

LEGAL IMPLICATIONS OF BRITISH ENTRY INTO THE COMMON MARKET

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I

THE CONSTITUTIONAL ISSUE

The British Constitution is founded on the theory of the supremacy of Parliament. The doctrine of the separation of powers is recognized, but not in the form applicable in the United States which gives to the courts the power to limit the scope of the legislature if an enactment is not in conformity with the Constitution. The United Kingdom does not have a comprehensive written constitution, but if it had, the most significant clause would be that which gives to Parliament the power, at least in theory, to legislate both in the criminal and in the civil field without restriction. In other words, in the United Kingdom there is no judicial review of legislation other than to construe Parliament's intention. The courts can of course intervene if executive action goes beyond the scope of a statute or if executive powers are exercised in a manner not reasonably contemplated by the statute, but this is a check on the executive, not on the legislature.

The theory propounded by Dicey of the absolute supremacy of Parliament in the legislative field has been encroached upon by convention. The best-known example is probably to be found in the Statute of Westminster¹ passed in 1931 by which in practice Parliament bound itself not to legislate for Commonwealth countries except with their consent. There are many other examples to be found in treaties to which the United Kingdom is a party and which effectively limit the freedom of Parliament to legislate in the field with which they are concerned. However, the form of Parliamentary supremacy is nevertheless retained even in this field, since treaties themselves do not have the force of law in the U.K. until they are ratified by Parliament. According to Dicey's theory, the Statute of Westminster could not bind succeeding Parliaments, but all subsequent Parliaments accept the fact that they could not revoke the Statute of Westminster. Nevertheless, it must be recognized that conventions do not have the force of law and, according to the doctrine of Parliamentary supremacy, could be terminated by legislation which permits of no other interpretation than that it is intended to overthrow the convention. The English courts will obviously avoid concluding that such is the intention of the legislation if they can possibly do so.

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¹ Statute of Westminster, 22 & 23 Geo. 5, c. 4.

A. Community Law Becomes British Law

In order to harmonize English and Community law, Parliament passed the European Communities Act, 1972. This legislation enables the United Kingdom to comply with the obligations entailed by and rights derived from membership in the European Economic Community (EEC), the European Coal and Steel Community (ECSC), and the European Atomic Energy Community (Euratom).

Under the Act, the existing Community treaties and regulations are automatically incorporated into British law. Future Community law will also be absorbed into domestic law. Thus, all rights and obligations "provided for by or under the Treaties are, without further enactment to be given legal effect in the United Kingdom." Hereafter, when a point arises in an English court to which a Community treaty or regulation is pertinent, the English court will interpret and apply the proper Community law.²

In situations where Community law and previously enacted British law conflict, the provisions of the Community treaties and regulations will take precedence. This is clear, even on the principal of Parliamentary sovereignty, because the European Communities Act which gives effect to Community law supersedes the earlier acts to the extent that it is inconsistent with them. The fascinating questions for constitutionalists are what result should ensue and what will be reaction of our national courts if the enabling Act is followed by another Parliamentary act and the latter act is then followed by Community regulations which are inconsistent with it. The constitutional argument runs as follows—the second act must be deemed to repeal the power of the enabling European Communities Act to authorize the inconsistent regulations, so that according to the doctrine of Parliamentary sovereignty the later act would prevail over the Community regulations. However, the English courts are bound to hold that Community regulations override conflicting domestic legislation. In effect, the judiciary would be limiting the powers of the legislature—ostensibly for the first time in British constitutional history.

The most probable result is that the British courts will avail themselves of all the long-developed techniques of statutory interpretation favoring the maintenance of international treaty obligations and that they would resolve the inconsistency in favor of the Community regulations by an appropriate interpretation of the legislation in question. Without doubt, the British courts will be quick to identify and acknowledge as a convention of the constitution that the British Parliament will not pass legislation which is contrary to Community law, and they will construe such legislation in the light of that convention.

With regard to the interpretation of words or phrases in a particular Community treaty or regulation which an English court is seeking to apply in a case before it, interpretive rulings solely as to the wording are available (but not mandatory unless

² Denning, *Every Resource and Skill Needed in Grafting New Laws on to the Old*, *The Times* (London), Jan. 2, 1973, Special Report at II, col. 1.

it is an unclear passage and before a court of last resort) from the European Court in Luxembourg. As to the disposition of the case itself, the English court shall make its own decision.³

The Community treaties already in force among the member states total 115. The Act describes two procedures relating to Community treaties. Those concluded between Community institutions, which have automatic effect in the member states, obviously cannot be varied or brought into force by Parliament because such Parliamentary action in relation to a treaty which is self-executing in the United Kingdom would be entirely superfluous. Indeed, it would be antipathetic to the supranational character of Community law. However, Parliament, in relation to such treaties, may by Order in Council declare them to be "Community Treaties" so that everybody, including the courts which must give effect to the Community law, knows that the provisions of such treaties have effect as law within the United Kingdom.

The second procedure applies to treaties to which the United Kingdom becomes a party after Accession. In such cases, the treaty does not become a "Community Treaty" unless a draft Order in Council specifying the treaty as a Community treaty is approved by affirmative resolution of both Houses of Parliament.

Although ultimately the European Communities Bill reached its third reading and was enacted without amendment, numerous disabling amendments were proposed during its discussion. A number of Members of Parliament were particularly concerned with the automatic incorporation of future Community law into British law. They feared that far reaching changes could be effected under future Community treaties with no more Parliamentary control than is achieved by the affirmative resolution procedure of debate on an Order in Council. A debate on an Order in Council is normally limited to one and a half hours, although there are Parliamentary procedures for extending the time allowed. The discussion centered around removing from the Order in Council procedure certain kinds of future Community treaties so as to enable Parliament to exercise greater control over future developments of Community policy, without (according to the supporters of amendments to this effect) in any way disabling the Government from fulfilling its obligations under the Treaty of Accession.

The Solicitor General used the following arguments against the amendments in question—first, that the affirmative resolution procedure on Orders in Council does in fact enable either House to block a development if it does not like it; second, the scope of some of the treaties would be slight or very technical in their effect and Parliament would not want to be cluttered up with full scale legislation on such matters; third, any new Community treaty falling within the affirmative resolution procedure on an Order in Council would have to be "ancillary" to an existing Community treaty and, according to the Solicitor General, the word ancillary is likely to be given a narrow and not a broad definition, so that radical changes

³ *Id.* at col. 3 & 4.

could not be initiated under the Order in Council procedure; and fourth, nothing in the Bill would prevent a future Government from adopting the full legislative procedure to approve a treaty in any given case if it decided that it was proper in all the circumstances to do so.

The Government used the "ancillary" argument in order to defeat an amendment proposed by the Opposition, the purpose of which was to prevent the EEC turning itself into a defense community without the necessity for full legislative procedure in the British Parliament. Sir Geoffrey Rippon⁴ pointed out that such a fundamental change in the nature of the EEC could not possibly be deemed to be ancillary to existing treaties and therefore would not fall within the Order in Council procedure. However, Mr. Rippon was obviously loathe to use the same argument in dealing with an Opposition amendment designed to prevent the Community from establishing a monetary union with a common currency without the full legislative procedure of the British Parliament. It can, therefore, be presumed that in his view such a treaty would be "ancillary" to the Treaty of Rome and could be dealt with by the Order in Council procedure. The Government suggested that an ad hoc committee should be set up in order to decide which new treaties deserve full Parliamentary legislative procedure and which can be dealt with by Order in Council, but the Opposition took the view that the establishment of such a committee is merely a ruse designed to distract attention from the inadequacy of the European Communities Act, and accordingly refused to participate in any such committee.

Aside from the issue of procedure in respect of Community treaties to which the United Kingdom is a party, it should be noted that the Community can conclude treaties with other states or international organizations which will be binding on the United Kingdom as a member of the Community but to which the United Kingdom itself will not be a party. Such treaties, negotiated by the Commission and concluded by the Council after consultation with the Assembly, have binding effect under Rule 228(3) of the Rome Treaty on all Community institutions and member states.

B. Loss of Parliamentary Sovereignty

Critics of the Act point out that not only is there an abdication of sovereignty by the British Parliament to the Community's organs in Brussels—which is, of course, a necessary result of acceptance of the Treaty of Rome—but that this legislation produces an abridgement of Parliament's powers or at least an abridgement of normal Parliamentary procedures when consideration is given to new legislation in respect of future developments in the Common Market. In this respect, there was some criticism even from supporters of the Government of the manner in which new developments in Community law would be dealt with. Perhaps the most telling

⁴The primary British EEC negotiator, he was asked to organize the legislative action for the necessary harmonization of British and Community law.

criticism was that which came from Mr. Enoch Powell⁵ when he refuted the Solicitor General's argument that future Governments would, in appropriate cases, elect to proceed by full legislation rather than by Order in Council. Mr. Powell stated that unless legislation was rendered necessary by the form of the Act, there would be no legislation. According to him, a Government which can do something by affirmative resolution on an Order in Council will always do it by such resolution if it can get a majority of one in the division lobby.

Unquestionably, some degree of sovereignty has been ceded. However, it remains as yet unclear exactly how much is lost. That assessment will have to be made in the days that follow. In making any evaluations it should be kept in mind that future Community decisions will be made with no little amount of British influence. Britain as a member state is now represented on the decision-making Council of Ministers and the Commission.⁶ The Government counters the constitutional argument with the assertion that rather than a situation of foreign-forged Community regulations being thrown at a powerless British Parliament, the impact of Parliament's viewpoints will be widened to a new scope by virtue of British influence on the decision-making in Brussels.

II

ANTITRUST IMPLICATIONS

One of the areas in which the implications of British entry into the Common Market are of considerable interest to the lawyer, particularly one practicing in the company and commercial field, is that of monopolies and restrictive trade practices. To appreciate the implications, it is necessary briefly to examine the present English law of restrictive trade practices and monopolies.

An American audience may be surprised to learn that the law in question is recent—all of the statutes have been passed since the Second World War—and, by comparison with U.S. legislation, lenient in its provisions and certainly in its sanctions—or rather the lack of them. The statutes in question are the Monopolies Act of 1948⁷ and the brief Amending Act of 1953,⁸ the Restrictive Trade Practices Act of 1956,⁹ the Resale Price Maintenance Act of 1964,¹⁰ the Monopolies & Mergers Act of 1965,¹¹ and the Restrictive Trade Practices Act of 1968.¹²

Under the Monopolies Acts, a Commission was appointed by the Board of Trade, the function of which is to examine monopoly situations and proposed mergers

⁵ Mr. Powell is a conservative member of Mr. Heath's party.

⁶ On the thirteen-member Commission, Britain, France, Germany, and Italy each have two representatives. The smaller states each have one.

⁷ Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948, 11 & 12 Geo. 6, c. 66.

⁸ Monopolies and Restrictive Practices Commission Act of 1953, 1 & 2 Eliz. 2, c. 51.

⁹ British Restrictive Trade Practices Act of 1956, 4 & 5 Eliz. 2, c. 68.

¹⁰ Resale Prices Act, c. 58 (1964).

¹¹ Monopolies and Mergers Act, c. 50 (1965).

¹² Restrictive Trade Practices Act, c. 66 (1968).

and to report to Parliament its views as to whether such monopolies or mergers might be expected to operate against the public interest. So far as concerns mergers, the Department of Trade and Industry (DTI) may refer an intended merger to the Commission if as a result of the merger control over one-third of the relevant market will pass into the hands of one company or group. The Acts apply to the provision of both goods and services. The DTI may also refer a merger to the Commission if the value of assets taken over exceeds 5,000,000 pounds or approximately \$13,000,000. Special restrictions apply to newspaper mergers involving newspaper proprietors having a daily circulation of over 500,000, whether before or after the proposed merger.

Two points should be emphasized in relation to this legislation. First, the criterion of control is not the clear and straightforward one to be found in the U.K. Companies Act¹³—namely, the power to exercise voting control as a shareholder or to appoint a majority of the Board of Directors of the company—but includes the rather indefinite power “materially to influence the policy of a body corporate” without having a legal controlling interest. Secondly, there is no very clear definition in the statutes as to the relevant market, merely to “goods of any description,” and so it is left very much to the discretion of the Department of Trade and Industry as to how they will define the goods in respect of which a monopoly situation may be created. Thus, it would be theoretically possible for the DTI to refer a proposed merger between two machine tool manufacturers to the Monopolies Commission for investigation, not because together they controlled one-third or more of the market in machine tools, but because they controlled one-third or more of the market in a particular category of machine tools.

In passing, it should be made clear that relatively few cases have in fact been referred to the Monopolies Commission and most of these have been approved. In some cases, the Commission has relied on somewhat informal undertakings given by the companies concerned which would, perhaps, surprise a student of U.S. antitrust law. Thus, when the British Motor Corporation (now British Leyland Motor Corporation) took over Pressed Steel Company Limited, which was the source of most of the car bodies used in the U.K. automobile industry, the Commission accepted undertakings from BMC and Pressed Steel to the effect that present customers of Pressed Steel would continue to receive from them the same supplies as in the past and to the extent necessary to ensure continuity of their future requirements, despite the fact that those very customers were BMC's biggest competitors. The Commission stated that it was satisfied that such undertakings would be honored “throughout the foreseeable future.”

However, the biggest drawback in a merger situation arising from the 1965 legislation is that if a merger is to take place at all, it should take place quickly.

¹³ The Companies Act, 11 & 12 Geo. 6, c. 38 (1948).

Normally, the proposed purchaser cannot afford to wait for up to six months while the Commission deliberates on its report and reaches its findings.

The present U.K. Restrictive Trade Practices legislation also has its unusual features, at least to an American audience. The first Act, passing in 1956, provided that particulars of restrictive agreements between persons carrying on business in the United Kingdom should be registered with the Registrar of Restrictive Trade Practices. A separate Court, the Restrictive Practices Court, was set up to make judicial investigations of restrictive trading agreements. However, there was a significant omission in the Act. Although it required parties to a restrictive agreement to register, it imposed no sanction whatsoever if they failed to do so. Not surprisingly, the Act was largely ignored and I think it is accurate to say that the only area in which it has had significant effect is where restrictive agreements have been entered into by trade associations and like bodies. The 1968 Act provided that restrictive agreements which were not registered would be void (which was a feature missing from the 1956 Act) and that it was unlawful for any person who was a party to the agreement to give effect to the restrictive provisions. However, it then went on to say that no criminal proceedings should lie against any person on account of a contravention of this provision but that the obligation not to give effect to the restrictions was to be considered as a statutory duty owed to any person who might be affected by their implementation. In other words, a person injured as a result of the enforcing of the restrictions is entitled to sue the parties to the agreement for breach of a statutory duty or the commission of a statutory tort. Again, to lawyers who have practiced in the U.S. antitrust field, this must seem a very mild sanction compared with those in force under U.S. legislation and particularly to the remedies available in the U.S. to persons injured by restrictive practices, such as the treble damage suit.

Section 8 of the 1956 Restrictive Trade Practices Act exempts from registration patent licenses so long as the restrictions in question relate to the invention to which the patent refers or articles made by the use of the invention. It also exempts from registration trademark licenses so long as the restrictions apply only to the goods bearing the trademark or to the process of manufacture to be applied to goods bearing the trademark. The same exemption applies to exchange of know-how and to licenses under registered designs. Thus, in the industrial property field, there is a complete exemption from registration of restrictive trading agreements so long as the restrictions in question fall within the ambit of the particular monopoly under consideration, whether it be a patent, a trademark, a registered design, or secret processes and know-how.

There are other escape clauses in both the 1956 and the 1968 Restrictive Trade Practices Acts. The most important are those to be found in Section 21 of the earlier Act under which the Restrictive Trade Practices Court is bound to consider a restriction contrary to the public interest unless it is satisfied of one or more of the following:

- (a) that the restriction is necessary for the protection of the public against injury;
- (b) that the removal of the restriction would deny the public specific and substantial benefits;
- (c) that the restriction is necessary to counter measures—by persons who are not parties to the restrictive agreement—which are themselves aimed at preventing or restricting competition;
- (d) that the restriction is necessary to enable the parties to the restrictive agreement to negotiate fair terms with another person who controls a predominant part of the market;
- (e) that the removal of the restriction would increase unemployment;
- (f) that the removal of the restriction would reduce exports;
- (g) that the restriction is merely ancillary to and is required to maintain in force any other restriction found by the Court not to be contrary to the public interest;

The 1968 Act added a further reason for considering a restriction not contrary to the public interest, namely, that it does not materially discourage competition. The primary object of this new defense was to protect harmless information agreements which could not qualify under any of the existing seven escape clauses.

The 1968 Act also exempted from registration certain agreements to be approved by the Board of Trade regarded as of importance to the national economy, such as those designed to create or improve productive capacity, but the Board of Trade is not entitled to approve such agreements unless the restrictions are necessary for the achievement of the particular object of national importance. The Act also exempts from registration agreements which are designed to hold down prices, but these must be approved by certain designated competent authorities such as the Board of Trade, the Minister of Agriculture, or the Minister of Health. Such approval may only continue in force for a maximum of two years.

It may be stated that parties to proceedings before the Restrictive Trade Practices Court have found it difficult in practice to satisfy the Court that they are entitled to the benefit of one or more of the exemptions under Section 21 of the 1956 Act and that, therefore, their agreement is not against the public interest. Even where the result of the agreement has been the achievement of one or more of the benefits set out in the Section, the Court has sometimes decided that the restriction is not *essential* for the achievement of such benefit.

However, there have been one or two surprising cases. For instance, the principal manufacturers of black bolts and nuts formed an association called, perhaps not surprisingly, the Black Bolt and Nut Association, and adopted rules which required the members to sell their products to "ordinary users" at the prices set out in the Association's price list and to report to the Association prices they proposed to charge to larger users such as Government departments, railways, harbor boards, and the

like.¹⁴ After days of argument, the Court held that the ordinary user restriction conferred a specific and substantial benefit on the public because it saved purchasers the extra administrative expense of "going shopping!" It decided against the "larger user" restriction, but when the Association amended the "larger user" restriction so as to provide that members could only quote a reduced price for non-standard bolts and nuts. If a reduction in costs of production was achieved, the Court approved the restriction as being reasonably required for the maintenance of the ordinary user restriction which they had found to confer a benefit on the public, since they felt that maintenance of the ordinary user restriction would not continue if members could reduce prices to certain categories of larger customers. They did, however, require the Secretary of the Association not to pass on immediately to members particulars of cut prices to large users so that the other members could not use the reduced prices when making their own tenders or offers.

Before leaving this brief review of restrictive practices legislation under English law, mention should be made of Section 57 of the Patents Act of 1949¹⁵ which is designed to prevent abuse of monopoly where patents are concerned. It has the effect of prohibiting conditions in patent licenses which restrict the licensee from acquiring non-patented articles except from the patentee or his nominee, or which prohibit or restrict the licensee from using articles or processes not belonging to the licensor. The sanction against such conditions in patent licenses is a very real one, since for all practical purposes the patent itself is invalidated during the continuance of any such condition. However, this effective restriction on abuse of monopoly has been somewhat eroded by the decision of the House of Lords in *Tool Metal Manufacturing Company v. Tungsten Electric Company Limited*,¹⁶ where the Court held that the imposition of a monetary penalty in the form of increased royalties to deter a licensee from acquiring products from third parties did not "prohibit or restrict" him even though the monetary deterrent was a thirty per cent royalty.

Turning now to the situation in the antitrust field in the Common Market, it will be seen that this is markedly different from that which exists in the United Kingdom. In the first place, there are real sanctions which may be imposed for breach of the Common Market antitrust laws. In the decision of the Commission prohibiting the International Quinine Cartel,¹⁷ fines were imposed totalling approximately \$500,000 on the six companies involved, one company alone suffering a fine of \$210,000. In the decision prohibiting the Dyestuff Manufacturers Cartel,¹⁸ fines

¹⁴ *In re* Black Bolt and Nut Association's Agreement, [1960] L.R. 2 R.P. 50.

¹⁵ Patents Act of 1949, 12, 13 & 14 Geo. 6, c. 87.

¹⁶ *Tool Metal Mfg. Co. v. Tungsten Elec. Co.*, [1955] 1 W.L.R. 761 (H.L.).

¹⁷ Quinine Cartel [New Developments Apr., 1965-Dec., 1969 Transfer Binder] CCH COMM. MKT. REP. ¶9313 (1969); 2 CCH COMM. MKT. REP. ¶9484 (1971).

¹⁸ Dyestuffs Cartel [New Developments Apr., 1965-Dec., 1969 Transfer Binder] CCH COMM. MKT. REP. ¶9314 (1969); 2 CCH COMM. MKT. REP. ¶9397 (1970).

were imposed totalling \$490,000, including fines on companies incorporated outside the Common Market in Switzerland and Great Britain.

Secondly, the exemptions available under British restrictive trade practices legislation for the exercise of industrial property rights do not apply to Articles 85 and 86 of the Rome Treaty.¹⁹ In fact, the development of Community law in respect of the interplay between industrial property rights and the rules of competition of the EEC has been, and remains, one of the most fascinating aspects of the Community legal scene. When the Community first came into existence, there was much speculation as to the effect that the rules designed to free competition and remove trade barriers might have on industrial property rights. Commentators, including myself, pointed out that Article 222 of the Treaty provided that it would in no way prejudice the system existing in member states in respect to property, and of course, industrial property such as trademarks, patents, copyright, and registered designs is as much property as any other kind. It was also pointed out that Article 36 of the Treaty states that provisions of the Treaty designed to eliminate quantitative restrictions between member states were not to prevent prohibitions or restrictions justified on the grounds of the protection of industrial and commercial property. In the case of Article 36, however, it should be noted that the final paragraph states that such prohibitions or restrictions shall not constitute a disguised restriction on trade between member states. It was therefore confidently predicted by some writers that, since the Treaty left intact the existing system of national recognition of industrial property rights, a proprietor of such rights was free to exercise them without attack under Article 85 or 86 so long as he did not attempt to impose restrictions which were outside the scope of the monopoly created by the industrial property right concerned. Thus, a patentee who had registered his patent in France and Germany was said to be entitled to enjoin his French licensee from exporting to Germany if he relied simply on his German patent, but could not impose a contractual restriction in his French license to that effect, because such a restriction was outside the ambit of the monopoly created by the French patent.

Over the last ten years, these prophets have been shown to be wrong, at least in part. I would like to illustrate this by reference to three of the leading cases which have been heard before the European Court of Justice.

The first case is that which concerns The Grundig Company²⁰ and which related to an exclusive distributorship arrangement made between Grundig and a French company, Établissements Consten. The agreement provided, *inter alia*, that Consten would not make deliveries of products purchased from Grundig to any country except France. Grundig allowed Consten to register in France the trademark GINT, standing for Grundig International, Grundig being the proprietor of the Berne

¹⁹ Treaty establishing the European Economic Community, March 25, 1957, 1 CCH COMM. MKT. REP. ¶ 1-5449, 298 U.N.T.S. 14-94 [known as the Rome Treaty].

²⁰ Établissements Consten & Grundig-Verkaufs-GmbH v. E.E.C. Comm'n, 12 Recueil de la Jurisprudence de la Cour 429 [hereinafter Recueil de la Cour] [Court Decisions 1961-1966 Transfer Binder], CCH COMM. MKT. REP. ¶ 8046 (1966).

Deposit of this mark under the Paris Convention for the Protection of Industrial Property. Consten agreed to assign the GINT trademark in France to Grundig if the exclusive distributorship arrangement were cancelled or terminated by effluxion of time. Another French company, Unef, purchased Grundig equipment from German dealers and resold it on the French market. Consten sued Unef on the grounds of unfair competition, in that Unef was knowingly encroaching on Consten's exclusive rights under its agreement with Grundig, and for infringement of the GINT trademark. The Paris Court of Appeals suspended proceedings pending the decision of the EEC Commission on the application made to it by Unef that the Consten/Grundig agreement was in breach of Article 85. The Commission's finding that the agreement was in breach of Article 85 was appealed to the Court of Justice. The Court held that the GINT trademark, although validly registered in France in the name of Consten, could not be used by its proprietor to restrict imports into France of Grundig products by competitors. In effect, the Commission and the Court stated that trademark rights may not be exercised in such a manner as to prevent, restrict, or distort competition within the Common Market so as to affect trade among the member states.

It should perhaps be noted that both the Commission and the Court could have come to the same decision in the *Grundig/Consten* case on somewhat different grounds than those on which they justified their findings. A trademark is used to denote a connection in the course of trade between the proprietor and the goods to which it is applied. The products in question already bore the GRUNDIG trademark denoting the connection between the manufacturer and the products. The GINT trademark, which was in any event applied in such a manner as to be virtually invisible to the purchasing public, could only have denoted a connection in the course of trade between a vendor and the product, showing to the public that the vendor-proprietor of the mark had exercised his selective capacities in choosing to place such products on the market under his mark. In fact, Consten had exercised no such selective capacities in relation to the products, because it was precluded under its agreement with Grundig from selling any competing products. There are, therefore, arguments in support of the proposition that the GINT trademark was never used as a trademark but simply as a means of preventing competitive imports into France. Therefore, Consten should not be entitled to rely on the argument that this use of the GINT trademark was a valid exercise of industrial property rights. In other words, it was not a valid exercise of industrial property rights as envisaged by Article 222 and Article 36 of the Treaty. Unfortunately, it was not the reason given either by the Commission or by the Court in coming to its decision.

The second case is the *Deutsche Grammophon*²¹ case which concerned records made by the Deutsche Grammophon Company in Germany and sold to its French subsidiary, Polydor. Some of these records found their way back onto the German

²¹ *Deutsche Grammophon v. Metro-Sp-Grossmärkte*, Case No. 78/70 (Cour de Justice, Justice de la Communauté européenne, June 8, 1971), 2 CCH COMM. MKT. REP. ¶ 8106.

market and were resold by another German company called Metro-Grossmärkte at prices substantially below the prices required by Deutsche Grammophon. The Deutsche Grammophon price under its resale price maintenance system was 19 D.M. whereas Metro was offering reimported records at approximately 12 D.M. Under German copyright law, Deutsche Grammophon was entitled to exclusive copyright in records which it had produced and it sought to obtain an injunction restraining Metro from reimporting and selling those records. The Court ruled that Deutsche Grammophon could not exercise this right because in the circumstances it would be contrary to the rules providing for the free movement of goods within the Common Market.

The third case is the *Sirena*²² case which involved the PREP trademark used on cosmetics. The Sirena Company acquired the PREP trademark from the U.S. company, Mark Allen, in 1937 and had enjoyed the continuous and exclusive use of the trademark in Italy since that date. A company called Novimpex imported into Italy from Germany products manufactured under license from Mark Allen, the owner of the formula for the preparation of the cosmetics and of the trademark in Germany. The Sirena price for the product was 500 Lire per jar whereas the Novimpex price for the same product imported from Germany was 250 Lire per jar. It was held by the Court of Justice that Article 85 applied to prohibit Sirena from relying on its rights in the PREP trademark to prohibit imports into Italy from another member state, as Sirena had acquired the mark or the right to use it under agreement with a former proprietor who had made a parallel assignment of the mark in other member states, and that where, as in this case, the agreement in question was entered into prior to the date on which the EEC Treaty came into force, it could still constitute a breach of Article 85 if the effects of the agreement were still felt in the Common Market after such date.

By way of contrast, I would now turn to the *Parke Davis*²³ case in which the proprietors of a Dutch patent covering certain medical products were held entitled to prohibit imports from Italy of products which infringed upon the patent even though no patent existed covering the manufacture or sale of the product in the country of manufacture and the price offered by the Italian manufacturer on the Dutch market was substantially below the price at which the proprietor of the patent was selling the competing product. The case is interesting because the Court concluded that the exercise by a patentee of his rights to prohibit infringing imports did not amount to an abuse of a dominant position in Article 86 of the Rome Treaty even though it resulted in the maintenance of a substantially higher price for the product in the member state concerned than would have obtained if the competing product had been allowed in.

How does one distinguish the *Consten*, *Deutsche Grammophon*, and *Sirena*

²² *Sirena S.r.l. v. Eda GmbH*, 17 Recueil de la Cour 69, 2 CCH COMM. MKT. REP. ¶8101 (1971).

²³ *Parke, Davis & Co. v. Probel, Reese, Beintema-Interpharm, & Centrafarm Cos.*, 14 Recueil de la Cour 81 [Court Decisions 1967-1970 Transfer Binder] CCH COMM. MKT. REP. ¶8054 (1968).

cases from the *Parke Davis* decision? It should be noted that in the first three cases a connection existed between the proprietor of the industrial property rights sought to be enforced and other persons involved who were the source, whether immediate or ultimate, of the goods, the sale of which was the subject of the claim for an injunction. In the *Grundig* case, the connection was between Consten, the would-be prohibitor of the imports, and Grundig, the manufacturer; in the *Deutsche Grammophon* case the connection was between Deutsche Grammophon and its subsidiary, Polydor, from whom indirectly the reimported records were obtained. In the *Sirena* case, the connection was between Sirena and the Mark Allen Company under the 1937 Agreement, and Mark Allen was the proprietor of the formula and trademark in Germany under which the competing products were manufactured and sold in Italy. In the *Parke Davis* case, no such connection existed between Parke Davis, the patentee, and the goods imported from Italy, or the person selling them on the Dutch market, or those who had manufactured them in Italy. It is interesting to observe, however, that, according to a rumor which gained some currency after the *Parke Davis* case was heard, Parke Davis had in fact imparted know-how to the Italian manufacturer in respect of the products which eventually found their way on to the Dutch market under a royalty arrangement, although this was never mentioned in the hearing before the Court of Justice.

In considering the question of the interaction between antitrust rules and industrial property rights in the Common Market, mention should perhaps be made of the so-called Koch-Froschmaier doctrine which was formulated in an article published in 1965.²⁴ Messrs. Koch and Froschmaier were both officials in the Directorate of Competition in the Brussels Commission at the time. Their theory was that since one of the fundamental principles of the EEC Treaty was to build up an economic system of undistorted competition within an integrated market, once a patented product had been put on the market in one of the member states either by a patentee or his licensee, the product could then be freely sold in any other member state notwithstanding the existence of a parallel patent vested in the same patentee. It should be observed that the Koch-Froschmaier doctrine could not have been applied to reverse the decision in the *Parke Davis* case, since no parallel patent existed in Italy from which the Dutch patentee had already derived an advantage, either directly or through his licensee.

So far as mergers are concerned it should be noted that the provisions of U.K. law relating to these which I have described are very much more detailed than any contained in the Rome Treaty. In fact, there is no specific reference in the Rome Treaty to mergers and acquisitions. There is no requirement for *a priori* approval to mergers in the Rome Treaty such as that which is contained in the U.K. Monopolies and Mergers Act of 1965. At one point, the Brussels Commission obviously had under consideration the possibility of applying Article 85 to restrict

²⁴ Koch & Froschmaier, *Doctrine of Territoriality in Patent Law and the European Common Market*, 9 *IDEA* 343 (Summer, 1965).

mergers which they thought would reduce competition. When the Agfa-Gevaert merger took place, the Commission approached the two companies concerned with a request for particulars on the assumption that Article 85 was applicable to this situation. However, after the appointment and report of a Professorial Committee to advise the Commission on its powers under Article 85 in respect of mergers, it was at length acknowledged that the Article would not apply to the act of merger itself, although in some circumstances it could apply to subsequent agreements and arrangements between the parties involved. Article 86 has, however, been applied by the Commission in two cases. The first concerned the German firm GEMA which deals in copyrights of musical works. The Commission has found that GEMA has a dominant position in a substantial part of the Common Market and that it has abused such position by discriminating against nationals of member states other than Germany, by imposing unfair conditions on its own members by preventing the establishment of a single market for music publishers, and by exploiting its copyright position to impose unfair conditions on German record manufacturers and on German importers of tape recorders.²⁵ We now have the fascinating *Continental Can*²⁶ decision which was recently promulgated by the Commission in which the acquisition by Continental Can of a competitor is claimed by the Commission to constitute an abuse of a dominant position under Article 86 and a breach of the Treaty provisions. The decision is under appeal to the Court of Justice but there have been recent hints that Continental Can may agree to divest itself of some of its manufacturing operations in the Common Market if the Commission will accept such divestiture in settlement of the case. In one sense, it will be a considerable disappointment to the student of antitrust law in the Common Market if the case is settled on this basis, since there is very widespread interest in knowing which way the Court of Justice would decide on the facts of the *Continental Can* case. One most interesting feature of the case is the claim made by the Commission that the mere reduction of competition by acquiring a competitor can be an abuse of a dominant position. Another interesting feature is the definition which the Commission has laid down of what constitutes a dominant position, namely, the ability of an enterprise to disregard competitors, buyers or suppliers, or to determine prices, or to control production or distribution of a substantial proportion of the relevant goods. The finding of the Commission as to what may constitute an abuse is in fact in direct contradiction to the conclusions of the Berkhouwer Report to the European Parliament, which stated that an enterprise which enjoys a dominant position and which absorbs another enterprise in the same field does not thereby infringe the provisions of Article 86. In fact, it was partly because of this conclusion that the Report recommended the adoption of a system of prior notification in the case of mergers and the grant of authority to the Commission to prevent a merger which

²⁵ *Re GEMA*, 2 CCH COMM. MKT. REP. ¶ 9438 (1971).

²⁶ *Continental Can*, 2 CCH COMM. MKT. REP. ¶ 9481 (1971).

would result in control of more than twenty per cent of the relevant market passing into the hands of one enterprise.

III

THE IMPACT ON COMPANY LAW

I would like to say a few words about the legal implications of British entry into the Common Market so far as concerns the field of company law. In this connection, I hope you will not consider that I am being chauvinistic if I emphasize two facts concerning companies and company law in the United Kingdom. The first is that the possible impact of Community law on British companies is a matter of utmost concern to the United Kingdom simply because there are far more companies in the U.K. than in the whole of the rest of the Common Market. There were well over half a million companies on the Register in 1971. The U.K. has more quoted companies than the other members of the Common Market combined. There were 3,300 quoted companies in the U.K. on December 31, 1971, whereas there were only 2,500 in Germany, France, Italy, Holland, Belgium, and Luxembourg together. The market capitalization of U.K. quoted companies on December 31, 1971, was 50.2 thousand million pounds compared with 34.7 thousand million pounds in the six member states of the Common Market. The U.K. has a far greater capital market than any that exists in the rest of Europe.

The second point I would like to make is that company law in the U.K., where the joint stock company originated, is in my view more flexible than any other system of company law in the Common Market, or indeed in Europe. For instance, there are no requirements as to nationality of shareholders or officers of a U.K. company. There are no requirements as to minimum capital, or as to the ratio between debt and equity capital. There are no rules as to workers' participation in management. Although there are very full and detailed requirements as to the form and content of Prospectuses and Offer documents, which are of course essential from the point of view of protection of the purchasing public, there is no such body as the SEC, although there is a self-regulatory body known as the Panel on Takeovers and Mergers which is responsible for enforcement of the City Code on Takeovers and Mergers and which has as its ultimate sanction the power to deprive an offender of his ability to enjoy the facilities of the securities market.

The development of common rules for company law in the Common Market has not yet reached its final stage, but the development of ideas for the adoption of common rules in the Common Market has indeed done so. It is this which is causing some disquiet amongst bodies such as the Confederation of British Industries and professional advisers in the company field, including both lawyers and accountants. There is a fear that harmonization of company law in the EEC will take a form which would necessitate the reform of U.K. company law in a manner far from acceptable to the majority of the industrial and commercial community. Thus, for instance, we may be faced with acceptance of the Continental system of two-tier

boards, one a board of management and the other a supervisory board. We may have to accept employee participation in management on the German worker-directors model.²⁷ We may have to enact legislation requiring companies to have minimum share capitals in an amount exceeding the share capital of some seventy per cent of the U.K. companies now in existence. We may have to accept bearer shares for companies despite the objections from the taxation and exchange control points of view. We may be faced with accounting and reporting requirements which are different both as regards presentation and content from present U.K. practice. The free and competitive approach to mergers which prevails in the U.K. may have to be amended and restricted.

These fears are so real and immediate that the Council of the Institute of Chartered Accountants has issued a public statement drawing attention to the dangers that exist if the code of company law in the Community develops in too rigid a fashion. It is stressed that the proposals made by the Commission are not necessarily wrong in principle insofar as they depart from U.K. practice but that they should be subjected to full review and further consideration in the light of the circumstances and needs of the new member states before they become law.

IV

THE CIVIL LAW BOGEY

Much has been said, particularly by the anti-marketeters, of the effect of British entry into the EEC on what is usually described in emotive tones as "the heritage of the Common Law." Speeches have been made and articles written in which it is implied, if not stated specifically, that entry into the Common Market by the United Kingdom will mean that the Magna Carta might just as well not have been signed, the Bill of Rights enacted, or the Writ of Habeas Corpus evolved. This is nonsense, of course. So is the suggestion that we will all soon be living under the Napoleonic Code. It is sometimes forgotten that a large portion of the United Kingdom is in fact a Civil Law country, namely, Scotland. Moreover, Community law will have virtually no impact on large areas of the law, particularly those which most affect the individual, such as family law. In fact, where Community law will have most impact is in branches of the law which have developed comparatively recently to meet the needs of modern business communities, such as company law, patent law, transport, communications, and antitrust. In these branches, differences between Civil Law and Common Law are comparatively slight, because the needs of modern business communities do not differ greatly.

²⁷ Suggestions from the Brussels Commission already indicate the likelihood of such action. Without uniformity throughout the Common Market on worker-directors, countries where they are required might find their investors transferring to countries where participation by workers in management is not mandatory. Such an unequal investment situation is not acceptable under EEC regulations. It is doubtful that Germany and Holland will relinquish their worker-director policies. Consequently, the other states may have to adopt the German model.

It must, however, be accepted that Continental statutes tend to be drafted in broad terms to emphasize points of principle as opposed to matters of detail, whereas enactments of the British Parliament strive to achieve great precision of language and to cover points of detail as well as of principle. Whether they always succeed is another matter. It is also true that the structure of the three Community Treaties differs from that of U.K. statutes in that they are drafted in more general terms and therefore leave more scope for judicial interpretation. However, it is felt that there are three reasons why the difference in construction between the Treaties and existing U.K. legislation will be unlikely to cause any great difficulty. First, the Treaty provisions must meet the test of clarity before they can have direct internal effect in the member states, according to the European Court of Justice. Secondly, the U.K. courts will be concerned more with regulations issued by the Commission than with the Treaties themselves, and the regulations are drafted in greater detail and with greater precision. Lastly, regulations, directives, and decisions of the Commission must be fully reasoned and must contain preambles referring to any proposals or opinions which the Treaties require to be obtained before their promulgation and may be interpreted in the light of these preambles.

Finally, it must be recognized that the interaction between Community law and English law will not be only one way. English lawyers will soon be taking part in the framing of Community regulations, directives, and decisions and these will have to pay regard to English law relating to techniques of construction. English judges will be appointed to the Court of Justice, and the U.K. will appoint one of the three Advocates-General of the Court. Each system will be bound to have some effect on the other, and it is hoped for the benefit of both.