FOREWORD TO THE SECOND EDITION, 1975

Much water has flowed under the bridges in London and in Brussels since the first edition of this book appeared in 1968 under the title *Monopolies and Restrictive Practices.* At the time when I am writing this Foreword it is not yet certain that the flow in Brussels as it affects the United Kingdom may not be reversed. The referendum to determine whether this country is to remain within the Common Market has not yet been held. To a constitutional lawyer the adoption of this method of deciding a question so vital to the future of the nation would seem to involve an abdication of the sovereignty of Parliament more fundamental than any transfer of law-making powers to the Community which opponents of the Common Market claim to be the consequence of accession to the Treaty of Rome. Nevertheless I have sufficient faith in the instinctive common sense of the British people to believe that what Mrs Korah has written about the Competition Law of the Common Market in Part Three of this work will still be directly applicable to industrial and commercial undertakings in the United Kingdom when the result of the referendum is known.

The competition law of Britain is a plant of recent growth. In the course of the nineteenth century the courts of common law resigned their claim to exercise control over agreements that were restrictive of business competition. They were content to accept that business men knew what was best for the nation too. In the depression of the nineteen-twenties and -thirties current economic theories in this country, in contrast to those in the United States, commended the rationalization of industry by mergers and cartels. Such limited statutory intervention as there had been in the field of competition before 1948 was designed to restrain it in the worst hit industries of agriculture and coal mining and, in the case of the latter, to promote mergers of undertakings.

The turning point came with the creation of the first Monopolies and Restrictive Practices Commission in 1948. Its early reports upon restrictive practices drew the attention of Government to how widespread these had become; but it was not until the year before the making of the Treaty of Rome that restrictive trade practices were made subject to effective legal control in the United Kingdom by the passing of the Restrictive Trade Practices Act 1956.

The legal control of business practices which have the effect of limiting competition in the market for goods or services confronts the legislator with a dilemma. One of the most valuable features of Mrs Korah's book is as a corrective to the view that all cartels and all concentrations of market power are *ipso facto* contrary to the public interest – a view which the decisions of the British Restrictive Practices Court may well have tended to foster. Once it is accepted that some cartels and some concentrations of market power may promote economic progress and benefit consumers of goods or users of services, the dilemma lies in the choice of the most appropriate body to undertake the task of identifying cartels and concentrations which ought to be permitted and the most appropriate procedure for carrying out the task.

There can be little dispute that the appropriate body should include, whether as members or advisers, economists and persons with practical experience of industry and commerce. In the United Kingdom persons with these qualifications are full members of the Restrictive Practices Court and of the Monopolies and Mergers Commission. Despite the initial doubts of the judiciary the composition of the Court has proved no obstacle to its adherence to the judicial procedure. The members who are not lawyers by profession enable the court to take "judicial notice" of many facts of business life that would be beyond the ken of any judge who sits in the Restrictive Practices Court, at any rate when he was first appointed. It is not the composition of the body but the nature of the question which it has to answer that dictates the procedure best suited to its purpose: investigation and inquiry, as in the case of the Monopolies and Mergers Commission, or the adversarial judicial process as in the case of the Restrictive Court.

The judicial process provides a reliable, though long and costly, means of ascertaining facts about what has happened in the past. In the adversarial system followed in the United Kingdom the facts to which the attention of the Court is directed are confined to those which the parties themselves adduce to lend support to their respective contentions. So it is not surprising that with the growing expertise of lawyers practising before the Court the assessment by the Court of the effect of what would appear to be similar restrictions in not dissimilar industries should not remain unchanged. But the ascertainment of facts about what had happened in the past is only an initial step towards a decision that depends on predictions as to what would happen in the future if on the one hand the restriction were removed, or on the other hand it were retained. It is perhaps inevitable that a court faced with the unaccustomed task of prediction should take refuge in the concept of onus of proof as the Restrictive Practices Court was encouraged to do by the terms in which the statute was drafted; and here again the way in which the evidence and the arguments are presented may be the decisive factor in the conclusion reached by the Court.

Mrs Korah's penetrating, though polite, analysis of the major judgments of the Restrictive Practices Court confirms me in my suspicion that the judicial process does not provide the most appropriate method of deciding what restrictions upon competition are justified as being in the public interest. And if this is so in the comparatively simple field of restrictive agreements between separate undertakings, it is the more so in the complex field of monopolies and mergers which the British legislator has never entrusted to a court. Nevertheless the Restrictive Practices Court has served the wider purpose of changing the attitude of British businessmen to restrictions upon competition. It was only those few agreements of which it could be plausibly argued that they could escape through one or other of the "gateways" that came before the Court at all; and the plausibility of those arguments diminished with successive decisions of the Court. In the result there has been brought about a virtual abandonment of the type of restrictive agreement that was not exempted from registration under the Restrictive Trade Practices Act 1956. Though much of what was exempted under the Act will fall within the scope of the Community rules on competition, acceptance of the rules will not involve so great a change in business practices in the United Kingdom as it would have done if our accession to the Common Market had taken place in 1957 when the Treaty of Rome was drawn.

The authors of the Treaty laid down the rules on competition applying to undertakings in much broader terms than those used by the draftsmen of the contemporaneous British legislation. Articles 85 and 86 leave to the bodies charged with the task of determining whether the rules have been complied with in particular instances much greater latitude in making their own value judgments upon the economic consequences of concerted action by undertakings and the exercise of market power than is entrusted to the British Restrictive Court. The Treaty itself by Article 87 conferred upon the Council the power to lay down detailed rules for the application of the exempting provisions in Article 85 and to define the respective functions of the Commission and the Court of Justice in giving effect to the rules so laid down.

By Regulation 17 the Council conferred upon the Commission the primary function of determining whether what was done or proposed to be done by an undertaking was contrary to Article 85 or 86. This is, according to English legal concepts, a quasi–judicial function but as an executive body the Commission was able to adopt the procedure described by Mrs Korah. This is predominantly investigatory and more akin to that adopted in this country by the Monopolies and Mergers Commission than to that followed by the Restrictive Practices Court. For my part, for the reasons already suggested, I believe that this permits of a more wide–ranging objective market analysis than is practicable under the procedures available to a court.

From decisions of the Commission there is an appeal to the European Court of Justice. Broadly speaking the grounds of such an appeal are not dissimilar to those on which the English High Court reviews decisions of administrative tribunals; but one cannot read Mrs Korah's analysis of the judgments of the European Court of Justice on the rules on competition without becoming aware that the Court exercises a much wider jurisdiction to examine the "merits" of a decision of the Commission than an English court would think appropriate in reviewing decisions of administrative tribunals.

The reason for the difference in approach can, I believe, be accounted for by the fact that there is another route by which disputes about the effect of the Community rules on competition are brought before the European Court of Justice. Articles 85 and 86 were among the first provisions of the Treaty of Rome which were held to be directly applicable in the Member States. They form part of the domestic law of Member States and litigants in national courts can rely upon the invalidity of agreements made, or action taken, contrary to the prohibitions contained in these two articles. Where such reliance raises a question of interpretation of the Treaty the national court may, and if it is a court of final instance must, refer the question to the European Court of Justice under article 177. Such a reference invokes what is in the nature of an original jurisdiction of the European Court in contrast to its appellate jurisdiction under regulation 17. Whether the kind of agreement or action that is impugned falls within the prohibitions contained in the articles depends upon an assessment of its economic effect; but the reference may come from the national court to the European Court without the benefit of any prior market analysis. Although the jurisdiction of the European Court is limited to interpretation, it is inevitable that in interpreting what is expressed in such wide terms as those used in the Treaty, the Court should be driven, upon material that may not always be adequate, to form its own value judgment as to the economic consequences of particular kinds of restrictions upon competition or particular ways of exercising market power.

Some of the judgments commented upon in Part Three of this volume were given upon references by national courts under Article 177, others upon appeals from decisions made by the Commission after full investigation pursuant to its own procedure under Regulation 17; but there is no obvious contrast between the Court's own approach to its functions under these two disparate jurisdictions.

So in the Common Market there is no clear–cut separation between the use of the investigatory procedure (by the Commission) and the judicial procedure (by the Court of Justice) for deciding whether Community rules on competition have been broken in particular instances. Sometimes these procedures follow one another; sometimes the judicial is used alone. In either case it is the value judgment of the Court upon the economic consequences of the impugned agreement or activity that ultimately prevails. My personal experience in the Restrictive Practices Court in the United Kingdom leads me to believe that the kind of market analysis that the Commission can undertake in the course of its investigatory procedure is an essential aid to any court which has to form a value judgment of this kind. It is to be hoped that the case law of the European Court of Justice in appeals from decisions of the Commission will in course time reduce the need for references by national courts on competition law which leave the European Court to form its judgment without the help of this kind of factual analysis.

The Common Market rules on competition now interpenetrate our national legislation on restrictive trade practices and monopolies and mergers. The interpretation is bound to grow greater if, as I assume, the United Kingdom continues to form part of the European Communities. To those concerned in the management of large scale enterprises or dealings in patents, trade marks and "know–how", and to the lawyers who have to advise them, the combined effect may well appear to be the creation of a legal labyrinth. The present volume charts a clearer path through it than has previously been available to English lawyers. It does not claim to answer all the questions that may arise for decision by the E.E.C. Commission or by the European Court of Justice. It does not shirk the difficulties which flow from the contrasting approaches to the problems of competition adopted by the various bodies, investigatory and judicial, charged with the task of applying the law both in the national and in the supra–national community field. What it sets out to do is to combine a scholarly analysis of the significant decisions of those bodies with practical guide lines as to what conduct is likely or unlikely to satisfy the various criteria of lawfulness. In doing this Mrs Korah will have earned the gratitude alike of businessmen and students of the law.

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