APPENDICE

TESTO IN LINGUA ORIGINALE DELLE RISPOSTE AL QUESTIONARIO

PAGINA BIANCA

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1. - Restrictive agreements serve almost entirely to keep prices higher, and therefore costs also higher, than they would otherwise be. This may result in high profits; but much more likely is simply too high a level of costs, too many inefficient firms, and too many workers and suppliers drawn into the business, who could be better elsewhere. This penalizes the economy directly and indirectly, for example by raising costs of export goods.

Oligopolistic structures may sometimes obtain the results of restrictive agreements by tacit understandings. But this is usually difficult, and if communication among them is forbidden as to fixing prices, limiting production, or sharing markets, not many of them are very effective. But there are important exceptions, as in the U. S. steel industry (Ref. 1). I do not see any final or ultimate solution to this problem.

Concentration I understand to be an indicator that the structure of the market may be oligopolistic (Ref. 2). Sometimes it is taken to indicate « dominant positions ».

« Dominant positions » are difficult to identify. Sometimes they are taken to mean size. Then the opposition to them is merely a plea to help out smaller businesses who are less efficient. In other words, an argument in favor of restrictive agreements. (Ref. 3) But a dominant position may mean a real monopoly. In the U. S., because the market is so large, there are very few such companies. In Europe, the problem has in the past been more serious because markets were segregated; hence, for example, the dominant position of Fiat in Italy. But the coming into force of the Common Market is bringing this state of affairs to an end. Hence « dominant positions » are much less important for the future.

2. - In the underdeveloped countries, markets are so small that most of them are occupied by only a few firms. Hence monopoly is very strong, and this hurts their development. Unfortunately, the governments of these countries mostly fear competition from abroad and also at home. Often they have serious unemployment problems, and therefore (mistakenly, I think) act as though it did not matter that their labor was wastefully and inefficiently used. Also, they may want to have a steel or ther industry as a prestige symbol. Finally, there is a strong belief in planning for its own sake, and a distrust of any kind of market economy. This leads many of them to dislike the United States and Western Europe. The unfortunate result is that the gap between the rich and poor countries tends to become even wider. No underdeveloped country, for examply, can show anything like the growth of Japan or Italy — or France and Germany — over the last decade, and most of them have not even done as the United States and Great Britain, who are both rightly dissatisfied with their progress. I believe the monopoly element in the backward areas has a great deal to do with their condition.

3. - In the United States, I think the legislation against restrictive agreements (*Sherman Act,* Section 1) has been of very great benefit. Our legislation against « dominant positions » (*Sherman Act,* Section 2) has been or some benefit on the whole, in at least curbing the market power of some companies, and making them less restrictive in licensing of patents, for examply. Other legislation, chiefly the *Robinson-Patman Act,* has actually helped restrictive agreements and inefficient methods. (Ref. 4).

The main weakness lies in vagueness of basic concepts, and hence great awkwardness and inefficiency in handlying economic data. When one does not know what he wants, he naturally wanders backward and forward looking for it. But please note that these weaknesses are largely confined to Section 2 of the *Sherman Act,* to the *Robinson-Patman Act* and to some supplementary legislation, of little importance. If public policy clearly accepted the object of maintaining competition, rather than protecting competitors, the weaknesses would largely disappear.

4. - Restrictive agreements and practices, whose purpose or probable effect is to fix prices, divide markets, or limit output, should be forbidden by a strict per se rule. Those providing for control of distribution channels, or of patents, should be scrutinized to see whether they achieve economies of scale or of integration not otherwise attainable, or whether they only serve to restrict entry. Here some discretion is desirable, but the burden of proof should be on those making the agreements. Price

discrimination should be carefully defined so as not to be confused with mere price differentials, and care should be taken not to imitate the U. S. example.

The exceptions should be only for cost-reducing arrangements. « Good performance » is in my opinion indefinable, and as a general rule the competitive performance is the better. That is, indeed, the only reason for desiring it. Exceptions will no doubt arise, but it seems to me the lesser evil to suppress the few beneficial ones in order be safely rid of the great majority.

Mergers in the United States are rather strictly controlled today, in fact in some directions too strictly (Ref. 5). In Western Europe, the problem is different. Many companies are too small for efficiency and economies of scale. Many mergers are therefore to be expected and even welcomed. But one might as a rule of thumb say that any merger which will give the firm more than 15 percent of the market should at least be looked at. It is possible and desirable to be much more strict with respect to mergers than with respect to going concerns because then there is no problem of undoing what has already been done. As for the « abuse of dominant positions », one should, first and always, be sure that one is talking about abuse of customers, and abuse of the economy, not « abuse » of competitors or other business men who merely fear competition.

Because many of the large firms of Western Europe are still considered as national, I think that the problem of abuse of such positions might best be handled by a Community body set up for that purpose and sitting in Brussels.

So far as concerns procedure, I think that all agreements should be registered with an administrative body, which could then decide whether or not they appeared to be restrictive. There should be appeal possible to a higher body, which would sit for this purpose continuously. In this respect, I recommend the procedure of the *British Restrictive Practices Court and Registrar,* which is not very different from the procedure of our own *Federal Trade Commission.* The great difference is in the generally dull and incompetent people who are appointed to the U. S. Commission. I have already commented on procedure on « dominant positions », which ought to rest on a Community body, and from whose decisions there might be appeal to a Community organ as well.

5. - Technological progress would not change matters in either direction, I believe. Trade liberalization and integration offer an opportunity for an effective public policy because they both expose the economy

to foreign competition, and provide opportunities for domestic business and labor to find profitable markets outside.

To maintain competition is to get the full benefits of European integration. If restrictive agreements are permitted, much will thereby be lost. The Traty of Rome has been a great success because the benefits of greater competition among the member nations, with lowering of costs and raising of living standards, was judged greatly to outweigh the losses of those damaged by competition. A policy against monopoly shoud aim at the same objective, and not be diverted by any ideas about either « sound cartels » or excessive size of businesses.

6. - A country like Italy has probably more to gain from a sound anti-monopoly policy than countries not advancing so rapidly, and it can more easily manage such a policy, since employment and production are increasing so quickly.

It should be noted, in conclusion, that monopoly is most effective when promulgated and supported by law. In the United States, the most important monopolies are in agriculture, transportation, certain natural-resources industries and industries like textiles, which are protected from foreign competition.

7. - Nothing has been said about « administered prices » or about « countervailing power ». These do not have any content. (Refs. 1, 6):

Wo Begriffe fehlen,
Da steht zur rechten Zeit ein Wort sich ein.

[1]« Steel, Administered Prices, and Inflation », *Quarterly Journal of Economics* (February 1961). Enclosed.

[2]« Concentration Measures: Their Use and Abuse », National Industrial Conference Board, *Studies in Business Economics,* No. 57, 1957.

[3]« Small Business », *Proceedings of the American Bar Association,* Section of Antitrust Law (April 1960).

[4]Review of Edwards, *The Price Discrimination Law,* in *American Economic Review* (September 1960). Enclosed.

[5]« The Anti-Merger Act, 1950-1960 », *Proceedings* of the American Economic Association, (*American Economic Review,* May 1961). Enclosed.

[6]Review of Lilienthal, *Big Business,* and Galbraith, *American Capitalism, Northwestern University Law Review* (July 1954).

Also enclosed:

« Integration and Antitrust Policy », *Harvard Law Review* (November 1949).

Review of Edwards, *Big Business and the Policy of Competition* in *Northwestern University Law Review* (July-August 1957).

« Economic and Legal Concepts of Competition », *Journal of Farm Economics* (December 1959).

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1. - Depuis vingt ans je n'ai cessé de considérer qu'une condition très importante pour la réalisation d'une économie progressive est l'existence d'une structure concurrentielle effective et que toutes limitations de la concurrence constituent un obstacle à l'accroissement des niveaux de vie.

2. - L'analyse à laquelle j'ai pu procéder ces dernières années de différents problèmes d'économie appliquée (comparaison des économies américaine, française et soviétique, économies des transports, de l'acier, économie charbonnière, etc...) n'a cessé de confirmer et de renforcer ma convinction.

3. - Je n'ai pas consacré d'études spéciales à la législation anti-*trust*. Cependant je considère comme une faiblesse essentielle la législation sur les ententes françaises, ainsi que les dispositions du Traité de la C.E.C.A. et du Traité du Marché Commun sur les ententes, que dans certains cas les ententes peuvent être admises et favorisées lorsque la preuve peut être apportée qu'elles favorisent la productivité.

En effet, il est toujours facile sur le plan politique de fournir cette preuve, alors que sur le plan des faits toutes les ententes se sont toujours révélées malthusiennes.

4. - Je considère que, dans l'ensemble, la législation anti-*trust* américaine peut être prise comme modèle.

Je considère, en outre, que d'une manière générale il est très dangereux d'admettre des exceptions et de mettre en vigueur des textes insuffisamment rigoureux dont on peut tirer en réalité ce qu'on veut.

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INTRODUCTORY NOTE.

My views are the result of (*a*) studies of pricing, etc. policies and market practices of individual businesses on which I have been engaged for a very long time; (*b*) studies of the working of various cartels which I have made for the last decade or so; and of (*c*) more recent studies of United Kingdom restrictive practices legislation and of the working of the *Monopolies Commission* and the *Restrictive Practices Court.* I have been led to develop a special theoretical framework to take account of this experience, because traditional economic analysis has appeared to be misleading or inadequate when it is applied to economic problems and practical political problems at the level of the behaviour of individual businesses (micro-economic theory). My theories have been developed in (1) *Manufacturing Business,* Macmillan, 1949; (2) « Industrial Analysis in Economics », in *Oxford Studies in the Price Mechanism* (Co-Editor, T. Wilson), Clarendon Press, 1951; (3) *Capital Development in Steel* (Co-author, Elizabeth Brunner), Blackwell, 1951; (4) « Fair Trade » (Co-author, Frank A. Friday), Macmillan, 1960; (5) « Competition in the Modern Economy », in *Competitive Aspects of Oil Operations* (Ed. George Sell), Institute of Petroleum, 1958. The reference in (3) is to Chapters 1, 8 & 10, dealing with investment theory; in (4) it is to my own part 2, which outlines a new theory of retail trade consistent with my general normal cost theory of manufacturing prices, and in the course of which I consider particularly the practice of resale price maintenance; reference (5) is a convenient reference for the question of competition generally but I note that the further development of my views on oligopoly is in an essay, *The Oligopoly Problem,* which Miss Brunner and I have yet to publish.

5. - Je ne pense pas que mes vues présentes puissent être affectées par les développements à prévoir dans un proche avenir.

Au contraire, et en particulier, je considère qu'on ne pourra tirer un plein bénéfice des échanges en Europe que si une législation anti-*trust* efficace est appliquée de manière rigoureuse.

6. - Je considère que mes vues sont applicables à tous pays et en particulier à l'Italie dans sa présente situation économique et sociale.

Reference à mes travaux:

Abondance ou misère;

L'Europe Unie, Route de la Prospérité;

Le Tiers-Monde au carrefour, centralisation autoritaire ou planification concurrentielle;

L'influence des besoins sur la production des biens de consommation;

Le problème de la coordination des transports et la théorie économique.

Le système des prix et la concurrence dans le Marché commun de la C.E.C.A.;

Manifeste pour une Société Libre.

References:

Abondance ou misère, Propositions hétérodoxes pour un redressement de l'économie française, Libraire de Médicis, 1946, pagg. 120 in-8°;

L'Europe Unie, Route de la Prospérité, Calmann Lévy, Paris 1960, 368 pages, Grand Prix de l'Association Française pour la Communauté Atlantique.

Le Tiers-Monde au carrefour: centralisation autoritaire ou planification concurrentielle, Document miméographié, 327 pages et 156 pages d'annexes.

L'influence des besoins sur la production des biens de consommation, Communication au Colloque de Grenoble, Septembre 1961, Document miméographie, 85 pages.

Le problème de la coordination des transports et la théorie économique, Revue d'Economie Politique, Mars-Avril 1948, n. 2, pages 212 à 271.

1. - (1) In general, as with most modern economists who have discussed the question of the competitiveness of industrial and commercial markets, I attach the greatest importance to the freedom, and ease, of entry of new competitors. In order to explain why my own conclusions have some degree of novelty, however, something more should be said about concepts which are used when potential entry is discussed.

I have found that much generally-accepted analysis of the efficacy of the threat of entry (e.g. the works of Prof. J. S. Bain) is vitiated practically by being confined to consideration of the scope for new businesses in the strictest sense. In modern economies, my studies show, existing businesses are powerful prospective new entrants to any market to which they may be attracted. Moreover, precisely in those industries where simplified analysis of technological and market conditions suggest minimum scales of size which it might be difficult for new businesses to reach, more careful analysis will often show that at least some businesses already established in other industries would find entry attractive at substantially lower prices and at substantially lower minimum scales. (Cf. « A Note on Potential Competition » by Elizabeth Brunner, *Journal of Industrial Economics,* July 1961). It is of course also true that potential competitors who are existing businesses will find it easier to finance any minimum scale of investment than would really new businesses.

Further, the mono-product basis of traditional economic analysis has prevented it from paying proper attention to the possibility of entry, into others markets, by businesses already established in the « industry » concerned. I have found such « cross-entry », as I call it, to be a powerful competitive force in the markets for manufactured goods. A major reason why the effect of this type of competition has not been given its due importance previously is that orthodox analysis of what I classify as « sub-markets », insofar as it offers determinate conclusions, the treatment of such markets as subject to « monopolistic » or « imperfect » competition, with the resulting arbitrary introduction into the analysis of individual demand curves which are treated as exploitable by the existing firms.

Finally, practically all analysis of the effects of free entry has been vitiated by the unwarranted assumption that any potential new entrant will determine the profit possibilities open to it by reference to the cost-circumstances of businesses already in the industry (even when, according to the most usual systems of analysis in some cases, those businness would be operating at very restricted scales of output).

(2) *Restrictive Agreements:* I shall use the term « cartel » to refer to any horizontal association of businesses which results in restrictive agreement between them.

On the theoretical plane, mono-product analysis, the neglect of cross-entry and narrow definitions of new entry in general (see paragraph 1 above), and a consequent tendency to analyse the mere fact of agreement in terms of text-book monopoly, (see paragraph 4 below), have tended to rule out the theoretical economic discussion of cartel prices in terms of competitive forces. In contrast, even the studies of cartels which consistently discuss them in monopoly terms (e.g. the classic volumes of Stocking and Watkins) may be drawn on for the opposite contention that cartels which go for high prices break up under internal and external pressures. My studies have led me to endorse Louis Marlio's position (in his *Aluminum Cartel*) that a cartel will not normally endure unless it gives elbow-room to the more efficient businesses within it and unless its prices and terms are low enough to discourage the entry and expansion of outsiders (and it should be noted that the mere maintenance of prices by cartel members helps outsiders since they can compete by undercutting those prices); this can be analysed in terms of the necessity of setting long-run competitive prices. In particular, I have been impressed by the extent of the competitive forces arising within cartels.

If ordinary economic analysis has too readily tended to attribute to cartels the detrimental welfare consequences of text-book monopolies, it has nevertheless also tended to overlook, by reason of its static character, certain genuine benefits which it is possible for cartels to achieve. It has become normal to contrast cartels with straight monopolies and to stress the possibility of technological benefits from the latter which are thought to be denied to cartels because the opportunity for capital development and research will there be bounded by the sizes of the individual firms. I shall comment on the technological aspect of monolithic monopolies in a later answer. In the case of cartels, the relevant question is to what extent development etc. may be more vigorously undertaken in the presence of agreement than they would be if member businesses competed freely at arm's length.

My experience leads me to endorse the conclusions of my Oxford colleague, Mr. G. B. Richardson that, insofar as cartels offer insurances against short-term instability of prices, they offer a more favourable environment for capital development and research. (Ref. G. B. Richardson, *Information and Investment,* Oxford University Press 1960). They may also make possible the prosecution of co-operative research with commercial significance, of a kind which one could not expect in a genuinely

independently competitive industry. To recognize this is to recognize the possibility that cartels may achieve lower costs (and therefore prices) in the long run than would be achievable if they were effectively prohibited.

For these reasons I do not favour the general prohibition of cartels but rather the adoption of policies aiming at sharpening and encouraging the working of competitive forces in and around them. I am opposed to the legal enforcement of cartel agreements, and favour their having to be re-negotiated at not-very-long-intervals (especially if they include quota arrangements). I am in favour of increasing the information about cartels and their working not only for the benefit of consumers, the general public, professional economists and the government; but also because such information would tend to increase the speed with which competitive forces can assert themselves. I also favour the setting up of special economic advisory bodies with powers of investigation and think that governments should take powers to intervene in the event of proved abuse of cartel agreements. I would favour the possibility of tariffs being lowered to increase foreign competition in few-firm industries where cartels had endured for any considerable period of time.

(3) *Restrictive Practices:* Paragraph (2) above has dealt with restrictions on prices in the form of collective agreement of them. In this paragraph I turn to certain other restrictions. These do not necessarily arise only in the case of cartels.

In view of the importance of freedom of competitive entry, I am opposed to collective interference with this except in cases where governments might impose or encourage restrictions on a public interest ground — and even there I should like to see the government having the benefit of advice from an outside investigatory body. (I recognize that some such restriction may be necessary to facilitate the long-term re-organization of industries suffering from severe excess capacity or extreme technological backwardness, but where a re-organized industry could be expected to stand competition on its own feet, any interference on these grounds should b only temporary and subject to progressive alleviation).

I therefore oppose on economic grounds any collective control over new entrants to an industry, over its suppliers, or over distributors, unless the restriction is operated solely to apply reasonable standards of financial solvency or commercial reliability.

I am not, in general, in favour of interference with the right of an individual business to choose its own suppliers or distributors. In the case, however, of individual businesses which predominate in the national market for any class of product, I would like to see provisions for public inquiry into any such restrictions and I would think it proper that there

should be government interference provided that this were decided on the facts of the case and not on general, doctrinaire grounds.

For general economic reasons, which I have explained in *Fair Trade,* I am in favour of leaving individual businesses free to impose resale price maintenance as part of a general freedom to determine their conditions of trade. I am totally opposed to the collective enforcement of resale price maintenance and therefore to collective boycott and other such sanctions. Because of the difficulties which small manufacturers would otherwise encounter in the very trades where the nature of the commodity and market circumstances favour resale price maintenance, and because of the importance of preserving as much competition as possible from, and freedom of commercial development for, such smaller businesses, I do approve the kind of provision we have under British law, whereby the individual manufacturer can enforce his resale prices in the Courts.

I do not object to provisions for special inquiry, with the possibility of subsequent legislative interference, into cases of individual resale price maintenance where it might reasonably be alleged that this involved some large interference with a whole sector of retail trade (as in the case of monopolist or a predominant manufacturer). I do object, however, to proposals for a general ban on individual resale price maintenance with provisions for individual manufacturers securing exemption only on proof of public benefit — especially if the standard of proof were to be as severe as that applied in litigation in the United Kingdom Restrictive Pratices Court.

Collective bonuses, sometimes referred to as loyalty rebats, do present some difficulty. In themselves they represent an inducement to trade with an association which can not be directly justified on grounds of economy of production and distribution. I have, however, been much impressed by the cases of industries where small, specialist manufacturers could supply any customers — and so build up the total trade which they needed for efficiency more easily — because large customers had no financial incentive not to deal with them, which they would have had if rebates had to be tied to the trade with individual suppliers. Because such a restriction may in this way greatly increase both the actual and the potential competition in an industry, I am not on balance in favour of any general prohibition. I would be in favour of prohibiting such practices to large national monopoly businesses in isolation and also in favour of provision for inquiry into any cases where specific abuse were alleged.

So far as concerns other discriminatory terms — those more simply based on classification of customers — I am once again in favour of having

the possibility of public inquiry where serious detrimet is alleged, especially where monopoly businesses are concerned. As a general rule, however, I am opposed to any interference with commercial freedom here, whether collective agreements or individual policies are concerned. The freedom to discriminate is a necessity for flexible competition. It is often essential if technological developments, whether in manufacturing or in distribution, are to be flexibly and rapidly accommodated by the economic system. If such commercial discrimination persist, I should expect to find competitive justifications, and I should argue that the long-run development of efficient competition would control them, if, in a particular case, it was not actually served by them. (Here it may be convenient to refer to M. A. Adelman, *A and P,* chapter 8).

(4) *Oligopolistic Structures:* I presume that reference here is intended to be to few-firm industries where customer-preferences are sufficiently weak for there to be strong competitive relationships between the individual businesses. (The « fewness » is often determined only with reference to a national market which can be a misleading criterion in some industries - e. g. certain heavy chemicals).

The traditional economic analysis of the pure model for such an industry produces unrealistic results — whether of stability, of price and output, which can only by expected on assumptions which most theorists boggle at, or of chronic instability of price and output. In the face of apparent stability in many actual oligopolies, the modern preferred, solution runs in terms of collusion, either explicit or tacit (via the fashionable phenomenon of price-leadership), and so, in the last resort, in terms of a monopoly solution, I presume that this heading of this answer is designed to lead to the discussion of ways of preventing or regulating collusion in such situations. I cannot however follow the discussion along these lines because my analysis is quite at variance with what, until recently at all events, have been prevalent modes of thought.

To be brief: (*a*) the modern, more sophisticated discussions to which I have alluded all embody serious errors in the way they handle the entry problem, which I have previously referred to, and make implicit assumptions about the data available to and about the conduct of individual businesses which I find it impossible to accept from my knowledge of oligopolistic situations; (*b*) in my practical investigations I have not found it necessary to handle « oligopolies » in any other way than I handle « ordinary » manufacturing industry — where, by the way, once one gets down to sub-markets and related market structures, one finds that oligopoly conditions are normal; (*c*) although it is fashionable to use some

such phrase as and industry whith an oligopolistic structure, it is paradoxical that most « analyses » of such industries make very little analysis of structure except for occasional unanalytical references, e.g., to the « market power » of « strong businesses ». (In all instances of the latter type of analysis there is complete lack of reference to the competitive power of smaller businesses in typical oligopolistic structures and to the conditions in which such power can be important. I call attention to this, in passing, as very largely another instance of the practical disadvantage which has flowed from economic theory being so largely mono-product in character).

A much more detailed discussion of oligopoly will be given in a paper (as yet unpublished) by myself and Elisabeth Brunner, where our main conclusion is that it is a false problem misleadingly stated in the past.

(5) *Concentration*: We are all aware of, and must accept, the increasing importance of technology in industrial affairs and this must have its consequences in industrial organization. Some modern industries demand such large capital investment from the start that they are inevitably at least national monopolies under public ownership or regulation. (In the species-type of such industries, atomic--fission industries, it may be said that non-economic motives are responsible for their being demanded on so large a scale, or at all, at the present time; and it may be that had their development occurred naturally they would have come such later when, against the ordinary progress of industrial development, their relative scale would not be so colossal). With this development there has co-incided an important change in technical economic thinking. Increased knowledge of industrial facts (e.g. throught the work of a succession of economists from prof. Eiteman in the U.S.A. down to professor Johnston of Manchester) has brought a scepticism concerning the traditional U-shaped cost curve with its implications of optimum scales of output and of disadvantageously large scale thereafter. Economists are now prepared to believe that, given time for readjustment, economies of scale are continuous (e.g. recent pronouncements by Mrs. Joan Robinson). This has led to an increased tenderness towards large businesses and mergers which is in contrast to the prevalent attitudes towards cartels. (I have already commented on the relationship between these attitudes).

My own work and the work of other economists, however, suggests the need for some caution. In most industries it seems fairly clear that economies of scale do not continue with the same vigour beyond what are usually moderate scales of plant and the possible gains of scale

themselves must then be measured against all the uncertainties (including those which surround the estimating and achievement of costs of production at any given scale) in the actual world. In my view we should not be stampeded by the real need for each of our national economies to be as up-to-date as possible into too-ready acceptance of synthetic arguments for the artificial encouragement of yet larger businesses. I shall not repeat what I have said about the dangers of mono-product analysis, although some consideration of them is relevant. Most modern industries are multi-product and we must not overlook the scope for specialist businesses who are much smaller in scale than the plants devoted to the meeting of the needs of the more mass-market products. And, as I shall argue below, we should be aware of the importance of businesses which are apparently relatively small at present as possible future competitive centres for growth and development.

When it comes to policy I would feel reluctant to impose artificial barriers on the growth of individual businesses, so long as that comes from within; and my appreciation of the importance of the kind of balanced and integrated management and processes which « natural » growth brings is such that I recoil from drastic U.S.A. Anti-Trust proposals to break up enterprises because they have a dominant market position. When it comes to mergers, however, my studies show that many motives besides the purely economic are at work. In Europe, at the present time, there are apparent political advantages from being one of the *n* large businesses which may sometimes appear to be worth the correlative political disadvantages. Business leaders may desire to run a bigger business from personal motives of power, etc., and from the nature of this case are not necessarily apt to weigh up the disadvantages of the larger business from an economic and financial point of view. On the more economic side, mergers may be sought by reason of beliefs in the benefits of the increased market power which will be achieved (in my experience these are often illusory; cf. also the classic study of Macrosty of the merger movements around the turn of the last century).

Against the possible technical advantages of mergers, I wish to propound a relevant consideration which is not often referred to, and then to list some of the real disadvantages from the economic point of view which seem to me to attend on mergers in any already-concentrated industry. The consideration is that mergers take a good deal of time to be consummated and the more successful the constituent businesses have been, the longer it takes. To merge factory processes takes some time in itself and even here important obstacles come up on the management side, which is where, in my experience, any merger takes a decade or

more to achieve the fully integrated business which all arguments about economies of scale presume.

The economic disadvantages are all about up in one way or another with the reduction of decision centres which mergers must entail. The history of the development of manmade fibres in the United Kingdom industry is a clear example to my mind of the harm which might have been caused by an earlier merger. Research and development decisions in the long-run can be analysed into decisions to back particular leaders of research teams. It is, in my experience, important that there should be as many decision centres here as we can afford. The logic of investment in research in industries where development is expensive, is such that inevitably, in any one business, good alternative lines are not explored at one time, and the knowledge of them may become too remote for practical value later.

If I stress technical development, I can not end without referring to disadvantages of increased concentration in the purely management field — and observe that it is to this field that we have to look, not only for right decisions about research and techniques, but also for right decisions about marketing development and about the purely human side — and the progress of our civilisation, even in material terms, is not less dependent upon these, on a long-range view, than it is upon developments in the technological field. The greater the concentration in an industry already, the narrower the range of alternative employment which is open. Further, in my experience, once the numbers of businesses drop below a not very low level it becomes very difficult for a manager to move from one firm to another, whatever the reason for his wishing to change, and the difficulty increases with further reduction in the number of businesses.

We tend to look at an industrial situation too statically. Progressive development in any industrial society demands dynamic change, and ideally this needs the maximum number of independent centres of decision-making.

My conclusion, in so far as public policy is concerned, and certainly with reference to my own country, is that we need machinery for the public investigation of mergers in industries where business is already concentrated. In such a matter, I believe, only the Government can be the final arbiter, but in view of the shifting nature of the knowledge of industrial circumstances which is available to government departments, and because of the powerful political pressures which the most perturbing kinds of mergers can develop, I would urge the setting up of an expert body to help the Government with the analysis of available facts. I

would like to see mergers being referred to such a body before they could take place — and my criterion for such reference, since some practicable measure must be proposed, would cover all proposed mergers where any of the parties is already producing one-third or more of the national output of any of the major commodities produced by any of them, or where the merger, if it came about, would produce such a concentration. (I must not take up space with further details of this proposal; but I should perhaps observe that fears about the time needed for a purely factual inquiry seem to me misplaced where the parties, or at least one of them, can be presumed to have thought about the precise gains which might be achieved; I should admit *ex parte* evidence freely and give the appropriate Government department the right to assist the inquiry with further factual evidence and even with the examination of the evidence of the parties before the inquiry. Delay would seem to be likely if the inquiry itself had to decide about the public interest, and from the nature of things, a Government has to reach decisions in this field quickly; I believe it would do so more efficiently if it had this help on the factual side).

(6) *Dominant Positions:* I interpret this heading to refer to enterprises whose sizes are such that they might dominate their markets (in the sense envisaged in article 86 of the Treaty of Rome). Since realistic measures have to be drawn strictly, I am prepared to accept the supplying of at least one-third of a market in any one type of good as being sufficient to bring a business at least within the scope of any investigatory machinery. Having said that, I should make it clear that I am not concerned about dominant businesses on the basis of the fear straightforward monopolistic exploitation of the kind which is often posited as a consequences of static economic analysis. Large businesses come sufficiently into the political sphere for them to be wary about their conduct in the large and, in any case, mere relative size does not exempt a business from the pervasive force of competition as I analyse it and, as I have argued elsewhere, the procedures for personal success within a business tend ultimately to assert a genuine kind of competitive outlook.

Just because large businesses bulk so large in the national economy, however, is a good reason for not relying so much on the longer-run processes of competition as I am prepared for in the case of smaller businesses. There are special dangers of stereotyping and complacency of higher management here which, once present, necessarily require time for their eradication. In the important matter of capital investment decisions (and therefore of major research and development policy) I have

already called attention to the weaknesses of the large business being served at any one time only by one major decision centre.

It seems therefore reasonable that the practices of such businesses should be more frequently a matter of inquiry and that they should not everywhere be allowed the full freedom of action, without inquiry, which smaller businesses might safely enjoy. It would seem to be fair also that they should have to provide considerably more commercial information as a matter of routine, even if only to a confidential Government agency. (This would have the healthy effect of causing a — in my experience — minority of Chairmen of really large businesses to care a little more about the factual accuracy of some of their pronouncements and a little less about their political effects. This is an important matter insofar as there are many areas in the management of an economy where policy decisions are taken in the light of general impressions drawn from more-or-less public sources of information about the experience and policies of domestic industries). In the United Kingdom we have already, in the Monopolies Commission, a suitable body with a good record in its inquiries into dominant businesses, and I should like to see it more active and with more routine duties in this field (with, perhaps, more detailed factual remits and with less emphasis on it being the arbiter of public interest than has been the case so far).

There seems good reason for inquiry, case by case, how far ordinary levels of tariff protection should be relaxed when once individual domestic businesses have maintained dominant positions for some fair lenght of time. Now that we are embracing proposals for much freer trade generally (as in the European Economic Community) it may be desirable that more active steps should be taken to encourage such businesses to trade with countries where precisely the same industries are under dominant businesses; the political importance of really large businesses and their capacities for successful reprisals may bring an undue freedom from competition in their domestic markets, so far as foreign industries are concerned. (In this area I endorse the warnings which Professor Philips of Fribourg has given as a result of his researches into medium-term competition within the Common Market).

Since study of U.S.A. Anti-Trust developments brings the matter up, I should make it clear that I do not endorse the more extreme proposals for the breaking up on businesses with dominant positions into smaller concerns. This is so, partly because, as I have said earlier, I can not adopt the kind of theorizing about « monopoly » which underlies the economic if not the political side of these proposals; it is also because my studies have convinced me of the dynamic advantages of continuity

in successful enterprises and I do not believe that non-wealthy countries could afford the diseconomies of the rather long interim period of reorganization which would be necessarily caused by the fragmentation of such important elements in the whole economy.

2. - *On economic developments*: I have not been very impressed by argument that restrictions on competition have become unecessary in principle by reason of expansionary and full employment conditions in the economy generally, and on assumptions that these conditions can be maintained. In all the industries I have studied there have been periods since the war of great uncertainty and of the falling back of markets to such an extent that local, industrial effects have been sufficient to negative those of the more general industrial conditions. Generally, full employment conditions can affect the validity of arguments based upon the contributions to general employment which restrictive agreements may make in periods of general depression; they are however irrelevant to arguments about the effects of competitive uncertainty of prices upon investiment and development decisions, etc.

On policy experiments: I welcomed the British 1948 and 1956 Acts and think the latter especially, with its compulsory registration of restrictive agreements and the publicity given to them, led to a much-needed weeding out and conscious reappraisal of restrictive practices generally. I welcomed the principle of *ad hoc* defence of individual agreements but think that the working of the Restrictive Practices Court has in some ways been too severe and that the case record — including the small proportion of cases which have come to trial — gives a minimal estimate of the proportion of agreements which should have been tried on purely economic grounds. See answer No. 3, below.

3. - *U. K. legislation*: The 1948 Monopolies and Restrictive Trade Practices Act had a very important educational and informational effect on public opinion generally, besides causing business to begin to make a general re-appraisal of the public validity of its practices in the light of post-war conditions. The work of the Monopolies Commission led directly to the 1956 legislation, and, in that connexion, I note the banning of the collective enforcement of resale price maintenance. The procedures of the Commission were necessarily lengthy and because it both assembled facts and reached a judgment on the practices it was investigating, its judicial processes were difficult for industries to accept as obviously entirely fair. (Complaints were made enonymously and witnesses could not be interrogated, etc. Judgment and procedure seemed to be dominated

by abstract economic argument which appeared to be *a priori* hostile to business, and so on). I myself think that the Commission could well have been much more extensively employed on factual inquiries and that the responsibility for a judgment about the public interest might have rested more squarely on Government, even at the first stage. I regret that the Commission has not been used more continuously to investigate the practices and record of Monopoly businesses.

With the exception of the ban on collective enforcement of resale price maintenance, the procedure under the 1956 Restrictive Trade Practices Act was intended to avoid the wholesale banning of restrictive practices and to make it possible for any agreement, which the parties believed to be in the general public interest, to be judged on its merits according to evidence and argument in open Court. Most agreements which have come to trial have been condemned and the example of the early cases caused many agreements to be abandoned without defence. It would be both cynical and incorrect to assume that all these agreements were abandoned because they were genuinely against the public interest on any broad appraisal of that. I say something more below about the difficulties which the Act itself has set in the way of the defence of an agreement even with regard only to the restricted definitions of the public interest embodied in the Act.

In cases where agreements have been turned down by the Court, as well as where agreements have been abandoned without defence, recourse has been had to mergers which would not have taken place otherwise. There has been insufficient public discussion of the effects of these, and indeed of mergers generally. I regret that we lack regular machinery for investigating the facts relevant to the desirability of mergers before they take place. As I have said earlier, I consider that a merger involving businesses, or which could lead to a business, which would control one-third or more of the output of any major products, should be prohibited failing prior sanction of the Government which should be helped by the advice of an independent fact-finding body.

I personally agree with the idea behind the 1956 Act that there should be a heavy onus of proof on the industry defending an agreement. I think, however, that a procedure should be adopted which would make it easier for industry to bring economic evidence before the Court. At present, an association is liable to have the strictest rules of evidence applied against it. This means that any factual evidence from an economist, as distinct from general argument upon the issues before the Court, and even if he has made a special study of the industry, may be inadmissible

as hearsay insofar as it, or some stage in it, depends upon an examination of factual matters and opinions which he has obtained by research-interrogations. Il would seem better that the Court should be specifically enabled to take any evidence which was proffered in good faith (much is submitted in writing so that procedures need not be lengthened unduly) and then it would still have its freedom to decide what precisely the evidence is worth.

The industry has to get its restrictions one by one through some one of a few narrowly defined gateways; if it succeeds, the particular public benefit which has been proved is weighed in the balancing clause against any detriment to the public interest. Any detriments of any weight are considered at this point but only the one benefit. Just as the detriments systematically derive from the way the whole agreement has been operated, so, it may be argued, individual restrictions are often related in their purpose and effect. There may be other benefits which an industry has adduced but which individually had not been « specific » or « substantial » enough to get through any gateway; it would not seem likely to lead to injustice if the Court could bring any established benefit from these into its judgment under the balancing clause, together of course with any detriment, when the successful restriction is being considered.

Under the existing law it is necessary for an industry to prove a positive public benefit for each restriction. There have been cases where the industry has proved that there is no public disadvantage flowing from a particular restriction and where there is clearly some positive benefit to the industry itself in having the restriction. It would seem reasonable to amend the law to allow such restrictions to stand, instead of being condemned, if the industry wants them and has been able to prove that there is no specific disadvantage to the public, apart from the presumption laid down by the Act.

I myself regret that our legislation does not extend to cover restrictions on personal services.

If you think public control of the restraints on competition possible and desirable, what should be the guiding principles underlyng anti-trust legislation ?

4. - The leading principle should be to increase or safeguard to the maximum extent the long-run competitiveness of an industry. As I have indicated, legislative control should try to maintain and increase freedom of entry to an industry or trade. From this point of view, the general object would be served, even more than by direct control, by

measures to increase the amount of information publicly and regularly available on profits, market structures, etc. Where it was considered that public policy was against such publication, the provision of such information on standard lines to an appropriate body would at least help any bureaucratic controls to be applied more effectively.

I would suggest that (subject to considerations affecting national defence or similarly grave public issues) it should be a condition of a cartel agreement being allowed that there should be full publication of the agreement itself and of information concerning the profits which the parties are making under it, with any other information necessary for the proper interpretation of the latter. In present circumstances I would favour such information being freely available to other Common Market nationals and not just one's own. In other words, businesses might be forced to choose between commercial secrecy and restrictions on competition.

To promote the continuance of commercial flexibility, I consider that industries with restrictive agreements should be compelled to review them at regular intervals. Quota restrictions in particular should be subject to fairly frequent review and might be required to be specially justified according to some investigatory procedure at such times.

Should it try to suppress restrictive agreements and practices by means of inflexible, per se rules ?

Yes, so far as restrictions on entry are concerned, although special legislative dispensation might on occasion be necessary; and certainly, so far as collective boycotts are concerned.

I have indicated already that, on balance, I am not in favour of the banning *per se* of discriminatory pricing within any particular national market. (I recognize that dumping is a separate problem and that the circumstances which give rise to dumping in what is normally the market of another country's industry might often be purely predatory in its effects or anti-competitive in its intentions. Where regular supply is likely to be forthcoming at the dumped prices I should not be so happy about interference; but, in any case, such a probability might be hard to establish).

Should it allow for exceptions and discriminations as determined by appropriate tests (special aims, business performance, market structure, etc.) ?

Yes, see my earlier answers. In terms of them, I attach the qualification that I do not believe that any guide to the competitiveness

of an industry is obtainable *via* the normal kinds of analysis (description) of its structure.

I would normally allow individual resale price maintenance to be a general exception.

So far as most collective restrictions are concerned, I should prefer that the case for them should be made out before a special expert body following broadly judicial procedures, but this opinion should be read in conjunction with my earlier answers and, in particular, with what I have said in answers to question 3.

I should be prepared to allow generally the collective agreement of prices and terms of goods, subject to the conditions and qualifications which I have indicated in my answer to the leading question in this section.

How could concentration and merger movements be controlled and limited ? How could the abuse of dominant positions be prevented or suppressed ?

I have given reasons earlier why I do not consider it desirable to break up established big businesses. They should be controlled by being required to make a good deal of information public and by the reduction of tariff barriers, etc. In my view the availability of adeguate information would facilitate direct public (Government) oversight of dominant businesses.

Mergers which involve or which would produce dominant enterprises (I have earlier suggested definitions in terms of narrowly defined markets) should be forbidden without prior investigation and Government sanction.

What should be the anti-trust procedure ?

In the case of the control of mergers and of dominant businesses, I consider that the responsability for determining the question of the public interest and of any consequent action should rest with Government. It should, however, be helped by special tribunals or commissions which could help it by finding the relevant facts, including advice on the probable consequences of alternative actions. So far as restrictive agreements and restrictive business practices are concerned, I would favour a judicial form of inquiry, such as that of the United Kingdom Restrictive Practices Courts, subject in the latter specific example to the amendments in procedure etc., which I have suggested above.

5. - I hope that my earlier answers have indicated the extent to which my views have been affected by my studies of technological factors determining cost-conditions in various industries, and of the circumstances affecting technological progress at the level of the individual firm. Since I have given special weight to the desirability of the latter, I do not consider that my views are likely to be modified on account of likely technological progress or technological possibilities in the near future.

Since I consider further progress towards trade liberalization and the integration of national economies, especially in Europe, to have high « welfare value », on political no less than on economic grounds, my views, as my comments on the control of dominant businesses should have made clear, have already taken into account presently discernable tendencies. I would make this reservation: that I have not interpreted the questionnaire as inviting me to comment on the international control of restrictive practices, as for example within the European Economic Community. I have made some study of the provisions of the Treaty of Rome and I think the general lines upon which I would comment on some aspects of the enforcement of these provisions will have been clear from the answers which I have given.

6. - I have been concerned with general principles which have been influenced by ideas which I have developed in the course of my researches into businesses, almost entirely in the United Kingdom. I should not like my evidence to ben taken as specifically directed towards Italian conditions which I have not studied. I have encountered some of the very modern sectors of Italian industry, or at least the effects of them, in my researches, particularly into an international cartel, and I have the greatest respect for the level of technology reached in Italian industry. At the same time, I know that Italy has sectors and areas where there are big problems of securing the rate of development which will be necessary if she is to attain her goals as a whole. Nevertheless, I have tried to enunciate general principles as I see them; and I should expect Italian thinking to be affected by much the same forces as are at work in other countries. The pressures to which I have referred may well have produced in your country an even greater pre-occupation with technological progress than prevails in my own. I would therefore except to find pre-conceptions in favour of large business organization in Italy similar to those in other Western countries and I would urge that, if these operate within the economic conceptual framework which I have sometimes ventured to criticize in my answers, they could lead to policies which I should believe to be mistaken in principle. (I have wondered whether

through I.R.I. Italy might not have an unique organization to help in the social control of dominant businesses). I should not be surprised if Italian opinion has shared in the general reaction against cartel organizations which can be detected in other European countries, and which I would characterize as too-easy a reaction in principle for reasons which will have become clear from my answers.

KENNETH E. BOULDING

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I cannot claim any special competence in this field except as a general economic theorist, so that I am not sure that I have anything of great value to contribute, specially as the most difficult problems in this field are legal rather than economic.

The problem, I think, has two aspects: one is the formal aspect of the exact language and administration of the law; on this there is ample literature. The other aspect might be described as the informal aspect, which is the impact of the very existence of anti-trust legislation on business behavior. This is harder to observe, yet it may in fact be the most important consequence of legislation of this kind. We have a saying in the United States that « the ghost of Senator Sherman sits at every American board of director's table ». Senetor Sherman, of course, was the author of the original Anti-Trust Act of 1890, and it can be argued that the major impact of this legislation is not in the actual prosecutions or legal action taken, but in the impact which it has made on business behavior. Even the very uncertainties and ambiguities of the legislation may have helped in this regard. Because of the Anti-Trust Act American businessmen will often hesitate to do things in the way of monopolistic practice or exploitative pricing, which they would probably not hesitate to do if there were no such legislation, even though these acts may not be specifically proscribed.

Unfortunately, the legal definition of monopolistic behavior is extremely difficult, especially as open collusion is not the only sign of such behavior. We have, I trink, by no means solved this problem in the United States, and we can, I think, learn a great deal from the experience from others.

My personal preferences in regard to this type of legislation would be for a rather loosely-drawn act, coupled with a very substantial research organization for the investigation of the abuses of economic power. In this connection, I would like to recommend the extremely interesting suggestions brought forward by Gardiner C. Means in his recent book entitled: *Pricing Power and the Public Interest: A Study Based on Steel,* Harper & Brothers, 1962.

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This letter attempts to respond to the questionnaire enclosed with your letter of February 10. I do not know in what way my name came to your attention. It seems to me, however, that your interpretation and evaluation of my reply be aided by information about my background. Thought I am an economist, my replies are derived primarily, not from economic theory, but from experience as 1) chairman of the Policy Board of the Anti-Trust Division of our Department of Justice, 2) chief economist of our Federal Trade Commission, 3) technical director of the Consumers' Advisory Board of our National Recovery Administration (which was our experiment with lawful cartelization as a remedy for depression), 4) adviser on cartels to our Department of State, 5) head of the post-war American mission on Japanese combines, 6) negotiator for the United States in the *ad hoc* committee on restrictive practices of the United Nations Economic and Social Council, and 7) scholar attempting an analytical comparison of monopoly legislation here and overseas, a topic upon which I am now writing a book based upon 18-months of study abroad.

My study of foreign restrictive practice laws for my projected book has led me to believe that the differences in national law are derived chiefly from differences in the cultural heritage of different countries rather than from differences in national economic problems. The principal differences between American and European law are that 1) we distrust concentrated power both in business and in government, whereas many Europeans tend to accept it, 2) our purposes are to encourage experimental change as well as to prevent exploitation, whereas the European emphasis has been chiefly on the latter, 3) we seek to accomplish our purposes chiefly by limiting concentrations of power, whereas Europeans have

sought to accomplish theirs chiefly by curbing harmful conduct, 4) our Congress decides the nature of the public interest and expresses it in prohibitions and statutory exemptions which are applied by judicial processes, with the discretion of administrative officials narrowly limited, whereas in most European laws, decisions as to the public interest are entrusted to the broad discretion of public officials. I have summarized and sought to explain the reason for these differences in an article entitled *Foreign Antitrust Laws in the 1960's,* which has just appeared as part of a volume entitled *Legal Problems in International Trade and Investment,* edited by Crawford Shaw and published by Oceana Publications of Dobbs Ferry, New York.

In the answers below, I shall pay relatively little attention to the limits placed upon action by the cultural heritage. These limits are self-operating. I shall try (probably with only partial success) to set my own cultural heritage aside, and to answer on the basis of what is reasonable and technically feasible. However, I shall assume, as an American, that release of the forces of progressive change is an important purpose that we want to enlarge the national product, not just to assure its fair division. Except where I specifically say otherwise, my remarks are, in my opinion, properly applicable to countries at the Italian level of development.

1. - *Restrictive agreements.* Agreement that is non-restrictive should be permitted (e.g., agreement to collect and disseminate trade statistics). Agreement for a restrictive purpose or with a restrictive effect (that is, agreements capable of harming consumers, competitors, suppliers, or reluctant participants) should be forbidden by law. The prohibition should not be conditioned upon any showing that the agreement has a harmful effect but should be applicable because the agreement is restrictive. This is wise for several reasons. First, the greatest harm that such agreements usually do is one that cannot be demonstrated: it is so discourage innovations in price reduction and in experimenting whith new methods that facilitate price reduction. A cartel fosters a quiet life. Since nobody can measure an unexplored opportunity, the magnitude of this harm can only be vaguely realized by contemplating the relatively unchanging methods of many cartelized industries. Second, when no cartel is forbidden unless its harmful effect is shown, most cartels can continue unmolested except as government agency slowly demonstrates the harm in one after another; and thus the aggregate effect of cartelization can clog the roads to progress for a long time, even if the cartels can be proved harmful. To enact a law of this kind is to decide that not much decartelization is needed.

With a cartel law of this type since 1923, Norway had about 500 cartels engaged in horizontal price fixing when it applied a broad prohibition to them by royal decree in 1960. Cartels have shown similar persistence under laws of similar character in Denmark, where the law has existed since 1937.

As a general rule, one does not enchance trade by aggreeing to restrict it; persons on one side of the market cannot be trusted to fix for those on the other side the terms of commercial dealings; and competition constitutes not only a useful curb upon greed but also a useful source of innovation and experiment, without which improvements would take place only at the pace of the average, if not the slowest, member of an industry. These generalizations will be recognized by general avoidance of agreed restriction only if such agreements are made clearly unlawful. I have expressed this opinion more fully in Chapter One of my book, *Maintaining Competition* (McGraw-Hill Publishing Co., 1949).

In unusual cases, exceptions are appropriate and they should be recognized by legal exemptions. Such exemptions should be few and should be made only by processes in which the burden of proof is upon those who ask for exemption. The agency empowered to confer the exemption should stand higher in the government hierarchy than that which enforces the prohibition; for the agency applying the prohibition should be single-minded in doing its job, and the business community should have an incentive to comply with the prohibition without first waiting to see whether or not exemption is available.

The law itself might reasonably exempt these classes of agreement: *a*) among emplayees, for the formation and operation of unions; *b*) among consumers, for the formation and operation of consumers' cooperatives; *c*) between employers and employees, as to wages, working conditions, and the like, but not as to the non-use of new processes and materials nor as to the prices at which goods are to be sold or the amount of goods that will be offered for sale; *d*) all agreements explicitly authorized by special legislation. A limited exemption is needed for patent licensing agreements and possibly for producers' cooperatives, and whether needed or not, one is likely to be granted for agricultural marketing; but since each of these should be accompanied by complicated limits and safeguards, the best way to deal with them is by special legislation, which would then convey exemption under (*d*) above.

American experience does not, in my opinion, justify exemption for resale price maintenance nor for depression cartels. Indeed, under our National Recovery Administration, the industries that agreed upon commercial restrictions showed a slower recovery in employment than those

that did not. In our experience, too, the efficiency of operation which Europeans have sometimes sought through « razionalization » agreements is usually retarded rather than enhanced by such agreements. Exemptions for export trade, however appropriate as a part of a pattern of economic warfare by tariffs and other governmental restrictions, are not proper under a policy of reducing national trade barriers.

A country which applies a prohibitory rule for the first time to a business community in which cartels have been legal should, so far as possible, define the exempted areas in statutory terms, so that from the outset the application of prohibitory law is clear. If an area of uncertainty must remain, the law should seek to define the boundaries of this area and to apply transitional provisions by which, within the area, agreements otherwise forbidden would be permissible for a period of time long enough to permit the legislature (or other agency having the power to exempt) to receive and decide upon applications for further exemption.

Good examples of appropriate ways to apply prohibitions that are coupled with exemptions are *a*) the Norwegian royal decree of July 1, 1960, with reference to horizontal price agreements, *b*) Section One of the American Sherman Act, considered along with later Congressional exemptions such as that for agricultural and labor organizations in Section Six of the Clayton Act. The German cartel law is defective in that: *a*) it contains numerous discretionary provisions for exemption, devoid of time limit, so that considerable parts of business have little incentive to conform to the statutory prohibition or to hasten the processes of decision, *b*) the deciding body as to exemptions is the same agency that applies the prohibition, and its energy is diverted largely to considering whether or not to exempt. The British law is defective in that no cartel need cease to operate until its agreement has been considered by a court, and that no cartel has an incentive to expedite the judicial machinery. However, under this law burden of proof is properly placed upon those who want exemption.

The prohibition of restrictive agreements should be applied by processes which are, so far as possible, quick, simple, and sure, and which foster voluntary compliance. This means that illegality should inhere in the restrictive character of the (non-exempt) agreement not in a record as to performance or effect. If such a simple standard is invoked, the problem of enforcement will be greatly simplified; for lawyers will usually know what the law forbids, and their advice to their business clients will become a major means by which compliance is obtained. Provisions should be made for penalties for non-compliance with the

law as well as for corrective orders by a body charged with enforcement. Processes of enforcement should be public, to assure just treatment of individuals and to foster general acquaintance with the policy of the law. Clarification of doubtful matters should come definitively from the accumulation of precedents in decided cases, but provisional clarification should be provide *a*) by interpretative general statements by the enforcement body, to be regarded as advisory rather than definitive, and *b*) by exempting from penalties (but not from corrective orders) agreements that have been submitted in advance to the enforcement agency and have not been characterized by it as probably unlawful.

There is consensus in the United States that the most successful part of our antitrust laws is Section One of the Sherman Act. Argument about this part of our policy is almost wholly confined to debate as to whether or not certain existing exemptions should be reduced (e.g., those for resale price maintenance) or broadened (e.g., those for operation in foreign trade).

For exposition of this general attitude toward restrictive agreements, see my book *Maintaining Competition*, Chapters 1-3 and a book called *The Antitrust Laws of the U.S.A.*, Cambridge University Press, Chapters 1-3 14, by Alan Neale, a high official of the British Board of Trade.

2. - *Dominant Enterprises.* American law in this field has been only partly successful. Something can be learned from our successes and failures.

We have conceived the problem chiefly as one of preventing dangerous concentrations of power. So far as this can be done, I think we were right to focus upon this rather than upon abuse of power. Action against abuse of power tends to be *a*) ineffective, because enterprises can usually devise new ways of achieving their purposes, *b*) expansive, because the ineffectiveness of old rules encourages the promulgation of new ones by reinterpretation or new legislation, *c*) prevasive, because the expansion of the rules places an increasing part of business action under public control, and *d*) arbitrary, because in curbing abuses of power, which are numerous and complex, the enforcement agency cannot afford an extensive analysis of each matter, but must rely upon crude rules of thumb.

I have discussed the choice between limitation of power and prevention of abuse in a paper entitled « Large Enterprises and Antitrust Policy », published in a pamphlet entitled *Public Policy Toward Competition.* I have asked the publisher, the National Industrial Conference Board, to send you a copy. One of our efforts to act against abuse of power is our price discrimination law. I made a comprehensive analysis

of this law's operation in *The Price Discrimination Law, A Survey of Experience,* published in 1959 by the Brookings Institution of Washington. D. C.

In action against concentrations of power, our policy has had three major defects: *a*) the problem has been conceived too narrowly; *b*) we have placed insufficient emphasis upon preventative rather than corrective measures, *c*) in providing for preventative measures, we have neglected the possibilities of corporation law, taxation, and the like.

Because our basic law was enacted in 1890, it envisages the problem of power as one of monopoly. The later development of oligopolies and great conglomerate enterprises has made it clear that power depends not only upon share of a market but also upon fewness of competitors, relative size of competitors, and the size of the financial aggregate that operates in various industries under a single control. The European concept of the dominant firm is better than our concept of monopoly as an expression of the scope of the problem. Much recent thinking about our policy consists of proposals to extend it to cover more of the problem of power. (See, for example, Carl Kaysen and Donald Turner, *Antitrust Policy,* Harvard University Press, 1959).

Though from the beginning in 1890 our law forbade attempts to monopolize, we enacted no other preventative legislation until 1914, when we forbade corporations to acquire stock in other corporations if the acquisition probably would reduce competition. We left mergers uncurbed until 1950, when we applied a similar rule to corporate acquisitions of the assets of other business enterprises. A large part of the present power of our dominant firms is due to this delay in applying preventative measures; and what we might have prevented (and are now preventing) we shall probably not be able to undo. Prevention early is better and easier than correction later.

Both our preventative and our corrective measures consist of legal action by our antitrust authorities. We have still done nothing *a*) to remove from our tax laws incentives that they now create for profitable enterprises to merge with unprofitable ones, *b*) to provide incentives, through taxation or otherwise, for enterprises to grow no bigger than they should be for efficiency's sake, and for existing large enterprises to spin off parts of their holdings as separate firms, *c*) to modify our laws about incorporation to discourage bigness by limiting the right for one corporation to hold stock in others, and by subjecting large corporations to requirements more stringent than small ones as to disclosures about ownership and operations. By contrast, the Germans are wisely consider-

ing the problem of undesirable concentration as one of the matters relevant to the modification of their tax and corporation laws.

Our law to prevent anti-competitive mergers is only 12 years old, and experience with it is still limited. The best summary of that experience appears in Betty Bock's pamphlet, *Mergers and Markets,* published by the National Industrial Conference Board. The law wisely undertakes to prevent mergers that probably will impair competition, whether these are horizontal, vertical, or conglomerate. Little can be lost in efficiency by preventing the mergers of concerns (which were not built to operate as one), so long as each enterprise is free to expand individually. Much is gained in efficiency as well as in competition by depriving businessmen of a considerable part of their opportunity for empire-building by consolidation, thus forcing them to take more often the harder but more useful road to growth derived from successful operation. Much is gained also in simplifying the task of coping with dominant firms if their size and number are kept down by application of such a control of mergers.

But our test of probable future effect requires a complex analysis of complicated facts, and thus results in proceeding that are unduly slow and costly. This is the right way to proceed in fields where a simpler rule would have no predictable relation to the purposes of the policy. Hence it is appropriate for such matters as conglomerate mergers, as to which the significant considerations of public policy are still uncertain. As to horizontal mergers, however, a simpler rule would now be appropriate: one forbidding acquisition of any competitor by any enterprise of substantial size unless that competitor is bankrupt and no other purchaser of his assets is available.

A country that, like Italy, is now formulating its policy, would be wise to adopt a merger law to meet as much as possible of its problem of concentrated power, but it would also be wise to seek a simpler test of legality than ours for as much of the merger problem as possible.

More than 70 years of experience with our law that condemns and permits the dissolution of existing monopolies has shown that it is very useful but that it alone is insufficient. Such a law induces large enterprises to be more circumspect in acquiring and using their power, and authorizes the government to force the termination of the particular practices by which power is acquired or maintained in a particular case. It provides an important guarantee that small concerns will not be ecluded or driven from the market. In extreme cases, it can be used often, and hence is not sufficient, without preventative measures like the merger law, to curb excessive concentration. Moreover, in each such case the government is forced to prescribe the scope of each of the new

enterprises to be created out of the old one, and for this responsibility the government is not well suited.

American experience has shown, however, that there is little substance in the views, often expressed in Europe, that intervention against the power of large companies is inconsistent with the development of the economies of scale. Though in small countries economies of scale may be inconsistent with competition, this is untrue in the United States and presumably will be untrue in the Common Market. We have found that, if uncurbed, firms expand and merge to sizes larger than are needed for economy. A policy against excessive power can ben so formulated that it has no application to power that consists only of the possession and use of economies of scale. There is no evidence that where we have broken up large companies, efficiency has been impaired. Rather, there are persuasive indications that it has sometimes been increased.

My views about policy toward dominant enterprises have been expressed more fully in Chapters 4-6 of *Maintaining Competition,* mentioned above, and in my book, *Big Business and The Policy of Competition,* published by the Western Reserve University Press of Cleveland, Ohio, in 1956.

The more that is done to limit power, the less need there will be to take action against abuse. But though excessive power should be curbed both by merger legislation and by a law providing for the dissolution or reduction of excessive concentrations, such laws are not sufficient to cope with the whole problem of dominance. Hence, in spite of the disadvantages of abuse laws that are listed above, there is need for legislation to cope with abuses by dominant firms.

Unfortunately, such laws tend to be least applicable to a changing and dynamic economy. The standards by which abuse is to be identified are easily formulated in relatively static societies, but are difficult to discern in societies in which economic organization, economic relationships, social stratification, standards of living, and costs are all fluid. In such societies the innovator flouts the conventions of the group and is often accused of unfair practice. (Ford created the mass automobile market by pricing each year's car below last year's cost, thereby enhancing sales sufficiently to permit new methods that reduced the new costs below the price). There is a tendency for control of abuses to penalize the innovator for the benefit of the established group, and thus to foster stability at the cost of progress.

For this reason, control of abuse should be cautions, limited to matters that are both clear and important, and used chiefly for types of conduct that offer little prospect of useful innovation. Efforts to keep

prices reasonable by this means are peculiarly undesirable. They tend to prevent shifts of resources between activities, and thus to impose upon the state great burdens of detailed economic planning.

In the United States, we have sought to control abuses chiefly in two ways, by curbing price discrimination and by preventing misrepresentation of goods; since candor in selling is a virtue which the innovator should practice like anybody else, our law of misrepresentation has not raised questions of principle. Our price discrimination law, however, has raised many problems that seem to me similar to those implicit in European control of abuses. I have discussed the problem at length in my book, *The Price Discrimination Law,* mentioned above.

May I express by best wishes for your success in devising a law that incorporates our success, avoids our mistakes, and appropriately expresses the possibilities of Italian society. I shall be grateful for a copy of your report.

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1. - It would seem to me that in the field with which the questionnaire is concerned the most important single problem of the European countries is to prevent international cartellization in the wake of economic integration. Of the forces on which it is possible to rely for offsetting concentration tendencies, free trade is the most promising, except in countries in which the export-import sector is very small. But even in the United States we have recently observed the beneficial effects of foreign competition in that the decisions of managements and of labor in such highly concentrated industries as steel and automobiles have clearly been influenced by the growth of efficiency of foreign producers. It seems obvious to me that the European economies could now derive important benefits from the prospective significant increase of international competition. It seems equally obvious to me that a tendency will develop to limit these competitive forces by international cartellization, and I therefore believe that a common effort to suppress these offsetting tendencies could contribute a great deal to vigorous competition in the European economies.

I have not myself been engaged in technical work on this aspect of the problem, but I imagine that the task with which European policy-makers will be faced in this regard is quite difficult. For example, producers can agree on a kind product specialization in each country which in effect secures monopoly and oligopoly advantages to the firms of each country. *Prima facie* this may not be easily distinguishable from natural tendencies to specialize in those productive processes for which each country has a « comparative advantage ». I believe that only studies of experts can disclose whether the subsequent price developments do or do not reflect the exploitation of protected positions, that is to say, whether

the producers of other countries actually are incapable of supplying certain goods at lower prices than those currently charged. It seems to me, therefore, that it would be important to have the developments in the concentrated industries studied by a permanently-constituted impartial board (or « commission ») on an international scale within the European Community. Countries desiring to prevent international cartellization might then outlaw agreements which would reduce the degree of competition between the producers of the Common Market.

2. - As for the general characteristics of the problem of concentration, I believe that recent experience in various countries has brought out the importance of taking a joint view of producers' oligopoly power and of the power of large labor unions. What has been happening in most Western countries is that bargaining arrangements which developed in periods of recurring unemployment were carried over into periods with tight labor markets. Consequently, these bargaining arrangements have had an appreciable inflationary effect; or (in some cases) they have had the effect of forcing restrictionist monetary policies on the country in question to avoid cost-push inflation. This is surely not conducive to economic growth. In countries which have a high level of employment the trend in real wage rates will go along with productivity trends at any event, and the main result of bargaining by large labor unions and by oligopolistic groups is that it creates inflationary tendencies. Furthermore, these arrangements tend to prevent the spreading of the advantages of technological progress over the economy as a whole.

I would, therefore, be strongly inclined to say that the whole setting in which wages are determined requires re-examination. I should add, however, that I am aware of the fact that the Italian situation has special characteristics because of large-scale unemployment in Southern Italy and because of the migration of workers from the South to the North. I do not have the technical competence to judge the extent to which this factor should modify one's position concerning the wage-setting problem in general. On occasion I have heard it argued that some of the wage policies of the North increase the difficulties of the South.

3. - Coming back to producer's oligopoly, I do believe that even if we take the existence of narrow oligopolies in certain industries for granted, the policies of these groups should be made to comply with specific legal regulations in various respects. But I believe that these rules should be flexible and that there should be a board of experts — a com-

mission — which administers the rules. The decisions of such a body should of course be subject to revision by the courts. What I am saying here applies to measures directed against *discrimination,* against so-called *tying clauses,* and generally against practices by which oligopoly and monopoly power can spread from one industry to another.

Insofar as it is possible to draw inferences from American experience for other countries, I would not exclude the possibility of dissolution proceedings against companies whose size exceeds what is necessary for technical efficiency. Provisions permitting dissolution would of course also have to be handled with a great deal of flexibility and with the courts ultimately in charge of the matter. Moreover, I have not competent judgment about whether dissolution provisions would or would not be justifiable in European practice.

4. - One of the central problems of antimonopoly policy is to make it easy for technically efficient entrants to take up production in industries where large corporations operate. This is in part a matter of seeing to it that credit facilities should not be blocked to efficient entrants. In part, however, this is a matter of suppressing practices by which large firms can impose losses on smaller ones whenever these try to become established, and then can change their terms of selling when the field has been cleared for them.

5. - In general, I do not consider it promising for the government to get involved in regulating costs and prices. I believe that a government-regulated wage and price system inevitably leads to highly arbitrary and politically-determined structures which do not serve the objective of economic efficiency well at all. Consequently, I belong among those who have a strong preference for trying to suppress restrictive practices and for trying to enforce more competition, rather than among those who would like to solidify oligopolistic positions and have government officials control the policies of producers. I feel strongly opposed to recent attempts of governments to exercise arbitrary wage and price controls by exerting political pressure. These misgivings were explained in the minority opinion which Professor Friedrich A. Lutz of the University of Zürich and I have formulated in 1961 in the O.E.E.C. Report on Rising Prices, see pp. 63-64).

6. - Finally, I would like to say that in my opinion American antitrust legislation has served a useful purpose. In particular, I believe that it was very useful to enact legislation by which it is possible to

prohibit mergers such as would substantially reduce competition without leading to significant economies of large-scale production. I also believe that the coordination of the price and other policies of oligopolistic firms is less tight under the American system than in some other countries, because in the United States explicit agreements are outlawed. Furthermore, the American antitrust agencies have on some occasions successfully put an end to the joint ownership of facilities in various industries by one and the same corporation, and I believe that this has made it more difficult for oligopolistic firms to spread their oligopolistic power to other areas of economic activity. In general, I believe that American firms are aware of the dangers of getting in trouble with the antitrust agencies and that this has contributed to keeping oligopolistic tendencies within bounds.

I believe that some very large corporate units would never have developed if the American antimerger provisions of 1950 had been adopted earlier in economic history. In some industries corporations tend to grow beyond the size which could be justified by genuine economies of large-scale production, and it is of course much easier to prevent mergers *in statu nascendi* than to dissolve already established oversized units. However, in American antitrust practice there are examples even for the application of the second of these two methods.

We do, of course, have oligopolistic market conditions in a good many industries. It remains an important objective of American economic policy to reduce oligopoly power where this can be done without giving up important economies of large scale. However, to many competent students of this problem it seems that there has been no risingtrend in oligopoly power over the decades. I would certainly not go along with the view that it is hopeless to use antitrust policies for keeping oligopolistic tendencies within reasonable limits.

These policies should be administered with the purpose of increasing the degree of competition and of *widening the area of individual initiative*. They should *not* be administered in a punitive spirit with the intention of substituting the even more concentrated power of government officials for the power of corporations and unions.

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My knowledge of the problems of restriction of competition rests on familiarity with the operation of the antitrust laws of the United States and some inquiry into the operation of enactments having similar purposes in other countries. Responding to the first three items in the questionnaire, I should say that the maintenance of competition in the private sector of the economy should continue to be a principal policy for securing the public interest, and that there are feasible enforcement devices for carrying out such a policy. Developments in the enforcement of the antitrust laws in this country during the past twenty years have greatly strengthened this belief, even though much remains to be done. I do not, however, think that competitive private enterprise need be the sole reliance for securing the public interest in so large a portion of the economy as in the United States. I would favor, for example, the partial nationalization of the radio and television industry, the nationalization of large segments of trasportation, and the establishment of public enterprise in competition with private enterprise in certain areas vital to welfare, such as the manufacture of drugs. For most of the manufacturing and distributing industries, however, private competitive enterprise seems to offer the best solution; and it is here that legal measures to secure the maintenance of competition need to be taken.

My conclusions concerning the antitrust laws of the United States are fairly well summarized in two publications. One of these is an article, « Economic Considerations in the Enforcement of the Antitrust Laws of the United States », printed in the *Minnesota Law Review* for February, 1950 (vol. 34, n. 3 at pp. 210-230), of which I enclose a copy, and the other is a book review of « Antitrust Policy: and Economic and Legal Analysis », in the *University of Pennsylvania Law Review,*

November, 1960 (vol. 109, n. 1, pp. 146-152), which unfortunately I do not have available to send. The first of these articles is printed also in Part VI of Vol. III of the Memoirs of the International Academy of Comparative Law, published as a supplement to Vol. XXX of the yearbook of comparative law and legislative studies (Annuario di Diritto Comparato e di Studi Legislativi) for 1957 at pages 629-652. Recent developments, including the decision of the Supreme Court of the United States in June, 1962 in the case of the Brown Shoe Company, confirm my belief in the efficacy of Section 7 of the Clayton Act, as now amended, to restrain further economic concentration. The United States has, however, not solved the problem of reducing existing concentrations which are inconsistent with the maintenance of competition. Responding to a point in the second-to-last question on the questionnaire, I think the increased liberalization of international trade, which seems to be taking place, will be an important factor in improving the situation in the future.

With regard to the intervening questions in the questionnaire, I would say that the adoption of *per se* rules is desirable so far as practicable, but that all such rules, to be workable, must allow for justification of the otherwise proscribed practices under some circumstances. Hence there will be inescapable difficulties of enforcement. Whether in the light of them administration should be in the hands of judicial courts or administrative bodies will depend on the history and nature of the developed legal systems of particular countries.

It does seem to me that a country on the level of economic development of Italy should have need for laws securing the maintenance of competition; but, no doubt, this aspect of economic policy will come to be developed increasingly on the level of the European Common Market.

Economic considerations in the enforcement of the antitrust laws of the United States *

The purposes of law determine its content and account for the decisions of courts and administrative agencies; but purpose is registered typically in rules and principles. Once these have been enacted or accepted, they are purportedly applied with only secondary, rather than primary,

* This paper has been prepared for presentation to the Third International Congress of Comparative Law at the Hague, August 1-7, 1950. Since it is intended for the information of foreign lawyers having ne previous acquaintance with the antitrust law of the United States and was subject to a word limit, it is rather elementary and cryptic. We believe it has suggestive value for readers in this country, however, especially by way of introduction to the subject.

reference to the considerations that gave them birth (1). In other words, a doctrinal screen separates the ends of law from the process of effectuating them through administration and adjudication. Decisions are reached, or at least rationalized, in terms of legal propositions recorded upon the screen (2), rather than in terms of the purposes that lie behind. It is so in the traditional fields of private law; in the criminal law; and in large areas of public law, such as those by which pensions and benefits are provided. It is emphatically not so, however, under the antitrust laws of the United States (3); for there the doctrinal screen is exceedingly thin and large of mesh, permitting — indeed requiring — the enforcement tribunals to look constantly through it to the purposes of the laws, instead of finding their patterns of decision upon the screen itself. The rules of antitrust law are few and broad in terms; the necessity for resorting to social ends and economic data as guides to decisions is constant.

1. - *The Evolution of Antitrust Doctrines and Methods of Enforcement.*

The principal Federal antitrust law is the Sherman Act of 1890 (4). It prohibits « Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations » (5), and any conduct whereby any person « shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations... » (6). Criminal prosecutions for violations and civil enforcement

1) *Cf.* Holmes, The Common Law, esp. p. 5 (1881).

2) There is no intention here, of course, of estimating with precision the relative roles of legal doctrines and practical considerations in judicial administration. Sufficient to the argument is the point that lawyers and judges typically frame their questions and put their answers in doctrinal terms.

3) Under the terminology employed in the United States, antitrust law is the law designed to guard against monopolies, restrictive business combinations and undesirable restraints of trade. Statutory and non-statutory doctrines of early English law, which had these purposes, form a background for 19th-century decisions, and occasional contemporary ones, in the United States, which do not rest upon modern statutets. In the United States, however, Federal and state legislation has almost entirely covered the field and forms the starting point for practically all decisions. Because of the nation-wide scale of much of American business and the greater vigor of enforcement by Federal officials as compared with those of the States (with rare exceptions), the state antitrust laws have become of decidedly secondary importance. This paper will be confined tho the Federal laws.

4) 26 Stat. 209 (1890), as amended, 15 U. S. C. § 1 *et seq.* (1946).

5) 15 U. S. C. § 1 (1946).

6) 15 U. S. C. § 2 (1946).

proceedings at the suit of the Attorney General and of private parties, are authorized (7).

The terms of the Sherman Act's prohibitions are obviously broad and afford little guidance to the decision of cases arising under them. Under one interpretation originally urged, these terms derive more specific meaning from the preexisting common law and do not extend beyond it (8); but this view has not been accepted. Instead, the substantive clauses of the statute have been deemed to prohibit vague, rather than precise, categories of acts which conflict with the legislative purpose (9). That purpose, it can scarcely by doubted, was the maintenance of competition in the economy (10), in so far as conflicting laws of a specific nature were not in effect or might not be afterward adopted (11).

Since the terms of the statute were very sweeping, it became necessary to limit their application to acts and transactions which threaten the maintenance of competition, as distinguished from others which limit competition merely to serve some legitimate business purpose. Many business contracts limit the subsequent competition of the parties or of others in some way; yet clearly it was not intended by the Sherman Act to prevent contracts of partnership or sale which, to the extent of the business involved, tie the parties to each other, eliminating competition between them or excluding outsiders from competing for the same sales. To furnish a basis for discriminating between lawful transactions and unlawful restraints, the Supreme Court, after much difficulty (12), announced its famous « rule of reason » under the Sherman Act, whereby « the standard of reason (is)... the measure (to be) used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided » (13).

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7) Violations of the Act are made misdemeanors by the sections just cited. Other remedial provisions, including injunction suits, are prescribed in sections 4-6, 15 U. S. C. §§ 4-6 (1946); in section 7, omitted from the Code, and in supplementary proscriptions of the Clayton Act of 1914, note 32, *infra*, 15 U. S. C. §§ 15, 26 (1946).

8) Holmes, J., dissenting, in Northern Securities Co. v. United States, 193 U. S. 197, 400, 403-404 (1904). Compare the same writer's opinion of the Court in Swift and Co. v. United States, 196 U. S. 375, 394-396 (1905).

9) Standard Oil Co. v. United States, 221 U. S. 1, 51-62 (1911).

10) The historical evidence is summarized by Chief Justice Stone in Apex Hosiery Co. v. Leader, 310 U. S. 469, 389-493 (1940).

11) Legislation, which it is not necessary to cite, provides for regulated monopolies or restrictive licensing in trasportation, communication, and other public services; legalized combination among employees and farmers; and government ownership of the post office, numerous electric power and local public utility projects, and atomic energy development.

12) Controversy within the Supreme Court over the interpretation of the Sherman Act is reflected in the following leading cases: United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290 (1897); United States v. Joint Traffic Association, 171 U. S. 505 (1898); and Northern Securities Co. v. United States, 193 U. S. 197 (1904).

13) Standard Oil Co. v. United States, 221 U. S. 1, 60, 61-64 (1911).

This so-called rule was, of course, nothing but a formula to justify the courts in drawing lines between transactions deemed legitimate on economic grounds and those thought to be harmful. Far from affording a guide for the future, the opinion which announced the rule of reason appeared to merge the several clauses of the Sherman Act into one broad prohibition and thus to eliminate such definiteness as otherwise might have continued to result from the different phrases in the Act (14). Under this approach, the Court has been compelled to distinguish as best it could between concerted activity that aided (15) and similar activity that restrained (16) healthy competition, or between corporate consolidations that eliminated competition without warrant (17) and those that appeared to be justified by considerations of efficiency in manufacturing or marketing (18). Similarly, some patent pools and cross-licensing agreements are sustained because they avoid conflict among the patentees and make en entire technology available to all, even though at the same time they strengthen the parties in competition with outsiders (19), wheraes others are condemned because they establish control over an industry, sustaining prices and excluding competition (20).

The « rule of reason », however, did not long remain the sole formula to guide the courts in applying the Sherman Act. Since its announcement, the Supreme Court has concluded in a series of decisions that some restrictive and monopolistic practices produce so serious a danger to competition or involve so menacing a concentration of economic power as to be « unreasonable *per se* ». Under the principle of stare decisis, these practices thereupon became unlawful without reference to their economic justification under particular circumstances. Such has now become the holding with respect to agreements among competitors upon the prices they will charge or pay, at least if a substantial portion of the trade in a product is involved (21); agreements to refrain from particular forms

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14) *Ibid.*

15) Maple Flooring Ass'n v. United States, 268 U. S. 563 (1925).

16) American Column & Lumber Co. v. United States, 257 U. S. 377 (1921).

17) United States v. Reading Co., 253 U. S. 26 (1920).

18) United States v. United States Steel Corp., 251 U. S. 417 (1920); United States v. Columbia Steel Co., 334 U. S. 495 (1948).

19) Standard Oil Co. (Indiana) v. United States, 283 U. S. 163 (1931).

20) Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20 (1912);Hartford-Empire Co. v. United States, 323 U. S. 386, U. S. 570 (1945); United States v. National Lead Co., 332 U. S. 319 (1947); United States v. United States Gypsum Co., 333 U. S. 364 (1947). Compare, as to copyright, United States v. Paramount Pictures, 334 U. S. 131, 141-144 (1948).

21) United States v. Trenton Potteries Co., 273 U. S. 392 (1927).

of price competition, resulting in price uniformity (22); schemes to influence prices by market operations (23); agreements between a seller and buyers of his product upon resale prices to be charged by the latter (24); pooling of profits or receipts among competitors (25); territorial division of markets among competitors (26); agreemtns among holders of complementary patents, providing for licenses to others conditioned upon the licensees' charging stipulated prices for the patented product (27); intentional maintenance of power to control prices or exclude competitors (28); acquisition of power to control prices or exclude competitors through intentional expansion of a business enterprise (29); agreements among competitors, occupying a dominant position in an industry, not to do business with specified outsiders, either to compel them to adopt business practices favored by the conspirators (30) or to compel them to refrain from dealings with outsiders whose competition the conspirators desire to eliminate (31).

In addition to these judicially evolved rules under the Sherman Act, the effort has been made to strenghten the antitrust laws by legislation supplementing that Act, whereby specific business practices which are thought to endanger competition are rendered illegal. Among the measures of economic reform adopted in 1914, early in the administration of President Woodrow Wilson, were the Clayton Antitrust Act (32) and the Federal Trade Commission Act (33). The former is a lengthly

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22) Federal Trade Commission v. Cement Institute, 333 U. S. 683 (1948). Similarly, agreements to restrict producition for the purpose of influencing prices are necessarily illegal. American Column & Lumber Co. v. United States, 257 U. S. 377 (1921); United States v. Alluminium Co. of America, 148 F. 2d 416, 444-445 (2d Cir. 1945).

23) United States v. Patten, 226 U. S. 525, 540-543 (1913); United States v. Socony-Vacuum Oil Co., 310 U. S. 150 (1940).

24) United States v. A. Schradr's Son, Inc., 252 U. S. 85 (1920); United States v. Univis Lens Co., 316 U. S. 241 (1942). See also Boston Store of Chicago v. American Graphophone Co., 246 U. S. 8 (1918).

25) United States v. Paramount Pictures, 334 U. S. 131, 149 (1948).

26) United States v. National Lead Co., 332 U. S. 319 (1947); United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio, 1949).

27) United States v. Line Material Co., 333 U. S. 287 (1948).

28) American Tobacco Co. v. United States, 328 U. S. 781 (1946).

29) United States v. Aluminium Co. of America, 148 F. 2d 416 (2d Cir. 1945).

30) Paramount Famuos Lasky Corp. v. United States, 282 U. S. 30 (1930); United States v. First National Pictures, 282 U. S. 44 (1930).

31) Fashion Originators' Guild v. Federal Trade Commission, 312 U. S. 457 (1941). Although this case, like the *Cement Institute* case, arises technically under the Federal Trade Commission Act, note 33, *infra,* both decisions are equally applicable to the Sherman Act.

32) 38 Stat. 730 (1914), as amended, 15 U. S. C. § 12 *et seq.* (1946).

33) 38 Stat. 717 (1914), as amended, 15 U. S. C. § 41 *et seq.* (1946. The social philosophy embodied in the two foregoing statutes is interestingly presented in Woodrow Wilson, The New Freedom, a collection of addresses made during the 1912 presidential campaign.

statute, the most important provisions of which forbid specified conduct, provided « the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce ». The business practices so proscribed are: discrimination in the prices charged to different buyers of the same product and the knowing inducement or receipt of such discrimination (34); sale or lease of any article on condition that the buyer or lessee shall not use or deal in the products of a competitor of the seller or lessor (35); and acquisition of the capital stock of a competitor (36). Enforcement of these provisions is entrusted to the Federal Trade Commission (37), newly established by the Act bearing that name (38), but may also be had through judicial proceedings in the same manner as under the Sherman Act, except that criminal proceedings are in some istances not available (39). In addition, the Federal Trade Commission is empowered to proceed against an undefined group of practices originally designated as « unfair methods of competition » (40) and now enlarged to include also « unfair or deceptive acts or practices » (41). The Commission proceeds by administrative order, preceded by hearings, in exercising all of its powers. Its orders are judicially enforceable, subject to review as to legality by the courts (42).

It was intended that the 1914 legislation should accomplish two improvements, among others, in antitrust enforcement. These were: 1) outlawry of specific conduct dangerous to competition or productive of monopoly (43), and 2) continuous surveillance of competitive practices

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34) Clayton Act § 2, as amended June 19, 1936, c. 592 (the Robinson-Patman Act), 49 Stat. 1526 (1936), 15 U. S. C. § 13 (1946).

35) *Id.*, § 3, 15 U. S. C. § 14 (1946). This provision has been broadened by interpretation to cover exclusive dealing arrangements which, although affirmative instead of negative in terms, have the effect of precluding the purchase or lease of others' products. The decisions on this point are reviewed in Standard Oil Co. of California v. United States, 337 U. S. 293 (1949).

36) *Id.*, § 7, 15 U. S. C. § 18 (1946). This provision has the weakness of not forbidding acquisition of the assets of a competitor to the same extent as acquisition of capital stock. Continued attempts to secure strengthening amendments have so far been unsuccessful.

37) *Id.*, § 11, 15 U. S. C. § 21 (1946).

38) Note 33 *supra.*

39) Clayton Act §§ 15, 16, 15 U. S. C. §§ 25, 26. *Cf. id.*, § 9, 15 U. S. C. § 24 (1946); Robinson-Patman Act § 3, U. S. C. 13a (1946).

40) Federal Trade Commission Act § 5, as amended, 15 U. S. C. § 45 (1946).

41) Act of March 21, 1938, c. 49,52 Stat. 111 (Wheeler-Lea Act). The amendment was designed in part to permit the Commission to deal with practices harmful to consumers, without the necessity of showing that harm to competitors could also be expected to result. See Federal Trade Commission v. Raladam Co., 283 U. S. 643 (1931); Federal Trade Commission v. Raladam Co., 316 U. S. 149 (1942).

42) Clayton Act § 11; Federal Trade Commission Act, as amended by the Wheeler-Lea Act. 15 U. S. C. § 45 (1946).

43) See Sen. Rep. No. 698, 63d Cong., 2d sess. 1 (1914); 51 Cong. Rec. 13,484 (1914).

by an administrative agency which should be able to identify additional conduct presenting the same dangers and to proceed promptly and expeditiously in all such situations (44).

For a variety of reasons (45) the hopes entertained with respect to the contribution of the Federal Trade Commission to these aspects of antitrust enforcement have remained to a large extent unrealized (46). Commission proceedings have been frequently protracted, rather than expeditious (47). The Supreme Court early claimed for the judiciary the ultimate determination of what methods of competition are « unfair» within the meaning of the Federal Trade Commission Act (48). And the Commission itself has been unable to reduce its conclusions to the form of a workable code which can be given effective application (49). The definiteness of the rules embodied in the Clayton Act is, moreover, somewhat illusory because of the qualification that the proscribed practices, to be illegal, must present a threat of substantial lessening of competition or tendency toward monopoly. The meaning of this provision clearly depends upon economic factors which have not on the whole been reduced to rules and hence require exploration in particular situations.

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44) See Sen. Rep. No. 597, 63d Cong., 2d sess. 8, 15 (1914); H. R. No. 1142, 63d Cong., 2d sess. 18 (1914); 51 Cong. Rec. 11,455 (1914). In addition, more effective dissolution decrees under the Sherman Act, which the Commission was to aid in formulating, and a body of Commission-developed antitrust law which should serve as a more satisfactory guide to businessmen than was then avaible, were sought by means of the new legislation.

45) Among other factors, the quality of appointments to the Commission has been far from uniformly adequate to the task to be accomplished. See Herring, *The Federal Trade Commissioners,* 8 Geo. Wash. L. Rev. 339 (1940). Despite criticism from an early date (see Gerard C. Henderson, The Federal Trade Commission (1924), moreover, the Commission has adhered to certain methods of administration which have reduced its effectiveness. *Cf.* Final Report, Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong., 1st sess. 135-137 (1941). The Commission's annual reports for subsequent years reflect later changes in its organization and procedure.

46) The Commission has, however, made a major contribution to the understanding and regulation of business enterprise by a noteworthy series of investigations and reports. It has also devoted much effort to the elimination of false and misleading advertising, a problem which is collateral to the one here under discussion.

47) An extreme example is the proceedings which eventuated in the decision in Federal Trade Commission v. Cement Institute, *supra,* note 22. These continued in the Commission for six years. 37 F. T. C. 87. Judicial review of the Commission's order required almost five years. See Aetna Portland Cement Co. v. Federal Trade Commission, 157 F. 2d 533, 537 (7th Cir. 1946), for an account of the proceedings in the initial reviewing court. Cf. also Attorney General's Committee on Administrative Procedure, *op. cit. supra* note 45, at 367-374.

48) See Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568, 579-580 (1923). Partly responsible for this development is a lack of clarity in the legislative purpose, evidenced in the discussions in Congress. Thus it was said, in answer to objections to the breadth of discretion apparently conferred upon the Commission by the bill then pending, which was later enacted, that « The term " unfair competition " has a more or less fixed meaning in law. It is a term that is known to the law, and has been defined in part by the courts ». 51 Cong. Rec. 11,107 (1914). The words « unfair competition » appeared in the bill under discussion, but were eliminated from the Act as finally adopted.

49) See Handler, *Unfair Competition,* 21 Iowa L. Rev. 175 (1936), for a critical discussion of the Commission's performance in this regard.

The apparent definiteness of some of the judicially-evolved rules of « per se illegality » under the Sherman Act also disappears upon closer examination. Price fixing agreements, for example, although condemned, are not necessarily illegal if less than a « substantial portion » of an industry participates in them (50). The « rule » against them, moreover, is subject to the possible exception that arrangements designed to enable the members of an industry to mitigate the effects of unrestrained competition, amounting to neardisaster, are lawful (51). The judgment as to the presence of saving circumstances in particular cases turn necessarily upon the economic factors involved. Similarly, the power to control prices or exclude competitors, which is illegal if purposefully acquired or maintained, is a matter of economic fact not easy of ascertainment. The masterful analysis in the leading opinion upon the subject is somewaht weakened by the unrealistic dictum, not necessary to the decision of the case, that ninety per cent of an industry « is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is not » (52). The validity of concentrations of economic power in the hands of corporate entities therefore remains subject to grave doubts. These doubts may be resolved as to particular cases by judicial decisions relating to them; but little guidance for other situations results from such decisions (53).

Judicial distaste for voyaging upon a « sea of doubt » (54) in economic matters, or for engaging in lengthy trials with regard to economic

50) *Cf.* United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 212 (1939).

51) Appalachian Coals, Inc. v. United States, 288 U. S. 344 (1933). The reasoning of this case is repudiated in the opinion in United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 214-222 (1939); but the decision is distinguished, not overruled, *id.* at 216. Hence it remains as a precedent that may be invoked in future periods of adversity. Other circumstances that may justifv limited price fixing appear in Chicago Board of Trade v. United States, 246 U. S. 231 (1918).

52) United States v. Aluminium Co. of America, 148 F. 2d 416, 424 (2d Cir., 1945). The Supreme Courts inability to arrive at criteria of illegality, including the requisite percentage control of the industry involved, in long series of cases dealing with industrial mergers, is demonstrated in Handler, *Industrial Mergers and the Anti-Trust Laws,* 32 Col. L. Rev. 179 (1932), and the same author's Study of the Construction and Enforcement of the Federal Anti-Trust, T. N. E. C. Monograph No. 38 (1940).

53) The decision in United States v. Columbia Steel Co., 334 U. S. 862 (1948), by a 5-4 vote of the Justices of the Supreme Court, is illustrative. Clear analysis of the facts is employed in the opinion, leading to the Court's conclusion that illegal control of segments of the steel industry was not shown to be likely to result from the acquisition of a locally important fabricating concern by the United States Steel Corporation; but the conclusion is not demonstrably either correct or incorrect. The case, more-over, repudiates the suggestion in a case decided only the year before, United States v. Yellow Cab Co., 332 U. S. 218 (1947), that acquisition of « some appreciable part » of the market for a concern's product, by purchase of the businesses of possibile customers, is in itself illegal. Hence both so-called « vertical » integration of businesses and so-called « horizontal » acquisitions remain subject, in effect and for the time being, to the « rule of reason ».

54) See the opinion of Judge (later Chief Justice) Taft in United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 283,284 (6th Cir. 1898).

problems (55), is partially responsible for some of the decisions that have laid down « rules » of antitrust law in the past; for each formula to guide decisions, to the extent that it is definite, forecloses troublesome controversy thereafter. Lately a number of developments have evidenced a strengthened judicial resolve to accept legislative prescriptions (56) and administrative judgments (57) whenever possible. This tendency, however, while it may mitigate the necessity of weighing economic factors in antitrust cases as they arise in court, cannot dispense with that necessity altogether. To the extent that it rests upon deference to administrative determinations, moreover, it simply emphasizes the importance of the role of the Federal Trade Commission in these matters and enlarges the need for realistic, statesmanlike administration within that agency. The Commission, to a greater extent than the courts, must continue to determine whether particular practices arising before it actually may tend « to substantially lessen competition or... create a monopoly » (58).

2. - *Major Economic Factors Influencing Decisions.*

Given the doctrinal framework and means of enforcement just outlined, the tribunals that have carried on the task of administering the antitrust laws of the United States have been influenced in their decisions by a number of major considerations of policy. These are largely economic, but to some extent also social and political, in nature.

To an undetermined extent, of course, the Sherman Act is based upon a belief in the desirability of a competitive, profitseeking, private-enterprise economy such as is contemplated in the economic theory dominant at the time the statute was enacted, accompanied by that minimum of governmental regulation which is envisaged in laissez faire

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55) See Dession, *The Trial of Emonomic and Technological Issues of Fact,* 58 Yale L. J. 1019, 1242 (1942), for a discussion of the legal and judicial techniques involved in such proceedings.

56) Standard Oil Co. of California v. United States, 337 U. S. 293 (1949). In this case the Court adopted a rule that agreements of a single seller which may be illegal under section 3 of the Clayton Act provided the « effect may be to substantially lessen competition », are illegal without more if they cover a substatial portion of the trade in a given product. Vigorous dissenting opinions contended that the probable effect upon competition should be made a subject of judicial determination in the ligh of all relevant fact, after a trial directed to that issue.

57) Federal Trade Commission v. Morton Salt Co., 334 U. S. 37 (1948); Federal Trade Commission v. Cement Institute, 334 U. S. 839 (1948).

58) For an illustration of the difficulty of such determinations see In the Matter of Standard Oil Co., 43 F. T. C. 56 (1946), *aff'd,* with modifications, Standard Oil Co. v. Federal Trade Commission, 173 F. 2d 210 (7th Cir. 1949), *cert. granted,* 338 U. S. 865 (1949), in which two specific policies under the antitrust laws appear to come in conflict and the answer to the problem presented turns largely upon the relevant conceptions of competition.

ideology (59). The Act itself was looked upon, doubtless, as essentially a police measure, designed to preserve an economic order within which human welfare might be achieved through competitive processes (60). The framers of the Act had no thought, however, of halting the expansion of corporations. So far as they were concerned, the subjiection of large areas of business enterprise to the unitary control of single managements might continue, provided « restraints » upon competitors or upon competition in the markets where goods were sold were not imposed (61). Thus was introduced a dichotomy into the conception of the structure and mechanics of a competitive order which has persisted to the present day (62).

Closely allied to the traditional capitalist ideology as a factor influencing the antitrust laws and their administration — although less clearly relevant under the economic terms employed in the statutes — is the belief in a society composed in large part of independent, self-reliant individuals which has found frequent expression in the course of American history. Eloquently uttered by Louis D. Brandeis both before his accession to the Supreme Court and in judicial proceedings while he was on the bench (63), this belief has recently been advanced as added cause for declining to sanction the exercise of market controls by a large-scale corporate enterprise and for compelling the surrender by such a corporation of some of its assets, if not its total dissolution (64). It has also been repeated with renewed fervor by Mr. Justice Douglas in dissenting opinions (65). Justice Douglas advocates such methods of antitrust interpretation, including acceptance by the courts when necessary of

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59) Hamilton and Till, *Antitrust in Action,* T. N. E. C. Monograph No. 16, 3 (1940). Illuminating excerpts from the legislative history of the Sherman Act may be found in Milton Handler, *Cases and Materials on Trade Regulation,* 208-218 (1937).

60) Hence the Act, however distasteful at times to the owners of largescale capital, is consistent with the ideology that modern private enterprise has adopted in the United States as a defense against unwanted governmental regulation. *Compare* Addyston Pipe & Steel Co. v. United States, 175 U. S. 211 (1899), *with* Adair v. United States, 208 U. S. 161 (1908); and see Beard, *Individualism and Capitalism,* 1 Encyc. Soc. Sci. 145, 153-154, 161 (1930).

61) *Cf.* Handler, *supra* note 59.

62) See the recent Symposium on the Federal Antitrust Laws, 39 Am. Econ. Rev. 689 (1949), especially the views of Arthur R. Burns at 691, Frank Albert Fetter at 695, Ben W. Lewis at 703, 705, and Edwards S. Mason at 712.

63) See especially his dissenting opinion in Liggett Co. v. Lee, 288 U. S. 517 (1933), a case involving the constitutionality of state legislation intended to have a restrictive effect upon chains of retail stores. In American Column & Lumber Co. v. United States, 257 U. S. 377 (1921), Brandeis's preference for small interprise over large led to his dissenting conclusion that an association of small businesses should not be held to violate the Sherman Act by cooperative activity in connection with the production and sale of a commodity, lest the members be driven to merging the ownership of their businesses. *Id.* at 418-419.

64) United States v. Aluminium Co. of America, 148 F. 416, 428, 429 (2d Cir. 1945).

65) United States v. Columbia Steel Co., 334 U. S. 495, 534 (1948).

the duty of making onerous economic determinations, as will contribute most effectively to the maintenance of independent, small enterprises (66).

Belief in vigorous competition and small enterprise has been accompanied, strikingly, by the desire for security and for orderly progress through planning as a factor to be taken into account in antitrust administration, as well as in other economic regulatory measures (67). Woodrow Wilson, even while advocating free enterprise, looked upon the controlled freedom of the locomotive, running smoothly because of superb coordination of its parts, as the analogue of freedom in society (68). During the post-1929 depression when the winds of adversity blew strong, the philosophy of economic planning, mitigating the evils of competition when necessary, found eloquent expression (once more in dissent) by the same Justice Brandeis who believed in small enterprise — and, therefore, in its preservation rather than its self-destruction (69). During this period, the Supreme Court found room within the antitrust laws for the lawful operation of a common selling agency for a group of coal producers, despite the price uniformity and the probable sustaining effect upon prices which that operation would have (70). Earlier, a regulation of an organized commodity exchange which resulted in price fixing for short periods of the day was upheld as valid upon a theory, enunciated by Mr. Justice Brandeis, that some economic restraints « merely regulate... », whereas others suppress, competition, and that the distinction between the two must be drawn in the light of relevant economic factors (71). As respects price-fixing or price-influencing arrangements, this view has now been repudiated under the Sherman Act in favor of a more hard-bitten philosophy (72); but the decisions still stand and may again be invoked in less prosperous times.

When the economy of the United States is viewed as a whole, including both the parts that are subject to the antitrust laws and those that have been excepted (73) or have come under other forms of regulation, it is clear that in fact, as regards privately-owned business, an ever-changing adjustament has been struck between competition protected

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66) Standard Oil Co. of California v. United States, 337 U. S. 293, 315 (1949).

67) Also, of course, in connection with the imposition of protective import duties.

68) The New Freedom 281-284.

69) New State Ice Co. v. Liebman, 285 U. S. 262 (1932).

70) Appalachian Coals, Inc. v. United States, 288 U. S. 344 (1933).

71) Board of Trade of Chicago v. United States, 246 U. S. 231, 238 (1918).

72) United States v. Socony-Vacuum Oil Co., 310 U. S. 150 (1940).

73) S. Chesterfield Oppenheim, Cases on Federal Anti-Trust Laws 63-69 (1948), contains a useful summary of statutory exclusions from these laws. To these must now be added the Act of June 17, 1948, c. 491, 62 Stat. 472 (1948), 49 U. S. C. § 5b (1946).

from impairment on the one hand and sanctioned restraints and regulations on the other hand. In addition, considerable segments of governmentally owned and managed enterprise, such as the post office, the Tennessee Valley Authority, the Atomic Energy Commission, federal lending agencies, the public educational system,and local public utilities, have been maintained. A a result of the adjustment that has been struck, labor and farmers may combine to engage in forms of price fixing and collective bargaining which are forbidden to others; while utility enterprises, both publicly and privately owned, are allowed protected, stable (although limited) earnings so far as consumers can be made to provide them. Taxation is employed to provide through the public treasury for personal, « social » security and for the earnings of business enterprises, such as ocean shiping, which are deemed to be in need of such provision.

The reasons for these disparities of treatment lie, of course, in the social importance of the interests sought to be protected, as these are legislatively, administratively, or judicially viewed. The motivating considerations behind protective measures may relate to human welfare, national defense or pride, or protection of favored enterprises against loss. Whatever the specific considerations may be, the losses or adversity that otherwise would fall upon someone loom as greater than the state is willing to tolerate; and measures are accordingly taken to prevent them if possible.

The philosophy of national responsibility for the general welfare implicit in sovereignty and set forth originally in the provision of the Constitution that Congress shall have power to levy taxes to provide for the general welfare (74), has recently found explicit, although equivocal, legislative expression in the Employment Act of 1946. That Act envisages coordinated legislative and administrative measures, drawing upon all of the powers of the Federal Government, « for the purpose of creating and maintaining... conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing, and seeking to work, and to promote maximum employment, production, and purchasing power » (75). These necessary governmental measures are to be taken, however, « in a manner calculated to foster and promote free competitive enterprise »; but the end purpose is pretty clearly the general welfare, for which the rest is but a means. Although Congress at times seems still unaware of its own pronouncement, laissez

74) U. S. Const. Art. I, § 8 cl. 1.
75) 60 Stat 23, § 2, 15 U. S. C. § 1021 (1946).

faire has thus deprived of its status as the dominant economic and political philosophy of the United States Government.

Like all other measures of national economic regulation, the antitrust laws should be appraised and administered in the light of this dominant national purpose; and it is believed that such has in fact been the uniform intention, and usually the practice, of those charged with responsibility for their enforcement. Just as the antitrust laws have yielded to other legislative measures when necessary, so discrimination has been exercised in their application, for the purpose of promoting « maximum employment, production and purchasing power ». The « rule of reason », the various « *per se* » doctrines that have supplemented it, and the additional acts of legislation have been largely means to this end (76), as the interests of producers and consumers and of diverse groups in each category have been balanced against each other.

In the administration of the antitrust laws, the responsible tribunals have been compelled to deal frequently with three economic factors that bear closely upon the dominant over-all purpose. These are 1) the tendency of business enterprises possessing sufficient market control to curtail production and enhance prices in order to maximize profits; 2) the influence of heavy capital investment in intensifying the extremes and the hardship of price competition; and 3) the tendency for the production and marketing of numerous commodities to become concentrated in the hands of ever-larger (and usually fewer) aggregates of ownership.

In recent years the first of these three factors has received definite theoretical attention. Whereas formerly « conspiracies » to « victimize » the purchasers and consumers of products through unnecessarily high prices were viewed as abnormal practices (77), it is recognized today that the

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76) An exception may be the Miller-Tydings amendment to section 1 of the Sherman Act, 50 Stat 693 (1937), 15 U. S. C. § 1 (1946), which yielded the policy of that Act as judicially evolved, outlawing resale price maintenance contracts between sellers and buyers, to the contrary policy of subsequent state legislation validating such contracts as to trademarked and branded commodities. The pressures that resulted in the adoption of the amendment came largely from associations of small retailers who sought means of securing protection against the price competition of chain-store merchants who handled the same goods. However speciously, they invoked the philosophy of maintaining small enterprise and the principles of fair dealing in support of their endeavor. These had erly persuaded Louis D. Brandeis to become the best-known proponent of the legalization of resale price maintenance. *Cf.* Mason, Brandeis, A Free Man's Life 424-428 (1946). For light on the campaign for resale price maintenance see 2 Marketing Laws Survey, State Price Control Legislation 31-59 (U.S. Works Progress Administration, 1940); Temporary National Economic Committee, Final Report and Recommendations, Sen. Doc. No. 35, 77th Cong., 1st sess., 142, 164, 232-237 (1941).

77) The view that organized activities to reduce competition in the sale of a product are unnatural and improper is most strongly expressed in the opinion of the Court in American Column & Lumber Co. v. United States, 257 U. S. 377 (1921).

profit incentive operates normally to cause business enterprisers to endeavor to create conditions under which profits can be maximized and to take advantage of these conditions when they exist. The recurring (but not universal) economic fact appears to be that greater profits result from a smaller volume of business in a given product at prices which can be realized from this volume than from a larger volume, saleable only at lower prices. The rate of profit may be higher from a lesser volume of business even when total profits are not; and the prospect of enhanced returns from a controlled volume of business may be particularly attractive to the individual producers of producing enterprises that lack incentive to expand (78). Under such conditions the single enterprise will adjust its prices and volume of business to a program of restriction if assurance can be obtained that competitors will do likewise rather than capture business through price cutting (79). Such assurance can arise in either of two ways: *a*) by agreement or *b*) by mutual understanding among competitors of the wisdom of a restrictive policy, coupled with knowledge of each other's prices or production policies at all times. As has been noted, agreement upon prices or price policies is ordinarily illegal; but circumstances under which a restrictive policy may be followed without agreement are common and present a legal problem which, as yet, has not been clearly answered.

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78) *Cf.* Fly, *Economic Theory and The Sugar Institute Decisions,* 45 Yale L. J. 1339, 1343 (1936). The text in the opening pages of this article contains a lucid treatment of the economic factor here under discussion.

79) *Cf.* Burns, *The Decline of Competition* 26, 27, 199 (1936); I Lyon, Watkins, and Abramson, Government and Economic Life 277-279 (1939); Chamberlin, *The Theory of Monopolistic Competition,* c. 3 (5th ed 1946). No assertion that there is any economic « law » which dictates such conduct, or any universal tendency to engage in it, is intended, of course. Contrary conduct, as well as failure of price maintenance attempts, has been observed and may be frequent. *cf., e.g.,* Stocking and Watkins, *Cartels or Competition?* 261, n. 13 (1948); Wilcox, *Competition and Monopoly in American Industry,* TNEC, Monograph No. 21, 48-51 (1940) (the rubber industry in the United States prior to 1935). See also Mason, *Price and Production Policies of Large-Scale Enterprise,* 29 Am. Econ. Rev. Supp. 61 (1939). Notice must also be taken of the difficulties created by concealed price cuts, accompanying purported adherence to quoted prices, which many price-maintenance schemes have failed to overcome. See Sugar Institute v. United States, 297 U. S. 553 (1936). Professor Mason has recently again called attention to the concept of « effective competition », whereby the demands of antitrust policy are met if, under all the circumstances prevailing in an industry and despite limited power over prices by sellers or buyers, there is « a fairly large number of sellers and buyers, no one of whom occupies a large share of the market, [an] absence of collusion among either group, and [a] possibility of market entry by new firms ». Mason, *Current Statuts of the Monopoly Problem,* 62 Harv. L. Rev. 1265, 1268 (1949). Granted that, under modern conditions, nothing more is possible or desirable than administration of the antitrust laws in such a way as to promote and preserve competition in this sense, it is still worth while to examine the logic of « imperfect » competition and identify those aspects of it that are likely to give trouble and to call for rimedial action if not offset by other factors.

In dealing with adherence to such a restrictive policy, which is known as « imperfect » competition (80), the courts and the Federal Trade Commission may now draw upon economic reasoning which was not articulated until a few years ago. According to this reasoning, competitors who have continuous knowledge of each other's prices, or production policies bearing upon prices, know that any effort by one to obtain a competitive advantage through lower prices, of through expansion that can only lead to lower prices, will be met promptly by the others (81), with consequent loss of the benefit that had been sought. The result will be lower prices to all with conseguent enlargement of volume but, unless market conditions require such a readjustment, lower profits than a price-maintenance policy would have brought. Hence frequently, in the situations where price-maintenance increases profits, or even where it is merely thought to do so, a restrictive policy results naturally from the availability of information as to actual prices or production policies (82). This result is particularly probable in capital goods and raw materials industries, where demand is usually inelastic in relation to price and price reductions may not even add materially to volume of business (83). It is dependent, however, upon the existence of obstacles to the advent of new competition, such as spring from the need for heavy capital investment to commence mass production or from patent, copyright, or trade-mark monopolies in the hands of existing producers (84). Such barriers to the intrusion of unwanted competition are sufficiently usual to afford protection to existing enterprises in many situations.

The recurring pattern in many areas of business that have attracted enforcement efforts under the antitrust laws is one of real or suspected price maintenance under the conditions just outlined. Knowledge among

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80) Wilcox, *supra* note 79, at 3, 4.

81) The response of competitors may be delayed, of course, or avoided altogether, by factors such as trade-marks, uniqueness of style, etc., subsumed under the term « product differentiation », which enable price differentials to exist. Chamberlin, *op. cit. supra* note 79, c. 4; Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols,* 57 Yale L. J. 1165, 1170-1175 (1948).

82) Considerable attention has been given recently to evidence that concerns having power over prices may exercise it under some circumstances to hold their charges below the highest feasible levels on products they sell, as many have done during the post-war boom period. They are doubtless moved to this course by possible adverse effects on labor and government attitudes and on consumer good will, which might result from charging all that the traffic would bear. *Cf.* Lewis, *supra* note 62; Adelman, *Effective Competition and the Antitrust Laws,* 61 Harv. L. Rev. 1289, 1290 (1948).

83) Burns, *op. cit. supra* note 79, at 26, 27. *Cf.,* however, Stocking & Watkins, *supra* note 79, at 247-248, pointing out that demand for raw materials as a whole may be quite elastic, even though the demand for a single product, taken by itself, is inelastic.

84) Stocking and Watkins, *supra* note 79, at 11, 12; Hamilton, *Patents ad Free Enterprise,* T. N. E. C. Monograph No. 31, 76-86 (1941); United States v. U. S. Gypsum Co., 333 364 (1948); United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (1949).

competitors of each other's prices or policies affecting prices comes about either because the competitors are extremely few in number or because, where the number is somewhat larger but not too large for practical communication, information is exchanged among them usually through trade associations. Where the competitors are few, « price leadership » (85) or tacit understanding (86) readily arises; where the number is greater, a variety of reporting schemes has been devised to enable each to proceed with relative security in regard to the others (87).

It is relevant to note here again that, according to certain legal doctrines reviewed above (88), which have been enunciated rather recently under Sherman Act, the intentional acquisition or maintenance of power to control prices in illegal. By power to control is not meant absolute power free of limits, but power within limits to exercise choices (89) such as cannot be made by one who deals in a fully competitive market (90). If these doctrines are logically and rigorously applied, the small number of firms dominating an industry who watch each other and follow calculated, restrained price policies, and the larger number who establish means of watching each other and follow similar policies, violate the law unless, in the case of the smaller number, their position is achieved without design through the failure of competitors or, perhaps, through lawful use of one more patents or other lawful bases for monopoly power. No decision has as yet actually rested alone upon this logic, however (91).

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85) Burns, *op. cit. supra*, c. 3; United States v. United States Steel Corp., 251 U. S. 417 (1920); United States v. International Harvester Co., 274 U. S. 693 (1927).

86) American Tobacco Co. v. United States, 328 U. S. 781 (1946). This case involves mutual adherence to advantageous price policies by a few large buyers, as well as sellers. All that is said with reference to price practices on the part of sellers is applicable also to buyers in the rarer situations where the advantage in economic power rests with them—with the modification, of course, that their effort will be directed toward holding prices down rather than toward sustaining them.

87) That such is the purpose of numerous trade association plans, which have embodied a succession of devices for enabling members to keep track of what was going on, taking cognizance of legal hazards revealed by Supreme Court decisions, in clearly evident from the account given in Pearce, *Trade Association Survey*, T. N. E. C. Monograph No. 18, 46-56, 352 (1940).

88) See text to notes 28, 29 *supra*.

89) The opinion in the *Aluminium Co.* case, holding the Company's power to be illegal recognizes clearly the limits to that power imposed by the possibility of imports and by the competition of other products, to say nothing of potential competition within the industry even in the face of the advantages which the Company enjoyed.

90) The classic example of such a market is, of course, the commodity exchange; but any line of business in which prices are determined separately in each transaction, without knowledge among buyers or sellers of each other's identities, is likely to belong in the same category.

91) An exception should perhaps be made of certain cases in which combinations of the ownership of partially competing failroad lines wede held illegal, specially Northern Securities Co. v. United States, 193 U. S. 197 (1904); United States v. Union Pacific Co., 226

Only in the *Aluminum Company* case (92) has the logic been set forth with complete clarity; and even there abuse of power through squeezing of competitors was also present in the facts. In all other cases involving the problem, in which decisions adverse to defendants were reached, similar « predatory practices » were prominent or a concerted effort to limit or apportion production or control prices was clearly evident. Hence it is still to be seen whether the existence of non-collusive power over prices may alone lead to decisions holding such power to be illegal (93), or whether it will remain, as heretofore, simply an aid to the recognition of situations where oppression of competitors or collusive effort to control prices is manifested (94).

In so far as the decisions display a tendency to tolerate control over prices by business enterprisers, with benefit to themselves, the reason lies less in a desire to permit large profits to be achieved by this means than in recognition of a need for preventing the evils of « cut-throat » competition. These evils include not only the human consequences of business failure, analogous in some degree to the effects of sub-standard wages and depressed agricultural prices, but also the intensified business hardship of competitive price reductions in industries characterized by heavy capital investment — the second of the economic factors mentioned above as frequently important in the administration of the antitrust laws. The quest for security, so prevalent among all participants in economic activity, becomes particularly urgent under these circumstances. The failure to achieve control over prices may lead, in times of inadequate

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U. S. 61 (1912); and United States v. Southern Pacific Co., 259 U. S. 214 (1922). It is probable, however, that the decisions in these cases were influenced by the general bad odor into which the railroad industry had fallen because of past bad practices and the financial manipulation which attended personal and corporate struggles for « empire ». United States v. Yellow Cab Co., 332 U. S. 218 (1947), looks in the same direction as the railroad cases; but the Government's effort to secure dissolution failed. 80 F. Supp. 936 (N.D. Ill., 1948), *aff'd,* 338 U. S. 338 (1949).

92) United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945).

93) As stated in the opinion of the court, Tag Manufacturers' Institute v. Federal Trade Commission, 174 F. 2d 452 (1st Cir., 1949) appears to present this question. The decision sustains the Institute's arrangements, in the absence of proof that the power was used to sustain prices. In the *Sugar Institute* case also, advance announcement of prices, understood to be effectice until further notice, but without obligation to adhere to them, was accepted as valid because of historical factors within the industry. Publication of current prices, theoretically subject to change without notice, is common, of course.

94) Arguably, the decisions in American Column & Lumber Co. v. United States 257 U. S. 377 (1921), and Maple Flooring Ass'n v. United States, 268 U. S. 563 (1925), which frequently are regarded as essentially in conflict, may be reconciled on this ground. In the former, actual prices of the members of the harwood association were distributed quite promptly among the membership. Whithout agreement to follow a common policy, the members were nevertheless enabled to do so. In the later case, a single average cost figure was communicated, giving no assurance as to the members' price policies in the absence of an obligation, which was not shown, to use the figure as a basis for calculating prices.

demand, to competitive price reductions which carry income far below cost of production. So long as some margin above variable costs in realized and can be applied to interest upon indebtedness and other fixed costs, the business receiving the margin is better off than it would be if it ceased operating. Moreover cost per unit of product falls rapidly as volume of production rises, under conditions of heavy capital investment. Hence the effort to secure volume of business at the expense of competitors and to continue to receive some income in excess of out-of-poket cost may well lead to price reductions that will prove disastrous to solvency when reserve funds have been exhaused. It is likely, moreover, that the facilities of businesses which fail under these circumstances will not be withdrawn from production. Being frequently more advantageously saleable for use as entities than for dismantling, these facilities may pass into the hands of new owners who, freed of a large part of previous capital charges, may offer lethal price competition to remaining solvent enterprises (95). Consumers may benefit from low prices under these conditions; but expenditures for the preservation of physical properties may be omitted and, in the extractive industries, conservation of natural resources may suffer (96). In any event, investment of additional funds in an industry that falls into these circumstances in likely to be discouraged (97).

It is arguable, of course, that concerted measures to cope with such conditions, regardless of their merit, are forbidden by the antitrust laws and can only be undertaken if legislatively authorized (98), as concerted action by farmers has been authorized. Further, it can be argued that it is not wise to authorize such private controls and that, if controls are needed, they should be set up under public authority, as has been done in the regulation of public utilities (99). Statutes establishing public con-

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95) Burns, *supra* note 79, at 29-34; Hamilton and Till, *Anti-trust in Action,* T. N. E. C. Monograph No. 16, 19-20 (1940); Clark, *Studies in the Economics of Overhead Cost,* c. 21 (1923).

96) The Annual Report of the United States Secretary of Agriculture for 1947 brings out strikingly the relationship between adequate farm incomes ad adherence to soil-conserving measures. Enormous waste in the lumber and coal industries is proverbial. As to petroleum see Rostow, *A National Policy for the Oil Industry* (1948) and works cited, some of which adopt conflicting views.

97) In the bituminous coal industry of the United States the opening of new mines has been deterred less than the spread of coal-conserving practices and devices. Hamilton and Wright, *The Case of Bituminous Coal* (1925), *passim.*

98) The most essential and pervasive features of the scheme etablished by the National Industrial Recovery Act of 1933 were of this type and were so authorized; but official supervision of industry programs was contemplated. See II Lyon, Watkins, and Abramson, Government and Economic Life, c. 27 (1940).

99) The bituminous coal industry in the United States was subjected for a period before World War II to public control which, however, was experimental and did not achieve a stable pattern before its demise in 1941. *Id.* c. 24 *Cf.* the exchange of views between Professors Rostow and Hamilton in 50 Yale L. J. at 543-620 (1941).

trols are difficult to secure, however, and are subject to weaknesses of their own. Until the pressures generated by a depression or in some particularly hard-hit industry (100) have again come before the courts, it is not possible to say that the difficulty of preserving efficiency and solvency for large-scale enterprise in a fluctuating economy, unless some form of control over prices in maintained, has no claim to recognition in the administration of the antitrust laws.

The third economic factor listed above, the tendency toward larger and fewer aggregates of ownership in modern business, had a strong influence for more than thirty years after the adoption of the Sherman Act in favor of relaxation of the statute as against large corporations (101). Recently it has again been accepted by a majority of the Supreme Court as a consideration favorable to the legality of a corporate acquisition which had been challenged (102). The extent of the tendency has been pointed out strikingly in the literature (103). Justification for it is offered on the basis of a variety of alleged benefits, including especially (*a*) increased technological efficiency through larger units of manufacture, combining both successive stages in production and greater volume of production at the same stage (104), and (*b*) increased economic efficiency made possible by assured outlets and sources of supply for products where concerns which use certain articles of materials are brought under the same ownership as those that make them (105). The validity of these contentions, as applied to combinations sufficiently large in scale to raise questions under the antitrust laws, has not been either established or

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100) See National Ass'n of Window Glass Manufacturers v. United States, 263 U. S. 403 (1923).

101) Especially in United States v. United States Steel Corp., 251 U. S. 417 (1920).

102) United States v. Columbia Steel Co., 334 U. S. 495 (1948).

103) The facts are assembled in Wilcox, *supra* note 79, c. 1; Smaller War Plants Corporation Economic Concentration and World War II, Sen. Doc. No. 206, Part 1. 79th Cong., 2d sess. *Cf.* also Levi, *The Antitrust Laws and Monopoly* 14 U. Chi. L. Rev. 153 (1947). For a critical discussion see Adelman, *supra* note 82, at 1292-1295.

104) The two forms of integration are known, respectively, as « vertical » and « horizontal ». Both exist to a degree in all production, as contrasted with the minutest possible division of labor. Integration which goes beyond the conventional, or which involves uniting physically separate etablishments under one ownership, gives rise to questions of public policy.

105) The *Yellow Cab Co.* and *Columbia Steel Co.* cases involve combinations partially of this variety, as do the American Telephone & Telegraph Company's ownership of the Western Electric Co., the chain grocery store's ownership of food processing concerns, and the community of ownership of a variety of concerns maintained by the duPont interests, which are currently being challenged. A still different variety of integration occurs when concerns dealing in products that have no physical relation to each other are brought under one ownership, as has happened notably in the food and drug manufacturing and processing fields. *Cf.* United States Federal Trade Com,n, Report on the Present Trend of Corporate Mergers and Acquisitions (1947).

disproven (106). In the nature of things it probably cannot be, except in particular situations to which attention is directed. There can scarcely be doubt, however, as to the economic power over prices results when a few aggregates of ownership enjoy the entire trade in a given commodity, or as to the monopolization of a market or source of supply which occurs in fact when ownership of a customer or supplier is acquired. The most critical test of the present vitality of the antitrust laws will come when, without the mitigating factor of actual or threatened economic hardship and in the absence of abuse of the economic power enjoyed, a large aggregate of capital controlling a considerable segment of an industry (107) is again compelled to rely in an antitrust proceeding upon the alleged benefits of bigness as justification for its size.

Undoubtedly business combinations, whether aggregates of ownership or organizations of otherwise separate units, are able to engage in economic planning such as cannot occur in a fully competitive system. The question naturally arises, therefore, whether the philosophy of the antitrust laws, which would place strict limits upon the opportunity for such planning, is opposed to economic planning in general. The answer it that it is not, unless the antitrust philosophy condemns not only business combinations but also all forms of control. Historically and to some extent in administration, as has been noted, the antitrust laws constitute a positive program for maintaining a competitive system, as well as a prohibition of specific evils. The assertion is frequently made today that success of the antitrust program is essential to democracy and to the avoidance of public regulation or socialization, which are asserted or assumed to be undesirable (108). Yet the laws as formulated are directed only against aggregates of power in the hands of business enterprisers, and they contain no commitment to private enterprise as against public ownership or in favor of competition as against possible legislative provision for some publicly regulated scheme of economic organization. In the setting of contemporary thought and tendencies, particularly as they emerge in the Employment Act of 1946, the antitrust

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106) Adelman, *supra* note 82, at 1291, 1292. *Cf.* Blair, *Technology and Size,* 38 Am. Econ. Rev. Supp. 121 (1948), and the comments of Stewart at 166; Federal Trade Commission, Relative Efficiency of Large, Medium Sized, and Small Business, T. N. E. C. Monograph No. 13 (1940).

107) The *Columbia Steel Co.* case while presenting this question in a sense, actually involved only a relatively minor absorption of a regional concern by the United States Steel Corporation, coming after a more important acquisition which had received government sanction. The power of the Corporation as a whole was not challenged.

108) Arnold, *Democracy and Free Enterprise* 44-62 (1942); Berge, *Cartels: Challenge to a Free World* 234-235 (1944).

laws should be viewed as neutral in relation to other types of planning or control which, in time, may supersede them at least in part (109). The solution of the economic problems of the future is likely to require resort to all of the organizational devices evolved by men which are consistent with the fundamental values of western culture, rather than doctrinnaire adherence to only a single one.

ANDRÈ GRANDPIERRE

Nancy

1. - Il est très difficile de formuler des règles générales simples en ce qui concerne l'attitude à prendre vis-à-vis des ententes, concentrations et positions dominantes. Il est clair qu'il peut être utile, indispensable même, d'unir et de rationaliser les efforts. De même, l'évolution économique et technique tend à des concentrations de plus en plus grandes, que le Marché Commun développera encore.

Par contre, les ententes qui ont pour effet d'abaisser la production en dessous des quantités nécessaires pour satisfaire les besoins, et cela pour aboutir à une augmentation artificielle des prix, sont évidemment néfastes.

2. - L'évolution générale justifie un développement des ententes d'ordre technique, la rationalisation des productions entre plusieurs entreprises, afin d'atteindre la meilleure efficacité et d'abaisser les prix, les concentrations permettant des productions suffisamment massives pour utiliser des équipements modernes et obtenir des prix de revient bas.

3. - Il ne semble pas qu'il ait été possible jusqu'à présent d'établir une législation anti-trust vraiment efficace, c'est-à-dire permettant d'éviter les coalitions malfaisantes et d'encourager les ententes utiles.

La principale faiblesse me paraît être la difficulté d'établir des critères d'ordre juridique discernant les bones ententes des mauvaises.

4. - Je pense que l'effort des législateurs, comme d'ailleurs des entreprises elles-mêmes, devrait surtout rechercher des moyens d'enlever tout caractère secret aux ententes réalisées.

Il faudrait officiellement reconnaître qu'il y a beaucoup de bonnes ententes et faire en sorte que ceux qui les réalisent n'aient aucun intérêt, bien au contraire, à les dissimuler.

D'autre part, je rappellerai volontiers ce mot de Carnegie (je crois), disant que la véritable concurrence se fait actuellement etre les laboratoires: les positions dominantes de certaines industries ne devraient pas être critiquées si les faits prouvent que leurs efforts de recherches aboutissent à des progrès continus et à des baisses de prix favorables aux consommateurs.

En résumé ce n'est pas l'entente en elle-même, ou la position dominante qui devrait être critiquée, mais la dissimulation de l'entente et l'abus fait d'une position dominante pour ralentir le progrès dans une industrie.

5. - Je crois, en effet, que les nouvelles concurrences provenant, d'une part de la mise en vigueur du Marché Commun, d'autre part des progrès scientifiques et techniques qui accélèrent l'évolution générale, apportent des éléments très favorables pour empêcher une « sclérose » de l'économie par des coalitions abusives.

6. - Je crois très sincèrement que les principes très sommaires énoncés ci-dessus s'appliquent à l'Italie, comme aux autres pays.

WALTER ADOLF JÖHR

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1. - Main conclusions of my studies on the problems of economic policy raised by the limitations of competition.

As I developed in more details in the Schweizerische Zeitschrift für Volkswirtschaft und Statistik, 1951, n. 3, pp. 244-247, the effects of cartels are not so disadvantageous to the economy as it is often mentioned. I recognize that though I consider the market economy with a high degree of competition as the ideal setup for a modern economy Economists who favour a radical and consequent anti-monopolistic and anti-cartel policy usually overlook the following points:

a) They consider the problem from the static instead of the dynamic point of view, overlooking that cartels and big enterprises are a factor which stimulates economic growth.

b) Cartels do not mean elimination, but simply limitation of competition.

c) Not all the cartels lead to a monopolistic position. In many cases they only eliminate cut throat competition and therefore represent an approximation to pure competition.

d) Also in those cases where cartels lead to a monopolistic position, these advantageous effects for the economy are reduced by the fact that we have relation of monopolistic competition between the different cartels.

e) It is not correct that an economy with a great number of cartels would lead to a permanent state of disequilibrium. This would be only true if there were no other political and istitutional factors which would exert a stabilizing influence.

f) The reduced flexibility of prices has in general a rather stabilizing influence on business fluctuations.

In addition to what has been said I developed that the Swiss cartels have a peculiar character:

a) The smallness of economic conditions in Switzerland and the resulting transparency for the pubblic prevent the cartel from great abuses of their monopolistic position.

b) The Swiss is as the Italian a hard working man. The danger that the cartel of the monopoly would serve as a temptation to laziness, is not great.

c) Several cartels protect industries and plants which are basic elements of the economy of a certain region. The federal structure of the Swiss Confederation favours the efforts to maintain the economic potential of the different cantons.

d) If therefore the cartels would be dissolved by decree of the state, a great number of industries would apply for subsidies of the Confederation.

2. - There have been no changes in my opinion as a result of economic developments and policy experiments.

3. - Results of the studies of anti-trust legislation and main weakness in the drafting and application of this legislation:

My other plans of work and obligations did not allow me to study thoroughly the effects of anti-monopolistic legislations in other countries. I think, however, that one of the basic weaknesses of the American anti-trust policy consists in the fact that by prohibiting cartels, it favours the huge enterprises and herewith concentration of power. Furthermore I fear that a anti-cartel legislation of the German type means a considerable increase of state intervention in the economy with the paradoxical result that a policy designed to serve the aim of economic freedom, reduces freedom in quite considerable degree.

4. - *Guiding principles of an anti-monopolistic and anti-cartels regulation.*

a) Though I evaluate the disadvantages of cartels not as so big as many of my collegues and though I could not propose to follow the American or the German line of policy, I would not come to the con-

clusion that the state should renounce on any activity against cartels and monopolies. The attitude of the proposed Swiss law on cartels and similar organizations seems to me appropriate. The basic idea of this law has been developed in the publication of the « Preisbildungskommission » with the title « Kartell und Wettbewerb in der Schweiz » (1957). It was formulated as the conception of potential competition what means that the state has the obligation to guarantee to everybody the possibility of competition. This means that the cartels are not to be prohibited, but that the boycott is not admitted as a weapon of the cartels. By taking away this weapon the power of the cartels is substantially reduced, and it is therefore not necessary to control cartel prices which in any case would mean a very heavy and almost impossible task for the government. Unfortunately the Swiss project of law which is now submitted to the parliament, has introduced too many exceptions from the general rule to prohibit all the measures of boycott. In addition I would like to call your attention on the « Vorarbeiten für ein Bundesgesetz über Kartelle und ähnliche Organisationen. Bericht und Text des Gesetzesentwurfes der Expertenkommission » (1). I was one of the members of this commission of experts and accept in general (with an exception: namely the decision on the cartel register) the conclusions of our commission. Also in regard to the procedure and the sanctions I think that our solution might serve as a basis also for other countries like Italy.

b) Should concentration and merger movements be controlled and limited ?

How could the abuse of dominant positions be prevented or suppressed ?

In my contribution to the publication « Die Konzentration in der Wirtschaft », ed. Helmut Arndt, Berlin 1960, p. 1289 et seq., I treated these problems. I came to the conclusion that the possibilities of government interference, which have no greater disadvantages in other respects, are very limited. It is also for this reason that the new Swiss law has renounced on all the measures to prevent concentration and mergers. It provides only sanctions in the cases of abuses of the monopolistic position, for which the boycott is the principal example.

5. - I do not think that my present view could be effected by economic development of the future. Of course the question is still open

(1) In the meantime I have been informed that this publication is out of print.

of that would be the consequences for our anti-cartel policy, if Switzerland would become an associated member of the Common Market.

6. - I do not know the Italian conditions well enough to see if my views are applicable to your Country, but I think that the differencies between Italy and our Country are not so considerable that this could not be expected.

J. B. HEATH

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1. - There are two main problems: *a*) If restrictive agreements are prohibited, other arrangements are likely to arise which may have broadly the same effects. I refer in particular to « information agreements » or, as they are sometimes called « open price » agreements. See my article in the *Economic Journal,* September 1960; *b*) There may be little effect, if restrictive agreements are abandoned, if the market for a commodity is supplied by only a few firms. Firms act in just the same way as they did before. See my article in the *Manchester School,* May 1961, which is a study of the effects of abandoning price agreements.

2. - Since visiting the United States, and since observing the operation of legislation in Britain, I have moved more towards the support of a *per se* rule against price-fixing. If a country has no laws regulating price-fixing it might be wise to think of introducing such a *per se* rule. See my forthcoming article in the *Northwestern University Law Review,* May 1962.

3. - I find it difficult to discuss general principles in a short space. For my detailed views see my booklet « Not Enough Competition » ? (London, Institute of Economic Affairs, April 1961).

4. - I do not think that one can easily prevent the abuse of position by a dominant firm; one can, however, create the environment in which it is less likely to occur. Pressure from public authorities and public opinion can be very infuincial. On criteria for controlling mergers, see my articles in the Manchester *Guardian,* February 6th and 7th, 1962.

5. - Measures against restrictive practices and dominant firms within a single country may become less important if tariff barriers are removed (as in the E.E.C.), provided international cartel agreements are not formed. Tecnological progress is, I think, encouraged by competition rather than the reverse. But at least some firms in an industry should be large enough to undertake the necessary fixed cost involved in research and development activities.

My guess would be that Italy is not too small to undertake antitrust measures, from the point of view of technological change and economic progress. I would expect the removal of restraints on competition to have *some* effect — though rather limited I fear — on progressiveness. The most important factor is not, I believe, the presence or absence of antitrust laws, but the spirit of enterprise and initiative of the people. It may be that this spirit of enterprise is affected by the presence or absence of antitrust laws; but it is at least a plausible hypothesis — I do not know how much weight to give to it — that the antitrust laws are a *reflection* of the spirit of enterprise in the people. In the United States people accept — even welcome — the antitrust laws because they accord with the spirit of the community.

In my experience, two books on antitrust are well worth studying: 1) A. D. Neale, « Antitrust Laws of the U.S.A. », (Cambridge University Press, 1960), in particular Chapters 14, 15, and 16; and C. Kaysen and D. F. Turner, « Antitrust Policy - A Legal and Economic Analysis », (Oxford University Press, 1960).

6. - The above is, I fear, an inadeguate summary of my views. If you wish further information, please do not hesitate to contact me.

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1. - The highest degree of competition is desirable for several reasons:

1) Since prices play a role in the allocation of productive resources, it is important that these prices result from a truly competitive process and not from administrative decisions either by business or by government.

2) Since economic waste ought to be avoided and competitive pressure is the most expedient means of reducing waste in production and distribution, any mitigation of competitive pressure is harmful.

3) Since the maintenance of a free-enterprise system depends on its acceptance by the masses, it is necessary to avoid the formation of private power groups. The competitive system operates to disperse economic power widely.

The highly beneficial competitive forces usually cannot survive the constant efforts to limit or eliminate them for the benefit of particular interest groups. Competition remains effective only where the state promotes it by removing the restrictions which private parties or the state itself have placed upon it. Hence, it is a paramount function of the state to prevent restrictive agreements and practices and to avoid the establishment of dominant market positions wherever this can be done without undue cost, and even to break up economically unnecessary concentrations of market power.

2. - Before I became acquainted with the American literature on antitrust legislation, I shared the view largely held by economic liberals in Europe to the effect that private restrictions of competition are merely

the result of government interventions, especially through import tariffs. While I still agree that the reduction or elimination of import tariffs would be the most important single method of promoting competition, I have become convinced that more is needed. Even in a wide free-trade area, private cartel-type arrangements can effectively reduce competition, and mergers of previously independent firms can build up powerful concerns not sufficiently exposed to competitive pressures. Consequently, I have concluded, prohibition of restrictive agreements and practices as well as prohibition of mergers which may reduce competition are necessary for the maintenance of the free-enterprise system.

3. - On the basis of my studies of the United States antitrust legislation and its enforcement by the courts, I may state that:

1) The prohibition of contracts in restraint of trade (restrictive agreements, cartels, price maintenance, etc.) has been highly effective.

2) The prohibition of mergers that may reduce competition has not been enacted in any effective way until 1950, by which time many oligopolistic concerns with excessive market power had been formed through merger.

Because the United States was so late in enacting laws to prevent the establishment of dominant positions through merger, the present laws cannot effectively deal with the problems raised by the existence of dominant firms. It would be necessary to enact new legislation to break up corporations consisting of many separate establishments when is no demonstrable economic advantage in centralized control and operation of these establishments by one concern. Such new legislation would have been unnecessary if effective laws against establishing unnecessarily large corporations through the merger of competing companies had been in existence and properly enforced sixty years ago.

Most of my findings on the results of the antitrust laws are summarized in Chapter 6 of my book, *The Political Economy of Monopoly* (Baltimore: The John Hopkins Press, 1952). A discussion of a possible law for the break-up of existing dominant firms can be found in Chapter 16 of *Monopoly and Free Enterprise,* by George W. Stocking and Myron W. Watkins (New York: Twentieth Century Fund, 1951), especially pages 563-564.

4. - My general views on the guiding principles underlying antitrust legislation are contained in my book, cited above. In particular, I believe that *per se* rules in the prohibition of restrictive agreements and practices

are preferable to rules leaving too much discretion to the courts. The fact that price-fixing has been declared illegal *per se* in the United States at relatively early times — for example, in 1927, when the court declared price fixing illegal no matter how reasonable the prices may be — has been of great help in combatting cartels. There are several other matters which could be made illegal *per se*. Exceptions are too easily used to make a law ineffective. However, there are certain practices which should not be universally prohibited. For example, price discrimination may have desirable aspects under certain conditions and hence should not be indiscriminately prohibited.

In some instances it may be possible to draw an easily enforceable line, for example, by prohibiting large firms from doing things that small firms may be permitted to do. Admittedly, this is a rather rough method but it is simpler than attempts to formulate more sophisticated exceptions.

Our experience with laws preventing mergers and undue concentration is rather short, but this should not be an excuse for postponing legislation in these matters. The longer legislation is postponed, the more difficult it becomes. If the law errs on the side of preventing mergers that might be economically useful, it will have less serious consequences than if it errs on the side of permitting mergers that are economically harmful.

5. - Needless to say, we always learn from new developments and may change our mind in the future. This should not be taken as an excuse for adopting a wait-and-see attitude. The fact, for example, that the Common Market may strengthen the forces of competition should not lead to complacency. Precisely because of the fear of increased competition, business is likely to try harder to form restrictive arrangements or mergers. Hence, speedy enactment or preventive legislation is important.

6. - In answering all the foregoing questions, I have had the applicability of my views to the case of Italy in mind. I believe that my empirical and theoretical studies have led to findings fully applicable to the case of the Italian economy.

André Marchal

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1. - L'évolution des techniques, d'une part, et l'intégration européenne, d'autre part, agissent dans le même sens, c'est à dire dans le sens d'un accroissement de la dimension des entreprises et d'une diminution de leur nombre. S'opposer à cette évolution équivaudrait à s'opposer au progrès tout court.

Par ailleurs, les théoriciens de l'économie admettent de plus en plus que l'atomicité du marché (existence d'une multitude de petites unités de production incapables d'agir, à elles seules, sur le prix ou sur la demande qu'elles se contentent de subir) n'est pas la condition indispensable d'une situation de concurrence. La concurrence peut être réalisée dans le cas d'une structure oligopolistique du marché, et même dans le cas d'un duopole, si le producteur est constamment limité dans ses prétentions par les réactions qu'il prévoit de la part de ses rivaux actuels ou potentiels.

Bref, le développement des structures oligopolistiques en Europe ne signifie pas forçément une diminution de l'esprit concurrentiel. C'est parfois même le contraire, car une entreprise doit se sentir assez puissante pour oser empiéter sur le marché des autres. Il faut seulement craindre que la lutte oligopolistique, en devenant trop acharnée, aboutisse à une armistice dont les consommateurs feraient les frais.

2. - Les résultats de la lutte anti-trust aux Etats-Unis, seul pays où elle a été menée avec une certaine solennité, ont été inégaux. Le vote de la loi Sherman en 1890 n'a pas empêché la création du monopole de l'acier par J. P. Morgan en 1901. Le Sherman Act a été amendé par des législateurs peu convaincus de ses mérites, il a été violé et tourné maintes fois, mais il n'en demeure pas moins comme un symbole de la conscience américaine. Ainsi, dans un pays dont la structure économique est souvent

concentrée en un petit nombre d'entreprises géantes, les dirigeants des trusts sont moralement tenus de faire des professions de foi en faveur de la concurrence, et, par conséquent, de conformer leur comportement à leur profession de foi.

Bref, dans les pays anglo-saxons, la législation anti-trust exerce surtout un effet de contrainte morale par le canal de l'opinion publique.

Par contre, en Italie comme en France et dans les pays latins en général, la concurrence n'est pas l'object d'une dévotion particulière. En Italie surtout, le mot doit évoquer le chômage plus que les vertus de la libre entreprise. Il est dit, je crois, dans la Constitution de 1948: « L'initiative privée est libre. Elle ne peut se développer à l'encontre de l'utilité sociale ou nuire à la sécurité, à la liberté, à la dignité humaine ».

Il serait bon que l'on pose, en principe, dans l'introduction de la loi, que la concurrence n'est pas une fin en soi, mais un moyen, qu'elle doit stimuler les énergies, non les gaspiller, faire participer les masses aux progrès économiques, non créer chez les plus déshérités un sentiment d'insécurité.

3. - Je crois davantage à l'efficacité d'un contrôle *a posteriori* qu'à celle de la déclaration *a priori* des ententes. Il faut observer le comportemente effectif des firmes au cours du temps (période de marasme, période de reprise), juger les résultats plus que les intentions, les buts avoués étant toujours louables.

4. - Il faut se garder de s'en tenir à des critères purement structurels: le degré de concentration est commandé par des impératifs techniques avant d'être le signe d'une volonté de domination économique. Le degré d'accaparement du marché par une seule firme est difficile à déterminer en raison de la substituabilité de plus en plus grande des produits et de la concurrence « intersectorielle ».

En un mot, le véritable critère de la concurrence n'est pas la structure du marché, mais le comportement effectif des firmes.

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1. - The major conclusions of my studies on the problems of economic policy raised by restrictions on competition are these:

a) Vigorous competition is essential to the rapid development of any economy organized primarily on a basis of free, private enterprises competing in open markets, because it provides a discipline that fosters innovation, cost reduction, efficient management and thereby increases consumer welfare.

b) Government cannot passively assume that vigorous competition will continue by itself, but must actively promote and foster it by policies.

c) The kind of competition to be fostered by public policy is not the « pure » or « perfect » competition of economic theory, but « workable » competition. This exists where there are (a) *alternative sources* of supply open to buyers, (b) suppliers *act independently* of each other, and (c) buyers have *information* available to them about alternative sources of supply.

d) The major public policies to foster competition are those which (a) foster the entry of new firms into markets, (b) encourage research invention, technological progress, and creative thinking, and (c) broaden the flow of international trade and investment.

e) In addition to the above policies, it is also necessary that government adopt and enforce anti-monopoly laws, in order to eliminate private actions which may restrict unduly the entry of new firms into the market, or produce collusive action among existing firms.

f) Anti-monopoly laws should be general in application, and should not exclude any industry or private economic group, such as agriculture, coal mining, cooperative organizations, labor unions, etc.

g) Agreements between producers to fix prices, limit production, exlude new firms by cut-throat pricing, or other coercive action, or divide up markets should be *per se* illegal.

h) Government should prosecute offensive *behavior,* and should not prosecute firms merely because of their large size, parallelism of action with other firms, or alleged concentration of power.

i) Government should be empowered to examine proposed mergers of existing firms to determine in advance whether they will reduce competition and consumer welfare.

2. - There have not been any material changes in the opinions I have expressed above as a result of economic developments, except that I have become more convinced of the importance of rapid technological development and economic innovations to the preservation of vigorous competition.

3. - I believe that the anti-monopoly legislation of the United States has exerted a beneficial influence upon economic development. This influence cannot be measured merely by considering the number of anti-trust cases prosecuted by the government and the judicial decisions rendered. The mere existence of the anti-trust laws and of a vigilant Federal government agency standing ready to enforce them has produced an important deterrent effect upon business firms, and has prevented them from taking monopolistic actions they would otherwise have taken. The major weaknesses of the U. S. anti-trust laws are: first, that they exempt transportation companies, cooperative organizations, and labor unions from their application; and secondly, that they are so vague as to lead the Department of Justice to take legal actions in many cases where firms have not overtly acted as monopolists.

4. - I believe that public control of private actions to limit competition is both possible and desirable. The guiding principles of anti-trust legislation are those I have set out in answer to question 1. Government should try to suppress restrictive agreements and practices by means of definite rules, and should not allow for exceptions and discrimination among firms on the ground that this is necessary to meet special aimsor can be justified by a showing that the monopolistic behavior has not

damaged the public interest. In other words, monopolistic behavior should be branded as evil *per se*. To do otherwise is to invite an ever-widening range of exceptions which will damage consumer welfare in the end. Concentration and merger movements should be controlled by the right of prior investigation and approval by a government agency. The fact that a firm has attained a « dominant position » in its industry as a result of superior management should not be the occasion for anti-trust action against it. However, if such a firm uses its economic power overtly to coerce or destroy a smaller rival, by such means as « cut-throat » pricing, it should be prosecuted for this anti-social action.

5. - The views I have expressed will not be affected by technological progress, trade liberalization, or the movement toward integration of national economies in the European Economic Community. All of these developments are desirable, will foster vigorous competition within the Italian economy and between its producers and those of other European countries, and will thus enhance the economic welfare of Italian consumers. Yet the experience of the United States, which has long had a « common market » even larger than that of the E.C.C., shows that these measures should be supplemented by a positive anti-monopoly law in Italy and in each of the other countries of the E.C.C., as well as by anti-cartel legislation of the E.C.C. itself. In other words, vigorous competition should be promoted both by positive actions of government and also by the negative prohibitions of anti-monopoly legislation.

6. - I consider that the views I have expressed are applicable in principle to all countries with roughly the same level of development and economic and social conditions as those of Italy. In terms of overall economic development and annual per capita real income, Italy stands today at about the point the U.S.A. stood in the 1920s. Yet it is clear that the anti-trust laws of the U.S.A. served as useful a purpose in the decade of the 1920s as they to today. Indeed, it appears likely that the benefits of anti-trust legislation in Italy may be even greater than in the U.S.A., because of the stronger forces of tradition, family enterprises, and social and economic stratifications.

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Effects of resale price maintenance (*).

1. - Resale price maintenance occurs with varying degrees of strictness. Selling prices may be imposed upon retailers, and enforced by sanctions, such as the black-listing of those who fail to comply. Or prices may merely be indicated, often by printing a price on packages, while enforcement is left to a tacit understanding between retailers. The seller imposing or indicating resale prices may be an individual manufacturer trading in competition with close rivals, or a ring covering the bulk of all production of a certain range of goods, though even where a ring of producers is in existence there is usually indirect competition for custom between various commodities.

The broad consequences of price maintenance tell in the same direction whatever the degree of strictness, so that these consequences may be discussed, in general, without reference to the exact degree to which price maintenance is in force.

2. - The imposition of price maintenance appears to retailers to be advantageous and profitable to them. Though any one might gain, by attracting custom from rivals, if he were free to out prices, yet if all are free, all must suffer from the pressure of each other's competition. Thus normally each expects to gain more by having his rivals bound than he loses by being bound himself.

The motive for producers to secure this advantage to retailers is to promote their own sales, first by ensuring the existence of retail outlets

(*) Committee on resale price maintenance, Statement submitted by Miss R. Cohen, Mr. R. F. Kahn, Mr. W. B. Reddaway and Mrs. J. Robinson.

for their production, and secondly by engaging the interest of retailers in pressing sales. Retail price maintenance is primarily a device, comparable to advertisement, for promoting sales of particular commodities. In other words, it is one element in the competition between producers.

Two broad types of competition must be distinguished. First, what may be called « internal » competition between rival producers of closely similar commodities (say, between firms producing chocolate) and, second, « external » competition between the group of commodities in question and all other uses of the consumer's purchasing power (say, between chocolate and visits to the cinema or savings certificates).

So far as internal competition is concerned, no one producer can afford to allow a lower margin to his retailers than that allowed by his competitors, for if he did so the retailers would be less anxious to display and press his goods, or might refuse to handle them altogether.

It is true that a lower margin, resulting in a lower final price, may be presumed to attract purchasers, so that beyond a certain point price-competition may be expected to assert itself. If this were not so there would be no upper limit at all to the level to which margins might be pushed. But the attraction of a moderate reduction in price is normally less effective than the attraction of salesmanship exerted by retailers (indeed, unless combined with suitable salesmanship, a price cut may be taken by consumers to indicate poor quality, and so have the reverse of an attractive effect). Thus non-price competition tends to drive out price competition. When any one of a group of competitors raises the margin allowed to retailers the rest generally have to follow suit.

Certain firms with a national reputation, based on superior quality or on advertisement, may enjoy such insistent demand from consumers that retailers would be anxious to handle their products even at a relatively low margin, but in cases of this kind demand is not likely to be very responsive to price differences, so that the producer has little incentive to risk making hi goods unpopular with retailers, and probably most often falls in with the prevailing scale of margins.

From the point of view of any one producer, a high margin secured to the retailer by a rival producer is a move in internal competition, which he has to counter by raising his own margin or by other means; in respect to extarnal competition his internal competitors' high margin is an advantage to him, for it helps to keep in existence retailers who will handle his goods also. Thus even where internal competition is keen, producers of similar goods have a collective interest in maintaining the level of margins which they all offer.

This is particularly important where the existence of a large number of shops promotes sales. The producers of chocolate, for instance, believe that in normal times a considerable part of their sales depends upon « impulsive buying » due to the sight of some chocolate in a shop window. Thus it suits them all that shop windows containing chocolate should be numerous and widely diffused and each is, so to speak, carrying his share of the cost for the industry as a whole by the margins he secures to his retailers. Thus co-operation re-inforces rivalry in maintaining the level of margins.

3. - Once a certain level of margins has been established by price maintenance, it is exceedingly difficult to lower it. No one seller can afford to offend his retailers by reducing margins, so long as others keep them up, and no one wants to precipitate a price war which would leave all the belligerents worse off in the end.

On the other hand, there is little resistance (within a wide range) to an upward movement of margins. It is rare to raise a final price to consumers, everything else remaining the same. But there is never a time when everything is remaining the same. When the general level of prices is moving upwards, an extra rise to cover an increased retail margin can easily be made. When costs are falling it is easy to maintain final prices, or to reduce them less than in proportion to ex-factory prices, thus increasing dealers margins. Any one of a group of competitors who raises his margin may hope to gain an advantage by engaging the interest of retailers in selling his product which more than offsets his rivals' advantage in offering a lower final price to consumers, and they can counter only by following him upwards. Thus, it appears that, where resale-price maintenance is in force, there is a stronger resistance to cutting margins than to raising them, and we should expect to find that the level of margins creeps gradually upwards as time goes by, though some limit must be set by the emergence of price-competition when margins reach a very high level.

There is another reason to expect a rising tendency in retail margins. Margins are normally reckoned as a percentage (whether on cost or on final price), so that the amount of margin, in terms of pence per unit sold, automatically varies with prices. When retailers costs (wages, rents, fuel, etc.) are moving in step with other prices, a constant percentage margin may be expected to yield a more or less constant profit to retailers in real terms. But the change in prices may be due to some cause totally irrelevant to retailing (for instance, a change in cost of raw materials). If prices rise, when retailers' costs are constant, retailers are likely to

accept the larger absolute margin without comment. But if prices fall when retailers' costs are not correspondingly reduced they have good reason to protest that with the old percentage margin, they can no longer cover expenses, and they may succeed in getting the margin set higher. This re-inforces the tendency for an upward movement in margins through time.

4. - In the absence of resale price maintenance there would be a check upon the rising tendency of retail margins, since there would always be some retailers who would think it worth while to compete for custom by lowering prices. This did occur to a limited extent before the war with cut-price shops. There were also a number of agencies for dealing at wholesale prices. In fact it became a by-word that « only a fool pays retail prices ». However, there were enough « fools » to maintain a large and growing number of retailers in existence.

The object of the system of resale price maintenance is precisely to prevent the emergence of competition in prices, and its consequence is to foster a high and gradually rising level of retail margins.

5. - The high level of margins by no means entails a high level of profit to retailers. There is no reason to suppose that retailing was in general more profitable than other lines of activity. The tendency was rather for costs to rise in such a way as to swallow up margins. This occurred in two main ways. The first is a reduction of turnover per shop. Since retailing is a relatively easy type of business to enter, profits are kept in check by the emergence of new competition whenever they tend to rise. When the turnover of existing shops, at prevailing margins, yields an attractive profit, new shops are set up in competition with the existing ones, and their turnover is reduced. Since a large part of costs are in the form of very inflexible overheads, the fall in turnover raises costs per unit handley. The high margins then appear necessary in order to preserve even relatively low profits, and the suggestion that margins are excessive appears highly paradoxical. The enforcement of fixed margins checks the growth of efficient shops, since they cannot attract business by charging lower prices on the goods concerned, and the existence of a large number of shops selling these branded goods makes it difficult for them to build up an adequate trade in unbranded lines.

There was in progress before the war a tendency to rationalisation in retailing, and the application in this sphere of economies of large scale in a number of ways — both by the growth of individual stores and development of chains. The consequent reduction in costs per unit

sold was prevented from having its full effect on final prices, and the process of rationalisation was retarded by the system of price maintenance.

The second way in which costs rise to absorb margins is by the growth of services designed to attract custom. This may take all sorts of forms. Displays, provision of sufficient staff to give customers plenty of attention even at peak periods, attractive premises, high rents for particular sites, long credit to customers, frequent delivery of goods, and so forth. Such forms of non-price competition impose themselves upon groups of competitors, for as soon as one offers attractions to consumers the others must defend their share of the market by offering an equivalent counter-attraction. The one counter-attraction which is ruled out, under the system of price maintenance, is cheapness. So long as extra business yields an addition to net profit it is worth undertaking extra expense to get the extra business. Thus there is a natural tendency for costs to swallow up margins, so that margins rarely appear excessive in relation to the costs they have to cover.

The two phenomena of high costs due to low turnover and high costs due to expenses of services affect different types of shops unequally. The first is particularly prevalent in the chocolate and tobacco business, where, as was mentioned above, it is in the interest of the producing firms to foster it, and the latter is more prevalent with department stores, though both act to some extent in all types of retailing.

In face of the tendency for rising margins, price maintenance prevents the corrective of price competition from coming into play, and so fosters and maintains costly methods of retailing.

6. - The cost to the nation of retailing is measured by the man-power absorbed by it, capital costs of building and costs of fuel, etc., which in turn represent man-power, and the absorbtion of sites which could be used for other purposes. The question which has to be considered is whether cost is excessive in relation to services rendered — whether the nation as a whole would be better off if part of these resources was withdrawn from retailing and applied to other uses.

There is a strong presumption that excessive conveniences are provided to the consumer. The conveniences are in the main a genuine benefit to the shopper, but the fact that he accepts them is no indication that he considers them worth the money, for he is not presented with the alternative of for going them and saving the money. There is a close analogy here with tied sales. « You may have a shillings' worth of my tomatoes if you will take a cabbage for tenpence ». If I want the tomatoes

I will buy the cabbage, even though I would not give sixpence for it when it was offered separately. Similarly « You may have a shillings' woth of chocolate if you will also give tenpence for my services in being a hundred yards nearer to you than the next confectioners ».

There is no practicable way of estimating the real value to shoppers of the conveniences provided, though the success of shops of the Marks and Spencer type, which charge low margins and sell on a « cash and carry » basis indicates that a great many consumers find the cost of credit and delivery excessive.

7. - The consequence of the abolition of resale price maintenance, by causing a fall in the level of margins would be partly to reduce the number of shops, raise the rate of turn-over of those that remain, and so secure genuine economies in the use of our national resources.

It may be argued that there are social objections to this course. The case of the elderly widow and the disabled man who eke out their pensions with a shop in the front room will be quoted to show the cruelty of reducing margins. But this argument has no real force. If our social conscience tells us that pensions are inadequate, we should demand that pensions should be raised. There is no reason why every consumer should pay a tax on his purchases, much of which goes to retain in the distributive trades able-bodied workers capable of making a contribution to production, in order to supplement the income of a small number of widows or wounded men. The elderly and disabled, who cannot contribute to production, and therefore cannot earn a wage in industry, would still be perfectly free to keep their front-room shops. They would initially make less out of them if margins were lower, but many of their able-bodied competitors would be induced to leave a business which now yielded a smaller return, and the resultant rise in their turnover would partially restore their earnings.

The effect of lower margins would also be to reduce the lavishness of services. It might foster a system of giving discounts to « cash and carry » purchasers, thus making those who actually enjoy the advantage of long credit and delivery pay for them. It might perpetuate war-time economies such as common delivery services for a number of shops. It would be very likely to stimulate economies in a number of small ways which, taken together, would reduce the real cost of selling goods without any inconvenience to shoppers. It would probably also reduce some services which are a genuine advantage to shoppers, but which are now paid for at more than their value; these however, would, still be available in some « high-grade » shops, for those who like to pay the

higher margin. The chief effect would be to increase turnover relatively to overheads, by eliminating surplus capacity. Or, looking at the same thing in another way, it would reduce the amount of labour and of building space occupied in the service of retailing, and so release resources more valuable to society in other lines of activity.

Suggestions for Action.

8. - We now consider what action it is desirable and possible to take, on the basis of the above analysis. We shall be concerned mainly with those forms of resale price maintenance which are enforced on the distributor with the aid of sanctions: the less strict forms (« indicated » prices, conventions between retailers, etc.) are difficult to combat and are unlikely to have any serious consequences in an industry with so many competitors as retail distribution. In the absence of sanctions, one (or more) of the firms is almost certain to start price-cutting, so long as it coud handle more business without a great increase in its total operating costs. The real limiting factor on the efficacy of price-competition is the inherent imperfection of the retail market, caused by the buyers' inability to judge the relative quality of the goods offered by rival shops, by their varying preferences for different shops, and their natural reluctance to go all over the town for the sake of small price differences: the marking of branded goods with a suggested price may well help to make price competition between retailers more effective, by making it clear that some retailers really are offering goods more cheaply.

9. - We consider that complete abolition of re-sale price maintenance (subject to a saving clause discussed in para 13 below) is the right objective. The most direct attack on the practice would be to make it illegal for any seller to impose a condition about the price at which the buyer might re-sell the goods. Such a policy would, however, be ineffective unless it were coupled with provisions to ensure that retailers who in fact sold below the desired price were able to buy further supplies at normal trade prices. There would have to be a simple means whereby complaints on this score could be speedily examined, since delay might cause the retailer to be ruined through lack of merchandise to sell.

10. - If, however, it is considered too difficult to compel individual firms to supply the « offending » distributors on fair terms, then we recommend that a first step should be taken by making it illegal for firms to *conspire* to cut off supplies from any other firm or to charge

them higher prices. The plight of the retailer who is deprived of one manufacturer's goods is not nearly so serious if he can buy thos of a rival and the manufacturer's power of boycott is correspondingly weakned.

Such a provision would automatically render the production of « stop lists » illegal. In most trades a proportion of the goods passes through wholesalers, so that a boycott can only be made really effective if the manufacturers induce these to join the conspiracy. It would be hard enough for the manufactures to operate their part of the boycott without providing evidence that an offence was being committed, even supposing they were prepared to break the law in this way to try to bring the wholesalers into the ring would expose them to such grave risk of detection that there would be few trades where it would be attempted. We consider that the law should provide both for generous compensation to the victimised distributors and for heavy criminal penalties.

11. - We recognise that there is some force in the argument that a retailer may seriously disorganise a market by selling at prices which are in a sense « absurdly » low, and we do not consider it unreasonable that suppliers should be permitted to try to stop this. The retailer's motive might be to sell one line of goods at little more than cost so as to attract customers to his shop, in the hope that they would then make other purchases. The manufacturer has a reasonable right to prevent this, since it may cause other retailers to cease stocking his wares, and the one in question may then cease to use it as a « loss-leader »; the other retailers can also make out a case for action to prevent this sort of upset to their business, and the public as a whole may lose as much through the disturbance as they gain from the cheap suppliers. We therefore see no objection to a saving clause which would permit manufacturers to withhold suplies from distributors who were adding a percentage margin which was less than a figure prescribed from time to time by the Central Price Regulation Committee (or some other official body) for that class of goods.

We wish to make it quite clear that we do not recommend that the State should itself take any action to enforce minimum margins, and also that the sort of figures which we consider should be prescribed are far lower than the margins now enforced as *maxima*. The C.P.R.C. should fix the lowest margin for a class of goods on which they consider that any trader could possibly operate successfully, even when giving the absolute minimum of service, and they should ensure that any error was in the downward direction. They should be under a statutory

duty to reduce the figure if any retailer showed that he could operate successfully on a lower margin.

Separate percentages should be fixed for wholesalers and for retailers, to be applied to the price paid by them. We do not consider it necessary to provide a special (higher) figure for the firm which combines both functions: so long as it charges at least the retail percentage it would be immune from boycott. Nor do we consider it necessary to have a (lower) figure for the « brass-plate » wholesaler: he would nominally by liable to be boycotted, but there is no reason to suppose the manufactures would be any more anxious to take that course than they are now.

We consider that percentages should be fixed for very broad classes of goods. Their function is solely to remove the prohibition on boycott when a distributor is charging « absurdly » low prices, and there is no need to attempt any elaborate differentiation in deciding what percentage is « absurd ». There is also no need to cover the whole field: the consequence of omitting some goods is simply that boycotts are illegal in that sphere.

12. - Finally, we wish to emphasise that the objection to resale price maintenance applies with particularly obvious force to general discounts, rebates and « dividends » which a retailer gives on all goods in that broad class which he sells. The leading case here is, of course, the « divi » paid by co-operative societies, but the principle is of more general application, and covers any cash discounts, self-service discounts, etc. We consider it directly contrary to the pubblic interest for retailers to be put in a position that they can compete for business by offering any kind of « free » service, but cannot set out to attract those people who prefer to buy at lower prices, even if these man « cash and carry » and less of the shopkeeper's time and counter-space to help them make their selection. The fact that the rebate was a *general* one disposes of any argument that « the stability of the trade would be upset by irresponsible price-cutting on leading lines », etc.

In connection with the above we wish to refute in advance any argument on the lines that « by permitting such discounts, etc. one would in effect be compelling *all* shops to give them, and so making it impossible for high-grade shops to stay in business, or for shops to carry a proper assortment of goods, some of which are slow-selling and can only be stocked because of the profit made on the more rapid turnover of standard lines, etc., etc. ».

Neither theory nor experience seems to give any support for such arguments. Theory suggests firstly that some purchasers will prefer the better service and selection offered by the high-grade shops, even if any do charge a greater margin, and secondly that if there is a general tendency for most retailers to concentrate on standard lines and drop (e.g.) outsizes, then some traders will find it profitable to advertise that they *specialise* in outsizes, and so concentrate the potential trade of all the others on to their stock. These results are certainly borne out in practice: the co-operative societies' « divi » does not given them a monopoly of the trade even in lines which are branded and price-maintained, high-grade fruiterers have not been driven out of business by the lower prices charged in less dignified quarters, the specialists in « outsizes » and the « full-range » shops flourish in the face of competition from the low-margin shops which only carry quick-selling standard lines. An extension of the effective field of price competition would probably reduce the present excessive number of shops, but that is highly desirable.

Direct Attempts to Rationalise Distribution.

13. - We have considered whether other measures should be taken to reduce the waste of resources described in para 6. As a matter of practical politics we consider that apart possibly from a few special cases licensing of shops is unlikely to yield desirable results as a long-term policy. Nor do we consider it desirable to attempt any compulsory measures to keep certain classes of people out of the distributive trades, even if this were possible.

14. - In a more limited way, however, the routine application of town planning powers will necessarily exercise some influence on the number of shops, especially in new or growing towns. We consider it desirable that these powers should be used to keep down the number of shops to a level rather lower than would otherwise have been established, and to secure a suitable geographical distribution. But no retailer, once established, should be prevented from dealing in any line of goods that he wishes to handle.

There is, of course, some risk that the benefits of this rationalisation will accrue to the owners of the shops as monopoly values, rather than be passed on to consumers. Even if this were the case, it would probably be better to secure the economy of physical resources, especially as the owners will at least have to pay normal taxation on their swollen incomes.

But we consider that this risk can very easily be exaggerated, *provided that re-sale price maintenance is abolished.* There will normally still be a substantial number of rival sellers of each kind of goods, and indeed there will normally still be some measure of « excess capacity » in each trade, at least so far as any but peak shopping periods are concerned. Consequently each retailer will still be under a strong incentive to try to attract business by a small price cut, and the number of retailers *in a particular trade* would be increased if it seemed abnormally profitable. It is unlikely, therefore, that the whole gain from the higher average turnover caused by the limit on shop numbers would be retained as a « monopoly profit »; competition should lead to a part at least of the benefit being passed on as a lower margin. The position would, of course, be quite different if fixed prices still prevailed, especially if the retailer's margin were still fixed on the basis of towns with the present number of shops: the only way in which the benefit could then be passed on would be in still more lavish services, which the competitors might gradually introduce in an attempt to increases their share in the trade.

The Present Situation.

15. - In normal times considerable dislocation and losses would result from the sudden abolition of price maintenance. In present conditions of scarcity it is unlikely that there would be much immediate price cutting. The effect would show itself as supplies increase, and since the increase will be gradual there would be no sudden shock and the consequences of the new system would be gradually digested by the retail trade. The effect would be to check the absorption of man-power into retailing and prevent the return to over-lavish services rather than to drive man-power out by the painful process of bankruptcy and dismissals. Thus the present time is the best for making the transition with the minimum of distress.

By the same token, mere abolition of price maintenance would not be expected to be of much help in our immediate difficulties. If the principle is granted, however, that retailing normally tends to assorb excessive resources it follows that the existing official maxima for margins, calculated to ensure profitability to all shops, however small their turnover, must be too high.

In the present state of affairs, where it is necessary for this country to economise resources in order to restore the balance of payments, there is a strong presumption that economy in retail services would

cause a smaller loss of real satisfaction than a corresponding economy of man-power in production. In other words, if we are obliged to accept a reduction in our standard of life, one of the least onerous cuts we can make is a reduction in the level of retail services which we enjoy. One way to deflect labour from unessential services into production would be to reduce margins, and squeeze redundant capacity out of retailing.

The prohibation of price maintenance now would produce this effect only gradually, and to gain immediate advantage it would be necessary to accompany it by a reduction in the level of statutory margins.

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1. - The main difficulty in the whole field of monopoly and economic policy lies in the contradictory effects flowing from the increasing size and power of business units. On the one hand it seems fairly established that in some of the most important modern branches of industry only big firms are capable of conducting research and introducing innovations on a sufficiently large scale. On the other hand, there is no doubt that big firms can dominate the maret in a way which is harmful to the consumers and small business. In a system of private ownership it is a very difficult task for economic policy to steer a course which will preserve the advantages of big production and financial units and at the same time reduce the abuses following from monopolistic practices.

On the whole the American line of hitting cartels with the full force of the law while neglecting mergers and size was pointing in the right direction. For cartels are mostly directed in the first instance towards restrictions of competition and only occasionally foster technical progress (if they do not actually hamper it). The trouble, of course, is that even in the absence of cartels cartel-like agreements can easily come about as soon as the number of decisive firms becomes small. Outlawing of cartels in itself may, therefore, turn out to be insufficient in order to maintain a desirable degree of competition (as the American experience has shown).

2. - From what has been said under 1) it will already by clear that there can be no simple prescription for a system of public control of the restraints on competition. Experience has shown that business firms and their lawyers have often been able to get round anti-monopolistic legislation by inventing new forms of business practices and inter-firm

agreements. The first rule for an anti-monopolistic public policy should therefore be a high degree of flexibility which will allow the supression of certain monopolistic *activities* (e.g. fixing of retail prices) rather than the supression of certain monopolistic *forms*. Here is, of course, another dilemma for public policy. It arises from the difficulty of combining this high degree of flexibility, a quick reaction to new tendencies in the industrial sphere, and the rule of law which demands a certain constancy of regulations. This is a problem which has to be solved by lawyers, administrators, and politicians and cannot be followed up here.

From the demand for a high degree of flexibility and quick adjustment to the changing practices of the market it follows that the type of person to be in charge of an anti-monopolistic program should not be the usual type of a lawyer or judge. The main task will not be the application of invariable rules but the adaption of rules to a changing environment. Apart from a high flexibility of mind and a willingness to make the policy work this will require a certain expert knowledge of economics and business. This will also mean that a considerable body of facts will have to be provided and sifted by a sufficiently large and expert staff (which can be supplemented by outside experts). Only with a sufficient staff, who can carry out through investigations, will a public commission be able to command the knowledge and the respect which are necessary for an effective policy. Also, investigations in themselves can have — as the American and more recently the British experience have shown — a dampening effect on monopolistic practices, even if they are not immediately followed by legal or administrative measures.

3. - With the growing integration in Western Europe cartels and monopolies will tend to cover the whole area of the Common Market (plus E.F.T.A., if an agreement is found). In addition to a national anti-cartel policy now comes an E.E.C.-policy for which certain provisions are already made. This creates problems of compromise and coordination. In some cases the national interest may demand not so much the break-up of an international cartel (which may lie beyond the power of a single government), but rather the strengthening of the position of national undertakings against the superior power of leading (German, French or British) firms in the cartel (or cartel-like) organisation. This may create new types of approach to the whole problem of competition. In a similar way one has to look at the problem of foreign competition once the tariffs have been abolished. Industries which are still in the course of development may have a justified claim towards a certain protection against

old-established foreign firms. Certain public measures may be justified which will reduce the pressure of (foreign and internal) competition. The problem will be to devise methods which will prevent these temporary measures developing into permanent strongholds of monopoly. One will have to be particularly careful in this direction because with the advance of automation it may became increasingly difficult to correct misdirected investments or to change back to smaller scales of output. The last-named factor will quite generally intensify the monopoly problem and will in future require increasing attention. A certain amount of coordination between the regulation of monopoly and investment policy may become necessary.

AUBREY SILBERSTON

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1. - That a constructive Governmental policy to prevent undue limitations of competition is essential.

2. - British experience has convinced me that a Court is more effective against restrictive practices than an administrative tribunal.

3. - It has helped competition to work more freely. There has not always been a presumption against the practices being considered. This has weakened the effect of the legislation .

4. - On balance I prefer the British test of « public interest » when it is strengthened by an initial presumption against these practices. A few *per se* rules seem to me desirable. Otherwise, cases should be considered *ad hoc*. I do not favour exceptions for the more obvious restrictive practices. A Government agency should be responsible for bringing projected mergers or actual monopolies before a Court of tribunal.

I prefer consideration by a Court, but consideration by an administrative tribunal has its advantages provided the tribunal could enforce its decisions.

5. - Not appreciably. If legislation is drafted carefully, changes in conditions can be taken into account when considering whether the public interest is served.

6. - Yes.

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1. - I maintained (in *Maturity and Stagnation in American Capitalism,* Oxford 1953) that an oligopolistic structure of industry leads either to excess capacity or to an increased fear of excess capacity, either of which discourages investment. This involves, naturally, also an adverse effect on technical progress and the rate of growth.

2. - I still think that these adverse effects of oligopoly exist, but I recognise that they have been offset by new elements in the post-war situation. These elements are: *a*) an increased propensity to consume (facilitated by consumers credit and engineered by the whole apparatus of mass media — magazines, cinema, wireless, television — which moulds the mentality of the modern consumer) and, far more important: *b*) an increased share of governments in the total expenditure on goods and services, due partly to armament expenditure, partly to large public investments and partly to an increase of current public expenditure for civilian purposes. Even though this increased public expenditure is financed out of taxation, it raises effective demand (in accordance with Haavelmo's « multiplier effect of a balanced budget »); the increased public spending is not a mere switching of demand from private to public channels, but it is *additional* demand.

These new elements which have been operative in most advanced European countries and in U.S., have brought about high employment and capacity use in Europe, and — compared with pre-war — also in America. These conditions and, in some countries, an increasing price trend, have operated powerfully in favour of a high level of private investment.

3. - I have not studied anti-trust legislation sufficiently to give an opinion.

4. - I think that legislation cannot artificially create competition where the conditions of modern industry rule it out. It is, however, possible and desirable for governments to set up machinery, both judicial and advisory, to influence the actions and policies of the oligopolists. The function of the machinery will be to exert pressure, whenere it is necessary, to induce the oligopolies to pay due regard to the public interest in their actions; it must, therefore, have authority and competence.

This view implies, naturally, flexibility. It is not a matter of outlawing industrial structures, but a-social behaviour. And as this can be only imperfectly defined, the rules cannot be rigid. There will be a body acting as council for the public interest in a continuing suit against the oligopolies; in economic and political terms, there will be continuing negotiations between the government and oligopolistic industries, to avoid a disregard of the public interest in the major decisions of private industry.

5. - I think that automation, and, even more, the evergrowing importance of research in industry, strongly favour concentration of power in industry. The integration of national economies will, after a temporary phase of competitive struggles, lead to concentrations in the integrated market: there will, in fact, be less competition as the ultimate and long run results of integration, than there is now.

6. - I do not know the Italian economy well, but what I suggested probably applies to all industrially developed countries. The Italian South, naturally, offers problems of market domination of a very different kind, too (mafia etc.). I do not know whether they are covered by your terms of reference, but I feel that it would be a pity if they were not; it would be very fruitful to study them from an economist's point of view, in the context of the wider problem posed by your terms of reference.

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1. - My studies of the problems in economic policy raised by limitations of competition lead me to the conclusions that 1) a concentration of economic power leads to the coalescence of economic and political power and to the loss of individual liberty in both spheres; 2) competition is only effective when resources are allocated in response to independent decisions of rival business firms, none of whom has any considerable power over the market; 3) a dynamic society is necessarily subject to frequent disturbances in the level of business activity if resources are to be reallocated in response to changes in the tastes and habits of consumers and in the way tastes and habits are satisfied; 4) such disturbances are painful to the industries affected because competitive forces in an industrially developed society work imperfectly (for example, high capital requirements may block entry into an industry and the immobility of factors of production may block egress from it; 5) businessmen react to threats to their position in the market by resorting to mergers and restrictive agreements and practices; and 6) the state's obligation is to facilitate competitive readjustments leading to a more economical use of limited resources. It does this best by prohibiting restrictive agreements and practices. In some industries the conditions of modern technology make oligopolistic structures unavoidable, but the public policy of a capitalistic state should be directed toward the retention of as many firms in each industry as is consistent with the economies of scale. For a fuller exposition of my views on this subject, see pages 16-17, 32-33, 117-118, 195, 223, 229-230, 236-239, 272, 399-400 (1).

(1) References are to my book, *Workable Competition and Antitrust Policy* (Nashville, Tennessee, U.S.A., Vanderbilt University Press, 1961).

2. - See answer to question No. 5.

3. - *a*) American antitrust legislation has served to prevent the cartelization of American industry but has failed to make all sectors of it effectively competitive.

b) In the United States antitrust legislation (the Sherman Act, the Clayton Act, the Federal Trade Commission Act, the Robinson-Patman Act of 1936 amending the Clayton Act, the Miller-Tydings Act of 1937 amending the Sherman Act, and the Celler-Kefauver Anti-Merger Act of 1950 amending the Clayton Act) has had two objectives, sometimes in conflit. The Sherman Act of 1890, the Clayton Act of 1914, and the Celler-Kefauver Act were designed to prevent the growth of combinations and monopolies in restraint of trade; the Federal Trade Commission Act, the Robinson-Patman Act, and the Miller-Tydings Act, regardless of their purposees, have been administered and interpreted in such a way as to give legal status to arrangements limiting competition and preserving small-scale enterprise. The forces making for concentration of economic power in the United States have been complex. The difficulty of preventing it lies not so much in the provisions of our laws as in the fact that public opinion adjusts itself to the *status quo*.

For a fuller exposition of my views see pages 196-201, 226-230, 268-269, 410-411.

4. - *a*) See pages 16-17, 33, 116-118, 180-183, 194-196.

b) See pages 116-117, 206-208, 222-228.

c) See pages 134-140, 196-199, 260-263, 268, 275-276, 383, 388-389, 396-397, 400.

d) See pages 199-200. For a discussion of ineffective treatment of a dominant firm see pages 374-377.

e) See pages 16, 110-111, 267-272, 363-365, 382-383.

5. - As I have indicated above, I believe that public policy should be directed toward keeping the number of sellers in any market as great as is consistent with the economies of scale. Technological progress in some industries may make the optimum scale of the firm so large that competitive conditions cannot be maintained. Trade liberalization may intensify competition within any geographic or political area. If it does, it will affect my views on the problem of maintaining effective competition. A breadening of the Common Market might make for more effec-

tive competition. Stabilization policy should be directed toward the stabilization of the general price level, not the maintenance of individual prices. Antitrust policy should be designed to aid flexibility in individual prices.

6. - I consider the general aim of maintaining as many sellers in each industry as are consistent with the economies of scale a valid aim for a country like Italy, but I am aware of the fact that in some industries the economies of scale may necessitate firms of such magnitude that at best there can be only a few sellers, or only one.

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1. - The basic dilemma is how to provide incentives to business (which may include monopoly position) without thereby impeding economic progress. It is, on the face of it, self-contradictory to call upon firms to compete, i.e. to attempt to win a race in which the victory of one precludes that of others, while simultaneously threatening them with penalties of they succeed.

One therefore has to choose between more or less satisfactory compromises.

Mergers are preferable to cartels where:

a) economies of scale are important;

b) wide divergencies of efficiency between firms exist;

c) economies in defensive advertising can be achieved;

d) gains from pooling technical knowledge, complementary patents, etc., are available.

Formal, detailed cartel agreements, including allocation of quotas to low-cost producers and technical provisions for rationalisation are preferable to informal, tacit ones, which are often the result of legislation.

2. - Legislation by itself cannot achieve much. Forbidding one form of restrictive agreement may simply give rise to others. Thus price leadership has in many instances replaced restrictive price agreements since the 1956 Act. More important are general attitudes created by legislation, which may influence the climate in which business decisions are taken.

3. - Results: some reduction in restrictive agreements and a move towards mergers (not outlawed) and price leadership. In brief, some forms of monopoly (in the widest sense) replacing others. Some of these new forms are probably preferable, though they, too, have unsatisfactory features. Weakness: 1) « specific and substantial benefit » is too narrowly interpreted. Benefits may be *general* and substantial: they may be diffused over many beneficiaries and over a long time, and hence more important than specific ones. And they migth *not* be *substantial,* though a number of small benefits may, in time, amount to a large one.

2) Some of the defences are economically unjustifiable, e.g. export promotion or avoidance of unemployment in the industry.

3) It is deplorable that expert evidence by economists must be given for one of the litigating parties (Registrar or association) and not, impartially, to the Court.

4) Individual resale price maintenance should not be legally enforceable.

4. - Remove obstacles to economic progress: for this it is less important to insist on large numbers of firms and small size, and more important that innovation is not retarded. Competition cannot easily be measured, and, in particular, market power or size are inadequate indexes. The fear of *potential* competition, and of power concentration in the markets to which the industry sells or from which it buys, are more important than the presence of numerous rivals.

a) No inflexible *per se* rules: proof of benefit under specified headings should provide a « gateway ». Consider each case « on its merits » (ideally).

b) How could mergers be controlled and limited ? In this country certain features of company law and tax law have greatly contributed to take-over bids, which in turn have promoted mergers. On the other hand, mergers may present a form of growth more desirable than internal growth of the firm. They should be controlled only when they reach the point where the number of decision-taking units in the industry is greatly reduced.

Other forms of control than legislation may be explored, e.g. the establishment of firms under public ownership competing on fair terms with private firms. Since one of the difficulties of private monopoly is the absence of *yardsticks* or *standards* by which to appraise efficiency, publicly owned firms might meet this requirement. Policies of freer

trade might also help. Even though international cartels often replace tariff and other import restrictions, these cartels tend to be less restrictive.

5. - Certainly. I believe the whole subject to be still very inconclusive. Moreover, what might be valid for one country or for one time may be wrong for another country or another time. Much depends, as in any law, on the attitudes of citizens (business community), and on their law-abidingness. I should be against a doctrinaire approach, and for allowing continual revision in the light of new evidence. *Ad hoc* inquiries may also be useful.

6. - I am afraid I cannot answer this question, in view of 5.

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1. - The influence of monopolies on the general distribution of income should not be exaggerated, because competition between products remains. Yet they must be watched and kept within limits. The process of concentration is not as outspoken as it was around 1850-1900.

2. - As to the results of anti-trust legislations the fact may be pointed out that there seems to be more intensive competition in the United States than in Europe.

3. - The main weakness in anti-trust legislation is that government can be easily misled by interested parties; it is always less informed about details and about escape possibilities.

4. - The guiding principle of such legislation should be to set examples in cases of considerable abuse of economic power; not to try to deal with all.

The government should have the right to lower prices in cases of strong monopoly power.

5. - The fixation of retail prices by manufacturers should not be legal.

6. - The government may by given the right to investigate price fixation in cases where excessive profits are being made.

7. - I do not think that recent technological progress and integration will change the situation very much.

8. - I do think that my views also apply to a country like Italy. Italy may even need somewhat more control, especially in the South, when competitors are few in some branches.