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British Antitrust Response to the American Business Invasion*

Arnold B. Kanter†
Stephen D. Sugarman‡

Call it fear of American business takeover;¹ call it reaction to the American challenge;² call it what you like: There is an unmistakable feeling in western Europe that modern, dynamic American enterprise, once so warmly embraced for its capital, products, and management techniques, may no longer be such a good thing, at least not for Europeans. The cries of alarm over American investment in Europe tend to center around the theme of firm size. American giants, it is said, can afford massive outlays for research and development, reap economies of scale in marketing and management as well as plant size, and command better terms in financial markets. Moreover, the natural advantage of a huge home market as a springboard into Europe and the artificial advantage of substantial United States Government backing (particularly through subsidized research in the most technologically advanced industries) are viewed as factors precluding European companies from matching American performance and capabilities through competition in the marketplace. As a result many European governments are being asked to respond to the size gap.³

Antitrust is concerned with size, with economic power; and having gone to Europe to study foreign antitrust systems, we quickly realized that by broadening our scope slightly we would be in the thick of the American business-invasion controversy. Hence this Article: the British response to the American invasion through what might be termed "competition policy"

* Numerous businessmen, lawyers, government officials and academics have been most generous with their interviews. We hope their confidences have been protected, their views not misrepresented, their anonymity appreciated, and their help, inadequately acknowledged here, understood to have been substantial. However, special counsel given by Mrs. Valentine Korah of the Law Faculty, University College, must be singled out for our express appreciation.

† B.A. 1964, Brandeis University; J.D. 1967, Northwestern University; LL.M. 1968, London School of Economics and Political Science. Member, Illinois Bar.

‡ B.S.B.A. 1964, J.D. 1967, Northwestern University. Member, California Bar.

1. See J. McMILLAN & B. HARRIS, *THE AMERICAN TAKE-OVER OF BRITAIN* (1968).

2. See J. SERVAN-SCHREIBER, *THE AMERICAN CHALLENGE (LE DÉFI AMÉRICAIN)* (1967). This book by the editor of *L'Express* has caused more of a storm than any of the many diatribes recently released on the subject. See also Eglin & Bambridge, *The Great American Takeover*, *The Observer* (London), July 21, 1968 at 10, col. 3.

3. There may also be growing resentment (and calls for retaliation) based upon what some view as American interference with efforts of European firms to grow, as evidenced by the recent involvement of the Antitrust Division of the Department of Justice in three merger proposals: KZO's (Holland) and International Salt, British Petroleum and Standard Oil (Ohio), and the American holdings of the two Swiss pharmaceutical giants, CIBA and Geigy. See *BUSINESS INTERNATIONAL*, Oct. 10, 1969, at 323.

—antitrust and related tactics. The British response deserves study for a number of reasons: American investment in the United Kingdom is greater than in any other European nation;⁴ the variety of antitrust and related techniques employed in Britain illustrates a range of models, many of which may be applicable elsewhere; and finally, the most important British pro-competition measure may only recently have come to light. At the outset we think it important to note that Britain is pursuing several different economic goals through its competition policy; accordingly, anyone who simply labels it anti-American is making an indiscriminating accusation.

This Article is organized around three areas of traditional antitrust concern: mergers, dominant market position, and restrictive agreements. In each area we focus upon the manner in which the British have tried or may try to confront the American onslaught. First, merger policy is examined from two aspects: selective use of merger control to benefit national⁵ interests, and affirmative stimulation of mergers designed to strengthen British firms facing domestic competition from international concerns. Second, direct confrontation of American giants through monopoly regulation is surveyed. Finally, the sanctioning of cartels in export and selected domestic settings is scrutinized. We shall try to present a clear picture of this admittedly narrow part of the saga of the American business invasion in Britain. Hopefully, our largely episodic approach, designed in part to tie the analysis to specific and familiar industries, will highlight British competition policy in a way that will facilitate the completion of the story of the British reaction by those versed in its other aspects.

I. MERGER POLICY

One way to close the size gap is by promoting significant horizontal mergers. Although these amalgamations represent the most direct threat to competition, where companies are combined in order to battle the American foe, competition between equals is furthered. Although such combinations may produce tight oligopoly, the alternative may be tight oligopoly by British attrition, culminating with the American company in a relatively stronger market position.

Yet the imperative to "merge," or to "rationalise"⁶ as the British say, is

4. American investment in Britain in 1968 totaled \$6.7 billion; Germany was the second greatest recipient of American investment with \$3.8 billion. *BUSINESS INTERNATIONAL*, Nov. 21, 1969, at 364.

5. In this Article we use the term "national" to mean pro-British in the sense of British ownership; other terms will be used to describe policies or actions that might be considered in Britain's best interest but involve support of American or other foreign-owned interests operating in Britain or competing with British-owned firms.

6. The term carries the connotation of pruning wasteful duplication in processes, research, products, or employees. Yet this emphasis on efficiency has turned it into a dirty word for unions; rationalisation means layoffs. Union pressure on the Labour Government, however, has made it difficult for merged firms in fact to lay off workers.

too facile an approach. Consider areas where there is no American might—the bulk, if not the most crucial part, of the economy. Flexible tools that can stimulate some mergers and thwart others are certainly the order of the day. And so the British have adopted a basic antitrust law to prevent mergers that are against the “public interest” and at the same time have allocated resources for the expansion and reorganization of industry through mergers where increased firm size is viewed as a national need.⁷ Despite the potential squeeze play they represent, the two policies, as will be explained, have been far from uniformly anti-American in their application. Like most things dependent upon many factors, the picture is mixed.

A. Merger-Control Policy—“*The Toothless Wonder*”

We turn to the British antitrust policy for limiting mergers; our inquiry centers on national (British) bias, impact upon American interests, and evaluation of the current efficacy of the policy. A muckracker's paradise would be discovery of the following pattern of enforcement: (1) regular attacks on American acquisitions; (2) attentiveness to the needs of the British consumer by preventing British mergers having a primarily domestic impact; (3) acquiescence, however, to mergers, regardless of the local impact, when important British international interests may be served. Only the third of these, however, may be asserted with any confidence. Hence, while the weaponry exists, Yankee paranoia today, at least, is premature.

1. *Mechanisms and processes for merger control—visible and invisible.*

Under the Monopolies and Mergers Act of 1965,⁸ the Board of Trade⁹ may, at its discretion, refer any significant merger¹⁰ to the Monopolies Commission.¹¹ The Board is given no statutory guidelines to assist it in making

7. Boundaries of the two policies have not been well delineated, however; friction was evident throughout 1968 and 1969 between the pro- and the anti-merger interests. Resolving the divergent attitudes, while not too difficult in theory, can become very thorny in specific cases. See text accompanying notes 110–137 *infra*.

8. Monopolies and Mergers Act 1965, c.50 [hereinafter cited as 1965 Act]. The Act develops further the U.K. dominant-position policy found initially in the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948, 11 & 12 Geo. 6, c. 66 [hereinafter cited as the 1948 Act], and modified in the Restrictive Trade Practices Act of 1956, 4 & 5 Eliz. 2, c. 68 [hereinafter cited as 1956 Act].

9. The Board is a Ministry important in many economic fields. Its President is a leading member of the Cabinet.

10. Merger is loosely and broadly defined; the 1965 Act applies when “two or more enterprises, one at least carried on in the United Kingdom or by or under the control of a body corporate incorporated in the United Kingdom, have . . . ceased to be distinct enterprises . . .” 1965 Act § 6(1)(a). A merger is significant if the result includes control over one third of any relevant U.K. market in the supply of goods or services, *id.* § 6(1)(b)(i), or “the value of the assets taken over exceeds five million pounds [\$12 million],” *id.* § 6(1)(b)(ii).

11. See generally, C. ROWLEY, THE BRITISH MONOPOLIES COMMISSION (1966). The Commission members serve part-time. They are appointed by the President of the Board of Trade for expertise in various areas of commercial and academic life and sit in panels of eight to ten for each merger case. The Commission's other major function is making substantive decisions in the “monopolies” cases, applying the 1948 Act provisions on dominant economic power. See Part II *infra*. The following description accompanied the announcement of seven new appointments to the Monopolies Commission

its referral decision; however, in mid-1969 the Board itself issued a checklist of important considerations in a referral decision.¹² If the Board decides not to refer, the merger goes through without challenge and, since the Board generally makes its decision quickly, without a very thorough consideration. If a reference is made, the Commission conducts investigations at which interested persons and members of the public can testify; it then publishes its report on whether, in its view, the merger "operates or may be expected to operate against the public interest."¹³ The Commission's findings, along with its recommendation for a course of action if the merger is seen to operate against the public interest, are returned to the Board. The Board of Trade then has complete discretion to decide whether any action is to be taken and, if so, whether the Commission's recommendations will be followed in whole, in part, or not at all.

Thus, while the Commission makes the substantive decisions on the merits of the "public interest" issue, the Board has both prior-screening power and eventual control over remedies. This procedure means that the 1965 Act is administered by a mixture of visible (public) and invisible (closed-door) decisionmakers, each of whom, in theory, wields potent weapons. The visible process, the Commission's operations, runs from reference through recommendation, while the invisible process, which goes on inside the Board, occurs both before and after Commission action. It is important to realize that the real power lies in the invisible processes. If no reference is made, the matter is over—the Commission has no power to institute proceedings. Moreover, even if a case is referred, the decision of the Board rather than the recommendations of the Commission determines the final result.

The political-organ-independent-body dichotomy between the Board and the Commission is akin to that between the American Congress and

in 1969: "The monopolies legislation provides that at any time the Commission may have up to 25 regular members. With the new appointments the current membership of the Commission will stand at 20. The appointments of several members have expired in the past few months, and this has provided the occasion to maintain the strength and widen the experience of the Commission by appointing these new members. The Commission, with the new members, will include five industrialists representing a wide range of industry, one merchant banker, three management consultants from leading companies in this field, four economists with expertise in different but relevant branches of that subject, two senior trades unionists, two lawyers, one member of the Co-operative Movement, one stockbroker, one former senior civil servant." 196 Bd. TRADE J. 744 (1969).

12. BOARD OF TRADE, MERGERS—A GUIDE TO BOARD OF TRADE PRACTICES (1969). However, the document represents little more than some generalized concepts in line with the overall economic thinking for the Labour Government: for example, whether the efficiencies created by a merger outweigh the loss of competition and the nature and character of remaining competition. Moreover, because one must contend with the intervention of the Industrial Reorganization Corporation, *see* text accompanying notes 76-110 *infra*, and with the national planning goals of other segments of government (for example, the Ministry of Technology in the textiles industry), and because of other factors, such as balance-of-payments considerations, the guidelines necessarily take on different meaning for different companies that might be called upon to justify their merger plans.

13. 1965 Act, § 6(2).

courts. The Board's political nature is important because its ties to the party in power will necessarily affect both the frequency with which it elects to refer mergers to the Commission and its selection of cases. Similarly, it must be sensitive to various political pressures in its regulation of remedies. Thus, the Board's sensitivity means that its practice regarding the reference of American acquisitions should reflect British political attitudes toward the American-takeover problem. In short, the political nature of the Board magnifies the importance of trying to understand and analyze the invisible process; to concentrate simply on the Commission's decisions would capture but a small slice of the merger-control policy.

With this outline of the merger-control system in mind, we will summarize some of our main findings before examining the system's operation in some detail. The Commission's public-interest yardstick, while given no statutory definition, is surely capable of swatting American hands attempting impolite grabs for part of the British market. As yet, this has not happened. The Commission simply has had no meaningful opportunity to consider the public-interest standard as a direct anti-American stand; the Board has referred only one case of an American takeover. Yet we cannot attribute the Commission's lack of cases involving American takeovers to any dramatic reluctance on the part of the Board to refer American takeovers. The simple truth is that American acquisitions since 1965, when the merger-control law went into effect, have been almost unimportant. As a result, we believe that while the direct anti-American impact of the 1965 Act, at both its invisible and visible levels, has been slight so far, its potential has hardly been tested.

2. *The safe life of the dieting vulture.*

The British merger-control law as a device to help meet the American challenge may be a case of closing the barn door after the horse is *inside*. Despite talk of an American runaway, we have found little actual evidence of American enterprises trying to pick up big trophies on the British scene since the adoption of the merger-control law. As of the end of 1969, we have unearthed only 13 major merger matters¹⁴ directly involving American firms or their subsidiaries important enough for the Board even to have considered referral to the Commission.¹⁵ At the same time we have not learned of even one proposed American acquisition that the British merger policy

14. We say merger "matters" because some failed to materialize for other than U.K. antitrust reasons.

15. Though beyond the scope of this Article, the impact of U.S. antitrust law may have been one significant factor. See testimony of Edwin M. Zimmerman, Acting Assistant Attorney General, Antitrust Division, in *Hearings on S.R. 191 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., pt. 1, at 485, 491 (1966).

has prevented. Only one matter was referred, and that one the Commission approved. This combination of facts is the foundation from which we have concluded that the American corporate birds of prey are not making large forays into England and that this may be the most relevant reason why open season on them has not been declared.

These facts alone, however, may not be adequate to support our conclusion as to the absence of impact of the 1965 Act on American activities, as the reader attentive to the processes of the 1965 Act will surely argue. He will want to know more about the invisible process and will want to be able to decide for himself whether more than the 13 major U.S. merger matters we uncovered in fact have existed. He will also want to know something about the 13 cases actually discovered. These were concerns of ours as well, and we take them up next.

Extent of the invisible system. In attempting to evaluate the extent to which the policy of the merger-control law or the administration of the invisible process may have prevented American takeovers of which we are unaware, we begin by considering whether some mergers may have been killed by lawyers' advice concerning the British antitrust risks. We seriously doubt if many, even any, were; not one instance was reported to us in the course of our interviews. It is an important point, for in the functioning of American merger law, lawyers are probably the most important law enforcers. Yet it is a point upon which we have little more to offer. The Commission's interpretation of the public-interest standard in cases involving all-British mergers simply has not raised a red warning flag in the eyes of solicitors (as, for example, Supreme Court decisions have in the eyes of American lawyers). Hence, because of the substantive posture of the law, we would expect those advising on proposed American takeovers in England to be chary about recommending against the acquisitions.

Also important is the fact that lawyers in the U.K. advising on proposed mergers are permitted to bring important matters before the Board's staff for informal discussions. The now common practice of seeking informal clearance of a merger with the Board is nowhere mentioned in the 1965 Act and apparently was not contemplated at the start, but it has decidedly become a very important part of the preresearch segment of the invisible process. Our interviews revealed that the practice, widespread among lawyers handling British companies, has been used by two firms of solicitors representing numerous American clients in the rare instances of American takeovers that they have considered. The availability of such talks with Board officials further supports our notion that probably no American takeover has been halted in a lawyer's office because of British antitrust risks. However, the procedure of having informal talks with the Board deserves more attention and it raises the next important question: How many mergers

have been halted by mere threats of reference to the Commission during these informal discussions between the Board and the parties?

Three positive things might come out of such informal talks. First, the Board might indicate that it planned to refer the proposed merger, the parties would proceed nonetheless, and the matter would be considered by the Commission. Second, the Board might, by its threats of reference, force the parties to abandon the idea. To the extent that the Board is able to quash merger plans secretly, it may be doing more than we are aware of to stem the American invasion. Third, the Board might agree not to refer the merger, thereby giving it its informal approval. The latter two possibilities need further explication.

Since this part of the process is "invisible," typically forever unreported, it is difficult to know much about it. We have inquired in our interviews and while there were some rumblings about some obstinance on the part of some Board staff members, no actual cases of threats were cited or accusations made, with one exception.

The one acknowledged example of the use of threat of reference hardly turned out to be anti-American.¹⁶ Imperial Tobacco, the British cigarette giant, sought to acquire Smith's Crisps, which held a strong position in the potato-chip market. Imperial, however, was already a potato-chip power through its Golden Wonder brand; the Board feared monopoly. Ironically, with Smith's clearly in the market for a buyer, the eventual acquiring company turned out to be the American food giant, General Mills. Nonetheless, one must not discount this threat of reference as an isolated example of the way mergers are stopped (the Board is noncommittal); this power is very worrisome in theory¹⁷ because of its potential for being brandished at prospective American acquirers. At present no further information is available to outsiders.¹⁸ In short, we conclude that there is no reason to believe that the Board at present is stopping American takeovers through the invisible process.

The next question, then, is what American takeovers the Board permits

16. See statement by George Darling, Minister of State, Board of Trade, in 194 Bd. TRADE J. 567-68 (1968); J. McMILLAN & B. HARRIS, *supra* note 1, at 113.

17. The threat of referral is strong because appearance before the Commission involves major costs as well as publicity that a firm may not wish to risk even with a good chance of winning. This kind of low visibility decisionmaking is reminiscent of the U.S. Securities and Exchange Commission's power regarding "stop orders" that has developed into a system whereby "deficiency letters" automatically bring company compliance with suggested changes in registration statements even if the firms believe they could win on a given point in court.

18. There have been comments from many quarters that the Board informally put an end to the proposed merger of the British Viyella Mills and the American Burlington Mills. See BUSINESS EUROPE, Sept. 19, 1969, at 302; THE ECONOMIST, Aug. 2, 1969, at 58. Interestingly enough, a bid for Viyella by ICI, the British chemical giant, has recently been announced. CCH COMMON MARKET REP., EURO-MARKET NEWS, Jan. 7, 1970, at 2.

Acting behind closed doors the Board has in fact stopped another proposed merger in textiles, that between Courtaulds and English Calico. This action rested, at least arguably, upon the Board's remedial powers with respect to dominant-position cases. See BUSINESS EUROPE, Feb. 21, 1969, at 64; THE WALL STREET JOURNAL, Feb. 7, 1969, at 18, cols. 1-2.

through the invisible process. As noted above, when private talks are held, the Board effectively gives a merger informal approval by agreeing not to refer it to the Commission. In essence, it is constantly making this decision whenever it learns of an important merger by any means and decides not to refer it.¹⁹ Hence an important and complementary aspect of the preference invisible process is the government go-ahead. The overwhelming majority of all the important mergers that have taken place since the 1965 Act went into effect were approved without reference to the Commission.

The Board publishes information identifying a great number of the mergers that it has considered (either in informal talks or on its own after learning of the merger) and has decided not to refer.²⁰ This publication is the primary source from which our list of 13 proposed American takeovers comes. Four problems are raised by our method. First, since the Board can consider and give informal clearance only to those mergers about which it learns, are there some secret American acquisitions? We are aware of none unknown to the Board. Secret mergers are discouraged by the 1965 Act provisions that give the Board 6 months after the time it should reasonably know about a merger to decide whether to refer it to the Commission.²¹

Second, does the Board know more than we do? It does, and this represents a shortcoming in our analysis. Not until May of 1966 did the Board begin noting publicly the names of firms involved in mergers that it decided it would not refer; at the same time, however, the Board qualified its practice by agreeing not to reveal some approved mergers discussed in confidence.²² These two limitations are not conclusive. We estimate that confidential matters—considered and approved by the Board, but not reported in the *Board of Trade Journal*—numbered decidedly fewer than 30 between May 1966 and May 1968, although a goodly number could have involved American interests.²³ Between August 1965 and May 1966, the Board considered

19. Although the 1965 Act contains no such requirement, the practice has grown up for parties to huddle informally with the Board about the antitrust issue before the merger is put through. Typically, the parties will notify the Board when they have reached an agreement to combine. Since the involuntary stock-market-takeover approach has come strongly into vogue—through secret share purchases or tender offers—the Board, in a growing number of cases, is informed when and in the same way the financial world is. In either case the matters considered go into the Board's statistics, the highlights of which are reported from time to time.

In the following textual discussion of the Board's decisions not to refer particular mergers, no distinction will be made between matters that were informally discussed with the Board and those that were not.

20. In its weekly *Board of Trade Journal*, the Board publishes unsigned notices under the title "Consideration of Mergers by the Board of Trade" or "Mergers not for Monopoly Commission." The Board also publishes annual reports concerning its activities under the 1965 Act.

21. 1965 Act § 6(9).

22. Published approval of a merger is a provisional decision not to refer, based upon the facts that the Board has in its possession at the time. See 190 Bn. TRADE J. 1051 (1966). As to confidentiality, the Board states: "In order to make available a more balanced picture of the way in which the Board of Trade have discharged their responsibilities under the Act, it has been decided to publish decisions in all cases which have not been put to the Board on a confidential basis." *Id.*

23. We base this on the "nearly 250" figure reported by the Board, 194 Bn. TRADE J. 1336-37 (1968), of which we could account for 215 unreferred and 8 referred based upon prior Board releases.

72 unreported mergers,²⁴ two of which we can identify as including American firms; the bulk, however, remains a blank. Still our scouring was successful in identifying the parties to about 200 of what by September 1968 totaled 300 merger matters that the Board had examined.

We used various means, including cross-referencing Board publications with international business periodicals, in an attempt to identify the parties in the unreported merger matters. This raises a third problem, whether our identification is complete.²⁵ Fourth, there surely have been some American takeovers that have been important in some respects but that involved either too little money or too small a portion of the relevant market to be covered by the 1965 Act. These are necessarily excluded from our analysis.

From our researches, then, have emerged 13 major merger matters. Because of the shortcomings noted, we do not assert that they are the total of the major American acquisition efforts that have taken place since the beginning of the operation of the 1965 Act. However, we do believe them to represent the bulk of American takeovers. More important though, we believe this small number is strongly indicative of the fact that economic takeover through acquisition of substantial existing firms simply has not been the American pattern in Britain in the recent past.

The visible—examining American mergers. In only one of the 13 major cases involving American interests was the merger referred to the Commission. An American company, DSC, and a British company, DMC, were bidding for another British company, ADC. Acquisition by DSC would have meant a substantial (\$21 million) jingle in the British till; acquisition by DMC while carrying the speculative hope of increased British exports meant the certain loss of a DSC-ADC franchise agreement upon which ADC was heavily dependent. The Commission approved both mergers; neither materialized.²⁶ Disapproval of a British merger coupled with approval of an American one might have been indelicate.

Consider next the other 12 matters²⁷ in which the mergers were unop-

24. 191 BD. TRADE J. 1051 (1966).

25. Basically, the companies involved in the mergers were checked against lists of American firms now doing business in Britain: WHO OWNS WHOM (U.K. ed. 1967); AMERICAN CHAMBER OF COMMERCE DIRECTORY OF AMERICAN BUSINESS IN THE U.K. (1967); and the private list of Professor John Dunning of the University of Reading, which he kindly made available for viewing. At some point the definition of what is an "American" business must come into play, and this question is getting progressively more difficult to answer with the internationalization of ownership and management and the decentralization of headquarters. Today, however, the answer is still rather clear, at least with respect to most enterprises.

26. MONOPOLIES COMM'N, DENTAL MFG. CO. LTD. OR DENTISTS' SUPPLY CO. OF N.Y. AND AMALGAMATED DENTAL CO. LTD., A REPORT ON THE PROPOSED MERGERS, H.M.S.O. No. 147 (1966). This instance illustrates a second aspect of the potency of a reference: ADC opposed both mergers (though if forced to choose it preferred the American takeover) and in the delay caused by the reference was able to ward off both attempts.

27. Surprisingly, the Board seems to have ignored the takeover of Imperial Typewriter by the U.S. conglomerate Litton Industries that gave Litton a strong position in the office-equipment market. This takeover, we think, occurred shortly after the 1965 Act took effect, and it is not included in the 13. In 1969 both Monsanto and USM (formerly United Shoe Machinery) bought out minority interests

posed by the Board. Three may be disposed of quickly, one involving only a technical restructuring²⁸ and two others representing only minor acquisitions.²⁹ The other nine, however, contain aspects worthy of specific mention.

The takeover of the Agip chain of gasoline stations by Esso (Standard Oil of New Jersey) came in the wake of a Monopolies Commission investigation of petrol retailing generally, which led to a temporary ban on the further acquisition of stations by the major oil companies, including Esso. But because the Esso-Agip matter was already in process, the Commission's report was not applied to it and a new reference was not made.³⁰ An opposite result would have represented a clear anti-American discrimination, for other oil companies were permitted to complete takeovers of retail outlets in progress.

Chrysler's takeover of the dying Rootes Motors³¹ was apparently undertaken with a promise of assistance from the Industrial Reorganisation Corporation (IRC),³² the government body most responsible for encouraging British competition on an international scale through merger promotion. American capital was viewed as essential to the continued operation of Rootes and hence the employment of its workers. While a British takeover surely would have been preferred, no promising one was in the offing. Chrysler, on the other hand, was willing to absorb losses in order to break into the market with an established line of cars.

The IRC appears to have acted behind the scenes to help Studebaker-Worthington win out against the Scottish Weir company in a \$25 million battle for Worthington-Simpson, a company with which the American bidder had substantial previous ties.³³ Participation of the IRC underscored the

in their controlled British subsidiaries; such increase in U.S. investment in the U.K. is not here considered as coming by way of merger.

A possible 14th matter is the merger of British Paints (owned by Celanese—U.S.) and Berger, Jenson & Nicholson, leaving Celanese a 30% holder of the combined entity, followed by the Sherwin Williams' acquisition of the Celanese interest and its battle with the combined forces of the Reed Group (U.K.) and Hoechst (German) for control of BJN, which remains unresolved at this writing.

28. 192 BD. TRADE J. 1469 (1967) (breakup of CalTex by Chevron and Texaco).

29. TRW, Inc.'s subsidiary, Cam Gears Ltd., acquired Engineering Production (Clevedon) Holdings Ltd. See 190 BD. TRADE J. 1178 (1966). Rheem Corporation's subsidiary Rheem Lysaght acquired Blagden and Noakes. See 194 BD. TRADE J. 668 (1968).

30. See statement by Douglas Jay, then President of the Board of Trade, in 190 BD. TRADE J. 370-71 (1966).

31. Chrysler began its takeover in 1963, acquiring a minority interest amid protests. Rootes was very sick at the time, losing both its money and its chief executive, Lord Rootes. The takeover was accomplished in the spring of 1967 without resistance. J. McMILLAN & B. HARRIS, *supra* note 1, at 64-66.

The Chrysler takeover of Rootes was used to justify approval of the BMC-Pressed Steel merger when the Commission argued that BMC was responding to a possible attempt by a foreign competitor to capture one of its crucial suppliers and saw Pressed Steel's interest in the merger as a response to a possible long-term weakening in its consumer market should Chrysler-Rootes opt for its own fabrication facilities. MONOPOLIES COMM'N, BRITISH MOTOR CORP. LTD. AND THE PRESSED STEEL CO. LTD., A REPORT ON THE MERGER, H.M.S.O. No. 46, paras. 42-57 (1966).

32. The IRC made a loan to Chrysler in 1967 at the request of the First Secretary of State for the Department of Economic Affairs. See INDUSTRIAL REORGANISATION CORPORATION, FIRST REPORT AND ACCOUNTS (DECEMBER 1966-MARCH 1968), H.M.S.O. No. 252, at 17, 22 (1968).

33. BUSINESS EUROPE, Mar. 7, 1969, at 75.

belief that the merger was in the best interest of the British economy, regardless of the bidder's nationality.

Fourth was General Mills' bid for part of Smith's Crisps. Perhaps having brushed off Imperial indirectly by threatening a reference, the Board feared to say no twice, lest it be accused of creating a failing company. Hence, once again, rather extraordinary circumstances surrounded the U.S. acquisition. In short, in all four of these takeovers special considerations prevented a neat testing of the Board's reaction to the American invasion. More than anything else, they indicate something about priorities: American investment is desirable when it means shoring up a sagging part of the economy.

The excitement throughout 1968 in the tobacco field, however, presented what we will count as three fairly clear opportunities for anti-Americanism.³⁴ Around 1900 most of the important British tobacco manufacturers combined to form Imperial Tobacco to thwart entry into the British market by the powerful American Tobacco Co. The upshot was the formation in 1902 of British-American Tobacco, jointly owned by Imperial and American. The new firm was to cover world markets outside Britain and the United States, while the two owners promised to keep out of each other's domestic territory. This arrangement officially came to an end with the U.S. antitrust case against American Tobacco in 1911.³⁵ Time, however, left its mark; important entry into the U.K. cigarette market never materialized. Whether by gratuitous choice, shrewd economic judgment, or inability to break in, American Tobacco simply did not get going in England, nor did other U.S. tobacco producers.

Imperial, meanwhile, dominated the British cigarette industry. Furthermore, since 1932 it owned a large financial stake in what had become the other strong British manufacturer, Gallaher.³⁶ Under the Monopolies Act the Commission investigated the British tobacco industry and its report in 1961 recommended that Imperial dispose of its interest in Gallaher, although the Board did not attempt to enforce this. Imperial had admitted that it was maintaining its Gallaher holdings largely in the hope of warding off a U.S. takeover. Important now, although of small significance at the time, American had acquired a small share (13 percent) of Gallaher in 1962.

34. See MONOPOLIES COMM'N, REPORT ON THE SUPPLY OF CIGARETTES AND TOBACCO AND OF CIGARETTE AND TOBACCO MACHINERY, H.M.S.O. No. 218 (1961); Aris, *Will Gallaher dance for the Morris men?*, Sunday Times (London), June 30, 1968, at 27, cols. 1-5; Carrington, *Philip Morris surprises Gallaher with £92m takeover bid*, The Times (London), June 27, 1968, at 19, cols. 1-5; Jacobson & Corina, *Second US tobacco giant bids for half of Gallaher*, The Times (London), July 17, 1968, at 21, cols. 1-5; Jacobson, *City row flares as Panel censures Gallaher bid deals*, The Times (London), July 19, 1968, at 17, cols. 1-4; Jones, *Why American's blend could boost Gallaher*, The Times (London), July 17, 1968, at 25, cols. 3-6; Richardson, Searjant & Unger, *Anti-trust spark lit the tobacco battle*, Sunday Times (London), June 30, 1968, at 27, cols. 1-5.

35. United States v. American Tobacco Co., 221 U.S. 106 (1911).

36. In 1967 the British market shares were approximately: Imperial 66%, Gallaher 27%, others 7%. Corina, *American challenge in the tobacco war*, The Times (London), June 28, 1968, at 29, cols. 1-8.

In May 1968 Imperial finally sold its interest in Gallaher, separating itself financially from what had become its strong and growing competitor. Then the fun began.

On June 26, 1968 the Philip Morris Co., a U.S. concern, made a surprise takeover bid for control of Gallaher that was promptly rejected by the management, sending Philip Morris people back to consider making a higher offer. Exciting as this was, the explosion came when on July 17 American Tobacco entered the battle by simultaneously announcing that it was making a takeover attempt for 50 percent of Gallaher, that the Gallaher management welcomed it, and that it had been active in the securities market, having already increased its 13 percent holding to 28 percent. The ensuing charges and counter-charges centered on the "Take-Over Code"³⁷ and other fine points of law and ethics in the securities field. It seems that American Tobacco employed the same merchant bankers who had managed the Imperial offering and hence knew of both unplaced shares and eager institutional sellers, delighted to receive American's favorable terms and take a quick profit on their recent purchase.

However, not a word about the antitrust policy.³⁸ The Board at each of the relevant times announced that it would refer neither the American bid (eventually successful) nor the Philip Morris bids to the Commission.³⁹ The pattern in the tobacco industry was repeated again when Philip Morris made a successful bid for a much smaller British cigarette manufacturer, Godfrey Phillips. Again, the Board indicated its approval.⁴⁰

What are we to conclude? Is tobacco a special situation because of the great market share held by Imperial? Perhaps so. Or perhaps the traditional and somewhat disfavored status of the product involved is important (cigarette advertising is banned from commercial TV in Britain). It is hard to tell; if there were only a larger sample with which to work . . . but of course that is the very point—there is not.

The 1969 counterpart of the activity in the tobacco industry was the American Leasco Data Processing Corporation's bitter fight for control of Pergamon Press.⁴¹ The \$60-million takeover battle was marred by numerous

37. The Take-Over Code, administered by the Take-Over Panel, is designed to ensure shareholders fair treatment in takeover bids. The Code is not nearly as extensive as the American securities acts and, due largely to the recent "Pergamon Affair," see text accompanying note 41 *infra*, there has been agitation for expansion of the Code. See *The Observer* (London), Aug. 31, 1969, at 6, col. 1.

38. The only antitrust concern seemed to be American's risks under U.S. law, and the press reported its prior clearance with the U.S. Antitrust Division. Richardson, Searjant & Unger, *supra* note 34, at 49, cols. 1-4.

39. 195 *BD. TRADE J.* 373 (1968) (American Tobacco approval); *id.* at 157 (Philip Morris approval).

40. 195 *BD. TRADE J.* 588 (1968). See also *BUSINESS EUROPE*, Sept. 13, 1968, at 29, col. 3.

41. For much of the story see *NEWSWEEK*, Sept. 8, 1969, at 74, 76; *The Observer* (London), Sept. 14, 1969, at 1, col. 1; *The Observer* (London), Aug. 31, 1969, at 8, col. 3; *The Observer* (London), Aug. 24, 1969, at 1, col. 2; *id.* at 8, col. 3; *The Observer* (London), June 22, 1969, at 9, col. 1. See also *BUSINESS EUROPE*, July 18, 1969, at 226; *The Wall Street Journal*, June 19, 1969, at 34, col. 1.

crises involving alleged misrepresentations, violations of the Take-Over Code, and threats of lawsuits. Yet despite extensive press coverage, with the securities law at the fore, antitrust was again forgotten or ignored.

Finally, we note the bid by General Foods for Rowntree, a British food giant. The Board agreed not to interfere and the IRC announced its opposition to the merger. Yet it was the decision of the shareholders, led principally by three trusts, that made the final decision to reject the takeover bid.⁴²

In sum we find merger control policy as applied directly to American interest a rather inconclusive experience. In this unresolved state, we turn to application of the 1965 Act to British firms.

3. *The rusting cannon—British mergers.*

British merger fever is running high, and restraint upon its pace, even in wholly domestic matters, has been almost absent. Although the absolute number of mergers by large companies is on the decline, the amount of consideration paid for acquisitions is increasing sharply.⁴³ Let us consider the visible process first: How is the "public interest" measured in all-British mergers?

Because of the manner in which the statutory question is phrased, the 1965 Act was bound to be a paper tiger. The Commission is not asked to decide whether a particular merger is in the public interest, but only whether it operates or may be expected to operate *against* that interest. Hence, a merger need not be justified by the parties; the 1965 Act has placed the burden on the Commission to show possible ill effects. Thus a substantial lessening of competition, the American Clayton-Act test, is not fatal to a merger if it has other redeeming advantages. Moreover, a merger may be permitted simply if harm from a substantial lessening of competition cannot be pinpointed. In short, the Commission will cast about for evidence of specific

42. Instead, Rowntree merged with MacKintosh and has entered into a long-term distribution agreement with the American Hershey to improve its marketing capabilities in the United States. CCH COMMON MARKET REP., EUROMARKET NEWS, Oct. 29, 1969, at 3-4.

43. Large companies are those that (a) had assets of £500,000 or more in 1964 or an annual income of £50,000, (b) were regarded by the Board of Trade as engaged mainly in the United Kingdom (with the exception of banks, financial institutions, and some additional activities), and (c) were quoted on a federated stock exchange. A recent Commission report reveals the trend toward fewer but more lucrative mergers:

Year	Number of Companies Acquired	Total Consideration £ m	Average Consideration £ m
1964	939	502	0.5
1965	995	507	0.5
1966	805	447	0.6
1967	661	781	1.2
1968	598	1653	2.8

disadvantages and will approve the merger if it fails to find any disadvantages or if those encountered are at least balanced by advantages.

The Board had voluntarily referred only 10 mergers to the Commission from 1965 when the law was passed through 1969; two others involving newspapers were automatically sent for consideration as the special statutory provisions in the 1965 Act involving this subject require.⁴⁴ And in only four of those cases has the Commission found the merger against the public interest.⁴⁵

The Commission's visible international perspective. Nonetheless, even within this generally cautious approach runs a theme that has direct bearing upon our concern: The Commission appears especially leery of scotching any private efforts to reduce the size gap that might hold prospects for a stronger British role in world competition. Herein lies an important response to the "challenge."

Consider the acquisition by British Insulated Callender's Cables (BICC) of Pyrotenax.⁴⁶ When ICI, the British chemical giant, offered to sell its 17.3 percent holding in Pyrotenax, BICC jumped at the opportunity. In the words of the Commission, for Pyrotenax "the acquisition of a substantial shareholding by its main competitor made a fundamental change in its prospects of survival as an independent company, and it effectively had little choice but to acquiesce in a complete merger."⁴⁷ The Commission concluded that the alleged economies and other benefits that would arise not

44. 1965 Act § 8. Both were permitted. MONOPOLIES COMM'N, *THE TIMES NEWSPAPER AND THE SUNDAY TIMES NEWSPAPER, A REPORT ON THE PROPOSED TRANSFER TO A NEWSPAPER PROPRIETOR*, H.M.S.O. No. 273 (1966); MONOPOLIES COMM'N, *THOMSON NEWSPAPERS LTD. AND CRUSHA & SON LTD., A REPORT ON THE PROPOSED TRANSFER OF THREE WEEKLY NEWSPAPERS*, H.M.S.O. No. 66 (1968).

45. The four were: (1) MONOPOLIES COMM'N, *ROSS GROUP LTD. AND ASSOCIATED FISHERIES LTD., A REPORT ON THE PROPOSED MERGER*, H.M.S.O. No. 42 (1966). Together the two companies accounted for 54% of cod landings at the two crucial fishing ports. The Commission feared that their combined market position would give them undue pricing power. *Id.* paras. 119-20. Indicating perhaps a greater tolerance for conglomeration than horizontal amalgamation, the Board appears to have given its blessing to the recent bid by the giant Imperial Tobacco for Ross Group. See CCH COMMON MARKET REP., *EUROMARKET NEWS*, Aug. 26, 1968. (2) UNITED DRAPERY STORES LTD. AND MONTAGUE BURTON LTD., *A REPORT ON THE PROPOSED MERGER*, CMND. No. 3397 (1967). On the one hand the Commission concluded: "We see little prospect of any benefit to the public interest resulting from [the merger]; the extent to which it might lead to improved efficiency is negligible." *Id.* para. 146. On the other hand this would give the combined companies about 40% of the market for men's suits, and the Commission feared mainly their buying power against the wool and worsted textile trade and their strength as compared with the rest of the men's tailoring trade. *Id.* paras. 129-44. (3) MONOPOLIES COMM'N, *BARCLAYS BANK, LTD., LLOYDS BANK, LTD. AND MARTINS BANK, LTD., A REPORT ON THE PROPOSED MERGER*, H.M.S.O. No. 319 (1968). The Board of Trade had permitted the Westminster Bank and the National Provincial Bank to form the largest bank in England without reference to the Commission. 194 Bd. TRADE J. 472 (1968). In none of the three cases were the parties able to show that international advantages would arise from the merger. (4) MONOPOLIES COMM'N, *RANK ORGANISATION LTD. AND DE LA RUE CO. LTD., A REPORT ON THE PROPOSED ACQUISITION OF THE DE LA RUE CO. LTD.*, H.M.S.O. No. 298 (1969). The Commission seemed to fear most a threatened walkout of De La Rue executives, who strongly opposed the Rank takeover bid. Indeed, De La Rue assisted the Commission to its conclusion by arguing that many crucial international ties would be severed if the takeover were allowed. See *THE ECONOMIST*, June 14, 1969, at 69.

46. MONOPOLIES COMM'N, *BRITISH INSULATED CALLENDER'S CABLES LTD. AND PYROTENAX LTD., A REPORT ON THE PROPOSED MERGER*, H.M.S.O. No. 490 (1967).

47. *Id.* para 135.

only were speculative, but also "appear to have been almost an afterthought."⁴⁸ Still the merger was approved. All agreed that the merger gave BICC "an almost complete monopoly" in the supply of mineral insulated cable,⁴⁹ though much of the debate centered around the competition from other kinds of cable, *à la Alcoa-Rome*.⁵⁰ Somewhat forlornly the Commission concluded that the "economic benefits which are expected to result from this merger . . . are not of sufficient importance to suggest that the public interest would suffer very much if the merger had not taken place."⁵¹ It sounds almost pathetic for the Commission, the decisionmaker, next to conclude that "it is regrettable that competition in this field has been reduced" and that "apprehensions in some sections of the trade . . . seem to us to have been justified."⁵² How, then, did the merger gain approval? BICC gave assurances about its future conduct to allay some fears,⁵³ and the Commission discovered that perhaps "the most valuable result of the merger for the public interest will be that it will make possible a more rapid increase in exports."⁵⁴

Or consider the approval of Thorn Electrical Industries' acquisition of Radio Rentals, which increased concentration in the already oligopolistic British television industry.⁵⁵ The Commission saw some potential scope for cost savings arising from the merger, and it found that neither product range and quality nor competition would be altered by the merger in a way that would adversely affect the public interest.⁵⁶ Most persuasive, however, was the parties' argument that the British television industry had long been insulated from foreign competition by both a substantial import duty and by so-called "line standards" that made production of televisions by foreigners for the British market both costly and troublesome. The Commission gave weight to the parties' argument that the merger would better enable the industry to withstand the onslaught of foreign competition that the imminent reduction in import duties and the adoption of a single line standard would bring. Furthermore, the Commission gave sympathetic consideration to Thorn's case for "a stable and secure home market as a basis for establishing itself in overseas markets."⁵⁷

48. *Id.*

49. *Id.* para. 136.

50. See *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964).

51. MONOPOLIES COMM'N, *supra* note 46, para. 161.

52. *Id.*

53. Much of British antitrust enforcement is based on voluntary compliance with "assurances" given by businessmen. Often these assurances run directly counter to the businessman's interest and amount to pledges hardly more definable than to "be fair." This technique of enforcement, while fascinating, is outside the scope of this Article.

54. MONOPOLIES COMM'N, *supra* note 46, para. 160 & app. V.

55. MONOPOLIES COMM'N, THORN ELECTRICAL INDUSTRIES LTD. AND RADIO RENTALS LTD., A REPORT ON THE PROPOSED MERGER, H.M.S.O. No. 318 (1968).

56. *Id.* paras. 194, 207, 215.

57. *Id.* para. 216.

Or consider the acquisition of Birfield by Guest, Keen & Nettlefolds (GKN), which made the merged company "[v]irtually the sole manufacturer in this country of propeller shafts and of constant velocity joints."⁵⁸ The Commission considered the effect the merger would have on "(1) costs and prices, (2) security of supply for the motor industry and (3) quality, improvement and innovation,"⁵⁹ and, although the Commission harbored some doubts, it found the merger unlikely to operate against the public interest.⁶⁰ More interesting, though, are two additional factors the Commission considered. First, GKN stressed as its "wider reasons" for merger the desire to increase exports by effective use of Birfield's established European distribution network.⁶¹ The Commission's ambivalent response again reflects its willingness to sanction monopoly by merger on the strength of what seems to be wishful thinking: "We cannot of course say whether GKN will succeed in these aims but we have little doubt that its success would be to the national advantage. There is at least no obvious reason why the merged company should be any less successful overseas than its constituents have been."⁶² Second, the Commission thought it relevant to consider the possible alternatives to the merger. The Commission took pains to point out that "[a]t the time when GKN made its bid there were said to be rumours to the effect that either a British motor manufacturer or an American component manufacturer would bid for Birfield."⁶³ It then went on to speculate that Birfield was in fact the likely object of a merger bid at least some time in the future because of its "relative lack of weight and size" in the motor component market. The Commission concluded, "If the future for motor component manufacture lies with large units we do not think it can be said that there is any other potential partnership for Birfield which would have obvious advantages over the merger with GKN."⁶⁴ Throughout, the Commission withheld judgment on whether the rumors were in fact correct.

Finally, in 1969 the Commission approved the proposed Unilever linkup with Allied Breweries, which, if carried out, would have combined the fifth and seventeenth largest companies in Britain. The parties relied heavily upon the alleged international trade benefits that would accrue to the United Kingdom from the addition of Allied's drink business to Unilever's

58. GUEST, KEEN & NETTLEFOLDS LTD. AND BIRFIELD LTD., A REPORT ON THE MERGER, CMND. No. 3186, para. 124 (1967).

59. *Id.* para. 128.

60. *Id.* paras. 137, 143-45.

61. *Id.* para. 154.

62. *Id.*

63. *Id.* para. 156. A similar possibility of a foreign takeover was considered by the Commission in the BMC reference. See MONOPOLIES COMM'N, *supra* note 31, at 16-17.

64. See MONOPOLIES COMM'N, *supra* note 58, para. 156.

already diversified string of enterprises. Despite the fact that the Commission found the international advantages "small and uncertain," the merger was approved.⁶⁵

What conclusions may be drawn from these four examples? They indicate, it seems to us, that even if there is no substantial existing American invasion in an industry, the opportunity for a merger to yield a grand British enterprise with growing international strength seems enough to scuttle any counterbalancing fears of what a future domestic monopoly created by the merger might do to competition. Put another way, barriers to entry of potential competition (American or other) are willingly condoned, to the possible long-term detriment of British consumers. The Commission seems loath to wade into the stream of wrath that might be forthcoming if it were to advocate steps that might injure the presently precarious British balance-of-payments position. We do not deny that world market and monetary considerations are legitimate concerns for the British. However, the precedence they are given means that the American businessman, competing in the British market, must not expect that the merger law will be applied other than in the rather narrowly defined national interest.

The Commission's invisible permissiveness. Consider lastly the general operation of the invisible process. Most striking in the entire picture of the short history of the 1965 Act is the temerity with which the Board has made use of its powers to refer. Reporting in the *Board of Trade Journal* in April 1968, the Minister of State for the Board of Trade noted that the Board had referred only eight of the nearly 250 matters that it had considered under the 1965 Act, just over 3 percent.⁶⁶ Of the 35 mergers that took place in 1968 involving more than \$24 million, only two matters were referred to the Monopolies Commission.⁶⁷ This permissiveness of the merger-control policy can be further amplified by a look at some of the market positions that the Board permitted without reference.⁶⁸

Consider five important mergers announced in 1968 and 1969 without the Board lifting a finger: (1) the merger of two drug-store chains, together accounting for 10 percent of retail outlets and an estimated 30 percent of re-

65. MONOPOLIES COMM'N, *supra* note 43. The Commission reported that "both companies have told us that their main purpose in seeking a merger is to provide the basis for an international drinks business . . ." *Id.* para. 107. See THE ECONOMIST, June 14, 1969, at 69-70, 101.

66. 194 Bp. TRADE J. 1337 (1968) (statement of Mr. Edmund Dell). This number, 250, seems to represent fairly the sum of the matters that might have appeared to the Board to possess the necessary attributes for referral if the Board had so wished; presumably an additional number of matters were informally taken up with the Board, but in the end were deemed to fall outside the statutory requirements of section 6 of the 1965 Act necessary for reference. The number had climbed to about 300 by September 1968.

67. See MONOPOLIES COMM'N, *supra* note 43, at 43 (app. 1, pt. B).

68. This is not to evaluate the merits of these cases, but it at least allows mental comparisons for those accustomed to the danger zones reflected in market-share size as established under American case law.

tail drug sales;⁶⁹ (2) the merger of two aggressive supermarket groups, placing the combination close to its major rival in number of outlets, vaulting it into first place in number of stores and turnover in the supermarket trade, and solidifying its fourth place position in the general grocery category;⁷⁰ (3) the merger of two companies in the beer, wine, and spirits trade to form a concern "that will dominate the British market with a complete range of well-known drink brands,"⁷¹ despite a trend in the trade toward consolidation and interlocking interests that had already drawn an investigation by the Monopolies Commission;⁷² (4) the merger of two giant concerns in related fields to form a half-billion dollar company: Schweppes (the soft-drink power) and Cadbury (the chocolate king);⁷³ and (5) the merger of two carpet firms together holding 25 percent of the British market.⁷⁴

4. *Assessment of merger control.*

Because the American and British economies are in vastly different states of development, the same antitrust policies are not likely to be equally efficacious in both countries. As one British writer recently commented, "with its huge marketplace, America can afford the luxury of tough anti-trust laws without stunting its industrial enterprises. When you are small it pays to worry more about competition abroad than competition at home." Thus, we do not criticize the basically promerger policy in Britain—in fact, we recognize a need for it. What we question is the need for such an elaborate antimerger framework if merger control is virtually nonexistent.

Experience with the 1965 Act to date argues persuasively that Parliament forgot to look before leaping into the merger-control field. One does not set up so elaborate a structure expecting such sparse effect. A record of five known mergers blocked⁷⁵ and well over 250 substantial ones executed suggests precious little control over growth by acquisition—particularly since

69. Boots Pure Drug Company Ltd., the market leader, and its major competitor, Timothy Whites and Taylors. *The Times* (London), May 14, 1968, at 21, cols. 1-5. For the approval see 194 B.D. TRADE J. 1712 (1968).

70. Tesco Stores and Victor Value. *The Times* (London), May 16, 1968, at 25, cols. 6-7. For the approval see 194 B.D. TRADE J. 1787 (1968).

71. Allied Breweries and Showerings, Vine Products & Whiteway. *The Times* (London), May 18, 1968, at 13, cols. 1-3. For the approval see 194 B.D. TRADE J. 1712 (1968). As noted above, the Commission later approved the proposed Unilever-Allied-Breweries merger. See note 65 *supra*.

72. For the text of the pub reference of July 27, 1966 see BOARD OF TRADE, MONOPOLIES AND MERGERS ACTS 1948 AND 1965, ANNUAL REPORT BY THE BOARD OF TRADE FOR THE YEAR ENDED 31ST DECEMBER 1966, H.M.S.O. No. 345, at 11 (1967) [hereinafter cited as 1966 ANNUAL REPORT].

73. *BUSINESS EUROPE*, Feb. 21, 1969, at 62. Indeed, Schweppes and Cadbury pleaded for no reference on ground that such a delay would cause significant injury. CCH COMMON MARKET REP., EUROMARKET NEWS, Feb. 4, 1969, Part I, at 4.

74. Carpet Manufacturing and John Crossley Carpet Trades. *BUSINESS EUROPE*, Mar. 14, 1969, at 85.

75. Four by the Commission plus Smith's Crisps-Imperial Tobacco. We put Courtaulds-English Calico in a different category. See note 18 *supra*.

the case-by-case nature of British merger law will prevent the four mergers the Commission did condemn from serving as real precedents.

B. *The IRC and Merger Promotion Policy*

By simply failing to apply merger control policy vigorously, the British may be said to be promoting larger industrial units, but this is only part of the picture. The British government has embarked upon an affirmative giant-creating course, and a number of the most important combines that have been created are obviously directed at providing worthy competitors to some of the greatest sources of existing American industrial might.

1. *The work of the IRC—the jolly great giant-maker.*

Inauspiciously located at 46 Pall Mall, London, behind a facade notable only for its “space available” sign is the Industrial Reorganisation Corporation. Started at the end of 1966 with modest hopes, substantial capital, and great uncertainty, the IRC has become the most dynamic force in British industrial restructuring, and its activities place it at the center of the size-gap question. Its advice is sought by numerous sectors of industry, its officers are constantly interviewed in the financial press, its mere attention is suggested as a panacea for all kinds of economic ailments, and on top of this its accomplishments are rather important.

We will begin with an overview of the IRC's general statutory framework, ground rules, and actions. In January, 1966 the British Labour government announced its intention to establish the IRC⁷⁶ as an instrument for the promotion of concentration and rationalisation of British industry, particularly where the British production units “are small by comparison with the most successful companies in international trade.”⁷⁷ Restructuring and reorganization were seen as essential if British industry was to keep pace with “the growing competition it will face in world markets.”⁷⁸

While non-U.K. companies were large units “often based on a much larger market,” British companies operating in the British market were seen as frequently “too small to achieve long production runs; to take advantage of economies of scale; to undertake effective research and development; to support specialist departments for design and marketing; to install the most modern equipment or to attract the best qualified management.”⁷⁹ Yet the government believed that large size is productive only when composed of the proper complementary units and that market forces alone could not be relied upon to create this style of restructuring. Accordingly, the plan for a

76. INDUSTRIAL REORGANISATION CORPORATION, CMND No. 2889 (1966).

77. *Id.* at 2, para. 3.

78. *Id.* para. 1.

79. *Id.* para. 3.

government catalyst was born: The IRC was seen as a government-financed, independently acting, business reorganizer.

The powers of the IRC are broadly drawn. The 1966 Industrial Reorganisation Corporation Act simply states that "for the purpose of promoting industrial efficiency and profitability and assisting the economy,"⁸⁰ the IRC may "promote or assist the reorganization or development of any industry."⁸¹ The IRC can focus on any sector it feels it is expedient to work with⁸² and is empowered to "do anything . . . which is calculated to facilitate the discharge of its functions," including making loans, acquiring ownership interests, and holding property.⁸³ It was initially given the right to draw up to £150 million (\$360 million) from the government to support its efforts,⁸⁴ although financial outlay was not necessarily to be a part of every project.

After 6 months' operation the IRC was called "no more than an experiment" by its first Managing Director.⁸⁵ Its efforts had been directed toward establishing "a good working relationship with industry"; it was even admitted that the IRC had initially "received a cool reception" from business.⁸⁶ Perhaps to allay industry fears, some working principles were then outlined: First, the IRC would not duplicate the work of existing agencies (lest its search for rationalisations cause it to self-destruct); second, the IRC would act pragmatically, company by company, and not on an industry-wide grand scheme; third, the IRC would not concern itself with mere financial mergers without rationalisation of operational responsibility; fourth, the IRC would hold securities only temporarily and always openly; and fifth, the IRC would not seek bigness for its own sake.⁸⁷ Since these principles were set out, the IRC has become involved in a whirlwind of activity, and whether it has kept to the above guidelines is arguable.

In its first report covering activities through March 1968, the IRC acknowledged participation in 14 projects.⁸⁸ Classifying IRC support into seven industry groups (electrical and electronics, mechanical engineering, motor, wool and textile, paper and board, scientific instruments, steel), the report disclosed that the corporation "has had contact with some 400 companies and continues to be engaged in confidential discussions with many of

80. Industrial Reorganisation Corporation Act 1966, c. 50, § 2(1).

81. *Id.* § 2(1)(a). A second function is also provided: "[I]f requested to do by the Secretary of State, [the IRC may] establish or develop, or promote or assist the establishment or development of, any industrial enterprise." *Id.* § 2(1)(b).

82. *Id.* § 2(2).

83. *Id.* § 2(3).

84. *Id.* § 7.

85. See Grierson, *General licence to roam*, *The Times* (London), June 29, 1967, at 11, cols. 1-6.

86. *Id.*, col. 1.

87. *Id.*, cols. 4-6.

88. INDUSTRIAL REORGANISATION CORPORATION, FIRST REPORT AND ACCOUNTS (DECEMBER 1966-MARCH 1968), H.M.S.O. No. 252, at app. I (1968). See also Corina, *IRC's battle for change*, *The Times* (London), May 23, 1968, at 27, cols. 3-6.

them on a wide range of projects involving both rationalisation and development."⁸⁹

The IRC won its first important marks in backing the bid of the English General Electric Company (GEC) to take over Associated Electrical Industries (AEI); GEC was then third in size in the electrical industry, AEI second. The IRC's power and importance reached a high point in the summer of 1968 when on two occasions it strongly backed one of the two competing companies battling for the same prize acquisition. But before dealing with the most controversial aspect of IRC actions, a look at IRC projects in terms of their involvement with U.S. interests is in order.

2. *IRC giant creation: Might is right.*

Although the actual number of major amalgamations in which the IRC has participated is not large, its style of operation and some specific big deals that it has engineered have brought about a striking change. The press reporting of the way the big British mergers are creating companies of world-class size is almost gleeful.

Consider the electrical and electronics field in which the IRC saw British companies facing "intense competition from powerful companies in the United States, Europe and Japan."⁹⁰ The IRC first backed the merger of Elliott-Automation into English Electric to create the then biggest British electrical firm and "one of the largest and best-equipped European groups in the field of automation and industrial control systems."⁹¹ This put English Electric solidly in first place among British electrical firms.⁹² But that was short-lived, for the IRC soon sponsored the GEC-AEI merger, which boosted the newly created giant into the top domestic spot and well up in world ranks.⁹³

However, not satisfied even with this ranking, the IRC was next instru-

89. INDUSTRIAL REORGANISATION CORPORATION, *supra* note 88, at 10. Lest we give the impression that IRC involvement has always proved a panacea, consider Davy-Ashmore. In a 12 month period the IRC had encouraged Davy-Ashmore to take over three steel plant companies in an effort to rationalise the plant contracting industry. The successful bidder on the construction of a Continental Oil plant at £25 million, Davy-Ashmore was forced to admit in August 1969 that the plant was costing £37 million (\$28.8 million off). Eglin, *The £12 million clanger*, *The Observer* (London), Aug. 3, 1969, at 12, cols. 3-6. Undaunted by this and Davy-Ashmore's near \$9,000,000 loss for the year, the IRC has requested Davy-Ashmore to institute merger talks with Simon Engineering and, together with the Finance Corporation for Industry, is making Davy-Ashmore a \$2,400,000 loan. *Id.*

90. INDUSTRIAL REORGANISATION CORPORATION, *supra* note 88, at 8.

91. *Id.*

92. See Lee, *A Big Deal in London*, *N.Y. Times*, Nov. 19, 1967, § 3 (Business & Finance), at F-3, cols. 3-6.

93. The combined firm ranks eighth, ninth, or tenth in the world, depending upon who is counting and how; it would rank behind America's General Electric and Westinghouse, Holland's Philips, and Germany's Siemens and AEG on all lists, and America's Western Electric, RCA, General Telephone, and ITT and Japan's Hitachi on some lists. *Id.* See also INDUSTRIAL REORGANISATION CORPORATION, *supra* note 88, at 8; Marley, *£260m Plessey takeover bid for English Electric*, *The Times* (London), Aug. 22, 1968, at 17, cols. 1-7.

mental in the amalgamation of the two British giants, English Electric and GEC-AEI.⁹⁴ Admittedly, this union may have come somewhat sooner than the IRC had planned, for it was a direct response to the daring takeover bid by Plessey, a smaller British electronics and telephone firm, for English Electric.⁹⁵ Nevertheless, the merger was one that the IRC had been eyeing and one to which it quickly lent its powerful support.⁹⁶ The new General Electric-English Electric Company, with combined sales of \$2190 million, moves ahead of all non-American competitors and close to both ITT (\$2760 million) and Westinghouse (\$2880 million), although still substantially behind General Electric-U.S. (\$7680 million).⁹⁷

Although the new giant will be represented in almost all aspects of the electric industry, interestingly it will rarely hold more than a third of any British market, except in the markets where it will be dealing with a monopoly buyer, the Central Electricity Generating Board.⁹⁸ In any case, British eyes are looking at world competition; the merger is expected, in the words of the President of the Board of Trade, to "increase the efficiency and productivity of the electrical engineering and electronics industries and in particular the effectiveness of the export effort of the companies whose overseas sales are of the greatest importance to the balance of payments."⁹⁹ With all this talk of *international* competition against the U.S. (and other) giants, one should not forget Standard Telephone and Cables (STC), ITT's major U.K. subsidiary; while it has been an important force in the British market, the wave of mergers may well hamper its market strength. Though the EE-GEC-AEI linkup creates the fourth largest firm in the U.K., with strength throughout electrical equipment and electronics generally, it will not be a force in computers, which brings us to the next example.

If nothing else, the IRC-backed mergers in the electrical and electronics field paved the way for a consolidation of British-owned computer mak-

94. For the full story see Jones & Topping, *GEC-English Electric merger would change face of the whole industry*, The Times (London), Sept. 7, 1968, at 11, cols. 1-4; Jones, *How they wired up the £900m mammoth*, id., Sept. 9, 1968, at 19, cols. 3-8; Jones, *Plessey talks with Hawker: merger fever in the City*, id., Sept. 10, 1968, at 17, cols. 1-2; *Now Plessey may be target for takeover*, id., Sept. 11, 1968, at 19, cols. 6-7; Jones, *Top Whitehall talks on GEC-English Electric merger today*, id., Sept. 12, 1968, at 17, cols. 2-3; *Right decision on the big electrical merger*, id., Sept. 14, 1968, at 13, cols. 1-2; Topping, *Payroll of 250,000 for the new giant*, id., Sept. 14, 1968, at 13, cols. 3-7; Mackie & Marley, *Plessey to fight back with another bid for English Electric*, id., Sept. 20, 1968, at 21, cols. 1-3.

95. See Marley, *supra* note 93. The linkup with GEC-AEI was welcomed by the EE management, which strongly opposed a union with Plessey, which had sales of \$350 million.

96. Jones, *supra* note 94. IRC backing seems to have been crucial to the government's general approval and its decision not to refer the matter to the Monopolies Commission. Jones, *Government approval for biggest merger in British history*, The Times (London), Sept. 14, 1968, at 11, cols. 1-3. The IRC response to the Plessey bid had been: "We are positively neutral." Marley, *supra* note 93, at col. 1.

97. Jones & Topping, *GEC-English Electric merger would change face of the whole industry*, The Times (London), Sept. 7, 1968, at 11, cols. 1-4.

98. The Times (London), Sept. 7, 1968, at 13, cols. 1-2.

99. Mr. A. Crosland, quoted in The Times (London), Sept. 14, 1968, at 11, cols. 1-3.

ers.¹⁰⁰ With active government support through the Ministry of Technology, the major British interests in data processing have joined to form International Computers Limited (ICL). The reorganization brings together International Computers and Tabulators (ICT), the major British computer firm; the data-processing interests of English Electric; investment and future cooperation of Plessey; and \$36 million in government support,¹⁰¹ giving the government a 10 percent shareholding and the Minister of Technology a voice on the Board.¹⁰² ICL becomes the largest non-American computer group in the world and is designed as a direct challenge to America's IBM, far and away the industry leader, as well as to other major American interests.¹⁰³ And while governmental and quasi-governmental units already buy British,¹⁰⁴ increased strength as well as direct Ministry participation may help ICL win a far stronger share of the British corporate users.¹⁰⁵ At least as to number of machines, ICL should have a solid first place position in the British market; IBM and ICT were nip and tuck prior to the amalgamation.¹⁰⁶ But it is not only domestic strength that the British seek with ICL, for international war with IBM has been declared.

The third major area of the economy that has drawn government backing aimed at producing a world giant is motor vehicles. With IRC help and \$60 million in IRC financing the entire British-owned automobile industry has effectively been consolidated.¹⁰⁷ The new company, called the British Leyland Motor Corporation (BLMC), combines British Motor Holdings

100. The IRC states that it "did not participate directly in this merger, but was fully informed of the negotiations." INDUSTRIAL REORGANISATION CORPORATION, *supra* note 88, at 9.

101. The Government support for the computer merger was based upon the Industrial Expansion Act (in fact not passed until after the merger was put together), which may prove a new and useful tool in the British promoter arsenal. Industrial Expansion Act 1968, c. 32. According to its Preamble, the Act is designed make government funds available "for industrial projects calculated to improve efficiency, create, expand or sustain productive capacity or promote or support technological improvements." For more details of schemes contemplated see *id.* § 2. While it is too early to tell how the Act will be used, it may prove to be the vehicle by which the Ministry of Technology, and perhaps others, will jump on the IRC bandwagon, making merger-aiding or development moneys available to key sectors of the economy involved in world competition. A loan for the establishment of two aluminum smelters was arranged under the Act by the Board of Trade. Kershaw, *Approval—and £62m government loan—for two smelters*, *The Times* (London), July 25, 1968, at 17, cols. 1-3.

102. Wright, *ICL: the giant that has to move fast*, *The Times* (London), Mar. 22, 1968, at 25, cols. 4-8; statement by the Minister of Technology, Mr. A. Benn, reported in 194 *BD. TRADE J.* 978 (1968).

103. The Dutch electrical giant Philips has now thrown its hat into the ring. *The Times* (London), June 24, 1968, at 23, cols. 2-3. In addition to IBM, the American firms Honeywell, Burroughs, GE-Bell, Control Data, National Cash Register, Univac (Sperry Rand), and perhaps others are active competitors in the U.K. market.

104. For the 12 months ending in May 1968, 85 percent of the computer orders from the British public sector went to the British companies that now make up ICL (67% to ICL alone). American interests landed 6 of 40 orders. *Sunday Times* (London), Sept. 15, 1968, at 30, cols. 3-5.

105. A review of the computer sales in November 1967 indicated that American subsidiaries in Britain buy American. 7 *COMPUTER SURVEY* 9 (1967). Of the more than 100 machines reported that were clearly placed with or on order by U.S.-controlled firms, 70% were IBM equipment and about 85% were American.

106. See 7 *COMPUTER SURVEY* 200-01 (1968); *id.* at 7 (1967). The United Kingdom market appears to be the only major "western" one in which IBM does not control more than 50%. See J. McMILLAN & B. HARRIS, *supra* note 1, at 70-79; J. SERVAN-SCHREIBER, *supra* note 2, at 68-72, 99-105.

107. INDUSTRIAL REORGANISATION CORPORATION, *supra* note 88, at 19-20.

(BMH) and the Leyland Motor Corporation, which themselves are the products of substantial British mergers in the recent past.¹⁰⁸

BMH, the U.K. leader, had been rapidly losing its share of the market, mainly to American competitors, and it is clearly the IRC's hope that a boost of capital and management from Leyland, owner of Standard-Triumph, will revitalize the U.K. segment of the industry.¹⁰⁹ BLMC will control about 37 percent of the market; the American "Big Three" have captured more than half the British market through recent sales gains, with Ford well in front with about 29 percent.¹¹⁰ A stronger national base is seen also as a springboard for increased Common Market and U.S. sales by BLMC.

In sum, the British government, mainly through the IRC, is engaged in an active process of building British-owned companies that will have a solid and secure home base and that will be strong enough to do aggressive business in other markets. Much of the effort is, we have seen, directed toward closing the size gap where it is the greatest; that is, in countering the power of the American giants active in British and world markets. It is something with which both the parties to the American invasion and those at home will increasingly have to contend.

3. *IRC in controversy.*

The IRC's activities have created two major kinds of controversies in Britain that might have an impact on American interests and that are worth considering briefly in an attempt to see how the promerger policy can come into conflict with other values: First, is the IRC wrongfully interfering with market forces by participating in takeover battles? Second, is it acting at cross purposes with the merger-control policy?

One might originally have thought that the IRC would lend its support only when the managements of two concerns both favored a merger. But its action in supporting GEC's bid, unwanted by the AEI management, suggests otherwise.¹¹¹ While this simple endorsement of a takeover bid may be understood as part of the IRC's function to encourage restructuring, its later actions—siding with one of the two parties seeking to take over a third and making bids on its own behalf for majority ownership—were sure to evoke protests. It is not surprising, then, that serious concern arose over the IRC's

108. For a brief history of the U.K. auto industry see J. McMILLAN & B. HARRIS, *supra* note 1, at 56-69. While it is true that the IRC also has backed Chrysler, to the tune of \$4 million, this sum was advanced by the IRC not on its own initiative but upon the request of the Secretary of State. As we mentioned earlier, this seemed to be part of the understanding surrounding Chrysler's takeover of control of the wilting Rootes. See note 31 *supra* and accompanying text. See also INDUSTRIAL REORGANISATION CORPORATION, *supra* note 88, at 17, 22.

109. This is clearly the BLMC aim as well according to Sir Donald Stokes, its chief executive. Charles & Jones, *Sir Donald charts the route toward a £1,000m sales target*, *The Times* (London), May 14, 1968, at 27, cols. 3-8.

110. *Id.* at 27, cols. 6-8.

111. See text accompanying notes 92-93 *supra*.

backing of Kent in its battle with Rank for control of Cambridge Instruments and its support of GEC's bid in competition with Plessey for EE; perhaps its running battle with SKF was received with greater toleration because SKF is Swedish-owned.

The Cambridge Instruments battle¹¹² started with a £9.5 million (\$22.8 million) bid by the giant Rank Organisation to add Cambridge to its growing scientific instruments group. With the IRC informed (it had studied the industry and had already fostered two mergers¹¹³) George Kent, a specialist instrument maker, made a counterbid for Cambridge valued at £11 million. The Cambridge management preferred Kent as a partner, and eventually so did the IRC. But it took two more Kent bids and substantial IRC market support to fight off Rank's two further bids and sew up the union.

The IRC entered the fray with the statement by its chief executive, Charles Villiers: "[L]ogic led us inexorably to the conclusion that a merger of Kent and Cambridge would bring greater benefits to the British instrument industry than if Cambridge were acquired by Rank,"¹¹⁴ and the IRC backed up its conclusion with an initial purchase of 19.3 percent of the Cambridge shares. This turned the tide against Rank's third bid and paved the way for Kent's success, generally conceded impossible without IRC financial support.

The action brought blasts from Rank and the Confederation of British Industries as well as concern in investment and securities quarters. The London *Sunday Times* criticized the IRC on three counts: (1) forcing Cambridge shareholders to settle for what in the final analysis was a slightly lower bid than Rank's last offer; (2) creating a precedent that might either deter future takeover battles or unnecessarily intensify them, leading to bids that distorted the market value of shares; and (3) damaging the IRC reputation in the business community and hence IRC's ability to help with uncontested mergers.¹¹⁵ *The Times*, distinguishing 3-party from 2-party takeover battles, suggested that in the former case the IRC might seek approval from a panel of industrial leaders before disturbing normal market forces that would otherwise sort out rival bids.¹¹⁶ The Conservative Party attacked the IRC's action, but got nowhere in Parliament against the Labour Government. The outcome of the controversy probably can only be measured

112. For the full story see *The Times* (London), May 16, 1968, at 25, cols. 6-7; Marley, *IRC backs Kent's bid for Cambridge*, *id.*, June 6, 1968, at 21, col. 5; Marley, *Kent wins Cambridge with IRC backing*, *id.*, June 15, 1968, at 11, col. 1; *id.*, June 18, 1968, at 19, col. 4; Marley & Jones, *Lessons of the Cambridge fight*, *id.*, June 21, 1968, at 29, cols. 3-8. See also *The Sunday Times* (London), June 23, 1968, at 25, cols. 1-3.

113. INDUSTRIAL REORGANISATION CORPORATION, *supra* note 88 at 10, 18-19. Nuclear Enterprises acquired parts of both Electric & Musical Industries and Elliott-Automation; British Oxygen merged with Edwards High Vacuum International.

114. Marley, *supra* note 112.

115. Milner, *Dangerous precedent for the IRC*, *Sunday Times* (London), June 16, 1968, at 27, cols. 1-4.

116. *The Times* (London), July 9, 1968, at 23, cols. 1-2.

by the success of the IRC in future negotiation efforts. For us, however, this behavior raises the spectre that the IRC may respond to an attempted American takeover by asserting that a different (British) acquiring firm would better suit the British economy's restructuring needs and by backing up such a claim with funds from the public Treasury. While no one can predict how long such a situation will be in coming, there seems no reason to doubt that it will eventually. It would be incongruous for the IRC, given its spunk and its statutory goals, to bypass American takeovers and halt only domestic ones in the name of international cooperation. When such interference does come, we may discover that the IRC is a more potent weapon than the merger-control law for meeting the American challenge.

Indeed, one instance of IRC intervention in a takeover fray with a foreign competitor has already occurred. The three British ball-bearing manufacturers, Pollard, Hoffman Bearings, and Ransome & Marles, together occupy less than 50 percent of the British bearings market, the balance held by Skefco, a subsidiary of the Swedish SKF (27 percent) and by the American companies, Fafnir and Timken (over 25 percent). "But for the intervention of the Industrial Reorganisation Corporation . . . , there was every chance that this £70 million industry might have ended up by being wholly dominated by foreign companies."¹¹⁷

SKF made the opening move in April 1968, mopping up a minority interest in Skefco as a prelude to a bid for Ransome & Marles, the largest British company. The latter bid was stifled by a combined IRC-government front.¹¹⁸ The IRC entered in late January 1969 with a surprise takeover bid for Brown Bailey Steels, Hoffman Bearings' parent.¹¹⁹ SKF countered in April 1969, purchasing one-sixth of Pollard.¹²⁰ By May the contest had shifted to a battle for Pollard—between SKF and the IRC-backed Ransome & Marles, with one of the two bidders likely to pick up Hoffman as an added plum.¹²¹ By mid-May Ransome & Marles had put in its bid for Hoffman—with the blessing of the IRC (now a 60-percent owner of Hoffman).¹²² At the end of May the British entities were nicely bound together with SKF left to internal growth. The moral: Clearly, the IRC is not deterred from swinging its considerable weight by the presence of a foreign competitor.

Consider a further aspect of the reshaped roles for the promoter and

117. Eglin, *Keep ball bearings British*, The Observer (London), Apr. 13, 1969, at 13, col. 4.

118. *Id.*

119. Davis, *Making Money—Taking a Chance on the IRC Takeover*, The Observer (London), Feb. 2, 1969, at 13, cols. 1-3.

120. Eglin, *supra* note 117.

121. Davis, *Making Money—Cheap Grab*, The Observer (London), May 4, 1969, at 11, col. 6.

122. Davis, *Making Money—Ballgame Grab*, The Observer (London), May 18, 1969, at 13, col. 2.

antimerger agencies raised by IRC participation in takeover bids. In Britain the practice of making a takeover bid typically arises when the management of the firm to be acquired is flat against or at least uncooperative with a bidder's desire for an amicable union. Yet it must not be forgotten that not only peaceful but also stormy combinations are theoretically subject to reference to the Commission.¹²³ Given this, it would seem a waste of government efforts if firm X, with IRC support, were able to win a battle for firm Z only to have the takeover found against the public interest by the Commission. In fact, there seems to be little fear of this happening.

In creating the IRC, the government anticipated the problem of a clash between the policies of promoting some mergers and stopping others. The issue is, where does the ultimate power lie? Does IRC support for a merger mean no reference to the Commission? If not, is the Commission to review IRC-sponsored mergers to the same extent as other mergers? The government ruled out Commission review, saying:

Many of the rationalisation schemes sponsored by the Corporation will result in mergers which come within the scope of the Monopolies and Mergers Act, 1965. As the Government made clear when the Act was introduced, it is no part of its purpose to hold back mergers which are desirable in the national interest. Arrangements will therefore be made, so that companies participating in the Corporation's schemes can be certain, before schemes are completed, that the resulting mergers will not be referred to the Monopolies Commission.¹²⁴

Yet the solution that appears to have been adopted has not shifted the ultimate power to the IRC. While an IRC-supported merger will not be referred to the Commission, the IRC will not actively back a merger without first obtaining a waiver of the antitrust question by the Board. Such a plan could be sensed from the following response of the President of the Board to a parliamentary question in March, 1966 when the IRC was first proposed:

Mergers proposed by the Industrial Reorganisation Corporation would be discussed at an early stage with the Board of Trade, who would consider them in the same way as they would consider any other proposal for a merger. The Corporation would not proceed with its proposal if there was a risk of public detriment sufficient to justify further investigation by the Monopolies Commission.¹²⁵

In its first report the IRC acknowledged a kind of clearance system, "working arrangements with the Board of Trade in connection with the latter's statutory responsibilities under the Monopolies and Mergers Act 1965."¹²⁶

123. Recall that BICC's less-than-enthusiastically received takeover of Pyrotenax and the competing bids for Amalgamated Dental were considered by the Commission. See text accompanying notes 46-48 *supra*.

124. INDUSTRIAL REORGANISATION CORPORATION, *supra* note 76, at 4.

125. 190 Bd. TRADE J. 539 (1966).

126. INDUSTRIAL REORGANISATION CORPORATION, *supra* note 88, at 11.

What seems to happen in fact, although this has not been publicly acknowledged, is that representatives of various government interests sit down with IRC and Board representatives to discuss whether IRC projects should be given the go-ahead. If the answer is "No," then the IRC retreats and nothing happens, unless the parties merge on their own; if "Yes," then there are assurances of no reference to the Commission. What is unclear is whether the Board has ever firmly opposed an IRC plan either successfully (with the IRC retreating) or unsuccessfully (with the Board retreating). In the instance of a takeover battle it is dubious that the Board can make much of an evaluation before it is called upon to waive its right to refer the merger.¹²⁷ Still it seems willing to give a hastily fashioned green light. The IRC, in short, seems fairly successful at winning general government support for its plans.

The process can be seen at work in the EE-GEC-AEI matter,¹²⁸ a combination of such moment that Commission attention surely could not be termed unsuitable. *The Times* reported :

The Cabinet mergers sub-committee is meeting today to discuss the proposed tie-up between G.E.C. and English Electric. The committee, whose existence is not normally acknowledged by Downing Street, was the body which gave the all-clear to the British Motor Corporation-Leyland merger¹²⁹

The Committee heard the IRC's arguments for the merger, after which Mr. Crosland, President of the Board, announced that he would not refer the matter to the Commission. He stated, however, that the government demanded undertakings from the parties not to engage in "policies directed towards damaging fair and effective competition," and asserted that if the parties did not comply the Board "will not hesitate" to refer the new company to the Commission.¹³⁰ What this is, beyond a warning to obey the law, escapes us.

The upshot is that because of the IRC's role the Board is making the public-interest decision in many major mergers, or at least participating in committee evaluations and thereby precluding exercise of the Commission's expertise. Moreover, it is doing so in matters that it had neither a long time to consider nor that the IRC, by its own admission, had been long in planning. The question is whether this is a good way to resolve the two policies; or, put another way, what does this arrangement do to the Commission? Perhaps in the beginning the Commission had been en-

127. It should be said that the Board is typically rather quick with its approval of ordinary (*i.e.*, non-IRC) mergers, and our doubts as to the extent of its evaluation apply in such cases as well.

128. See text accompanying notes 90-99 *supra*.

129. Jones, *Top Whitehall talks on GEC-General Electric merger today*, *supra* note 94.

130. Jones, *Governmental approval for biggest merger in British history*, *supra* note 94. It is rather frightening to note that one reason given was the "damaging effect of uncertainty and delay" in a reference to the Commission. *Id.* col. 2.

visioned as handling monopoly and merger cases, somewhat like a court but with nonjudicial decisionmakers. This is clearly not what has happened. Rather, the Commission has become an official factfinding and opinion-giving body to which the Board can turn for *advice* when it wants it. This is evidenced by the great discretion employed by the Board not only in deciding which monopoly and merger matters to refer, but also in deciding what action should be taken in response to the Commission's conclusions.

Perhaps it is proper, at least on merger matters, that conflicting views of where the public interest lies in a specific IRC-backed merger be resolved other than by reference to the Commission, although it creates doubt about the value of the Commission altogether. Our main uneasiness is that, despite the Commission's reluctance to disapprove projected mergers, the Board may still be approving IRC plans that the Commission would oppose and that, without IRC backing, would at least have been referred to the Commission. Noteworthy is *The Times* report that Commission members have "serious anxieties that their work is being undermined by other agencies."¹³¹

The IRC has come under attack in recent months as the financial results of some of its initial ventures are beginning to be evaluated.¹³² The Conservative opposition party clearly believes that the IRC is too powerful and too disruptive of normal market forces. Even the Labour Government is showing signs of concern that the IRC may be pushing its way too far into industrial planning believed to be better reserved for cabinet-level decisionmaking. The disaffection seems to stem from a slow rate of improved performance in the industries in which the IRC has been active; one really could not hope for dramatic, overnight results from a policy aimed at long run industry restructuring, and perhaps the government is simply suffering from some version of the 3-year itch.

4. *Dover and beyond: transnational mergers.*

And what of the IRC's future? The agency is on the move, and that means across the Channel for even greater combinations that are not hemmed in by national boundaries.¹³³ Its hope—to stimulate the multi-

131. Corina, *Anxiety over role of Monopolies Comm'n*, *The Times* (London), Sept. 16, 1968, at 17, cols. 6-7. Even more to the point may be the view of one member: "We are not being taken seriously." *Id.* col. 7. For further discussions see 194 Bd. TRADE J. 567-68 (1968); 192 Bd. TRADE J. 262 (1967).

132. *THE ECONOMIST*, Feb. 14, 1970, at 61-62.

133. INDUSTRIAL REORGANISATION CORPORATION, *supra* note 88, at 11; Bambridge, *Marriage lines for Euro-giants*, *The Observer* (London), May 26, 1968, at 13, cols. 1-6; *The Times* (London), May 16, 1968, at 25, col. 1. Interestingly, economic leaders of the small British Liberal Party urged a U.K.-German merger as a preferable alternative to the EE-GEC-AEI combination. *The Times* (London), Sept. 11, 1968, at 25, cols. 4-5. Britain not long ago announced a joint venture with Holland and West Germany to develop the process of ultracentrifugation to produce enriched uranium. The joint venture was an attempt to catch up with the Americans who are "streets ahead." Eglin, *The Great Atom Rush*, *The Observer* (London), Mar. 16, 1969, at 11, cols. 1-4.

national, or European, corporation with an economic base comparable to that of the United States—will surely produce, even on the American scale, large firms, with which even British monopolies cannot compare. Such firms may be what the Common Market requires; they may be what all Europe will turn to in trying to combat the American invasion.

5. *Assessment of merger promotion.*

The IRC has been a dynamic force in forging British combinations capable not only of holding their own against foreign competition in the United Kingdom, but also of competing in world markets. This should have a salutary effect on Britain's balance-of-payments problems. Yet two questions remain without satisfactory answers: How does the IRC square with Britain's merger-control policy, and what price will the British consumer have to pay in the long run because of the IRC's waste product, the discouragement of actual and potential competition?

II. DOMINANT POSITION

A second method for dealing with the size gap is to regulate the behavior of foreign giants.¹³⁴ To the extent that large size creates efficiency, controls might be used to ensure that the benefits of such efficiency are enjoyed by the public and not simply turned into large profits for the giant's coffers. Large size among either foreign or domestic companies may also breed abusive trade practices. Hence, it is reasonable to expect government regulation in the public and national interest of the activities of those holding dominant economic positions, and that is the British policy.¹³⁵ Under the 1948 Act, the Monopolies Commission can be called upon by the Board of Trade to evaluate companies with substantial market power to determine whether their structure, behavior, or performance are harmful to the British economy and, if so, to recommend necessary ameliorative action.¹³⁶

A number of American giants have been required, as a result of Commission investigations, to make significant changes in their behavior, alterations designed to favor the British public at the expense of the American firm. This is not meant to conjure up a picture of British harassment of all American might; yet it illustrates at least that dominant American firms

134. It is assumed that the breaking up of foreign firms will not be attempted. Another alternative is simply to foreclose their opportunity to do business in the host country; restricting establishment, however, is rarely used today as a policy by itself and in any event is somewhat afiel from anti-trust.

135. The basic British antitrust legislation is the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, *see* note 8 *supra*, which, despite various alterations, still contains the major provisions of the dominant-position policy.

136. 1948 Act §§ 2, 6(1), 7(2).

come under the British antitrust statutes in much the same way as foreign interests monopolizing any part of the U.S. market would come under the Sherman Act.

A. Monopoly-Control Policy: "Hold That Tiger"

The British law nowhere uses the term "dominant position." However, the statute's definition of a monopoly is sweeping enough to cover what might better be termed an oligopolist. The market-power test for bringing a firm within the substantive provisions of the 1948 Act is that "at least one-third of all the goods of [any] description which are supplied in the United Kingdom or any substantial part thereof are supplied by or to" that firm.¹³⁷ It is clear that there may be more than one "monopolist" in the supply of the same goods.¹³⁸ Thus, the wider concept of "dominant position" seems appropriate.

The procedure for dealing with dominant-position cases is like that of the 1965 Act. If it appears that the one-third market test is met, the Board of Trade may refer the matter to the Monopolies Commission, which then determines whether the appearance conforms to reality.¹³⁹ If so, the Board's reference may limit the Commission's investigation to "things done" by the parties concerned as a result of, or for the purpose of, preserving their one-third share.¹⁴⁰ Typically, however, the reference also instructs the Commission to report whether in its opinion "all or any of the things done" by the parties "operate or may be expected to operate against the public interest."¹⁴¹

The public interest test is imprecise and very broad, and left largely for Commission development. The Commission is instructed that "all matters . . . relevant shall be taken into account" and that it should be mindful of the need for:

137. *Id.* § 3(1)(a). The 1948 Act applied to the "application of any process to goods" and to the "export of goods" as well as to their supply. *See id.* § 2. The amendments made by the 1965 Act further extend the 1948 Act's coverage to "the supply of services" swallowing up the "application of any process" test. 1965 Act § 2(2).

In addition, a firm need not individually hold the requisite market share to be covered by the 1948 Act: (a) It may be shared by "any two or more persons, being interconnected bodies corporate," 1948 Act § 3(1)(a); (b) it also may be held by any two or more persons who together, accounting for at least one-third of the market, "so conduct their respective affairs as in any way to prevent or restrict competition," *id.* § 3(2). However, the latter language covering restrictive agreements is limited by the 1956 Act, dealing specifically with some restrictive trading agreements; the 1948 Act does not apply to any agreement under the 1956 Act. *See* 1956 Act § 29(1). The nature of the intended dividing line is quite easily understood. The 1948 Act, the first modern British antitrust law, applied to dominant position through status or agreement, and the 1956 Act removed part of the jurisdiction. But it may not be so simple to decide in a particular case whether the conduct is covered by the 1956 Act and its broad test of agreement (including the concept of "arrangement"), or by the residual 1948 Act jurisdiction that still applies to other jointly held power.

138. *See, e.g.,* MONOPOLIES COMM'N, HOUSEHOLD DETERGENTS, A REPORT ON THE SUPPLY OF HOUSEHOLD DETERGENTS, H.M.S.O. No. 105 (1966). *See* text accompanying notes 193-213 *infra*.

139. 1948 Act §§ 2, 6(1).

140. *Id.* § 6(1)(a).

141. *Id.* § 6(1)(b).

(a) . . . efficient and economical means of [production of] goods [for] . . . 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 . . . and (d) the development of technical improvements and the expansion of existing markets and the opening up of new markets.¹⁴²

Once the Commission has decided that the behavior of the parties is or may be in some way against the public interest, it considers and may recommend what action, if any, should be taken to remedy the detriment.¹⁴³ While perhaps morally bound to pay attention to the Commission's report, the Board need neither act in response to a finding of detriment to the public interest, nor, if it does act, adopt the Commission's specific recommendations for change.

When the Board does decide to act, however, it has broad powers to regulate the behavior of the firms involved;¹⁴⁴ it may even break up a dominant firm into component parts.¹⁴⁵ But the Board, rather than wield its powers directly, prefers to use them as leverage to reach acceptable negotiated settlements with the parties involved.

How great is a firm's risk of being referred and, if referred, of being found to operate against the public interest? Since 1948 the Commission has been asked to investigate and has reported on 38 dominant-position situations.¹⁴⁶ An additional four references were under Commission investigation in late 1969. Of course, more than these 40-some areas of the economy fall under the statutory umbrella; hence, the Board uses discretion in selecting which to refer. Unfortunately, little is known about what prompts a reference, although the feeling we obtained through interviews with members of the British business and legal communities is that complaints, particularly by members of Parliament, significant business associations, and government purchasing departments, play an important part in the process.

In line with this, there is some hard evidence of the Board's past behavior, which, if nothing else, serves as a warning to a limited number of firms each year that they had better be prepared for a possible reference. The 1948 Act instructs the Board to include in its annual report of activity under the

142. *Id.* § 14.

143. *Id.* § 7(2).

144. See 1965 Act § 3, amending 1948 Act § 10.

145. 1965 Act § 3(6).

146. Two references, unreported at the time of the enactment of the 1956 Act, were withdrawn. Besides merger cases, the Commission has made some other special investigations as well. For example, at the time of this writing it was investigating the practice of refusal to supply and restrictive practices in the professions. In February 1969 it reported upon the practice of recommending resale prices. MONOPOLIES COMM'N, RECOMMENDED RESALE PRICES, A REPORT ON THE GENERAL EFFECT ON THE PUBLIC INTEREST OF THE PRACTICE OF RECOMMENDING OR OTHERWISE SUGGESTING PRICES TO BE CHARGED ON THE RESALE OF GOODS, H.M.S.O. No. 100 (1969).

monopolies law a list of the "nontrivial" complaints it has received.¹⁴⁷ It is unclear whether some of these complaints originate from the staff of the Board itself. What is clear, however, is that most often a matter will appear as a nontrivial complaint sometime prior to its reference, particularly in the immediately preceding year.

Consider 19 recent monopolies references, those from the years 1960-68.¹⁴⁸ Of them, 16 (including all three that involved significant American interests) were on prior Board complaint lists.¹⁴⁹ Two of the three not on prior lists can perhaps be seen as exceptions; they are the only two references of specific services since the 1965 Act extended the 1948 Act's coverage to this field,¹⁵⁰ although admittedly the supply of other services has appeared on the complaint list. Of the 17 references of suppliers of goods, then, not only have 16 appeared on the complaint list at some time but 14 appeared in either or both of the two years immediately preceding reference.¹⁵¹

Of the 19 references made to the Commission between 1960 and 1968, four matters were still pending in late 1969.¹⁵² The other 15, representing all of the Commission's monopolies reports since 1964, form the block that we examine here.¹⁵³

147. 1948 Act § 16(2).

148. There are two reasons for examining these years as a group; first, there was a break in 1958 and 1959 in which no references were made, and second, shortly prior to 1958 the 1948 Act was still applicable to restrictive agreements, resulting in reference of matters that the Commission would not be asked to examine today.

149. The nineteen are:

<i>Subject</i>	<i>Year of Nontrivial Complaint</i>	<i>Year of Reference</i>
Fire Insurance		68
Metal containers	66	67
Rods for cigarette filter tips	66	67
Men's haircutting services	X	67
Clutch mechanisms for road vehicles	53	66
Estate agents' services	X	66
Beer	64 & 65	66
Int'l motor insurance cards	65	66
Electric lamps	64	66
Infant milk food	64 & 65	66
Cellulosic fibres	64	65
Flat glass	63 & 64	65
Aluminum semimanufactures	64	65
Electrical wiring, harnesses	64	65
Cinema films	X	64
Household detergents	57	63
Color films	62	63
Wallpaper	59 & 60	61
Petrol	58 & 60	60

Note also that some industries were the subject of complaints for earlier years in addition to those shown.

150. See note 149 *supra*.

151. Note also that a complaint may be made, say, at the beginning of the year and a reference take place at the end of the year; this might explain why the parties would be without nontrivial complaint warning; but they might still have some public notice, for example, a question to the President of the Board of Trade in Parliament.

152. The four were: fire insurance, metal containers, rods for cigarette filter tips, and beer.

153. See BOARD OF TRADE, MONOPOLIES AND MERGER ACTS 1948 AND 1965, ANNUAL REPORT FOR THE YEAR ENDED 31ST DECEMBER 1968, H.M.S.O. No. 147 (1969) [hereinafter cited as 1968 ANNUAL

In 11 of the 15 matters the Commission found a monopoly that in some way was operating against the public interest.¹⁵⁴ Twice it concluded that the monopoly conditions existed but found nothing within the scope of its reference against the public interest.¹⁵⁵ Twice it found that the conditions of the 1948 Act did not prevail.¹⁵⁶ Thus, if the monopoly conditions in fact exist, chances are good that there are "things done" that operate against the public interest. In seven of the 11 matters resulting in against-the-public-interest finding, the Board announced that it secured undertakings by the parties to change their behavior.¹⁵⁷ Discussion regarding the other four, the most recent, was still going on at this writing. In all but one of the seven cases (and then only involving one party) undertakings were given simply on the basis of negotiations, without the Board having to resort to stronger sanctions.¹⁵⁸ That the Board achieved, or even asked for, what the Commission recommended, however, was often not the case as we shall illustrate when examining the three references in which American interests played a major part.

B. *Control of American Giants—Shooting Down the American Eagle*

Six of America's 50 biggest corporations¹⁵⁹ have been forced to alter their business behavior in Britain because of three very important monopolies cases in the past 4 years. First, Kodak was found to be exercising its monopoly in the supply and processing of color film in a manner contrary to the public interest.¹⁶⁰ Second, Procter & Gamble, along with the Anglo-

REPORT]; BOARD OF TRADE, MONOPOLIES AND MERGER ACTS 1948 AND 1965, ANNUAL REPORT FOR THE YEAR ENDED 31ST DECEMBER 1967, H.M.S.O. No. 131 (1968); 1966 ANNUAL REPORT, *supra* note 72; BOARD OF TRADE, MONOPOLIES AND MERGERS ACTS 1948 AND 1965, ANNUAL REPORT FOR THE YEAR ENDED 31ST DECEMBER 1965, H.M.S.O. No. 87 (1966) [hereinafter cited as 1965 ANNUAL REPORT].

154. See note 153 *supra*. In reverse chronological order, they were: estate agents' services; clutch mechanisms for road vehicles (Automotive Products Group); electric lamps (British Lighting Industries, GEC, Philips Electronic and Associated Industries and Crompton Parkinson); cellulosic fibres (Courtaulds); infant milk foods (Cow & Gate and Glaxo); international motor insurance cards (Motor Insurers' Bureau); color film (Kodak); household detergents (Unilever and Procter & Gamble); cinema films (The Rank Organisation Ltd. and Associated British Picture Corp.); petrol (numerous); and wallpaper (Wall Paper Manufacturers).

155. MONOPOLIES COMM'N, FLAT GLASS, A REPORT ON THE SUPPLY OF FLAT GLASS, H.M.S.O. No. 83 (1968); 1965 ANNUAL REPORT, *supra* note 153, at 12.

156. In MONOPOLIES COMM'N, MEN'S HAIRCUTTING SERVICES, H.M.S.O. No. 263 (1968), the Commission found that the one-third of the market requirement was not met. In aluminum semi-manufactures, 1966 ANNUAL REPORT, *supra* note 72, at 16, the Commission uncovered an agreement among four parties who together controlled at least 73% of the U.K. market. The matter was then referred to the Registrar of Restrictive Trading Agreements; it became registered agreement number 3045, 191 Bd. TRADE J. 866 (1966), was officially abandoned in July 1967, 193 Bd. TRADE J. 818 (1967), and was formally pronounced against the public interest by the Restrictive Practices Court in January 1968, 194 Bd. TRADE J. 1052 (1968). See Part III *infra*.

157. See note 153 *supra*.

158. 1966 ANNUAL REPORT, *supra* note 72, at 5. Total Oil Products fought the Board in the House of Lords in an attempt to prevent the Board's proposed remedies in the *Petrol* case from coming into effect; on losing, Total gave the same undertakings as the other petrol companies had. See text accompanying notes 219-27 *infra*.

159. See FORTUNE, May 15, 1969, at 166-87 (list of *Fortune's* 500).

160. MONOPOLIES COMM'N, COLOUR FILM, A REPORT ON THE SUPPLY AND PROCESSING OF COLOUR FILM, H.M.S.O. No. 1 (1966).

Dutch giant Unilever,¹⁶¹ was held to be using its position of dominance in household detergents against the public interest.¹⁶² Third, the Commission concluded that four giant American petroleum companies, Standard of New Jersey, Mobil, Texaco,¹⁶³ and Continental Oil, along with others in the trade, jointly held monopoly power in the supply of petrol to retailers and were exercising that power in ways not in the public interest.¹⁶⁴

In addition to being important economically, in terms of both market size and of the scale of the relief involved, these three cases illustrate a great deal about the British system. Through them we see, among other things, the British ability to train antitrust policy on American might; the contrasting roles of, and the interplay between, the Board and the Commission; the variety in the nature of both problems and remedies reached by the monopolies law; and examples of single, dual, and multifirm monopolies. If nothing else, the cases demonstrate that important American firms must recognize their antitrust risks when evaluating their British business in terms of the British monopolies policy. We shall look at color film, detergents, and petrol, in that order.

1. *Color Film.*

The color-film investigation was 3 years in developing, but once printed, the strongly worded report led to prompt and important changes in the policies of Kodak and other suppliers.¹⁶⁵ The Commission found that Kodak monopolized the supply of color film, accounting for 75 percent of the total U.K. volume (77 percent by value) in 1964.¹⁶⁶ The processing was divided into three categories by type of film,¹⁶⁷ and Kodak was found to hold a monopoly in the processing of nonsubstantive-reversal film with 85 percent of the British market in 1964.¹⁶⁸ Agfa, a German firm and one of Kodak's two substantial competitors in the British market, was found to have a monopoly in the processing of substantive-reversal film.¹⁶⁹ Moreover, the Commission found that both the supply and the processing of color film (the processing of negative-process type excepted) was monop-

161. Its U.S. subsidiary is Lever Brothers.

162. See MONOPOLIES COMM'N, *supra* note 138.

163. Texaco and Standard of California (Chevron) were jointly involved in the British petroleum market, at least in some respects, until 1967 when their joint venture, Caltex, was broken up throughout Europe with most of their U.K. retailing-outlet business going to Texaco.

164. MONOPOLIES COMM'N, PETROL, A REPORT ON THE SUPPLY OF PETROL TO RETAILERS IN THE UNITED KINGDOM, H.M.S.O. No. 264 (1965).

165. The matter was referred to the Commission on May 14, 1963, and released in published form April 28, 1966; negotiated compliance as to Commission recommendations was announced in part on August 8 and in part on October 3 of that year. See *Financial Times* (London), Apr. 29, 1966, at 1, cols. 5-6; *Financial Times* (London), Aug. 9, 1966, at 1, cols. 4-6.

166. MONOPOLIES COMM'N, *supra* note 160, paras. 232 & 235.

167. Negative-positive, substantive reversal and nonsubstantive reversal. *Id.* para. 237.

168. *Id.* paras. 239, 240. Kodachrome is its brand of film in that category.

169. *Id.* At least 44% of the market in 1964. Agfacolor is its brand in substantive-reversal film; Kodak's is Ektachrome.

lized by industry members generally through two restrictive practices: maintenance of minimum retail prices, including discounts to intermediate suppliers,¹⁷⁰ and refusal to sell color film exclusive of processing.¹⁷¹

While other suppliers individually or jointly qualified as statutory monopolists, the Commission's attention was clearly focused on Kodak, in both its public-interest analysis and its recommendations for change. After surveying the history of the color film industry and asserting that "the bulk of the colour film trade [in the U.K.] was likely, for economic reasons, to fall into the hands of not more than two or three suppliers in any event,"¹⁷² the Commission first concluded that "Kodak's monopoly position, as such, does not operate against the public interest nor may it be expected to do so."¹⁷³ While citing the "economies of scale which exist in this industry and . . . the company's general efficiency," the Commission then asserted that "the *things done* by Kodak which are against the public interest are capable of being remedied while still leaving it in its dominant position in the market."¹⁷⁴ If its dominant position were against the public interest, however, we wonder what the Commission would have suggested: nationalization? an absolute limit on sales? divestiture of part of the business?

With restructuring set aside, the Commission went on to find much that was objectionable about Kodak's behavior. First, adopting performance tests, the Commission found that Kodak's pricing policy gave it too great a profit from its monopoly position.¹⁷⁵ The Commission's figures showed that Kodak made a 55.6 percent return on capital employed in its color-film business, compared with a 17.6 percent return on the rest of its business.¹⁷⁶ Second, the Commission objected to the retail profit margins that Kodak set by resale price maintenance for both the sale and the processing of its color film.¹⁷⁷ These margins permitted retail outlets to earn substantially more on color-film sales than on cheaper black and white without requiring significantly more skill and effort;¹⁷⁸ we can understand the objection to the amount of the margin, but we fail to see any magic connection between the amount of work the retailer does to sell an item and his profit. Third, Kodak was scored for limiting the retail sale of its color film to a list of appointed dealers, particularly drugstore and photographic specialty shops, thereby excluding discount stores and mail-order

170. *Id.* paras. 234, 235.

171. *Id.* paras. 239, 240.

172. *Id.* para. 252.

173. *Id.* para. 292. *See also id.* paras. 253, 276.

174. *Id.* para. 276 (emphasis added).

175. *Id.* paras. 259, 261.

176. *Id.* para. 253. Kodak disputed the calculations, but the Commission, not treating them as sacred, found Kodak's profits on film too high in any event.

177. *Id.* paras. 263, 269 (generally 30% on sales and 33 1/3 % on processing).

178. *Id.* para. 267.

houses.¹⁷⁹ The Commission saw no reason for such a marketing pattern other than pressure from traditional retailers who enjoyed the security of artificially high profit margins.¹⁸⁰ The Commission also attacked the practice of Kodak, Agfa, and other manufacturers of selling at least one major brand process-paid.¹⁸¹ The suppliers' argument, that their processing was needed to ensure high quality, was rejected as inadequate to justify the restriction on competition in the processing trade.¹⁸²

The Commission then set out five recommendations designed to eliminate those aspects of the color film business that it faulted. Turning to Kodak first, the Commission recommended that the firm (a) lower its prices on film and processing;¹⁸³ (b) lower the retailers' discount on color film;¹⁸⁴ and (c) deal with any retailer, subject to credit-worthiness considerations, who wished to stock color film.¹⁸⁵ Dealing with the processing problem, the Commission recommended (d) that manufacturers should sell film and processing service separately and that retailers should offer film with or without processing, at the customer's choice. In an effort to stimulate the entire market, the Commission recommended (e) an end to import duties on color film.¹⁸⁶

Less than 4 months after the Commission's report, the Board of Trade President announced that voluntary compliance had been agreed to by Kodak and the other suppliers with respect to three of the Commission's recommendations and that the Board had rejected a fourth.¹⁸⁷ Kodak agreed to reduce its prices 12½ percent, which would lead to a 20-percent reduction in retail prices, and further agreed to make its color film generally available to any outlet. Finally, suppliers generally agreed to sell their film exclusive of processing and to give technical aid to independent processors. An investigation into the lowering of the import duty¹⁸⁸ had led the Board to the conclusion that such a move was then unwise; presumably, balance-of-payments considerations outweighed considerations of competition.

The action that created the most interest was Kodak's agreement to

179. *Id.* paras. 270, 272, 274.

180. *Id.* para. 273.

181. Ninety percent of all reversal film was sold process-paid; Kodak's Ektachrome was an exception. Negative-positive film was normally sold without processing, and half was processed by independent processors. *Id.* paras. 239, 277.

182. *Id.* paras. 282-84. The mere existence of Kodak and Agfa monopoly positions in two sectors of processing was not the source of Commission objection. *Id.* para. 285.

183. *Id.* para. 287.

184. *Id.* para. 288. The Commission did not give its opinion on the issue of whether resale price maintenance should be abolished, for this is a subject covered by special British antitrust legislation, the Resale Prices Act 1964, Part II, c. 58.

185. MONOPOLIES COMM'N, *supra* note 160, para. 289. Suppliers were also directed to provide technical assistance to independent processors. *Id.* para. 290.

186. *Id.* para. 287.

187. 191 BD. TRADE J. 393 (1966). See also 1966 ANNUAL REPORT, *supra* note 72, at 6, 26.

188. See Financial Times (London), Apr. 29, 1966, at 1, cols. 5-6, at 9, cols. 1-3.

lower its prices. As the Commission pointed out,¹⁸⁹ Ilford, Kodak's biggest competitor, was staying alive mostly because its prices were substantially lower than those of Kodak; thus a price cut by Kodak might reduce Ilford's share of the market. However, Ilford expressed general pleasure with the package of changes, indicating that it expected to be able to move into mass retailing outlets in order to maintain or increase its market share.¹⁹⁰

Then in October 1966 Kodak announced that it was ending its resale price maintenance program and shifting to price recommendations. Kodak proposed a retail price 20 percent below the price prevailing at the time of the Commission report.¹⁹¹ With this the Board announced that it would pursue the Commission recommendations no further.¹⁹² Apparently it hoped that the end of retail price maintenance would itself lead to lower retail margins, making a direct push for a lower recommended margin unnecessary.

The *Color-Film* case nicely illustrates the Commission's power to make fairly sweeping findings and proposed remedies, combined with substantial implementation by the Board, to effect a significant change in the parties' business. Moreover, it makes a nice contrast with the *Detergents* case, which we consider next.

2. *Detergents*.

Not only was the Commission's household-detergents report¹⁹³ more than 3 years in the wash, followed by 8 months' delay in the Board's announcement of changes in behavior agreed to by the parties,¹⁹⁴ worse, mockery was made of the Commission's rather bold suggestions for solving the public-interest problems by the undertakings eventually accepted by the Board. This is not necessarily meant as an endorsement of the Commission's position, but rather an expression of dismay over what a large effort and little result the Commission's findings yielded.

The Commission first determined that both Unilever and Procter & Gamble were statutory monopolists in household detergents, holding 45 percent and 43 percent respectively, of the British market by weight in 1964 (44 percent and 46 percent, respectively, by value).¹⁹⁵ The Commission then concluded, *à la Kodak*, that their monopoly positions, as such, did not operate against the public interest.¹⁹⁶ In short, it acceded to the continuance

189. MONOPOLIES COMM'N, *supra* note 160, paras. 88 & 260.

190. Financial Times (London), Aug. 9, 1966, at 8, cols. 5-8. Apparently Ilford previously feared a retailer boycott and was unwilling to buck the traditional retailers.

191. 1966 ANNUAL REPORT, *supra* note 72, at 6.

192. *Id.* See also 191 BD. TRADE J. 854 (1966).

193. The reference was made May 14, 1963, and the Commission's report was published August 10, 1966. 192 BD. TRADE J. 1124 (1967).

194. The President of the Board of Trade reported them April 26, 1967. *Id.*

195. MONOPOLIES COMM'N, *supra* note 138, paras. 90 & 91.

196. *Id.* para. 121.

of the duopoly, perhaps anticipating unwillingness by the Board to do anything effective to end it, and instead focused on means to shield the public from any abuses caused by the duopoly. As in *Kodak*, then, the Commission looked basically at behavior.

Pricing, advertising, and promotion policies of the two giants were scored by the Commission. Concisely, it stated, "Our principal criticism is that competition in advertising and promotion has tended to displace price competition."¹⁹⁷ The effects of this displacement, the Commission concluded,

are not only to increase prices to the extent that the additional expenditure in this field is wasteful, but also . . . to keep new entrants out of the market, to weaken other competitive restraints on prices and profits, and to create a situation in which even the less successful of the two principal competitors can earn extremely comfortable profits while those of the more successful are outstandingly high.¹⁹⁸

It reads beautifully, like a description of a duopoly model from a theoretical economics textbook; perhaps it is, for some of these findings seem more instinctive than demonstrated by hard evidence.

Yet the Commission did put forward a strong case, grounded in its objection to the selling methods of the two firms.¹⁹⁹ Detergent advertising was found to be aimed at building "brand images" rather than at disseminating information; promotional activities featured gimmick giveaways unrelated to the products; numerous very similar products were marketed under different brand names. Together these practices resulted in selling costs that were "unduly high"; in turn, not only were there high barriers to entry into the market, but also the public was burdened with promotion costs from which it received no benefit. Hence, the parties avoided price competition, sealed themselves off from competitors, passed the cost of promotion on to consumers, and wound up with excessive profits to boot. Performance tests were again used to bolster the Commission's case; although the figures are disputable, the Commission found that even on a replacement-cost basis Procter & Gamble's profits on capital employed were 37 percent for 1965 and Unilever's 16.4 percent, both well above the United Kingdom manufacturing industry average.²⁰⁰

The Commission is shy about judging pricing policies directly by behavior tests; that is, through examining price levels. First, it realizes, as do the parties, that the market structure makes non-oligopoly pricing unlikely without outside (government) pressure.²⁰¹ Second, many ingredient costs

197. *Id.* para. 116.

198. *Id.*

199. See generally *id.* para. 94.

200. *Id.* para. 109. We ask the reader to consider what the Commission would make of a situation in which Unilever's profits were, say, 10%, slightly below the manufacturing industry average.

201. In a sense, while not knowing exactly what comparison to make, the Commission simply believes prices are too high because of the lack of pricing pressure on the parties; moreover, it is safer sticking to theory. *Id.* paras. 114, 115.

seemed to be falling, making useful comparisons precarious.²⁰² Third, another government agency, the Prices and Incomes Board, is responsible for price-level problems generally,²⁰³ and it made an evaluation of detergents during the course of the Commission's investigation, refusing to condemn price increases in 1964 and 1965 of 12 percent to 20 percent.²⁰⁴ Rather, in the eyes of the Commission, it is the high selling costs and profits that go into making up the final price that are most objectionable.

To summarize the Commission's view: If only the parties would put less into sales promotion, then they would be able to lower prices; in turn, they would have to compete more on prices generally, would be open to more outside competition, and would earn more reasonable profits. Or, at least, it thought this would happen with the help of some government arm-twisting, as we shall see. Thus, the Commission's conclusion was in line with that of the Prices and Incomes Board, which had said that "the consumer would benefit if the area of competition on price could be increased, at the expense, if need be, either of outlays on advertising and promotion or of profit."²⁰⁵

The Commission's major recommendation was quite daring (assuming no restructuring was to be done), although quite in line with its findings. It urged a 40-percent cut in the selling expenses of the two companies, to be followed by substantial price reductions.²⁰⁶ However, the Commission was unwilling to assume that the expense cutting would lead automatically to voluntary price cuts rather than increased profits; thus the Commission recommended that the Board negotiate a 20-percent price decrease, tied to the cost decrease.²⁰⁷ Finally, for the longer term it suggested adoption of measures to discourage excessive promotional costs, intimating its preference for the disallowance for tax purposes of unneeded promotional costs.²⁰⁸

The parties, disturbed by the Commission's wish to involve the government so deeply in the details of business decisionmaking, decided to fight the suggested remedies.²⁰⁹ The Board, either because it disagreed with the

202. *Id.* para. 113.

203. See Prices and Incomes Act 1966, c. 33 (putting the Board, first established by Royal Warrant April 8, 1965, on a statutory basis).

204. PRICES OF HOUSEHOLD AND TOILET SOAPS, SOAP POWDERS AND SOAP FLAKES, AND SOAPLESS DETERGENTS, CMND. No. 2791 (1965). The Prices and Incomes Board, taking other things as given (including selling expenses), approved the 1964 and 1965 price increases on the basis of cost increases, particularly in soap, as opposed to synthetic, powders. *Id.* para. 60. It further recommended a price freeze on the parties' detergent products until the end of 1966, encouraged increased price competition, and urged the end of retail price recommendations. *Id.* para. 61. The Commission reported that price recommending had been terminated. MONOPOLIES COMM'N, *supra* note 138, para. 116.

205. PRICES OF HOUSEHOLD AND TOILET SOAPS, SOAP POWDERS AND SOAP FLAKES, AND SOAPLESS DETERGENTS, *supra* note 204, para. 61; MONOPOLIES COMM'N, *supra* note 138, para. 116.

206. See generally MONOPOLIES COMM'N, *supra* note 138, paras. 122-27.

207. *Id.*

208. *Id.*

209. The press also seemed dubious about the Commission's proposals. See, e.g., THE ECONOMIST, Aug. 13, 1966, at 664, 665: "If the President of the Board of Trade tries to put this one over on the

Commission, because it was unwilling to jeopardize its general relations with the business community, because a voluntary settlement meant more to it than an effective one, or because it was not interested in supervising this type of experimental relief (at least not in the detergent field), or perhaps for some other reasons,²¹⁰ reached an altogether different solution.

After months of haggling the Board President announced that the parties agreed to freeze prices for 2 years on detergents covered by the report²¹¹ and to make available, along with their regular brands, first-class products with little or no advertising behind them, selling at 20 percent below the heavily promoted brands.²¹² The Board seemed to think this was adequate; it would give the consumer a choice between cheaper products and more expensive, highly advertised ones with no loss in quality. Discussions of soap sales have since centered on arguments over whether the non-advertised brands are making an impact in the market.²¹³

This kind of competitive experiment, however, is not at all what the Commission had in mind, and it hardly tests the relationship between heavy advertising and high prices, high profits, and barriers to entry. It was not alleged that housewives would buy a cheaper though less known (or unknown) brand X, if the joys of brand Y are pumped into their homes every evening on the "telly." It is much more important to find out the effect of letting the housewife choose among numerous cheaper, little-advertised brands instead of among numerous heavily advertised brands. Would people buy a lesser amount of detergent? Would prices be driven down to levels where they would yield only reasonable profits, even for the most successful? Would new competitors and new kinds of detergent products come onto the market? Commission members probably thought so, or at least felt such an experiment is justified. With the approved plan, however, we will never know. This may be a less onerous result for the

soapers, they should not cave." See also Carlson, *Advertising: Soft Line on British Backwash*, N.Y. Times, Aug. 12, 1966, at 46, cols. 4-6.

210. The Board's President did assert, "My examination of this problem has led me to conclude that we know too little about the economic effects of advertising in general and its relationship to competition. Accordingly, I have decided to institute some independent research into this subject, and will be consulting industry about its scope." 192 Bd. TRADE J. 1124 (1967). We ask what better research project could he design than the Commission's proposals?

211. *Id.* This is an extension of the price freeze recommended earlier by the Prices and Incomes Board. See note 204 *supra*. In mid-1969 the price freeze was lifted and Unilever immediately raised its prices on leading brands. The Times (London), June 24, 1969, at 19, col. 5.

212. 192 Bd. TRADE J. 1124 (1967). For Unilever this meant only converting its already little advertised "18% more for your money" brand into a "same amount for less money" package. UNILEVER, ANNUAL REPORT 1967, at 15-16 (1968). Procter & Gamble converted some of its advertised, lower-priced products. The Board also proposed consultations with a view toward standardized packaging of detergents.

213. Unilever reported in April 1968 that "new brands have gained only minor market shares and it is clear that the great majority of consumers still prefer the other brands." UNILEVER, *supra* note 212, at 15-16. It also asserted that its "total sales of detergents increased and trading profits improved." *Id.* Retailers have asserted that "[s]tate soaps" [are] outshone by the high-pressure brand names." The Times (London), June 26, 1968, at 27, cols. 3-5. The Consumer Council, however, has called the cut-price washing powders a success, with 20% of housewives buying them.

American subsidiary Procter & Gamble. However, the Board's unwillingness to defer to the Commission is a large threat to any innovativeness that the Commission had seemed to offer in methods of controlling the power of oligopolists.

3. *Petrol.*

The Commission's inquiry into the supply of petroleum to retailers centered on the relationships between the oil companies and their dealers; in practically every case the dealers were either managers of company-owned stations or franchisees who had made exclusive dealing arrangements with one supplier.²¹⁴ Hence, the Commission's concerns were both structural—the direct ownership of important shares of the retail market by oil companies—and behavioral—the restrictive nature of the arrangements between suppliers and their franchisees.

Ultimately, the Commission was interested in generating more competitive conditions in the distribution of petroleum to the consumer. Hence, in addition to influencing the relative bargaining power of the dealers as against the otherwise very powerful suppliers for the sake of competitive fairness, the Commission clearly hoped that by making the retail trade more independent, it would create competitive behavior up and down the chain of distribution.

The six biggest petroleum suppliers accounted for 95 percent of the British market in 1964;²¹⁵ on a status test only one, the Shell-Mex and B.P. combine,²¹⁶ qualified as a statutory monopolist with 45 percent of the market. Esso (Standard of New Jersey) was a solid second with 27.4 percent, followed by three other American powers, Regent (Texaco) with 11.1 percent, Mobil with 5.9 percent, and Jet (Continental) with 3.5 percent. Because Shell-Mex and B.P. owned but 2330 of a total of nearly 40,000 outlets, and Esso even fewer, there was no monopolist status at the retailing level.²¹⁷ The Commission, however, considered the industry as a whole (including even the smaller petroleum companies), and found that the 1948 Act applied because the suppliers generally "conducted their respective affairs as to restrict competition" through their arrangements with and behavior toward the dealers, particularly as regards price recommending and exclusive deal-

214. For each of the four biggest suppliers (controlling together 90% of the market) company ownership or exclusive dealing existed in at least 92% of the outlets that they supplied with petroleum. *MONOPOLIES COMM'N*, *supra* note 164, para. 101.

215. *Id.* para. 9.

216. In the U.K. market the international Anglo-Dutch giant, Shell, and the British oil giant, British Petroleum, have formed the joint marketing company Shell-Mex and B.P. for the distribution of their products. *Id.* para. 10.

217. *Id.* para. 101.

ing arrangements.²¹⁸ In short, the dominant-position policy was found applicable to vertical restrictive practices engaged in by tight oligopolists.

The Commission's objections to the way the retail supply of petrol was conducted led it to recommend both structural and behavioral changes. With respect to structure the Commission suggested that

no petrol supplier . . . whose deliveries of petrol in any year to company-owned stations exceed 15 percent of his total deliveries to petrol stations in that year should build or acquire any further stations . . . while such excess continues, provided that this prohibition should not apply in any year in which the total deliveries by the supplier . . . are less than 10 million gallons.²¹⁹

Turning to behavior the Commission urged numerous changes in the franchise relationship, including a maximum permissible length of exclusive dealing contracts, the right of dealers to carry collateral products of other manufacturers, and the rights of dealers in regard to credits extended by suppliers.²²⁰

The report and recommendations were nearly 5 years in being refined, and it took the Board an additional year to secure satisfactory undertakings from petrol suppliers.²²¹ The Commission's proposals for behavioral changes were generally adopted in promises given by the suppliers, which remain in force and apparently have been kept.²²² The structural remedy—limitation of station ownership—went haywire from the start and after less than 2 years of operation in modified form was abandoned altogether.²²³

While the Commission recommended that the limit on new stations apply to companies with a volume of 10 million gallons a year or more, the Board was talked into setting the standard at 50 million gallons.²²⁴ The Board President asserted that the lower limit "would carry a risk of discouraging new entrants to the U.K. market with the effect of diminishing rather than promoting competition."²²⁵ Hence the restriction applied, at the time of adoption, only to the six largest companies, including of course the four American giants.²²⁶ Moreover, the Board did not cast the parties' undertakings in terms of "build or acquire" as suggested by the Commission, but put them simply in terms of a limit on the number of company

218. *Id.* para. 427. See also *id.* paras. 344-49.

219. *Id.* para. 428.

220. *Id.*

221. The reference was September 27, 1960, and the report printed July 22, 1965. The undertakings were effective as of August 6, 1966.

222. For the complete undertakings see 1966 ANNUAL REPORT, *supra* note 72, at 27-39.

223. The failure of the Board to stick with structural reform in the petrol industry, plus the general unwillingness of the Commission either to condemn bigness or to support dismantling, has made the tone of the British antitrust policy almost exclusively "behavioural control."

224. 1966 ANNUAL REPORT, *supra* note 72, at 25.

225. *Id.*

226. Their petroleum volumes in 1964 in millions of gallons were: Shell-B.P., 1191; Esso, 724; Regent, 295; Mobil, 155; Jet, 92; and Petrofina, 65. MONOPOLIES COMM'N, *supra* note 164, para. 9.

stations. The upshot has been that the major oil companies generally were able to replace poorer sites and modernize older structures, while still keeping their station numbers constant;²²⁷ whether the Commission foresaw or intended this is unclear.

In any event, some aggressive smaller companies soon found themselves approaching the 50-million-gallon limit and realized that they would never be able to make a dent in the majors' market except through franchising stations, which did not appeal to them. Total Oil, which had originally fought the Board to the House of Lords over its right to impose the limit, was the first to run into the barrier.²²⁸ Apparently the Board first considered constructing some kind of sliding scale as an alternative to the 50-million-gallon rule; perhaps the percentage of owned stations would be limited inversely to the supplier's total gallonage. However, in mid-1968 the Board decided to abandon the limit on structural concentration altogether.²²⁹ If the objection to company-owned stations is the rigidity they bring to the system, then surely there was no need to drop the bar completely just to be "fair" to Total and others running into it. The gallonage test could have been increased; the rule could have been limited (to Shell-Mex and B.P. and Esso alone, for example); possibly the majors could have been forced to give up some of their stations. Removal of the bar to the acquisition of stations seems to us to be abandoning the structural objection, for surely the majors will return to acquisition with as much or more zest as the aggressive minors. Not surprisingly, the demise of the rule led promptly to the announcement that Shell-Mex and B.P. had plucked off Heron, a chain of independent stations in the London area.²³⁰

An important effect, or at least coincidence, of the short ban on station acquisition by the majors was the sharp increase in the participation of giant American oil companies in the British market.²³¹ What impact the vagaries of the Board's policy regarding remedies will now have on these companies

227. Actually Esso, as we have mentioned in the mergers section, was permitted to go ahead with its acquisition of Agip, a matter in progress at the time of negotiations with the industry. 190 Bd. TRADE J. 370-71 (1966). See text accompanying note 30 *supra*. Agip had more than 60 stations and about 6 million gallons of volume. MONOPOLIES COMM'N, *supra* note 164, para. 264.

228. See 1966 ANNUAL REPORT, *supra* note 72, at 5. In 1964 Total's volume had been more than 27 million gallons supplied to 321 retail outlets. MONOPOLIES COMM'N, *supra* note 164, para. 264. By 1968 Total had increased its outlets to 700. See PETROLEUM INFORMATION BUREAU, OIL—THE UNITED KINGDOM II (1968).

229. See The Times (London), May 4, 1968, at 11, cols. 3-4; *id.*, May 7, 1968, at 25, cols. 6-8. For the official announcement see 194 Bd. TRADE J. 1403 (1968). See also 1968 ANNUAL REPORT, *supra* note 153, at 18-19; 195 Bd. TRADE J. 636 (1968).

230. The Times (London), July 3, 1968, at 26, cols. 1-3. Heron's 35 stations had achieved an impressive volume of approximately 20 million gallons annually.

231. MONOPOLIES COMM'N, *supra* note 164, para. 264. In the spring of 1968 the number of outlets served by American firms other than the big four was more than 2000. Financial Times (London), Jan. 20, 1968, at 10, cols. 5-8; Sunday Times (London), Mar. 31, 1968, at 30, cols. 3-8; The Times (London), Apr. 5, 1968, at 29, cols. 3-6; PETROLEUM INFORMATION BUREAU, *supra* note 228, at 11.

is conjectural, which perhaps is one of the main problems the American invaders face.

4. *More sitting ducks?*

What other American firms can expect to be subjected to a Commission investigation?²³² No meaningful prediction can be made. The ability of the Commission to investigate entire industries in which firms conduct their affairs so as to restrict competition, as in *Petrol*, means that all American firms, especially those in oligopolistic trades, face some risk. Indeed, the Commission was asked in late 1969 to look into the supply of starch; one of the market leaders is a subsidiary of the American Corn Products.²³³ Moreover, because of the uncertainty concerning which statutory monopolists the Board might elect to refer, it seems unprofitable to try to construct market-share analyses for various American firms. A number of American cyclops surely must act with an eye on potential Commission investigation.²³⁴

When monopolies regulation hits, it can sting. Though it may be possible to roll with the punch by skillful negotiation with the Board, this will not always work. To minimize the chance of not seeing the haymaker coming, the best warning is the Board's list of nontrivial complaints in its annual reports.

III. RESTRICTIVE AGREEMENTS

A third way to bridge the size gap is to allow smaller competitors to join together, short of merger, for the purpose of achieving some of the advantages of bigness that they do not possess individually. This may be labeled "cooperation" among competitors.²³⁵ But however euphemistically styled,

232. Past Monopolies Commission matters other than those already discussed have involved American interests. They include: Champion Sparking Plug Co., a subsidiary of the American Champion Spark Plug, dominant in its special field, MONOPOLIES COMM'N, REPORT ON THE SUPPLY OF ELECTRICAL EQUIPMENT FOR MECHANICALLY PROPELLED LAND VEHICLES, H.M.S.O. No. 21 (1963), and subsidiaries of Goodyear, Firestone, and Uniroyal, investigated along with the British tire-market leader Dunlop and continental manufacturers, MONOPOLIES COMM'N, REPORT ON THE SUPPLY AND EXPORT OF PNEUMATIC TYRES, H.M.S.O. No. 133 (1955).

233. See CCH COMMON MARKET REP., EUROMARKET NEWS, Sept. 30, 1969, at 3.

234. Consider the roster of such giants compiled by two recent writers: "Already a number of key British industries are dominated by US companies. Motor manufacturing; tyres; oil and petrol; car accessories; computers; office equipment; accounting machines; photography; chemicals; chemical engineering; film industry; paper-back publishing; drugs and medicines; roadmaking machinery; agricultural tractors and harvesters; razor blades; electric shavers; toilet accessories; cosmetics; soap detergents; consumer durables—vacuum cleaners, sweepers, refrigerators, washing machines, heating appliances, telephones; electric tools; pens and pencils; typewriters; canned, tinned and packaged foods of all kinds; advertising; film production; news magazines; mining equipment; manmade fibres; radio equipment; electric switchgear; shoemaking machinery; machine tools; cigarette lighters; clocks and watches; women's foundation garments; car hire; cine-projectors; dental goods; sewing machines; locks; beverages and chewing-gum." J. McMILLAN & B. HARRIS, *supra* note 1, at 4-5. For a more scholarly study of U.S. business in the U.K. and what is clearly the best work in its field see J. DUNNING, AMERICAN INVESTMENT IN BRITISH MANUFACTURING INDUSTRY (1958).

235. See Turner, *Cooperation Among Competitors*, 61 NW. U.L. REV. 865 (1967) (comments by the former Assistant Attorney General, Antitrust Division on permissible "cooperation" under the Sherman Act).

this approach means permitting competitors in some way not to compete; it is condoning agreements in restraint of trade, or, as the British call them, restrictive trading agreements. This is not to say, by any means, that all such agreements are unreasonable or against the public interest. Still the lesson that many western European nations seem to feel they have learned, by comparing the American economy under the Sherman Act to their previously cartelized industries, is that unbridled cooperation has a strong tendency to produce a *less* vigorous economy.²³⁶ Competitors too often want to join together to avoid rather than to evolve the research and development, the modern marketing strategy, the quantitative managerial techniques, and the innovation that large-size economic units are supposed to accomplish for the Americans.

Consequently, as in the case of mergers, the British have adopted a flexible policy that generally discourages the old-style combinations for price-fixing or rigid patterns of distribution, but at the same time encourages certain cooperation in the national interest. The British Restrictive Trade Practices Act 1956,²³⁷ amended in 1968,²³⁸ is the principal instrument of British policy in the area. To be sure, it was aimed primarily at dismantling the great network of trade-restraining associations that grew from governmental controls, imposed during World War II and retained voluntarily by British industry after the postwar return to economic normalcy. Yet it is also true that the drafters of the 1956 Act were clearly aware of the size question.²³⁹ While not specifically pointed at American bigness or strength, the 1956 Act has been, and may in the future be, employed in support of countervailing British interests.

A. *Competition and the Public Interest*

Agreements falling within the very broad definition in the 1956 Act²⁴⁰ are to be reported by the parties to a Registrar who enters them on a public

236. Since World War II the adoption or modernization of antitrust laws, grounded generally in the ideology of American antitrust policy, has been marked; the pattern appears in the two major European trading blocks, EEC and EFTA, as well as in other wealthy industrialized nations. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (1964).

237. See note 8 *supra*.

238. Restrictive Trade Practices Act 1968, c. 66 [hereinafter cited as 1968 Act].

239. While the American Sherman Act generally attacks restraint of trade, the British policy has assumed from the start that certain groups of agreements dealing with specific areas of trade restraint will operate for the national good; in other words, unbridled competition within the country simply might render the British economy too vulnerable.

240. Agreements concerning "prices to be charged . . . terms or conditions . . . [or] quantities or descriptions . . . of goods, [or] the processes of manufacture to be applied to any goods, . . . or the persons or classes of persons to, for or from whom, or the areas or places in or from which, goods are to be supplied or acquired, or any such process applied" fall within the Act. 1956 Act § 6(1). In addition, "agreement" includes "any agreement or arrangement, whether or not it is or is intended to be enforceable . . . by legal proceedings . . . and 'restriction' includes any negative obligation, whether express or implied and whether absolute or not." *Id.* § 6(3). Registration is required of agreements "between two or more persons carrying on business within the United Kingdom" in which "restrictions are accepted by two or more parties." *Id.* § 6(1).

register.²⁴¹ He then brings the agreements before a special Restrictive Practices Court, which decides whether they are in the public interest.²⁴²

The public-interest standard is more precisely spelled out in the 1956 Act than in the 1948 and 1965 Acts under which the Commission evaluates dominant-position and merger matters. Under the 1956 Act the parties have the burden of showing that their agreement is in the public interest first, by satisfying (passing through) one or more of the prescribed public-interest standards (called gateways)²⁴³ and second, by showing that on balance the agreement is not unreasonable (called the tailpiece). The burden of proof is key: Most applicants have failed to meet it; many have been deterred even from trying. In the 13 years since the statute was passed, the Court has approved less than a dozen agreements;²⁴⁴ about three dozen have been disapproved after full hearing and about 200 have been found by the Court to be against the public interest by default. Moreover, more than 1900 agreements have been abandoned by the parties after their registration and have never been processed through the Court.²⁴⁵

241. *Id.* § 1.

242. *Id.* §§ 2, 20(1). This Court, dealing only with restrictive practice matters, has, in addition to regular judges, other members "qualified by virtue of . . . knowledge of or experience in industry, commerce or public affairs." *Id.* § 4.

243. Six gateways were established in the 1956 Act, but the general nature of one, gateway (b), has to a large extent made it the most important. Under gateway (b) the test is whether "the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom . . ." *Id.* § 21(b). This gateway has been relied upon, either alone or with others, in practically every case, even though the Court has developed substantial interpretative material on a number of other gateways.

The other gateways relate to (a) protecting the "public against injury . . . in connection with the consumption, installation or use of those goods"; (c) considerations "necessary to counteract measures taken by any one person not party to the agreement with a view to preventing or restricting competition"; (d) negotiating "fair terms for the supply of goods to, or the acquisition of goods from, any one person . . . who controls a preponderant part of the trade or business of acquiring or supplying such goods"; (e) the "effect on the general level of unemployment in the area"; and (f) "the volume or earnings of the export business." *Id.* § 21(1). Gateway (g) permits restrictions reasonably required for the maintenance of a restriction approved by the Court under another gateway. *Id.* § 21(9).

A new gateway was added to the list by the 1968 amendments, but it is unlikely that it will alter the chances of getting ordinary agreements approved. Agreements for the exchange of information, previously not registerable, now may be submitted. 1968 Act § 5. It was felt that some information exchanges might simply be harmless and that agreements should not have to be abandoned, even though the parties might have difficulty getting through one of the old gateways by showing the agreement was positively in the public interest. Hence the new gateway provides approval if "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." *Id.* § 10(1), amending 1956 Act § 21(1). This gateway applies generally, however, and can be claimed by parties to any agreement—not just with respect to information agreements.

The problem with trying to apply the new exemption to traditional cases is that most of the important agreements—for example, those defended before the Court—clearly do restrict competition to a material degree. It is their purpose, and the parties' point is that somehow this restriction is good. While the gateway could mean that the Court will have to deal with a number of information-agreement cases, action-oriented agreements will likely remain as rarely defended as before.

244. The agreements approved have involved subjects of some moment but are hardly the key aspects of the British economy: black bolts and nuts, distant water vessels, glazed and floor tiles, permanent magnets, scrap iron, watertube boilers, windows, books (probably the most important of the approved agreements and a special case because of the free-speech and cultural-development interests at stake), and sulphur. For a good review of all the decided cases see ORGANIZATION OF ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 236.

245. See RESTRICTIVE TRADING AGREEMENTS, REPORT OF THE REGISTRAR, 1ST JULY 1963 TO 30TH

It is important for American firms to be aware that this already tough British stance against restrictive agreements has recently been made even firmer. The 1968 amendments to the 1956 Act represent a major tightening of its operation, felt by many to be long overdue. Sanctions for nonregistration of restrictive agreements were adopted for the first time. Previously, the duty to register an agreement had not been clearly placed on anyone; if an unregistered relationship that qualified as a restrictive trading agreement were uncovered, the penalty was simply registration. Because of this, numerous unregistered agreements might well have continued to operate, since discovery at worst meant eventual abandonment. This small risk also encouraged lawyers to design complicated relationships that fell outside the formal definition of agreements to be registered. In recent years much of the Registrar's efforts have been directed toward uncovering secret restrictions.

The 1968 changes provide civil actions for damages to parties injured by the operation of unregistered agreements,²⁴⁶ permit the Registrar to request an injunction against the agreement from the Court,²⁴⁷ with findings or decisions of law binding against the parties in civil cases,²⁴⁸ and make unregistered agreements void and unenforceable.²⁴⁹ This move in the direction of the Sherman-Act approach of treble damage and criminal penalties is something for which American companies must be alert.

Our concern is with the British response to the American business invasion, and the application of the general policy against restrictive agreements described thus far hardly seems to fit this bill. However, when exceptions to this general policy either patently or latently may be directed at the size gap, we are back on the track. The gateways of the 1956 Act represent exceptions to the general British policy against restrictive trading agreements and are, to a greater or lesser extent, latently relevant to the size gap. To the extent that agreements justifiable under the 1956 Act achieve public benefits that might otherwise be accomplished by an efficient giant, such agreements may be alternatives to size. If size is equated with American companies, admittedly an oversimplification, such agreements are alternatives to American companies.

Some gateways are less latently relevant to size than others. We first examine one of these less latent gateways and then turn to exemptions from the 1956 Act's coverage to illustrate how the Act may be focused on considerations directly relevant to the size gap.

JUNE 1966, CMND. NO. 3188 (1966). Until the 1968 amendments the Registrar seemed to have a duty, uncomplied with, to refer even the abandoned agreements to the Court. *Id.* at 4-5. This has been changed so that reference is left to the Registrar's discretion, 1968 Act § 9, and it seems fair to assume that he will refrain from disturbing practically all abandoned agreements.

246. *Id.* § 7(2).

247. *Id.* § 7(3).

248. *Id.* § 7(4).

249. *Id.* § 7(1).

B. Import Cartels and Schemes of National Importance

Gateway (d) exempts agreements that are necessary to enable the parties to negotiate fair terms from a preponderant buyer or seller. A typical import cartel, in contrast to a domestic buying cartel, seems almost certain to get past the tailpiece once it gets through this gateway, for it is hard to see any harmful local effects from such an agreement.²⁵⁰ The case of the National Sulphuric Acid Association,²⁵¹ shows that an import cartel should easily get through either the specific buying-pool gateway or else the general public-benefit gateway.

1. *The Sulphur Case.*

The words of art whose definition is required in gateway (d) are "fair terms" and "preponderant." The approach taken in the *Sulphur Case* indicates that these are easily defined in favor of import groups. NSAA was a long-standing buying organization, comprised of British makers of sulphuric acid, whose major function was to secure their members' requirements of imported sulphur. Interestingly, the American giant against which this pool was ranged was not an individual enterprise in the traditional sense but an approved export cartel exempt from the Sherman Act under the Webb-Pommerene Act.²⁵² Its members were the large American sulphur producers who, because of this nationalistic antitrust exemption, were able to further aggregate their strength into the group called Sulexco (Sulphur Export Corporation of the United States).

The Court, finding that it was not necessary to hold even half the market to be preponderant, deemed Sulexco a preponderant seller; at the time of the case Sulexco provided about half the world's export supply and about half of NSAA's needs. If the Court eventually takes a cue from the British monopolies policy and equates "preponderant part" with dominant position (that is, one-third or more of the relevant market)²⁵³ many American giants might qualify, Webb associations aside.

"Fair terms," the Court held, meant commercially favorable terms; it had nothing to do with moral overtones. Moreover, NSAA success in obtaining sulphur at prices generally better than the world market and in fighting off Sulexco's demand for an end of such price advantages were enough to meet the requirement. Fruitful bargaining seems to speak for itself. In fact, the Court's only real concern was whether all of the restrictions

250. Admittedly, this assumes that the cartel does not, for example, restrict membership; that is, it is not used as a device to the advantage of some conspiring importers against their local competitors.

251. The Agreement of the National Sulphuric Acid Association, 12 July 1963, L.R. 4 R.P. 169.

252. Export Trade Act, 15 U.S.C. §§ 61-65 (1964). The *Sulphur Case* supports the assertion that American policy stimulates international cartelization and illustrates that so long as this exemption remains on the U.S. statute books Americans bargaining for world-wide antitrust commitments must operate with one hand tied behind their backs.

253. 1948 Act § 3(1)(a).

that the pool placed on its members were needed; it resolved the question affirmatively and the agreement got through the tailpiece with no trouble.

If this were the end of the matter, it would appear to be an example from which one might extrapolate to a general statement that British policy is to encourage cooperation among smaller British importers (buyers) pitted against large world sellers. But it was not the end.

If the ease with which import cartels can get through gateway (d) is not enough, the subsequent history of the NSAA matter has made the picture for import groups even brighter. Originally, NSAA had made its primary claim on the general "substantial benefits to the public" gateway,²⁵⁴ and shifted emphasis to the "fair terms from a preponderant seller" gateway only as the course of the litigation made clear that the latter course was the easy way to win. Yet it so happened that relations between NSAA and Sullexco later deteriorated and at the same time other sources of sulphur increased. Because of this combination of events, the Registrar felt justified in taking the case back to the Court, claiming that the British parties were no longer organized to combat a preponderant seller.²⁵⁵

However, without the preponderant-seller issue ever being decided, the Court shifted back to the "substantial benefits to the public" gateway, the Registrar hardly put up a fight, and now NSAA enjoys a restrictive agreement approved under both gateways. Most of the hearing in the second case was held in camera and hence it is hard to learn details even from the available transcript.²⁵⁶ But from what can be sensed from the public records, it seems that the general public-benefit gateway can be satisfied by showing, first, that the import cartel is able to achieve good prices (not necessarily showing anything about the nature of the sellers), and secondly, that the members are not making inordinate profits. Together they satisfy the Court that the pool members' costs would be higher without the pool and that subsequent prices to the public (the buyers from the pool members) would be higher as well; hence the general gateway is met.

Though firm conclusions perhaps should not be drawn from the two sulphur cases alone, they do indicate at least that the Court is prepared to allow British interests to unite for size advantages against American and/or other foreign interests without much objection.²⁵⁷

Although the *Sulphur Case* involved an import cartel, gateway (d) has a broader potential impact. It may be used by domestic buyers to meet a preponderant domestic seller or by domestic sellers in order to extract fair

254. See notes 243-44 *supra*.

255. The Agreement of the National Sulphuric Association II, L.R. 6 R.P. 210 (1967).

256. For some comments on the second case see Korah, *Restrictive Trade Practices Section of British Business Law*, 1968 J. Bus. L. 67, 69-71 (1968).

257. It should be noted that economies of shipping costs, insurance coverage, buyer-purchase-quantity flexibility, variety in delivery sites—in short, benefits of size—were asserted by the NSAA to result from its program, along with sheer greater leverage created by its combined buying power.

terms from either foreign or domestic buyers. Clearly this gateway is designed to bolster the bargaining power of the little competitor, whether buyer or seller, and thus to minimize one advantage of size.²⁵⁸

2. *National interest.*

In 1968 some amendments to the 1956 Act were adopted that permit the Board of Trade to exempt certain agreements of national importance from registration, and thereby from examination by the Court. The purpose of the exemption is to allow the Board to supervise cooperation aimed at efficiency. Specifically, the Board must conclude that the following conditions are met:

- (a) that the agreement is calculated to promote the carrying out of an industrial or commercial project or scheme of substantial importance to the economy;
- (b) that its object or main object is to promote efficiency in a trade or industry, or to create or improve productive capacity in an industry;
- (c) that that object cannot be achieved or achieved within a reasonable time except by means of the agreement or of an agreement for similar purposes;
- (d) that no relevant restrictions are accepted under the agreement other than such as are reasonably necessary to achieve that object; and
- (e) that the agreement is on balance expedient in the national interest.²⁵⁹

The agreements are approved for a specified, although extendable, period; however, approval by the Board is revocable at any time after one year following initial approval.²⁶⁰ The Board must lay the exemptions before Parliament and make the agreements available for public inspection.²⁶¹

It is not clear, of course, exactly what will be permitted by the Board under the new provisions. It is interesting, however, to note that the language describing the conditions required for exemption from the 1956 Act parallels the language of the Industrial Expansion Act establishing conditions for financial support. An industrial investment scheme should be calculated "to improve the efficiency . . . of an industry" or "to create, expand or sustain productive capacity in an industry."²⁶² It is certainly possible then that a cooperative research and development project, for example, would first be exempted from the 1956 Act and then be given government economic backing under the Industrial Expansion Act. This is reminiscent

258. We have excluded export cartels from the above discussion because the general 1956 Act rules do not apply to them. Rather, export cartel agreements are simply to be reported to the Board. 1956 Act § 31(1). The Board keeps this information secret and apparently takes no action on these restrictive practices. Hence, the extent to which these cartels do exist is not publicly known, and the real impact of this exemption cannot be evaluated. Still it represents a nationalistic statement of policy that, so long as the home market is not involved, British exporters are free to combine to eliminate competition; in large part, this appears to be a policy designed to improve the British balance of payments.

259. 1968 Act § 1.

260. *Id.* §§ 1(3), (4).

261. *Id.* § 1(5).

262. Industrial Expansion Act 1968, c. 32, §§ 2(1)(a), (b).

of the pattern of first keeping a proposed merger from the Commission and then having the IRC support it financially.²⁶³

What is clear is that the projects or schemes of national importance that the drafters had intended to exempt from the 1956 Act are to be cooperative ventures for the purpose of gaining rationalisation benefits through consolidation without merger. And this means that they could well involve British interests joined to offer substantial competition to already large American interests. Furthermore, while we do not know very much about the Board's inclinations under the section, its freewheeling position on mergers is a hint that it may become active here as well. In the short time that the exemption has been available, the Board has not yet invoked it with vigor; thus far, only two exemptions have been granted. Perhaps the Act's requirement for affirmative approval by Parliament will be seen by some observers as different from the unreviewed Board's decision in the merger area simply to refrain from acting to stop mergers, but we are not so sure why. This exemption could change the entire structure of restrictive agreements; it seems certain (short of substantive statutory change in the Court's standard) that change will not come from the Court.

C. Assessment

The 1956 Act is more relevant as a response to the American business invasion in its exceptions than in its enforcement. Unlike the mergers and monopolies statutes it is not aimed directly at size; therefore, the disbanding of agreements is not necessarily a blow against size. Nor are large American companies likely to run afoul of its provisions since it is not size but agreement that is challenged; no single company can violate the 1956 Act by itself. The Act's relevance to our inquiry lies in its exceptions: agreements exempt for all practical purposes (import cartels), possible agreements of national importance, and justifications (the latently relevant gateways). It is, to be sure, an indirect response to the American invasion, but a response, we think, nonetheless.

263. We know of at least one instance, though apparently not involving the Industrial Expansion Act, in which government funds were used to aid competitors in cooperating to meet American competition. The problem was simple: "how to put more beef into the British microcircuits industry and ward off the growing micromight of the Americans in this field." *The Observer* (London), Mar. 16, 1969, at 13, col. 5. The IRC had been unsuccessful in combining the three British manufacturers of microcircuits, Plessey, Ferranti, and GEC-English Electric's subsidiary Marconi-Elliott, into one giant. Derek Roberts, general manager of Plessey's microcircuits company, claimed that American competition in the British market was unfair. "The American market is paying their R and D (Research and Development) costs and they are running a relatively cheap operation over here. And they were dumping the fall-out from their military projects on the British market." *The National Research and Development Corporation* found the solution; it would pump £5,000,000 (\$12,000,000) into cooperative research and development by the three British companies. The companies would remain "fierce competitors." Query whether this cooperative research plan will ever reach the Restrictive Practices Court—we doubt it; and the exemption claimed may well be that the scheme is one of national importance.

IV. CONCLUSION

The 1956 Act permits British companies to justify agreements among themselves on some grounds that, as a practical matter, would not be available to American companies. Monopolies policy has caused important changes in the conduct of several large American companies investigated under that Act. And in the merger area, the American firm must not expect protection from British combinations through enforcement of an antimerger policy, and must be prepared to meet competition from government-initiated and -supported amalgamations.

British competition policy is not aimed primarily at American business. It is designed, rather, to create the economic climate thought healthiest by Parliament from time to time.²⁶⁴ Aspects of that competition policy are aimed at preserving competition, creating particular efficiencies in the economy, and constructing a satisfactory balance of payments ledger. Legislation enacted to accomplish these goals has impact on the American business firm in Britain, at times quite directly, at times most indirectly. We have attempted to isolate and evaluate this impact.

ADDENDUM

In late 1969 all of the functions of the Board of Trade in the fields of monopolies, mergers, and restrictive trade practices were shifted to another government ministry, the Department of Employment and Productivity (DEP).²⁶⁵ Hence, references to the Board throughout this Article must be read with the understanding that additional patterns of administration may develop under new leadership. For example, there are signs from DEP behavior toward the recently proposed linkup of Reed Paper and International Publishing that the DEP may rely upon direct negotiation with the parties to a planned merger to establish limitations that will forestall the government's reference of the merger to the Commission. This may be seen as analogous to the actions of the United States Antitrust Division in the planned merger of British Petroleum and Standard Oil of Ohio. Conditions are exacted from the parties as to their future structure and behavior, after which the merger is allowed to proceed.

In addition to the transfer of powers to the DEP and the potential for change in their exercise, an even more significant development is in the

264. Indeed, there are, from time to time, reports of changes in competition policy that could be expected to occur if the Conservative Party (Tories) were to return to power, such as greater reliance on monopoly and merger control and less reliance on government sponsorship of firm growth. See *BUSINESS EUROPE*, May 30, 1969, at 70.

265. *STAT. INSTR.* 1969, No. 1534.

offing as this Article goes to press: The government has announced its intention to merge the functions of the Monopolies Commission and the Prices and Incomes Board, placing them under a single body to be known as the Commission for Industry and Manpower. It is difficult to predict the effects of the proposed merger; however, one result may be closer governmental examination of recommended prices.