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IN 1948 the British Parliament passed the Monopoly and Restrictive Practices (Inquiry and Control) Act.[1] It is instructive to examine this Act against the background of the criticisms and suggestions for improvement which have emerged with sixty years of American anti-trust legislation. Section one of this paper presents some reasons why the measure has appeared at this time. The next section summarizes the Act's provisions. Section three contrasts the British technique of monopoly control with the American and considers whether the different approach is likely to avoid the debilities which have become evident in the American legislation.

I

A reading of the Parliamentary debates on the Monopoly Bill indicates that developments in economic thought, the British economic crisis, the objectives of the Labor Government, and the past weakness of the judicial attitude toward monopoly regulation have all contributed to the passage of the Act.[2]

Prior to the early 1930's, Marshallian and neo-classical economic analysis dominated British economic thinking. In that analysis, monopoly was recognized as a limiting case, the infrequent exception to the general rule of pure competition. With the appearance in 1932-33, however, of Professor Chamberlin's and Mrs. Robinson's studies of monopolistic or imperfect competition,[3] this faith in competitive equilibrium as the underlying tendency in the economy gave way to an emphasis on monopolistic competition as being the more appropriate framework for economic theory. Following this emancipation, economists have emphasized the deliberate price policies of the firm, the purposeful differentiation of products, the nature of duopoly and oligopoly, and the complexities of market control schemes.[4]

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[1] 11 & 12 Geo. 6, c. 66 (1948).

[2] Cf. H. of C. Debate, 452 H.C. DEB. 5s., 2026-2167.

[3] CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (1932); ROBINSON, ECONOMICS OF IMPERFECT COMPETITION (1933).

[4] An excellent review of these problems is provided by Galbraith, "Monopoly and Concentration of Economic Power," in A SURVEY OF CONTEMPORARY ECONOMICS (1948).

Paralleling this reformulation of the economic theory of monopoly, another branch of economics developed—that of "welfare economics." This allowed economists to offer certain criteria of productive and allocative efficiency and to examine the "wastes of monopolistic competition."

While economists have continued to concentrate upon these problems for the past fifteen years, the subtleties of their analyses have been expressed to the layman in realistic, and not infrequently quite dramatic, events: the restriction of output, price inflexibility, exploitation of suppliers, suppression of technical improvements, aggressive price discrimination, and distortion of the price structure in depression.

Thus, even without the present economic crisis, the British intellectual climate alone may have been sufficient to induce a demand for some control over monopoly.[5] But the postwar economic situation accentuated the demand. It became patent that if the export drive was to be successful it would be necessary to lower costs and increase productivity. Supporters of the Monopoly Act contended that this could be achieved only if the economy became more competitive and if the inter-war trend toward more cartels, trade associations, and combinations was reversed.

Further, the Government recognized its international obligation under Chapter V, Articles 46-54, of the International Trade Organization to "prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control."

It is also significant that the act was passed during a period in which the Labor Government has criticized the concentration of private economic power and has desired to reduce profits and redistribute income.

Though the economic and political environment was thus favorable for more effective regulation of monopoly, it had long been recognized that such control was exceedingly unlikely to be forthcoming if it had to proceed merely from actions in tort to compensate for injuries. Over half a century ago, Lord Justice Bowen had stated: "If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not

[5] Indeed, the Coalition Government's White Paper on Employment Policy of May, 1944 suggested action regarding "combines and restrictive agreements against the public interest" ¶54.

see that they are under the ban of the common law." Experience during the intervening period confirmed this view and made supporters of monopoly control apprehensive concerning the adequacy of the common law for the maintenance of competition.

Conviction for criminal conspiracy at common law was frequent in early British cases involving trade combinations.[6] By the last decade of the nineteenth century, however, this position had been severely limited. Since "the famous trilogy of cases" (1892-1901) it has been generally accepted that conspiracy, to be actionable, requires (a) joint action by at least two persons, and (b) malice, to be understood as action devoid of a reasonable purpose.[7] As Lord Cave observed, "If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues."[8] This interpretation left business men virtually free to enter into whatever combinations they considered necessary for the protection or advancement of their private trade interests.[9] In the law of contract this has meant that practically all such agreements receive court approval.

By this reasoning, free competition, which had initially been interpreted to mean freedom to enter the market and sell, degenerated into meaning the freedom to prevent others from so doing.[10] Perhaps the most striking feature of this outlook is that in not a single English decision has a consideration of what is reasonable in the public interest influenced or altered a decision reached by consideration of what is reasonable between the parties.[11]

[6] R. v. Journeymen Tailors of Cambridge, 8 Mod. 10, 88 Eng. Rep. 9 (1721); R. v. Eccles, 1 Leach 274, 168 Eng. Rep. 240 (1783); R. v. Mawbey, 6 T.R. 619, 101 Eng. Rep. 736 (1796); R. v. Hammond, 2 Esp. 719, 170 Eng. Rep. 508 (1799); R. v. Bykerdike, 1 M. & Rob. 179, 174 Eng. Rep. 61 (1832); R. v. Rowlands, 17 Q.B. (Adolphus & Ellis) 671, 117 Eng. Rep. 1439 (1851); Hilton v. Eckersley, 6 E. & B. 47, 119 Eng. Rep. 781 (1855); and R. v. Druitt, 10 Cox (Criminal Cases) 592 (1867).

[7] Mogul S. S. Co. v. McGregor Gow & Co., A.C. 25 (1892); Allen v. Flood, A.C. 1 (1898); Quinn v. Leathem, A.C. 495 (1901); Sorrel v. Smith, A.C. 700 (1925); Thorne v. Motor Trade Assn., A.C. 797 (1937); Crofter Hand Woven Harris Tweed Co. v. Veitch and Another, 1 All E.R. 142 (1942).

[8] Sorrel v. Smith, A.C., at p. 712 (1925).

[9] Though the cases in note 7 represent the major trend in English law, there has been some judicial resistance to restriction of freedom of trade in a few cases: Evans v. Heathcote, 1 K.B. 418 (1918); the Irish Dairy Case, A.C. 548 (1919).

[10] The economic implications of this are well presented by Lewis, "Monopoly and the Law," 6 MOD. L. REV. 97 (1943).

[11] Cf. FRIEDMANN, LEGAL THEORY 295-6 (1949).

It consequently became clear that the desire for monopoly control could not be fulfilled merely by actions in tort to compensate for injuries. The difference between the legal ideal and economic reality was apparent. To resolve this difference, supporters of monopoly control have resorted to legislation, rather than rely on the courts to revise their theory.[12] Attention may now be given to the provisions of the resulting Monopoly Act.

II

The long title of the new Act provides

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

A commission of from four to ten members appointed by the Board of Trade acquires the task of investigation.[13] The Commission may require any person to give evidence and to provide information relevant to the investigations. It will operate only when the Board of Trade publicly refers to it a case in which the condition appears to prevail that one-third or more of the goods concerned is supplied, bought, processed, or exported by either one firm or a group who arrange to limit competition.[14]

[12] The rejection by the majority of modern constitutional jurists of Dicey's exclusion of administrative justice as incompatible with the rule of law, and the revival of administrative law in England also undoubtedly influenced the choice. Cf. ROBSON, JUSTICE AND ADMINISTRATIVE LAW, esp. chapters 1 and 8 (1947).

[13] On January 1, 1949, eight members were appointed to the Commission. The full-time chairman, appointed for five years with an annual salary of £5,000, is Sir Archibald Carter, formerly Joint Permanent Under-Secretary of State for Commonwealth Relations. Of the remaining seven members, two are appointed full-time for five years with annual salaries of £3,000, two part-time for five years with annual salaries of £500, and three part-time for three years with annual salaries of £500. The Commission includes two members of the bar, a Lecturer in Economics at Cambridge University, a member of the Trade Union Congress' General Council, a former Comptroller-General of the Patents Office, an Accountant Adviser to the Board of Trade, and a managing director of an industrial firm.

[14] When the Bill was before the House of Commons the President of the Board of Trade stated that the Board had thirty-eight cases suitable for investigation. On March 3, 1949, the Board announced the first six industries to be investigated: electrical lamps, dentistry instruments, insulated electric wires and cables, matches, machinery for the manufacture of matches, and miscellaneous builders' casters.

The Commission is instructed to investigate and report on (1) whether conditions to which the Act applies in fact prevail, and if so in what manner and to what extent; (2) the things which are done by the parties concerned as a result of, or for the purpose of preserving, those conditions; and (3) whether the conditions in question or all or any of the things done as aforesaid operate or may be expected to operate against the public interest.

The Board of Trade may limit the investigation and report solely to the facts, that is to say, to whether the conditions to which the Act applies in fact prevail for the goods in question. Or it may require investigation and a report on both the facts and on whether the situation reported operates, or may be expected to operate, against the public interest (section 6). In either case, there must be a separate investigation for each trade, as no allowance is made for the general prohibition of certain practices to the whole of industry.

The "public interest" is defined in section 14 as being consistent with

> "the general economic position of the United Kingdom, to achieve—
>
> (a) the production, treatment and distribution by the most efficient and economical means of goods of such types and qualities, in such volume and at such prices as will best meet the requirements of home and overseas markets;
>
> (b) The organisation of industry and trade in such a way that their efficiency is progressively increased and new enterprise is encouraged;
>
> (c) the fullest use and best distribution of men, materials, and industrial capacity in the United Kingdom; and
>
> (d) the development of technical improvements and the expansion of existing markets and the opening up of new markets."

If the terms of reference to the Commission require only a report on the facts, the Board need not publish the report. If, however, they involve the question of the public interest the Board must publish the report (subject to safeguarding public security and legitimate business interests) and lay it before each House of Parliament. Even though the majority opinion of the Commission is that conditions do not violate the public interest, nevertheless the House of Commons may, if it so desires, declare by resolution that they do so operate. Where it is found that activities are against the public interest, a competent Minister may make orders applying remedies, subject to affirmative resolutions in both Houses of Parliament.[15] These orders may include the prohibition of specified agreements or arrangements, boycotts, conditional sales, or preferential terms. No criminal proceedings can be brought for contravention of an order under the Act, but civil proceedings for an injunction or other appropriate relief can

[15] The Ministers of nine Government Departments have such powers—The Ministers of Supply, Works, Fuel and Power, Health, Agriculture, Food, the Admiralty, the Board of Trade, and Secretary of State.

be brought either by the Crown or by any person affected. Finally, it should be noted that the Act expressly exempts labor practices and does not refer to nationalized industries.[16]

III

A comparison with American anti-trust legislation shows the broad differences in technique represented by the British Act: (1) Ascertainment of the facts is accomplished by the Commission acting as a tribunal rather than by a court; (2) findings are referred for Parliamentary action; (3) the method of enforcement is by individual orders, applicable only to single trades.

The interesting question arises whether these differences are likely to free the British Act from the debilities which have developed in applying the Sherman, Clayton, Federal Trade Commission, and Robinson-Patman Acts. Experience has demonstrated that the main deficiencies in the American legislation center about the gap between legal process and economic fact, loopholes in the law, ineffectual enforcement, and the power of pressure groups.

Since the British Act initially leaves the elucidation of the facts and the question of public interest to the Commission and not to the courts, it might be thought that the juridical problems which have reduced the efficacy of the American laws may not arise. However, since any interested party or the Crown may apply to the courts for an injunction or other relief if contravention of an order is alleged or apprehended, there will actually be a considerable amount of argument over the case. It will have to be decided whether the order was made within the terms of the Act, whether the order prohibits the acts the defendant is alleged to be committing, and whether in fact the defendant actually is committing these alleged acts. These

[16] In so far as a nationalized industry is a form of monopoly the inapplicability of the Act to such industries might be considered unfortunate. Though the new nationalized industries would benefit by some type of independent "efficiency audit," it is, however, reasonable to seek this type of analysis elsewhere than from the Commission. For it is a different type of task from that of seeing that private property and the desire for private profit do not operate against the public interest—a task which alone will undoubtedly keep the Commission fully occupied.

Respecting the constitutional status of public corporations in nationalized industries, it is worth noting a recent judgment in the court of appeal. In Tamlin v. Hannaford, 2 All E.R. 327 (1949), the court had to consider for the first time whether the Transport Act of 1947 made the British Transport Commission a servant or agent of the Crown, thereby conferring on it all the immunities and privileges attaching to such a status. The court held that it did not.

questions may lead to problems of interpretation as complex as those which the American judiciary have had to decide.

In so far as the Commission presents a substantial report and ably argues the economic facts there is the hope that the legal and economic conceptions of monopoly might be more consistent than if reliance were placed merely on the interpretation of the courts. Yet, as the history of the Federal Trade Commission demonstrates, the mere fact that competent economists might be members of the Commission is no guarantee that the economic implications of certain monopoly situations will be unambiguous.[17] The Commission may still hesitate over the application of a standard of evaluation. For though the Act defines the "public interest," the definition suffers from ambiguity and vagueness. Much as the economics analysis of monopoly has progressed, it is not yet true that economists are united as to what can or ought to be done about monopoly. To the economist, monopoly is primarily an analytical concept, and when its normative implications are examined a wide divergence of opinion results. This uncertainty as to how precisely to express and locate the evils of monopoly must dampen the enthusiasm with which an anti-monopoly drive is pursued.

Moreover, the resort to a Commission instead of to the courts has serious disadvantages. No prosecutor will appear before the Commission. In so far as the Commission undertakes the functions of both prosecutor and judge, it will be liable to criticisms similar to those which have been levied against the Federal Trade Commission. Further, unlike the situation in a court, the evidence before the Commission need not be given in public.

It is also uncertain how far the Board of Trade will be willing or capable of helping the Commission in its role of prosecutor. Even though the Anti-Trust division of the United States Justice Department has police powers, it has still found it difficult to uncover all the necessary evidence. Lacking such extensive powers and working with a small staff handicapped by budgetary limitations, the Commission will undoubtedly encounter even more formidable difficulties in accumulating evidence and preparing its cases.

Nor is it true that the British Act removes the loopholes which have become evident in the American laws. The power to terminate or forbid by order the making or carrying out of agreements, and to

[17] Cf. Handler, "Unfair Competition," 21 IOWA L. REV. 175 (1936).

prohibit boycotts, conditional sales, and preferential terms actually strikes at little more than the periphery of the monopoly problem. These powers may be effectual for the cartel type of monopoly where firms maintain their separate identities, and agreements are usually explicit. But they will be as impotent as the American powers are respecting mergers by sale of assets, oligopoly, price leadership, and monopolies supported by patents.

Limited as have been the funds and staff for antitrust enforcement in America, the British provisions are even more inadequate, even after allowance is made for the relative magnitudes of the problem in each country. Not only is the staff provided insufficient in size, but the fact that the Commission is subordinate to the Board of Trade may well deter personnel of sufficient competence from joining the Commission. Moreover, the necessity of investigating each trade individually makes the potential work of the Commission enormous. There is also no indication that adequate means are available for the surveillance which frequently may be necessary to determine whether the provisions of an order are being fulfilled. And if the American penalties have been "so low as to constitute at most a good business risk," the British penalties will indeed be a weak obstacle to violation.[18]

Finally, the provisions of the British Act seem to have given little heed to the American lesson of obstruction by organized special interests. By requiring Parliamentary approval for each order, the Act furnishes ample opportunity for interested parties to lobby members of Parliament. Prolonged debates over whether the particular practices in a particular industry exist—let alone are desirable—may well exhaust what force the Act does have. There is also the danger that since it will not enjoy the traditional respect given the courts, the Commission may have its prestige and power lessened if it reports adversely against a powerful political group.

From the foregoing discussion, one has to conclude that the new British Act has not taken much cognizance of American experience. In fact, the new monopoly Act suffers from the same major debilities which have handicapped American monopoly control.

[18] Section 18 provides: "Every person who is guilty of an offense under this Act shall be liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding one hundred pounds or to both such imprisonment and such a fine."