COMPARATIVE LAW of MONOPOLIES

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Comparative Law of Monopolies

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Responsibility for the errors, of course, resides entirely in the writer.

Foreword

The main object of this work is to analyse and compare the laws on monopolies and mergers in the United States, the European Community, the Federal Republic of Germany and the United Kingdom. It is not possible to explain the rules concerning monopolies and mergers outwith the context of the rules on restrictive arrangements, or restraints of trade, to use the American nomenclature; many of the concepts under which activities of a dominant firm may be treated as monopolistic derive directly from the categories of prohibited conduct under the cartel provisions of antitrust and competition law. Therefore, the work treats, in some detail, Section 1 of the Sherman Act, Article 85 of the Treaty of Rome, Section 1 to 21 of the German law against Restraints of Competition and the UK Restrictive Trade Practices Acts. It has not, however, been the intention, nor has it been possible, given space considerations, to treat the cartel provisions comprehensively.

In the main part of the book, Part 2, I have treated the control of monopolies and mergers on a country by country basis. Part 3 attempts to examine and compare the concepts in each of the four jurisdictions. In many respects this is the most important and novel feature of this work. By comparing and contrasting the several material concepts of monopoly/dominance, abusive conduct and merger control it is to be hoped that both national standards and the current objectives of antitrust policy will be more clearly understood.

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D. M. Raybould
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PART 1

INTRODUCTION

The history of thought on monopoly control can be traced back as far as India to a time some centuries BC. In the later Roman Empire a relatively advanced set of prohibitions on price-fixing are to be found in the Constitution of Zeno. The development of the English common law between the thirteenth and the nineteenth centuries contains much illuminating material concerning monopoly privilege obtained by grant of the Crown and, latterly, concerning the presumption that private restraints of trade were contrary to the public interest.[1] It is, however, in the appearance of statutory control of cartels and monopolies, first in the United States, later in Europe and elsewhere, that the modern concepts have been developed. It is with the modern law of monopolies in the United States, the EEC, the Federal Republic of Germany and the United Kingdom that this work is concerned.

Antipathy to monopoly in the United States can be traced to the period shortly after the establishment of the first settlements when strong objection was made to the grant by government of exclusive privileges.[2] This may have represented an early manifestation of the anti-monarchism which led, finally, to the War of Independence. This objection to monopoly may be thought to have features in common with the opposition that developed under English common law and among the classical school of economists to commercial privileges within the dispensation of the Crown. Exceptions were made in America and in England for patents to inventors.[3] It is to be noted, however, that the Constitution of the United States does not contain an express prohibition on monopolistic privileges, despite Jefferson's advocacy of such a provision.

Public opposition to monopoly manifested itself in the congressional debates on the estabishment of the Bank of United States in 1791, and in 1831 President Jackson vetoed the renewal of its charter on the grounds that it represented a 'nobility system' closely linked with 'Manufacturing Monopolies'.[4] The view that all corporations were monopolies was popular in the United States, partly because most were incorporated by special legislation up to the date of the Civil War; many viewed those who obtained

1. See D.M. Raybould, *The Development of Thought on Public Control of Monopolies* (Graham & Trotman, 1988).
2. Letwin, *Law and Economic Policy in America* (1965), p.59, refers to a declaration of the Massachusetts colonial legislature of 1641.
3. id., p.60.
4. id., pp.61–2.

the necessary statutory authority as having obtained unjustifiable privileges.[5] By the time of the Civil War the hostility to corporations had largely been blunted by the limitations upon the privileges granted on incorporation and by making this form of business organisation generally available.

After the Civil War the traditional concern with monopoly focused upon the wealth and power enjoyed by many large corporations.[6] Criticism of monopolies became more specific and centred upon the economic abuses perceived to be the result of the practices of some corporations.[7] During the 1880s, the attention of critics focused on combinations of industrial firms which had come to be characterised, whatever their legal form, by 1890, as trusts. The term 'trust' derives from the innovation of the attorneys of the Standard Oil Company in meeting its organisational problems. To overcome the limitations of its Ohio charter, which prohibited ownership of property outside the state or the stock of another company, Standard Oil's associates initially placed the legal management of the properties acquired outside the state with an amenable trustee; in 1882 all the properties and stocks of all companies within the Standard Oil 'group' were transferred by their owners to nine trustees, the owners being issued with trust certificates in return.[8] Other prevalent forms of combination, however, attracted the general reprobation attaching to 'trusts'. In particular, these included temporary cartels and more permanent arrangements that bear some resemblance with the British trade association.[9]

Although many other companies and institutions were attacked as monopolies in the years after 1880, the Standard Oil Company became the favourite target of the anti-monopolists. But the practice of trust-building was accelerating; cotton, linseed oil, envelopes, salt, cordage, oil-cloth and numerous other industries became more concentrated by adopting this legal form of association.[10]

By 1888:

> [t]he general disposition of the public was not in doubt. There were numerous objections to the trusts. . . . Trusts . . . threatened liberty, because they corrupted civil servants and bribed legislators; they enjoyed privileges such as protection by tariffs; they drove out competitors by lowering prices, victimized consumers by raising prices, defrauded investors by watering stocks, put labourers out of work by closing down plants and somehow or other abused everyone.[11]

The public sought a remedy by law to destroy the power of the trusts. The alternative suggestion that government should acquire the property of the trusts and operate them as publicly owned assets had little support.[12] The result of this agitation was the passing

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5. id., p.63. Some corporations were exempted from taxes and given public subsidies in addition to the more common features of incorporation such as long life and limited liability.
6. Letwin cites the remarks of Catron, J., in *Ohio Life Insurance Co. v Debolt*, 16 HOW (U.S.) 416, 422 (1853): '. . . the vast amount of property, power and exclusive benefits, prejudicial to other classes of society, that are vested in and held by these numerous bodies of associated wealth.' Also Cloud, *Monopolies and the People* (1873), p.259: '. . . the rapid concentration of the whole political, commercial and financial interests of the country in corporations and other monopolies.'
7. Opposition by farmers to, in particular, the railroads was coupled with demands for their regulation by government, Letwin, op. cit., pp.67–9.
8. D. Dewey, *Monopoly in Economics and Law* (1959), p.141, points out that other legal structures, e.g. vesting properties in a corporation formed in another state, would be equally effective.
9. id., p.141.
10. Letwin, op. cit., pp.69–70.
11. id., p.70.
12. id.

of the Sherman Act. The legislative history of the statute is complex.[13] Congress was reacting to a variety of often conflicting political opinions that joined in loose alliance to attack the 'trusts'. The bill brought to Congress by Senator John Sherman in 1888 was brought before the Senate for debate in 1890.[14]

> Sherman praised his bill. He began by explaining its political and legal theory. It was intended, he said, to destroy combinations—not all combinations, but all those which the common law had always condemned as unlawful. It was not intended to outlaw all partnerships and corporations, though they were by nature combinations. The corporations had demonstrated their usefulness by the vast development of railroads and industry and Sherman added—bearing in mind the lingering prejudice against them—that as long as every man had the right under general laws to form corporations, they were 'not in any sense a monopoly'. But any combination which sought to restrain trade, any combination of the leading corporations in an industry, organized in a trust to stifle competition, dictate terms to railroads, command the price of labor, and raise prices to consumers, was a 'substantial monopoly'. It smacked of tyranny, 'of kingly prerogative', and a nation that 'would not submit to an emperor . . . should not submit to an autocrat of trade'.
>
> Sherman went on to say that all such combinations in restraint of trade were prohibited by the common law, wherever it was in force; it had always applied in the states, and the 'courts in different States have declared this thing, when it exists in a State, to be unlawful and void'. Senator Cullom interrupted to ask: 'Everywhere?' 'In every case, everywhere', Sherman replied, and went on to list the recent decisions supporting his view. He first read the full opinion of the Michigan Supreme Court in the case of *Richardson v Buhl*, which had a double attraction for him. It struck at the Diamond Match Company's monopoly, and it branded as a monopolist General Russel Alger, one of his chief rivals in 1888 for the Republican presidential nomination, whom Sherman blamed for his unexpected defeat and publicly accused of having bribed delegates. Sherman then cited other cases, which if they did not hold the same personal interest for him, all supported the view that monopolies and combinations in restraint of trade were unlawful and void in courts of common law. But, he continued, the trusts were threatened by no similar law in the Federal courts and a statute was needed to enforce the common law that already applied in state courts; once again, he insisted that Congress was authorized alike by the commerce and revenue clauses of the Constitution to regulate combinations affecting interstate and foreign commerce; he concluded that his bill, based on this Constitutional power and declaring the common-law rule, would effectively destroy the power of trusts.[15]

After much disputation the Judiciary Committee of the Senate produced a bill of its own which, after conferences between the two chambers, was finally passed into law on July 2 1890. Much debate occurred during its passage and continues to this day on the questions as to whether the Sherman Act was largely restating the hostility of the common law to monopolies and restraints of trade and as to the underlying policy objectives of the Congress.[16]

Despite the arguments and the conflicting interpretations by the courts, the language of the Sherman Act is of constitutional breadth and has remained the central antitrust provision of United States law ever since. Section 1 prohibits contracts, combinations or conspiracies in restraint of trade or commerce. Such arrangements are declared to be illegal and to constitute a felony. Section 2 condemns as a felony acts to 'monopolize or attempt to monopolize or combine or conspire with any other person or persons, to

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13. For the background to the Sherman Act, see Letwin, op. cit., pp.53–99; Dewey, op. cit., pp.109–57; H.B. Thorelli, *The Federal Antitrust Policy* (1954), pp.164–232.
14. Letwin, op. cit., pp.87–90.
15. id., pp.91–3 (footnotes omitted).
16. id., pp.95–9.

monopolize any part of the trade or commerce among the several States, or with foreign nations.'

In Europe the enactment of public statutes dealing with cartels and monopolies did not occur until after 1945. The climate of the 1920s and 1930s in England had been favourable to price-fixing and production limitation by agreement between firms.[17] Cartel activity was not merely lawful[18] but was encouraged by government.[19] The scale of the depression and in particular the level of unemployment led to widespread criticism of the neo-classical approach with its strong preference for government inaction in the economic sphere. John Maynard Keynes was to influence a generation with his hostility to conventional *laissez-faire*. The maintenance of full employment and economic stability was thought to require the use of fiscal policy to swell aggregate demand. In sharp contrast to the classical and neo-classical schools, Keynes thought the unregulated market system could not optimise the use of resources, and active government intervention in the economy, including the manipulation of public expenditure as a counter-cyclical force, was necessary.

The 1944 White Paper 'Employment Policy' reflected to some extent a change in the climate of opinion, which had moved in favour of some form of control of cartels and monopolies.[20] The first modern legislation was the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948 which set up the Monopolies and Restrictive Practices Commission, a body invested with powers to investigate particular markets and to inquire into the general effect on the public interest of certain practices. The Restrictive Trade Practices Act 1956 created a registration system for certain restrictive agreements relating to goods. Legislation creating the power to control certain mergers was enacted in 1965 and consolidated in the Fair Trading Act 1973.

The European Community consists of a group of institutions created by treaty between sovereign nations, with a primary objective of a large degree of economic and political integration between the Member States. The EEC is much more than a mere customs union under which all trade impediments between members are intended to be abolished and a common external tariff on imports accepted. The Common Market was set up to create a single market with free-factor mobility in, *inter alia*, capital, labour and enterprise. In the words of the preamble to the Treaty of Rome of 1957, the EEC was to 'lay the foundations of an ever-closer union among the people of Europe and by pooling resources to preserve and strengthen peace and liberty'.

Among the specific objectives set out in Article 2 of the Treaty is 'the establishment of a system ensuring that competition in the common market is not distorted'. Articles 85 and 86 of the Treaty set out the basic provisions of the competition law of the Community which forms part of the domestic law of the Member States. Article 85 provides that agreements, decisions or concerted practices between enterprises which affect inter-Member-State trade and where competition is prevented, restricted or distorted are, as a general rule, prohibited. Article 86 prohibits actions which constitute an abuse of a dominant position, where inter-Member-State trade is affected. The detailed rules of the competition law are contained in numerous regulations, directives, decisions and notices, and in judgments of the European Court.

In the Federal Republic of Germany also, the post-war period has witnessed the development of anti-cartel and anti-monopoly laws. The Law against Restraints of Competition[21] generally prohibits broad categories of restrictive agreements while

17. p.393 et seq. infra.
18. id.
19. id.
20. Cmnd. 6257 of 1944.
21. 1953, amended in 1965, 1973, 1976 and 1980.