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Monopoly, Competition and the Law: The Regulation of Business Activity in Britain, Europe, and America

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BOOK REVIEW

MONOPOLY, COMPETITION AND THE LAW: THE REGULATION OF BUSINESS ACTIVITY IN BRITAIN, EUROPE, AND AMERICA. By Tim Frazer. Wheatsheaf Books Ltd., Brighton, Sussex, United Kingdom, and St. Martin's Press, New York: 1988. Pp. xvii, 265.

Reviewed by Leslie Melville*

The author of *Monopoly, Competition and the Law* succinctly and thoroughly capsulizes the law in the fields of antitrust, monopoly, merger, restraint of trade, restrictive practices, and anticompetitive practices, as determined by the courts and authorities in the United Kingdom, the European Economic Community (EEC), and the United States.[1] Within the limits inherent in the presentation of a large subject in a small volume, the author lays out a penetrating examination of the main principles adopted regarding these interrelated fields of law, and the motives which led to that adoption.

In the opening chapter, the author examines the policy behind antitrust, starting with the notion of "distributive equity."[2] Proponents of distributive equity assume that there is some standard of fairness achievable through governmental regulation, curtailment or direction of the forces of commerce. The author contrasts theories of distributive equity with the principles of the conservative Chicago School of economic thought that "the competitive process will insure the efficient allocation of resources," and that the process of distributive resources is a "self-correcting mechanism."[3]

The controversy between those who advocate distributive equity and proponents of a self-correcting, naturally efficient market exists only in the United States, asserts the author.[4] EEC objectives are fairly well-settled, apart from the absence of an effective policy to control mergers.[5]

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* Author, The Draftsmen's Handbook (1985).

1. T. FRAZER, MONOPOLY, COMPETITION AND THE LAW: THE REGULATION OF BUSINESS ACTIVITY IN BRITAIN, EUROPE AND AMERICA (1988) [hereinafter FRAZER].

2. *Id.* at 2.

3. *Id.*

4. *Id.* (citing Rowe, *Antitrust in Transition: A Policy in Search of Itself*, 54 ANTITRUST L.J. 5 (1985)).

5. *Id.* at 3-4.

In illustrating the principles that underlie antitrust policy, Mr. Frazer examines *United States v. Topco Associates*,[6] an important United States decision that defends the antitrust laws for producing a competitive effect, and refers to those laws as the "Magna Carta" of free enterprise.[7] The author refers also to an earlier pronouncement on the subject, in which Judge Learned Hand likened the absence of competition to a "narcotic" and deemed rivalry to be the "stimulant" of industrial progress.[8]

The author praises the EEC for its policy toward small firms. In contrast to the Robinson-Patman Act[9] in the United States, EEC policy subrogates the need for economic efficiency—a concept solely concerned with consumer benefit—to other aims of a unified economic policy.[10]

The author concludes the first chapter with a discussion of the significance of competition as the basis for antitrust policy,[11] and the varied approaches that jurisdictions take to ensure an adequate level of competition.[12] These approaches, which Mr. Frazer categorizes as abuse, or prohibitive per se,[13] are used respectively by the United Kingdom, the EEC, and the United States. The author further points out that there are alternatives to antitrust for the regulation of market structures.[14]

The second chapter[15] entitled "Monopoly Policy," informs the reader that none of the three legal systems[16] has adopted a policy directed against monopoly power. Although market forces often will erode monopoly power, there are occasions when this "eco-system" will fail to function.[17] Theorists have attempted to devise structures to control unchecked monopolies.[18] They cannot, however, even begin to discuss the curtailment of monopoly power until they have identified the market in which monopoly is alleged.[19] Only then may they proceed to

6. 405 U.S. 596 (1972).
7. *Id.* at 610.
8. United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945).
9. 5 U.S.C. §§ 13-13b, 21a (1982).
10. FRAZER, *supra* note 2, at 4.
11. *Id.* at 6-7.
12. *Id.* at 7-8.
13. *Id.* at 7. In an abuse system, controls are imposed only when practices are found to be contrary to the public interest. A prohibitive system forbids certain practices or structures, but provides for an exemption when it would be advantageous. A per se system conclusively presumes certain practices to be contrary to the public interest. *Id.*
14. *Id.* at 8.
15. *Id.* at 9-70.
16. Those of the United Kingdom, United States, and the EEC.
17. FRAZER, *supra* note 2, at 10-11.
18. *Id.* at 10.
19. *Id.* at 13-23 (citing Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d

consider the nature of monopoly power.

The author systematically examines the problems inherent in controlling monopolies. First, he compares and contrasts the definitions of "relevant market" in all three jurisdictions.[20] Next, similar treatment is accorded to the definition of "monopoly."[21] The bulk of the second chapter consists of an analysis of the approaches taken for the regulation and restriction of monopolies in the three jurisdictions.[22] The long history of the United States' policy against "monopolization" (an offense criminalized by section 2 of the Sherman Act)[23] is given considerable attention.[24] The author summarizes the prevailing positions of all three jurisdictions as follows:

> It is a function of the competition authorities, within the context of a behavioral policy, to determine whether any advantages accruing to a dominant firm are due to anticompetitive features or to efficiency. Although there are great differences between monopoly policies of the U.K., the EEC and the U.S.A. respectively, they may all be classed as behavioral policies, seeking to distinguish between benign and malign monopolies.[25]

Merger policy is the subject of chapter three;[26] there, the author distinguishes three types of merger policy, namely, horizontal, vertical, and conglomerate.[27] Examining in detail the law of the United Kingdom, Mr. Frazer reports that, in practice, governmental investigations target *proposed* mergers rather than finalized mergers, because financial backers need assurances that their investment is not at risk of subsequent disallowance by the Monopolies and Mergers Commission (MMC).[28]

Originally, in the United Kingdom, the law favored mergers because of the difficulty in proving that the merger would have an adverse effect.[29] Even now, the EEC has no merger policy; although in 1973, *Euroemballage Corp. and Continental Can Co. v. Commission of the European Communities*[30] treated a merger as abusive behavior.[31]

Cir. 1979)).

20. *Id.*
21. *Id.* at 23-34.
22. *Id.* at 34-67.
23. 5 U.S.C. § 2 (1982).
24. FRAZER, *supra* note 2, at 60-67.
25. *Id.* at 13.
26. *Id.* at 71-105 ("Merger Policy").
27. *Id.* at 72.
28. *Id.* at 75-82.
29. *Id.* at 82.
30. 1973 E. Comm. Ct. J. Rep. 215, [1973] 3 Comm. Mkt. L.R. 199.

The author asserts that a full merger under EEC law does not constitute an agreement subject to restrictions because the identity of the two firms ceases to exist upon merger. Therefore, there is no agreement between two separate parties which the EEC can regulate.[32] Under United States law, the primary concern is the competitive impact of a merger on the degree of competition remaining.[33]

Conglomerate mergers lift the problems inherent in merger policy to a new level of complexity. In the United Kingdom, the MMC has issued reports adverse to those conglomerates desiring to combine and thereby create larger conglomerates.[34] The author approaches the problem by looking at the public policy issues concerning the effects of mergers on the distribution of industry, and the ability of the MMC to base its findings on such effects. The MMC is criticized in the United Kingdom for exceeding the scope of its charter: The critics contend that the commission should confine its activities to questions of competition, and not touch on aspects of regional policy, such as the need to promote industry in depressed areas.[35] Yet, the MMC is authorized to investigate and to issue reports viewing disputed practices in light of the "public interest."[36] Given the broad scope of public interest, criticism of the efforts of the MMC is inevitable. Thus, the MMC has clarified its criteria in making its determinations. For example, the MMC "has confirmed that foreign ownership is not of itself relevant to the public interest,"[37] but there can be an exception to that rule where, for example, a foreign bank would have control of a United Kingdom clearing bank if the merger were to be allowed.[38]

With no merger policy in effect in the EEC,[39] the Commission of the European Communities ("European Commission")[40] has been seek-

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31. FRAZER, *supra* note 2, at 85.

32. *Id.* at 87.

33. *Id.* at 91 (section 7 of the Clayton Act, 15 U.S.C. § 18 (1982), requires that mergers be measured by whether they substantially lessen competition).

34. FRAZER, *supra* note 2, at 81-82.

35. *Id.* at 81 (citing George, *Monopoly and Merger Policy*, 6 FISCAL STUDIES 34 (1985)).

36. FRAZER, *supra* note 2, at 81.

37. *Id.*

38. *Id.*

39. *See supra* text accompanying notes 23-25.

40. The Commission of the European Communities (also known as the European Communities Commission, the European Commission, or the EEC) initiates legislation in the European Economic Community by submitting proposals to the EEC's governing body, the Council of Ministers. The European Commission is politically responsible to the European Parliament, an elected body with consultative and budgetary powers within the EEC. The European Commission also enforces the decrees of the EEC, and acts as executive body for the Council of Ministers. The author compares the antitrust functions of the European Commission to the United States Federal Trade Commission, "which also combines investigative, prosecutorial and decision-making roles within the

ing legislation in this field ever since the *Continental Can* decision.[41] Articles 85 and 86 of the Treaty of Rome,[42] under which the EEC exercises control over unfair trade practices, are limited in their effect, resulting in a lack of power in the European Commission to apply antitrust law to the EEC as a whole.[43]

United States law on mergers is dominated by *United States v. General Dynamics Corp.*,[44] which allowed evidence to rebut the presumption of illegality raised by a substantial market share[45] and thereby gave a new leniency to horizontal mergers.[46]

Chapter four[47] traces the restraint of trade doctrine in the United Kingdom back to the Magna Charta of 1225,[48] examines fifteenth century decisions,[49] and then moves forward to the definitive decision in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* [50] of 1894, in which the interests of the parties in restraining trade were weighed against the interests of the public in allowing an open market. United States law in this field follows the English restraint of trade doctrine.[51]

The EEC possesses no discrete restraint of trade doctrine. Article 85 of the Treaty of Rome must suffice to effectuate the goals of such a policy.[52] In *Remia B.V. & Bedrijven Nutricia N. V. v. Commission of the European Communities*,[53] the European Commission held that non-competition clauses applying to different geographical markets were contrary to article 85, although they did not per se violate article

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framework of an administrative agency." FRAZER, *supra* note 2, at 45-46.

41. Euroemballage Corp. and Continental Can Co. v. Commission of the European Communities, 1973 E. Comm. Ct. J. Rep. 215, [1973] 3 Comm. Mkt. L.R. 199.

42. Treaty of Rome, Mar. 25, 1957, arts. 85-86, 289 U.N.T.S. 3, 47-49.

43. FRAZER, *supra* note 2, at 86.

44. United States v. General Dynamics Corp., 415 U.S. 486 (1974).

45. *Id.* at 501. "[C]ompanies that have controlled sufficiently large shares of a concentrated market are barred from merger . . . because their past performances imply an ability to continue to dominate with at least equal vigor." *Id.* "[V]iewed in terms of present and future reserve prospects[,] . . . [the defendant] was a far less significant factor in the coal market than the Government contended or the production statistics seemed to indicate." *Id.*

46. FRAZER, *supra* note 2, at 93; *see* Lipner, *Horizontal Mergers, General Dynamics and Its Progeny: Requiem for a Presumption*, 27 S. TEX. L. REV. 381 (1986).

47. FRAZER, *supra* note 2, at 106-18 ("The Restraint of Trade Doctrine").

48. *Id.* at 106.

49. *Id.* at 107.

50. [1894] App. Cas. 535, 565 (H.L.). *Nordenfelt* is discussed in FRAZER, *supra* note 2, at 107-08.

51. FRAZER, *supra* note 2, at 115-17. *But see* Handler & Lazsaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669 (1982) (criticizing the interpretation of United States law as following that of the United Kingdom).

52. FRAZER, *supra* note 2, at 113.

53. 1985 E. Comm. Ct. J. Rep. 2566, [1985-86 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,217 (1987).

85(1),[54] because such clauses may be necessary to ensure that the full value of goodwill is transferred to the purchaser.

The United Kingdom's Restrictive Trade Practices Act (RTPA) of 1976 contains a unique series of analytical tests,[55] which have become known as "gateways."[56] Any agreement containing a "restriction or information"[57] provision must pass through the gateways in order to prove that the agreement is in the public interest.[58] Specific gateways require, for example, that a provision must be "necessary to protect the public against injury,"[59] that removal of the provision would deny the public "specific and substantial benefits,"[60] and that the provision is "reasonably necessary to enable the parties to the agreement to negotiate fair terms . . . ."[61]

The author presents, in chapter five,[62] a thorough treatment of RTPA,[63] including a comprehensive table of analysis that compares the decisions of the court that have interpreted the "gateways."[64] This table categorizes the types of agreements and the gateway justification, and presents the author's observations. The author ascribes meaning to the terminology in the RTPA[65] and examines the historical reasons for the government's decision to establish a judicial body to scrutinize

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54. Article 85(1) prohibits agreements which prevent, restrict, or distort competition within the Common Market. Treaty of Rome, Mar. 25, 1957, art. 85(1), 289 U.N.T.S. 3, 47-48. *See* FRAZER, *supra* note 2, at 114.

55. Restrictive Trade Practices Act, 1976, §§ 10, 19 [hereinafter RTPA].

56. FRAZER, *supra* note 2, at 138-39.

57. RTPA § 1 (applying RTPA to "restrictive agreements" and "information agreements" pertaining to goods or services). Restrictive agreements are those which contain any of the specific restrictions listed in RTPA §§ 6, 11. Information agreements are those which, under RTPA § 7 or § 12, contain provisions pertaining to the furnishing of information between contracting parties, or to others, which may have an anticompetitive effect.

58. FRAZER, *supra* note 2, at 138.

59. RTPA § 10(1)(a).

60. RTPA § 10(1)(b).

61. RTPA § 10(1)(d).

62. FRAZER, *supra* note 2, at 119-96 ("Restrictive Trade Practices").

63. *Id.* at 122-58.

64. *Id.* at 141-52. Under the Restrictive Trade Practices Act of 1976, certain agreements are per se registrable with the Office of Fair Trading. *Id.* at 123. Once registered, the Director General of Fair Trading must proceed against the parties to the agreement in the Restrictive Practices Court unless the restrictions "are not of such significance as to call for investigation by the [c]ourt." *Id.* (quoting RTPA § 21).

> Once before the court, the restrictions in an agreement will be declared void as being contrary to the public interest, *unless* the parties can convince the court that, within the meaning of the RTPA, the agreements will not operate contrary to the public interest. Such a test will only be satisfied if the parties can guide the agreement through one of the "gateways" provided in the RTPA . . . .

Id. (emphasis in original).

65. FRAZER, *supra* note 2, at 124-25.

agreements, rather than establish an administrative agency.[66]

The author details the shortcomings of the United Kingdom law, examining in particular the problem of the unregistered agreement.[67] Registration is only required when an agreement is in a particular form;[68] if it does not comply with certain criteria, it is registrable.[69] If it is not registrable, it is not subject to the provisions of the RTPA.[70] Thus, there is a loophole in the provisions available by skillful drafting.[71]

EEC law does not impose any formal limitations on the type of agreement which may fall under the provisions of the Rome Treaty.[72] Article 85 covers any informal agreement, such as an arrangement made within a trade association.[73] The Commission, however, issued a Notice on Cooperation Between Undertakings[74] in 1968, which states that "agreements providing for the exchange of opinion or experience; joint marketing research; joint cooperative studies; or joint statistical exercises" are permitted despite article 85.[75] Moreover, the Commission has not objected to informal means of obtaining details of a competitor's prices.[76]

Frazer views United States law on restrictive practices as originating in the English common law.[77] The passage of statutes spelling out prohibited practices was sparked by the Granger Movement, which consisted of farmers who perceived that they suffered a "deteriorating economic position" caused "by combinations and price-fixing cartels amongst manufacturing industries and the railroad companies . . . ."[78] In 1875, about ten percent of all farmers were adherents to the

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66. *Id.* at 136. The government was strongly influenced by pressure from industry. It was "plain that judicial sympathies were entirely on the side of freedom of contract, no matter how anti-competitive the arrangements might be . . . . [I]t is quite plain that the judges' sympathies were enlisted on the side of the businessmen who were making such efforts to restrict competition." P.S. ATIYAH, THE RISE AND FALL OF CONTRACT 700 (1979).

67. FRAZER, *supra* note 2, at 156-58.

68. RTPA §§ 1, 6, 7, 11, 12 (discussed *supra* note 58).

69. FRAZER, *supra* note 2, at 156.

70. *Id.*

71. KORAH, COMPETITION LAW OF BRITAIN AND THE COMMON MARKET (1975) (quoted in FRAZER, *supra* note 2, at 156).

72. FRAZER, *supra* note 2, at 159.

73. *Id.* at 161.

74. 11 O.J. EUR. COMM. (No. C. 75) 3 (1968).

75. FRAZER, *supra* note 2, at 167.

76. *Id.* (citing Genuine Vegetable Parchment Ass'n, 20 O.J. EUR. COMM. (No. 70) 54 (1978), Common Mkt. Rep. (CCH) ¶ 10,016 (1978) (bylaws of an international trade association in which members agreed to exchange statistical information, including all export data, prohibited by article 85(1) of the Treaty of Rome)).

77. FRAZER, *supra* note 2, at 174.

78. *Id.*

Granger Movement.[79]

The author shows[80] how the Grangers' concerns led to the passage of the Sherman Act of 1890,[81] and favorable decisions in the *Standard Oil Co. v. United States* case of 1911,[82] and the *Chicago Board of Trade v. United States* case[83] of 1918.

Chapter six is entitled "Anticompetitive Practices."[84] The theme of this chapter is clarified in the opening sentences: "The regulation of anticompetitive practices cannot be undertaken solely through monopoly control or the control of restrictive trading agreements. Both policies have limitations which make them unable to cope with certain commercial behavior which damages the competitive equilibrium."[85] The Director General of Fair Trading in the United Kingdom therefore has power to investigate anticompetitive practices,[86] bridging, in part, the gap left by limitations in statutory controls.[87] The Director General has power to refer cases to the MMC, and cases relating to a number of industries have been subject to this treatment.[88] Intellectual property rights are not, in themselves, immune from consideration of their effects in relation to competition.[89] Much the same treatment is meted out by the EEC authorities.[90]

In United States' law, the Robinson-Patman Act of 1936[91] was particularly relevant during the economic depression of the 1930s. The Act assigned liability for creating competitive injury to a party who sold like goods to different customers at different prices.[92] Another form of anticompetitive practice consists of tying arrangements. The Supreme Court found tying arrangements to be a form of anticompetitive practice in *International Salt Co. v. United States*.[93] Tying arrangements are therefore prohibited by section 3 of the Clayton Act of

79. *Id.* at 196 n.62.

80. *Id.* at 174-93.

81. 15 U.S.C. §§ 1-7 (1982 & Supp. IV 1986) (protecting trade and commerce against unlawful restraints and monopolies).

82. Standard Oil Co. v. United States, 221 U.S. 1 (1911) (applying a rule of reason, based on common law, to the interpretation of the Sherman Act).

83. Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918) (enumerating factors for construing *Standard Oil*'s rule of reason).

84. FRAZER, *supra* note 2, at 197-240.

85. *Id.* at 197.

86. *Id.* at 201-02.

87. *Id.* at 197.

88. *Id.* at 203-04.

89. *Id.* at 211-12.

90. *Id.* at 215-26.

91. 15 U.S.C. §§ 13-13b, 21a (1982).

92. FRAZER, *supra* note 2, at 227.

93. 332 U.S. 392 (1947) (nation's largest salt producer could not, under section 3 of the Clayton Act, 15 U.S.C. § 14 (1982), require lessees of company's machines to use only products of the company).

1914.[94] Although there may be a conflict between intellectual property rights and antitrust, the author highlights the fact that such a conflict has never fully been acknowledged by authorities in the United States.[95]

The final chapter, entitled "Extraterritoriality,"[96] although short, is a useful outline of potential problems in the future. Control of anti-competitive behavior becomes far more troublesome when markets are international. Foreign competition must be taken into account when markets are defined, and policymakers must decide whether activities outside the national territory should be subject to control.[97] Nations differ as to whether the "effects doctrine" gives extraterritorial jurisdiction to the courts.[98] While the United Kingdom rejects the effects doctrine,[99] the Second Circuit Court of Appeals, in *United States v. Aluminum Corp. of America*,[100] has expressed its support for this principle.

Notwithstanding the fact that this work is less than three hundred pages in length, it is impossible to do justice to it in these few paragraphs. The author's style is pithy but clear, penetrating and impressive. Furthermore, the volume is comprehensive insofar as it concerns the critical appraisal of essential principles, presenting both positive and negative opinions where appropriate. This reviewer's only criticism is that a great deal could be gained by expanding the indexing.[101]

94. 15 U.S.C. § 14 (1982).

95. FRAZER, *supra* note 2, at 237 (citing Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1815 (1984)).

96. *Id.* at 241-47.

97. *Id.* at 241.

98. *Id.* at 242.

99. *Id.* (citing Lowe, *The Problem of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution*, 34 INT'L & COMPARATIVE L.Q. 724 (1985) (setting out United Kingdom objections to EEC jurisdiction over U.K. firms)).

100. 148 F.2d 416 (2d Cir. 1945).

101. FRAZER, *supra* note 2, at 259-65.