices Act which established the Restrictive Practices Court. Instead of proceeding on an industry

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\(^4\)An Act for the Prevention and Suppression of Combinations in Restraint of Trade, 1889. The Sherman Act came into force a year later.

\(^5\)Australian Industries Preservation Act, 1906, which though amended up to 1950 went into virtual disuse within a few years of its enactment.

basis, the Act required all agreements involving specified restrictions upon two or more parties doing business in the U.K. to be registered and to be defended before the Court on the grounds laid down in the Act. Initially the Court, which consists both of judges and experts in other fields, attempted to apply a strictly legal interpretation of the Act, but since consideration of the public interest was involved, this proved impossible and it soon found itself involved in economic assessments, for which it has been much criticised.\(^7\)

However, because of a combination of the narrowness of the grounds for justification, the heavy onus of proof on companies, the Court's rigid interpretation of the legislation and the time and cost involved in proceedings before it, companies became increasingly discouraged from entering into and trying to justify registrable agreements. The chances of success were extremely small and few agreements seemed so potentially attractive as to justify the uncertainties, expense and other burdens of court proceedings.

The Government was however trying to encourage various rationalisation schemes, but these would frequently have involved registrable restrictions for which the companies were not prepared to embark on litigation. They therefore tried to persuade the Government to introduce a flexible procedure for exemption from registration which would avoid the need for court proceedings.

Nothing was to be done about this until 1968 and in the meanwhile further controls were introduced. The Resale Prices Act of 1964 prohibited individual resale price maintenance agreements (collective agreements were already banned) unless they could be justified on specified grounds. Again the Restrictive Practices Court took a rigid line and only one such agreement has been found not to be contrary to the public interest.\(^8\)

The Monopolies and Mergers Act of 1965 introduced the control of mergers which led to or increased a monopoly position or where the value of the assets taken over exceed £5 million. It also provided for the control of newspaper mergers under rather different conditions and extended monopoly control to the supply of services (the 1948 Act having only covered the supply of goods). There is no requirement to notify a merger or proposed merger and they are referred by the D.T.I. to the Monopolies Commission for investigation only where there are sufficient doubts about their implications for the public interest. As a result only 20, or 2.4 percent, of mergers (excluding newspapers) of those considered by the Mergers Panel from 1965 up to the end of June 1973 were referred to the Commission.

In practice, companies seek informally the views of the D.T.I. as to whether a proposed merger would be referred and receive a reply within two or three weeks. When a reference is made, the Commission is required to make its report

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\(^8\)Re Medicaments Reference No. 2. Restrictive Practices Court 1971.
within six months, but usually completes it within eight to twelve weeks. Very few mergers have been stopped on their recommendation but probably numbers of companies have changed their minds about proceeding with a merger on learning that it was to be referred for investigation.

There is no doubt that the 1956 Restrictive Practices Act had a considerable effect in stopping restrictive agreements. In particular, price-fixing agreements were so unlikely to be accepted as justifiable by the Court (though some have been)\(^9\) that they were possibly quite frequently replaced by price information agreements which, so long as they did not amount to arrangements involving the acceptance of restrictions, were perfectly legal, even though they might have had the same object as the original price-fixing agreements.

This gap was filled by the Restrictive Trade Practices Act of 1968, which made various types of information agreements subject to registration, but only as called up by Order. There has in fact only been one Order covering information agreements relating to prices and those relating to terms and conditions of supply. Other types of information agreement which would assist in investment planning have on the contrary been actively encouraged.\(^10\)

To meet the continued demand from industry for a more flexible system which would allow the drawing up of agreements which, though they might contain registrable restrictions, were likely to assist beneficial rationalisation measures, the 1968 Act introduced three provisions which were intended to help. Two of them did not and the helpful purpose of the third was for a long time not appreciated. The first was to introduce a procedure for exemption from registration. This was so cumbersome, so onerous in the justifications required to be given to the D.T.I. and involved excessive publicity for exempted agreements that it has had virtually no effect.\(^11\) In five years only one exemption order has been made and that was early on, probably to encourage others to seek the same remedy.

Secondly, to meet the criticism that the grounds for justification for an agreement being defended before the Court were too narrow, a more general defence was introduced.\(^12\) But by this time companies had been too discouraged to undertake the long costly proceedings before the Court to be tempted by this new defence.

Thirdly, the Registrar of Restrictive Trading Agreements (who was responsible for initiating proceedings before the Court) was given the discretion to recom-

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\(^10\)See INVESTMENT IN THE CHEMICAL INDUSTRY, a report by the Investment Working Party of the Economic Development Committee (1972), on which there was Government participation.

\(^11\)Sec. 1.

\(^12\)That the restriction does not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry and is not likely to do so. Sec. 10.
mend that the restrictions in a registered agreement were not of such significance as to call for investigation by the Court and if the D.T.I. accepted his recommendations, the Registrar was discharged from the duty of taking proceedings in respect of that agreement. For a long time it was not realised that this was really any different from a provision in the 1956 Act which entitled the then Board of Trade to authorise the Registrar to remove from the Register agreements which appeared to be of no substantial economic significance. Whether on his own initiative or encouraged by the D.T.I. because of the lack of success of the exemption procedure and of the general defence in encouraging beneficial agreements which involved registrable restrictions, the Registrar began using his discretion in a much broader fashion and refrained from referring to the Court numbers of agreements which were certainly not economically insignificant. They were mostly for the purpose of rationalisation through co-operation in various forms, as for instance by specialisation of production or the setting up of joint companies.

After many years of experience, therefore, the rigidity of the system for dealing with restrictive agreements has been loosened by the exercise of discretionary power. The only drawback from the point of view of industry is that in order to benefit from it, it is firstly necessary to have the agreement entered on a public register and secondly, of course the Registrar might not necessarily exercise his discretion and could decide after all to refer the agreement to the Court.

As from 1st November 1973, the post of Registrar disappeared and his place was taken by the Director-General of Fair Trading, a new office provided for by the Fair Trading Act, 1973, which received Royal Assent in July of that year. The holder of this independent post has been given very extensive powers—to refer restrictive trade practices to the Court, monopolies and mergers to the Monopolies and Mergers Commission and consumer trade practices (basically misleading and pressurising consumers) to the Consumer Protection Advisory Committee. Alternatively, he has considerable discretion to deal with these matters himself in negotiation with the parties involved (other than in the case of mergers).

One of the purposes of this new piece of legislation is to consolidate (and repeal) the Monopolies and Mergers Acts of 1948 and 1965, with a few amendments, including that of the definition of a monopoly situation which will now be one-quarter instead of one-third of the market.

In appointing a Director-General of Fair Trading the Government has met one criticism of industry—that the Monopolies Commission was prosecutor,

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13Sec. 9(2).
judge and jury, for although it is an administrative body which only makes recommendations, a finding that certain acts of a company are contrary to the public interest amounts, in public opinion at least, to a verdict of guilty of charges which the Commission had formulated as it carried out its investigation. Now at least the investigation will lie with an independent body who may, or so industry hopes, often reach an informal settlement with companies as to the cessation or modification of practices, as an alternative to formal references to the Commission. Their reasoning is that since under the present system an investigation which lasts for years and thoroughly disrupts the activities of the companies under investigation almost always ends up with their voluntarily agreeing to comply with certain recommendations as to their course of conduct, why not reach the same end very much more quickly in negotiations with the Director-General, who is indeed specifically required under the new Act to seek undertakings from the companies for the purpose of remedying or preventing the adverse effects specified in the Commission’s report.¹⁵

Even if the Director-General does not use his discretionary powers for informal settlement as much as industry would hope, he may under the new Act limit the scope of a monopoly reference to the consideration of specific practices of a company¹⁶ and so avoid the present excessively lengthy investigations of the Commission with their uncertain objectives. Similarly a merger reference may be limited to consideration of whether certain aspects of a merger are, or may be, contrary to the public interest.¹⁷

Because of the particular problems of parallel conduct in a market where there are relatively few suppliers, there are provisions for investigating what are described as “complex monopoly situations.” This is where two or more persons having between them at least 25 percent of the market for goods of a particular description “whether voluntarily or not, and whether by agreement or not, so conduct their respective affairs as in any way to prevent, restrict or distort competition in connection with the production or supply of goods of that description.”¹⁸ This provision first appeared in the 1948 Act (with a one-third share of the market) but is now given a description and has greater significance through the switch in emphasis from monopoly to oligopoly.

Among other new features of this latest Act, one should mention that services are now brought within the scope of the Restrictive Practices legislation, which

¹⁵Sec. 88. To be exact he must seek undertakings if so requested by the Minister, but since undertakings have in the past been found more satisfactory (chiefly in that they are more flexible than formal Orders) this is likely to continue to be that case. It may however be felt that although the end result is the same, the publicity of a Report by Commission is in itself a useful deterrent.

¹⁶Sec. 49. It seems likely that a fair amount of use may be made of the possibility of referring specific practices, in order to determine for broader purposes how far some of them, such as parallel pricing, can be justified.

¹⁷Sec. 69.

¹⁸Sec. 11.
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(unlike the Monopolies legislation) had previously been confined to goods. These will be called up for registration by category and seem likely to include certain professional services, banking and shipping conferences.

To sum up, therefore, we see in a series of six Acts over a period of 25 years first the setting up of an administrative body to carry out far reaching investigations into whole sectors of industry, a cumbersome procedure with uncertain objectives, so that eventually the latest of the Acts provides that references to it may be limited to specific practices of the company. The same body is also entrusted with the investigation of mergers but only some 2½ percent of mergers have been considered sufficiently doubtful as to their potentially harmful implications to warrant investigation by the Commission.

For the control of restrictive trade practices between two or more parties a special Court was set up, but partly because the grounds for justification were very limited and partly because of the Court's rigid interpretation of the law, companies almost ceased entering into and trying to defend registrable agreements before it and the Court is now almost dormant. Instead, increasing use has been made in the past two or three years of the discretionary power of the Registrar to allow registrable agreements to be carried on without reference to the Court.

The exercise of discretionary powers may be still further increased with the appointment of a Director-General of Fair Trading who is now responsible for supervising the whole fields of monopolies, mergers, restrictive practices and consumer practices, but this will largely depend on how the Director-General interprets his role.

In the meanwhile the scope of the legislation has been constantly widened. Starting with monopolies in the production, supply and export of goods, this was later extended to cover the supply of services, as was the control of concerted practices relating to goods. Resale price agreements were later brought within the scope of control, as were agreements for the exchange of information. Monopolies and mergers subject to investigation were brought down from one-third to one-quarter of the market.

2. U.S.A.

In the very early application of the Sherman Act's broad prohibition of every contract, combination or conspiracy in restraint of trade, it was interpreted literally as prohibiting every type of restraint, but this interpretation was soon modified and by 1910 it was being proposed in Congress that the concept of reasonableness should be introduced into the Sherman Act itself. President Taft, who many years before as a federal judge had opposed the application by the courts of a test of reasonableness, referring to "the manifest danger in the administration of justice according to so shifting, vague and indeterminable
standard..."19 repeated his fears in a Special Message to Congress in which he said:

...I venture to think that this is to put into the hands of the court a power impossible to exercise on any consistent principle which will ensure the uniformity of decision essential to just judgment. It is to thrust upon the courts a burden that they have no precedents to enable them to carry, and to give them a power approaching the arbitrary. ...20

The Sherman Act was not amended because the following year the Supreme Court itself elaborated what came to be known as "the rule of reason" in its Standard Oil and American Tobacco decisions21 applying the common law standards of reason.

At once it was asked in the Senate whether they were in the future to permit the administration regarding these great combinations to drift practically into the hands of the courts and subject the question as to the reasonableness or unreasonableness of any restraint upon trade... to the varying judgments of different courts upon the facts and the law, or whether we will organise, as the servant of Congress, an administrative tribunal similar to the Interstate Commerce Commission, with powers of recommendation, with powers of correction. ...22

The debate continued for some years as to how the resultant uncertainties could be removed. The Senate did not agree with the proposal of the House of Representatives to have a number of specific unqualified prohibitions and of making the prohibited practices criminal offences and as finally enacted in 1914 the Clayton Act and the Federal Trade Commission Act represented a compromise whereby the Clayton Act prohibited, without making them criminal offences, certain specific practices—price discriminations, exclusive dealing and tying arrangements and mergers through acquisitions of stock—where their effect "may be to substantially lessen competition or tend to create a monopoly," whilst the Federal Trade Commission, which was given concurrent jurisdiction with the Department of Justice to enforce the Clayton Act, was also, under the Federal Trade Commission Act, empowered and directed to prevent persons from using unfair methods of competition. These were left undefined, for the Commission to establish, and were later held by the courts to include restraints of trade prohibited by the Sherman Act.

The application of a test of reasonableness by the courts had been criticised because it must lead to uncertainty and lack of uniformity. The inclusion of a qualification to the prohibitions of the Clayton Act, involving a judgment as to

19 U.S. v. Addyston Pipe & Steel Co. (1898) 85 Fed. (6th Cir.). Taft's judgment was affirmed by the Supreme Court (1899), 175 U.S. 211.
20 Special message from the President of the United States to Congress, 7th January, (1910), 45 CONG. REC. 378, 392.
22 221 U.S. 60.
potential effects, led to the same result, as did the delegation to the Federal Trade Commission of the task of determining what constitutes unfair methods of competition. Thus the intention that uncertainty and explicitness should be introduced into the law was abandoned in favor of flexibility, not only again in the substance of the law but also in the new machinery and procedures which were introduced for applying it, although no very clear dividing line was drawn between the functions of the Commission and those of the courts, which in any case retained the power of review.

The Supreme Court has, however, over the years reduced to some extent the areas of uncertainty surrounding the law by developing with respect to certain types of conduct the concept of presumptive illegality. Since the purpose of the Sherman Act was the maintenance of competition, the court held that it must judge the reasonableness or otherwise of a restraint of trade in the light of its effect on competition. The anti-competitive aim and result of certain kinds of arrangement, such as agreements between competitors to fix prices, divide market territories, limit production and boycott particular persons, being readily ascertainable, they are presumed to be illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. In practice such agreements do not necessarily have an anti-competitive aim and indeed may be intended to promote greater competition between groups of small companies and larger ones. This will not save them.\(^3\)

Considerable problems of uncertainty have also arisen in relation to the handling of mergers and take-overs under Section 7 of the Clayton Act and again the courts have attempted to lessen this uncertainty by developing the concept of presumptive illegality in certain instances. Thus in the case of a bank merger the court recognised that "unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded." Going on therefore to refer to the motives of Congress in introducing the 1950 amendments to Section 7, it said:

This intense congressional concern with the trend towards concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behaviour or probable anti-competitive effects. Specifically we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the
absence of evidence clearly showing that the merger is not likely to have such anti-
competitive effect. But the test introduced in this case and applied in subsequent cases with the
purpose of lightening the burden of proving illegality was only intended to apply
to "mergers whose size makes them inherently suspect in the light of Congress's
design in Section 7 to prevent undue concentration." Uncertainty remained
therefore as to where the courts would draw the line and how they would define
the relevant geographical and product markets.

Congress always intended that the basic principles of antitrust policy which it
established should in their application by the courts be adapted to changes in
the economy, which in practice generally means in accordance with the judges'
understanding of public policy in relation to such changes. Since the judges
have no significant expertise in the economy and the vague language of the
statutes gives them little guidance (and the Sherman Act was in any case
designed to meet the needs of a 19th century economy), the result — as has
recently been again pointed out in the U.S. Senate — has been confusion,
conflict and uncertainty in the law, some of the developments and applications
of which may be said even to be anti-competitive.

The handling of often very complex economic evidence presents a particular
problem for the judge and it was especially because of such difficulties that the
Federal Trade Commission had been established, with the idea that it would
assist businessmen in securing a better understanding of their responsibilities
under the law, using more flexible and informal methods for securing
compliance and that it would find solutions to general problems through the
development of industry rules and guides and advisory opinions. Although in
recent years it has made increasing use of these general measures, it has devoted
too much of its time to investigating individual complaints with a view to

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court thought it would be beyond the ordinary limits of judicial competence for it to have decide on
some ultimate reckoning of social or economic debits and credits that an anti-competitive merger
may be beneficial. Id. at 371. A similar comment was made in the Supreme Court's decision (of 29th
March 1972) in Ford Motor Co. v. U.S. in more vigorous and effective competitor (1972) 405 U.S.
562.

25 The position as to bank mergers was subsequently dealt with under the Bank Mergers Act 1966
which, inter alia, "forgave" all bank mergers consummated prior to 17th June 1963, the date of the
Philadelphia Bank decision, except as to violations of Section 2 of the Sherman Act. The general
test laid down in that decision continued however to be applied until in May 1968 the Department of
Justice laid down Merger Guidelines, which have been regarded as excessively specific as to market
percentages. A year later the Federal Trade Commission issued a regulation requiring notification
and the submission of special reports with respect to mergers involving firms having assets of $10
million or more combined assets of 1250 million or more. 34 Fed. Reg. 7592 (10th May 1969). This
has created further problems but the procedure has been continued and implemented by

26 These were reasons given by Senator Javits for introducing legislation to establish an 18 member
Antitrust Review and Revision Commission to make an overall review of the anti-trust laws. (S. 1196
introduced on 14th March, 1973.)
litigation and since it has concurrent jurisdiction with the Department of Justice over a large sector of the antitrust laws, its role has in many respects been indistinguishable from that of the courts. Indeed difficulties have frequently arisen because its interpretations of the intentions of Congress have often been at variance with those of the courts and even its guidelines have not always been consistent with those of the Department of Justice.

Probably a great majority of cases, other than those relating to mergers under Section 7 of the Clayton Act, are still developed from the private complaints of businessmen regarding their competitors and suppliers and thus, according to one Assistant Attorney General in charge of the Antitrust Division who was commenting on this fact "it is apparent that our enforcement efforts are, to some extent, fortuitous." A well-balanced enforcement programme required in his view a more careful evaluation of the type of case filed and the particular industry affected by such case. The position has not however changed greatly and indeed the initiative is now left more to the complainants themselves as private damage suits have become an increasingly important method of enforcement of the antitrust laws. Whereas previously private litigants generally awaited the final judgment in any civil or criminal proceeding brought by or on behalf of the Government, because this saved them the often lengthy and difficult task of proving violation, now a considerable number of private actions have been instituted without the benefit of a prior Government proceeding, particularly with the great development in recent years of class actions consolidating a large number of individual claims — which the defendant generally prefers to settle, even if he believes he has a good case.

Because of the length and cost of court proceedings, if carried to a final conclusion there, some 70 percent of civil actions have been settled by consent decrees, or negotiated settlements of the case. They represent in other words a

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27This complaint continues to be made. Thus Milton Handler in his "Twenty-five years of Antitrust" (Vol. 27 of the Record of the Association of the Bar of the City of New York, Dec. 1972) said:

Nothing is more frustrating to a businessman than to find that conduct which scrupulously complies with the requirements of all the antitrust laws may nonetheless be denounced as a violation of the Federal Trade Commission Act. No-one has adequately explained why the same conduct, such as exclusive dealing, should be measured by different standards of legality, dependent upon the adventitious factor of whether the challenge is in a court suit or an administrative proceeding.

28Industry guides of the F.T.C. state what the Commission believes to be lawful and unlawful. The courts do not necessarily agree. Continuing attempts have been made to improve the liaison between the Commission and the Department of Justice. Among the recommendations in the very critical report of the American Bar Association on the F.T.C. in 1969 were that the F.T.C. should leave to the Antitrust Division cases which would be challenged in a criminal proceeding if handled by the Division and the Antitrust Division should leave to the F.T.C. cases which involve complicated economic analysis. It was further proposed that a joint standing committee be created to allocate long-term investigation and enforcement responsibilities.

compromise solution in which the private parties may, in order to bring the matter to a close, accept more stringent prohibitions than a court would have imposed in a contested case, although it can occasionally happen that they may be less stringent! This procedure, which involves the lodging of objections by third parties and a review by the courts of the negotiated terms, may also turn out to be very lengthy, so they have various drawbacks as a means of settling antitrust cases.

Thus, in the United States, flexibility to meet changing conditions has, because of the frequently changing, and indeed often differing, interpretations by the courts and the Federal Trade Commission of the broad prohibitions of the statutes, been criticised for creating excessive uncertainty as to the law whilst the efforts of the courts to reduce the areas of uncertainty by developing the concept of presumptive illegality with regard to certain practices and situations have still left much uncertainty and have created areas of excessive rigidity.

Clearly matters have not been helped by having such an overlap of enforcement functions, with the courts and the Commission often applying different standards of legality to the same type of conduct, but the author cannot help feeling that many difficulties are created by the basic attitude of the enforcers towards those who infringe upon the antitrust laws. It is true that criminal proceedings are now generally confined to instances where proof of violation is clear and the law is settled, yet even in civil suits there still tends to be an attitude towards offenders that their conduct has verged on the criminal and certainly the sanctions of treble damages which can also apply in civil proceedings are far more severe than the penalties which can be imposed by the court in a criminal suit. When the law is so changing and uncertain and when the great majority of cases (other than those relating to mergers) develop from the private complaints of businessmen regarding their competitors, so that enforcement tends to be fortuitous, this attitude and these sanctions seem often to be inappropriate.

It is true that both the Antitrust Division and the Federal Trade Commission have tried to encourage businessmen to consult with them about proposed

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3Criminal prosecutions will be recommended in the case of per se offences (80 percent of criminal cases filed being conspiracies to fix prices) or else where it appears that the defendants knew they were violating the law or were acting with flagrant disregard for the legality of their conduct. Task Force Report, Crime and its Impact, An Assessment 110; submitted in 1967 to the President's Commission on Law Enforcement and Administration of Justice.

31Among other sanctions applicable also in civil suits are such effects as adverse publicity injurious to the corporate image, shareholders' derivative actions for the waste of corporate assets caused by treble damage payments and defence counsel fees, negative customer reaction, including possible refusal by an "overcharged" customer to permit bids for further requirements, and sanctions imposed by administrator agencies, such as the Federal Communication Commission's refusal to renew a broadcasting licence. Diverstiture to restore competition is also not uncommon in civil suits and not only in the case of mergers.
transactions where the position may be uncertain, but partly because of the general "cops and robbers" attitude towards enforcement, partly because a request for clearance may be turned down and action initiated against the company making the request and partly because an advisory opinion may always be revoked, there tends to be a reluctance on the part of businessmen to seek such advice and thus to provide information to the authorities which might later, even if indirectly, be used against them.  

3. EEC

The Rules of Competition of the Rome Treaty also started off with broad prohibitions — of restrictive agreements and practices and of abuses of a dominant market position, insofar as in either case they may affect trade between Member States. Articles 85 and 86 of the Rome Treaty, in which these prohibitions are contained, give some illustrations of what is considered undesirable, and Article 85 also sets out grounds for exemption from the prohibitions.

The scope of these Rules is gradually being clarified over the years by implementary Regulations, policy statements and decisions of the European Commission, decisions of the European Court and by general exemptions for certain categories of agreement. With such broad prohibitions there is however room for great flexibility and new decisions are frequently bringing up new interpretations, which in some respects may be said to be extending the scope of the rules.

Thus the Commission's decision in the Continental Can case interpreted the prohibition of Article 86 against abuses of a dominant position as covering the take-over of a competitor by a company already holding a dominant position, in that this eliminates actual or potential (in this case, potential) competition between them.  

Under the provisions of the Commission's draft Regulation on merger control, a merger which merely leads to a dominant position in a substantial part of the Common Market (which may be a single Member State) and does not therefore necessarily involve an abuse of an existing dominant position may be prohibited, whilst prior notification would be required of

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32Thus the Antitrust Division's Business Review Procedure states enforcement intention as of the date of the letter and the Department "remains completely free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest." Antitrust Division Directive 2-68, 26th Jan. 1969 para. 50.6.

33Continental Can Co. Inc. (1972) C.M.L.R. D11. Although on appeal the European Court annulled the Commission's decision on the grounds that the Commission had not sufficiently established the elimination or near elimination of competition in the relevant product market, the Court nevertheless upheld the Commission's opinion that there can be abuse of a dominant position contrary to Article 86 if a company strengthens its dominant position to a degree of control which substantially obstructs competition.

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mergers involving companies which, with all their affiliates world-wide, have more than a specified turnover.\textsuperscript{34}

This and various decisions of the Commission show an increasing tendency towards an extension of jurisdiction over agreements, practices and situations within a single Member State and although Community law takes precedence over conflicting national law, which applies when there is no appreciable effect on trade between Member States, questions seem likely to arise as to where the dividing line is to be.

Since agreements falling within the basic prohibitions of Article 85 and not covered by a category exemption are void and cannot be enforced,\textsuperscript{35} agreements are only notified to the Commission if there is uncertainty as to whether they fall within the prohibitions, when application may be made for a negative clearance,\textsuperscript{36} or if it is desired to seek exemption from the prohibitions of the grounds specified in paragraph 3 of Article 85.

For many years the Commission worked mainly on the agreements which had been notified. Since of the 37,000 agreements notified up to October 1971, some 30,000 were exclusive distributor agreements, it was decided, after one or two test cases had been brought before the European Court, to formulate a category exemption for these agreements. It was a long time before this eventually emerged,\textsuperscript{37} and the drawing up of further category exemptions has been even slower, partly because the Commission first likes to bring test cases before the Court and secondly because of its very precise definition of the conditions for such exemption. In fact only one other category exemption has been made — for certain specialisation agreements.\textsuperscript{38}

Whereas in certain respects the scope of the prohibitions has been narrowed by category exemptions and policy statements, the benefits of these may only apply to small and medium-sized companies, leaving larger companies or companies which form part of a group to apply for individual exemption, even

\textsuperscript{34}Proposal for a Regulation (EEC) of the Council on the control of concentrations between undertakings. (Com(73) 1210 final 18th July 1973.) This seems likely to be subject to various amendments before coming into force and indeed 31 were tabled when it came up for consideration by the European Parliament in January 1974. It has now been referred back to the Commission for further examination.

\textsuperscript{35}This often arises before national courts when one party seeks to enforce an agreement which the other maintains is contrary to Article 85. National courts, which may apply the prohibitions of Article 85, but not the exemptions or fines, frequently refer the issue to the European Court as a question of interpretation of the Treaty under Article 177.

\textsuperscript{36}A negative clearance is a declaration by the Commission that on the basis of the facts then known to it, there are no grounds for intervention on its part. Certain agreements have been specifically excluded from the need to notify, but may nevertheless still be prohibited. These and agreements which had been notified were regarded as provisionally valid, but since the Haecht II decision this is no longer the case, except for agreements already in existence before notification was required (viz., before Regulation 17 came into force or, in the case of new Member States, before accession).

\textsuperscript{37}EEC Regulation No. 67 of 22nd March, 1972.

\textsuperscript{38}EEC Regulation 2779 of 21st December 1972.
though their specialisation or other agreement may account only for an insignificant part of the relevant market.\textsuperscript{39}

The procedure for securing exemptions and negative clearances is slow and involves considerable publicity and partly for this reason and partly because of the complaints voiced, especially over the past couple of years, both of certain defects in the Commission's procedure and that when an agreement is notified the Commission uses the opportunity to enquire into various other, often unrelated, activities of the parties, many companies are becoming increasingly unwilling to notify.

Although the Commission has attempted to speed up and simplify its individual notification procedures by, in numerous instances, giving parties to a notified agreement informal notice that if they make certain amendments to it, the Commission will grant them exemption or negative clearance, parties cannot be sure that this speedier and simpler procedure will be applied to their agreements, if they notify them.

Perhaps partly because of this slowing down of notifications the Commission has increasingly been taking the initiative in seeking out infringements or possible infringements, both of Articles 85 and 86. They have certainly uncovered some wilful infringements, for which they have imposed some very severe penalties. Whereas such penalties have no doubt been justified, these few cases seem to have led them of late to have become excessively suspicious in general and to turn from what was regarded as an extremely reasonable co-operative approach to a general "cops and robbers" attitude. There is also a growing tendency to regard competition as an end itself and to consider bigness as at least potential badness.

Again we have a situation of broad prohibitions whose implications are gradually unveiled over a period of many years, often leaving industry in a state of uncertainty. If companies feel that they can discuss freely with the authorities, they will themselves for the most part be co-operative. Lately many companies have become more hesitant about having such discussions, even about what they consider to be rationalisation schemes which could be in the public interest.

4. AUSTRALIA

The Australian Industries Preservation Act of 1906 was based on the Sherman Act and made it an offence to be a party to a contract or combination

\textsuperscript{39}Thus the Notice on Agreements of Minor Importance (Official Journal, 2nd June, 1970) excluded from the need to seek negative clearance, agreements accounting for not more than 5 percent of the relevant market, provided that the parties to the agreement and all their associated companies did not have a total turnover in all products of more (in the case of trading enterprises) than 20 million units of account (slightly more than $20 million). Similar limitations appear in the bloc exemption for specialisation agreements, though the percentage of the market is 10 percent and the total turnover 150 million units of account.
in restraint of, or with intent to restrain, trade and made every such contract illegal and void. The generality of its terms meant that a good deal of policy was left to be spelt out by the ordinary courts and placed a heavy burden of proof on the prosecution as to the extent of the detriment to the public and as to the intention to cause such detriment, which the Privy Council, on an appeal to them in 1911, said must be shown.

Following this decision no further proceedings were brought under the Act until shortly before its repeal.

The next law to be introduced—the Trade Practices Act, 1965—followed much more closely the U.K. pattern as to restrictive practices and required the registration of broadly the same types of agreement as under the 1956 Restrictive Trade Practices Act. The Australian Register is not however open to public inspection and registration does not admit that the agreement is even a registrable agreement.

Since the Labour Government which came into office in December 1972 introduced in September 1973 a new Bill reverting to a prohibitory system and which is intended to replace the present legislation, the author will deal only briefly with the Trade Practices Acts 1965-1971, but has included them among his illustrations because there are some features in the procedural aspects which are of general interest in considering different approaches to the application of competition laws.

The Commissioner of Trade Practices, who has been responsible for maintaining the Register and initially dealing with registrable agreements, has had first to decide whether an agreement was contrary to the public interest and before forming his opinion he would normally discuss it with the business interests concerned. When he has decided that the agreement is contrary to the public interest he has been required to have discussions with the parties to see if he could persuade them to abandon or modify it. Only failing such settlement has he referred it to the Trade Practices Tribunal.

The Act provides that all statements made in the course of such consultations may, if the parties so wish, be kept off the record and may not be admitted in any proceedings before the Tribunal.

Should the Commissioner decide that the restriction in a registered agreement is not contrary to the public interest (or ceases to be, following a

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4*Attorney-General v. Associated Northern Collieries, 14 C.L.R. 387 (1911).

4Amendments were made in 1967, 1969 and 1971. In September 1971 a High Court decision held that the Act was invalid for constitutional reasons except for the 1971 amendment dealing with resale price maintenance. It all became operative again in February 1972 and further amendments were announced in May 1972. In October 1972 two new Restrictive Trade Practices Bills and a Monopolies Bill were introduced. In December 1972 came the change of Government and completely revised proposals for a new law.

4Up to the end of the period covered by the Sixth Annual Report of the Commissioner of Trade Practices (30th June 1973) there had only been three decisions by the Tribunal, one of these relating to resale price maintenance.
recommended amendment) he may, with the leave of the Tribunal, file a certificate with the Registrar to that effect. So long as a certificate remains unrevoked, proceedings will not be instituted in respect of the restriction or practices to which the certificate relates.

By way of contrast there are two specific prohibitions — of collusive tendering and collusive bidding, for which not only fines of up to 10,000 dollars may be imposed, but in respect of which persons suffering loss or damage may recover the amount of it from the person guilty of the contravention.

This procedure of registration, consultation and negotiated settlements with its confidentiality and informality, encouraged the registration of many agreements which parties to similar agreements in the U.K. would never consider registering under the 1956 Restrictive Trade Practices Act and has led to the building up of a considerable dossier of information from the Commissioner's consideration of many agreements and consultations with parties, which have been summarised in his five annual reports. This information and experience led to the conclusion that the system needed to undergo various changes.

Although the secrecy provisions meant that businessmen were willing to provide the Commissioner with detailed information as to their activities, it also meant, as the Commissioner observed in his second Annual Report, that the experience of particular cases discussed with his Office was not available to other businessmen on other occasions. Furthermore, he added, complainants felt frustrated that having given information in support of their complaints they got none back, as to whether an agreement existed or whether any action was being taken on it or whether an anti-competitive agreement had been abandoned.

In his third Annual Report, the Commissioner concluded that businessmen probably needed guidelines in the application of the Trade Practices Act from decisions of the Tribunal in cases argued before it. But there had to date been no such cases, since companies preferred to discuss their agreements with the Commissioner and make such changes to it as he recommended, rather than face the publicity and expense of proceedings before the Tribunal. With such a procedure it would take years to deal with all the agreements and practices which required attention.

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43 In announcing these proposed changes in May 1972 the then Attorney General (Senator Greenwood) commented that the 1965 Act had to be formulated without the benefit of reliable information on many aspects of the extent, character and effects of the practices being engaged in in Australia. (Parliamentary Debates, 24th May, 1972).


45 Year ended 30th June 1970.

46 At the end of the period covered by this Report there were 12,649 registered agreements; by the end of June 1973, 14,103 had been registered from when the Register was opened and of these 1743 had been terminated by the parties. This compares with 2875 registered under the U.K. Restrictive
In his Fourth Annual Report, the Commissioner reiterated his comments on the slowness of the procedure and the need for guidelines, but by the time he came to write his Report for the year ended 30th June 1972, the Attorney General had already made his proposals for changes.

The proposals regarding the procedural aspects were to the effect that all registrable agreements and practices should be referred by the Commissioner to the Tribunal for examination. It would not therefore have been necessary for the Commissioner to form his own opinion that a particular agreement or practice was contrary to the public interest; nor would he have been under obligation to engage in consultations with the parties to the agreements, though he still could have done so at his discretion. As to the institution of proceedings his only discretion would have been as to the order in which he would bring particular agreements and practices forward. The onus of proof would have been on parties to agreements to satisfy the Tribunal that they were not contrary to the public interest, whereas at present the approach of the Government has been to treat registrable (but not resale price agreements) as not being restrictive and against the public interest unless proved otherwise.

These proposals are probably now only of academic interest in view of the far-reaching changes which the Labour Government proposes to make. But what conclusions are to be drawn from the experience gained since the 1965 Act came into force?

Because there had scarcely ever been any actively applied legislation, price-fixing and other restrictive agreements were numerous and were not regarded by the parties as objectionable or by the Government as necessarily harmful. When, therefore, controls were introduced involving a confidential Register, off-the-record discussions with the Commissioner and the possibility of negotiated settlements with him before the opening of any more formal procedures, a very larger number of agreements was registered, in the hope no doubt that the Commissioner would allow some parts at least of the agreements to stand and that if he did not, no harm would have been done.

Having started on such a basis, it soon became clear that there were going to be a great many individual discussions and negotiations. Perhaps the confidentiality had been taken too far, whilst the obligation on the Commissioner to consult with the parties placed too much of a burden on him,

Trade Practices Acts at the end of the period covered by the Registrar's last Report (30th June 1972). Particulars of a registered agreement remain on the U.K. Register even after the agreement has expired or been terminated, unless authorised to be removed as economically insignificant under Sec. 12 of the Restrictive Trade Practices Act 1956.

*year ended 30th June 1971.
**Speech by Senator Greenwood Q.C., Attorney General, to Parliament (Parliamentary Debates, 24th May); Restrictive Trade Practices Bill 1972 (No.2) and 2nd Reading Speech by the Attorney General, 11th Oct. 1972. Under the Labour Government's new Bill restrictive practices will be unlawful except when specifically authorised following application by the parties.
as was recognised. Had the Register been open to public inspection, as in the U.K., there would obviously have been far fewer registrations and without the obligation to consult and try to settle with the parties, the Commissioner could at an early stage have referred numbers of different types of agreement to the Tribunal, which would have produced some indications of what was likely to be rejected.

The author does not know whether with this kind of system it would have been necessary in Australia to have any sanctions for non-registration. In the U.K. there were none, but the firm line taken by the Court certainly had a deterrent effect on the drawing up of similar agreements to those which had been banned, because of the adverse publicity which being found out and brought to Court would involve.\footnote{The U.K. Restrictive Trade Practices Act of 1968 did introduce the possibility of private damage suits for injury from another's failure to register a registrable agreement, but this provision has never been used, although the Registrar, in his latest Report, stated that probably particulars of a higher proportion of registrable agreements had been furnished because of this sanction. \textit{Op. cit.}, p.14.}

As for the criticism that those who complained about suspected restrictive agreements and practices never heard what, if any, action had been taken in their regard, this could have been met by a combination of having a public register and of the Commissioner publishing a brief summary of the cases he settled, as is done by the European Commission with their informal settlements and in the U.K. by the Registrar of Restrictive Trading Agreements in his periodic Reports.

The Trade Practices Bill 1973 provides for the prohibition by the Act itself of various practices, namely contracts, combinations and conspiracies in restraint of trade, monopolisation, exclusive dealing, resale price maintenance, price discrimination and anti-competitive mergers. These prohibitions are subject to qualifications regarding their effects on competition and the Bill recognises that in certain circumstances the practices (other than price-fixing) may be capable of justification; it therefore enables the parties to seek authorisation from a Trade Practices Commission (no longer a single Commissioner) which must be satisfied that an authorisation is justified on certain broad grounds that are specified in the Bill. Where authorisation is refused the parties may apply to have the decision reviewed by the Trade Practices Tribunal.

In the case of exclusive dealings and mergers, which are prohibited where their effect will or may be to substantially lessen competition or to control a market, clearance from the applicability of the Act may be sought from the Commission.

The broad language of the substantive parts of the Bill (which at the time of writing has been passed by the House of Representatives but not yet by the Senate) seems likely to present numerous problems of interpretation.
Canadian legislation has undergone many changes since the original introduction in 1889 of an Act for the Prevention and Suppression of Combinations in Restraint of Trade. That Act — to summarise its provisions in broadest terms — prohibited as criminal offences combinations to restrict production, transportation or trade, to lessen competition or to enhance prices, provided they were "unduly" restricted or "unreasonably" enhanced. These provisions became part of the Criminal Code until they were, after various amendments, consolidated in the Combines Investigation Act in 1960.

In the meanwhile ad hoc machinery was provided for in the Combines Investigation Act of 1910 whilst the Act of 1923 appointed a full-time Commissioner with extensive powers of investigation. Indeed business interests regarded them as too extensive in that they enabled a single person to act as investigator, prosecutor and judge. This criticism was accepted by the Committee to Study Combines Legislation which was set up in 1950 and in 1952 the Commissioner's functions were divided between two new bodies: a Director of Investigation and Research and a Restrictive Trade Practices Commission.

The penal nature of the legislation has certainly had an inhibiting effect on its enforcement and leaving aside the cases dealing with misrepresentations concerning price, misleading advertising or constitutional issues, the total number of cases brought before the courts in the first eighty-three years of the legislation's existence can still be listed in three and a half pages of the Annual Report of the Director of Investigation and Research.50

When determining whether competition has been limited unduly, the Canadian courts have consistently stated that they are not called upon to adjudicate upon the economic effects of the arrangement, since this would put them "to the essentially non-judicial task of judging between conflicting theories of economy and conflicting political theories."51

... The relevant question thus becomes the extent to which the prevention and limitation of competition are agreed to be carried and not the economic effect of carrying out the agreement. In each case which arises under the section, the question whether the point described has been reached becomes one of fact.52

One of the criticisms of the Economic Council of Canada in their 1969 Report

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50Report for the year ended 31st March 1973, pp. 81-84. the Commission's function is broadly, after receiving a statement of the evidence submitted by the Director, to conduct a hearing and submit a Report to the Minister of Justice who then has to decide whether a prosecution is warranted. Admittedly the publication of a Report in the event of an investigation probably has in itself some deterrent effect.

51R. v. Howard Smith Paper Mills (1954) O.R. 543571. The Supreme Court of Ontario was here referring by way of illustration to a comparison of one industry's profits against those of industry generally and of the movement of prices in that industry against the movement of prices generally.

on the present legislation is that there is too much emphasis on conduct and structure and too little on economic performance, considering in particular that the underlying objectives of the Act are economic in nature —viz., "the improvement of economic efficiency and the avoidance of economic waste."

In recommending, therefore, the setting up of an entirely new tribunal whose members would be selected for their expertise in economics, business and law, they proposed that whilst it should retain some of the characteristics of a court, there should, however, be less formality of procedure and "the prevailing atmosphere would ideally be one of a collective search for understanding of business practice and its economic effects and for the progressively clearer discernment of the nature of the public interest in particular cases."\(^53\)

The new Competition Bill which followed this Report set up a Competitive Practices Tribunal along the lines envisaged by the Economic Council.\(^4\) It allowed the Tribunal to indicate what modifications to a proposed agreement would enable the Tribunal to approve it, as well as empowered the Tribunal to formulate draft guidance rules for particular industries, or in respect of specified practices (on which interested parties could make representations before they became effective). The Tribunal was itself given guidance in the Bill as to the circumstances when it should approve an agreement notified to it for approval.

At the same time certain practices, such as price-fixing, division of markets and lessening of production, were to become per se prohibitions and indictable offences, whereas at present they are only prohibited if they unduly limit competition. There were however to be certain exceptions for specialisation, export and franchise agreements, which required the approval of the Tribunal, whilst certain other types of agreement (e.g., for co-operation in research or development or for standardisation) required no such approval.

The provisions which left much to the discretion of the Tribunal were criticised as too vague and injecting great uncertainty into business decisions and at the same time as giving excessive power to the Tribunal to shape national policy in areas of great economic importance\(^5\) and of imposing its own views on the business community, thereby possibly greatly curtailing business initiative.

Whereas the prohibition of certain practices if they lessen competition unduly has been criticised by some for leaving business in a state of uncertainty as to when this could be said to apply, the new proposal for making certain absolute prohibitions has been criticised for not taking into account whether the conduct complained of has any effect on competition, i.e., whether the restraint was undue.

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\(^53\)Interim Report on Competition Policy, 110.
\(^4\)Bill C-256, presented for first reading to the House of Commons, 29th June 1971.
As a result of the many criticisms of the Bill, it was withdrawn and in November 1973 a new Bill was tabled with substantial amendments. These would, inter alia, extend the application of the Combines Investigation Act to services, introduce new consumer protection measures, enable the Restrictive Practices Commission to review exclusive dealing and other tying practices as well as instances of compliance with foreign judgments and laws or directives from foreign managers (implementation of which in Canada they may prohibit when contrary to the public interest) and introduce civil suits for recovery of loss or damage resulting from conduct contrary to the Act. All the basic machinery of the present Act is however retained. Further consideration will be given as to how this might be changed and proposals for this will appear in a new Bill, not expected before 1975, which will also deal with industrial structure and specialisation agreements.

The provisions for reviews of practices by the Restrictive Practices Commission and the power for them to make corrective orders would introduce the beginnings of a civil jurisdiction in the field of competition, which may be said to be very necessary.

Anti-competes legislation in Canada became part of the criminal law not so much because criminal sanctions were considered the appropriate weapon to use against infringements of the rules of competition, but rather because of constitutional difficulties, which have still not been resolved. This has certainly had a considerable effect on the degree of enforcement, partly perhaps because of a certain unwillingness to apply criminal penalties to business conduct, particularly where comparable activities in various sectors of the economy are exempt because they are subjected to special regulations, and certainly because the standard of proof required by the courts in criminal cases is such that prosecution except in very clear-cut cases is unlikely to prove successful.

Certainly in recent years there has been increasing awareness of the complexity of the issues involved and of the difficulty in many cases of determining exactly where the public interest lies. Hence the proposals in the 1971 Bill for more flexible and informal procedures, whilst prohibiting per se certain practices which are considered to be rarely in the public interest and so avoiding any discussion of their possible benefits in particular circumstances.

Yet the provisions aimed at greater flexibility were criticised for leaving the position too uncertain and for giving excessive discretionary powers to the Tribunal. It appears to be difficult to find an appropriate compromise. It would seem that the business community would like to see precise criteria defining

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11"Proposals for a new Competition Policy for Canada—First Stage 1973." Published in November 1973 by the Department of Consumer and Corporate Affairs, this also contains a commentary on the proposed changes. It is anticipated that the Bill may be passed by the summer of 1974.
those agreements and mergers which are to be prohibited, whilst allowing ex-
emptions on clearly defined terms.

6. INDIA

If certainty as to what is prohibited or not is a requirement of the
businessman, the Monopolies and Restrictive Trade Practices of India, enacted
in 1969, is not the illustration he would take of the kind of law he would favor
(having by now accepted that some form of control is necessary). In fact it
probably combines for him the worst of all features: controls, backed by fines,
over an extensive collection of broadly defined restrictive trade practices (which
have to be registered), monopolistic practices and monopolistic and dominant
undertakings, which are required to notify and secure approval of any
substantial expansions which they propose to undertake, whether by the issue of
fresh capital or by the installation of new machinery or other equipment or in
any other manner.\textsuperscript{57}

Furthermore, should the Government be of the opinion that “the working of a
monopolistic or dominant undertaking is prejudicial to the public interest or
has led, or is leading, or is likely to lead to the adoption of any monopolistic or
restrictive trade practices,” it may, after an investigation by the Commission,
order divestiture, the transfer of property, the payment of compensation and
other remedies,\textsuperscript{58} whilst under another provision it may virtually take over
control of the enterprise, regulating its production and supplies, fixing
standards for its goods, controlling its contracts and so on.\textsuperscript{59}

The definition of restrictive trade practices includes any practice “which
tends to obstruct the flow of capital or resources into the stream of production,
or which tends to bring about manipulation of prices, or conditions of delivery
or to affect the flow of supplies in the market relating to goods or services in
such manner as to impose on the consumers unjustified costs or restrictions.”
Included in the definition of monopolistic practice is any practice which is likely
to have the effect of “limiting technical development or capital investment to the
common detriment.”\textsuperscript{60} These are the very evils which the Act is succeeding in
producing rather than remedying since (when the country is badly in need of
large scale investment) the long waits for approval of expansions or mergers
have meant that urgently needed products have not been available because of
bottlenecks in production and distribution, the cost of many projects has

\textsuperscript{57}Sec. 21. Within two years of the Act coming into force more than 1,000 companies had notified
such expansions and more than 100 others were facing prosecution under the Act for failing to
notify expansions.
\textsuperscript{58}Sec. 27.
\textsuperscript{59}Sec. 31.
\textsuperscript{60}Sec. 2(i) and (c).
substantially increased whilst other projects have been abandoned as uneconomic in view of the delays.

Here is an instance of a competition law introducing drastic and often unworkable remedies for ailments which have not been properly identified. Because some practices and situations have to be strictly controlled in certain other countries does not necessarily mean that they have to be strictly controlled everywhere. At any rate it is important not to maintain in this field massive controls through which most have to pass in order to catch the very occasional wrong-doer, if the result is to accentuate the problems.

C. International Controls

Over the past twenty-five years there have been numerous proposals to establish international controls over restrictive practices in international trade. This has been partly because of the different directions and scope of national competition laws, partly because those laws generally exclude, and indeed often encourage, export associations, in part because of attempts to apply competition laws extra-territorially (leading sometimes to legislation prohibiting compliance with such foreign laws) and in part because there is a belief that with the growth of multinational enterprises, it has become too easy to escape the net of national controls—a belief which the author does not share, provided, of course, that there are adequate national laws.

In fact, it was because of the inadequacy or non-application of national laws in other countries that led the United States, after the Second World War, to instigate action both through the encouragement of national laws and of international controls.

Thus, the United States made it a condition of post-war economic aid that recipients should introduce legislation against restrictive business practices and took the initiative in trying to set up an International Trade Organisation. In preparing the first draft of what came to be known as the Havana Charter, they provided that any activities "which restrain competition, limit access to markets or foster monopolistic control in international trade" would be presumed to be violations of the Charter and more specifically that certain practices should be banned outright; these were collective price-fixing, dividing markets or territories, limiting production or exports, suppressing technology or invention, boycotting or discriminating against particular firms and abusing copyright, trademark or patent rights.

In the final draft of the Havana Charter those specific practices were retained, no longer however as per se violations, but merely as prima facie justification for an investigation by the International Trade Organisation, after complaint by a

*Suggested Charter for an International Trade Organisation of the United Nations, Department of State Pub. 2598, Commercial Policy Series 93 (1946) Article 34(1) and (2).
signatory State. But the States participating in the negotiations were never able to agree upon what remedial action should be taken if a complaint were substantiated. Every subsequent attempt to introduce international controls has failed essentially on this issue, and the numerous national competition laws enacted as a result of American encouragement have, whilst referring to many of the same practices, reflected the wide range of views towards them and on how they should be handled, as the author has indicated in his illustrations.

The author believes, therefore, that leaving aside economic communities like the EEC, ECSC and EFTA, where in each case the rules of competition form an integral part of the machinery for the application of the Community's general economic policy, it will not be possible either to agree on an international convention applying controls over particular practices or to harmonise national competition laws. Even in the present European Economic Community one Member State, Italy, has still no competition law, whilst the laws of the other eight States differ considerably one from the other. If in place of national laws there was a harmonised law for the whole Community, left largely to enforcement by the Eupopean Commission, there would be more consistency of decisions, but excessive delays in reaching them; whereas if it were left largely to national authorities to apply, the considerable differences in their manner of application would soon become apparent.

However, with the growth of international trade and the spread and development both of national laws and economic communities of states, the interrelation of national laws becomes closer and hence the need for closer consultation between national authorities, in particular to avoid conflicts. Such consultations and general cooperation have been developing for many years.

The first of the consultation procedures was that developed between the United States and Canada, which began in 1959 and was confirmed and extended in 1969. The original purpose was that the two countries in enforcing their respective laws, should consult with each other when it appeared that the interests of the other country would be affected by such enforcement. The 1969 understanding stated that a primary concern would be cartel and other restrictive agreements and practices of multinational enterprises, the enforcement agencies of the two countries, each within its own jurisdiction, coordinating where possible the enforcement of their respective laws against such practices.

The O.E.C.D., in particular through the work of its Committee of Experts on Restrictive Business Practices, has made an important contribution in this field.

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\(^{52}\)Havana Charter for an International Trade Organisation, Article 46(2) and (3), Dept. of State Pub. 3117, Commercial Policy Series 113 (1947).

through encouraging the development of consultation procedures, whilst in a Recommendation adopted in 1973 it proposed that its Committee of Experts might act as conciliators where satisfactory solutions cannot otherwise be found.

In the EEC a Consultative Committee of Government Experts from Member States collaborates with the Commission in the enforcement of the Common Market Rules of Competition, whilst in the European Free Trade Association a number of complaints regarding restrictive practices have been resolved in bilateral negotiations between Member States.

Earlier this year, an ad hoc Group of Experts appointed by the United Nations Conference on Trade and Development (UNCTAD) met and drew up a Report on restrictive business practices in relation to the trade and development of developing countries. Among its recommendations were that there should be greater exchange of information between developed and developing countries, that a training program on restrictive business practices should be established to assist developing countries and that further consideration should be given to the establishment of an office to receive complaints, to the development of consultative procedures and to the drawing up of guidelines.44

We can expect to see the continued development of such consultative and cooperative procedures.

II. Differences of Approach—Some Conclusions

From the few illustrations which have been given of different laws, it will be evident that there is great variety of approach towards the handling of monopolies, mergers and restrictive trade practices. Even price-fixing agreements between competitors, which will invariably be either specifically included in, or be covered by, every competition law, may either be prohibited outright (though perhaps with exceptions for certain categories of agreement or sectors of the economy), prohibited only if found to be contrary to the public interest or, switching the burden of proof, may be permitted if they can be satisfactorily justified by the parties on the grounds specified in the law, whilst in other instances they may be prohibited only if they constitute an abuse of a dominant position.

Individual resale price maintenance is not subject to any controls under many antitrust laws, but under other laws is either generally prohibited outright, as in France and the Scandinavian countries, or subject to justification on specified grounds as in the U.K. Exclusive distributorships are prohibited under the criminal law in Chile but subject to category exemptions under the Common

44UNCTAD TD/B/C.2/119 of 26th April 1973. This was examined in August 1973 by UNCTAD's Committee on Manufactures, which decided that a Group of Experts should meet early in 1974 to develop these studies. The UNCTAD Secretariat has produced several detailed reports on the subject.
Market rules of competition and, in a rather different way, under the U.K. Restrictive Trade Practices Acts. And so one could continue with every restrictive business practice to show the variations of attitude and treatment.

The position varies also with regard to monopolies and mergers. Thus, in announcing in May 1972 his proposals for amending Australian legislation, the then Attorney General, whilst recognising the possible use of a dominant position to inhibit the growth of competition, nevertheless went on to point out various advantages for the Australian economy of a concentration of power, as for instance that in a number of industries the size of the economy may not be sufficient to support more than one, or a very small number of businesses that are efficient by overseas standards. For this reason, he added, his Government believed that a drastic prohibition of monopolisation on a general basis, as provided for in the U.S.A. would be inappropriate for Australia. In fact, very few countries have as yet legislation to deal with monopolies, and even fewer with mergers.

In considering what further action might be taken to deal with restrictive practices, including the possibility of drawing up a model law, the UNCTAD Group of Experts in their Report published in April 1973 agreed that the actual method or methods adopted could well vary, depending on the level of economic development in the country and its social, economic and even political objectives, so that no one approach could be recommended.

Most countries which have had legislation in this field for more than a very brief period, have experimented over the years with various methods, but it is extremely unlikely that any country would claim that it has found an ideal system, even to meet its own particular objectives. If it does have that belief, it is improbable that it would hold to it for many years, because the nature of the problems with which it has to deal varies or else its objectives change.

The conclusions which can be drawn from the experience of individual countries are not therefore necessarily conclusions which can be applied to other countries, yet perhaps some useful general indications can be seen, or at least of some of the problems which particular systems may involve.

Obviously, some differences will arise from whether the starting point is to regard competition as an end in itself which must be maintained at all costs regardless of whether in some circumstances reduction of competition may have certain beneficial effects, or whether competition laws are regarded merely as one of various weapons in the economic armoury which can be used to safeguard the public interest. In the latter case the public interest is generally either not defined or defined in broadest terms and left to be established by the authorities applying the law. This obviously involves fluctuating interpretations and con-

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ขาณตร์, TD/B/C.2/119, 26 April 1973, para. 60.
sequential uncertainty, but United States experience has shown that the same applies even when the criterion is the maintenance of competition, for except to some extent with regard to per se prohibitions, views will change considerably as to where the line is to be drawn.

Even the establishment of absolute prohibitions does not necessarily clarify the position, for there may be doubts as to whether for instance a particular conduct amounted to an agreement to fix prices or, to refer to a recent United States case mentioned earlier, whether a division of territories (another per se prohibition) is justifiable in order to promote greater competition in a more important sector of the economy. In fact, this is a good illustration of how efforts by the courts to reduce the areas of uncertainty by developing the concept of presumptive illegality with regard to particular practices and situations have not only left uncertainty, but created areas of excessive rigidity.

A comparable situation was seen in the U.K. where for many years the combination of limited grounds for justification of restrictive agreements and the strict interpretations of the Restrictive Practices Court meant that it was not possible to allow various types of rationalisation agreement which could be regarded as in the public interest but for which no appropriate gateway could be found; eventually the matter was in part dealt with through the exercise of administrative discretion.

Indeed, the exercise of administrative discretion in general provides a more flexible system for dealing with complex economic issues than any court procedures, but as seen from the Australian experience and from some of the fears expressed about the Canadian Bill introduced in 1971 (but withdrawn partly because of these fears) this may leave too much uncertainty as to the Government's policy and give too much power to those having to exercise their discretion. Both criticisms could to some extent be met by publishing summaries of the settlements reached, in the manner which has been done by the European Commission when they have recommended changes in order to legalise agreements and by the Registrar of Restrictive Trading Agreements in the U.K. with regard to his recommendations.

Nevertheless, if such discretionary powers are to be used (as the author believes they should), it is desirable that initially at least there should be some formal decisions of the Tribunal or other authority in order to establish some guidelines. That kind of guideline is probably more appropriate than one set out in the law itself since that must necessarily be too general, but guidelines (or checklists) set out in a document not having the force of law and again leaving scope for flexibility may sometimes be helpful.

Civil procedures are, the author suggests, far more suitable for laws subject to

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*See note 23.
*See notes 13 and 14.
very varying interpretations, where the border-line between what is and is not allowed is often far from clear, but penal sanctions may be justifiable in the case of what is no doubt a wilful infringement of a clear-cut prohibition. There is still too much of a tendency, however, to consider conduct as verging on the criminal where the infringement is neither particularly clear nor wilful.

Most court and administrative proceedings tend to be lengthy and costly, unless the issues to be determined are very specific. More could, the author suggests, be done to make those issues more specific and to avoid wide-ranging investigations just to see if anything wrong is being done.

There is no general solution to the matters we have been examining. Each country must find its own answers and inevitably it will be a compromise between certainty and flexibility. It is, however, important, as the author observed at the beginning, that the nature of that compromise be examined from time to time from a broader viewpoint; with that in mind it is always helpful to turn to look at what other countries are doing in the same field, even though the lessons they learn are not necessarily applicable to our own problems.