GOVERNMENTAL ECONOMIC REGULATION


DONALD S. MACKAY, LL.B. (Edinburgh)

LL.M.
University of Edinburgh
1968
A young student approaches with a certain degree of trepidation the constitutional complexities of governmental intervention in the economy. It is a field where political and economic concepts are evolving at a rapid rate. Nevertheless fascination exists for the constitutional lawyer with the new constitutional structures and procedures being created to administer the various regulatory policies. My particular interest was aroused during the courses on Constitutional Law, conducted at the University of Edinburgh.

For constant encouragement and counsel, during the writing of my dissertation, I have to thank my supervisor, Professor J.D.B. Mitchell. He has set me an example in many ways and acted as a stimulus to new fields of study and interest. Likewise I am grateful to Mr. T.C. Daintith, for his readiness to listen to any of my problems. Needless to say, any deficiencies in what follows are entirely my own responsibility.

Thanks are also due to various students, secretaries and librarians, associated with the Department of Constitutional Law and latterly with the Centre of European Governmental Studies. They have provided encouragement and friendship in moments of despair and a particular debt of gratitude is owed to Mrs. Katherine Maxwell and Miss Patricia White (as she then was), who have been around throughout my two years of study. The debt I owe my typist, Mrs. Evelyn Turner, is unquantifiable. I only hope that she does not consider her labours to have been in vain. Finally, and above all, I am grateful to my parents, who have suffered much complaining and worrying as my dissertation reached its conclusion.

The writing of the dissertation was completed in mid-June 1968.

D. S. Mackay.
GOVERNMENTAL ECONOMIC REGULATION

Economic regulation is an increasingly important part of governmental activity. This dissertation is concerned with governmental economic regulation and intervention in the fields of competition policy, regional policy and industrial rationalisation. It examines the constitutional machinery associated with governmental policy in these three fields, comparing the position in the United Kingdom with that in the European Economic Community, and then draws certain conclusions from the differences in structures and procedures employed.

With competition policy in the U.K., the roles of the Monopolies Commission and the Restrictive Practices Court are examined, together with their relationships with Government departments and other bodies. Thereafter attention is turned to the Commission's enforcement of a community competition policy in the E.E.C.

Turning to governmental participation in industrial rationalisation in the U.K., after a short discussion of previous activity in this field, the role of the Industrial Reorganisation Corporation is discussed, as are the powers to be acquired by the Government under the Industrial Expansion Bill. This is followed by an examination of the action by community institutions in the field of industrial rationalisation in the E.E.C.

Finally consideration is given to governmental regional policy. The present structure of regional planning machinery in the U.K. is described and certain of the problems associated with it are discussed. The various instruments of regional policy operated by the Board of Trade and the Department of Employment and Productivity are covered and particular attention is given to the role of the
Highlands and Islands Development Board. With regional policy in the E.E.C., the examination is primarily concerned with the community instruments for regional development. These are the European Social Fund, the European Investment Bank and the European Agricultural Guidance and Guarantee Fund.

The role of the Commission in co-ordinating regional development in the community is also discussed, particularly with regard to its control over the regional policies of the member states.

Throughout this examination of the constitutional machinery associated with these economically related policies, particular attention is given to the procedural links between the administrative bodies involved. The relationship between administrative and control machinery is also discussed. In conclusion certain suggestions are made for developing constitutional machinery suitable for the three policies of governmental economic regulation examined.
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Bibliography
CHAPTER 1

GOVERNMENTAL ECONOMIC REGULATION
Any analysis of the constitutional structure of Governmental participation in the economy must clearly define the particular sectors of participation, with which it is to be concerned. Thus, at the outset, a clear distinction must be drawn between 'planning' in the sense of centrally co-ordinated macro-economic medium-term strategy, aimed at higher growth rates on the national scale, and 'planning' as a programme of governmental regulation and intervention, concerned with industrial development and reform on the micro-economic scale. For while the implementation of strategy evolved by the former process depends very largely on an extensive development of the latter, a discussion of the constitutional techniques and problems involved must bear this distinction very clearly in mind.  

This study is concerned with the constitutional structures evolved in three fields of governmental regulation and intervention, both in the U.K. and the E.E.C. These fields are those of competition policy, industrial rationalisation policy and regional policy, and they have been chosen because repeatedly, the individual problems to be faced, during the exercise of any one of these policies, have considerable implications for aspects of the others. Against this background of economic inter-relationships, the constitutional structures and techniques employed will be examined — individually in relation to the particular policy exercised and collectively as to their relationships with the procedures of other Government departments and public bodies.

1 e.g. The success of the Commissariat du Plan in France is largely due to the backing it receives from a highly centralised and powerful civil service, acting in unison throughout the various government departments. See: Modern Capitalism — Andrew Shonfield 1965 p. 146
For the development and implementation of any of these policies, the constitutional problem is twofold. Firstly, there must be created some constitutional structure, capable of effectively administering the particular policy. This may take the form of a Government department, an independent or semi-independent public body or even a court of law, and in certain cases, the final solution includes elements of more than one of these alternatives. Whatever the final choice, the aim in every case must be to create the structure most suitable for administering the particular policy, as it has been politically decided. But the choice of structure and procedure is not purely a question of their administrative suitability. There must also be linked with the choice, a consideration of the democratic or legal controls to which the operations of the structure are to be subject. For whatever structure and procedure are to be chosen, the method through which they are controlled will exert considerable practical influence on them. ²

Thus, in the U.K., the reliance on control by a central Parliament has encouraged administrative structures to be vertically orientated towards a centralised Government. Any attempts at administrative devolution have been largely frustrated by a failure to devolve corresponding methods of control and therefore in many cases, the constitutional structures chosen for particular aspects of Governmental regulation and intervention, have not operated as envisaged, and have therefore been less effective than they might have been.

Consequently, this parliamentary tradition of control by reliance on ministerial responsibility, has prevented the creation of suitable structures and procedures, and this contrasts strongly with the carte blanche with which the founders of the European Communities were able to establish the institut-

² e.g. The fact that any democratic control over the Highlands and Islands Development Board is exercisable only at Westminster, serves both to weaken control over the Board’s minor activities and encourage the impression that in more major projects, the Board is dominated by St. Andrew’s House or Whitehall.
ional structures for the Communities. Thus in the E.E.C., the primary control that exists over executive action, is a legal control exercised by the Court of Justice. This, supported by the continental tradition of administrative jurisdictions, ensures that the administrative structures and the policies, which these structures are required to implement, are orientated towards a legal control more effective than those of a traditionally democratic nature. In the following chapters, the relationship between structure and control will be discussed, but in neither the U.K. nor the E.E.C. is this relationship the only element in the choice of an administrative structure to implement a particular policy.

The economic inter-relationship mentioned above demands corresponding procedural inter-relationships, and this latter topic is central to this study. What are to be the formal and informal channels of communication and consultation between administrative bodies, concerned with related economic policies? How far is co-ordination to be written into the structure and procedure of these bodies or alternatively, how far is this to be left to informal and ad hoc consultation? These are questions of equal importance to those as to the administrative effectiveness of the chosen structure, and like that effectiveness, they are linked with the method of control to which the administrative structures are to be subject. 3

For these reasons, the analysis that follows is largely orientated towards an examination of the procedural inter-relation of the three policies considered, and against this background, it will attempt to compare and contrast the advantages and disadvantages of the multi-farious constitutional techniques employed

3 e.g. The administrative co-ordination, which the Regional Economic Planning Boards were created to achieve in the U.K., has been largely frustrated by the centralised control to which the various departments involved are subject.
in the U.K. with the more uniform structures of the E.E.C.

But first, we must set the governmental scene into which these three policies fit. In the U.K. we return to the distinction drawn earlier between macro-economic and micro-economic 'planning'. In the macro-economic field, the responsibility for overall planning rests between the Department of Economic Affairs and the Treasury. The balance of power and of responsibility between these two departments is a constantly changing phenomenon, but shared between them is the ultimate responsibility for medium-term economic planning. Another body connected with macro-economic planning is the National Economic Development Council, which under the last Conservative government, was responsible for the first National Plan in 1962. After the creation of the D.E.A. in 1964, the Labour government took away from the N.E.D.C. the function of drawing up the plan, with its detailed study of figures and targets for particular sectors of the economy. This task was vested in the D.E.A. and the role of the N.E.D.C. became one of consultation between the Government and the interest groups represented on the N.E.D.C. 4

In the micro-economic field, there are various bodies concerned, and it is into this field that the three policies to be examined, fit. The D.E.A. has overall responsibility for regional planning, but the executive responsibility for the implementation of regional policy rests with the Board of Trade, and the recently created Department of Employment and Productivity. The D.E.A. also has responsibility for industrial rationalisation, through its links with the Industrial Reorganisation Corporation and the 'little Neddies'. These are the Economic Development Committees for particular industries, whose composition and role are discussed later.

The new Department of Employment and Productivity is liable to be a much

4 see 702 H.C. Deb. 1457-60 26th Nov. 1964.
more powerful and influential body than its predecessor, the Ministry of Labour. This is partly due to the personality of its first Secretary of State, Barbara Castle, and partly to its increased role which incorporates the existing function of the Ministry of Labour with the responsibility for prices and incomes policy, which previously rested with the D.E.A. The structure and role of the Prices and Incomes Board are not relevant to this particular study, other than to the extent by which the Board's activities overlap the three policies to be discussed. Two important examples of such an overlap could be mentioned. Firstly, there is the problem of voluntary price agreements, sponsored by the P.I.B. or by a Government department, as being for the benefit of the economy as a whole. Such agreements may nevertheless, fall within the scope of restrictive practices control under the Restrictive Trade Practices Act 1956. A certain conflict of purpose is thereby created and to alleviate this, the Government are at present seeking a discretionary power to exempt such price agreements from control. Likewise, a white paper is expected this summer, reviewing the monopoly of control exercised by the Government under the Monopolies and Mergers Acts 1948 and 1965. A second example of the implications of the P.I.B.'s activities, is the manner by which the Board examines the structure and efficiency of the industry or trade referred, while preparing its report on a reference. This process can duplicate the work of the E.D.C.'s and may even prevent Government departments from making references to the Board and thus the need for a co-ordination of responsibilities is apparent. 5

As well as the need for a clear division of responsibility, these examples show that the problems of consultation and co-ordination transcend all branches of governmental economic activity. Thus unless adequate channels of communication and consultation are developed, conflict and inefficiency will result.

Another important department is the Board of Trade, which has executive responsibility for some of the instruments of regional policy to be discussed. It also has complete ministerial responsibility, insofar as it extends, for the Government's competition policy. Likewise, the Ministry of Technology has responsibility for various aspects of regulation and intervention. It sponsors a number of basically technological industries, has responsibility for Government expenditure on research and development, and under the proposed Industrial Expansion Bill, will have responsibility for certain aspects of the governmental encouragement of industrial rationalisation.

While these are the main departments with which we will be concerned, certain aspects of the ministerial responsibilities of the Scottish and Welsh Offices, the Ministry of Transport, the Ministry of Housing and Local Government and other government departments also affect the policies to be discussed. All these departments, through their respective ministers, are answerable to Parliament by means of a control which consists of Parliamentary Questions, Adjournment Debates, Allotted Day Debates, the scrutiny of Delegated Legislation, and a few other opportunities for raising complaints. But because of the political nature of the House of Commons, only in the rarest of cases do these controls provide an effective control on the Government's activities. The role of the ordinary courts as a control over Governmental activity has traditionally been limited and at present, the courts are loath to accept any responsibility to act. Areas where legal control could play a fuller role are discussed below, and suggestions are made as to reinforcing the weak control which is at present exercised over administrative action in the U.K.

The haphazard division of responsibility between Government departments linked with centralised Parliamentary control, explains many of the instances of conflict and lack of co-ordination, which will appear in the following chapters.
This situation will contrast forcibly with the structure and division of responsibility within the E.E.C. Commission, which has almost complete responsibility for the execution of Community policy in the three fields of economic policy, which we are examining.

Before any comparisons are made between the U.K. and the E.E.C., it is important to make some preliminary observations. In the first place, the Community's institutions have a responsibility for policies affecting the six member states of the community, which form an economy far larger than that of the U.K. This responsibility extends only over those areas of economic policy, delegated by the Member states to the Community. In certain instances, particularly with regional policy, this severely limits the competence of the Community institutions and delays the development of community policies. Only where the Treaty of Rome granted specific responsibilities to the Commission, and where these responsibilities have been allowed to develop by the Member States, collectively through the Council of Ministers, has the implementation of Community policies had important practical effects throughout the Community.

A further factor to be borne in mind, during any comparison, is that some of the Community's policies, although centrally controlled from Brussels, are administered by national institutions throughout the Member States. This means that problems of control at the individual level, and the associated problems of effective remedies and recompense for wrongful administrative action, are transferred from being a Community constitutional problem to being one of national or regional significance. The importance of approximating systems of administrative control and remedy in the Member States is therefore very great.

The administration of the three Community policies to be discussed is largely in the hands of the Commission. In certain instances, power is given
to another Community institution, like the European Investment Bank, and in others there is some delegation of power to national institutions in the Member States. But to the extent to which these policies have been developed as Community policies, a development which varies considerably between them, then the responsibility lies, by and large, with the Commission. Where a major development of the policy is proposed by the Commission, it will require to be passed by the Council of Ministers. Otherwise, the regulations and decisions to be made are matters for the Commission alone, subject to the administrative jurisdiction exercised by the Court of Justice. There is no democratic control exercisable over the Commission, for the European Parliament is a consultative body only, and while democratic controls are not particularly effective over administrative action, the continued absence of such democratic control is liable to delay any further delegation of sovereignty, which the development of many of the Community's policies requires.

The Commission itself is divided into several Directorates-General. They are fewer in number than the Government departments in the U.K., but as shall be seen, have wider fields of responsibility. Thus the Directorate-General on Competition has responsibility for a wider field of policies than the term 'competition policy' would suggest in the U.K., including cartel control, regulation of state aids, harmonisation of tax and company laws, and the elimination of discriminatory practices by the Member States. Like other directorates, it has responsibility both for the initiation of policy developments and for the execution of these policies, and there is no illogical divisions of responsibility between policy formation and policy execution, as is to be found for example, with regional policy in the U.K.

Community regional policy, which is limited in scope, has become the responsibility of a separate Directorate-General, after the unification of the two
Commissions and the High Authority, and likewise industrial rationalisation policy is the concern of a newly created Directorate-General on Industrial Affairs. Previously, it was the responsibility of a division within the Economic and Financial Directorate-General. 6

While there is complete co-ordination between the different aspects of policy controlled within specific Directorates-General, there is also a similar co-ordination between the different Directorates within the Commission. Where a problem arises which overlaps the responsibilities of more than one Directorate, working parties are set up to discuss the different implications of the problem. Such consultation is essential for all decisions and regulations are made by the Commission as a collective body, and it is therefore essential for each Directorate-General to prepare its decisions in collaboration with the others, where this is necessary. Otherwise when the decision comes for final ratification by the fourteen commissioners, the objections of another Directorate-General may prevent and will certainly delay the decision's passage.

Likewise, where consultation and co-ordination with the Member States are required, there is usually written into the particular regulation, details of an appropriate consultative or co-ordinating machinery. Thus, every effort is made to solve in advance any possible conflict, which could arise between the application of different policies.

It is not suggested that similar consultation ever takes place between different departments and public bodies in the U.K., but because the procedure by which this could take place is not so fully specified or developed as it is in the E.E.C., it does appear that much of the consultation and co-ordination

6 The topic of industrial rationalisation policy was included in this work because of its considerable implications for competition policy and regional policy in the U.K. It is realised that its significance for this study is limited in relation to the E.E.C.
takes place too late - after the actual conflicts of policy, and their social and industrial implications have arisen. Partially, this may be ascribed to the more developed and detailed nature of the British policies and this follows quite naturally from the observations made above. However, the position in the E.E.C., with a legal control exercised by the Court of Justice, linked with the more developed procedures employed, does suggest a more effective structure for the administration of competition, regional and industrial rationalisation policies.
COMPETITION POLICY

(1) Introduction

Competition policy is a well-established extension of governmental activity in both the U.K. and the E.E.C. Such a development of power has to be fully integrated into the respective legal and constitutional orders, and consequently, it has raised fundamental questions of constitutional law.

It is widely acknowledged that to accept the economic concept of open competition as a basis for the economic order, and simultaneously to admit considerations of public policy, demands a public competition policy. The economic basis for such an assertion is not within the scope of the present work, but it is important for a structural analysis of competition policy, to bear in mind that such policy is not primarily concerned with the ideal of fair competition, (the protection of enterprises against unfair methods of competition by their rivals), but rather with the maintenance of open competition, as the underlying principle for the whole economic order. Thus, restrictions on competition are judged on their effect on the economy as a whole (a matter of public policy) rather than on their effect on any competitors in particular.

Looked at from a different angle, legislation in this field has to persuade companies to make decisions and carry on their affairs independently of one another and without collaboration and restrictive agreements. Enterprises are naturally expected to have regard for the operations of one another and a certain

1 'Competition and the Law' - A. Hunter London 1966 Chapt. 1 - where the author enumerates two categories of objectives for pursuing legislation to control monopoly and restrictive practices and thus to maintain and in some cases, restore, competition in the relevant private sector of the economy - (a) political or value judgements associated with maintaining a competitive system. (b) economic-efficiency objectives.
degree of market interdependence will continue, but the opportunity does
exist for competition legislation to tip the balance towards parallelism in
compny policy and away from outright collusion and collaboration.

Understandably, competition policy is not simply a question of transforming what
is economically or politically desirable into certain rules of law. As with
all aspects of governmental activity, there has to be seen a process of evalua-
tion and balancing of the various interests at stake. Here the structure of
the institutions and the procedure decided upon are crucial to the success of
competition policy, and yet, the difficulties to be overcome in arriving at a
procedure, both constitutionally and economically suitable, are considerable.

Firstly, there is constant development in the fields of market structure
and behaviour. Industrial innovations, better communications, lower tariffs
and a reduction in quota restrictions, all make for monopolistic and oligopol-
istic situations within particular markets. Hence any system of control must
be sufficiently flexible to give due regard to such developments. Further,
if this need for flexibility is acknowledged, a degree of discretion is
required in the application of competition law. With this discretion must
be provided a basis for controlling its exercise, for while such a discretion
should not be bound in advance, thus frustrating the desire for flexibility,
neither should it enjoy unfettered freedom.

Linked with this need for flexibility, are the two sides to competition
policy, namely policy consideration and legal decision-making. The balance
to be achieved between them is complicated by the vague and only loosely defin-
able nature of the subject matter. The element of policy, requiring as it does
an evaluation of economic principles, patterns of economic behaviour and
economic facts, is one for which the administration, public or independent, is
likely to possess the greatest degree of experience and expertise. Over and
against this, there is the argument that if the problems are entrusted to a court of law, the decision-making element will be more adequately covered and the judge can acquire, by way of testimony and the handling of cases, sufficiently expert economic knowledge to ensure that the economic-political factors are given due weight. Those who favour a judicial procedure for dealing with the problem of restrictions or competition, recognise the advantages which may stem from the use of administrative techniques for the selection of cases, but they are not prepared to concede that these advantages extend any further. For the actual decision as to whether a particular monopolistic or restrictive situation or practice is acceptable or otherwise, the judicial method is stressed as being the more appropriate. The argument continues that the central issue of balancing conflicting interests is more appropriate for the natural and everyday ability of the judge and that employing a judicial solution tends to limit the fear of arbitrariness which is often associated with the decisions of the administration. The question therefore is whether these decisions should be taken completely out of politics and be decided in a legal context.

In the final solution, both aspects of the problem must obviously be given their place. Theoretically, they may be examined separately, but in practice, a concern for the due administration of justice can very rarely be completely separated from a desire for an effective economic policy. For it is in the practical application of competition policy that the two aspects come into contact, and in certain respects, into conflict, with the subject matter of the policy - the so-called 'economic facts' of monopolistic behaviour and restrictive practices. Here the requirement is to define suitable standards, incorporating the accepted economic beliefs about open competition, sufficiently

\[2\] e.g. the British experience with the Restrictive Practice Court, which is discussed below.
definite to produce equality of application for the decisions to which they
are applied, and at the same time, sufficiently flexible to deal with the
constantly changing economic scene.

A classic statement of the difficulties experienced in deriving suitable
anti-trust standards and procedures is that of Justice Frankfurter in Standard
Oil Co. v U.S., where he doubts the ability of the U.S. Supreme Court, on
any reasonable standard of proof, to determine in any particular case, as
against specified economic standards, 'what would have happened but for the
adoption of the practice.' Such an attitude to the justiciability of restric-
tive practices control is widely held in the U.S.A. and it is generally
accepted that it has been correct to keep away from the courts the job of
deciding whether, in any given situation, an agreement which eliminates competi-
tion in a material way, should be permitted because of alleged economic benefits.

It is not the purpose of this work to discuss the criteria by which anti-
trust standards should be formulated, but an insight into the difficulties is
pertinent to the problem with which we are primarily concerned, for competi-
tion policy is inter-related with other aspects of public policy - economical,
political and legal.

Thus the final choice as to the structure and procedure of competition
policy must also be made with regard to the political and legal peculiarities
of the particular country involved. The need for this is particularly relevant
to the enforcement of competition law. If competition law is to have any
authority, then it must be obeyed because it is recognised as accepted public

where the Court of Justice in admitting Toepfer's challenge of a decision directed
to the German government, because of his direct and individual concern, held that
the Commission had not correctly decided what would happen if the import licences
had been issued.

4 Comparative Aspects of Anti-Trust Law in the U.S., the U.K., and the E.E.C.
p. 10. The author mentions the difficulties of conflicting economic evidence and
expert economic testimony and concludes that it is wrong to leave "the guesswork and
policy choices involved to the predictions of judges, or even wise administrators."
policy, embodied constitutionally in the law of the land, and not because of any sanctions which a breach of it may attract. However, the rules will still be broken and there must therefore be some means by which they must be backed up. Again a choice as to procedure has to be faced. At first glance, enforcement by the administration or an administrative agency would appear to be the most suitable, because of their ability to negotiate with the particular enterprises involved, thereby exercising a flexibility in policy. However, the discussion of the Board of Trade's enforcement of the Monopolies Commission's recommendations, which follows below, casts certain doubts on the value of an administrative enforcement procedure and leads to the suggestion that the enforcement of competition policy decisions by a court of law, using the normal legal techniques of sanctions to prevent contempt of court, may have a greater and more acceptable influence on business behaviour, at least, in a country where the courts are held in higher regard than the administration. 5

Again however, no answer is offered here for this particular problem. Its relevance is further evidence of the difficulties to be overcome in determining suitable procedure and institutions for competition policy. It is suggested that a pre-occupation with these difficulties has, especially in the U.K., detracted from the fact that the competition policy of any Government is part of its general public policy, and as such, as well as being integrated legally and constitutionally into the governmental machine, must pay due attention and give due weight to the economic and social elements of other aspects of governmental regulation and intervention.

Does the system of competition policy evolved, allow for adequate consideration of the economic and social cost effects of monopolistic or restrictive

5 Relevant here is the experience of the Restrictive Practices Court in the U.K. and the Court of Justice in the E.E.C. Their respective roles are discussed below.
practices on regional policy or government sponsored industrial rationalisation? Similarly, does the system allow sufficient consideration of other aspects of competition policy, when one in particular is being applied? Likewise, is provision made for reference to the whole pattern of governmental economic policy, before a decision in competition policy is finalised?

These are the questions which will be constantly posed during an examination of the structure of competition policy in the U.K. and the E.E.C. and it is to the system in operation in the U.K. that we first turn.
(2) United Kingdom

(a) Monopolies Commission

Before 1948, control over restrictions on competition rested with the common law. Control centred around the concepts of conspiracy and restraint of trade, and, as developed by the ordinary courts, amounted largely to turning a blind eye, except in an extreme case. This lack of control caused considerable concern about which, the Coalition Government during the war, had expressed its views in a white paper on Employment Policy. After the war, the Industrial Organisation and Development Act 1947 had given powers to the Board of Trade to set up associations or development councils in particular industries. These were a complete failure, partly because they were unable to relate the question of technical co-operation, with which they were concerned, to the economically related question of restrictions on competition. This competition aspect was left over until the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948. This act created the Monopolies and Restrictive Practices Commission.

The basic philosophy underlying the formation of the M.C. was that monopoly conditions may create pricing and other conduct, which may operate against the public interest, and that therefore, there is a prima facie reason for looking into each case on its merits and acting on the results of such an investigation. This philosophy is still true today, for despite the present merger boom with the public and political support which it has attracted, the danger still exists that a monopoly situation can be exploited to the detriment of

6 e.g. Crown Milling Co. V The King [1927]AC 394 per Lord Finlay at p. 402
7 "... it is not for this tribunal nor for any tribunal, to adjudicate as between conflicting theories of political economy." 'The control of Restrictive Practices from 1956' C. Brock McGraw-Hill 1966 pp. 21-25
8 Cmd. 6527 1944 see esp. Para. 54
9 This body was renamed the Monopolies Commission by sec 28 of the Restrictive Trade Practices Act 1956 and is hereinafter referred to as M.C.
consumers and of the economy at large.

**Composition, structure and scope of the M.C.**

The composition of the M.C. has undergone several changes by way of amendment of the 1948 Act, by the Monopolies and Restrictive Practices Commission Act 1953, the Restrictive Trade Practices Act 1956, and the Monopolies and Mergers Act 1965. This last act repealed all previous sections concerned with the composition of the Commission, and lays down the framework for the Commission as it is constituted at present. Schedule 1 of the 1965 Act lays down the detailed regulations for the appointment and reimbursement of the commissioners, and gives the Board of Trade power to increase the maximum number of commissioners.

The M.C. has a full-time Chairman, Sir Ashton Roskill Q.C., and a part-time Deputy Chairman. At the beginning of 1968, there were a further 18 Commissioners, a body of economists, trade unionists, stockbrokers, industrialists and lawyers. There is also a further panel of 9 from which additional members may be appointed to the M.C., to take part in any investigation into a newspaper merger. Members are appointed by the Board of Trade and a member can be dismissed if unfit to continue in office or incapable of performing his duties under the Act.

The M.C. is supported by a permanent staff culled from the ranks of the Civil Service. Like the members of the M.C. itself, this staff has suffered criticism for being inadequately qualified for economic functions of the Commission, and as shall be seen, it is unfortunately the case that the authority hereinafter referred to as the 1953 Act, the 1956 Act and the 1965 Act.

10 Hereinafter referred to as the 1953 Act, the 1956 Act and the 1965 Act.

11 Sec. 1 1965 Act replaced sec. 1 1948 Act, the whole of the 1953 Act and sec. 28 1956 Act.

12 1965 Act Sched. 1 para. 1 (2)(4). Maximum number is 25 at present.

13 1965 Act Sched. 1 para. 12 (1).

14 1965 Act Sched. 1 para. 1 (3)(b); for the present membership of the M.C. see Annual Report by the Board of Trade H.C. 131 (1967-68); on 25th April 1968, the Minister of Technology announced that Mr. Brian Davidson had been relieved of his post as a member of the M.C. as a result of the Bristol-Siddeley Affair.
and effectiveness of the M.C. is very closely related to the respect commanded by the individuals concerned. While this is true to a certain extent with all public bodies, the M.C. does not have the opportunity of rebuffing criticism of its activities, in the way that most other bodies do.

The M.C. is an independent body, similar in its relationship with the Government to a Royal Commission. It operates separately from the judicial system in Britain, but does have extensive powers to require evidence, call for figures and documents and to report and recommend to Parliament. In certain respects, the M.C. can be regarded as a quasi-judicial body, but it is of importance to remember that it is only an advisory body, capable of making recommendations to Parliament through the President of the Board of Trade. The constitutional position of the M.C. will become clearer when the procedure associated with the Commission's rules is discussed.

The role of the M.C. may be divided into two main headings: restrictive practices and monopoly situation investigations and merger investigations.

Firstly, investigations into monopoly situations and restrictive practices. Here there is the continuing difficulty of defining, within the terms of a statute, what constitutes a monopoly situation, but under the 1948 Act, the Board of Trade can refer such a situation to the Commission for a report on the facts or on the facts and the consequent effects on the public interest. The Board of Trade can only make such a reference when it is satisfied that the 'conditions' specified in the 1948 Act as amended, apply. These 'conditions' originally referred to situations concerned with the supply

15 Sec. 8 1948 Act
17 Sec. 6 (1)(a) 1948 Act - i.e. the question whether the conditions to which the Act applies, in fact prevail, and if so, in what manner and to what extent; and the things which are done by the parties concerned as a result of or for the purpose of preserving those conditions.
18 Sec. 6 (1)(b) 1948 Act.
of goods of any description, the application of any process to goods of any description and the export of goods of any description from the U.K. Latterly, these 'conditions' have been extended to cover the supply of all services other than those rendered under a contract of service. 19

The 1956 Act restricted the M.C. in relation to agreements 'registrable' under that act, and such agreements cannot be referred by the Board of Trade. 20 However, where a monopoly situation reference includes a reference to non-registrable agreements, the Board of Trade may ask the M.C. if they find that the conditions to which the Act applies, prevail, and to confine thereafter their investigation to the question whether any such practices, as are specified, operate, or maybe expected to operate, against the public interest. 21

A further type of investigation which the Board of Trade can refer to the M.C. in relation to restrictive practices and monopoly situations, is that for a general inquiry and report. The Board of Trade is able to require the M.C. to report on the general effect on the public interest of practices commonly adopted as a result of, or for, the purpose of preserving conditions of monopoly, or any specified practices which appear to have the effect of preventing, restricting or distorting competition, in connection with the production or supply of goods or services. 22 The M.C. have completed one such general report, the Report on Collective Discrimination, whose minority conclusions formed the basis for the creation of the Restrictive Practices Court in 1956. 23 During 1967, the M.C. was asked to make reports on the general effect on the public interest of certain restrictive practices which may prevail in relation

19 Sec. 2 1965 Act
20 For the division of responsibility between the M.C. and the Restrictive Practices Court, see the Annual Report by the Board of Trade for year ending 31st Dec. 1956 Para. 2-6 H.C. 97 (1956-57)
21 Sec. 6(2) 1948 Act 22 Sec. 5 1965 Act replaced and extended sec.1948 Act
23 Cmnd. 9504 1955
to the supply of professional services and the practice of recommending resale prices. 24

Finally, under this heading, the Board of Trade may refer to the M.C. for investigation and report the question whether, and to what extent, the parties have complied with the recommendations of the Commission, or of the Board of Trade itself. This type of reference cannot be used to inquire into compliance with an order made by the Board of Trade under either the 1948 or 1965 Acts. 25

The second category of investigation is merger investigations. The Monopolies and Mergers Act of 1965 empowered the Board of Trade to refer a merger or a proposed merger to the M.C., provided it falls within the limits specified in the Act. 26 On receipt of a reference, the Commission investigates the facts to see whether the merger accords with these limits, and if so, investigates further and reports whether the fact of the enterprises already having ceased, or intending to cease, to be distinct enterprises, operates, or may be expecting to operate, against the public interest. Thereafter, the M.C. may, if it thinks fit, make recommendations as to any action which might be taken. 27

The Act extends this new power of investigation over the question of newspaper mergers, where a similar procedure is conducted, with the M.C. being augmented by the special panel of extra members mentioned above. 28

These then, are the two broad categories into which the M.C.'s investigations can be divided. Our next concern is to follow the procedures applicable to these investigations through their various stages.

24 See Appendix 3 Board of Trade Report H.C. 131 (1967-68)
26 Sec. 6 1965 Act
27 Sec. 6 (2) 1965 Act
28 Sec. 8 1965 Act and Sched. 1 Para 12 (1) 1965 Act.
Monopoly situation and restrictive practices investigations.

There are three distinct phases to the procedure under the 1948 and 1965 Acts – reference by the Board of Trade to the M.C., investigation by the Commission culminating in the submission to the Board of Trade of a report on its findings with relevant recommendations and action taken by the Board of Trade to enforce the recommendations of the M.C.

(i) Reference by Board of Trade.

The power of the Board of Trade to make references to the M.C. is a very important aspect of the relationship between the two bodies. The M.C. has no power to initiate an investigation on its own, for this power rests with the Board of Trade alone. Consequently here, right at the beginning of the control procedure over monopolistic behaviour, there is an opportunity for considerable political pressure to be brought to bear, and this could be said to seriously prejudice an even application of the control under the 1948 Act.

The pressures brought to bear on the President of the Board of Trade, in exercising his discretion to refer, may be such as to distort his appreciation of the central economic issues, possibly to the extent that only where enterprises are politically felt to be acting against the public interest, will a reference take place. An outstanding example of this, which is discussed more fully below, was the delay in referring Courtaulds to the M.C. Pressures may come from various sources. Firstly, the Board of Trade is willing to receive complaints in relation to matters which could be referred to the M.C. While the Board is under no obligation to refer any particular matter because a request to do so has been received, constant pressures by means of complaints

30 These requests are included in the Annual Reports made by the Board of Trade see e.g. Sec. 26-29 Report for year to 31st Dec. 1967 H.C. 131 (1967-68)
from inside Parliament and from without, may tend to distort the economic basis on which the references should be made.

A second source of political pressure is from the other members of the Cabinet. When the President of the Board of Trade indicates to the Cabinet, and thus to other Government departments, an intention to refer a particular industry, then other ministers may produce reasons for not wanting the status quo to be disturbed. Thus ministries like defence and health, which are particularly involved respectively with the aircraft and drug industries, through the extent of their public purchasing, may prefer that the industries remain unferred to the M.C. While it is to be welcomed that there is this consultation between the Board of Trade and other government departments, the possibility nevertheless exists, that strong ministerial pressure may divert the President of the Board of Trade from a consistent policy. This diversion may be due to the personalities of the individual ministers or to the fact that for some internal party reasons, a Government may be unwilling to investigate and bring to the public eye the affairs of a particular trade or industry.

There is also a third consideration which might divert the Board of Trade from a consistent policy of references. Many of the Board's other powers and responsibilities rely on co-operation and goodwill with industry for their success. This is particularly true with its responsibilities for regional policy, which are discussed below. Clearly, the decision to refer a particular trade or industry, will not encourage such good-will, and such considerations may affect the Board's choice of industry for inquiry.

The significance of all these pressures can be seen more clearly at the later stage in the procedure, where the Board of Trade is considering possible action on the M.C.'s recommendations. The negotiations which take place then, show quite clearly the opportunities for persuasion to divert the President of the Board of Trade from a consistent economic policy. ③

③ This is discussed fully below. Page 33 et seq.
Thus, for example, after the M.C.'s reports on Tobacco and Household Detergents, the action finally taken by the Board of Trade was considerably different from that recommended by the M.C.

To decide on a reference, the Board of Trade is not limited to cases where specific complaints have been received and indeed, unlike the Competition-Directorate of the E.E.C. Commission, the Board has not given any preference to such complaints in working out which cases to refer. There are certain criteria on which the choice is based, and these have included the wish to obtain a degree of 'case-law', the economic size of the particular industry or trade, its market structure and also its significance to the economy of the U.K. as a whole. All these are of course, reasonably objective criteria, but they are nevertheless liable to the subjective distortion of the political persuasions discussed above.

Any assessment of the procedure for references to the M.C. is difficult in isolation and it is only when the whole procedure is examined, that the conflict between the political nature of reference and enforcement and the quasi-judicial approach of investigation becomes apparent. Nevertheless, it is only too apparent that serious faults exist. A leader in 'The Times' at the time of the publication of the M.C.'s Report on the supply of man-made cellulosic fibres states:

"almost the most curious aspect of the Courtauld's affair is the fact that the monopoly, which the Monopolies Commission found to be against the public interest, has existed during the whole life of the commission, uninvestigated. On any grounds a company that enjoyed not only virtual control of its market but also the tariff protection so substantial,"

32 Since the 1956 Act removed the investigation of all 'registrable agreements' from the jurisdiction of the M.C., more attention has been given to the relative importance of the particular industry or trade rather than to the cartel or monopolistic structure on which its economic power is based.

33 'The Times' – Wednesday March 6th 1968 page 31; H.C. 130 (1967-1968)
that consumers of the fibre have no alternative suppliers, would be an early candidate for the commission's attentions."

The obvious inference from such statements is that political pressures have had an excessive say in the delay in reference and this is a regrettable trend in the procedures. Yet it is one inherently foreseeable in the consultation carried out by the Board of Trade, with the President ultimately responsible to Parliament. This is not suggesting that the decision to refer should be taken in isolation, without any consultation or co-ordination; rather, it is submitted that the procedure of reference might be more effectively administered, if delegated, to a more objective agency - an independent official, such as the Registrar of Restrictive Trading Agreements.

However, this latter post has not been free from criticism, which has centred round the fact that he has no discretion not to refer to the Restrictive Practices Court, an agreement supported by other Government departments or public bodies. This criticism could be avoided by refraining from imposing on the official or absolute duty to refer all monopolistic situations, falling within the criteria laid down in the Monopolies and Mergers Acts 1948 and 1965. His duties as to reference, would involve deciding on the cases to be referred, on his own initiative or on receipt of complaints and suggestions, from private and public sources. The Conservative white paper suggested that the official's decisions would be subject to the approval of the Board of Trade. This approval would be required because of the political significance of the decision to make a reference, which is greater than the decision to refer an agreement to the R.P.C., since the powers of the Board of Trade, after a M.C. investigation and report, are greater than those of the R.P.C. Only thus could a conflict

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34 This fault is to be connected by the new Restrictive Trade Practices Bill, which gives a political discretion to the B.of T. and other Government depts. to exempt agreements rather than giving a discretion to the Registrar.

35 "Monopolies, Mergers and Restrictive Practices" Cmd. 2299 March 1964
between the Registrar and the Government be avoided, but since the rejection of the Registrar's decision would clearly demonstrate the influence of political considerations, such a rejection is not a decision that any Government would take lightly. In practice therefore, it is to be expected that approval would be automatic.

Alternatively, the Registrar could operate in complete independence, with a total exclusion of any governmental control. Provided there was an adequate system of judicial control in the U.K., such an independence would be desirable. However, considering the present balance that exists between Parliamentary and legal controls, it is considered that complete independence is not a feasible proposition.

Nevertheless, despite a requirement of the Board of Trade's approval for his decisions, the appointment of a Registrar of Monopolies, would ensure a more objective selection of references and a more efficient use of the Commission's time. It would allow political factors a consideration against an economic framework, but would clearly demonstrate where these political factors were detracting from a rational economic policy.

(ii) Investigation by Monopolies Commission.

Investigation, culminating in a report with recommendations, is the second phase of the procedure. Once again, it must be stressed that it can only begin when a reference is received from the Board of Trade. For this investigation, the M.C. is given the power to determine its own procedure, subject to any general directions which it may receive from the Board of Trade. This power extends to the determination of which persons are to be heard in evidence, and the procedure by which this is to be done. The M.C. is also able to require persons to give evidence, produce specified documents and furnish estimates, returns or any other specified information. 36

Once a reference has been received, the M.C. begins a full factual invest-

36 Sec. 8 1948 Act. Failure to comply, renders an enterprise guilty of an offence punishable under the Act.
gation of the subject matter of the reference. Facts and figures are collected from as wide a range of sources as possible, and all interested parties are encouraged to supply relevant information. This factual investigation and analysis of the referred trade or industry is conducted by the permanent staff of the Commission, supervised by the Commissioners. The survey ranges over the facts and figures of the referred industry, with a similar financial investigation as well. These surveys make the reports of the M.C. very valuable source books of industrial information.

While the Commission has statutory powers to collect evidence, it has preferred to work with the co-operation of the companies involved, relying on persuasion rather than compulsion. This co-operation is very important for the following phases of the procedure - the Clarification Hearing and the Public Interest Hearing. The Clarification Hearing is used to clarify the factual information on which the Commission's report and recommendations are to be based. It takes the form of a formal meeting between the Commission and the individual companies concerned, and discussion is limited to the facts of the reference, to eliminate any factual errors, and thereby provide a sound basis for the Public Interest Hearing.

The investigation moves to its next stage with a 'public interest' letter sent to each company involved in the reference. This contains the Commission's summary of the facts, and lays down the public interest issues involved, as they are seen by the Commission. The M.C. does not however, express any opinion as to how the facts of the reference relate to the public interest issues involved, and this has led to the strongly held criticism of the Commission's procedure, that companies are not fully aware of the case to be met.

In reply to this letter, the companies are required to comment on the issues involved, substantiating with evidence, any views they may hold. Then each
company is requested to attend a Public Interest Hearing. These are formal meetings and the companies are usually represented by counsel. Since the facts have been 'clarified' previously, discussion centres upon the critical public interest issues. Once again, the Commission gives little indication of its views and the companies are consequently rather vague as to the case to be met.

Once the hearings are completed, the Commission settles down to the difficult task of formulating its conclusions and recommendations, subject to the four aspects of the 'public interest' to which the Commission must have regard, under sec. 14 1948 Act. Further information can still be supplied by the companies, but as they are still unsure of the Commission's attitude, this can only be done in a rather haphazard fashion. It is only when the Board of Trade has examined the M.C.'s report, and it has been presented to Parliament, that their attitude becomes known. When the procedure under the Monopolies and Mergers Acts 1948 and 1965 moves to its third and final stage, it is noticeably affected by the lack of communication existing between the Commission and the companies, as to the lines on which the Commission's final conclusions and recommendations are to be made.

Criticism of the Commission's procedure is directed mainly at the time taken and the vagueness of the issues, as the companies understand them. 37 The procedure could be considerably accelerated by a restriction on the scope of references, by naming specific companies, rather than referring a whole industry, and by increasing the permanent staff of the M.C. To meet the other criticism, more drastic changes of procedure would be required.

This lack of definition of the Commission's attitude to the central issues involved, has led to the certain degree of antagonism between the reference companies and the Commission. The companies contrast this uncertainty with the situation in the Restrictive Practices Court, where the 'case' against the companies, and consequently the case to be met, is very clearly presented to the Court by the Registrar. Their argument runs that if this procedure were introduced for proceedings before the M.C., then the companies under examination would be much better equipped to decide which arguments and evidence to press most strongly.

The critics would also like the introduction of some means whereby the Commission's other sources of evidence could be cross-examined by companies involved in the referred industry. On the other hand, the Commission regard these other sources of evidence as being of great value to its investigation and subsequent report, and believes that much of the information thus received, would not be forthcoming if the rules of secrecy and no cross-examination were removed. There is also the possibility of intricate libel suits arising from such cross-examinations, which is not the case with any facts contained in the final report, as the report enjoys the protection of parliamentary privilege.

A further criticism, related to that just discussed, by the possible solution which will be suggested, is that the M.C. combines more than one role. In some senses, the Commission acts as an inquiry agent in that it collects all the relevant information and evidence, and then it presents it to itself, as a tribunal, to consider in relation to the principles laid down in the 1948 and 1965 Acts. Despite its reticence on the matter, the fact that the Commission's

In the introduction to the M.C. Report on the supply of man-made cellulosic fibres H.C. 130 (1967-1968), the Commission mentions that a request by Courtaulds to cross-examine other witnesses was refused.
ultimate task is to produce conclusions and recommendations, dictates that 'charges' are formulated against the companies, albeit informally. Then the Commission, as a 'prosecutor', presents these 'charges' to itself, to be judged upon before the final recommendations are submitted to the Board of Trade. This combination of roles has attracted much criticism.

Suggestions for reform either advocate amendments to the present set-up or a change to a judicial procedure similar to that of the Restrictive Practices Court. An idea discussed in a white paper of the last Conservative Government was for the creation of a Registrar of Monopolies. 39 It was suggested that the new Registrar would be responsible for the factual and financial investigation, which the Commission at present undertakes. Thereafter, the Registrar would be required to submit the 'case' to the M.C., formulating 'charges' which the companies would be expected to answer. 40 His duties would be similar to those of the Registrar of Restrictive Trade Practices, as far as the conduct of the case was concerned.

Other suggestions have advocated a much more dramatic change towards the concept of a judicial procedure - establishing a court of law on the lines of the Restrictive Practices Court. Comparison is obviously drawn with that court, but the analysis in procedure suggested, does not correspond with a similarity in the subject matters. Restrictive practices provide clearer focal points on which can be centred judicial review, involving as it does, a clear-cut adversary procedure. Within the structure of Sec. 21 1956 Act, a clear burden of proof can be established and be required to be met. Criteria for judgement can similarly be specified and an adversary procedure can consequently give an

39 'Monopolies, Mergers and Restrictive Practices' Cmnd., 2299 1964
40 These 'charges' would not be so specific as the issues involved in the adversary process before the Restrictive Practices Court, but they would nevertheless give the referred companies a clear indication as to the case to be met and thereby much of the present confusion and antagonism would be eliminated.
adequate treatment to the problem at hand. But even here, the criteria have required to be developed by the decisions of the Restrictive Practices Court and the variations which have occurred in the court’s decisions, show that it is impossible to define absolute criteria in a statute.

With enquiries into the behaviour of a dominant firm or the effect on the public interest of a proposed merger, the question is whether an adequate examination and treatment of individual cases could be guaranteed by a judicial procedure operated in relation to specified criteria. This is doubtful for several reasons. The practices and activities associated with dominant firm behaviour are not such as can be clearly defined, in a manner similar to the restrictive practices, registrable under the 1956 Act. Further, concepts of industrial management and organisation are rapidly changing, as indeed, are public attitudes to such developments, and consequently, the evolution of any rigid criteria, essential for a judicial procedure, is impossible. A judicial procedure may also tend to be rather rigid and not sufficiently flexible to accommodate legitimate pressures from other aspects of Government policy. 41

On balance, the creation of a Registrar of Monopolies is preferred, created as an independent official, working in collaboration with the M.C., as a specialised quasi-judicial body. This official would be given the duties of making references to the Commission and of investigating and presenting such references before the Commission. 42 He might also be given some minor duties

41 Thus the proposed changes in the new Restrictive Practices Bill, which are discussed fully in the section of the Restrictive Practices Court. It is considered unfortunate however that the desired flexibility should be introduced as a political discretion vested in the Board of Trade, rather than an administrative discretion, exercised within clearly defined limits, by the independent Registrar.

42 A separation of these two functions is possible and might alleviate any fears of too large a discretion being placed with one official.
in relation to the enforcement of the Commission's recommendation, which we shall discuss shortly.

To ensure the benefits from the use of an independent official, control over the Registrar would require to be kept to an absolute minimum. As an independent official exercising statutory duties, the registrar would be liable to judicial control, exercised through the ordinary courts. In particular, a mandamus would lie to ensure that his discretion on whether to make a reference, had been exercised according to the correct procedure and within the limits as statutorily defined.

Parliamentary control would be strictly limited and would only exist in relation to the Board of Trade's refusal to agree with the Registrar's decision to refer. Such a rejection would be a clear focal point on to which the traditional forms of Parliamentary control would be directed. If it were decided that Board of Trade approval were not required, then there would be no place for Parliamentary control over the Registrar, but as was stated above, it is unlikely that a sufficiently developed system of judicial control exists at the present time.

Apart from criticisms of the Commission's procedure, there are also criticisms levied against the Commission's final conclusions and recommendations. These criticisms are concerned with the economic logic and competence of the reports and are not of great relevance for our study, for it is to be expected that there will be disagreement and dispute as to the conclusions to be drawn from any collection of economic facts and figures. However, where this dispute

43 What has particularly to be guarded against, is inexpert control over the delegation of powers to an expert body or official.
44 See further a discussion of the control exercisable over the Registrar of Restrictive Trade Practices during the chapt. on the R.P.C.: Padfield V. Minister of Agriculture 1968 2 W.L.R. 925 - also discussed below. It is important to note that while the scope of a mandamus is limited to securing the performance of a duty which is imperative rather than discretionary, there may be an imperative duty to exercise a discretion one way or another.
is of relevance to our study is in the fact that there is no appeal against the Commission's conclusions and recommendations. There is no procedure by which the Commission may reconsider its decisions, nor is there an appeal body to which any appeal could lie. However, the fact that the M.C. is merely an advisory body, advising the Board of Trade as to possible action, by means of its recommendations, means that when the Board comes to act on the basis of the Commission's report, the companies, realising that the President of the Board of Trade is in no way bound by the Commission's finding, consider it worthwhile to argue the points at issue with the Board of Trade, and therefore an appeal takes place de facto. The extent to which these appeals can be successful, becomes apparent when we consider the third phase of the procedure under the Monopolies and Mergers Acts 1948 and 1965.

(iii) Enforcement.

After the Commission has prepared its report, containing its conclusions and recommendations, it is delivered to the Board of Trade prior to its presentation to Parliament and subsequent publication. The Board of Trade is under a duty to lay the Reports before Parliament, but in certain instances, it is allowed to omit parts from publication, where such publications would be injurious to the public interest or to the business interests of the referred companies.  

Once the report is published and open to public criticism, both from the referred companies and third parties, the President of the Board of Trade announces the extent to which he accepts the conclusions and recommendations of the Commission, and begins negotiations with the referred companies as to

45 Sec. 9 1948 Act. This duty does not lie in relation to general reports asked for under sec. 5 1965 Act. The delay between delivery and publication is usually three months.
the action to be taken to enforce the Commission's recommendations, insofar as it intends to do so.

This enforcement may take place by way of voluntary agreements between the Board of Trade and the companies, statutory orders passed by the Board or even by ad hoc legislation. Voluntary undertakings have been the method most often employed for acting upon reports of the M.C., and are favoured partly because they do not involve any legal commitment between the parties. They are also more flexible than individual statutory orders, and can easily be readjusted or indeed withdrawn, if the circumstances change. Both sides are eager that these undertakings should eventually be agreed upon — the Board of Trade, because it is keen to have some action taken on the Commission's report, albeit different from that recommended, and the enterprises, because they realise that such an agreement must be reached if they are to avoid being subjected to a statutory order. The process of voluntary undertakings can be criticised for the time taken to reach an agreement, and also for the extent to which the undertakings differ from the Commission's original recommendations, and the cause for both these criticisms will become apparent when some individual examples are discussed shortly.

The Government's power to pass statutory orders is now exercised by the Board of Trade. 46 By order, the Board may declare agreements to be unlawful and require parties to terminate them; it may declare unlawful discriminatory practices as to the supply of and prices paid for goods or services; it has power to regulate prices for specified goods or services, and in addition to its power to refer mergers or proposed mergers to the M.C., it can prohibit or restrict the acquisition by one enterprise of the assets of another.

46 Sec. 3 1965 Act established the Board of Trade as the only 'competent authority' and amended and extended the powers contained in sec. 10 1948 Act.
and also order the division of any trade or business by the sale of any part of the undertaking or its assets. The Board of Trade may only exercise these powers for the purpose of remedying or preventing any mischiefs, which in their opinion, result or may be expected to result from the conditions or things, which according to the Commission, operate or may be expected to operate against the public interest, and according to the procedure laid down in the Act.

Failure to comply with such orders, as are made by the Board of Trade, is not a criminal offence, but they may be enforced by civil proceedings brought by the Crown with private persons retaining the right to bring civil proceedings in respect of any contravention or apprehended contravention. Over and against this advantage of enforceability, the main disadvantage in the use of statutory orders, is that they are very inflexible instruments for Government action and cannot readily allow for changes in Government attitude or the material circumstances facing the companies concerned. Likewise, an Order, as drafted and approved, may be ambiguous or inaccurate, causing actions to be brought by private individuals and upheld by the courts, against activities which are fully acceptable to the Government which drafted the order. Therefore, Orders have not been extensively used, and their great value lies in their being an 'encouragement' to enterprises to reach agreement with the Board of Trade on voluntary undertakings.

The device of ad hoc legislation has never been used to correct situations,

47 While these latter powers are intended to be complementary to the Board’s power to refer mergers or proposed mergers, their exercise is not limited to such references; sec. 3(5), 3(6), and 3(7) 1965 Act.
48 Sec. 3(11) 1965 Act 49 Sec. 11(2) 1948 Act
50 Orders have been made on three occasions:— (a) Monopolies and Restrictive Practices (Dental Goods) Order 1951 SI 1951/1200; (b) Monopolies and Restrictive Practices (Imported Hardwood and Softwood Timber) Order 1960 SI 1960/1211; (c) Solus Petrol (No 2) Order 1966 SI 1966/1314.
found by the Commission to exist in relation to a particular trade or industry, but particularly the Restrictive Trade Practices Act 1956 and also the Resale Prices Act 1964 were passed on the basis of an accumulation of more general findings made by the Commission in the course of its reports.

Consequently, the choice as to the method of enforcing the Commission's recommendations, lies between the Statutory Order and the voluntary undertaking, with the latter being overwhelmingly the more commonly employed. The significance of this emphasis in favour of voluntary undertakings, is that it highlights an overt willingness on the part of the Government to 'negotiate' voluntary undertakings. Because this 'negotiation' is liable to the pressures of the political arena in which the Government operates, the effect is to subject the Commission's conclusions and recommendations to a form of political appeal, an appeal which in the past, has sometimes operated against the Commission and thereby has devalued the Commission's work. There are two important instances of this which could be mentioned. In 1961 the M.C. reported on the Supply of Cigarettes and Tobacco and of Cigarette and Tobacco Machinery. This was an exhaustive study of the tobacco industry, in which the Imperial Tobacco Company (I.T.C.) held at the time, a dominant position of 60% of the trade, as opposed to the 30% controlled by Gallahers. In addition to its proportional trade superiority, the Imperial Tobacco Company owned 42% of the shares of Gallaher, a fact which was not uncovered until the Commission's inquiry.

Despite the abolition of collective Resale Price Maintenance by the 1956 Act, price competition in the industry was non-existent with smaller manufacturers always following Imperial's lead. Nevertheless, the M.C. felt that the I.T.C. had shown responsibility and restraint in the use of its monopoly position, and that it was only in relation to I.C.T.'s holding in Gallahers that

51 H.C. 218 (1960–61)
some action was required. The members of the Commission accepted Imperial's assurance that it had never interfered in any way in the management of Gallahers, and that it did not at present, have any intention of doing so in the future, but felt that this was not an adequate guarantee for the future. In any case, the Commission believed that the continued holding of Gallaher's shares by I.T.C. acted to reduce competition, by rendering less financially serious to Imperial, any increase in Gallaher's share of the market, which would almost inevitably be achieved at Imperial's expense. Consequently, the M.C. recommended that I.T.C. should divest itself of any direct or indirect financial interest in Gallahers.

After six months of discussion and in the face of much critical comment, the President of the Board of Trade accepted Imperial's assurance as sufficient evidence to protest the public interest, and thereby rejected the M.C.'s recommendation. While the factual content of the report was in no way affected by this rejection, the fact that the Commission had taken almost four years to accumulate and assimilate the facts, and from then, to determine its conclusions and recommendations, only for the latter to be rejected, could not but devalue and damage the M.C.'s public standing.

More recently, the Commission reported on the supply of Household Detergents. 52 Again the report included an exhaustive survey of the referred industry, an industry dominated by two firms - 'Unilever' and 'Proctor and Gamble'. The Commission concluded that the 'monopoly conditions', as defined in the acts, existed and that the policies pursued by the companies with regard to advertising and to pricing, were such as to reinforce these 'monopoly conditions' and thereby, operated against the public interest. Therefore, it was recommended that substantial price reductions be made in the wholesale selling prices of both companies, and that the Board of Trade should encourage the two

52 H.C. 105 (1966-67) August 1966
companies to agree that at least a 40% reduction in promotion expenses should accompany any price reduction.

'Unilever' in particular, disagreed with the Commission's report and regarded its conclusions to 'be carrying to an intolerable degree the assumption that bodies of this kind can dictate to industry how it is to run its own business.' 53 Consequently, when approached by the Board of Trade, who had at first expressed approval and acceptance of the Commission's findings, the companies flatly refused to agree on voluntary undertakings to reduce their wholesale selling prices. However, aware of the implications of entering upon a prolonged legal battle with the Government, the companies added to this refusal what they termed to be 'constructive counter-proposals'. It was these which formed the basis of the settlement announced by the President of the Board of Trade in April 1967. 54 The settlement announced was that, given freedom on their main brands, the companies would undertake to provide a range of alternative, but non-advertised products, at prices 20% down on the normal brands, and also to keep prices static for two years on all their detergent prices. The companies in welcoming the agreement, argued that the President of the Board of Trade had, in effect, acknowledged that the Commission's conclusions as to the relationship between price policies and advertising and promotion were wrong. Indeed, by announcing an inquiry into advertising because 'we know too little about the economic effects of advertising in general and its relationships to competition', the Board of Trade were said to have destroyed the last vestiges of the Commission's case, and of the President's premature acceptance of it.

Such a claim may have been rather dramatic, albeit natural, after the

54 745 H.C. Deb. 1610-1614 26th April 1967
important concessions won by the companies from the Board of Trade, but it does
demonstrate the possible extent of the political appeal exercised by the Board
of Trade over the Commission's conclusions and recommendations. If this proc-
ness is to continue and the Board of Trade continue to introduce extra-economic
considerations at both the reference and enforcement stages of the procedures,
then it seems strange that the Government should wish that the inquiry stage
should remain so independent from such considerations and influences. Indeed,
suggestions as to a Registrar of Monopolies tend to strengthen the Commission's
independence, and these were supported in the Conservative White Paper. 55

In other fields too, the trend is to set up independent bodies to carry out
aspects of Governmental activity, the theory being that once a policy has been
decided upon, within defined limits, and the criteria by which it is to be
operated established, then it is more efficient and more acceptable to leave
the actual exercise of the policy to agencies given various degrees of inde-
pendence. Two examples of such bodies are discussed below – the Industrial
Reorganisation Corporation with complete independence of action, and the
Highlands and Islands Development Board with a limited independence. Both
bodies operate successfully and have removed the respective policies which
they administer from undue political pressures.

With the M.C., however, the position would appear to be that the degree of
independence can be, and regularly is, rendered worthless by the subsequent
actions of the Board of Trade. This situation is so readily accepted that the
referred industries feel almost 'invited' to argue the whole case over again,
either publicly or in private, and to exert every kind of legitimate pressure
in the negotiations in order to gain as favourable a decision as possible.

Statements such as those made by the President of the Board of Trade, when

55 'Monopolies, Mergers and Restrictive Practices' 1964 Comnd. 2299
announcing the publication of the Commission’s Report on Courtaulds, are an example of this open invitation to reconsider the reference – an invitation which the companies are only too ready to accept. It is indeed welcome that the question of Courtaulds’ future acquisitions should be considered ‘in the light of the Government’s policy of promoting desirable rationalisation in the textile industry.’ What is questioned here is the method by which this should be done. As has happened in the past, will this be the beginning of a long drawn-out process by which the Commission’s recommendations are gradually departed from and forgotten, without the Government having to openly repudiate them immediately? Or will it be a genuine effort to reconcile the need for an effective competition policy with the equally important need for industrial rationalisation? If, as one hopes, it is the latter process which has been begun, one must ask why the M.C. is not able to do this, by consultation, discussion and readjustment of its views, before it finally concludes and recommends. Because the M.C. is procedurally excluded from this co-ordinating process and it is left to the Board of Trade, then it is inevitable that the final action agreed on, either by Statutory Order or by voluntary undertaking, may differ from that recommended by the M.C. Assuming that this co-ordination should take place, it can either be politically exercised by the Board of Trade, subject to diversionary pressures mentioned above, or independently exercised by the M.C., albeit subject to an ultimate political control, which would exist as long as the powers of enforcement are left with the Board of Trade.

There are two suggestions as to the way by which this co-ordinating process could be integrated with a more effective role for the Commission. Firstly, assuming a retention of the powers of enforcement by the Board of Trade, the

56 760 H.C. Deb. 60 (W.A.) Here the Board of Trade hinted, that part of the recommendations, referring to restraints on any further acquisitions by Courtaulds in the textile industry, might be negotiable.
Board could be required to submit back to the M.C. for reconsideration with its reasons, any disagreements it may have with the Commission's conclusions and recommendations. This reconsideration by the M.C. could involve consultation with the Board and any other government departments or public bodies whose opinions are considered important to the disagreement. If agreement were still not reached between the M.C. and the Board of Trade, and consequently the action agreed on or undertaken by the Board differed from that recommended, the Board could be required to defend its action before a Select Committee, which would then report to the House of Commons as to whether the Board's action was justified. Such a procedural change would retain for the Commission's conclusions and recommendations, an importance and significance, which they have tended to lose, and would ensure that if political considerations are to ever-ride economic factors, then at least a more effective check and control could be installed into the process.

Alternatively, the enforcement of the recommendations could be left to the M.C. itself. This would involve turning the M.C. into a full court of law, with power to enforce its decisions through proceedings for contempt of court. Such a change, of removing from Parliament all control over this aspect of regulation, is too radical a solution in the present political climate, if indeed it would be an effective solution, and must therefore be excluded from other discussion. Thus, the former suggestion may now be linked with suggested roles for a Registrar, mooted above.

The procedure in relation to monopoly situation and restrictive practices

57 Sec. 10 (e)(ii) 1948 Act laid down that where the order to be made was contrary to the findings of the Commission, then a suitable resolution had to be passed by the House of Commons. This obligation was removed under the 1965 Act. Here it is suggested that its reintroduction should be linked with a Select Committee, where the control would be more thorough and effective than in the House of Commons and that it should be extended beyond action by means of statutory order to cases where voluntary undertakings are agreed upon.
references might be as follows. A post of Registrar of Monopolies might be created as an independent official. He would be responsible for referring matters to the M.C. for investigation and recommendation, and in doing so, would be required to follow a specified procedure of consultation, in line with general directions as to policy given by the Board of Trade. To obviate any of the difficulties as to a lack of flexibility, which hampered the Registrar of Restrictive Trade Practices, the Registrar would be given a clearly defined discretion as to his duties. The question as to whether decisions should be subject to the approval of the Board of Trade, would be dependent on the development of a more adequate system of judicial control.

This same Registrar would have the duties of investigating the facts of the reference, and of presenting the 'case' to the M.C. This would clarify the M.C.'s procedure and would answer many of the criticisms dealt with above. Once the Commission has reached its conclusions and recommendations, the Board of Trade would be required to consider its attitude to the report, and its subsequent action in collaboration with the M.C., and if disagreement still persisted, would be required to substantiate its actions before the Select Committee and through it, to Parliament.

A further aspect of the Registrar's function could be the policing of voluntary undertakings, made between the Board of Trade and the referred companies. He would have, at his disposal, the power to refer to the M.C. the question as to how far the companies have complied with the undertaking given to to the Commission. Where a statutory order has been made, contravention is a matter to be brought before the ordinary courts, and where this is done on behalf of the Crown, the registrar could carry out this function.

58 The power at present held by the Board of Trade under sec.12 1948 Act.
Finally, it might be noted that while these suggestions have been discussed in relation to references as to monopoly situation and restrictive practices, they are of relevance in relation to merger references to which we now turn.

Merger Investigations

Control over mergers, insofar as their formation was concerned, was non-existent in the U.K. until 1965. Only if questions of inward foreign investment were involved, was the Government allowed to interfere, through Treasury controls. However there was consistent political pressure that powers be acquired to control and in some cases, to prohibit intended mergers, for it was argued that there was little purpose in controlling monopolistic behaviour, if one of the main routes to a monopolistic situation was left outwith any control. 59

The task of competition policy in this area is twofold. Firstly, there is a need to prevent the emergence of oligopoly or monopoly situations, without adequate economic or technological justification, and secondly, where technological factors are of importance, there must be consideration of whether a reduction in competition is justified. 60 Here there is clearly required some form of control over the formation of mergers, increasingly a fact of economic life. In this a government's policy should not be to prevent completely the formation of mergers, but rather to control them in line with its other policies of industrial rationalisation and economic planning. Thus, in the U.K. the approach chosen was a pragmatic one with mergers being assessed to ascertain whether they are on balance, in the national interest. This control was instituted by the Monopolies and Mergers Act 1965 and entrusted to the same constitutional set-up as the control exercisable under the 1948 Act.

59 'Monopolies, Mergers and Restrictive Practices' 1964 Cmd. 2299
60 See 'Concentration or Competition: A European Dilemma' D. Swannand D.L. McLachlan. Chatham House - P.E.P. European Series No.1 Jan. 1967
Control is therefore exercisable with an ad hoc approach, which allows a full consideration of the advantages and disadvantages associated with any merger and should allow effective co-ordination with Government policy as to the regional distribution and relocation of industry and the sponsoring of industrial rationalisation. The underlying principle of the 1965 Act is to persuade companies to consult the public interest before merging, with delaying powers given to the Government to ensure that this takes place.

When a merger has been proposed or has existed for less than six months, and if the merged firms control or would control one-third or more of a commodity or service in the U.K., or a substantial part of it, or where the assets taken over exceed £5 million, the Board of Trade may refer the matter to the M.C. The Commission is then required to investigate and report as to whether the 'merger conditions' are satisfied. If this is the case, then the question of public interest must be considered and appropriate recommendations made. The Board has power to delay any merger action pending the report of the Commission, and after a report by the Commission that the 'merger conditions' exist and that the facts found, operate or may be expected to operate against the public interest, the Board of Trade may exercise the full range of powers discussed below in relation to monopoly situation and restrictive practices references.

The need for this has been greatly increased by the creation of the Industrial Reorganisation Corporation and the introduction of the Industrial Expansion Bill.

In the interests of both companies and the Government, it is essential that this consultation takes place quickly and the length of the M.C.'s investigation is limited to 6 months, with a possible extension to 9 months. Sec. 6(6) 1965 Act.

Sec. 6(1)(a) and (b) 1965 Act; the £5 million limit can be varied by Board of Trade. Sec. 6(3) 1965 Act.

Sec. 3(5), 3(7) and 6(11) 1965 Act e.g. the two orders restricting the merger of the Amalgamated Dental Co. Ltd. with the Dental Manufacturing Co. Ltd. and the Dental Supply Co. of New York. Restriction of Merger (No 1) Order and (No 2) Order 1966. SI 1966/136, SI 1966/137. Both orders were revoked by the Restriction of Merger (Revocation) Order 1966. SI 1966/992.

Sec. 3 1965 Act; supra. p. 34
The 1965 Act, acting in part on the recommendations of the Report of the Royal Commission on the Press also gave to the Board of Trade, power to control newspaper mergers. The Act states that the Board must refer a proposed merger to the M.C., where the combined circulation of the newspapers concerned would exceed a daily average of 500,000 and that it will be unlawful to carry through such a merger without the consent of the Board of Trade. This reference provision is qualified in that where the newspaper to be taken over is not an economic concern, and it is not intended that it should continue as a separate newspaper, then the Board must give an unconditional consent to the merger without referring the matter to the Commission, and also by the fact that the Board may give its consent to the merger without a Commission report, where the case is one of urgency or where the newspaper taken over has an average daily circulation not exceeding 25,000 copies and the newspaper is not an economic concern. The important aspect of the control is that without written consent from the Board of Trade, a merger coming within the ambit of the control, is unlawful and void and sanctions are enforceable against persons who conclude a merger without the consent of the Board of Trade, or in contravention of any conditions laid down by it. The Board of Trade's power to refer newspaper mergers has been used twice, and on each occasion, the proposed merger has been approved.

(i) Reference.

Here again, the sole right to refer rests with the Board of Trade. In relation to mergers, other than newspaper mergers, the Board can limit the factual

66 Cmd. 1811 1962
67 Sec. 8 1965 Act. The figure of average circulation can be varied by the Board of Trade by Order.
68 Sec. 8(3) 1965 Act
69 (a) The Times Newspaper and the Sunday Times Newspaper H.C. 273 (1966)
   (b) Thomson Newspapers Ltd. and Crusha and Son Ltd. H.C. 66 (1967-68)
aspect of the Commission's investigation to either of the criteria for reference and also to a specified part of the U.K. when considering the extent of control involved in the particular industry. 70 The power to refer is in relation to proposed mergers and to mergers which, not earlier than six months previously, ceased to be distinct enterprises. In relation to the latter category, the power is exercisable after six months, where there has not been notification to the Board of Trade and where the facts have been known to the Board of Trade for a period not exceeding six months. 71

Against the criteria specified in the Act, the Board of Trade is left with the discretion as to whether to refer. While this decision comes before the Commission's report, which will effect very largely the action taken by the Board of Trade in relation to referred mergers, nevertheless, this initial decision, as to whether to refer, is extremely important and in many cases, will decide whether a proposed deal is to be frustrated or cleared. 72 Thus some deals have been frustrated like the Ross Group-Associated Fisheries 73, Imperial Tobacco-Smith's Crisps 74, United Drapery Stores-Burtons 75, and the two bids for the Amalgamated Dental Co. 76; some have been delayed such as the proposed mergers between Radio Rentals and Thorn Electrical, and the proposed Lloyds-Barclays-Martins bank merger which are at present before the M.C.

70 Sec. 6(1)(b)(i) and (ii) 1965 Act 71 Sec. 6(9) 1965 Act
72 For if a merger is not referred, it is automatically cleared and while reference is not equivalent to a finding that a merger is against the public interest, in practice it is to be regarded as such a prima facie finding by the Board.
73 Ross Group Ltd. and Associated Fisheries Ltd. A report on the proposed merger H.C. 42 (1966-67) - the report concluded that the merger would operate against the public interest.
74 The threat that the powers under the 1965 Act would be invoked, prevented Imperial Tobacco from continuing its bid for Smith's Crisps. It already controlled Golden Wonder Potato Crisps.
75 United Drapery Stores Ltd. and Montagu Burton Ltd: a report on the proposed merger Cmd. 3397 1967 - the Commission by a majority of 7 to 1, concluded that the merger could be expected to operate against the public interest. The Board of Trade accepted the majority view.
76 See note (55) supra; Report H.C. 147 (1966)
while others such as G.E.C.—A.E.I. and British Motor Holdings—Leyland have been quickly cleared. So far, there have been ten merger references made to the M.C. and up till the end of February 1965, 169 mergers, satisfying the criteria for 'merger conditions' specified in the Act, had been considered but not referred by the Board of Trade. 77

Because the number of mergers referred is only a small proportion of the total considered, the policy by which the Board of Trade operates, is important, and yet it has never been particularly clear. Some indication can be gained from statements made in Parliament and it has been clearly stated the President of the Board of Trade only refers mergers when it appears that the question of possible detriment should be investigated. 78 However, this does not amount to much other than a prima facie judgement of the merger, and it does appear that political considerations are very important, particularly where the Government is more actively concerned in the sponsoring of industrial development and reorganisation. It is now the practical rule that mergers involving the Industrial Reorganisation Corporation or the support of Government departments are automatically exempted from reference by the Board of Trade, and confidential discussions within the Government ensure this before any public announcement of Government assistance is made. While such a rule is essential to prevent any conflict between the Government's competition policy and the increasing number of publicly sponsored mergers, nevertheless some criticism of the procedure may be made. Before the Board of Trade's clearance is given confidentially, prior to the merger being announced, certain of the implications cannot be fully assessed, nor are all interested parties given an adequate

77 760 H.C. Deb. 289 (W.A.)
78 758 H.C. Deb. 127 (W.A.); see also 759 H.C. Deb. 403(W.A.) where the President of the Board of Trade stated that it is no part of the Government's policy to hold back mergers except where the public interest is threatened.
opportunity to present their views. Because of the serious industrial repercussions which a merger may have, the argument for allowing some public debate on the proposals before clearance is given, is considerable. Such a debate might not ensure that mergers were referred to the Commission, because one would expect that mergers, which are prima facie against the public interest, would be referred by the Board on its own accord. However the debate might draw attention to some of the expected social and economic implications of the proposed merger and thereby allow the Board of Trade to impose certain conditions before clearance is given. 79

An indication of the industrial implications of a merger and therefore, of the importance of the Board of Trade's initial decision can be seen in the experience of the recent G.E.C.-A.E.I. merger, and this experience will be described in detail, because of its relevance to our whole study. As a result of the merger, G.E.C. are closing two factories and some laboratories and these closures have caused considerable dislocation of labour in the areas concerned. The resulting unemployment has stirred up considerable political inquiry as to how far the President of the Board of Trade was aware of the intended industrial reorganisation, when he accepted the proposals for the merger. 80 The reply given was that such decisions on the utilisation of capacity are commercial in nature and for the firm to take, but that assurances had been given that the decisions would as far as possible, be in line with Government regional policies.

A further statement from the Board of Trade reiterated this attitude and added that, while encouraging firms to discuss with the Government, at the earliest possible opportunity, any plans for closure, under no circumstances

79 The need for such a public debate also exists in relation to mergers, where there is to be no public involvement, but where clearance is also sought from the Board of Trade before a public announcement is made.

80 758 H.C. Deb. 222 (W.A.)
could it be expected that these commercial decisions be referred to the appropriate Regional Economic Planning Council for it to decide, whether they were in the public interest. 81 The unrest was still not eliminated and the matter was further raised at the Adjournment Debate on 20th February 1968. 82 It was argued that the Government policy of supporting mergers and handing over rationalisation and modernisation to the 'golden boys' of British Industry, did not adequately ensure that responsibility towards the workers and the community was covered, and while the company's primary responsibility had to be to its shareholders, the fact that public expenditure was involved, demanded a public responsibility. 83

The Government was urged to formulate a code of conduct for private industry to be used where a merger is being negotiated. This code should require consultation with workers and their representatives, with local authorities and with regional planning councils, before any closures or redundancies are settled. The importance of detailed planning of intended closures, with adequate consultation to determine and arrange alternative accommodation, was stressed, and the statement that regional planning councils could have no say in such a decision, was referred to as making a complete nonsense of regional government.

In reply, it was stated that the merger had received the endorsement of the I.R.C., as the basis of the expected rationalisation and improved efficiency, and that then, as when the Board of Trade examined the merger, there was no clear detail available as to the intended closures. The efforts the Government were making to attract further employment to the area, were stressed, but importance was also attached to the fact that a 'social conscience' towards the workers should not hold up the socially and economically essential task of modernising

81 758 H.C. Deb. 35-39
82 759 H.C. Deb. 389-400
83 In the G.E.C.-A.E.I.case, Government payroll subsidies are expected to reach £400,000 a year.
industry. It was stated that the Government were giving consideration to a code of conduct, applicable to all private firms in receipt of public funds, and that the suggestion that some consultation with the regional economic planning councils might be possible was being sympathetically considered. Nevertheless, in this instance, the closure of H.E.I.'s factory at Woolwich caused 6000 men to be unemployed and it was only after the company's announcement that the Government were able to take any measures to alleviate the problem caused. Consequently, the significance of the Board of Trade's initial decision cannot be over-emphasised.

Undoubtedly the introduction of a code of conduct and an extension of the public debate, as suggested above, would help to bring to light many of the problems which proposed mergers are likely to create. However, despite these changes, the final decision of the President of the Board of Trade would still be open to considerable political pressures, some of which may cause distortions in policy application. Because of this possibility, there is justification for suggesting that an independent registrar should also be given the duty of deciding on merger references.

Companies could be required to notify proposed mergers to the Registrar. He would then be required to make public such notifications and also to consult any Government departments or public bodies with a legitimate interest. If, as a result of this preliminary consultation, the Registrar was of the opinion that prima facie the merger was against the public interest, he would be under a duty to refer it to the M.C. Here again, the considerations discussed above are relevant, as to whether the Registrar's decision to refer should be subject to Board of Trade approval.

This necessity to notify a merger need not affect the secrecy which companies must maintain before announcing plans to merge. The proposed merger
could be finalised as far as the companies were concerned. All that is required here, is notification to the Registrar before clearance can be given or reference is made to the M.C. Where a merger is being sponsored by the Industrial Reorganisation Corporation, and the proposal is to be cleared with regard to the Monopolies and Mergers Act 1965, before it is made public, then the lesson to be learnt from the C.B.C./A.E.I. repercussions is that clearance should consist of a fuller consideration of the likely repercussions of the merger. If this consideration is to remain an internal matter, then it requires a strengthening of the consultation procedure within the governmental machinery.

The advantage of delegating the responsibility for merger references to an independent official would be that it would thus be possible to ensure that references were made against the background of known criteria, and after formal consultation with all interested Government departments and public bodies. Such a system would operate alongside 'The City Code on Takeovers and Mergers', which was published on March 27, 1968, and is intended to control the financial aspects of any takeover bids. Together, they could adequately control the industrial and financial implications of company mergers.

This discussion may appear to have ranged far from a consideration of the Board of Trade's power to refer mergers or proposed mergers to the M.C. It has done so to emphasise the importance of the Board of Trade's decision, for once a merger has been cleared, the only method by which control can be exercised is by beginning a monopoly situation and restrictive practices investigation, which is concerned with dominant behaviour rather than mere dominant size.

(ii) Investigation by Monopolies Commission

An important difference with the investigation of merger references, is the time limit placed upon them. The reference itself specifies the period
allowed, which normally must not exceed six months, although a three month extension is possible. With newspaper mergers, the time limit for investigations is three months, with possible extension for a further three, and the Board of Trade must decide within one month whether an application for consent to a newspaper merger has to be referred to the M.C. or whether consent can be given. Therefore, the time taken by the Commission to investigate and report on merger references, sharply contrasts with that taken with monopoly situation and restrictive practices investigations.

Once a reference has been received, the Commission is prepared to accept evidence from the companies involved in the merger, other companies which may be concerned as suppliers or customers, government departments and other interested bodies. The consultation with the companies would appear to be adequate and with merger investigations, it is certainly not beset with problems as to the vagueness of the 'charges' to be met, for the question to be decided is simply whether the merger or proposed merger operates or may be expected to operate against the public interest.

However, the M.C.'s consultation with Government departments and other public bodies is not so comprehensive. Each of the reports published, states that some has taken place, but it is not enumerated, and it appears that the Commission is more concerned with the Government departments and other bodies as buying and selling enterprises, rather than as bodies involved in some related aspect of public policy. For instance, in the report on the proposed merger between the B.M.C. and the Pressed Steel Company the consultation which took place seems to have concentrated on the Ministries of Defence and Aviation in relation to their role in the manufacture of aircraft. As such,

84 Sec. 6(6) 1965 Act
85 Sec. 8(1), 8(3) 1965 Act
86 H.C. 46 (1966)
they were consulted in a similar manner to the other customers of the Pressed Steel Company. The same pattern would appear to have been followed in the other merger investigation, and since the evidence given to the Commission is not published, there is no means of ensuring, for example, that adequate consultation took place with the Board of Trade as to its regional responsibilities or with the Ministry of Technology or the Industrial Reorganisation Corporation with their concern for industrial rationalisation.

After investigation of the facts and their relation to the public interest, the Commission is required to consider whether any action should be taken, either by the Board of Trade through its powers under the 1965 Act, or otherwise, and to make suitable recommendations to that effect. 87 With newspaper mergers, the Commission is required to report whether a proposed merger may be expected to operate against the public interest, and must consider any conditions which might be attached to any consent given to the merger. 88 Once the reports are completed, they are presented to the Board of Trade for the last stage of the procedure.

(iii) Enforcement

The question of the enforcement of the Commission's recommendations has not produced any difficulty in relation to merger references. On every occasion, the President of the Board of Trade has accepted the Commission's conclusion, whether it has gone against the merger as with Ross Group-Associated Fisheries 89 and United Drapery Stores-Montague Burton 90 or whether it has found that the merger does not operate and may not be expected to operate against the public interest, as in B.M.C.-Pressed Steel Company. 91

87 Sec. 6(2) 1965 Act
89 H.C. 42 (1966-67)
91 H.C. 46 (1966)
88 Sec. 8(3) 1965 Act
90 Cmnd. 3397 (1967)
This has avoided any criticism that at this stage in the procedure, political considerations are being given undue importance as against the economic assessment of the merger.

In both cases where the Commission found evidence against the proposed merger, it was abandoned by the companies involved, once the Government had indicated its support for the Commission's conclusions. But this is not the full extent of the 1965 Act's achievements. The possibility of the Government's powers being invoked, persuaded Imperial Tobacco to abandon its bid for Smith's Crisps which together with Imperial's interest in Golden Wonder Potato Crisps, would have created a control of over 80% of the potato crisp market. Such a process could be repeated, particularly after the informal and confidential consultation with the Board of Trade, which at present takes place before merger plans are made public.

If the need arose to enforce the Commission's conclusions and recommendations, the Board of Trade has at its disposal the power to make Statutory Orders as described above in relation to monopoly situation and restrictive practices investigations. 92 No exercise of this power has been required, but use has been made of the Board's power to delay mergers pending a reference to the M.C. This latter power can only be used once a reference has been made to the Commission, and unless previously revoked, the orders thus made, cease after 40 days after the report of the M.C. has been presented to Parliament, or on the failure of the M.C. to report within the time limit stated in the reference. Exercise of this power took place in relation to the two rival bids for the Amalgamated Dental Co., the report on the proposed mergers concluded that they would not be against the public interest and the two delaying orders were subsequently revoked. 93

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92 See above page 34  
93 See note (64) above; report H.C. 147 (1966)
The lack of activity by the Board of Trade in relation to the enforcement phase of the merger control procedure, is closely linked with the small number of references actually made to the M.C., and serves as further evidence of the importance of the initial decision taken by the Board of Trade as whether to make a reference.

Assessment of the procedure under the Monopolies and Mergers Acts 1948 and 1965

For present purposes, an assessment is concerned with the procedure instituted under the Acts of 1948 and 1965, and this procedure's relationships with Government departments and other public bodies. Thus the analysis of the procedure carried out above has tried to determine where such relationships do, and could possibly exist, and any suggestions or criticisms made, have been put forward with a view to a greater co-ordination in governmental economic activity.

For an accurate picture, however, a general indication of the procedure's, and particularly of the Commission's, value and standing would be helpful. Firstly the reports produced must be recognised as having great value as sources of information, for, like the reports of the Prices and Incomes Board, they are the result of investigations which would not normally be undertaken. With its access to and powers to require all relevant information and evidence, the M.C. has brought to public knowledge many facts and figures previously unknown, and as such, the reports have been welcomed by all sides of industry.

However, when it comes to interpret these facts in the light of contemporary economic theory, the Commission does not seem to command the same political and industrial respect - a respect which it requires to carry out its job effectively. Some disagreement is inevitable in a field where there can be no clearly defined right or wrong, and correspondingly, where the position of a body such as the M.C. is unclear. However, the lack of respect for the Comm-
mission seems to stem from the impression that it is not fully aware of the complex issues involved. The impression is gained both from the reactions of those who have appeared before the Commission and from the criticism levied against some of its more recent reports. 94 Allied with the considerable costs involved for the parties to a reference, and the adverse publicity which in many cases may result, it is not surprising that there is some feeling of resentment against the Commission at the present time.

Looking at the procedure as a whole, we have discussed how the action finally taken or agreed on by the Board of Trade, can differ from that recommended by the M.C. The resulting confusion gives the impression of a lack of coordination on economic control and regulation between the M.C., the Board of Trade and other public bodies, and this leads us to our next topic.

Relationships between the M.C. and Government departments or other public bodies.

In general, these do not appear to be as fully developed as they might be. With both types of reference, consultation may take place between the Board of Trade and interested departments and bodies like the I.R.C., before a reference is made. Such consultation however, remains confidential and uncontrolled. When the Commission comes to investigate the reference and subsequently to publish its report, the consultation is made more public and any lack of it, more obvious.

A survey of some of the recent reports would seem to substantiate such a lack. Reference was made above to the question of consultation with Government departments during merger investigations, and it was noted that any consultation seemed to be with the departments as sellers or customers of the products in question, rather than as administrators of Government policy in

94 e.g. criticism of Report on Courtaulds - see Sunday Times 10th March 1968 p. 35
related fields.

Undoubtedly, it is true that members of the M.C. will be aware, as individuals, of the Government policies being pursued in other fields. However, there does not appear to be any systematic consultation by the M.C., as a body, with these departments or other public bodies, as to the significance of the subject matter being considered by the Commission for the particular policies being administered by these bodies, be they for regional development, industrial reorganisation, the alleviation of unemployment or whatever. To see to what extent this is true, we must now look individually at some of the departments and bodies, with which the M.C. has, or should have a developed relationship.

(a) Board of Trade

The relationship between the M.C. and the Board of Trade has been fully discussed in relation to the Board’s power to make references to the M.C., and to enforce the conclusions and recommendations contained in the subsequent report. However, there are other functions of the Board of Trade which have relevance to the subject matter of references made to the M.C. When regional policy in the U.K. is discussed, the full extent of the Board’s responsibilities in this field will become apparent, and the industrial repercussions of the recent G.E.C.-A.E.I. merger show to what extent, instruments of regional policy have to deal with the side-effects of industrial mergers.

Therefore, a definite co-ordination between the M.C.’s investigation and the exercise of the Board of Trade’s regional policies, might enable the Commission to arrive at more practicable conclusions and recommendations, which would be more acceptable to both industry and Government, and thereby, likelier to be enforced than at present.
(b) **Department of Economic Affairs**

Under the aegis of the D.E.A., the Industrial Reorganisation Corporation and the Economic Development Committees of particular industries may well arrange voluntary agreements between firms, for the purposes of standardisation and rationalisation. Such agreements are more likely to come into conflict with the Restrictive Trade Practices Act 1956 - a conflict which the proposed Restrictive Trade Practices Bill is intended to eliminate. However, the problem is still of relevance to the M.C., and while a direct conflict can be avoided by the Board of Trade's discretion as to the references it makes, once again, the lack of a procedure for formal consultation and co-ordination between the M.C. and these bodies, cuts the M.C. off from a first hand knowledge and comprehension of the policies which these bodies are pursuing.

(c) **Industrial Reorganisation Corporation**

With the I.R.C. and its promotion of greater industrial reorganisation and rationalisation, the possibility of any conflict between the M.C. and the I.R.C. is prevented by the Board of Trade's discretion as to reference. It is for the Board of Trade and not the M.C. to decide whether a merger sponsored by the I.R.C. is acceptable, and after consultation with the Board of Trade, the I.R.C. would not proceed with a proposal if there was a risk of public detriment sufficient to justify further investigation by the M.C. 95 Thus it is the relationship between the Board of Trade and the I.R.C. which is of importance. A similar process is likely to be evolved in relation to any industrial rationalisation financially sponsored under the Industrial Expansion Bill.

95 Stated by the President of the Board of Trade in reply to a question whether mergers proposed by the I.R.C. would be exempt from the operation of the 1965 Act. The answer was 'no' since in all cases, mergers proposed by the I.R.C. would be discussed at an early stage with the Board of Trade. 725 H.C. Deb. 348 (W.A.) First Report of Industrial Reorganisation Corporation H.C. 252 May 1967.
If there is no requirement for a link between the I.R.C. and the M.C. in relation to merger investigations, this is not the case with monopoly situation and restrictive practices references. In such cases, the referred companies may seek to justify their behaviour on the basis that it will bring about industrial reorganisation and realitation. While this is the problem with which the I.R.C. is primarily concerned, there exists no formal link by which the M.C. can consult the I.R.C. in such instances, and although some ad hoc consultation may in the future, take place, it is suggested that the non-existence of a consultative link cannot but lead to a lack of co-ordination between the two bodies.

(d) Prices and Incomes Board

Because both the M.C. and particularly the P.I.B. are trying to clarify their functions, there has been some confusion as to their respective roles. The trouble has arisen over recommendation and price control made by the M.C. On any reference, the M.C. is able to recommend some system of price control over the referred industries, and the Board of Trade can enforce this by Statutory Order. Likewise one of the basic threads of the prices and incomes legislation is that of compulsory price control. The difficulty arises when the offending price increases come from the abuse of a 'monopoly situation' as defined by the Monopolies and Merger Acts 1948 and 1965. To which body should such a case be referred? The position seems to be that such a case will still be referred to the M.C., but as yet, is not clear.

A further aspect of the relationship between the M.C. and the P.I.B. is the extent to which each body takes cognisance of the reports of the other. An instance of this is the proposed merger between Thorn Electrical Industries and Radio Rentals, which is at present being investigated by the Commission.

96 Sec. 3(4) 1965 Act.
Recently, the P.I.B. brought out a report on the T.V. rental industry, dealing with the price record of both companies - Radio Rentals having a good record for keeping prices down, the Thorn rental subsidiary of D.E.R. the reverse.

In the evidence to the M.C. on the proposed merger, the Consumer Council referred to the P.I.B. Report, but it remains to be seen to what extent, if at all, the M.C. accepts the report's findings.

(e) Restrictive Practices Court

There are no procedural links between the R.P.C. and the M.C. There is no means by which one body can consult the other, before a decision is reached. Thus there is no consultation and co-ordination between the two bodies, one independent, the other semi-independent, which are concerned with the execution of competition policy in the U.K. While the benefits to be gained from the use of independent bodies largely depend on their being free to reach their own conclusions, it would be no breach of their independence to allow the M.C. and the R.P.C. to consult with one another, if either body felt the need to do so.

Informally, there may be co-ordination through a mutual reading of reports and judgements and the new powers sought by the Board of Trade to enable them to exempt restrictive agreements from registration, should enable some co-ordination with the Board's discretion to make references to the M.C. Nevertheless, the lack of any procedural relationship between two bodies whose functions are so economically interrelated, is both surprising and disturbing.

The general conclusion to be drawn from the M.C.'s relationships with these various other bodies, is that the further Government policy on industrial rationalisation develops, both through publicly sponsored mergers and through the instruments of regional policy at its disposal, so the more redundant the M.C. appears to become. Increasingly, the real decisions are being taken out-with the M.C. and its position is therefore becoming anomalous and requires
extensive consideration. It is to be hoped that this will have happened before the publication of the forthcoming white paper on 'Monopolies, Mergers and Restrictive Practices,' expected this summer.
(II) Restrictive Practices Court

(i) The scope of restrictive practices control

The creation of a separate form of control over restrictive practices arose out of the experience of the Monopolies Commission. As a result of the various investigations and reports of the Commission, it became apparent that certain categories of restrictive trade practices operated in more than one industry. This discovery prompted the Board of Trade to make a general reference to the M.C., asking for a report on the general effect which certain 'specified practices' had on the public interest. These 'specified practices' were primarily exclusive dealing practices, aggregated rebates and collective resale price maintenance schemes, and the M.C.'s report on Collective Discrimination concluded that in general these practices were contrary to the public interest. The majority of the members of the Commission recommended that all such practices be made illegal, allowing certain exemptions where benefit to the public interest could be proved. However, the minority of the Commission felt that the evidence considered, did not justify such an outright condemnation of restrictive trade practices. As a control, they recommended a system of registration for restrictive agreements, to be followed by individual scrutiny and prohibition of those agreements found to operate against the public interest.

When the Government's legislative intentions became clear, the proposed measure was a compromise with the bias in favour of the minority's recommendations. Only certain collective measures used for enforcing resale price maintenance were to be prohibited outright, while on the other hand, individual resale price maintenance was to be legalised. Other restrictive agreements would have to be registered and ultimately, referred to the Restrictive Practices

1 Comm. 9504 (1954-55) 2 Ibid para. 246-248 3 Ibid para. 255-259
Court, a new body which would be created. All registrable agreements would be presumed to be against the public interest, but through scrutiny against legal criteria, the R.P.C. could grant exemptions. Thus registrable agreements would be valid until ruled against by the Court.

On this basis, the Restrictive Trade Practices Act 1956 was passed, creating the R.P.C. and the Registrar of Restrictive Trading Agreements. Before discussing the constitutional structure of the control thus instituted, and the judicial problems which the R.P.C. has to face, a brief summary of the economic scope of the control exercised by the R.P.C. is necessary.

The 1956 Act covers any agreement between two or more persons involved in the production or supply of goods, or in the application to goods of any process of manufacture, where restrictions between the two or more parties are accepted. The restrictions must concern the prices associated with the goods, any terms or conditions involved, the quantities or descriptions of the goods, the processes of manufacture applicable to the goods or the persons or classes of person, who may be concerned in the manufacture and supply of the goods. Certain restrictions are to be disregarded and certain agreements are exempted from the application of Part I of the 1956 Act. In particular, the Act does not apply to any agreement which is expressly authorised by any enactment or by any scheme or order made under any enactment. Likewise, there is non-application to patent and trademark agreements. Otherwise, all agreements, to which the Act applies, are subject to registration, and while such registration has not been compulsory up till the present, it will become so under the new Restricted Trade Practices Bill. After registration, it is the duty of the

4 Hereafter referred to as R.P.C. 5 Hereafter referred to as the Registrar
6 Sec. 6 1956 Act – note the provision of services is not covered by the Act.
7 Sec. 7 1956 Act 8 Sec. 8 1956 Act 9 Clauses 6 and 7 of the new Bill.
Registrar to refer the agreements to the R.P.C., to determine their compatibility with the public interest.

All agreements registrable under the 1956 Act are presumed to be against the public interest. However, the act does provide certain gateways through which agreements may be exempted as being favourable to the public interest. The grounds covered by these gateways are public safety, the alleviation of localised unemployment, benefit to exports, protection of the firms involved against monopolistic behaviour, protection against a predominant buyer or seller and finally, the most important ground of 'offering a specific and substantial advantage' contained in gateway (b) (11). If any of these gateways are satisfied, then the R.P.C. can uphold as valid, an agreement registrable under the 1956 Act, provided that it is further satisfied that the restriction is not unreasonable, having regard to the balance between the benefit, satisfying the gateway, and the detriment to the public or to other persons, resulting from the operation of the restriction.

The R.P.C. is also given jurisdiction over agreements concerned with resale price maintenance. The 1956 Act placed an absolute prohibition on agreements used for the collective enforcement of conditions as to resale prices. Such measures include withholding supplies of goods or attaching unfavourable terms and conditions to such supplies, but excluded agreements between two parties where there were only undertakings by the purchaser in relation to the goods sold, and by the vendor in relation to other goods of the same description.

10 Sec. 21 1956 Act
11 There is also a further ground which allows restrictions intended to protect other restrictions, which have been upheld by the Court as in the public interest - sec. 21(g) 1956 Act; A further gateway is to be added by clause 10 of the new Restrictive Trade Practices Bill to the effect that the "restriction does not directly or indirectly restrict or discourage competition to any material degree."
12 Sec. 24 1956 Act.
Thus, the act allowed individual enforcement by legal proceedings of conditions as to resale prices. The manufacturer was allowed to enforce his resale price conditions against any distributor who acquired the goods with notice of the conditions, as if the distributor were a party to a contract of sale with the manufacturer. Where there was an agreement among firms to practise individually enforceable resale price maintenance, then such an agreement was registrable under Part I of the 1956 Act, and liable to investigation by the R.P.C. Such was the case with the Net Book Agreement considered by the Court in 1962. There, a system of resale price maintenance operated by the Publishers' Association was upheld as being in the public interest, in that it supported an extensive system of book-sellers throughout the country. Along with earlier cases like the Cement Makers' Federation Agreement and the Standard Metal Window Group's Agreement, this case stands as judicial authority for the view that in certain instances, resale price maintenance can be beneficial to the public interest.

Thus when public sympathy began to desert R.P.M., as desirable economic behaviour, and pressure increased for a prohibition on individual as well as collective price maintenance, the case was strong for introducing an exemption procedure to any system of control. Therefore, in the Resale Prices Bill, introduced in March 1964, an outright prohibition on R.P.M. was avoided, and in any case, such a prohibition would have been contrary to the traditional British approach of having monopoly situations and restrictive arrangements judged on the individual merits of the particular case.

13 Sec. 25 1956 Act
14 (1962) L.R. 3 R.P. 246
16 (1962) L.R. 3 R.P. 198
17 Resale price maintenance (hereafter referred to as R.P.M.) has also been upheld by the M.C. in relation to tea, rubber footwear and tobacco products. It will be interesting to see whether these findings will be repeated by the R.P.C., which is at present considering R.P.M. on shoes and will soon consider R.P.M. on tobacco.

Sec. 1 1964 Act.
The Resale Prices Act 1964 avoids any terms of a contract for the sale of goods, which provide for the maintenance of minimum prices to be charged on the resale of the goods within the U.K. Any indirect enforcement of minimum resale prices by the withholding of supplies or discrimination in prices or terms is also prohibited, although certain provision is made to allow suppliers to counteract the use of 'loss leaders'.

However, the prohibition is not absolute and the R.P.C. is given the power to exempt certain categories of goods. Parties wishing to claim exemption had to register with the Registrar of Restrictive Trading Agreements, those categories of goods for which exemption was sought, and such registration was required to take place within three months of the commencement of the Act. However, late applications for exemption can be made directly to the R.P.C. Once categories of goods are registered with the Registrar, then all R.P.M. agreements in relation to these categories are granted temporary exemption from the prohibition, until the category is referred to the R.P.C. and it has reached its decision.

The Registrar compiles a register of the categories of goods registered and from this, he must make references to the R.P.C., subject to any directions which the Board of Trade may give as to the order in which references are to be made. Goods which have already been before the R.P.C., under the 1956 Act, are restricted and agreements originating from enactments or orders.

Sec. 1 1964 Act. These terms of restrictions registrable under the 1956 Act, which are not void until the R.P.C. has taken a decision under Sec. 20 1956 Act or the High Court has made an order under sec. 18(2) 1956 Act.

Sec. 2 1964 Act

Sec. 5 1964 Act; sec. 13 1964 Act also exempts automatically, schemed agreements originating from enactments or orders.

Sec. 6(2) 1964 Act

In such an instance a prima facie case, on one of the grounds for exemption, is required before leave to apply is granted and the case will thereupon be decided by the Court on its merits. There is no period of temporary exemption as is normal after application for exemption.

Sec. 6(3) 1964 Act - a supplier of a class of goods can continue R.P.M. even although he himself did not make an application for exemption. Registration and any eventual exemption relate to categories of goods, not the agreements of particular suppliers.
can still be referred under the 1964 Act, but the Court may treat as conclusive any finding of fact made in the previous proceedings, unless there is prima facie evidence of a change of circumstances. 26 The R.P.C. takes its decisions on the references it receives.

Exemption can be granted on the basis of five criteria by which the R.P.C. has to make its decision whether the R.P.M. in question is beneficial to the public interest. These criteria are concerned with whether the R.P.M. is essential to the quality of the goods on sale, the number of establishments in which the goods are sold, the level of prices at which the goods are retailed, the public health or any necessary services provided in connection with the goods. It must also be shown that the detriment to the public or customers, which is thus avoided, would outweigh any detriment to them from the continuance of R.P.M. 27 On this basis the R.P.C. must reach its decision, and may make an order exempting specified categories of goods from the prohibition of the Act. 28 The Court has jurisdiction to review any previous decision on the application of the Registrar or of any supplier of goods affected by the decision, but such an application requires the leave of the Court, which will only be granted on proof of a material change in circumstances. 29

The provisions of the 1964 Act do not affect the existing right of the supplier to maintain and enforce maximum prices, or to recommend an appropriate resale price. Contravention of the provisions of the 1964 Act is not enforceable by criminal proceedings, but any person affected, has a remedy against the supplier by way of action for breach of statutory duty; the provisions are also enforceable by civil proceedings for an injunction or

26 Sec. 5(3) 1964 Act 27 Sec. 5(2) 1964 Act
28 Sec. 5(1) 1964 Act 29 Sec. 7(2), (3) and (4) 1964 Act.
other appropriate relief. The Crown is also able to seek an injunction. 30

Once the Resale Prices Act was passed, the widespread application for exemption drew adverse criticism from the Consumers’ Council and others. It appeared that the delay involved, until a reference was made to the R.P.C., would allow firms to evade the provisions of the Act, at least for a number of years. However, the R.P.C. is eliminating the categories of goods claiming Temporary Exemption and there are only a few important ones left. 31 So far, only one category has been exempted permanently. This is the R.P.M. on books, incorporated into the Net Book agreement. Here the Registrar decided not to oppose the Publisher’s Associations claim to be exempted. This followed on the clearance given to the Net Book Agreement in proceedings before the R.P.C. under the 1956 Act. 32

Because of the strict interpretation applied by the Court and the expense involved in fighting a reference, many applications have been abandoned. Important examples of this, are motor cars and spirits, and very recently, more than 40 of the main cosmetics firms announced their intention to abandon R.P.M. Thus, there is little doubt that the 1964 Act had reduced considerably the amount of R.P.M., and because R.P.M. is concerned primarily with consumer goods, the direct benefits to the public have been noticeable.

That then, is the economic scope of the control at present exercised by the R.P.C. However, many of the criticisms levelled against the scope and nature of restrictive practices control, have been accompanied by demands for further legislation. These criticisms are discussed more fully below, but it would be advantageous, at this stage, to briefly examine the proposed changes

30 Sec. 4 1964 Act; such civil action does not lie under the control of the 1956 Act, until the R.P.C. has made an order under sec. 20 1956 Act, but see clause 8 of the new Bill.
31 These include tobacco, clothing, records, drugs and diaries, with the case concerning shoes in progress at the moment.
32 (1962) L.R. 3 R.P. 246
contained in the Restrictive Trade Practices Bill, at present going through Parliament. 33

The economic scope of the control will be extended over information agreements, and the Board of Trade will be able to designate by order, which categories of these agreements are to be liable for registration. 34 These information agreements occur where manufacturers agree to tell each other about price changes, once they have been made. In practice however, the manufacturers have told each other before making price changes and thus have been able to co-ordinate any changes they have made. This loophole, through which the restrictive behaviour of many manufacturers has slipped, has been the subject for comment by the Registrar, in the periodic reports which he makes. He has repeatedly called for control over information agreements, and while his arguments have been accepted by all parties for several years, it is only recently that some legislative initiative has been taken. 35 The other substantive change in restrictive practices control is that a further gateway is being added to sec. 21 1956 Act. This will allow a restriction which 'does not directly or indirectly restrict or discourage competition to any material degree.' 36

The Bill also contains procedural changes, the reasons for which will become more apparent as our discussion continues. Firstly, a time limit is to be placed on registration. Registrable agreements will have to be registered before the restrictions take effect or before the expiration of three months of making the agreement, whichever the earlier, and agreements not timeously registered, will be void and liable to an injunction issued on behalf of the

33 It was given its 2nd Reading on 30th April 1968. 763 H.C. Deb. 1005-1046
34 Clause 5
36 Clause 10
Registrar. Third parties affected by the operation of unregistered restrictive agreements, are also to be given power to seek civil remedies from the courts. 37 These provisions will greatly alleviate the Registrar's problem of seeking out unregistered agreements, for although there are to be no criminal sanctions for non-registration, the fear of suffering civil sanctions in the form of damages, payable to an aggrieved third party, may be sufficient to deter many companies from pursuing unregistered restrictive practices.

The other main procedural changes are intended to prevent any conflict between the Government's restrictive practices policy and its other economic policies, particularly in relation to industrial rationalisation and to prices and incomes. This required some flexibility to be injected into the control, and this is to be done by allowing the Board of Trade to exempt certain agreements from registration, for a specified period. This discretion is to be exercised on agreements for import savings or product standardisation, where the national interest is involved and where the aim is to promote efficiency in the trade or industry concerned. 38 This flexibility will exempt voluntary agreements arranged on the initiative of the I.R.C. or the E.D.C.'s or a Government department. 39

As a corollary to the Government's prices and incomes policy, and as an extension of an existing power, 40 the Bill names a list of Government departments to be given the power to exempt from registration, agreements relating exclusively to prices and designed to prevent or restrict price increases, or to secure reductions, whether or not there has been a reference to the Prices

37 Clauses 6.7 and 8
38 Clause 1
39 e.g. the activities of the Ministry of Technology under the Industrial Expansion Bill, may involve the encouragement of voluntary agreements between enterprises.
40 Sec. 24 Prices and Incomes Act 1966 which allows a price agreement exemption from restrictive practices control, only after a recommendation from the Prices and Incomes Board.
With both these innovations the question to be asked is whether these discretionary powers will detract from the expected benefits of delegating the reference stage to an independent Registrar. Certainly, the delegation of responsibility to an independent body is liable to be frustrated, if the exercise of the powers delegated, is subject to a politically exercised discretion. However, the increasing governmental participation in the economy, has raised doubts as to whether the whole question of references can remain delegated to an independent registrar. The increasing political content of the decision to refer, makes it unlikely that the whole question could be contained within any defined criteria, as a basis for the Registrar's operations. Over and above the economic criteria on which the Registrar normally makes his decisions, there has to be some means whereby the political factors are considered.

The solution proposed by the new Bill, reserves this consideration completely to the Government and takes the matter completely outwith the control of the Registrar. However, it is suggested that it would be more satisfactory if all registrable agreements still required registration, and that if a Government department wished exemption for a particular reference, then an application for it could be made to the Registrar. The Registrar would decide whether it should be granted or refused, subject to the agreement of the Board of Trade. If the exemption were to be granted, with or without a recommendation to that effect by the Registrar, then it would be made an Order, laid before Parliament. While reserving the final decision to the Government, this procedure would clearly demonstrate the political element in the final decision and would provide a focal point on to which the traditional Parliamentary controls could be directed.

Finally, there is provision that the Registrar be no longer compelled to
bring insignificant or determined agreements before the R.P.C. 42

Because these changes have not yet become law, it is of course, impossible in any way to assess what they will eventually achieve. In particular, one cannot be sure that the fact, that unregistered registrable agreements will become void, will radically alter the number of secret restrictive practices, which are operated. However the Bill does signify a tougher and at the same time, a more flexible approach to restrictive practices control, and does much to answer many of the criticisms of the present procedure, which we now turn to consider.

(ii) The constitutional structure and procedure of restrictive practices control. 43

Registrar:

Under the Restrictive Trade Practices Act 1956, the post of Registrar of Restrictive Trading Agreements was created. The Registrar holds office during Her Majesty's pleasure, and may appoint assistant registrars and staff. 44 Since its inception, the post has been held by Rupert Sich.

The Registrar's duties are three fold. He is charged with the preparing, compiling and maintaining of a register of the restrictive agreements, registered under the 1956 Act. 45 Then he is required to refer these agreements to the R.P.C., subject to such directions received from the Board of Trade as to the order in which proceedings are to be taken. 46 Finally, the Registrar is required to ensure that any decisions taken by the R.P.C. are conformed to, and

42 Clause 9
43 The structure will be discussed basically in relation to the control, exercisable under the 1956 Act. Only where there are important differences will reference be made to the 1964 Act; see generally 'Competition and the Law' A. Hunter. London 1966 Chap. 5.
44 Sec. 1 1956 Act
45 Sec. 1(2) 1956 Act - a similar duty exists in relation to categories of goods registered under sec. 6(1) 1964 Act.
46 Sec. 1(2) 1956 Act and sec. 6(1) 1964 Act.
he can raise an action for an injunction to enforce them. A breach of any undertakings given to the R.P.C. can be referred to the R.P.C. by the Registrar. Such a breach is treated as contempt of court, and can result in fines being imposed on the companies involved.

(a) Registration:

At present, all agreements falling within the scope of the control under the 1956 Act, are subject to registration, but they do not become void until after an adverse decision of the R.P.C. This compares with the control under the 1964 Act, where R.P.M. is illegal in relation to unregistered categories of goods, and where agreements attempting to enforce such R.P.M. are void. In neither case, does failure to register carry criminal sanctions, but under the 1964 Act, and under the proposed Restrictive Trade Practices Bill, such failure will expose parties to actions for civil remedies.

There are various particulars which must be supplied when an agreement is registered. Basically, these relate to the parties, to the agreement and the terms of the agreement. Certain relevant documents must also be supplied. In most instances, these particulars are forthcoming voluntarily, but where an agreement is unregistered, after the time limit set by the Board of Trade, and the Registrar has reasonable cause to suspect that such a registrable agreement is unregistered, then the parties to the suspected agreement may be given notice requiring the requisite information to be furnished to the Registrar. The proportion of new registrations due to such an initiative by the Registrar, is steadily increasing and has caused the Registrar some concern. He believes

47 Sec. 9 1956 Act – The Board of Trade has a power to declare by order, the date by which different categories of agreement are to be registered, but there are no sanctions as yet to enforce these time limits e.g. the Registration of Restrictive Trading Agreements Order 1956 S.I. 1956/1869.
48 Sec. 4 1964 Act; clause 8 1968 Bill
49 Sec. 10 1956 Act.
that this is because there is no effective sanction for non-registration. The provisions of the new Bill should partially alleviate the problem, by making unregistered agreements void in respect of civil proceedings, and liable to actions for injunction raised on behalf of the Registrar.  

Similarly, where an agreement is registered, but where the Registrar feels that certain information is being withheld, he may give notice to the parties requiring the information to be supplied. The parties thus notified, may be required to give evidence on oath before the High Court. Where false particulars have been given or where notified parties have failed to supply the required information, then the parties concerned are liable to penalties as laid down in the Act. In this connection, the first successful criminal prosecution took place recently, when two traffic light firms were fined a total of £1,000 for suppressing details of their price agreement.

A further power is given to the High Court in cases where the requisite information has not been forthcoming from the parties to an agreement. If the court regard the failure to supply information as wilful, then the court may make an order declaring the agreement in question to be against the public interest. This order is equivalent to that which would normally be made by the R.P.C. and may be discharged by the latter court after due application. Such an application may only be made after a period of two years, from the date of the order made by the High Court.

The Registrar is empowered to make regulations for the purpose of the reg-

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50 Registrar's 4th Report Jan. 1967 Commd. 3188 (1966-67) p. 3 – the Registrar called for all restrictive agreements to be unlawful, unless expressly authorised by the R.P.C.

51 Sec. 14 1956 Act 52 Sec. 15 1956 Act – High Court in England, Court of Session in Scotland.

53 Sec. 16 1956 Act

54 The case was decided on 25th Jan. 1968, but is as yet unreported.

55 Sec. 18(2) 1956 Act 56 Sec. 20(2) 1956 Act.
istration of agreements. Such regulations cover the procedure of registration and the information to be excluded from the register. 57 The act also makes provision for the non-disclosure of certain information, unless the disclosure is necessary for the purpose of the control instituted under the Act. 58

The form and contents of the register are laid down by the Act, and apart from a 'special section', the register is open to public scrutiny. 59 The Board of Trade has a discretion to direct what information is to be contained in this 'special section', and while such information is not available for public inspection, the Registrar can bring it before the court and the court can make a direction to that effect.

Certain powers are given to the Board of Trade to authorise the Registrar to remove from the register, agreements which appear to the Board of Trade to be of no substantial economic substance. 60 These provisions of the 1956 Act are to be more fully developed under the new Bill, to ensure that insignificant agreements are not referred to the R.P.C. For the same purpose, a discretion is to be given to the Registrar as to whether he should refer to the R.P.C., agreements that have been determined by the parties, to them. 61

One problem in relation to registration, which has not yet been discussed, is where there is a dispute as to whether the arrangement or agreement in question, is registrable under the 1956 Act. Jurisdiction in these matters is given to the High Court. 62 An aggrieved person may apply to the High Court for an order for the register to be rectified, in relation to particulars which the person disputes. Similarly, a party to an agreement or the Registrar, may ask the High Court to declare whether or not the agreement is one to which the Act

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57 Sec. 19 1956 Act e.g. Registration of Restrictive Trading Agreements Regulations 1956 S.I. 1956/1654
58 Sec. 33(1) 1956 Act 59 Sec. 11 1956 Act 60 Sec. 12 1956 Act 61 clause 9 1968 Bill
applies. Where the problem is one of construction or of law, then the High Court has a clear jurisdiction, and when such a matter has been raised before the R.P.C., it is held that it should be decided by the High Court. 63 Sometimes however, the problem is one of fact, as for instance, whether an agreement ought to be inferred from certain facts or actions. Here the position as to jurisdiction is less clear and the R.P.C. has come to decisions in such cases. 64

The interpretation of the term 'agreement' given by the High Court, is crucial to the success of the restrictive practices legislation. A narrow interpretation would allow opportunities for the exercise of ingenuity in evading the prohibition by arrangements falling technically outside its scope. An early decision re Austin Motor Car Co. Ltd.'s Agreements 65 gave a very legalistic interpretation to the term and this encouraged company legal advisers to devise schemes for avoiding registration. However, in the important decision of Re British Basic Slag Ltd.'s Application 66, it was held by Cross J. that there was a registrable agreement if the parties had communicated with each other in some way, and that on that basis, each had intentionally aroused in the other, an expectation that he would act in a particular way. This decision was a departure from the formalistic approach in 'Austin' and this trend was followed by the Court of Appeal in Schweppes Ltd. V. Registrar of Restrictive Trading Agreements. 67 The Court of Appeal over-ruled the court of first instance where it had been held that whether an agreement fell within the Act, 'depended on its terms and not on the purpose which parties had in

63 e.g. In Re Net Book Agreement where the R.P.C. was asked to consider whether an agreement from which parties could withdraw at will, was registrable. (1962) L.R. 3 R.P. 246

64 e.g. In Re Blanket Manufacturer's Agreement (1959) L.R. 1 R.P. 208 affirmed by the Court of Appeal in (1959) L.R. 1 R.P. 271. The R.P.C. held that a resolution of a trade association did not amount to a registrable agreement.


mind when making it'. The Registrar's contention, that the motives of the parties could render an agreement liable to registration, even although the written document was outside the scope of the Act, was accepted and the Registrar was granted permission for discovery of documents relating to the circumstances in which the agreement was entered into by the parties.

Likewise, the R.P.C. has extended its interpretation of the term 'agreement' to include a rate notification scheme, where the parties had accepted a moral obligation towards each other, not to quote a rate below the lowest rate notified under the scheme, without prior consultation. The case was Re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd.'s Agreement 68, and the decision demonstrates that the R.P.C. is in agreement with the Court of Appeal, in wishing to ensure that all 'arrangements' within the spirit of the 1956 legislation are brought within legal control. Thus both courts are aware of the importance to restrictive practices control, of the interpretation given to the provisions as to registration. 69

(b) Reference to the Restrictive Practices Court

The second function of the Registrar is to refer registered agreements to the R.P.C., for it to determine whether they are contrary to the public interest. The Board of Trade is able to issue directions to the Registrar as to the order in which these references should be carried out. Initially, the Board of Trade issued four such directions, but since October 1959, the Registrar has been allowed to exercise a free discretion on this matter. In referring agreements, the Registrar has tried to refer as widely varied a group of agreements as possible, and those where a judgement of the R.P.C. appears

68 (1966) L.R. 6 R.P. 49
most likely to affect other registered agreements.

Whatever order he may choose, the Registrar is at present, under an absolute duty to refer all registered agreements to the R.P.C. In certain cases, this duty may conflict with Government policy in other fields. Thus, the new Bill will give the Board of Trade and other government departments power to exempt agreements from registration. Likewise the duty is unnecessary and wasteful in relation to a substantial number of agreements which are abandoned by the parties before reference is made to the R.P.C. Therefore, the Registrar is to be given a discretion as to whether to refer determined agreements. It is however vital that the Registrar has the power to refer determined agreements to the R.P.C., where he considers it desirable. This allows the Court to issue a consent order, declaring the restrictions in the determined agreement contrary to the public interest and thus, a succession of abandoned agreements can be prevented.

The Registrar and his staff also prepare the case to be presented to the R.P.C., after a reference has been made. When we come to discuss the Court's procedure, the Registrar's responsibilities for the presentation of the case will become clearer.

(c) Enforcement

Finally, the Registrar has a responsibility to ensure that parties comply with the decisions of the R.P.C. Under the 1956 Act, there is no specific duty placed on the Registrar, but he is able to prevent companies from disregarding the R.P.C.'s decision by alleging that a fresh agreement has been made and is being operated. The means by which such a fresh agreement might be brought to

\[ \text{Note:} \text{footnotes omitted for brevity.} \]
the attention of the Registrar, are similar to those by which unregistered agreements originally come to his notice. The Registrar may decide to make inquiries after complaints from the competitors or from government departments, or as the result of the Registrar's staff noticing references to restrictions in the registered agreements of related industries. Further, a fresh agreement may be suspected if the companies' competitive behaviour, vis-a-vis one another, remains similar, to what it was before, after their agreement has been struck down.

The Registrar can allege the existence of a fresh agreement and can give notice to the parties requiring information to be furnished to him. Any fresh agreement or arrangement, which fails to be registered under the 1956 Act, amounts to contempt of court. This happened in Mileage Conference Group of Tyre Manufacturer's Conference Ltd.'s Agreement. The original agreement of the Tyre Manufacturers had not been defended before the R.P.C. and an undertaking was given by the members of the Tyre Manufacturer's Conference, that they would not enter into an agreement or arrangement of like effect. On the basis of this undertaking, the R.P.C. made an order that all the restrictions in the original agreement were contrary to the public interest. However, on legal advice, a 'Rate Notification Scheme' was devised, whereby it was hoped that the same degree of co-operation could be achieved, without involving restrictions registrable under the 1956 Act.

A complaint was received by the Registrar from Birmingham Corporation, after level tenders had been submitted for a contract, and after further investigation, the registrar applied for writs of sequestration of the property, and assets of the member companies of the Conference as a sanction for their contempt of court. The R.P.C. held that the 'Rate Notification Scheme' amounted to a 'registrable agreement' and the companies involved were fined.

74 Sec. 14 1956 Act 75 (1966) L.R. 6 R.P. 49
£10,000 each.

The significance of this third aspect of the Registrar's functions is therefore, to bring to the attention of the R.P.C. instances of contempt of court.

These then are the duties of the Registrar and his staff, and it remains only to consider the control that is exercisable over them. When the 1956 Act was passed, and the office of Registrar was created as a quasi-judicial one, there was some apprehension about the fact that the Registrar would not be directly responsible to a Minister, and thereby, the power of parliamentary control over him would be curtailed. In practice, the problem of the control exercisable over the activities of the Registrar, has been of little importance, but it is of value to examine the aspects of control which exist, particularly in relation to the creation of a Registrar of Monopolies, which was suggested above.

The only control which the Government has over the Registrar, is that the President of the Board of Trade may issue directions as to the manner in which he exercised his discretion to refer agreements to the R.P.C. and authorising him to remove insignificant agreements from the register. Otherwise, the Registrar holds office during Her Majesty's Pleasure.

As for legal controls, the Registrar would be open to an application for an order of mandamus, requiring him to exercise his powers in relation to registration or reference. Since these are discretionary powers, the mandamus would only lie to ensure that he had considered the agreements concerned, and not to force him to take any particular course of action. Certainly, some difficulty exists as to who would have a locus standi to bring the

76 Secs. 1(2) and 12 1956 Act
77 This action only lies in England. In Scotland, a petition could be presented to the Court of Session under sec. 91 Court of Session Act 1868, which empowers the Court to order the specific performance of any statutory duty. Again, there would be difficulties as to which parties have the title to present such a petition, see Carlton Hotel v. Lord Advocate 1921 sc. 237
action, but it is imaginable that a third party could produce evidence of economic loss, sufficient to justify a locus.

A recent case, concerning a discretion vested in the Minister of Agriculture, demonstrates the type of legal control which could be exercised over the Registrar's discretion. The case was Padfield v Minister of Agriculture and involved the Minister's discretion to appoint a committee of investigation in relation to a question on which the Milk Marketing Board could not reach agreement. The House of Lords held, reversing the Court of Appeal, that although there might be reasons which would justify the Minister refusing to refer a complaint, his discretion was not unlimited, and since it had not been properly exercised according to law, the order for a mandamus should be issued. The court's decision was based on a finding that the Minister had not given valid reasons for refusing, within the defined statutory terms, to refer a genuine complaint to the committee. Thus the function of the courts is to ensure that a discretion, delegated by Parliament, is exercised lawfully. As stated by Lord Cairns in Julims v Bishop of Oxford, "where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislative of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the court will require it to be exercised."

The difficulty as to who would have a locus is more complicated, and is illustrated by the case of Reg. v Commissioner of Police of the Metropolis, Exparte Blackburn. The issue that was in dispute was the duty of the police to enforce the Betting, Gaming and Lotteries Act 1963. While it was held that the respondent owed a duty to the public to enforce the law, which he could be compelled to perform, and that while he had a discretion not to prosecute,

78 [1968] 2 W.L.R. 925 79 Ibid. per Lord Morris pp. 951-955
80 5 App. Cas 214 at 225 81 [1968] 2 W.L.R. 893
his discretion to make policy decisions was not absolute; it was doubted whether
the applicant had a sufficient interest to be protected by a mandamus, since
he was just an ordinary member of the public. The problem therefore, is deter-
mining what is a sufficient interest to bring an action for a mandamus, and
what would be desirable would be some clarification of the parties, who would
have a locus standi.

Restrictive Practices Court
(a) Composition

The R.P.C. was created by the 1956 Act as a superior court of record,
equal in status to the High Court in England and Northern Ireland and to the
Court of Session in Scotland. The court consists of five judges and ten
other members appointed from person having knowledge of, or experience in
industry, commerce or public affairs. The judicial members of the court are
appointed from the three jurisdictions and the lay members are appointed by
the Crown, on the recommendation of the Lord Chancellor.

The Schedule to the 1956 Act, contains further provisions as to the compo-
osition and procedure of the R.P.C. The Court may sit either as a single body
or in separate divisions, but for the hearing of any proceedings, the Court
must consist of a presiding judge and at least two other members.

(b) Jurisdiction

The jurisdiction of the R.P.C. extends to declaring whether or not the
restrictions to which the 1956 Act applies, are contrary to the public interest.
If the court thus declares, it may then proceed to make an order, restraining
all or any of the parties to an agreement from enforcing the agreement or

Secs. 2 and 3 1956 Act - judicial members; sec. 4 1956 Act - lay members;
sec. 5 1956 Act - the total membership of the court may be increased by the
Lord Chancellor.
any agreement to a like effect. The exercise of both of these powers rests on the initiative of the Registrar, in that he has to refer an agreement in the first place and then make an application for a restraining order. Where an agreement is abandoned after reference to the R.P.C., the Court must issue a consent order, declaring the relevant restrictions to be contrary to the public interest, and similarly it has the power to issue a restraining order in such a case. Instead of a restraining order, the Court may accept an undertaking from the companies involved.

Where the High Court has issued an order against an agreement, after wilful non-disclosure of information, the R.P.C. has jurisdiction to consider an application, declaring that the agreement is not in fact, against the public interest. Such an application cannot be made before the expiry of two years from the date of the High Court order.

Any decision made by the R.P.C. can be reconsidered by that Court on the application of the Registrar, or a party qualified to apply to the Court in the first instance. Such an application must have the leave of the Court, and this will only be granted on prima facie evidence of a material change of circumstances. This power of reconsideration is an unusual power for a court of law to possess, and is explainable only in relation to the developing nature of 'economic facts', compared with the 'facts' on which most other courts of law base their decisions, and to the system of appeal from decisions of the R.P.C. Any decision of the R.P.C. on a question of fact, is final. However, appeal does lie on a question of law, to the Court of Appeal in England and in Northern Ireland and to the Court of Session in Scotland. During proceedings before the R.P.C. itself, the decision of the judicial member(s) of the Court

83 Secs. 20(1) and 20(3) 1956 Act. Such a restraining order takes the form of an injunction.
84 Sec. 20(2)(b) 1956 Act
85 Sec. 22 1956 Act
86 Sched. para. 7 1956 Act.
is final on a question of law, but otherwise, decisions are taken by means
of a majority vote, with the presiding judge having a second or casting
vote in the event of equality. 87

Since the R.P.C. has the standing of a court of law, disobedience of
its orders is punishable as contempt of court. Therefore, the R.P.C. has a
jurisdiction to deal with such cases of contempt. The R.P.C. relies on the
Registrar to bring such cases of contempt before it. 88 An example of such
proceedings was Galvanised Tank Manufacturers' Association 89 where the R.P.C.
imposed fines totalling £102,000 on eight companies for breach of undertakings
given by the court in earlier proceedings, where certain restrictions in a
price fixing agreement had been declared contrary to the public interest. The
court further directed that the undertakings should be replaced by injunctions
in the same terms, and hinted that in the future, punishment for contempt
of court might not always be limited to financial sanctions. 90

(c) Procedure of the Restrictive Practices Court

The procedure of the R.P.C. is laid down partly in the Act, and its
schedule, and partly in the R.P.C.'s Rules 1957. 91 Basically, the procedure
is as follows. Before the Registrar takes any formal action as to the ref-
erence of an agreement, he communicates his intention to do so to the parties
of the agreement and their legal advisers. In many cases, the agreement is
then abandoned, and thereafter, there is no need for the Registrar to proceed
formally. He can however, apply to the Court for an order declaring the
determined agreement contrary to the public interest.

87 Sched. Para 5 1956 Act 88 See above pp. 78.
89 [1965] 1 W.L.R. 1074 90 see also Tyro Manufacturers pp. 79. above.
91 Restrictive Practices Court Rules 1957 S.I. 1957/603, as amended by
Otherwise if the parties signify an intention to defend the validity of the agreement, the Registrar sends them a Notice of Reference, formally notifying the parties of his intention to refer their agreement to the R.P.C. Then the Registrar applies to the Court for a declaration as to whether the agreement operates against the public interest. Each of the parties to the referred agreement sends to the Court and to the Registrar, a Statement of Case together with a list of the relevant documents and principal witnesses, which will be relied upon. Within six weeks, the Registrar must lodge an Answer to this statement with the R.P.C. and communicate the same to the parties to the agreement. The purpose of this preliminary hearing is to clarify the issues to be decided, and discover the areas of agreement and the exchange of the proofs of evidence, and allows the Court and counsel to examine and cross-examine the witnesses knowledgeably, which would not otherwise be possible. The reference is then ready for a hearing before the R.P.C.

Once the reference comes to this stage, the burden of proof rests on the parties to the agreement. Registrable agreements are presumed to be against the public interest, unless the Court is satisfied that the agreement falls within one of the gateways of sec. 21, and further, that the restrictions in the agreement are not unreasonable in relation to the balance between the benefit claimed under the gateway, and any detriment to the public or to individual persons caused by the operations of the restriction.

Once the Court has reached its decision, its judgement is delivered by the presiding judge. Where the decision is unfavourable for the agreement, the agreement is void in respect of the restrictions found against it by the R.P.C. and on application by the Registrar, the court may issue a restraining order. Alternatively, as discussed above, the Court may accept the undertakings of the parties.

92 Sec. 20(1) and (2) 1956 Act 93 Sec. 21 1956 Act
Mention must be made of some of the legal problems concerning the procedure of the R.P.C. In the first place, despite its lay members, the R.P.C. is a court of law and therefore its procedure, in detail and in atmosphere, is similar to that of any other court of law. The proceedings are carried out in judicial surroundings and the parties and Registrar are represented by counsel. Likewise the judgement, delivered by the presiding judge, is a legal judgement containing its ratio deciden
di and obiter dicta, and while this judicial approach is a natural consequence of the system of control created, it can raise difficulties in the discussion of the 'economic facts' contained in the evidence presented to the Court.

For although the Rules of the R.P.C. 94 allow greater freedom as to the admissibility of evidence, than is normal with a court of law, certain of the basic elements of the law of evidence have caused confusion. 95 In many cases, the questions at issue concern the future situation in an industry or trade, and this inevitably is a matter of opinion. Normally, opinions are inadmissible as evidence. However, there are exceptions to that rule and one of these allows the opinion of experts. Before the R.P.C. this does not include the evidence of trade witnesses, for although they may have considerable knowledge, they cannot be regarded as independent witnesses. 96 Even where expert economic opinion is admitted as evidence, it is not open for the expert to express an opinion on the actual point at issue, for this is the function of the Court.

A further difficulty has arisen as to the amount of evidence presented to the R.P.C. In certain cases, this has been excessive and in others, inadequate. This difficulty is partly due to the presence in the court of experienced lay experts, for whom much of the evidence can be unnecessary. 97 However, where

96 Re Chemists' Federation Agreement (No 2) L.R. 1R.P. 75 at 110-111
97 Practice Note L.R. 1R.P. 117
the evidence is inadequate, the R.P.C. has no power to call its own witnesses and on occasion, the Court has commented in its judgement, on the effect of such a lack. 98

The constitutional difficulties associated with the procedure under the 1956 Act, are primarily due to the application of a judicial procedure to a form of economic control. Whether despite these difficulties, such an application is a feasible proposition is a problem to which we must turn. But first, there is the role of the ordinary courts in relation to restrictive practices control.

Ordinary Courts:

Mention was made above of the role of the High Court and the Court of Session in disputes between the parties and the Registrar as to the registration of agreements. 99 There is however, one further method by which the High Court may be involved with the 1956 Act or the 1964 Act. That is where civil proceedings are raised against an arrangement or an agreement on the grounds that it is against the public interest in terms of either of the Acts. The problem arises in relation to agreements on which the R.P.C. has not reached a decision and which, in cases under the 1964 Act, have been registered in order to claim temporary validity.

Such a problem arose recently in the case of Daily Mirror Newspapers v Gardner. 1 The Daily Mirror changed the price of its paper and arranged that the retailers would get a slightly smaller discount margin, and because of this, the retailers' association brought an action for interim injunction to restrain the retailers' association from recommending its boycott. It claimed

98 e.g. Re British Jute Trade Federal Council's Agreements (1963) L.R. 4R.P. 399 at 450
99 see above pp. 2-78
1 [1968] 2 W.L.R. 1239
interalia that the boycott instruction was a restriction, registrable under the 1956 Act, and prima facie unlawful, and thereby the defendant's action was unlawful. It was held by Pennycuik J. and reaffirmed by the Court of Appeal that the plaintiffs had made out a prima facie case, that the boycott instruction would be struck down by the R.P.C. as against the public interest. The Court was therefore justified in granting interim injunction, pending a decision of the R.P.C. with whom the final decision must rest. 2

The ordinary courts therefore take cognisance of the provisions of the 1956 and 1964 Acts, and where an action is raised, disputing the validity of an agreement or arrangement registrable under either of the acts, then the courts will act to prevent any party taking advantage of a restriction which they consider will be declared unlawful by the R.P.C. Where however, the action is for an award of damages, it is likely that proceedings would be stayed until the R.P.C. has reached a decision.

(iii) Restrictive practices control and governmental economic regulation.

The fact that the procedure of restrictive practices control, instituted under the 1956 Act, operates successfully and in practice, has produced many desirable results, should not detract from the question as to whether the judicial procedure chosen was correct for the economic control required. The R.P.C. is required, by means of a case by case approach, to declare whether agreements are beneficial to the public interest. After a judicial consideration of their economic advantages and disadvantages, the R.P.C. is required to predict and evaluate the economic consequences of the removal of particular agreements. This consideration involves variables such as prices, profits, industrial investment, efficiency, exports and unemployment, and for its conclusions, the Court must have recourse to economic theory in which the Act gives little

2 Ibid. per Russell L.J. at 1255
assistance. Further public attitudes to industrial organisation may vary with a corresponding effect on economic theories. Thus the issues of economics are drawn firmly into the judicial arena and while this paper is in no way qualified to assess the success with which these economic issues have been tackled by the R.P.C., it is relevant to point to some of the economic questions associated with the choice of procedure.

Firstly, is the function given to the R.P.C. justiciable or in other words, can the decisions to be taken be subjected to legal standards? This does not imply that any elements of policy need be excluded completely from the procedure. All that is required, is an ability to restrict the policy element of the decisions within clearly defined standards or criteria. These must take precedence over any other factual, political or theoretical considerations.

When the Bill was introduced, there was considerable opposition to the judicial procedure to be adopted. The Opposition regarded restrictive practices control as essentially a governmental matter, because of its elements of political and economic choice. On the other hand, it was stressed by the Government, that in many cases, the courts were required to decide on questions of public interest, with social and economic implications, and while it was admitted that the R.P.C. involved certain innovations, it was maintained that the judicial level was the correct one at which to enforce control on individual restrictive practices.

Much of the controversy was caused over the insistence that decisions were either justiciable or non-justiciable. However, in all branches of law, it is possible to submit a particular topic to a judicial procedure and to determine

3 see 'The Restrictive Practices Court' Stevens and Yamey, op. cit., chap.5
4 see ibid. chap.3, 'Justiciability - the R.P.C. re-examined' R.B. Stevens 1964 Public Law 221
5 see 'The Restrictive Practices Court' Stevens and Yamey op. cit. pp. 34-38
criteria on which this procedure can be operated. In no case will these
criteria be absolute, as defined by Parliament, and some judicial development
of them is natural. Nevertheless, there are shades of justiciability, and what
is required for a judicial procedure to be effective, in a particular instance,
is not an exclusion of all discretion, but the primacy of principles and stand¬
ards over all other factors.

Thus when the Bill was passed, the judicial procedure adopted was probably
too absolute for the subject matter involved. For while the political content
of restrictive practices control is not such as to make a judicial solution
completely impracticable, there are instances where this political content must
be given non-judicial consideration. Otherwise, there is the danger of a
conflict between the judicial application of a defined policy and political
considerations, a conflict which some of the proposals in the new Restrictive
Trade Practices Bill are intended to eliminate. This is the experience in
relation to agreements sponsored by the 'Little Neddies' and the P.I.B., and
while it would be desirable to exclude political interference with the judicial
control exercised by the R.P.C., this experience suggests that it is essential
that restrictive practices control be co-ordinated with other aspects of
governmental economic regulation.

Given however, that judicial control is to be used, albeit subject to
limited discretionary exemptions, the next problem is to provide adequate jud¬
icial standards, for the clearer the standards provided by the legislative,
the more sophisticated and effective a judicial procedure will be. In the
1956 Act, these standards were embodied in sec. 21, which has three parts. 6
Firstly, there is a presumption that all agreements registered under the act
are against the public interest. This presumption can be rebuffed by one of
the seven gateways in the second part, and finally there is a balancing process
6  sec. 5 is the corresponding section of the 1964 Act.
in which the Court has a duty to balance the benefit claimed for the restriction, with the detriment suffered by the Public, or persons who are not parties to the agreement.

Much has been written about the standards laid down in the Act, particularly sec. 21(b), and undoubtedly, some of the criticisms made have some validity. In particular, the standards are liable to change in emphasis, due to the developing attitude of public opinion to restrictive business behaviour. In practice, the rather loose standards laid down have enabled the R.P.C. to utilise the considerable experience and skill of its lay members, and while it has thus become involved in questions of prediction and value judgement to a greater extent than is legally desirable, the R.P.C. has produced clear-cut decisions, largely acceptable to the parties concerned, and has escaped almost completely the political controversy, which has surrounded the control over monopolies carried out under the 1948 Act. The Court has developed acceptably many of the policy issues unsettled, while at the same time, reducing the incidence of restrictive practices in British industry. Thus the judicial solution chosen for restrictive practices control can be said to have operated with practical success.

However, the proposals in the new Bill confirm that such a solution is not entirely adequate, particularly with regard to the relationship between the control exercised by the R.P.C. with the policies of other Government departments and public bodies. The solution has been to take certain restrictive practices outwith the control exercised through the R.P.C. and has introduced into the system of restrictive practices control, a considerable political element.

7 'Restrictive Agreements and the Public Interest' B.S. Yamey 1960 Public Law 152; 'Competition and the Law' A. Hunter op.cit. chap. also note 4 above.
8 see also 'The Restrictive Practices Court' Stevens and Yamey, op. cit. chap. 6 — where the changing attitude of the Court itself is discussed.
These legislative developments have arisen because of the desirability of Government departments and public bodies like the 'Little Neddies', the P.I.B. and the I.R.C., encouraging voluntary agreements on industrial rationalisation, price control and other related topics. This is a logical development of increased governmental participation in the economy, and yet it is one which the R.P.C. could not accommodate without an important change in procedure. Thus the question must be faced whether, if certain aspects of restrictive practices require a political control, there is value in retaining an absolute judicial control for other aspects of the same problem. Since this paper is concerned with the inter-relationships of economic regulatory bodies, it is particularly relevant to pose the question, because the failure in the procedure at present has been the inability to co-ordinate the control of the R.P.C. with the activities of other Government bodies. This is a difficulty inherent in all delegation of functions to independent bodies, in that they are not only independent from the Government, but also from each other. While the purpose of delegation to such bodies is to get policies independently administered by experts, this should not entail that the policies are administered without regard for a co-ordination between them.

It is submitted therefore, that the proposed legislative changes do not fully solve this inherent weakness in the procedure under the 1956 Act. They may be seen only as a temporary solution and do not in any way, develop relationships between the R.P.C. and other Government bodies. Therefore, it is suggested that a more effective solution would have been to open the procedure of the R.P.C., to allow it to consult and co-ordinate its activities with those of other Government departments and public bodies. This could quite simply be done by a third party procedure which allowed Government departments and other public bodies to make submissions to the R.P.C. Such a development might require a restructuring of the standards and procedures operated by the R.P.C.,
but, while retaining for the R.P.C. the status of a court of law, at least in relation to the effect of its decisions and Orders, it could integrate the structure of restrictive practices control more fully with other aspects of governmental economic regulation.
Competition Policy in the E.E.C.

(i) The Rules of Competition

(a) Broad Scope of Competition Policy

The need for an effective competition policy in the E.E.C. is very real. Mentioned in the preamble to the Treaty of Rome and in Art 3(f), such a policy is a necessary addition to the elimination of customs duties and other quantitative restrictions on trade between the six member states. The basic problem is that the benefits of the elimination of tariff barriers can be eroded by cartels, dumping practices, state aids and other restrictive trade practices, which must therefore be controlled. On the other hand, certain industrial benefits can be achieved by agreements on research and development, marketing and subsidiary distribution, which at first sight, must be regarded as restrictions on competition. Likewise, mergers may be essential for the full development of economies of scale and these also may involve restrictions on competition. The need for an effective community competition policy is thus obvious.

In the E.E.C., the term 'competition policy' is given a wider definition than it is the U.K. As well as a responsibility for cartel, restrictive practices and monopoly control, the Directorate-General of Competition has responsibility for the regulation of State Aids and other discriminatory practices by the member states and the regulation of Dumping Practices. Most importantly too competition policy covers the public enterprises of the member states and the Treaty provisions on this topic, Arts. 37 and 90, are discussed below.

Previous to the reorganisation of the Commission on the merger of the executives, the Directorate-General was also concerned with the harmonisation

of commercial law, company law and anti-trust law in the member states. This is now the responsibility of the Directorate-General on the Internal Market and the Approximation of Legislation.

State Aids

Normally, within a specific country, the question of state aids to industry is not one for that country's competition policy, for its Government is free to decide which industries it wishes to subsidise and favour. Within the Community however, the question takes on a different complexion. In general, state aids are incompatible with the principles of the Treaty of Rome, if they have anything more than a local effect. A member state must obviously be restricted from nullifying the benefits of the elimination of trade barriers, by granting aid which may give its industries advantages over those of other member states. Art. 92 deems such aids to be incompatible with the E.E.C., but exceptions are allowed to prevent regional economic hardship, or hardship to certain categories of people, where this would be to the detriment of the Community at large. Thus member states are allowed to pursue regional policies and to correct serious economic disturbances, subject to the approval of the Commission. For approval, the Commission requires that two main criteria be satisfied. An aid must not be introduced to create a competitive advantage and merely to offset economic disadvantages, and aids are expected to be selective, given to those who really need them, and of a temporary nature. All aids must be submitted for approval to the Commission, and it has power to issue a decision requiring the member state concerned to abolish or modify the aid.

3 The powers of the Council and the Commission as to the harmonisation of the laws of the Member States are contained in Art. 100-102. Art. 220 also places on the M/S an obligation to negotiate between each other for the elimination of double taxation and the mutual recognition of companies. The use made of these powers is reported in the Supplement to E.E.C. Bulletin No. 12 1967: A similar harmonisation in commercial law was required between Scotland and England after the Acts of Union in 1707.

3 Arts. 92-94 4 Art. 92(3) 5 Art. 94 (2)
Through this continuous review of state aids, the Commission is able to co-
ordinate measures for regional development throughout the Community, and while
in this instance, the initiative for action lies with the member states, the
Commission plays a valuable role as catalyst and co-ordinator. 6

Dumping

Responsibility for the control of dumping is a further example of the wider
scope of Competition Policy in the E.E.C. 'Dumping' is defined as putting the
products of one country on the market of the importing country at a lower price
than their normal value. 7 Further, there is a requirement that the dumping must
'cause or threaten material injury to an established industry'. In the E.E.C.
the problem will only exist during the transitional period, for once all tariff
barriers have been eliminated and cartels and monopolies are controlled, the
market will level off any price differences which are not the result of transport
costs.

Control over dumping is covered by Art. 91, and the Commission can only act
after a request has been submitted by a member state or another interested party.
After investigation, the Commission may issue recommendations to those causing
the dumping practices, namely the enterprises that have exported products at
reduced prices from one member state to another. If these recommendations are
not complied with, the Commission may authorise the injured member state to take
protective measures of which the Commission shall determine the conditions and
particulars. 8 Such authorisation is issued by the Commission in the form of a
Decision. The Treaty also provides that products which have been exported from
one member state into another shall, if reimported, be admitted without
restriction. 9 This is intended as a deterrent to dumping, eliminating the need
for protective measures.

6 'Competition Policy in the European Community' McLachlan and Swann op. cit. chap 3
7 G.A.T.T. Art. VI(1) 8 Art. 226 9 Art. 91(2): see also Reg. No. 8
Cartels, Monopolies and Restrictive Practices

The substantive control over Cartels, Monopolies and Restrictive Practices is embodied in Arts. 85 and 86, which contain a priori prohibitions, with limited exceptions, on restrictive agreements and practices and the abusive exploitation of dominant positions. Theoretically, a presumption exists in favour of competition and against restriction, but as shall be seen, a more pragmatic approach has been evolved and the emphasis is not on the formal application of certain strict rules, but is rather towards a policy integrated into the Community as a whole, and compatible with the existing economic order and economic policies in the member states.

Art. 87 assigns to the Council the task of developing the basic provisions of Arts. 85 and 86 and authorises the Council, on a proposal from the Commission and after consulting the European Parliament, to issue the regulations or directives necessary to put the basic rules of the two articles into operation. Where a directive would accomplish the desired objective, the Council will issue one rather than a regulation, on the theory that a directive will interfere less with the legal systems of the member states.

The competence of the Council under Art. 87 is not confined to the procedural field and involves, to a large extent, the substantive elements of Community competition law. The Council is limited however, by the basic principles of Arts. 85 and 86. 10

The two most important regulations passed by the Council in this field, are Reg. 17 11 relating to the procedural implementation of Arts. 85 and 86, and Reg. 19/65 12 providing for the exemption of groups of agreements and practices from the prohibition of Art. 85 (1). Before discussing these two regulations

10 Art. 87(2) gives some examples of the topics which the Council's legislation may cover but the list is not exhaustive.
11 J.O. 1962/204
12 J.O. 1965/533
and the procedure to which they relate, some consideration must be given to Arts. 85 and 86.

(b) **Article 85**

This article contains the basic substantive law as to the control of restrictive agreements within the E.E.C.. Art. 85(1) states that agreements, decisions and concerted practices which are likely to affect trade between the member states and which have as their object or result the prevention, restriction or distortion of competition within the Community, are incompatible with the Common Market. The term 'agreements' refers to legal contracts on topics like price-fixing and the control of production and distribution, but it also covers agreements which would be enforceable by commercial rather than legal sanctions. 'Decisions' of associations of enterprises refer to where an individual enterprise would be bound by the collective decision of its association. The term does not cover decisions that are not legally binding, like recommendations and suggestions. Such non-binding acts could, however, lead to concerted practices. 'Concerted practices' refer to a conscious co-operation of enterprises, which does not give rise to any binding obligation. Such co-operation could arise at the preliminary stage of a cartel agreement, but it is not sufficient that there be merely uniform conduct nor merely 'price-leadership'. There must be concerted action, albeit only loosely concerted.

Art. 85 lists some of the more important agreements which are prohibited. It is however, impossible to enumerate all the agreements, decisions and concerted practices to which Art. 85(1) refers. Many may still remain informal and underground, and agreements notified to the Commission are not made public as they are in the U.K.

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13 In the E.C.S.C. control is exercised by the Commission under Art. 65 of the Paris Treaty. It is a more severe control than in the E.E.C., and restrictive agreements are forbidden unless expressly authorised by the Commission (formerly by the High Authority).
14 See 'Competition Policy in the European Community' McLachlan and Swann op. cit. chap. 6.
The prohibition of Art. 85(1) covers only those agreements and practices which directly or indirectly, actually or potentially, affect trade between member states. This criteria serves to separate the respective fields of application of Community Law and national law. Thus agreements will be examined, although prima facie national, to determine whether they have any restraining effect on the process of economic integration. As the economic integration within the community develops, so will the interpretation of inter-state. It is however, unlikely that as broad an interpretation will be given to the 'inter-state' criteria, as with the Commerce clause in the U.S. Constitution, partly because the Commission does not have the political authority it would command in a strongly federal structure.

A further requirement is that the agreements or practices must be designed to, or actually result in, the prevention, restriction or distortion of competition. Where an agreement operates against free competition, the prohibition of Art. 85(1) comes into play.

In the application of Art. 85, the first question to be decided is whether the restriction on competition falls under Art. 85(1). This cannot be done in a strict and dogmatic manner, and thus in deciding whether an agreement does in fact restrict competition, consideration is given to economic and political as well as legal factors. If the restriction is covered by Art. 85(1), it must then be determined whether the prohibition is inapplicable under Art. 85(3). The prohibition of Art. 85(1) may be declared inapplicable by the

15 Societe Technique Miniere v Maschinenbau Uhm Gmbtt. (1966) 12 Recueil 337 - the Court of Justice held that it was necessary to examine the agreement as to whether it is capable of partitioning the market in certain products between the Member States and of thus rendering more difficult the economic interpretation sought by the Treaty; for a discussion of the interpretation of 'interstate trade' in federal systems, see 'Comparative Federalism' MacKinnon chap. 3.

16 For a general discussion of the criteria of Art. 85(1), see 'Les Regles de concurrence precisees par la Cour de Justice' Georges Le Tallac; Revue Trimestrielle de Droit European 1966 p. 611.

17 see 'The Rule of Reason in Anti-Trust Law' R. Jollie 1967.
Commission, where the restriction on competition 'contribute(s) to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom.'

Further the Commission must be satisfied, that the agreement neither imposes on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives, nor enables enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

By Council Regulation 19/65, the Commission are empowered to make regulations as to 'Block Exemptions'. For a practical point of view, this will allow the Commission to clear the large backlog of notifications awaiting clearance, and thus increase legal security for the enterprises involved. Reg.19/65 cannot be used to defeat or extend the specific requirements of Art. 85(3).

It is a procedural device which was first used by the Commission in Reg.67/67, allowing group exemption to exclusive dealership and licensing contracts.

(c) Article 86

Art. 86 declares it unlawful for one or more enterprises to abuse a dominant position within the Common Market, or a substantial part of it, if trade between the member states could be affected. There are four conditions to be satisfied before the prohibition of Art. 86 will apply. Firstly, there must be improper advantage taken or abuse made of the position held. This could be defined as behaviour likely to frustrate the achievement of the goal stated in Art. 3(f) - 'the establishment of a system ensuring that competition shall not

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18 Art. 85(3) The detailed procedure by which this is done is contained in Reg.17, discussed below.
19 J.O. 1965/533 discussed below 20 J.O. 1967/449 discussed below
21 In the E.C.S.C. control exists under Art. 66 of the Paris Treaty. Again the control is more severe than in the E.E.C. and mergers require the approval of the Commission.
be distorted'. 22

Secondly, the enterprise concerned must be in a 'dominant position'. This concept is not defined in the Treaty, but by a reference back to the Treaty of Paris, the test may probably be taken to be whether the enterprise is removed from 'actual competition'. 23 Such a test can only be applied by an individual examination of the enterprises concerned, considering for instance, whether the enterprise is able to take its price decisions without regard to its competitors. The examination should also include consideration of the market structure, size of profits, elasticity of demand and any special characteristics of the market concerned. Nevertheless, the criteria of being in a 'dominant position' is still rather vague and it is further complicated by the third criteria that the dominance must be in relation to the entire Common Market, or to a substantial part of it. In the obvious discussion as to what amounts to a 'substantial part', the main question is whether a substantial part could be confined within one member state. The Commission's opinion is that this could be possible, provided that the fourth criteria is satisfied. This is that 'trade between member states' should be affected. This will be construed when there is a resulting restriction on the process of economic integration, between the six member states. It is conceivable that this could be the effect of the behaviour of an enterprise holding a dominant position within one member state. 24

All these criteria are vague and place a considerable interpretational burden on the enforcement agencies. 25 Where however, the criteria are satisfied, the consequences for the enterprises concerned would be considerable.

22 The improper conduct can be in relation to competitors, suppliers or consumers. Art. 86 gives some examples of improper exploitations, but the list is not exhaustive
23 Art. 66(7) E.C.S.C. It is however wise to avoid a specific definition.
24 see 'Concentration or Competition - A European Dilemma' op.cit. p.47 - examples are given as to how dominant enterprises can affect inter-state trade.
25 see generally 'Legal Problems relating to Art. 86' Samkalden and Druker 3 C.M.L. Rev. 158 particularly p. 168.
There is no possibility of exempting improper practices from the prohibition of Art. 86 and the procedure under Art. 86 and Reg. 17 merely brings the illegality to the public eye. The abuses prohibited by Art. 86 are unlawful, without the necessity of a decision to that effect, and the Commission can, by a decision, oblige the enterprises concerned to put an end to any infringement of Art. 86, which has been established. The Commission is however, given no power to order divestiture of enterprises, and therefore, will have to rely on its powers to terminate abuse and to impose financial sanctions, in order to control the behaviour of dominant enterprises.

The initiative for action under Art. 86 lies with the Commission and to a lesser extent, with the anti-trust agencies of the member states. Unlike the control under Art. 85, there is no requirement for the enterprises concerned in mergers and concentrations, to notify the Commission as to their existence or intention to merge. This places the Commission in the position of having to seek out violations of Art. 86, and this contrasts with the procedure under Art. 66 E.C.S.C., where authorisation is required for proposed mergers. In no case will the existence of a dominant position be by itself, a violation of Art. 86. Mere size is no offence. In every case, abusive exploitation of a dominant position is required, and this has severely curtailed the Commission's activities under Art. 86.

Despite a lack of practical application, the control of mergers and concentrations in the E.E.C. is a problem that has caused considerable concern. Any merger in the economic sectors covered by the Rome Treaty, may place enterprises in a dominant position, from which, abusive behaviour is possible.

While Reg. 17, which is discussed below, relates to the prohibition of Art. 86, the discussion is carried out primarily in relation to Art. 85. Therefore a few brief observations as to the procedural aspects of the control under Art. 86 are made.

Reg. 17 Arts. 1 and 3. Reg. 17 Arts. 15 and 16. All the decisions taken by the Commission in the course of this procedure, are challengeable in the Court of Justice under Art. 172 and 173.
Nevertheless, the control of Art. 86 puts no obstacles in the path of such mergers and it allows the creation of dominant positions, where there are no economical or technological reasons for them as a benefit to the economy at large. 29

While relatively powerless to act, the Commission has given considerable study to this problem, and produced a Memorandum for submission to the Governments of the member states. 30 This covered the applicability of Art. 85 and 86 to industrial concentrations. The Commission felt that Art. 85 would only apply to concentrations where the enterprises remained legally distinct and the concentration, by way of agreement, materially restricted competition. However, where the enterprises merged together, there could be no application of Art. 85. On the other hand, the Commission believed that Art. 86 can control concentrations, no matter how they have been created. It was suggested that Art. 86 would operate against an enterprise which uses its dominant position to force another enterprise into a merger against its will or under unfavourable conditions. Such a merger would have the effect of limiting 'production, markets or technical development to the prejudice of consumers' 31 and an application of Art. 86 on these lines could have extensive implications.

Theoretically, there is no objection to an extensive application of the Art. 86 prohibition. It would be complementary to that of Art. 85 and would ensure that neither a cartel nor an enterprise occupying a dominant position is permitted to eliminate competition by creating a monopolistic situation. In practice however, the powers given to the Commission under Art. 86 are not sufficient. There is no means of clarifying the four criteria to provide the degree of legal certainty required and thus, control requires to rely on case

29 cf. system of control in the U.K. under the Monopolies and Mergers Act 1965  
30 'Concentration of Enterprises in the Common Market' 1st December 1965  
CCH Common Market Reports No. 26  
31 Art. 86(b)
by case determinations of the Commission.

Here the Commission is beset by the problem of distinguishing between the conscious parallelism of a few oligopolists and the abuse of a dominant position. Difficulty is also encountered from the requirement that any investigation should cover the whole of an economic sector \(^{32}\) and that there be suspected abuse before the powers to request information are exercisable. \(^{33}\) Linked with the vagueness of the criteria, these difficulties have meant that in no case, which has come before the Commission, has it felt itself able to act. In fact the Commission is unlikely to embark on any application of Art. 86 unless flagrant abuses by oligopolists arise, and this is unfortunate for the general position of competition policy in the E.E.C., for thus, enterprises can achieve, due to the weakness of Art. 86, what Art. 85 prevents. \(^{34}\)

The movement towards a fusion of the Communities, following on the fusion of the executives, brings with it the hope that in the combined treaty, some attempt will be made to combine the two approaches to concentrations and dominant enterprises represented by Art. 66 of the Paris Treaty, and Art. 86 of the Rome Treaty – a rigorous emphasis on maintaining competition as opposed to a weak control over abuses of dominant market positions. At present in the E.C.S.C., the emphasis on competition tends to restrict the benefits of technological development, which can flow from larger enterprises, and some relaxation in its application, would make it more than merely a negative control of large scale enterprise.

There are however, certain aspects of the E.C.S.C. system worth extending to the economic sectors covered by the E.E.C. The necessity to refer merger

\(^{32}\) Reg.17 Art. 12

\(^{33}\) Reg.17 Art.12(2),(3) – if this were relaxed then a more realistic assessment of the situation might be achieved in time to prevent developments which might not be easily reversible.

\(^{34}\) An instance of this is the recent merger between Grundig and Constem, which followed the judgement of the Court of Justice, upholding the Commission's decisions, declaring the restrictions in the companies' agreement an infringement of Art.85, 1966 C.M.L.R. 418.
proposals of a certain size for prior approval could be extended, and with increasing the armoury of the Commission, to include the powers of divestiture and price control, would serve to strengthen the Commission's power under Art. 86. The benefit of a notification system would be that it would institute an element of prior control, exercisable when the desired competition level of a particular market was threatened. At present, the Commission can only try to prevent a bad situation from being exploited. It can do nothing to correct the economic dangers inherent in dominant positions.

Supplementing the per se prohibition of Art. 86, which serves to prevent enterprises exploiting any positions of dominance they may hold, a system of notification and approval would be an adequate procedure for dealing with the spate of community mergers and concentrations which, if British experience is repeated, is likely to develop over the next few years, as the legal and financial barriers to across-the-border mergers disappear.

(d) General application of Articles 85 and 86

The basic provisions of Arts. 85 and 86 apply to all sectors of the Common Market economy, other than coal and steel. However, the regulations and directions, which may be used to implement these basic rules, can be subject to modification and limitation in relation to particulars sectors of the economy. While regulations for particular economic sectors are being evolved, the application of the general competition rules may be suspended insofar as these sectors are concerned. This was done with transport by Council Regulation 141.

With Agriculture, specific provisions were made in Art. 42 concerning the extent to which the rules of competition should apply. This suspended their application until Reg. 26 applied certain rules of competition to the production of,

35 see Arts. 60, 65 and 67 E.C.S.C.  
36 Art. 87 (2)(c)  
37 J.O. 1962/275I: The Commission have submitted to the Council a proposal for a regulation applying Arts. 85 and 86 in the field of transport policy. If passed, this would come into operation on 1st July 1968.
and trade in, agriculture produce. The rules of competition are applicable to industrial property rights, such as patents, design patents and trademarks. However, the Commission has published an official notice to the effect that it regards certain provisions in patent licensing agreements, as falling outwith Art. 85. Likewise, restrictions on trade between the member states resulting from the territorial application of trademarks are not prohibited.

Most important, in comparison with the U.K., the rules of competition are applicable to the public enterprises of member states and to enterprises on which member states have conferred special or exclusive rights. Art.90 restricts the activities of the member states in this connection. The prohibition is slightly modified by Art.90(2) for enterprises entrusted with the management of services of general economic interest, or having the character of a fiscal monopoly. However there is some application of competition to public enterprises which does contrast with the situation in the U.K. Further to this control over public enterprises, Art. 37 requires member states to progressively adjust any state monopolies of a commercial character to ensure that by the end of the transitional period, all discrimination between member states as to the supply and marketing of goods is eliminated.

This covers the rules of competition applicable in the E.E.C. and we now turn to study the constitutional structure and procedure through which they are enforced.

(ii) The constitutional structure and procedure of community competition policy

In this section, the discussion is primarily concerned with the community institutional structure for the enforcement of competition policy and with the regulations concerned with the procedure it operates. This involves a discussion in relation to Art. 90

of the roles of the Commission and the Court of Justice. For the sake of clarification however, the role of member state authorities in the enforcement of community competition policy, is given some consideration.

(a) Regulation 17

The community rules of competition received considerable reinforcement from the passing of Reg.7, which declared that the agreements, decisions and concerted practices referred to in Art.85(1), and any abuse of a dominant position as covered by Art.86, shall be prohibited, no prior decision to this effect being required. 43 Previously, the prohibition of Art.85(1) was not applicable until a formal decision had been taken to that effect, either by the Commission or by the competent authorities in the member states. 44

Negative Clearance

Enterprises may wish to clarify the legality of any agreement or practice with which they are involved, and which they may have reason to believe, falls within the control of Art.85(1) or Art.86. Reg.17 Art.2 allows the Commission on request, to issue a 'negative clearance' as to an agreement or practice. 45 This decision signifies that the Commission, after an examination of the agreement or practice, have decided that they will not challenge it under Art.85(1) or Art.86, but insofar as it is issued on the basis of the information available to the Commission, a 'negative clearance' will be invalidated by a failure to supply all the facts or by a change in the factual situation.

When a request for a 'negative clearance' is made, all the relevant information must be supplied to the Commission. 46 The applicants for a 'negative

42 'Regulation implementing Art.85 and 86 of the Treaty' J.O. 1962/204
43 Reg.17 Art.1 44 see Bosch v de Gens (1962) 8 Recueil 89
46 see Reg.27 J.O. 1962/1118
clearance' have the right to a hearing and interested third parties may also submit evidence to the Commission. 47

The application for a 'negative clearance' only allows an enterprise to inquire of the Commission's attitude as to the application of the prohibition of Art.85(1) or Art.86 to the agreement or practice in which the enterprise is involved. It must not be confused with an application for an exemption under Art.85(3), from the prohibition of Art.85(1). While the decision to be taken by the Commission in relation to a negative clearance is one challengeable before the Court of Justice under Art. 173, the Commission is not bound by its decision, and in the event of a change in circumstances or further information, it is free to alter its initial decision.

A 'negative clearance' binds national cartel authorities by virtue of their being deprived of competence in the matter, 49 but a 'negative clearance' is not binding on the civil courts of member states. Thus the issue of validity falls to be considered de novo before the courts and the 'negative clearance' of the Commission has only persuasive authority. 50

A point of interest here is the Commission's approach to the problem posed by the 'negative clearance' procedure – the question whether an agreement falls within the prohibition of Art.85(1) or of Art.86. This problem arose in the case of Société Technique Minière v Maschinenbau Ulm GmbH, 51 which was referred to the Court of Justice by the Court of Appeal in Paris under Art.177. The Court of Justice was asked to decide whether an exclusive franchise agreement or an exclusive dealing clause was per se prohibited under Art.85(1) and could therefore only be exempted under Art.85(3) or whether the agreement should be

47 see Reg.17 Art.19 and also Commission Regulation 99/63 J.O. 1963/2268
48 Reg.17 Arts.4 and 5 – see below 49 Reg.17 Art.9(3)
50 'Restrictive Trading Agreements in the Common Market' Alan Campbell. London 1964 para. 106
51 (1966) 12 Recueil 337
subjected to a 'rule of reason' under Art.85(1). The Commission's attitude to
the dilemma had been that both should be considered per se violations of Art.
85(1) without any requirement for an extensive economic investigation, but
the Court's judgement comes out in favour of a degree of reasonableness, as
opposed to a per se prohibition, and it can be seen as implying preference for
a case by case economic investigation of agreements and practices. This att-
itude was reinforced by the Court's decision in Grundig-Consten 52 where, al-
though a per se prohibition was upheld on the grounds of an absolute territor-
ial restriction, other aspects of the Commission's decision were struck down
in that the prohibition of Art.85(1) had been applied absolutely, without
sufficient factual reasons being given for the Commission's decision.

Therefore the general trend seems to be away from an automatic applica-
tion of the Art.85(1) prohibition towards a more ad hoc approach and para-
doxically, it is the Court of Justice, as a legal body, which is directing
the Commission, as an administrative body, back towards the administrative ap-
proach. 53

Where a 'negative clearance' is not issued, the Commission may, on request
or ex-officio, counteract any infringement of Arts. 85 and 86 by issuing a
decision directed to the enterprises concerned. A request may be submitted by
a member state or by any natural or legal person with a justified interest,
and on receiving a sufficiently substantiated request, the Commission has a
duty to reach a decision on it. 54 Before issuing a formal decision requiring
the termination of an infringement, the Commission may prefer to persuade the
enterprises to desist from their agreement or practices, by means of a rec-
ommendation.

53 see 'The Role of Reason in Anti-Trust Law' Joliet op.cit.
54 The problem of requiring the Commission to act is dealt with below.
Alternatively, where a 'negative clearance' is not issued, the enterprises may wish to claim exemption from the Art.85(1) prohibition under Art.85(3). Such an exemption is not possible from the prohibition of Art.86. Our discussion now turns to the procedure by which an exemption is granted under Art.85(3).

Notification system and procedure for exemption under Art. 85(3)

All agreements, decisions and concerted practices covered by Art.85(1), which have come into being after the entry into force of Reg.17, must be notified to the Commission, if the enterprises involved wish to claim exemption under Art.85(3). In certain cases, this necessity for notification is reduced to an option, exercisable by the enterprises and broadly, these are cases which are regarded as being of less immediate importance, from the point of view of the development of the Common Market as a whole.

Similarly, there is compulsory notification for agreements, decisions and concerted practices, which were in existence on March 13, 1962 - 'existing agreements'. These were to be notified by November 1, 1962, unless they were concerned only two enterprises, where the date was February 1, 1963. Again, the necessity for notification was reduced to an option in certain instances.

Agreements not notified to the Commission within the correct time limits, and falling within the prohibition of Art.85(1), are null and void from the date Reg.17 came into effect, or the date the agreement commenced, whichever is the later. Mere failure to notify an agreement is not unlawful by itself. The agreement must also meet the objective criteria of Art.85(1).

55 13th March 1962  56 Reg.17 Art.4(1)
57 Reg.17 Art. 4(2)  58 Reg.17 Art. 5(1)  59 Reg.17 Art. 5(2); The exemptions from compulsory notification granted by Art. 4(2) and 5(2) of Reg.17 do not amount to an exemption from the prohibition of Art.85(1), as is possible under Art. 85(3). What is implied is that notification of these agreements and practices is not essential for a ruling of exemption.
Reg.17 Art. 4 and 5 do not require that enterprises must notify all agreements, decisions or concerted practices, which may be or are, unlawful under Art.85(1). The requirement only holds if the enterprises wish to claim exemption under Art. 85(3). Notification prevents the possible imposition of retroactive fines, if the decision of the Commission goes against the enterprise, and also fixes the date from which an exemption decision can take effect. A request for a 'negative clearance' is not considered as notification, but on the other hand, the filing of a notification for the purpose of obtaining exemption, does not constitute an admission that the prohibition of Art.85(1) applies, or in other words, involve forfeiting the right to ask for a 'negative clearance'. A duly notified agreement is granted provisional validity, until such time as the Commission examines the agreement and passes judgement as to its content.

The Commission alone has the competence to declare the prohibition of Art.85(1) inapplicable to duly registered agreements, decisions or concerted practices. When the Commission decides to issue such a declaration, it has to indicate the date from which the decision shall take effect. This date cannot be prior to the date of notification. A decision to invoke Art.85(3) is valid for a specified period and may be made subject to certain attached conditions. Any decision in renewable on request, but the Commission has a discretion as to whether it should revoke or alter its initial decision.

If the Commission decides not to grant an exemption, recourse may be made to issue a decision, under Reg.17 Art.3, requiring the termination of any infringement.

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60 Reg.17 Art.15(5) 61 Reg.17 Art.6(1)
62 e.g. N.V. Technische Handelssonderneming Nibeja v N.V. Graetz Nederland [1964] C.M.L.R. 366 Held that so long as an agreement has been duly notified to the E.E.C. Commission, and neither the Commission nor the competent national authorities have declared it prohibited, then the conditional validity of the agreement is preserved and a national court has no power to declare the agreement void under Art.85(1) & 86
63 Reg.17 Art.9(1); for an example of an exemption granted under Art.85(3) see re The Transocean Marine Paint Association Commission Dec. 67/454/EEC. J.O. 20 July 1967
64 Reg.17 Art.6(1); this qualification is not applicable to those agreements covered by Reg.17 Art.4(2) and 5(2) - Reg.17 Art.6(2) 65 Reg.17 Art.8; see also Reg.17 Art.23 for the renewal of exemptions granted prior to Reg.17.
ment of Art.85(1) or Art.86. However the mere communication to the enter-
prises of the Commission’s conclusions that an exemption is not justified, amounts
to a decision challengeable before the Court of Justice. 66 ’Existing agree-
ments’ which are not exempted, become retroactively invalid to 13th March, 1962
and ‘new agreements’, which are not exempted, become retroactively invalid to
the date of the formation of the agreement. In both cases, provided there has
been notification, fines cannot be levied against the operation of the agreements. 67

To enforce its decisions, the Commission has power to impose financial
penalties. 68 These penalties also serve to force enterprises to desist from
any action contravening the conditions under which an Art.85(3) exemption was
granted, to supply any information requested 69 or to submit to an investiga-
tion ordered by the Commission. 70 Fines are imposable for failure to co-oper¬
ate with the Commission in their investigation, and for any infringement of
Arts. 85(1) or 86. 71 However these fines cannot be imposed with respect to
the operation of agreements, decisions or concerted practices during the period
from the date of their notification to the date of the Commission’s decision.

Despite the existence of these fines and penalties, many agreements will
remain unnotified, particularly those which are unlikely to gain exemption
under Art.85(3). The Commission has power to control these unnotified agree-
ments, helped by requests for action from interested enterprises and individuals,
and from member states, particularly from the competent anti-trust authorities
in member states. 72

66 see Cimenteries C.B.R. and others v Commission (1967) 13 Recueil 93 – where the
Court annulled a Commission communication which had declared, that after a prelimin¬
ary examination, the Commission had concluded that the conditions governing the ap-
lication of Art.85(1) of the Treaty obtained and that the application of Art.85(3)
to the agreement in question was not warranted. The Court ruled that the act chal¬
eged was not a mere notice but a decision as the Commission had unequivocally taken
a step having legal effect, affecting the interests of the enterprises concerned
and compulsorily applicable to them. 67 Reg.17 Art.15; if there has not been
notification then fines can be levied on the operation of agreements, even though
they might subsequently be held to fall within the exemption of Art.85(3). Thus
immediate notification of new agreements is advisable to avoid the financial san¬tions involved in operating an unnotified agreement. 68 Reg.17 Art.16 69 Reg.17 Art.
11(5) 70 Reg.17 Art.14(3) 71 Reg 17 Art.15 72 Reg. 17 Art 3
The Commission is also empowered to instigate a general inquiry into any sector of the economy where there are signs that competition is being restricted or distorted. Here, the Commission's power to request information from the enterprises involved and from the member states is important. Such a request can be enforced against enterprises by means of a decision, breach of which involves the fines and penalties dealt with above. However, there are no means of enforcement against member states, and their competent authorities. Any request for information must indicate its legal basis, its purpose and the penalties involved in non-compliance, and a copy of any request made to an enterprise, must be forwarded to the competent authorities in the member state concerned. Further, the Commission is able to carry out any necessary investigations at the business premises of the firms and associations concerned. This must be done in collaboration with the competent authorities in the member states and may even be delegated to them.

Hearings Procedure

Any enterprise has the right to a 'hearing' before the Commission where it is applying for a 'negative clearance', where the Commission is intending to issue a decision enforcing the prohibition of Art. 85(1) or Art. 86 against it, and where the Commission is intending to enforce fines or penalties by means of a decision. Interested third parties may also be given a hearing, if they can prove a sufficient interest in the proceedings, and can submit their views as evidence to the Commission.

Because the Commission's role in enforcing Arts. 85 and 86 is an administrative one, the extent of the hearing given to parties, is not as great as it would be in a court of law. The Hearing's procedure has been laid down by

Reg.17 Art.12 Reg.17 Art.11 Reg.17 Arts. 13 and 14

i.e. where the Commission intends to issue a decision under Arts. 2, 3, 6, 7, 8, 15 and 16 Reg.17.
the Commission in Reg.99/63. It allows the submission of oral and written evidence and lays down the procedure by which the latter is to be obtained. Where the Commission has any objection to an agreement, it must state in writing to the enterprises concerned, the grounds of complaint against them. Such grounds provide the parties concerned with notice of the facts and matters alleged against them and at the same time, limit the issues at stake between them and the Commission. In any decisions it may make, the Commission is confined to the matters stated in the grounds of the complaint. After the hearing and submission of evidence, the Consultative Committee on Cartels and Monopolies must also be consulted, before any decision is made.

Judicial control over decisions taken under Regulation 17

The Court of Justice has jurisdiction in relation to the decisions made by the Commission under Reg.17. Appeal lies under Art.173 and if upheld, the Court can annul a decision by the Commission. Under Art.173, member states and individuals do not enjoy a right of appeal to the same extent. This difference is justified by the position and importance of member states in relation to the Community operations. Member states can challenge all binding measures taken by the Council or the Commission, on the grounds of lack of jurisdiction, infringements of important procedural rules, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. An individual is restricted to an appeal against a decision directed to him or against a decision which, although in the form of a regulation or a decision directed to another person, is of direct and individual concern to him. While the individual's right of appeal is restricted by the provision of Art.173, and particularly by the need for a 'direct and individual concern', the interpretation given to 'decision' by the Court, is broad and extends to any act which

77 J.O. 1963/2268  78 i.e. under Arts. 2, 3, 6, 7, 8, 15 and 16 Reg.17
alters the legal position of the addressee. 79

Art.184 allows any party, in the course of proceedings involving a regulation of the Council or of the Commission, to appeal to the Court to declare the regulation inapplicable on the basis of the grounds laid down in Art.173. This right of appeal is strictly limited however, and is not an extension of the rights of appeal, available under Art. 173. 80 Art.172 gives the Court a special jurisdiction in relation to the fines and penalties which the Commission can impose and the Court may cancel, reduce or increase any fine or penalty imposed.

The question of challenging the inaction of the Commission is more difficult. There is no time limit on the Commission's operations under Reg.17, and it is difficult to determine whether the Commission's powers are discretionary or mandatory. In certain cases, it is clearly stated what the Commission must do, if it decides not to act. Thus after a request to issue a decision under Reg.17 Art.3, the Commission must write to the complainant explaining why no action is to be taken. 81 Where there is no such requirement, the continued inaction of the Commission may amount to a misuse of its powers, and Art.175 allows appeal to the Court in connection with such a failure to act. Again there is a differentiation between the right of appeal of member states, and of an individual. A member state can bring an action under Art.175, where it considers there has been a violation of the Treaty, by the failure of the Council or Commission to act. For the individual, the right to raise an action

79 see Cimenteries C.B.R. v Commission - note 66 above.
80 Thus in Italy v E.E.C. Council and E.E.C. Commission – Italian Government (1966) 12 Recueil 457 - the request of the Italian Government that certain provisions of Reg.17 and Reg.153 be declared inapplicable was rejected because the two regulations were not sufficiently connected with Reg.19/65, which was the subject matter of the main proceedings before the Court; see also Milchwerke Heinz Wohrmann v E.E.C. Commission (1962) 8 Recueil 965.
81 Reg.99/63 Art.6
is limited to where there has been a failure to address to the individual an act other than a recommendation or an opinion. In practice however, 'any public body should consider it as its duty to reply to serious approaches made by interested parties and directed against a measure coming within its competence' 82 and since the Commission will rely on the vigilance of individuals for an effective enforcement of community competition policy, it is likely that the precedent in relation to Reg.17 Art.3, of being required to reply to complainants, will be extended to other instances where an individual brings a matter to the Commission's attention.

Despite this limitation on an individual's right to raise an action on the basis of the Commission's inaction, the legal control, exercisable over the Commission's operations under Reg.17, is extensive and has played an important role in the development of the community's rules of competition.

(b) Group Exemptions

The large number of agreements notified to the Commission for the purpose of acquiring exemption from the Art.85(1) prohibition, created a considerable administrative problem. Therefore Council Regulation 19/65 was passed, allowing the Commission to make group exemptions under Art.85(3). 83 This idea was inherent to a certain degree, in the communications from the Commission on the application of Art.85 to certain agreements for exclusive dealership and to certain patent licensing agreements. 84

Reg. 19/65 authorises the Commission to exempt as a group, those agreements

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82 A.G. Roemer in Rhenania v E.E.C. Commission (1964) 10 Recueil 839 at 857: this is what happened in Lutnicke v E.E.C. Commission (1966) 12 Recueil 27 - where the Court held that the fact that the Commission had replied to Lutnicke's letter requesting action, was sufficient to meet any challenge under Art.175. In fact, the request was for an action which would not have been directed to Lutnicke and the decision is probably distinguishable on those grounds.

83 J.O. 1965/533
or concerted practices falling within the categories of bilateral exclusive dealing agreements and licensing contracts. The validity of the Regulation was challenged by the Italian Government, but it was upheld by the Court of Justice.

The Commission's power, under the regulation, is to be exercised by way of regulations, specifying the classes of agreement exempted, any conditions which must be met and any clauses or restrictions that must be omitted. Apart from consulting with the Consultative Committee on Cartels and Monopolies consisting of representatives of the six member states, and being liable to challenge before the Court of Justice, the Commission is free, within the ambit of Reg.19/65, to pass group exemption regulations.

Agreements covered by Commission regulations will cease to be subject to compulsory notification in order to achieve exemption under Art.85(3). However, enterprises are still free to notify their agreements and this serves as an insurance against the Commission declaring that the group exemption does not apply. Notification gives the agreements conditional validity and prevents retroactive fines, although a group exemption may apply retroactively to agreements.

The Commission has power to withdraw the application of a Group Exemption regulation to a particular agreement, if it finds that the effects of the agreement are incompatible with Art.85(3), notwithstanding that all the conditions

85 Reg.19/65 Arts. 1(a) and (b)
86 Italy v E.E.C. Council and E.E.C. Commission (1966) 12 Recueil 457 - interalia the Italian Government challenged the regulation in that by enacting it, the Council had assumed that all agreements belonging to the exempted groups were to be considered as automatically prohibited under Art.85(1). This contention was not accepted by the Court who held that Reg.19/65 simply authorised the Commission to exempt as a group from the prohibition of Art.85(1) the agreements designated in it, and then only if they fell within Art.85(1). A group exemption does not directly pass judgement on whether or not a specific individual agreement comes within the Art.85(1) prohibition. 87 Reg. 19/65 Art.7
88 similarly to Reg.17 Art.6 - normal declaration of exemption under Art.85(3).
are satisfied. This alleviates the fear of 'bad' agreements being submerged in the group exemption and escaping control through a loophole in the law.

Commission Regulation 67/67 was the first exercise of the power given to the Commission under Reg.19/65. This regulation will clarify the position of thousands of agreements, which have been notified to the Commission. It covers bilateral exclusive dealing agreements and the exemption extends to agreements as yet unnotified. Besides the exclusive dealing clause, two further restrictions on competition are allowed – a ban on the manufacture or sale of competing products by the dealer and a ban on prospecting for customers outside the contract territory. The Commission is allowed to apply the normal cartel procedure in any cases where it appears that the restriction on competition are excessive and this device is an alternative to further vague criteria requiring satisfaction, before the exemption applies.

The practical effect of the regulation is to shift the burden of proof, as to whether the conditions of Art.85(3) are satisfied, from the enterprises concerned to the Commission. The Commission, by individual examination of cases, must prove that the exemption does not apply and enterprises are released from the obligation of proving the beneficial character of their agreements or concerted practices.

This regulation marks an important development in the Community's competition policy and is an indication of the Commission's experience after five years of activity under Reg.17. It covers an important conflict concerning exclusive dealing agreements, which can be violently discriminatory and restrictive on competition, and at the same time, beneficial to the process of

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89 Reg.19/65 Art.7
90 'Application of Art.85(3) of the Treaty to Groups of Exclusive Dealing Agreements' J.O. 1967/849
91 Reg.67/67 Art.1; see also Reg.67/67 Art.2 re other authorised restrictions on competition and Reg.67/67 Art.3 re certain prohibited clauses.
92 Reg.67/67 Art.6
integration. It will be followed by other regulations and the first of these will probably cover agreements on horizontal co-operation between medium and small sized firms.

(c) The role of national institutions

There are three aspects of the relationship between the member states and the Community, which are of importance with regard to the community competition policy. Firstly, there is the division of competence between the institutions of the member states and the Community, as to the enforcement of the Community rules of competition. Secondly, one must consider the authority of the acts of the Community institutions within the member states, with the allied problem of the validity of agreements challenged before member state institutions. And finally, there is the relationship between national law and Community law in the field of competition policy.

Competence

Prior to the passing of Reg.17, the division of competence as to the enforcement of Arts.85 and 86 was laid down by Arts.88 and 89. The 'competent authorities' of member states were, in accordance with their respective municipal law and with the provisions of Arts.85 and 86, to rule upon the admissibility of any understanding and upon any improper advantage taken of a dominant position. The role of the Commission was to ensure that Arts.85 and 86 were put into effect, but only when complaints were brought before it, could the Commission investigate, suggest appropriate remedies and if required, issue a reasoned decision, authorising the member state to take the necessary action.

93 For a discussion of the economic implications of Reg.67/67 see 'The Group Exemption of E.E.C. Reg.67/67' Claude Champand, 5 C.M.L. Rev. 23, see also Common Market Vol.7 No. 7 July 1967
94 i.e. when a restrictive agreement or the conduct of a dominant enterprise come up for consideration under their own municipal cartel law.
to bring the infringement to an end. Because enforcement had to take place 'in accordance with their domestic law', member states, who did not already have the institutional means, had to pass special legislation in order to enforce these provisions. 95

When Reg. 17 came into effect on 13th March 1962, the position was radically changed. Reg.17 Art. 9 is the crucial article. It contains three important elements: (i) The Commission has the sole authority to make declarations as to the non-applicability of the Art.85(1) prohibition under Art.85(3); (ii) The Commission is always competent to enforce Art.85(1) and Art.86. (iii) The authorities of the member states remain competent to enforce Art.85(1) and Art.86 in accordance with Art.88 provided that the Commission has not initiated any action in accordance with Art.2,3 or 6 Reg.17. 96

(i) Art.9(1) Reg.17 excludes both the competent authorities and the national courts of member states from the application of Art.85(3). This is the logical consequence of reserving sole authority to the Commission.

(ii) Art.9(2) Reg.17 gives the Commission the power to enforce the prohibition of Arts.85(1) and 86, even before the time limits for notification have expired. 97 This could cause difficulty with an unnotified agreement, for which existed the possibility of an exemption decision with retrospective effect. 98 In such a case, the Commission would not take a decision to apply Art.85(1), without anticipating and considering these possible exemptions.

No such difficulties arise with 'new agreements' notifiable under Reg.17 Art.4, where if there has been no notification, the Commission cannot be

95 In Belgium Art.28(2)(2) of law of May 27, 1960; in the Netherlands Art.88 of the Treaty of Dec. 5, 1957.
96 Reg.17 Art.9(1),(2) and (3). 97 Since the Art.85(1) and Art.86 prohibition applies from the 13th March 1962, no prior decision being required - Reg.17 Art.1.
98 Under Art.85(3) or Art.7(2) Reg.17 in relation to agreements notifiable under Art.5 Reg.17 or Arts.4(2) and 5(2) Reg.17.
involved in a later declaration of non-applicability under Art. 85(3). 99

(iii) Art.9(3) Reg.17 continues the competence of the authorities in member states to enforce Arts.85 and 86, with certain limitations as to the scope of this power and to the timing of the exercise of it. The power is restricted to an enforcement of the prohibitions of Arts.85(1) and 86, and can only be exercised if the Commission has not initiated proceedings under Arts.2,3 or 6 of Reg.17. Again this enforcement must take place in accordance with the respective domestic laws. 1

The first problem that arises is what amounts to 'initiation' of proceedings by the Commission. For this, it is not sufficient that the Commission is investigating a case, merely as an internal matter, and there must be some indication from the Commission that it intends to take action under Arts.2,3 or 6 Reg.17. Thus a request, complaint or notification is not sufficient for the 'initiation' of proceedings, for none of these amount to the beginning of a procedure resulting in the Commission making a decision under Arts.2,3 or 6 Reg.17. Nor does the mere transmission to the competent authorities of member states of copies of such requests, applications or notifications as have been sent to the Commission, amount to 'initiation'. 2 For an 'initiation' the copies would need to be accompanied by a request for an examination or an opinion. In practice, this difficulty is overcome by a formal letter from the Commission, sent to the competent authorities in the member states, and to the parties, announcing that proceedings have been 'initiated'.

A further difficulty arises as to what are the 'competent authorities' in the member states. Normally these are the authorities charged with the enforcement of national laws against competition or created especially to enforce Arts.85 and 86. However, the situation is complicated when, as in France, there

99 Reg.17 Art.6(1) 1 see note 94 above 2 Reg.17 Art.10(1)
are no such administrative authorities and jurisdiction lies with the courts. Are the courts to be allowed to enforce Arts. 85 and 86 freely or only within the limits of Art. 9(3) Reg. 17? It is generally accepted that Art. 9(3) Reg. 17 only refers to authorities especially constituted for the administration of competition law—national or community—and that national courts are only included if national procedure says so. Thus, national courts have a jurisdiction to apply Arts. 85 and 86 in the course of civil proceedings before them, and this creates a problem which we shall shortly examine.

Firstly however, we must finish our discussion on the division of competence between community authorities and member state authorities. Where the latter have jurisdiction and apply the Art. 85(1) prohibition before the initiation of any proceedings by the Commission, it is possible that this may conflict with a future declaration by the Commission granting exemption under Art. 85(3). In Bosch v de Geer it was held that such a prohibition could be enforced by the member state authorities, even although a retrospective declaration of exemption by the Commission was possible. Nevertheless, the action that national authorities may take under Art. 9(3) Reg. 17 cannot prejudicially affect the Commission's competence to grant exemption with retroactive effect and therefore national authorities will act carefully and may wisely prefer, instead of taking direct action, to refer the matter to the Commission for its decision.

One final aspect of the role of the member states, in enforcing the community competition policy, is the Consultative Committee on Cartels and Monopolies. This committee consists of experts from each of the six member states, and it must be consulted by the Commission prior to it taking any decision under

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4 (1962) 8 Recueil 89
5 cf 'The Distribution of powers of enforcement of the Rules of Competition under the Rome Treaty' A. Deringer I.C.M.L. Rev. 39—where the author argues that the competence of national authorities would be limited in such a case.
6 Reg. 17 Arts. 6 and 7
7 Reg. 17 Art. 3(2)
Art. 2, 3 or 6 Reg. 17 or concerning the renewal, alteration or revocation of a declaration under Art. 85(3), The Committee's advice is not binding on the Commission, but it does nevertheless, play a valuable role in the application of community policy. Mention might be made of certain provisions which regulate the Commission as to the way in which the member states are to be kept informed and involved in its procedures and others which require the member states to support the Commission in its activities under Reg. 17.

Effect of the rules of competition on domestic civil proceedings

Difficulty arises when, during proceedings before the civil courts of the member states, an agreement is challenged as being contrary to the rules of competition of the Community. The courts concerned are not those which would ex officio enforce the rules of competition either of member states or of the Community. However, in the course of private litigation, they may be asked to determine the validity of an agreement in relation to Art. 85 in order to decide on the civil remedies, such as damages or injunctions, which may be asked for.

Here the first possibility is that the Commission has taken a decision under Reg. 17. The agreement may have been given a 'negative clearance' or have been the subject of a decision requiring an alleged infringement to be terminated. Further, after notification, the agreement may have been exempted under Art. 85(3) or granted a period of grace. What authority do these decisions have in litigation before the domestic courts?

Ultimately, this is a question to be decided by the rules of the national jurisdiction, but there are certain general conclusions which can be drawn.

8 The constitution and procedure of the Committee are dealt with by Reg. 17 Art. 10 and its role is more fully described during the section on the place of competition policy in the general framework of community policy.

9 Reg. 17 Arts. 10, 11(6), 12(4), 15(3), 16(3) and 19(2) 10 Reg. 17 Arts. 11(1), 12(4), 13, 14(5) and 14(6).

11 Reg. 17 Arts. 2 and 3

12 Reg. 17 Arts. 6 and 7.
In relation to whether an agreement falls within the prohibition of Art.85(1), the national courts will place great authority on a decision as to negative clearance or the termination of an infringement of the prohibition. However there is no general rule that such decisions are legally binding on the courts, and they are not decisions of the Commission containing a pecuniary obligation, which are enforceable under Art.192.

Particularly with decisions as to negative clearance, there is no absolute binding authority. In fact, they have been referred to as having only 'persuasive authority' with the issue of nullity falling to be examined de novo. This follows from the fact that a 'negative clearance' is issued by the Commission according to the information available to it. The information before the court will most probably be different, or at least presented from a different viewpoint, and it is therefore logical that the court should be free to decide de novo as to the applicability of the Art.85(1) prohibition. The presumption in favour of acceptance of the Commission's decision can therefore be overturned.

It would be more difficult for a national court to overrule a decision requiring termination of an agreement and in relation to the parties to the agreement, it should probably be considered as res judiata. However, it is theoretically possible that, on the application of a third party, a national court could decide that the prohibition of Art.85(1) did not apply to an agreement, which the Commission had already subjected to a decision requiring termination. In practice however, a national court could avoid any difficulty by making a reference to the Court of Justice under Art.177(b), seeking a preliminary ruling as to the validity of the Commission's decision.

13 Reg.17 Arts.2 and 3 14 Restrictive Trading Agreements in the Common Market A. Campbell (Stevens) 1964 para.106
15 see Bosch v de Geus (1962) 8 Recueil 89 - submission of A.G. Lagrange.
16 see next page.
Where the Commission has made a decision in relation to Art.85(3), the national courts are bound. These decisions are challengeable only before the Court of Justice under Art.173. This is because Reg.17 Art.9(1) reserves to the Commission, the sole competence in relation to Art.85(3).

The second possibility is where there has been no decision taken by the Commission. What is the national court to do in such a situation? Initially the national court must determine where the community rules of competition apply to the disputed agreement. It is free to do this notwithstanding that the agreement has been notified to the Commission. In deciding this question, the national court may request the Court of Justice for a preliminary ruling under Art.177. Theoretically under Art.177, the Court of Justice is limited to an abstract interpretation of the Treaty or of measures taken under it. However, this interpretation takes place within the framework of questions referred from a particular case, and the facts of the case consequently have some bearing on the interpretation given by the Court, even if the latter falls short of an application of the Treaty to the particular facts. Further the Court of Justice has a duty to adopt an interpretative approach, both helpful to the national judge and within its jurisdiction to interpret Community law. Consequently, a preliminary ruling, under Art.177, may have a greater practical significance for the case, in connection with which it is given, than is to be expected from the formal nature of this procedure.

16 see Schwarze v Einfuhren und Vorratsstelle fur Getriede und Futtermittel (1965) 11 Recueil 1081 - where it was held that, where a question of interpretation of an act of a Community institution in fact concerns the validity of the act, then the Court must give a decision as to its validity.

17 see Etat Francais v Nicolès and Societe Brandt (1965) C.M.L.R. 36 - where it was held by the French Cour de Cassation that a national court had such a right and that where it finds that the Community rules do not apply, it is free to apply the member state rules notwithstanding that the agreement has been notified to the Commission.

18 see Société Technique Minière v Maschinenbau Ulm GmbH. (1966) 12 Recueil 337 - where the interpretation of the Art.85(1) prohibition given by the Court of Justice left doubt that agreement in question would be upheld by the Court of Appeal in Paris.
Where the national court decides that the community rules do not apply, then it is free to uphold the agreement or to apply national competition rules to it. On the other hand, where the national court holds that the agreement does come within the prohibition of Art.85(1), the action it should take is more complicated. If the agreement is unnotified to the Commission, and yet under Reg.17, should have been, then the national court must hold the agreement null and void, and decide the proceedings before it on that basis. Here, there is no possibility of an exemption, having retrospective effect, being granted in the future, as such exemptions are only retrospective to the date of notification. Consequently, there is no danger of conflict between the decisions of the national court and the Commission.

Where however, there has been notification or the agreements are excused notification, then the possibility of conflict does arise. If the national court enforces the prohibition against the agreement, then this may conflict with a later declaration of exemption granted by the Commission under Art.85(3), and retrospective to the date of notification. In the interests of legal security, this is unsatisfactory and while the difficulty can be partially alleviated by a reference to the Court of Justice under Art.177, since it is a matter of application rather than of interpretation, the final decision rests with the national court. The court has to decide whether to stay proceedings until after the Commission has acted, or whether to reach its own decisions on the facts before it. Neither the Treaty nor Reg.17 provides any device whereby a national court can refer to the Commission the question as to whether an exemption will be granted. 19

The justification for staying the proceedings has been based on an interpretation of Reg.17 Art.9(3) and on rules of national procedure. Where the

19 This can only be done by the parties to an agreement through notification or by member states and third parties under Reg.17 Art.3(2).
'authorities' referred to in Reg.17 Art.9(3) have been interpreted to include the national courts, then it has been held that they are under an obligation to stay proceedings. Thus in Consten v U.N.E.F. 20 the French Cour d'Appel in Paris held the national court must await the final decision of the Commission before private litigation could be settled. However, it is generally agreed that the correct interpretation of 'competent authorities' does not include the national courts, other than where they have been granted a specific role in the application of competition law. 21 Thus a stay of proceedings can not be legally justified under Art.9(3) nor under any other provision of the Treaty or Reg.17.

Justification for a stay in proceedings may be supplied by the rules of national procedure. Thus in N.V. Technische Handelfonderneming Nibeja v N.V. Craets Nederland, it was held that a national court has no power to declare an agreement void under Arts.85(1) and 86, as long as the agreement has been duly notified to the Commission, and neither the Commission nor the competent have declared it prohibited. 22 Likewise in the Ciment Portland Case 23 the Belgian Cour de Cassation upheld the decision of the Cour d'Appel to stay proceedings until the Commission had reached a decision.

Even where the rules of national procedure do not specifically grant

20 [1963] C.M.L.R. 176 - an action was raised to enforce an exclusive dealership agreement and the defendant claimed that the plaintiffs exclusive agency contract was null and void and produced evidence that the E.E.C. Commission had initiated proceedings against it. The Cour d'Appel held that this evidence required the court to stay proceedings; see also S.A.R.I.E. v U.N.E.F. [1963] C.M.L.R. 185 where it was held that the 'initiation' of proceedings by the Commission required a stay of proceedings by the national courts.

21 see note 3 above: Bosch v de Gena [1962] C.M.L.R. 1 per A-G Lagrange p.17:


23 [1967] C.M.L.R. 250 – see note 21 above – held that where an agreement is being considered by a jurisdiction which has the sole authority to determine its validity, a court trying a case which turns on that agreement is justified in staying until the other jurisdiction has given its decision on validity.
legal justification for a stay in proceedings, the moral obligation on the national courts to avoid a conflict is very great and every effort to do so, will be made. Nevertheless, the difficulty could be quite easily eliminated by instituting a procedure whereby national courts could refer to the Commission for its final decision on any disputed agreement.

National Law and Community Law.

The relationship between national law and community law in the field of competition policy presents the same problems as in other fields of the Common Market, where the Community does not have exclusive legislative competence. 24 The concurrent competence shared between the Community and the member states means that the member states are free to maintain existing law and to introduce new legislation, insofar as the Community has remained inactive. Once there is any conflict between the community law and the national law, then the latter becomes invalid.

The difficulty in resolving such a conflict is in determining the dividing line between community law and national law. 25 In particular with competition policy, both the community and member states rules have extra-territorial application. Some agreements exempted under national law, may be prohibited under Arts. 85 or 86, and other agreements may be struck down in the opposite circumstances.

Normally, the solution is to judge the particular aspects of the agreement or practice according to their particular effects - community effects as against community rules, and national effects as against national rules. Some agreements

25 see Costa v E.N.E.L. (1964) 10 Recueil 1141 - where the Court of Justice as a reference under Art. 177 from an Italian court, talked of the Treaty of Rome instituting a new legal order which limits the sovereignty of member states.
and practices however, affect trade both within a specific member state and within the community at large, and cannot, for the purposes of adjudication under the laws of competition, be separated into national elements and community elements. This type of agreement will increase in number as the process of integration develops.

With this indivisibility of subject matter, comes the possibility of conflicting decisions. Thus an exemption under Art.85(3) could be subsequently 'over-ruled' by a decision based on member state legislation, controlling national restrictive practices and agreements. Because of the public policy content of an exemption granted under Art.85(3), subsequent national decisions of this nature would be an unfortunate development. Thus in the anti-trust field, as in others, the limitations on the sovereignty of the member states must be clarified and be definite, if the Community institutions are to achieve the aims of the Treaty. There must be a clear limitation on national authorities preventing them from acting, on the basis of national anti-trust legislation, against agreements which are subject to the community rules of competition.

(iii) The general approach of the Commission to the administrative of competition policy

A discussion of the Commission's approach to the administration of the community's competition policy, within the constitutional structure and procedure just described, will show how the administration of that policy is co-ordinated with the other policies administered by the Commission. In particular, it will be seen how individual cases are cleared with the other Directorate-Generals before any final decision is taken. Initially however, consideration must be given to the Commission's attitude to the development of competition policy.

26 Here the Community institution's powers, under Arts. 100-102, in relation to the Approximation of Laws, are very important.
The Commission does not spend much time on questions of general competition policy. It does of course issue statements as to its future policy, hold meetings with experts on restrictive practices in the member states, and have regular consultations with the Conference de Cartels, which includes the six members of the Consultative Committee on Cartels and Monopolies, formed into a differently constituted body. This Conference is consulted on all basic questions, other than individual cases. Rather than devote its energies to the discussion of general policy in the abstract, the Commission prefers to formulate the development of its policy through the decision of individual cases.

This gives importance to the priority by which agreements are tackled, and the Commission thereby builds up a case law. Firstly the Commission attempts to find test cases, where the decision will be regarded as typical and have repercussions in similar cases. Secondly the Commission tries to deal with the economically important cases, in preference to those from less important sectors in the economy, and lastly, the Commission has regard to the source of its knowledge about the agreement under consideration. Preference is given in the order of complaints, notification, Commission investigation and information from the member states.

This emphasis on developing a case law is the most important aspect of the Commission’s approach to competition policy. As more cases are decided, the obvious definitional problems associated with Art.85 will be clarified and enterprises will have a more accurate indication of the validity of their

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27 see the Annual Reports of the Commission.
28 see statement in E.E.C. Bulletin Nov. 1967 as to the Commission’s policy in competition over the following twelve months. To ensure the maximum legal predictability for firms, the Commission intended to concentrate on three main categories of agreement:
(a) those eligible for 'negative clearance'
(b) those for which 'group exemptions' could be formulated under Reg.19/65
(c) those where position was doubtful until a more adequate case-law was developed.
agreements and practices. Further, since each individual case is co-ordinated with the Community's other economic policies, the development of competition will thereby be fully integrated with all aspects of the Community's economic development.

The development of a case law will also assist the informal aspect of the Commission's operations under Art.85. Through informal discussion, the Commission causes a considerable number of agreements to be abandoned or varied. In fact, the Commission prefers to act in this way rather than through the taking of formal decisions. As a case law is developed, so will the power of the Commission's persuasiveness increase.

It was mentioned that each individual case is co-ordinated with the Community's other economic policies and an examination of the internal procedure of the Commission, shows where this takes place. Within the General-Directorate on Competition, there is a fixed procedure which every individual case goes through. Initially, a restrictive agreement or practice is considered by the Individual Case Direction, which examines the full facts of the case and makes an initial proposal as to the action to be taken. This proposal is passed to the General Policy Direction, which examines it against the broad background of Community competition policy. Then the case is returned to the Individual Case Direction where any amendment suggested, is considered. The final proposal of the Directorate is then submitted to the Service Juridique for its examination. This is a most important stage in the procedure and the Service Juridique has considerable influence. All decisions taken by the Commission must fit into the legal framework of the whole treaty, and since the Service Juridique is better informed as to Community law and the decisions of the Court of Justice, its examination of all intended decisions is of great importance. Once approved by the Service Juridique, the decision goes up for final approval by the whole Commission. Any directorate within the Commission can object to
the decision and if there is objection, then the decision will be delayed until agreement has been reached. Usually however, all possible objections have been previously eliminated, by consultation between the Individual Case Direction and other directorates in the Commission. Where a real problem does arise, working parties are set up, composed of officials from the directorates concerned. Thus there is very real consultation and co-ordination within the Commission. A similar co-ordination between the Commission and the member states is achieved through the Consultative Committee on Cartels and Monopolies.

Despite this clearly defined procedure, which must be followed in administering the Community's competition policy, the Commission remains an administrative body, as opposed to a court of law. This administrative approach allows it to apply economic and policy considerations for which there is no legislative basis. Provided that it states the factual and legal elements which are essential for understanding its decision and resisting any challenge before the Court of Justice, then the other factors which it considers are a matter for its discretion.

This administrative approach is effective both in relation to the economic policy of the Community as a whole, and as a means for developing competition policy in line with changing economic circumstances. The flexibility in procedure also allows the Commission to reach decisions which would not be possible for a court of law. In general therefore, it can be said that the Commission's approach to the administration of Community competition policy is a correct and effective one.

30 It can allow temporary cartels with short-term economic benefits, which is not possible for the R.P.C. under the 1956 Act; but see the Restrictive Trade Practices Bill 1968 which introduced an administrative method of allowing them.
CHAPTER 3

INDUSTRIAL RATIONALISATION
INDUSTRIAL RATIONALISATION

(a) United Kingdom

Governmental participation in the rationalisation of British Industry has existed for many years. Prior to the creation of the Industrial Reorganisation Corporation, with its general responsibility for such rationalisation, any public intervention took the form of specific measures related to particular firms or industries, or alternatively, where the need was more prolonged, the Government adopted more permanent policies in relation to particular industries. 1 Examples of the former category are the siting of the two new steel strip mills of Richard Thomas and Baldwin and Colvilles, the rescuing of the Cotton Industry by the Act of 1960, and indeed, some of the provisions of the new Industrial Expansion Bill, such as clause 8 which would authorise the Board of Trade to lend £24 mil. to Cunard, for the new liner, Queen Elizabeth II, and clause 10 which authorises the Minister of Technology and others to buy Beagle Aircraft, also fall into this category. Of the more permanent policies, the relationship between the Government and the Aircraft Industry stands out as a prime example. 2 Here, there has been a considerable amount of governmental intervention - understandable because of the Government's position as a customer, through the Services and B.E.A. and B.O.A.C. The whole structure and profitability of the industry has been determined by the Government's placing of its contracts, and the industry is therefore continually affected by Government policy. Other examples of longterm control and influence are the Government's policy in relation to the agriculture, fishing and pharmaceutical industries.

Sometimes the Government's policy is administered by the ministers of the sponsoring department, such as the Ministry of Health, and other times, it is

2 Ibid p. 360
entrusted to an independent body or commission, operating under broad ministerial direction, such as the White Fish Authority, the Herring Commission, the Crofters Commission and many others. A recent development in this approach was the creation of the Shipbuilding Industry Board, as recommended by the Gedd-es Report. The report suggested the establishment of the Board to (a) initiate, assist and stimulate necessary action within the industry, (b) administer and control Governmental financial assistance (c) give the Government informed advice on the current prospects of British firms and on the effect on their business, of assistance given to shipbuilders overseas.

The Board was established for a period of five years, with provision for a possible extension for a further year. With competitiveness as its over-riding objective, the Board will operate under only the broadest of ministerial control.

To help in its task of the reorganisation of the shipbuilding industry, the Board has certain financial powers. It can make grants, up to a total of £5½ mil., in respect of transitional losses as a result of regroupings. These require ministerial approval, as does the taking of equity shareholdings. However in the distribution of the £32½ mil. of reorganisation loans, which it has at its disposal, the Board is left to its own discretion as to the amount it deems fit for a particular purpose.

Many of these policies have achieved considerable success in relation to particular industries, albeit that the government control thus exerted over private industry, is much greater than is realised, when the distinction between public and private enterprise is drawn. With both private and public enterprises, what may be the most likely course of action to be adopted will depend very largely on what the enterprise knows about specific government departments' policies. Further it may be in the interests of the industrialists concerned to

3 Cmd. 2937 March 1966  4 Shipbuilding Industry Act 1967
maintain good relations with the government departments, which have connections with their enterprises. Thus, company decisions may be affected by other than purely commercial considerations and because this government-enterprise relationship exists very largely behind closed doors, the constitutional problem of control is very difficult.

However, it is not only private enterprise that wishes to maintain a good relationship between the Government and industrialists. The Government itself is keen that it should exist, as increasingly, industrialists are being involved in the planning and execution of policy, with regard to the Government's participation in industry. Mention has already been made of the role of the National Economic Development Council, and under it exists a series of Economic Development Committees - 'Little Neddies'. There are now 21 'Little Neddies', each with a responsibility for a different industry. This responsibility extends to examining questions of industrial efficiency, of achieving import substitutions, of encouraging standardisation, of increasing exports and of how the structure of industry could be reorganised and rationalised.

Why the relationship between Government and industry is important, is with regard to the industrialists whom the Government wishes to serve on the E.D.C.s and to industry accepting the recommendations finally made. The E.D.C.s consist of representatives of the D.E.A., trade unions, management, any government departments concerned with the particular industry and they are chaired by leading industrialists from other industries, who can contribute their experience from an independent position. Thus, co-operation with industrialists is essential and since the E.D.C.s have no executive powers, this co-operation must extend to an acceptance of any recommendations, if these bodies are to achieve any success. Because the E.D.C.s are independent bodies, acceptance of their views is also required from the Government and rejection here also frustrates co-oper
ation between Government and industry. 5

Despite the achievements of past policies and the existence of the Meddy framework, the present Government felt that a more direct attack on the problem of the restricting and reorganisation of British industry was required. There was no organisation whose particular function was to search for opportunities for industrial rationalisation and to promote schemes which could yield substantial benefits for the national economy. The Government also felt the need to be able to respond promptly to future calls for aid, without requiring ad hoc legislation or being bound by Development Area policies. The Industrial Reorganisation Corporation and the Industrial Expansion Bill are intended to fill these gaps.

Origin of the I.R.C.

The I.R.C. was first publicly mooted in a White Paper published in January 1966. 6 The White Paper stressed the need for industrial rationalisation through mergers, acquisitions and regroupings, but complained that the pace of change was not sufficient. The Government believed that the economy could not rely on natural market forces to achieve this reorganisation, and in any case, felt that if the reorganisation was in the national interest, then it should be sponsored by the public at large, rather than by the consumers of a particular product paying higher prices. 7 While there exist specialised services, like merchant banks, which can assist enterprises interested in industrial regrouping, these bodies can only act on the initiative of their clients, and looked at against the broad national interest, this initiative is often lacking. The Government believed that this lack of any organisation positively looking for

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6 Cmd. 2889; see also 723 H.C. Deb. 55-62 7 cf. Report on the supply of man-made cellulosic fibres. H.C. 130 (1967-68) – where it was mentioned that one of Courtauld's defences of its position of market domination was that it used its excess profits for the rationalisation of the textile industry.
opportunities for rationalisation would be corrected by the creation of the I.R.C.

The I.R.C. was envisaged as a body of experts from all sides of industry, who would be given a considerable degree of independence in searching out possibilities for industrial reorganisation and in helping to finance them, when they appeared to be in the public interest. This was felt to be a more worthwhile role for public finance than that of being dragged in as a form of first-aid when the situation had become critical.

The proposed body was welcomed by many industrialists and economists, particularly those who appreciated the greater role that the Government would play in the economy of the future, and who had become involved in that role through the work of the E.D.C.s. They saw the I.R.C. as a source of industrial innovation and initiative and as a further sign that the artificial categorisation of industry into private and public sectors was disappearing.

The 'Economist' viewed the I.R.C. as a means whereby the Government could get away from Whitehall's extreme sensitivity to favouring one firm against another. This had prevented government planners from following up their 'industrial hunches', which was of course, the opportunity to be given to the I.R.C. The calibre of the members, who had initially agreed to serve on the I.R.C., should assure industry that the initiative offered would be towards better organisation, management and equipment, and the only danger the Economist could see, was an abuse of the financial powers to be given to the the I.R.C. It warned against the I.R.C. using its capital to become a Government holding company and being used to support financially worthy social causes, a risk to which all nationalised industries were exposed.

Conservative reaction to the I.R.C. was that it was seen as a device for

back door nationalisation. Objection was taken to the fact that the I.R.C. would be empowered without reference to Parliament, to acquire shares, including a majority holding, in any company in the U.K. The possibility that the I.R.C. might take and retain majority shareholdings in private enterprises caused considerable concern, particularly because of the lack of Parliamentary control which was to be exercisable over the body.

The Opposition suggested that the fact that specific initiatives of the I.R.C. would lack the sanction and authority of Parliament was a further step in devaluing the authority and democratic function of the House. Indeed it was suggested that to ensure success for the I.R.C.'s proposals, they should require not only the tacit approval of the Minister, but the clearly declared support of the House. Only then, would its proposals be respected and fully acceptable to industry. This would have, of course, jeopardised the independent nature of the I.R.C., and the benefits which this independence was expected to produce, and this was in fact suggested by a Conservative M.P., who proposed that the I.R.C., and the functions it was intended to fulfil, be transferred to a department within the Board of Trade.

Despite the various objections, the Bill was passed and the Industrial Reorganisation Corporation came into existence and began operations on 21st December 1966.

**Industrial Reorganisation Corporation**

(a) **Structure of the I.R.C.**

The I.R.C. was established by the Industrial Reorganisation Corporation Act 1966, as a public corporation with guaranteed independence. It is not to be regarded as a servant or agent of the Crown, nor is it to receive any

11 734 H.C. Deb. 323 12 Sec.1 1966 Act.
special privileges. This independence has been scrupulously respected by Ministers and officials.  

The Corporation consists of a chairman and seven to fourteen other members, appointed by the Secretary of State to the D.E.A. From amongst its members, is appointed a Managing Director, a post which carries a salary of £20,000 and is at present held by Charles Villiers, who was formerly a merchant banker. The members are 'to have a wide experience of, and to have shown capacity in, industry, technology, commercial or financial matters, administration or the organisation of workers.' Initially people of a high calibre have been willing to serve on the Corporation, despite the demands on time, and in certain cases, the drop in salary which this may involve.

The Corporation operates with small teams of members allocated to each investigation undertaken. These groups are able to avail themselves of any professional or consultancy services they require. They operate with a considerable degree of secrecy and given the vaguest possible terms of reference, a group can produce a report from a purely industrial and economic point of view, without having to balance the conflicting viewpoints which are inevitably put forward in the more publicised committees of inquiry and Royal Commissions.

The functions of the I.R.C. are clearly stated in the Act. Established to promote industrial efficiency and profitability, and thereby assist the economy of the U.K., the Corporation may promote or assist the reorganisation or development of any industry and, if asked by the Secretary of State, may promote or assist the development of any industrial enterprise. As a financial support to these functions, the Corporation can hold securities, form companies, make loans, and give financial guarantees. Likewise, it can acquire premises, plant, machinery and equipment for the use of enterprises assisted.  

14 sec. 1(4) 1966 Act  
15 sec. 2(1) 1966 Act  
16 sec. 2(3) 1966 Act
(b) Relationship between the I.R.C. and the Government.

Because the I.R.C. is an independent body, administering public investment, its relationship with the Government is important. In the exercise of its functions, there are two instances in which the Corporation must have regard for directions given by the Secretary of State. A request in relation to an industrial enterprise can be made under sec. 2(1)(b) 1966 Act, or a direction of a more general nature can be made under sec. 2(5) 1966 Act.

As early as January 1967, the Secretary of State used his powers under sec. 2(1)(b). It arose in relation to the proposed takeover by the Chrysler Corporation of Rootes Motors Ltd. The proposal was submitted to the Government for its approval, before Treasury consent under the Exchange Control Act 1947 was formally applied for. After several undertakings had been agreed between the Government and Chrysler, approval was given. One of these undertakings was that the I.R.C. should be offered 15% of the Preferred Ordinary Shares and an equivalent percentage of Unsecured Loan Stock, and that it should have the right to nominate one director to the Rootes Board. Consequently, a request was made, under sec. 2(1)(b) 1966 Act by the First Secretary of State, to the I.R.C. and it agreed to participate in Rootes, in accordance with Chrysler's undertaking. 17

The amount involved in the I.R.C. investment in Rootes-Chrysler was over £3 mil. and the method by which it was decided, gave the impression that the I.R.C. might be forced into taking more shareholdings than it felt was economically justified. In this case however, the investment seems to have been well justified, as the figures announced by Rootes on March 1st, gave evidence of what has been described as the 'most remarkable recovery in British Company History'. 18

The only other instance of a request under sec. 2(1)(b) 1966 Act was in

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17 sec. 739 H.C. Deb. 34-47 17th January 1967; for details of the request, see Appendix 2 First Report of I.R.C. op.cit.
18 Observer 3rd March 1968
relation to the Reed Paper Group. Here the group were given a loan of £1½ mil. to enable them to install facilities for de-inking waste paper. This loan was the first time a purely industrial project was helped as opposed to enterprises involved in rationalisation through merger.

When the I.R.C. was created, although the powers and responsibilities given were in general terms, the Government had special areas in mind to which it might direct its attention. One of these was the telecommunications industry. Thus on 5th January 1967 the Secretary of State to the D.E.A. issued a Press Notice to the effect that:

"The First Secretary, the right honourable Michael Stewart, M.P. in consultation with the Postmaster-General and the Minister of Technology, has invited the I.R.C. to examine the structure of the telecommunications industry and its relation with the Post Office as the major home customer, with the object of seeing whether these could be improved in the national interest." 20

This was the first use by the Government of its powers under sec.2(5) 1966 Act.

The Government has also asked the I.R.C. for an assessment of the financial position of the Cunard Steamship Company and the possible terms of the Government’s assistance, and for an appraisal of the proposals of several companies to construct aluminium smelters in the U.K. 21

These formal directions are not the only method by which the Government can discuss with the I.R.C. the possible subject matter of the latter’s investigations and possible action. In its report, the I.R.C. states that it has received valuable advice from Government departments and agencies. 22 It has developed working relationships with the D.E.A.; the Ministry of Technology, the Board of Trade, and other departments whose activities infringe on those of the I.R.C. These have prevented the I.R.C. coming to cross purposes with

17 see 761 H.C. Deb. 313 (W.A.) 28th March 1968; for details of the request of this see Appendix 2 First Report of I.R.C. op.cit.
22 Ibid. p.6
Government departments, without infringing the confidence of the I.R.C.'s separate dealings with companies in the private sector. Thus after consultation with the D.E.A. and the Ministry of Power, the I.R.C. undertook a study of the structural problems in the private sector of the steel industry.

This leads on to the question of the nature and extent of ministerial responsibility for the I.R.C. By the terms of the Act, this clearly lies with the D.E.A., but the fact that the I.R.C. participation in the Rootes-Chrysler deal was announced by the Minister of Technology aroused certain doubt. The doubt was nurtured by a reported statement by the Minister of Technology, that he couldn't visualise his job being done without the I.R.C. and by the fact that the ministerial responsibility for the Industrial Expansion Bill will lie with him. However, the responsibility of the D.E.A. has been clearly reaffirmed.

Ministerial responsibility exists over the membership of the I.R.C., but it does not include responsibility for the day to day conduct of the I.R.C.'s affairs. The Government cannot exercise a veto over the Corporation's decisions about individual projects or over the financial support it has decided to give. Similarly, the I.R.C. has a discretion as to the publicity to be given to its activities. Other than fulfilling the statutory requirements for its annual report, it is a matter for the I.R.C., in consultation with the companies concerned, to decide whether it wishes information about individual transactions to be made public. Thus, in its first report, the I.R.C. while giving a full account of its first year of existence, mentions some of its activities about which the details will remain confidential.

Ministerial responsibility for the activities of the I.R.C. is very limited, confined to instances where directions are given, and therefore, within the terms

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23 739 H.C. Deb. 34 17th January 1967  
24 740 H.C. Deb. 629 1st February 1967  
25 see note 24 above  
26 743 H.C. Deb. 134-5 (W.A.) 16th March 1967  
27 sec. 9 1966 Act  
28 First Report of I.R.C. op.cit. p.11 sec.7
of the act, the I.R.C. is given considerable independence.

(c) **Financial Powers of the I.R.C.**

The sources of the I.R.C.'s financial resources are laid down in the statute. The I.R.C. may borrow from the Secretary of State and others. Loans from the Secretary of State are longterm and are repayable on conditions approved by the Treasury. Loans from other sources are temporary and may be guaranteed by the Treasury, if it considers it necessary. With the approval of the Treasury, the Secretary may pay to the I.R.C. sums not exceeding £50 mil., in the form of Exchequer Dividend Capital. In consideration of receiving this money, the I.R.C. is required annually to make such payments to the Secretary of State as approved by him.

A limit is placed on the amount of money available to the I.R.C. and the aggregate of the principle of any loans guaranteed by the I.R.C., the principle of any money borrowed by or paid to the Corporation, and any sums outstanding to the Treasury, as guarantees for loans made to the I.R.C., must not exceed £150 mil.

Already some concern has been expressed at the amount of finance being drawn by the I.R.C. This year the supplementary estimate amounted to £5 mil. in addition to the original estimate of £15 mil. This is in relation to the Exchequer Dividend Capital with which the Secretary of State is empowered to provide the I.R.C., up to a total of £50 mil.

This money is not drawn from the Treasury to cover specific purposes, but to be available for any projects which the I.R.C., with its considerable financial independence, may decide to support. The Treasury and the I.R.C. have an understanding that the latter will not hold large funds over long periods. However,
the system means that when the money is given, the Treasury does not know what the I.R.C. are going to do with it. It is only through the system of unofficial clearance which is operated, that the Treasury is informed of the I.R.C.'s intentions.

In relation to the I.R.C.'s powers to invest its financial resources, the independent nature of the Corporation is important. It may acquire, hold and dispose of securities, form bodies corporate, grant loans and guarantees with respect to loans made by others, and acquire and place at the disposal of others, premises, plant, machinery and other equipment. The Corporation is free to decide the terms of any financial assistance it gives, although the Government made it clear that the Corporation would be expected to earn a commercial return overall on its operations. Nevertheless, the I.R.C. has taken the view that it would not have been created unless its financial resources should be made available to assist rationalisation on terms which differed from those normally acceptable to existing institutions and this is clearly in line with the Government's wishes that the I.R.C. should provide finance for industrial rationalisation when it is not available from the normal private sources. Within the necessity for earning a commercial return overall, the I.R.C. intends to use its independence to be as flexible as possible in relation to the granting of financial assistance.

The I.R.C.'s power to acquire securities is both important and controversial, and any dealings in securities must be included in its annual report. The first instance of such a shareholding was the I.R.C. involvement in the Rootes-Chrysler deal. Here the investment was on the basis of an undertaking agreed on between the companies and the Government and Treasury approval, although

A further example of an I.R.C. shareholding was in a rationalisation involving Nuclear Enterprises Ltd. The I.R.C. supplied capital of £600,000, consisting of £500,000 unsecured loan stock and £100,000 in ordinary shares.

Exercising its powers to grant loans and guarantees, the I.R.C. has made some important decisions. £15 mil. has been lent to the enterprise resulting from the merger of English Electric and Elliot Automation, on terms which provide for an interest rate of 8% a year to be charged after the first two years of the loan. The I.R.C. has also been given certain conversion rights into ordinary shares of English Electric.

Loans have also been arranged for £25 mil. with the British Leyland Motor Corporation, £3½ mil. with Whesoe, a Darlington-based process plant manufacturer, and £1½ mil. for the Reed Paper Group. In its first 15 months of operation, the I.R.C. has lent or agreed to lend approximately one-third of the £150 mil. available under the 1966 Act.

(d) Other projects of the I.R.C.

The I.R.C.'s influence is not of course limited to cases where it makes a financial investment. Its financial assistance is available only where a commercially sound project would be impossible or unduly delayed without it, and in general, it tries to encourage structural reorganisation, without any financial involvement.

In deciding where to concentrate its activities, the I.R.C. has received a considerable number of approaches from companies and their financial advisers. This has helped the I.R.C. to seek out the structural changes which have the most significant impact on the industry concerned and on the economy as a whole. It is concerned with eliminating wasteful duplication, to permit.
economies of scale in production, marketing and research, and in doing so, the I.R.C. has concentrated on industries which can make a major contribution to technological development. Thus the I.R.C. has paid particular attention to the electrical and electronics industries, the mechanical engineering industry, the motor industry and the scientific instruments. In each of these industries, the I.R.C. has sought to sponsor a merger which will have the widest repercussions throughout the industry. The Leyland Motor Corporation/British Motor Holdings and G.E.C./A.E.I. are the most important examples of this.

Although there was no financial involvement in the G.E.C./A.E.I. merger, the I.R.C.'s role was a crucial one. The I.R.C. had been examining merger possibilities in the heavy electrical field for a while and was pleased at the opportunity of supporting plans for logical rationalisation, when approached by the G.E.C. for support in its bid for A.E.I. However, the implied corollary of this support was criticism of A.E.I. and of its management, and the matter was further complicated by the membership on the I.R.C. of Sir Charles Wheeler, the chairman of A.E.I. Not unnaturally, he felt unable to continue as a member, and in his letter of resignation, spoke of the unfortunate lack of consultation between the I.R.C. and the A.E.I., before the G.E.C. bid was supported.

While the I.R.C. was probably economically correct in its support of the merger, the lack of adequate discussion with A.E.I. of G.E.C.'s merger and rationalisation proposals is unfortunate, and must be linked with the unforeseen employment problems created by the closure of the A.E.I. factories at Woolwich and Sydenham. These closures point to a certain lack of co-ordination between the I.R.C. and the Government's regional policies. Nevertheless, the merger must be seen as the basis for far-reaching structural changes in the electrical

39 Ibid. p.8  40 see letter of resignation in The Times 28th October 1967 41 758 H.C. Deb. 222 (W.A.) — see also section on the reference of mergers to M.C. chapter 2.
industry and as such, essential to the I.R.C.'s purpose.

It is difficult to gauge the importance of the I.R.C. in the present trend towards industrial mergers. Since the creation of the I.R.C. the trend has accelerated considerably and in January 1968 alone, the value of all the takeovers and mergers, in the £1 mil. plus bracket, which were completed, came to at least £750 mil., compared with a total of £1,000 mil. for the whole of 1967. Obviously, these are not all a direct result of the activities of the I.R.C., but the I.R.C. may well have developed the climate in which this spate of mergers takes place. Certainly the general movement for re-structuring industry, by which the present Government sets such store, has gone from strength to strength. The Industrial Expansion Bill is obviously intended to continue this process.

(e) Relationship between the I.R.C. and other public bodies and departments.

The question of the ministerial responsibility for the I.R.C. has been fully discussed above. What is relevant here is the I.R.C.'s relationships with bodies administering different aspects of governmental economic policy.

(i) Board of Trade and the Monopolies Commission

The relationship between the activities of the I.R.C. and the Government's competition policy is one that initially caused concern. How were the operations of the I.R.C. to be related to the Government's merger control under the Monopolies and Mergers Act 1965? The solution arrived at was that mergers proposed and sponsored by the I.R.C. would not be exempt from the operation of the Act, but would be cleared at an early stage in discussions with the Board of Trade. Similarly, the Board of Trade will shortly be able to exempt any restrictive agreements which the I.R.C. considers beneficial to industrial rationalisation. Thus the I.R.C.'s relationship with the Government's competition policy operates on a satisfactory basis.

42 see 725 H.C. Deb. 348(W.A.) 43 clause 1 Restrictive Trade Practices Bill 1968
(ii) Board of Trade: Regional Policy

The regional implications of industrial rationalisation are clearly demonstrated by the industrial repercussions of the G.E.C./A.E.I. merger. Thus, in supporting mergers, the I.R.C. must have regard to the Government's regional policies. However at the Report stage of the bill, an Opposition amendment was rejected, which tried to include the phrase 'having regard for the regional aspects of economic development' in the clause giving a general outline of the I.R.C.'s function. The Government's attitude was that the I.R.C. was not to be regarded primarily as a body for regional development, and that it was correct that the policy of regional development be left in the hands of the Government.

The difficulty is how far the I.R.C.'s activities can be co-ordinated with regional policy, without destroying the benefits for which rationalisation is sought. In the instance of the G.E.C./A.E.I. merger, there was a complete lack of consultation between G.E.C. and the Board of Trade and the Regional Planning Council as to the expected employment requirements of the rationalised enterprise, and as a result, the Ministry of Labour had to move in to alleviate the unemployment which the merger caused. Here the danger is that by answering calls for help, after the hardship has arisen, the Government may go too far in the way of benefits and aids for redeployment and may frustrate the economic benefits which the industrial rationalisation is intended to create.

The question which therefore arises is whether a fuller consultation with the Board of Trade, in relation to the regional implications of a proposed merger, would allow adequate measures to be planned to alleviate any hardship, without frustrating the economic benefits expected from the rationalisation.

There seems no reason why this should not happen, particularly since mergers have to be cleared with the Board of Trade for the purposes of competition policy, and consequently the lack of consultation that took place between the G.E.C. and the Board of Trade must be seen as a weakness in the co-ordination of industrial rationalisation policy with regional policy.

(iii) Ministry of Technology

Very recently the question of the I.R.C.'s relationship with the Ministry of Technology has become important. This is because of the powers in relation to industrial rationalisation to be given to the Ministry under the Industrial Expansion Bill. It is clearly intended by the Government that the Bill should not inhibit or impede the I.R.C. in pursuing its policies, but the question of the division of responsibility between the I.R.C. and the Ministry of Technology will be a complicated issue. First, however, we must look at the provisions of the Industrial Expansion Bill.

Industrial Expansion Bill

The provisions of the Industrial Expansion Bill will extend the Government's power to assist financially in the modernisation and technological advance of industry. At present through the National Research Development Corporation (N.R.D.C.), the Government is able to support research into the more rapid application of advanced technology to industry. However the Government does not have corresponding powers for the industrial application of the results of this research. Likewise, the scope of action of the I.R.C. is limited by the need to concentrate on its priority task of promoting industrial reorganisation. Thus the Industrial Expansion Bill will give the Government powers for the industrial application of advanced technology. These powers will enable the Government to respond promptly to the financial requirements of

see White Paper January 1968 Cmnd. 3509
projects as they emerge. Without the need for legislation on individual projects, the Government will be able to establish an independent and consistent system of appraisal, so that aid is economically and timeously available. At the same time, provision is made for more effective and rapid Parliamentary scrutiny of individual projects.

The Minister of Technology or any other sponsoring Minister will be able to provide direct assistance to projects designed to promote industrial efficiency, technological advance or an increase in productive capacity, which would not be undertaken without Government support. The relevant Minister will be able to provide financial support through industrial investment schemes. These schemes, which may take a variety of forms, must have Treasury approval and be approved by a resolution of the House of Commons. These investment schemes need not be limited to particular industrial projects and may be of a general nature covering a class or classes of projects in an industry or in a section of an industry. General schemes may include provision for the establishment of a board for the industry concerned. These boards will allow those with industrial experience to participate in Government intervention into private industry and may be given certain executive powers in relation to the projects to be supported. With these executive powers, will go a degree of financial independence, similar to that of the Shipbuilding Industry Board, on which the industrial boards are to be modelled, and it is intended that all future industrial boards, on that model, will come within the scope of the Industrial Expansion Bill.

The financial assistance given under the investment schemes will take the form of loans, grants, guarantees, the underwriting of losses and the subscript-

47 clause 1 Industrial Expansion Bill 1968  48 clause 2 1968 Bill

49 secs. 4-6 Shipbuilding Industry Board Act 1967
ion of share capital. However, the Bill does not confer any compulsory powers on the Government, either directly or indirectly. The Government may not acquire shares in an industrial undertaking, other than by voluntary agreement, and there is no intention of acquiring shares freely on the market.

The projects to be supported under this new Bill will need to be carefully evaluated. In this, the Minister of Technology will have the assistance of an Advisory Committee. This committee will be chaired by the chairman of the I.R.C. and will allow both the I.R.C. and the N.R.D.C. to advise on the projects to be supported. In many cases the projects considered will overlap the work of these bodies, and the Advisory Committee may serve as a clearing house where projects can not only be evaluated, but also assigned to the organisation most capable of handling them. The Committee will also advise the Government whether any aspects of the projects involve unfair discrimination between firms and what action would be appropriate in the circumstances. Such discrimination is a possible danger, for the powers under the Bill are to be operated on the basis of selectivity for those projects most likely to succeed. However the Government feel that the Advisory Committee will be an adequate safeguard.

As its name suggests, the committee is only advisory, and while the Government must consult it before a project is supported, there is no obligation to accept the committee’s advice. An opposition amendment tried to insert a requirement that it would be mandatory on the competent authority to receive the recommendation of the Advisory Committee before introducing an industrial investment scheme. This however was rejected and the committee will retain its advisory capacity.

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50 clause 4 1968 Bill provides for an overall limit of £100 mil. for expenditure under industrial schemes of investment. This may be increased to £150 mil. by order laid before and approved by the House of Commons. 51 clause 5 1968 Bill 52 see Industrial Expansion Bill - 2nd Reading 1st Feb.1968 757 H.C.Deb.1571 at 1583 53 see Industrial Expansion Bill - 3rd Reading 3rd April 1968. 762 H.C.Deb. 377 at 461 see also Committee Stage 5th March 1968. H.C. Standing Committee E. Official Reports 231-244 where an amendment was rejected which proposed that in relation to general schemes the Advisory Committee must declare that the scheme satisfies 5 criteria incl. that the scheme is in the national economic interest, that the necessary finance is not available from market sources, and (cont. p.152)
The fact that individual projects will no longer require separate legislation does not mean that projects can be supported by the Government free from any control. Any support to be given must be defined in a specific investment scheme by the competent Minister. This scheme must be approved by the Treasury, and in the form of an order, be the subject of an affirmative resolution in the House of Commons. 54

The latter part of the Industrial Expansion Bill gives the Government certain specific powers in relation to industry. The Board of Trade is to be authorised to lend £24 mil. to Cunard for Queen Elizabeth II. 55 The N.R.D.C.'s financial allocation is doubled from £25 mil. to £50 mil. 56 and an extra £15 mil. is available to the Shipbuilding Industry Board for disbursement in grants to shipbuilders. 57 Finally £1 mil. is available to enable the Government to purchase Beagle Aircraft. 58

Because the Industrial Expansion Bill has not yet become law, it is impossible to make any real assessment about operations under its provisions or their relationship with other governmental activity. The first use of the powers of the Industrial Expansion Bill will be the financial support which the Government are to give to the proposed merger between International Computers Ltd. and English Electric Computers. The Ministry of Technology has agreed to provide £13,500,000 for research and development in the form of a grant and a further £3,500,000 is to be subscribed by ordinary £1 shares. Through this arrangement, the Government will hold 10.5% of the ordinary shares and the Managing Director of N.R.D.C. will sit on the board of the merged enterprise as the Government director.

In supporting this merger, the Government would appear to be usurping the

54 Clauses 1 and 2 1968 Bill 55 Clause 8 1968 Bill
56 Clause 10 1968 Bill; see also sec.7(2) Development of Inventions Act 1967
57 Clause 9 1968 Bill 58 Clause 11 1968 Bill
53 (cont.) and that the scheme does not involve unfair discrimination between the companies.
functions of both the I.R.C. and the N.R.D.C. Since it is a merger concerned with industrial rationalisation, it is exactly the type of project which the I.R.C. is intended to sponsor, and similarly the public assistance for research in the field of computers is, and indeed has been, the province of the N.R.D.C. This possible duplication of powers is one that caused considerable criticism during the Bill's parliamentary history. The Minister of Technology explicitly stated that the Government did not intend to use the powers under the Industrial Expansion Bill where the same object could be achieved under existing legislation in the relevant fields. Similarly, the liaison with the I.R.C. and the N.R.D.C., through the Advisory Committee, is intended to eliminate any duplication of effort and to distribute the projects to the most appropriate bodies. Nevertheless there still exists a considerable overlap of responsibilities, as the proposed merger between International Computers Ltd. and English Electric Computers demonstrates, and the confusion which this will cause will not be decreased by the different constitutional method by which the Industrial Expansion Bill powers are operated, as against those of the I.R.C. and the N.R.D.C. The former are exercised by a Government minister responsible to Parliament in terms of the Bill and the latter are the responsibility of independent public bodies, for which the responsibility to Parliament is of a very different nature.

As to the relationship between the Industrial Expansion Bill and the Government's competition policy, there is of course, not yet any evidence of co-operation or conflict. It is likely that as with the I.R.C., merger proposals will be cleared with the Board of Trade before they are supported. Similarly, with regional policy there is no evidence on which an assessment could be made. However the White Paper did state that during the exercise of the powers under

59 A loan of £5 mil. from the N.R.D.C. to I.C.T. for research purposes is to be repaid earlier than originally intended.
60 Industrial Expansion Bill 2nd Reading 1st February 1968 757 H.C.Deb.1571 at 1580
61 This may also apply to agreements which fall within the control of the 1956 Act, but which clause 1 of the Restrictive Trade Practices Bill allows the Board of Trade to exempt, because they are designed to promote industrial efficiency.
the Bill, regard would be had for regional needs and it has been suggested that support could be given to projects for which the normal regional incentives are not sufficient. It seems likely therefore, that there will be no conflict between the exercise of these powers and the Government's regional policies.

(b) European Economic Community

Community policy towards the future structure of industry must have two objectives. Firms must be encouraged to rationalise their structures to reap the benefits of the larger market, and at the same time, an effective control must be evolved to prevent, or at least control, the development of oligopoly or monopoly market power. Our discussion of competition policy in the E.E.C. has shown that such control, as does exist under Art.86, rests with the Directorate-General on Competition of the Commission. However, it is not as straightforward to place the responsibility for industrial rationalisation policy at the Community level.

The need for community action on industrial rationalisation was clearly stated in the Medium-Term Economic Policy programme. The Council of Ministers' attention was drawn to the problems of adapting industrial structures to the requirements of a large market, open to considerable international competition. As well as the elimination of all legal and fiscal barriers to industrial rationalisation and the creation of a common competition policy, covering among other things, the problem of state aids to industry, the programme stressed the

Tenth Report of E.E.C. Commission sec.150 June 1967; see generally 'Concentration or Competition - A European Dilemma?' D. Swann and D.L. McLachlan op.cit. Chapter II.
need for community policies on the structure of firms, their financial arrangements, research and the question of industrial management.

After its internal reorganisation, following the fusion of the three executives, the Commission now has directorates-general on industrial policy, research and technology, competition, the right of establishment, fiscal policy, approximation of legislation, regional policy and energy policy. Thus the fiscal and legal barriers to inter-state industrial rationalisation are now the concern of specific directorates and greater progress can be expected in these fields than has hitherto been achieved.

Regional policy within the community, which we shall shortly turn to consider, is very largely concerned with industrial rationalisation. One of the two directorates within the recently formed Directorate-General on Regional Policy is concerned with the development and rationalisation of industry, as a part of regional development. The financial assistance available from the European Social Fund is also of importance for industrial rationalisation. This applies to the assistance available for the re-employment of labour by means of retraining and resettlement, and particularly to assistance for the maintenance of the wages of employees, affected by an enterprise changing the nature of its production. The European Investment Bank can give assistance to projects for industrial modernisation and reorganisation, where such projects are beyond the financial means available in the member states. Finally, the regional studies, sponsored by the Commission, analyse the need for industrial rationalisation in the regions.

The activities of all these directorates concerned with evolving policies on industrial rationalisation, are co-ordinated by a working group on industrial development, consisting of the Commissioners with responsibility for the various aspects of community regional policy are fully discussed in Chapter 4 Part (ii).
directorates. 3 The policy thus evolved operates on two levels. Firstly, there is general action to ensure that companies have a legal and financial framework in which to operate, suited to the requirements of a large competitive market. Examples of this are the community’s competition policy and the measures directed towards a harmonisation of national legislation, on fiscal and legal problems and on technical standardisation. Progress in the harmonisation of legislation is slow. The Council is only able to issue directives to the member states concerned. 4 Nevertheless, results are being achieved and in February 1968, representatives of the governments of the six member states, meeting within the Council, signed an important convention on the mutual recognition of firms and companies and legal persons. 5 There has also been development towards the creation of a legal form for a European company. On the initiative of the Commission, the Council set up a working party of experts from the Commission and the member states to examine the advisability of creating a European company and the associated problems. This working party reported in April 1967 and is now concerned with some of the specific problems uncovered. To speed up this work, the Commission appointed a group of experts, under Professor Sanders, to prepare a draft statute for a European company. This has been completed and has been submitted to the working party. 6

The second level at which action can take place, is in relation to sectors of industry where there are particular problems. These sectors may be particularly affected by the need to modernise, or future expansion may depend very largely on the development of scientific and technical research. Hence the Commission has undertaken studies in relation to particular industries,

3 First General Report of Commission sec. 598 February 1968
4 see Supplement to E.E.C. Bulletin December 1967 for progress made in this field.
5 Art. 220; see C.C.H. Common Market Reporter 9219 – the convention requires to be ratified by the six member states before it becomes effective.
6 see C.C.H. Common Market Reporter 9234
such as the textile industry, the electronics industry and the ship-building industry, where the problems and possibilities for industrial rationalisation and development are very real. Every effort is made to collect all the relevant information and direct industrial thought along the correct lines. Intensive though these studies are, it is found, in many cases, the results will not succeed in prodding the firms concerned into action. If the desired rationalisation is to be achieved, then public investment has to be available. Apart from the limited scope of the European Investment Bank and the European Social Fund, the Commission has to rely on the member states for the availability of this financial assistance. The Commission influence here is reduced to its powers of control over the distribution of state aids. 7

The general community policy towards financial assistance for industrial rationalisation is that it should be limited. It should be confined to helping those industries where the costs of research are too high and too risky for the firms themselves, or where the industries face severe structural difficulties, which could cause severe social and economic damage for the whole community. Where aid is to be given, it should only be for a limited period, and companies should be encouraged to repay the subsidies they have received, once their level of profits enables them to do so.

However, even where the public investment is available, the desired rationalisation may not take place. These are cases where the rationalisation would involve inter-state mergers. While the elimination of fiscal and legal barriers will encourage such mergers, certain psychological factors may operate against them. These factors are difficult to define, but their importance may be gauged from the low number of inter-state mergers which have taken

7 Arts. 92-94; this control is discussed later during the chapter on regional policy.
place, since the creation of the E.E.C. in 1958. In fact, there have been more links established between European companies and American companies than among European companies themselves. This trend has caused considerable concern within the Community and the problem has been discussed at length, between the Commission and experts from the member states. Some improvement is likely following the reorganisation of the Commission, with its clear division of responsibilities in the encouragement of industrial rationalisation. Ultimately however, the problem will remain until the Commission acquires the powers and resources similar to those of the I.R.C. Such a development is not likely in the immediate future.

8 see 'Concentration or Competition: A European Dilemma?' op. cit. p. 37
CHAPTER 4

REGIONAL POLICY
REGIONAL POLICY

(a) United Kingdom

(i) Regional Policy in the U.K.

Under the present Labour administration, the scope of regional policy has developed considerably. New instruments of policy have been introduced and others extended in scope, and the amount of direct assistance paid to firms in officially designated Development Areas, has increased from £34 mil. in 1964–65 to an estimated £264 mil. in 1967–68. ¹

While an extensive regional policy is a politically valuable policy to pursue, there are also strong economic and social reasons for its existence. Economically the Government sees regional policy as part of a structural policy, applied throughout the country, and intended to correct low rates of industrial investment, overemployment in static or declining industries, and bad location of industry. As such, it is related to the policies for industrial rationalisation discussed above. ² An effective regional policy also serves to correct high unemployment rates in depressed areas. A fuller use of manpower there increases the economic growth potential of the whole country, reduces the labour pressures in the Midlands and the South East, and increases the supply of skilled labour throughout the country. Allied with both these economic reasons are the social benefits, which include the alleviation of the social costs associated with high unemployment and industrial congestion. For these reasons, the Government operates an extensive regional policy, orientated towards specially designated Development Areas, where a wide range of industrial investment incentives are provided.

¹ 757 H.C. Deb. 280(W.A.) During this time, the extent of these designated areas has been increased considerably and the investment tax allowances which were available, replaced by direct Investment Grants under the Industrial Development Act 1966. Nevertheless the total amount involved has risen sharply.
² This is particularly true of the Investment Grants for plant and machinery, available under the Industrial Development Act 1966.
It is this industrial development aspect of regional policy with which this chapter is concerned. The various techniques and incentives used to guide industrial firms into the Development Areas will be discussed, as these are the main elements of the Government's regional economic policy. These techniques and incentives are largely under the control of the Board of Trade, supported by the role of the Department of Employment and Productivity in the re-deployment of labour. There are, however, other economic devices available to the Government to stimulate regional economic growth. These are largely the discretionary exercise of governmental spending and investment powers. Government departments and nationalised industries give preference in the placing of contracts to firms in the Development Areas, provided that price, quality and delivery dates are equal with the estimates of other firms. In addition to this general scheme, government purchasing departments operate a special scheme whereby firms in the Development Areas, that have been unsuccessful with their first tender, may be given an opportunity to tender again for 25% of the contract, at a price which will not increase the total cost of the contract. The important regional implications of public expenditure can not be over-emphasised, and for this reason, the Regional Planning Councils receive forecasts of public expenditure on new buildings and construction, to enable them to advise the Government on its regional implications.

A brief mention must also be made of the Development Commission, created under the Development and Road Improvement Fund Acts 1909 and 1910. This body is empowered to give loans to selected organisations concerned with the development of agriculture and rural industries and operates where assistance is not available from other sources.

Industrial development is only an element of regional development. Another important one is agriculture. This falls under the jurisdiction of the Ministry

3 see 760 H.C. Deb. 1360 13th March 1968 - all Government departments hold lists of firms in the Development Areas.
of Agriculture and Fisheries in England and Wales and the Secretary of State in Scotland. Linked with this is the work of public bodies such as the Herring Industry Board, the White Fish Authority and the Crofters Commission, which have the responsibility of grants and loans in their particular spheres of operation.

However, the main division in regional policy is to be drawn between economic planning and physical planning. Physical planning covers the topics of town and country planning, housing and the social and environmental services, which must be developed simultaneously with regional economic development. These topics are the responsibility of the Minister of Housing and Local Government in England and the Secretaries of State in Scotland and Wales.

Physical planning, involving the application of town and country planning legislation to economic development, should allow the co-ordination of the industrial development, permitted and encouraged by the Board of Trade, with the provision of the necessary infrastructure of housing, roads, schools, hospitals and other environmental amenities. However, the division of responsibilities for physical planning and economic planning between different bodies, at both national and at regional level, has caused much of the controversy which has been associated with regional policy in the U.K. 4

This has happened in spite of the fact that linked with their development of the scope of regional policy, the present government have tried to overcome this division of responsibility, by the creation of a regional planning machinery and it is to a consideration of this that we now turn.

(ii) Regional Planning Machinery

A new stage in overall national and regional planning was reached in 1964 with the creation of the Department of Economic Affairs, with responsibility for

4 This conflict between economic and physical planning is discussed later, particularly with reference to the Highlands and Islands Development Board.
for national and regional development. While a large portion of its responsibility for national economic development has now been transferred back to the Treasury or to the newly created Department of Employment and Productivity, the D.E.A.'s overall responsibility for regional policy remains. Within the D.E.A. a regional policy group exists to co-ordinate regional aspects of policies on industry, employment, land use and transport. In Scotland and Wales, the D.E.A. works with the Scottish Office and Welsh Office, while in Northern Ireland, measures for regional development remain the responsibility of the Northern Ireland Government, with which the U.K. Government maintains close contact at all levels.

Regional Planning Machinery was set up by the D.E.A. in December 1964. 5 This was a two tier structure of economic planning councils and economic planning boards. A council and a board were set up for each of the eight regions into which England was divided, for Scotland and for Wales. These councils and boards were intended to establish an effective regional machinery within the framework of the national plan for economic development. The planning councils are concerned with the broad strategy of regional development and the best use of the region's resources. Their principal function is to assist in the formulation of regional plans and to advise on their implementation. In this they have no executive powers. The councils also advise on the regional implications of national economic policies.

The council members are appointed on an individual basis. 6 They are appointed for their knowledge and experience of the region concerned and not as representatives of particular interests. So far, members have tended to be

6 A suggestion that the members might be directly elected was rejected by the D.E.A. 721 H.C. Deb. 725
those with a high level of local government, industrial, commercial or trade union experience, but others have been prominently associated with universities and research, community development and agricultural and rural affairs. The members of the English Councils are appointed by the Secretary of State for Economic Affairs; the Scottish Council by the Secretary of State for Scotland; and the Welsh Council by the Secretary of State for Wales. All the appointments are part-time, as are the chairman of the English regional planning councils. However, the Secretary of State for Scotland chairs the Scottish Economic Planning Council, and the Secretary of State for Wales the Welsh Council.

The Economic Planning Boards provide the necessary machinery for co-ordinating the work of the Government departments concerned with regional planning and development. The boards consist of civil servants representing the main government departments in each region, which are concerned with regional planning, in particular the D.E.A., the Ministry of Housing and Local Government, the Board of Trade and the Department of Employment and Productivity. In the English regions, the chairman is an official of the D.E.A., while with the Scottish and Welsh Offices, the chairman is an official of the Scottish and Welsh Offices and the D.E.A. is represented on each board by a senior official. Since these boards consist of officials from Government departments, they have executive powers which the respective Ministers have delegated to them within the framework of national policy decisions. Through these regional planning boards, it was intended that as much decision making as possible would be carried out at the regional level, without needing to refer back continually to the respective ministries in Whitehall. However, since the boards' creation did not affect the existing powers and responsibilities of local authorities, nor the existing ministerial responsibilities, the co-ordinated decentralisation

The responsibilities of the Welsh Economic Planning Council have recently been taken over by the Welsh Council, which has as its chairman the Secretary of State for Wales. 763 H.C. Deb. 1257 1st May 1967.
intended has not operated in practice and the traditional vertical lines of communication within the different ministries have continued to take precedence over the new horizontal pattern which the regional boards were intended to provide.

Regional Studies and Planning

A large part of the function of both Councils and Boards is the collection of information and statistics about their regions. Some of this is available from national statistics and sources, but in many cases, original research work is required. Much of this work has been done by local universities and other professional organisations. In these regional studies, particular attention is paid to population changes, employment, land use and communications. The individual studies concentrate on problems arising from geographical features, the need for change in traditional patterns of industrial structure and employment, and the need to accommodate the population to these changes. On the basis of these smaller studies, the Regional Councils have prepared policy studies for the whole of their respective regions. These studies have then been submitted to the Government for its consideration. So far, the Government has accepted in principle, the strategies implied in the studies for the Northern, Yorkshire and Humberside, and East and West Midlands regions. However, the South-West Economic Planning Council's plan has been rejected by the Government. This rejection caused considerable controversy and the resignation of a prominent member of the council. In resigning, the member felt that Whitehall had been 'pre-empting' the economic councils by taking arbitrary decisions, regardless of their recommendations. The member, Mr. Maurice Ash, vice-chairman of

8 A solution to this problem is dealt with below in chapter 4 (a)(iv) Page 206-8

the Town and Country Planning Association, regarded the councils as no more than a cloak of respectability for what the Government had always intended to operate an arbitrary regional policy on the basis of the Development Areas. 10

This incident brought to the public notice the considerable complaints that have been made about the Government, ignoring the advice offered by the Regional Planning Councils. This is particularly true of the English councils which are not chaired by a Government minister. These complaints have been accompanied by pressure to give the Councils more power and responsibility, but this has been rejected by the Government. The Government argues that such a devolution of power would require a more extensive and efficient system of local government than at present exists, and states that it would be impossible to turn the councils, which are non-elected bodies, into executive organisations with decision-making powers. However the Royal Commissions on Local Government, which are at present sitting, may produce a solution to this structural problem and enable the creation of a democratically secure system of local government, incorporating regional bodies which could operate regional policy in collaboration with the regional representatives of the central government, namely the Economic Planning Boards.

In Scotland, the procedure followed, has been slightly different. The strategy for Scottish regional planning is based on a white paper - 'The Scottish Economy, 1965 to 1970: A Plan for Expansion.' 11 This plan was prepared by the Scottish Office in consultation with the Scottish Economic Planning Council, of which the Secretary of State for Scotland is chairman. It is a master plan which requires to be worked out in detail, area by area, with those concerned at the local level. For this purpose, four Consultative Groups have

10 see resignation letter in The Times March 27 1968: Debate on Government's rejection during Consolidated Fund (No. 2) Bill 2nd Reading 761 H.C.Deb. 1170 11 Cmd. 2864 January 1966
been set up for the Borders, Tayside, the North-East and the South-West. Membership of these groups is based largely on nominations from Chambers of Commerce, Trade Unions, local authorities and other organisations, with the Secretary of State also appointing a few other people whom he feels will have a special contribution to make. The Consultative Groups are set up to consider specific narrow topics and make recommendations, which may or may not be adopted. Thus the groups are drawn into actual policy-making and implementation. They help shape regional plans and create within a region the understanding and sense of participation in broader objectives, that the existing local authority structure does not easily allow. 12 For instance, the Consultative Group for the Borders is associated with the Development Plan for the Western Borders, recently published by the Regional Planning Unit at Edinburgh University. Similarly the Tayside Group is linked with the Tayside Study being carried out by Dundee University and the Scottish Development Department.

Independent Councils and Associations

In many areas, development councils and associations were in active existence when the Regional Planning Councils and Boards were created. These have continued to exist, and indeed have increased in number as the Government's role in regional development has increased. This has been welcomed by the Government who see a continuing role for these associations, complementary to the work of the economic planning councils. While the finance for these bodies largely comes from industry in the respective areas, the Government continues to provide financial assistance where valuable publicity work is undertaken.

An important example of these bodies is the Scottish Council (Development and Industry), whose objective is to promote industrial growth throughout Scotland and thus increase employment opportunities. Its membership includes local authorities, trade associations, trade unions, chambers of commerce,

12 see Scottish Economic Development Quarterly Report No. 3 October 1966
co-operative societies, banks and individual firms. Others are the North-East Development Council, the Lancashire and Merseyside Industrial Development Association, the Fortyfour Committee, representing 44 local authorities from south Yorkshire, north Nottinghamshire and north Sheffield, and there are also regional councils of the Confederation of British Industry.

Primarily, these associations exist to attract industry into their respective areas, and recently, this aim brought the North East Development Council into conflict with the D.E.A.. Objection was raised to an advertising campaign run by the Council in the Yorkshire region and this resulted in a letter from the Secretary of State for Economic Affairs, warning the Council about its efforts to attract industry to the North East from the Development Areas, and suggesting that it confine such publicity efforts to the industrially congested South East and Midlands.

As well as attracting industry, these councils and associations attempt to influence the Government in its regional policy. An excellent example of this is the controversy over the designation of Development Areas, which the Hunt Committee is presently examining.

**Development Areas**

Many of the Government's instruments of regional economic policy are operated in relation to a system of designated Development Areas. The Government offers assistance under the Local Employment Acts 1960-66 to firms creating employment opportunities in the Development Areas. In Development Areas, investment grants for expenditure on plant and machinery are payable at a rate 20% higher than in non-development areas. The Regional Employment Premium is payable to manufacturers in Development Areas and there are other benefits in training schemes and a system of preference in Government contracts. Thus, designation as being a 'Development Area' carries considerable financial benefits for a region and the industry within its boundaries.
Under the Local Employment Acts 1960 and 1963, the Board of Trade was empowered to designate an area as a 'development district', if high and persistent unemployment existed or was expected to exist there. The unit of area used was that of the Ministry of Labour employment exchange, which enabled relatively small areas to be declared 'development districts'. With the passing of the Industrial Development Act 1966, the designation was changed to that of 'Development Area' and the Board of Trade extended its scope to cover most of Scotland and a large part of Wales, the Northern Planning Region and the Furness Peninsula, Merseyside and most of Cornwall and North Devon. In exercising this discretion, the Board of Trade are required to have regard for more than levels of unemployment. The areas designated should require special measures to encourage the growth and proper distribution of industry, a situation which should be determined by having regard to population changes, migration, the objectives of regional policies as well as to unemployment levels. However, the main criterion by which these areas have been designated has remained the level of unemployment and with the larger areas involved, than previously with the development districts, there has been criticism of the system on two accounts.

In the first place, because of the considerable scope of the incentives offered, and the large areas in which they are available, there has been a plea for greater selectivity in the choosing of areas for assistance. Further, a greater variation in the incentives offered would enable the intense problem of relatively small areas to be tackled more efficiently than under the present blanket system of aid. An example of what is envisaged is the additional

13 Local Employment Act 1960 sec.1(2)
14 sec. 15 Industrial Development Act 1966; the present Development Areas were designated by the Development Areas Order 1966 S.I. 1966/1032
15 sec. 15(3) 1966 Act
16 see 756 H.C. Deb. 971 18th December 1967
assistance recently made available in localities badly affected by colliery closures. These were announced by the Secretary of State for Economic Affairs\(^7\) and the President of the Board of Trade gave details of the criteria to be applied in designating these special development areas and of the assistance available. \(^8\) These are areas where, in the absence of special measures, colliery closures are likely to cause very high levels of unemployment, which would persist for at least two or three years. While the level of unemployment is still of importance, the factor of colliery closures is here being given special importance. The assistance offered includes the development of industrial estates near to the affected localities, higher building grants and loans at a more favourable rate of interest than is normal under the Local Employment Acts, operational loans of up to 10\%, and rent free Board of Trade factories for periods of up to five years. These are all intended to be short-term measures and are only available when new employment opportunities are brought into the area. To enable these measures to be fully exploited, the Ministry of Power has introduced a scheme whereby closures will be discussed in advance with the chairman of the relevant Economic Planning Council, which will enable the possible rephasing of closure lists to meet local problems and allow the chairman time to make representations in advance to the various Government departments concerned. \(^9\) This then is a model for selective regional assistance which could be followed in other sectors of the economy, or other small regions suffering from acute economic difficulties.

The second criticism against the present concept of 'Development Areas' is concerned with those areas excluded from the designation, which nevertheless experience considerable industrial and employment difficulties. Because of the large financial incentives available to encourage new firms, or expanding
\(^7\) 753 H.C.Deb. 293 at 299 1st November 1967 \(^8\) 753 H.C.Deb.1240;754 H.C.Deb. 84 (W.A.)
\(^9\) 755 H.C.Deb. 245 Coal Industry Bill - 2nd Reading.
ones, to develop in the Development Areas, there is a very real fear that some areas suffering from industrial decline will be bypassed by new industrial development, because they are outwith the Development Areas. These areas are referred to as 'Grey Areas'.

After discussion with the Regional Planning Councils, the Government set up the Hunt Committee to examine the problems of these 'grey' or intermediate areas. The Committee is to examine the situation in these areas, in relation to the economic welfare of the whole country and of the Development Areas, and is to report on the criteria by which these 'grey areas' might be defined, and on how assistance might be available in them. It is receiving evidence from these independent councils and associations mentioned above, who are submitting memoranda examining the whole structure of regional policy in the U.K.

This evidence, and much that has been said in Parliament about this problem, has centred round the criteria for defining areas which are to receive assistance. 'Grey Areas' have been defined as those parts of the country where economic stagnation or decline is taking place, but where these developments are not shown in high unemployment figures and therefore, they do not qualify as Development Areas, because of the strong reliance on unemployment levels as a criterion for designation. Thus further criteria have been suggested, such as substantial population loss and distortion of the population structure, contraction of traditional industries, narrow employment structure resulting in undue vulnerability and inadequate communications.

The evidence of the North West Regional Council of the Confederation of British Industry argues that scientifically weighted statistics on levels of consumer spending, domestic and industrial electrical power consumed, comparisons for term of reference see 749 H.C. Deb. 275(W.A.)

per Sir Keith Joseph - Debate on Grey Areas 761 H.C. Deb. 58 18th March 1968

see memorandum submitted to the Hunt Committee on behalf of the Lancashire and Merseyside Industrial Development Association.
of wages and other related factors would give a clearer indication of how far certain districts compared with others, than can be done by crude levels of unemployment. By this means, a more selective policy could be operated in which a wider responsibility might be given to the Regional Economic Planning Councils.

However, this examination by the Hunt Committee also created some strong pressure on the Government to maintain a system of 'favouritism' for the Development Areas. In particular, the chairman of the Northern Economic Planning Council urged that to extend 'Development Area' status to the 'Grey Areas' would have serious consequences for those areas at present designated as Development Areas.

A further problem for the Government is that within a few years, as the various regional policies take effect, some Development Areas, or at least localities within them, will become subject to the high pressures of industrial demand found in the Midlands and the South East. On the other hand, some localities will remain comparatively unaffected by the regional policies. Therefore the Government will be faced with the politically unpleasant task of descheduling large parts of the existing Development Areas. It is therefore in the Government's interests that a more selective system of designating areas for assistance be evolved.

A final observation, which might be made before leaving the topic, is that the evidence submitted to the Hunt Committee is not wholly concerned with the designation of areas for assistance. The various instruments of regional policy are also analysed and discussed and their value in correcting regional problems assessed. Such comments as are made, however, are more relevant in the discussion of the various instruments of regional policy.
(iii) Instruments of Regional Policy

Board of Trade

(a) Local Employment Acts 1960 to 1966

(i) Grants and Loans

The powers given to the Board of Trade under these Acts are intended to alleviate unemployment problems in the Development Areas. They include the powers to provide premises for rent or purchase, building grants and general purpose grants and loans.

The building grants are payable at a rate of 25% of the cost of erecting a new building or adapting an existing one. If the circumstances justify special assistance, the Board of Trade may grant up to 35% of the cost, and in other cases, can offer a lower grant, where the employment likely to be created does not merit the full rate. Applications for building grants must be made before the building is completed or occupied, whichever is the earlier, or in the case of buildings purchased after completion, before the date of occupation.

The advance of general purpose loans and grants is possible to undertakings, which will improve employment opportunities in the Development Areas and which are likely ultimately to be carried on successfully without further assistance. Aid under this category may involve the Board of Trade subscribing for shares or stock in the company.

Grants are also available towards the rehabilitation of derelict land. The Minister of Housing and Local Government must decide whether the land is derelict, neglected or unsightly. Then the Board of Trade is required to certify that it is in the interests of the development of industry that the

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23 sec. 2 1960 Act 24 sec. 3 1960 Act 25 sec. 4 1960 Act
27 sec. 4 1960 Act 28 sec. 18(1) 1966 Act 29 sec. 20 1966 Act
30 in England or the Secretaries of State in Scotland or Wales.
land be rehabilitated, before the grants are payable. Finally, grants are available for the improvement of basic services in a Development Area, where this would be in the interests of the development of industry in that area.

The building grants and the general purpose grants and loans are the most important financial aids given under the Local Employment Acts, and they amount to about £35 mil. per annum. They are administered by the Board of Trade in co-operation with the Board of Trade Advisory Committee (B.O.T.A.C.), a committee composed of industrialists and trade union leaders appointed by the Board of Trade.

The Board of Trade must consult B.O.T.A.C. before building grants are paid, but with general purpose loans and grants, these may only be paid as recommended by the B.O.T.A.C. Here the Board of Trade has no power to amend the B.O.T.A.C.'s recommendations and can only reject them completely if it disagrees. This has not happened in practice. The B.O.T.A.C. may also recommend that further assistance be granted to an undertaking, which has already received assistance under the Local Employments Acts. This is to enable the Board of Trade to recover all or part of the loans previously granted.

The B.O.T.A.C. is primarily concerned with the loans and grants given under sec. 4 1960 Act. These general purpose loans and grants include loans for the purchase or building of premises (except where the Board of Trade are providing the premises or a building grant), for the purchase of plant, machinery and equipment (excluding the amount of any investment grant made), and for working capital. Grants (other than investment and building grants) are offered only where an undertaking will incur initial expenses which are unusual in

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31 sec.7 1960 Act as amended by sec.21(2) 1966 Act  
33 sec.27 1966 Act  
34 90% of the assistance given under this section is in loans.
nature or arise as a result of a project being located in a Development Area.

In exercising its duties the B.O.T.A.C. is subject to the general directions issued to it by the Board of Trade, with the approval of the Treasury. Applications are sent directly to the B.O.T.A.C., who submit them to the Board of Trade for certification that the project will provide appropriate employment in the Development Area concerned. Here the Board of Trade have to have regard for the relationship between the expenditure involved and the employment likely to be provided. This cost per job ratio varies between the Development Areas and in Scotland, at an average of £1450, is over twice that in England. The Board of Trade do not judge the reasonableness of the expenditure by measuring it against a single inflexible standard, but broadly they regard as reasonable, any development where the cost for public money does not exceed £1500 per job. However the Board of Trade are prepared to give assistance at a higher rate, where the circumstances justify it, and in some cases, a cost per job ratio of over £2500 has been allowed. With these cases where higher ratios are allowed, if the total loan involved is not a large amount, then the decisions are made at official level, in line with the Treasury's concern with the cost per job ratio. All projects estimated to cost

35 Para 14 7th Report of Estimates Committee (1962-63) H.C. 229
36 Q.315 et seq. 7th Report of Estimates Committee op.cit.; these cases received Treasury approval after consultation and the Treasury accepted that in the circumstances, the actual cost per job ratio was reasonable and therefore due conformity had been paid to the provisions of the 1960 Act - see Letter to Subcommittee F. Appendix H. Minutes of Evidence. 7th Report of Estimates Committee op.cit.
more than £1,000 per job have to be submitted for its approval. Nevertheless, the Act gives the Board of Trade considerable discretion and this has made control of expenditure under the Act extremely difficult.

Once an application has been certified by the Board of Trade, the B.O.T.A.C. has to investigate the financial standing of the applicant, his business acuteness and the likelihood that the project will be successful in providing continuing employment. The undertaking is fully investigated by financial and technical staff and may be visited by B.O.T.A.C. officials. Interested Government departments are also consulted about the availability of labour and raw materials, and the present and prospective production capacity of the particular industry. After formulation, the B.O.T.A.C.'s recommendation is submitted to the Board of Trade for acceptance, before the applicant is informed. It specifies the rate of interest, terms of repayment and any other conditions that the Board of Trade should apply. Any grant or loan made must be in conformity with such a recommendation.

Applicants are notified directly of the rejection of their applications, but the reasons for rejection are not normally given. Although there is no appeal body for the rejected applicants, the B.O.T.A.C. is always willing to reconsider applications and where appropriate, to advise applicants of any amendments to their proposals, which would increase the prospect of a favourable recommendation from the Committee.

For building grants under sec. 3 1960 Act, the Board of Trade is required to consult the B.O.T.A.C., but it is not bound by the Committee's advice, which relates only to the economic viability of the project and not to the terms and conditions of the grant. In practice the B.O.T.A.C.'s advice is accepted, but there can be a variation between the advice tendered by the B.O.T.A.C. and the eventual contract entered into by the Board of Trade. Recently the Board of
Trade has been relieved of the obligation to refer to the B.O.T.A.C. certain applications for building grants. The Board of Trade has been given discretionary powers to deal directly with applications involving projects costing less than £10,000. In relation to Treasury control over building grants, the Board of Trade is given a delegated authority to offer grants where the sum involved does not exceed £50,000 or £300 for each job to be provided.

The whole procedure of referring applications to the B.O.T.A.C. has come in for considerable criticism. In the first place, it is criticised for the delay involved. The process can take up to a year and the delay can force companies to make other private financial arrangements. A recent report of the North East Development Council was apparently highly critical and led to the matter being raised in Parliament. The procedure was said to be 'under constant review', but since there were 698 applications outstanding at the end of January 1968, some indication of the delay involved can be gauged. This problem of delay has existed for some time and was the subject of a recommendation by the Estimates Committee. In reply the Board of Trade recognised the need for speed, but stressed that before assistance could be granted, they had to be satisfied that there were good prospects of the undertaking ultimately being able to carry on successfully, without further assistance. This required that the correct information was forthcoming from the applicants as quickly as possible, and the Board of Trade try to speed up this process by sending the B.O.T.A.C. secretariat to visit the applicants and help them to draw up their application.

A further criticism of the B.O.T.A.C. machinery is that the Committee alone is responsible for whether assistance is given under sec.4 1960 Act, for while the Board of Trade can reject its recommendations, in practice, this has

37 sec.6 Public Expenditure and Receipts Act 1968 38 758 H.C.Deb. 124(W.A.)
39 Para 30 7th Report of Estimates Committee (1962-63) H.C.229
40 3rd Special Report of Estimates Committee (1963-64) H.C.34 - Board of Trade's observations on 7th Report of Estimates Committee op.cit.
not happened. Similarly, if the B.O.T.A.C. rejects an application, the Board of Trade is powerless to act. Thus the Government could be helpless in the face of a B.O.T.A.C. rejection of an application which it wished to support. The B.O.T.A.C.'s decisions are therefore de facto of binding effect for the applicants. Yet they are not in practice liable to any form of control. Although there is no evidence to suggest that the B.O.T.A.C. is acting unfairly, this lack of control has caused the procedure to be criticised. This is an instance of the problem of delegating governmental functions to semi-independent bodies and making them theoretically answerable to Parliament through a minister, by their only making recommendations and not taking formal decisions. The parliamentary control exercisable is negligible and the question must be faced, if there is to be any control, whether a judicial control would not be more effective.

Finally, in relation to the loans and grants given under the Local Employment Acts, attention might be turned to a problem that caused the Estimates Committee considerable concern. To what extent do the employment potentials for which the assistance is given, actually materialise? How many of the jobs forecasted, are actually created? This problem was raised with the Board of Trade by asking what check was kept on the money spent and the jobs created. The Board of Trade replied that a full check would not be possible, because of the expense and delay involved, and in any case, the Board of Trade had no power to direct firms to employ anybody. However, the Board of Trade did agree to institute a regular series of sample employment checks. The projects chosen are those where the assistance given was in excess of £10,000 and the most recent results, in relation to projects supported during 1960-1964, show that

\textsuperscript{41} for criticism of present system, see 728 H.C.Deb. 1004 16th May 1966; the problem of control is more fully dealt with in Chapter 5.

\textsuperscript{42} Q.1304 Minutes of Evidence 7th Report of Estimates Committee (1962-63) H.C. 229
72% of the jobs forecasted have been created. Some of the projects may increase their employment figures further, but because of the variety of factors which can affect the situation, the Board of Trade are not sure how a higher percentage could be achieved.

(ii) Board of Trade Factories

A further aspect of the financial assistance at the Board of Trade's disposal under the Local Employment Acts is the provision of factories in the Development Areas for firms offering suitable additional employment. These premises are available for rent or purchase and where the circumstances justify the giving of special assistance, the Board of Trade may offer an initial period free of rent. The Industrial Estates Corporations for England, Scotland and Wales undertake the building and leasing of these factories on behalf of the Board of Trade. The three Corporations administer industrial estates as well as over 250 factories on individual sites. They also provide services for the undertakings who occupy the Board of Trade factories and also, with the Board's consent, for other undertakings.

Depending on the undertaking's requirements, the factory may be built to the undertaking's specification or be of a standard type. In anticipation of industrial demand, Advance Factories are built to standard designs, which have proved suitable for a variety of firms. In the siting of these Advance Factories, the Board of Trade consults with the Regional Planning Councils and other Government departments to determine whether any large redundancies are impending. Thus the Special Development Areas, associated with colliery closures, will be the situation of an increased number of advanced factories.

43 7th Report of Board of Trade on Local Employment Acts, op.cit. - the figures given show varying degrees of success between projects. p.4
44 sec. 2 1960 Act 45 sec. 19(4) 1966 Act
46 secs. 8, 9 and 10 1960 Act; sec. 19 1966 Act; see also Appendix A, B, and C 7th Report of Estimates Committee op.cit.
The job of attracting industry to utilise these Board of Trade factories, and particularly the Advance Factories, is undertaken by the Board of Trade itself, through its Regional Offices. It is not part of the Industrial Estates Corporations' functions to promote the areas where the factories are established or to approach individual firms to persuade them to set up in these areas. Unlike the Highlands and Islands Development Board, no missionary initiative lies with the Corporations, and it is felt by the Board of Trade that various approaches by different public bodies would be unwelcome by industrial firms. Thus the Board of Trade retains complete responsibility for attracting and dealing with applications from interested firms. The Corporations' role is the executive one of administering the factories and the estates. 47

As for Treasury control over the building of factories, the Board of Trade can approve new factories, for which there has been a firm demand, where the cost does not exceed £150,000 or £100,000 in the case of an extension to an existing factory. If the Board of Trade have occasion to build a factory outside the Development Areas, Treasury approval is required in every case. 48

(b) Industrial Development Act 1966

The investment grants scheme introduced by the Industrial Development Act 1966, replaced a system of investment tax allowances, operated under the Finance Act 1954. The Board of Trade is able to pay investment grants on capital expenditure incurred on new plant and machinery for use in the manufacturing, extraction and construction sectors of industry. 49 Grants are available for scientific research related to any of these processes and also for expenditure on computers, hovercraft and ships, by undertakings in business in Britain. 50

47 3rd Special Report of Estimates Committee (1963-64) op.cit. 48 sec.14 1960 Act
49 sec.1 1966 Act; 'Investment Incentives' Cmd. 2874 January 1966
50 secs. 2,3 and 5 1966 Act; the Act only applies to Britain. The Northern Ireland has a similar but separate system of grants. A system of reciprocal grants has been worked out, if the need should arise - see the Industrial Development (Eligible Assets) Order 1967 S.I. 1967/339
Normally investment grants are payable at a rate of 20% of the approved capital cost and at 40% in the Development Areas. However, the Board of Trade has exercised its power to vary the rates, to 25% and 45% respectively, for expenditure incurred between 1st January 1967 and 31st December 1968.

The broad field of eligibility for grants is laid down in the Act, but a certain degree of discretion has been given to the Board of Trade. The investment scheme is discretionary, as opposed to mandatory. However the Government recognised that it was essential for industry that it should know what expenditure was eligible for grants before any expense was incurred. Therefore the Board of Trade produced a booklet to act as a guide for industry as to how it intended to exercise its discretion. This booklet states the items which will not qualify for grants, and also that a grant will not be given on any individual item less than £25. This was imposed from the practical point of view of preventing people claiming every last nut and bolt. However, for any enterprise which has a large investment in items which individually cost less than £25, this decision of the Board of Trade has serious implications. An instance of this is the British Oxygen Company who spend £1½ mil. on gas cylinders each year. The company challenged the Board of Trade’s ruling in the High Court, and the challenge was upheld, Mr. Justice Buckley holding that it was wrong to apply this limit on individual items in the particular case of British Oxygen Company. The judgement did not say that the £25 limit was right or wrong in general, only that it went against the intentions of Parliament in this instance. The Board of Trade is still considering whether an appeal will be made.

The Court’s decision may seem an obvious one in the practical circumstances of the case, but the Government always intended the Board of Trade to exercise

51 sec.1(6) 1966 Act  
52 sec.7 1966 Act; The Industrial Development (Variation of Rate of Grant) Order 1966 S.I. 1966/1569

53 'Investment Grants' – A guide for industry Chapter 10 January 1968

54 British Oxygen Company v Board of Trade [1968] 2 All.E.R.177
a discretion in the administration of the investment grants scheme. Thereby the Board of Trade would be able to favour some types of industrial investment as against others. However, this decision shows that rule by statutory law does not always fit neatly and conveniently with interventionist and discretionary government. There is always the danger that judicial interpretation will not accord with parliamentary intentions.

It remains to be seen whether this decision is upheld on appeal or in the further challenges to the Board of Trade's ruling which are bound to follow from brewers, distillers and other gas companies, which make considerable investment in small containers. In the meantime, some limit has been placed on the exercise of the Board of Trade's discretion, and whether this limitation will be extended, is a question for the future.

The investment grants scheme is administered by five Investment Grants Offices throughout the country. They deal with 90% of the applications and the remainder are referred to Headquarters in London, where they are considered by the Investment Grants Division of the Board of Trade. Individual cases may be referred to the President of the Board of Trade if they are not covered by the broad lines of eligibility laid down in the Act and the explanatory booklet. There is an advisory committee appointed by the Board of Trade to advise it on the administration of the 1966 Act, but this committee does not vet individual cases. 55

In the majority of cases, applications are cleared in about six weeks, although border line cases may take considerably longer because of the policy implications involved. 56 Certain criticism has been levied against the operational costs of the investment grants scheme, compared with the system of

56 Ibid. Q.138
investment allowances which was operated through the normal tax channels by the Inland Revenue. This has been rejected by the Government, who have pointed out that the scheme has cost considerably less than was expected. 57

Because of the burden which might have fallen on the Exchequer during the transition from investment allowances to investment grants, the Government decided to operate a time lag between the expenditure incurred by companies, and the payment of grants by the Board of Trade. Initially, this was 18 months, but it has been reduced first to 15 months, and recently to 12 months. 58 Eventually, when economic circumstances permit, it is hoped to reduce the time lag to 6 months.

The investment grants scheme operates complementary to the grants and loans available under the Local Employment Acts 1960-66. Since both schemes are administered by the Board of Trade, a co-ordination of the assistance given is easily achieved. 59

(c) Control of Industrial and Office Location.

As well as the investment incentives, which it can offer to enterprises in the Development Areas, for an effective regional policy, the Board of Trade requires the means to direct industry into these areas. This is achieved by a control operated by Industrial Development Certificates (I.D.C.) for industrial development and Office Development Permits (O.D.P.) for office development. The Government does not direct industry to specific locations, but by refusing to grant an I.D.C. or an O.D.P. can force development into the Development Areas generally.

57 758 H.C. Deb. 373 7th February 1968
58 3rd Report of Estimates Committee (1967-68) op.cit. Q. 139, 140
59 see generally 1st Report of the Board of Trade Industrial Development Act 1966. H.C. 608 July 1967
(1) **Industrial Development Control**

The I.D.C. control was introduced by the Town and Country Planning Act 1947 and the Town and Country Planning (Scotland) Act 1947. An application for planning permission, made to a local planning authority, has to be accompanied by an I.D.C. where the development is to be industrial. The I.D.C.s are granted by the Board of Trade. Originally the control extended over the erection of industrial buildings exceeding 5,000 sq. ft. in floor area, but it was later extended to cover a change in use of a building, where the change is for a use of an industrial nature. At the same time, provision was made that the Board of Trade should have regard for providing employment in development districts when considering the issue of an I.D.C.

The control in England was further affected by the Town and Country Planning Act 1962, which extended the scope of the control, while specifying certain classes of development exempt from the requirement of an I.D.C.

The Control of Office and Industrial Development Act 1965 consolidates the application of the control in Scotland and England. The Act also enables the Board of Trade to amend the statutory exemption limit of 5,000 sq. ft. for industrial development not requiring an I.D.C. and this has been reduced to 1,000 sq. ft. for Greater London and other areas of South East England and the Midlands.

Finally, the control was extended by the Industrial Development Act 1966. Where initially on application for planning permission, an I.D.C. would have been required, because it involved the erection of an industrial building or

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61 sec.18 Local Employment Act 1960 - applies to both Scotland and England.

62 sec.17 1960 Act; the regard for development districts has now been replaced by one for Development Areas - sec.26 Industrial Development Act 1966; in year to 31st March 1967 I.D.C.s were issued for 85,761 thousand sq.ft. for the whole country, relating to development intended to provide 142,000 additional jobs. In the Development Areas the total area involved was 32,805 thousand sq.ft. for 73,100 additional jobs - 7th Report of Board of Trade Local Employment Acts 1960-66 H.C.607 July 1967 63 secs.38 & 39 Town and Country Planning Act 1962 64 Secs.20&21 1965 Act - see also schedules 3 and 4 65 sec.19 1965 Act; The Town and Country Planning (cont.184)
the change to an industrial use, then an application for permission to retain buildings or continue a use of land will also require an I.D.C. The definition of 'industrial building' is also extended to include premises used to provide ancillary services and facilities for industrial buildings, and buildings used or designed for use in scientific research in the course of a trade or business. The Board of Trade is further empowered to impose restrictions and conditions to the issue of an I.D.C. Restrictions attached to an I.D.C. may concern the period within which, or the persons by whom, a planning application with the I.D.C. may be made. Any application not in accordance with these restrictions is to be regarded as not accompanied by a valid I.D.C.

Restrictions attached to an I.D.C. must be such as the Board of Trade consider appropriate with regard to the proper distribution of industry. The planning authority is required to incorporate these conditions into the planning permission, and if this is not done, the permission will nevertheless be deemed to have been granted subject to the conditions imposed by the Board of Trade.

The changes introduced by the 1966 Act strengthen the control exercised by the Board of Trade, and partially to balance this development, the exemption limit has been raised to 3,000 sq.ft. for those areas of the Midlands and southern and eastern England, where it was previously 1,000 sq.ft.

The I.D.C. control procedure is not operated purely negatively by the Board of Trade. Firms intending to develop are encouraged to consult the Board of Trade as early as possible. They are told confidentially whether they are likely to obtain an industrial development certificate for the location of their choice. If firms have not decided to develop in a Development Area, then through the Location of Industry department of the Board of Trade, they are informed.

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65 (cont. from p. 183) (Industrial Development Certificates) (Exemption) Order 1965 S.I. 1965/1561
66 sec.22 1966 Act 67 sec.25 1966 Act 68 secs.23 and 24 1966 Act
of the financial and other advantages of the Development Areas. Arrangements can be made for the firm's representatives to visit possible development locations and the Regional Offices of the Board of Trade ensure that enquiries about labour, housing, fuel supply or any other matter can be answered by a competent official from the relevant Government department or local authority. Thus every effort is made by the Board of Trade to complement the negative aspect of the I.D.C. control with a positive encouragement to firms to move into the Development Areas. However, this effort is not always successful, and the withholding of an I.D.C. may force firms to pack new equipment into old and unsuited factories.

Where an application for an I.D.C. is actually formally lodged and is refused, there is no form of appeal. However, the regional comptroller of the Board of Trade, to whom the initial application goes, may refer it on reapplication to the Headquarters of the Board of Trade. The Board of Trade may also be open to political pressure in Parliament, as to its policy towards the issue of I.D.C.s in a specific locality. In all cases, the question to be answered by the Board of Trade is 'must this development take place here, or is it capable of being carried out reasonably successfully in a Development Area?'. Thus the Board of Trade is able to direct industry to the Development Areas and the Grey Areas in pursuance of its regional policy for leveling out unemployment rates.

(ii) **Office Development Control**

Control over Office Development is a much more recent control that that over industrial development. It was introduced by the Control of Office and Industrial Development Act 1965. Prior to that, the Location of Offices Bureau was set up in 1963, to offer free advice to those companies considering the decentralisation of office jobs. The Bureau's function became considerably

70 3rd Report of Estimates Committee (1962-63) op.cit. Q. 358
more important with the introduction of control over office development under the 1965 Act. The Act laid down that any application for planning permission, made to a planning authority, must be accompanied by an Office Development Permit issued by the Board of Trade. The categories of development covered are the erection or extension of offices and the change in use of premises to use as offices. The control extends over the whole of south-east England, East Anglia and the east and west Midlands and covers all office development over 10,000 sq.ft. Where a firm's intended development includes both office and industrial development then both an I.D.C. and an O.D.P. are required.

In exercising this control, the Board of Trade must have regard to the need for promoting the better distribution of employment in Great Britain and as with the I.D.C. control, there is a positive aspect to the control of office development. If the Board of Trade is satisfied that the proposed development could be carried out outside the control area, then the firm will be referred to the Location of Offices Bureau for help in finding an acceptable site.

The control of both the I.D.C. and the O.P.D. is complementary to the financial assistance offered by the Board of Trade. Both these policies operate together and since they are administered by the one Government department, it is relatively straightforward for control over the location of development to be co-ordinated with any subsidisation which is available.

Before the topic of industrial and office development is left, it is important to note that control over such development is exercisable by the Minister of Public Buildings and Works under the Building Control Act 1966. The Minister is able to delay privately sponsored building projects costing

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£100,000 or more, but this must be seen as a financial control, rather than as an instrument of regional planning. 76 It allows the Government to apply a curb to private expenditure corresponding to any restrictions on public expenditure, which the financial circumstances of the moment may force on the Government.

Department of Employment and Productivity 77

At the disposal of the D.E.P. there are three methods by which financial assistance may be given to firms in the Development Areas. The most important and the most recent, the Regional Employment Premium, is the only one that could be said to be specifically an instrument of regional policy. However, the other two, namely assistance for the removal and resettlement of key workers and for the training of labour, do help to overcome some of the problems which may prevent firms from moving into the Development Areas.

(a) Regional Employment Premium

The R.E.P. was developed from the system of repayments of the Selective Employment Tax to specific categories of industry. This tax was introduced by the Finance Act 1966 both as a fiscal tax to raise money and also to encourage mobility of labour, by economies in the service industries. The tax was levied throughout industry on all employees and the Ministry of Labour was empowered to repay the tax to certain categories of industry and to repay the tax plus a premium to others. 78 While S.E.T. has met with considerable opposition, the recent 50% increase announced in the Budget Statement on 19th March 1968, suggests that it is a tax that is likely to be retained. However, to meet certain of the criticisms levelled against its application, the Chancellor announced the setting up of the Reddaway Committee to examine and report on the effects of S.E.T. on prices, margins and productivity in industries on which the tax

76 secs.1 and 2 Building Control Act 1966 77 Hereafter referred to as the D.E.P.
78 secs. 1 and 2 Selective Employments Payments Act 1966
falls as a net burden and the consequent effects on the economy generally. 79

The basis of the R.E.P. is that in the Development Areas, S.E.T. is repaid plus an additional premium of 30/- for every full-time male employee in respect of whom manufacturing employers were entitled to claim selective employment premiums under the Selective Employments Payments Act 1966. 80 While the rates of the rebate were fixed by the Finance Act 1967, they can be varied by Treasury Order. 81 This variation is flexible and can include different rates for different Development Areas. Thus, while the R.E.P. is open to similar criticisms as the S.E.T., until the anomalous distinction between manufacturing and service industries is clarified, the possibilities for the R.E.P. as a highly selective and effective instrument of regional policy are considerable. 82

(b) Removal and resettlement of key workers

One of the main problems for firms moving into the Development Areas is the availability of suitably trained labour. In certain cases, it may prove necessary for firms to bring key workers from their previous industrial location. Under the Local Employment Act 1960, the D.E.P. has powers to assist by grants and allowances, with the removal and resettlement of key workers and their dependents. 83 These workers must have been employed elsewhere and must be transferred to a new undertaking being established in a Development Area.

(c) Industrial Training

There has been indirect Governmental sponsorship of industrial training since 1917, although it was not put on a statutory basis for able-bodied men till 1948. Today there are two main aspects of this sponsorship - the Government Training Centres and the Industrial Training Boards.

(i) **Government Training Centres**

These were placed on a statutory basis by the Employment and Training Act 1948 and now number 38. They are distributed throughout the country, particularly in regions of high unemployment, and provide training in 39 Trades. The centres provide 6 month courses in vocational training, and the 'accelerated adult' training provided is aimed at people who have missed an opportunity to do an industrial apprenticeship. 14,000 students a year pass through the Government Training Centres and while there, the students receive a £10.10/- allowance per week plus free board and lodgings.

Attached to this scheme are two Instructor Training Colleges, where the instructors are trained and where instructional staff from firms can also receive tuition. Courses are also available for supervisory staff.

(ii) **Industrial Training Boards**

The Industrial Training Act 1964 was passed to secure an adequate amount of training in industry at all levels, to improve the quality of training and to secure a fair distribution of costs. For this purpose, Industrial Training Boards have been set up to co-ordinate the industrial training within particular industries. So far, there are 21 Boards covering industries with over 10 million employees. The members of these boards are appointed by the D.E.P. and include representatives of the employers and the Trade Unionists in the industries concerned. The boards work out schemes for the co-ordination of training within their particular industries. These schemes may impose a levy on the firms in the industry and allow the boards to make grants throughout the industry towards the cost of courses and facilities for industrial training. The boards may also be empowered to set up their own industrial training centres. Each of these schemes must be approved by the D.E.P. and

84 759 H.C.Deb. 91-92 (W.A.) 85 sec. 1 1964 Act 86 see 2nd Supplementary Report of Estimates Committee (1967-68) H.C. 57 - Appendix
be incorporated in an order made by it. 87

On to these two aspects of industrial training, which apply throughout Great Britain, is added the additional training assistance available to firms in the Development Areas. Industrial Training Centres can be situated in Development Areas and likewise, the schemes of the Industrial Training Boards can be orientated to help these areas, but the Government have felt that this assistance was not sufficient for the needs of industry moving into the Development Areas. Therefore special schemes have been introduced to help firms moving into, or expanding in the Development Areas.

A scheme under the Employment and Training Act 1948 first made extra financial assistance available from 1st September 1964. This assistance was intended to cover the cost of training firms' workers. The scheme was extended from 1st July 1966 and also includes direct assistance given by lending D.E.P. staff to initiate training in the firms' own premises. Grants are payable at a rate of £5 per man and £3.10/- per woman, where the training of workers takes place on employers' premises. These are payable over a period determined by the D.E.P. Financial assistance is also provided to cover half the cost of employees sent on courses in management, supervising and technical subjects, where this is part of a firm's planned development. If a training section is established in rented accommodation in a Development Area, prior to the establishment of a factory in the area, a grant may be paid to cover half the cost of rates and rents and of any alterations necessary for training purposes.

All this assistance is available to firms providing, or intending to provide, additional employment for workers living in a Development Area. There is therefore considerable scope in providing assistance available to the D.E.P. 87

87 sec.4 1964 Act; see generally 9th Report of Estimates Committee (1966-67) 'Manpower Training for Industry' H.C. 548 - Memo from Board of Trade para. 79-144
and every encouragement is given to firms to consult with it at the earliest moment, so that a programme of training assistance can be given and specially arranged to meet a firm's particular needs. 88

Highlands and Islands Development Board

The economic and social problems of the Highlands and Islands have always been considerable. Successive Governments have recognised the need to make special provision for this area and consequently, various public bodies have been accorded responsibility for its development. Some bodies like the North of Scotland Hydro-Electric Board, the Highland Transport Board, the Herring Industry Board, The White Fish Authority and the Crofters Commission have responsibility for a particular aspect of the Highlands and Islands economy, while others are given a wider responsibility. In the past, there were the Highland Fund and the Highland Advisory Panel and they were forerunners to the Highlands and Islands Development Board, created by the Highlands and Islands Development (Scotland) Act 1965 and linked with the Highlands and Islands Development Consultative Council.

The area for which the Board is responsible includes the seven crofting counties: Argyll, Caithness, Inverness, Orkney, Ross and Cromarty, Sutherland and Zetland and extends to one-sixth of the area of Great Britain. Within this area, resides a population of 276,000 which is 5% of the total population in Scotland.

The 1965 Act established the Board as a unique instrument of regional planning within the U.K. Unlike the other instruments of regional policy, which are centrally administered, the Highlands and Islands Development Board has been given considerable powers of independent action at the regional level. This is to enable it to fulfil its two broad functions — to assist the people of the Highlands and Islands and to improve their economic and social conditions.

88 Ibid. Memo from Board of Trade para. 55-57
and to enable the Highlands and Islands to play a more effective part in the economic and social development of the nation. In its first report, the Board examined the possible solution to these problems and laid down the broad lines by which development would progress. Forestry, Tourism and Manufacturing industry are to be the three main props on which the area's future development is to be founded. This will allow agriculture, crofting and fishing, with their traditional links with the past, to continue and be modernised as far as possible, but these latter three activities cannot, by themselves, guarantee the future of the area.

**Composition and Powers of the Board**

The Board was established as an independent body, having a maximum membership of seven, of whom the majority must be full-time. The members are appointed by the Secretary of State for Scotland and, at present, there are four full-time and two part-time members. The Government rejected an opposition amendment trying to get the Board directly elected. The chairman, of the Board is Professor Robert Grieve. His position is a full-time appointment and carries a salary of £7,000.

Most of the members of the Board are from an administrative background, and generally this is regarded as satisfactory. Highland industrialists are so few in number that their membership to the Board is almost bound to cause trouble. Members from a political background are likely to attract too much publicity of the wrong nature. The Board is given certain powers to enable it to carry out its functions. The Board is able, with the Secretary of State's consent, to acquire and dispose of land compulsorily. It may also erect buildings and carry out operations on land, provide equipment and services in connection with land, and otherwise hire, let or dispose of such works, equipment

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90 sec. 1(4) 1965 Act
91 sec. 4 1965 Act - this power has not been exercised yet.
or services. With the consent of the Secretary of State and the Treasury, the Board may carry on business which is in the interests of the Highlands and Islands. Finally, in this respect, the Board may provide advisory, publicity and other services, which may help industrial development in the area.

However it is the Board's extensive financial powers that are of greatest importance. The Board's financial powers are widely drawn and in accordance with arrangements approved by the Secretary of State and the Treasury, the Board may give financial assistance to any industrial, commercial or other undertakings which it feels will contribute to the economic or social development of the Highlands and Islands. By exercising these powers in accordance with financial arrangements approved by the Secretary of State and the Treasury, the Board can co-ordinate its financial assistance with that given by the Board of Trade.

The arrangement operated at present is that applications for grants or loans of up to £25,000 are dealt with by the Board itself, up to £50,000 agreement is required from the Secretary of State, and over £50,000 Treasury approval is necessary for each application. Any application for over £25,000 can be referred to the Board of Trade, but the Board can ask to deal with it by itself and keep the Board of Trade informed.

Financial assistance is given to any new business or existing business in the Highlands and Islands, provided it is viable in commercial terms, and that it creates new employment or prevents unemployment. The Board can give building grants. For new enterprises, in new buildings or old buildings, which require modification or employment, the grant is 35% of the total cost. For modifying or extending existing premises, a 25% grant towards the 'approved cost' is payable. Loans of up to 80% are available for buildings, where no

92 sec.5 1965 Act 93 sec.6 1965 Act 94 sec.7 1965 Act 95 sec.8 1965 Act 96 sec.14(1) 1965 Act – Treasury approval may relate to a specific act of the Board or to all acts of a specified class or description.
grant is given. They are also made for plant, machinery and equipment. The Board of Trade gives 45% grants for these under the Industrial Development Act 1966, and the Highlands and Islands Development Board will advance a loan on the rest of the cost.

Loans are also available for working capital to cover the expenses of beginning a new business or expanding an existing one. These loans are available for a maximum of five years. Finally the Board is empowered to give special grants to attract new enterprises into the Highlands and Islands. For these grants, there are three special criteria to be satisfied:

(a) would the project develop or succeed without special assistance
(b) would the project make a significant contribution to the development of the area in which it is sited and will it have more than a normal development potential.
(c) does the project have special features which impose more than normal burdens of expenditure on it.

The exercise of this power is one where the Board's discretion is considerable, but the grants are limited to £10,000. 97

The broad scope of these powers enables the Board to avoid the complaint, which was frequently made by the Highland applicants, for grants and loans under the Local Employment Acts, that the criteria necessarily applied by the B.O.T.A.C. in assessing projects, were not sufficiently flexible to enable full regard to be had for Highland conditions. 98 Thus the Board's criteria are less strict than those of the B.O.T.A.C. For while investment is related to the number of jobs created, there is no strict cost per job ratio as operated by the B.O.T.A.C. In fact, the whole approach is different. The Board wants to attract industry to the area and therefore, looks for the gaps to be filled. It then seeks out suitable candidates to fill these gaps and offers them every assistance. While with the majority of applications, the initiative lies with

97 see 738 H.C. Deb. 319 (W.A.) 21st December 1966
98 see 2nd Reading Highlands Development (Scotland) Bill 16th March 1965.
708 H.C. Deb. 1079 at 1092
the individual enterprises, in many cases, it is the Board itself which makes the first approach. This compares with the systems of grants and loans operated by the Board of Trade, where the primary concern is to move industry into the Development Areas as a whole. The regional comptrollers of the Board of Trade can not exercise the same initiative in the development in specific localities, as does the Highlands and Islands Development Board.

All applications are the subject of a full examination and assessment by the Board's staff. Visits are paid to the enterprises involved and once this assessment has been completed, a formal decision is taken by the Board. No reasons are given for refusals as the Board's judgements on individual cases must be based on a variety of factors, including an assessment of the financial viability of the project and an evaluation of the personal quality of the applicants.

The financial powers of the Board are therefore extensive, especially as they exist in addition to Government investment in the area through the Forestry Commission, the Herring Industry Board and other public bodies. However, an extension to these powers is being sought by the Highlands and Islands Industry Bill. It is a Private Member's Bill which seeks to enlarge the Board's power to carry on business. In certain cases, the Board has had requests to take over the capital assets of a business, but has been unable to do so in terms of the Act because there have been no development implications. Thus the bill seeks to clarify the Board's capacity to form and promote companies and to give it power to acquire shareholdings in companies in the Highlands.

Up till 31st December 1967 the following financial assistance had been paid by the Board:

<table>
<thead>
<tr>
<th>Period</th>
<th>Grants</th>
<th>Loans</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st November 1965 - 31st December 1966</td>
<td>£22,328</td>
<td>£372,890</td>
</tr>
<tr>
<td>1st January 1967 - 31st December 1967</td>
<td>£173,977</td>
<td>£751,872</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>£196,305</strong></td>
<td><strong>£1,124,762</strong></td>
</tr>
</tbody>
</table>

1 2nd Reading 762 H.C.Deb. 755 5th April 1968 2 First Report of Board op. cit. para. 69
and Islands. The Board wants these powers to enable it to take an active and direct interest in the development of companies, other than merely fulfilling the role of a money lender. For this purpose, equity capital is more secure than grants and loans and since there is to be no compulsory purchase involved and the approval of the Treasury and the Secretary of State is to be required for any exercise of the powers, there has been little objection raised to the bill. In fact the Government have welcomed it and are expected to help its passage through Parliament.

One final aspect of the Board's financial powers, is the availability of grants of a non-economic nature - grants on which the Board expects to make no economic return. These are for social projects and are available to An Comunn Gaidhealach, the National Trust, the Scottish Tourist Board and other sporting and cultural bodies. The maximum assistance to any one body is £2,000 per annum. So far, over £20,000 has been distributed.

Activities of the Board

The activities of the Board are fully dealt with in the Annual Reports and a few general remarks about them are relevant. The permanent staff of the Board come from a variety of backgrounds and many have been attracted back to the Highlands by the challenge of the job. In the course of their job, the officials of the Board travel considerably. Within the seven counties, they visit all the projects which are being supported or sponsored, and they travel to regular meetings with St. Andrew's House officials in Edinburgh, and with other public authorities concerned with the problems of the Highlands and Islands. The staff is divided into groups to administer the loans and grants given, to advise the Board on projects to be supported, to co-ordinate the planning and research sponsored by the Board and to keep the public informed as to the Board's activities and the benefits of the Highlands and Islands.
This publicity undertaken by the Board is considerable and includes tourist publicity carried out through the Scottish Tourist Board. During 1966 £10,000 was spent on tourist publicity, and the Board intends to sponsor advertising films and travel guides. Publicity is also intended to attract both industry and labour back to the Highlands and Islands. For this purpose 'Project Counter-drift' was launched. This was a survey of qualified people throughout the U.K. who would be willing to come to the Highlands and Islands, if suitable employment were available. Over 6000 names have been collected and are available to firms coming into the area.

While many of its operations are concerned with smaller projects, concerning individual enterprises, the Board is also concerned with large scale development in the area. In this respect, the proposed Moray Firth Development is the major project. Here it is proposed to establish a major industrial centre, utilising the natural facilities available, particularly the sheltered deep water harbour at Invergordon, and to develop this as a major centre within the region. This would offer a full range of modern commercial, social cultural and other activities, as well as employment opportunities. The Board has submitted a formal proposal on the Moray Firth Development to the Secretary of State, and the first initiatives have related to the possibility of establishing a petro-chemical complex and one of the proposed aluminium smelters.

The siting of these aluminium smelters is an outstanding example of the complicated nature of regional development in the U.K. After the initial decision had been taken to sponsor the establishment of three aluminium smelters, because of the large import savings which would accrue, the process of deciding where they should be sited has been long and drawn out. The Treasury,

3 Ibid. paras. 88-97; 'The Moray Firth — a plan for growth' H.I.D.B. June 1968 This is a report by an independent group of consultants on the proposed Moray Firth Development.
the D.E.A., and the Ministry of Technology have been concerned with the public investment that will be involved. The loans will probably be given through the proposed powers of the Industrial Expansion Bill. The Board of Trade is involved through its powers to make investment grants and also to control the location of industrial development. The Scottish Office and the Welsh Office have been making strong regional claims about the siting of the smelters, as of course, has the Highlands and Islands Development Board. The Department of Employment and Productivity and the Ministry of Transport have been consulted on questions of manpower and communications. The availability of fuel for the smelters has aroused considerable controversy between the Central Electricity Generating Board, the North of Scotland Hydro-Electricity Board and the National Coal Board. Finally, the confusion has been given an international flavour by the necessity for the Foreign Office and the Commonwealth Relations Office to pacify the Norwegian and Canadian Governments, which are concerned with the drop in their exports which will result. The example demonstrates quite clearly the complicated nature of regional development, albeit that this may be a slightly extreme case. There is therefore, no doubt as to the need for clearer channels of consultation and co-ordination, to prevent the undue delay which has characterised the siting of the three aluminium smelters.

The relationships of the Highlands and Islands Development Board with other public bodies and Government Departments.

(a) Highlands and Islands Development Consultative Council

This body is composed of people with a wide range of knowledge and experience of the Highlands and Islands, and has as its chairman, Lord Cameron, who was also chairman of the Highlands Advisory Panel, the Council's predecessor. The Council has a threefold function. It acts as an additional channel of communication between the Board and the people of the Highlands and Islands

4 Schedule 2 1965 Act
affected by the Board's operations. Secondly, the Council can initiate and offer to the Board advice on matters affecting the development of the Highlands and Islands. Thirdly, the Council can examine problems presented to it by the Board. This latter function has been developed quite fully, and among topics considered by the Council has been the structure of local Government in the area, road development and the provision of housing for key workers. Thus, the consultation council has operated as a useful forum for debate and has allowed different interests to be given a hearing, without any executive or controlling power.

(b) **Local Authorities**

Under the Town and Country Planning (Scotland) Act 1947, local authorities are given responsibility for planning their districts, to secure the proper use and development of land, roads and other infrastructure, and the allocation of land for housing, industry and agriculture. They have the sole power to put their planning proposals into effect. On the other hand, the Highlands and Islands Development Board is concerned with questions of industrial and commercial development, which come within the scope of local authority planning control. There is therefore a need for co-operation between the Board and local authorities, if the Board's objectives are to be effectively achieved.

In working out its plans for development, the Board have engaged various professional advisors and have fully sounded out potential developers. At the same time however, the local authorities have not been as fully integrated in to the process. This has sometimes produced a breakdown in communications between the Board and the planning authorities, as happened with the Ross and Cromarty planning authorities over the Moray Firth Development. 5

The problem lies both with the out-dated structure of local government and with the separation of powers for planning and development. The Royal

5 see 'The Scotsman' April 8th 1967 - 'Where the Highland Board went wrong.'
Commissions on Local Government will undoubtedly suggest a more rational basis for the structure of local government. One solution for the Highlands and Islands would be for the Board to become a regional planning authority, in addition to its existing role in development. Such a combination of powers would require that the Board became answerable to an elected regional body, and this is open to the criticism that the elected members would be too concerned with their own sectional interests to assess a broad rational picture of the whole area. However, if the functions of planning and development were to be combined, it would be essential that the Board should be answerable to a regional body, rather than leaving control centrally located.

(c) Public Bodies

The Board has dealings with a considerable number of public bodies. Some are statutory, like the North of Scotland Hydro-Electricity Board, the British Transport Docks Board, the Forestry Commission and the White Fish Authority and others, independent like the Scottish Council (Development and Industry) and the Scottish Landowners Federation. In certain cases, members of the Board are also members of these other public bodies. Thus the Chairman of the Board is a member of the North of Scotland Hydro-Electricity Board and of the Scottish Economic Planning Council, and the Board is also represented on the Scottish Tourist Board.

With all these bodies, the Board claims to have close and co-operative relationships, and this is indeed essential for its activities. In particular, this is necessary with those bodies, such as the White Fish Authority and the Crofters Commission, which have executive responsibility for the Highlands and Islands area. In many cases, this responsibility is shared with the Highlands and Islands Development Board, and mutual projects are undertaken. While these

First Report of Board op. cit. Appendix IX — for a list of such bodies.
mutual projects could involve prolonged discussion, because of the different angles from which the same problem is approached, in practice, a high degree of co-operation is achieved.

(d) Board of Trade

The Highlands and Islands Development Board's relations with the Board of Trade are primarily concerned with the division of responsibility in the distribution of financial assistance for industrial development. This is controlled by a Treasury approved arrangement, discussed above, and so far, this has operated successfully, without conflict or confusion. The Board of Trade's control of industrial development, through the I.D.C. system, is also relevant, but here again, there has been no difficulty so far.

(e) Secretary of State for Scotland and the Scottish Office

The Highlands and Islands Development Board's relations with the Secretary of State for Scotland and the Scottish Office are crucial. The Board is ultimately responsible to Parliament through the Secretary of State, and therefore, he has ultimate control over the Board and its activities. His power to issue general directions has not yet been exercised. Nevertheless, there is a constant informal transfer of ideas between the Scottish Office and the Highlands and Islands Development Board.

In the other direction, the Board has to submit certain proposals for action to the Secretary of State. The nature of these proposals caused a certain degree of controversy in August 1967. Dr. Dickson Mabon, the Minister of State for Scotland, made a statement to the effect that the Board had not been established to set up multi-million pound enterprises of the type envisaged.

7 An indication of the problem that could arise can be gauged from the Mull Land Survey, which involved the Board with the Crofters Commission, the Forestry Commission, the Red Deer Commission, the Agricultural Executive Commission and the Argyll County Council. 8 As an example of the co-operation that is achieved, see the section on Fishing in the First Report of the Board op. cit. paras 100-117 9 see above p. 4-44 10 sec.2(1) 1965 Act 11 sec.3(1)(b) 1965 Act; see First Report of Board op. cit. Appendix VI
for Invergordon in the Moray Firth Development. The considerable reaction in
the press and from the Board, was met by an explanation from the Scottish Devel-
opment Department, that what Dr. Mabon meant was that the Board could not
do this on its own. 12

However, the suspicion still lingers that the Scottish Office would be
prepared to limit the Board activities, if this were felt to be desirable.
This suspicion is fostered by the fact that the 'Mabon incident' followed the
resignation of John Robertson from the Board in July 1967. Robertson, who was
concerned with the Moray Firth Development, accompanied his resignation with
a documented accusation of obstructionism by the Scottish Office, over the
Board's freedom in pursuing development concepts. Again the accusation was
denied, but it is unlikely that conflict has been completely eliminated, even
although the relationships between officials, at the individual level, are
stated to be satisfactory, both by the Scottish Office and by the Board.

In introducing the Bill in 1965, the Secretary of State made no apology
for seeking extensive powers for the Board. 13 Especially with its financial
powers, the Board was to play an extensive role in regional development. Never-
theless, because of the Secretary of State's ultimate responsibility for the
Board, the act gives him certain controls over the Board, which could be used
to frustrate the Board's activities. This is what the officials of St. Andrew's
House were accused of doing by John Robertson. Certainly all large projects
have to be referred to St. Andrew's House, and at the Board's weekly meetings,
when its formal decisions are made, there are two Scottish Office assessors
present. However, the frustration of which Robertson complained may have been
little more than the delay inherent in all government. For while in theory,
the Secretary of State has the right to control a large proportion of the Board's

12 see 'The Scotsman' Wed,13th September 1967
13 2nd Reading Highlands Development (Scotland) Bill 16th March 1965
708 H.C. Deb. 1079
activities, in practice, the position is different.

For instance, with its financial powers, the Board can only grant assistance in accordance with arrangements made with the Secretary of State and the Treasury. 14 However, it was clearly stated by the Government during the Second Reading, that the Board 'will have the freedom to give loans without running to the Secretary of State every time.' 15 Thus the arrangement was approved whereby the Board can give grants of up to £25,000 on its own initiative. 16 This gives the Board a considerably greater discretion than the Highland Fund, which was limited to loans of up to £7,500, and demonstrates how a workable arrangement can be arrived at between the Board and the Scottish Office.

For financial and other reasons, the Board's larger projects require consultation with the Scottish Office. The delay involved may be annoying, but as long as the Secretary of State is ultimately responsible to Parliament for the Board, there is no other alternative. Even if the Board were given planning and development responsibilities for the Highlands and Islands, and was made responsible to an elected regional body, this consultation would still be required. Whatever powers are delegated to regional bodies, the requirement for central co-ordination will still remain. Thus it is of importance that any rivalry between the Board and St. Andrew's House has subsided, and that the many meetings, which take place between officials, have engendered a feeling of co-operation.

(iv) The Administration of regional policy in the U.K.

In attempting to draw any conclusion as to the administration of regional policy in the U.K., it is necessary to consider two factors - the co-ordination between the various branches of regional policy and the control exercisable over

14 sec.8 1965 Act 15 708 H.C. Deb. 1202
16 An opposition amendment was rejected, which sought to give the Board power to give grants and loans of up to £50,000 without reference to the Secretary of State - 714 H.C. Deb. 908 17th June 1965.
the administration of regional policy.

The ultimate overall responsibility for the planning of regional policies rests with the D.E.A. It has been shown how there is some break in communications between the regional planning councils and the D.E.A., resulting in conflict between them as to the best policies to be followed. Because the councils have no executive authority and are largely forums, where the various interest groups are given a hearing and through which they can collectively put pressure on the central Government, their practical effect on the exercise of regional policy has been limited.

The regional planning boards were intended to provide a method of co-ordinating the activities of the various Government departments concerned with regional development - the D.E.A., the Board of Trade, the Department of Employment and Productivity, the Ministry of Housing and Local Government, the Ministry of Transport and the Scottish and Welsh Offices. Within each of these departments, the co-ordination of the different instruments of regional policy operates successfully and at the national level, the degree of ad hoc co-operation between them is satisfactory. However, at the regional level, the local co-ordination of regional development under the overall direction of the D.E.A. has not been achieved by the regional planning boards. This is largely because of the control exercisable over regional policy, which will shortly be discussed. It means, however, that problems are resolved vertically within central Government departments, rather than horizontally at the regional planning board level.

This is also the experience with the Highlands and Islands Development Board, where there has been conflict between the Board's plans for economic development and the planning powers of the local authorities. Here again, problems have to be referred vertically for solution, rather than be decided horizontally at the regional level.
This lack of co-ordination becomes apparent in practical terms, when one considers the position of infrastructure development in the U.K. While the industrial development aspect of regional policy operates with the prime objective of pushing industrial development into the Development Areas, there seems not to be a similar emphasis in relation to infrastructure development. Indeed some of the major developments in infrastructure in recent years - the M6 motorway up the spine of Lancashire, the London Transport underground extensions and others - seem to add to the attractions of the non-development areas, albeit that there have been large projects in the Development Areas as well.

Thus, while the D.E.A. has an overall responsibility for regional policy there does not appear to be sufficient co-ordination of all aspects of regional development. It is suggested that a Ministry of Regional Development, with a national responsibility for both economic development and physical planning control, would be more effective in this respect. But is a body with national responsibility sufficient? Can the national control exercisable over a central government department be effective and meet all regional requirements? To both these questions, a negative answer is suggested, for while there is a valid case for vesting in a single body overall national responsibility for the economic development and planning control aspects of regional development, there is equally a case for the devolution of many of the decisions to be taken.

The main difficulty in such a devolution, is the division of decision making into national and regional categories. Much of the division which at present exists, is due to historical accident rather than any degree of constitutional logic. Where there is some devolution of authority, as with the Secretary of State for Scotland and the Highlands and Islands Development Board, there is little rational basis for it in relation to the rest of the country. Yet there is little doubt that the efficient operation of public sector expenditure and public policies requires a regional level of decision making. It is
not sufficient that regional interests are merely consulted through the regional planning councils. Some decision-making authority must also be devolved. This has happened in the physical planning system, albeit that there is an ultimate appeal to the central authority. A similar system for economic development could allow local conflicts between physical and economic planning to be resolved at the regional level.

Crucial to this division of decision-making into national and regional categories, is the question of how far to decentralise without losing complete control. Undoubtedly some policies, like the I.D.C. control system, must be nationally supervised. Nevertheless, as regional policies become more selective and sophisticated, the opportunities for an exercise of regional discretion will increase. Consequently there is an increasing need to clarify the division of responsibilities between national and local authorities.

Allied with this division of responsibilities, there is the problem of the restructuring of local or regional government. This is a matter at present being considered by the Royal Commissions on Local Government, and involves not only the creation of a more effective machinery for decision making at the regional level, but also the question of a devolution in control. The present frustration of the administrative devolution intended by the regional planning boards, is largely due to the central parliamentary control exercised over the Government departments represented on them. If there is a problem within the jurisdiction of a particular department, then it has to be referred to the Whitehall headquarters of the department, or possibly in Scotland, to St. Andrew's House. The final decision must come from the central headquarters of the relevant department, as its Minister will be answerable for it to Parliament.

Yet how effective is the central parliamentary control? Many of the Parliamentary questions asked are unanswerable, because the required information
is neither available nor would the expense required to obtain it be justified. Even when the information asked for is available, unless a blatant case of maladministration is brought to light, the information obtained is of little use other than as a basis for a parochial speech by an M.P. during an Adjournment Debate or an Allotted Day Debate.

An outstanding example of this is the exclusion of Edinburgh, Portobello and Leith from the Development Area in Scotland. Despite repeated questions, speeches and protests, there is no evidence to suggest that the Board of Trade has been required to reconsider its decision, or that the decision has been subjected to any objective test of reasonableness. In effect, there is no effective control exercisable over this decision. Similarly, the Highlands and Islands Development Board regards parliamentary questions, asked at Westminster, as little more than a nuisance. If, on the other hand, there was an elected regional body sitting in Inverness, to which the Board was responsible, then it is likely that a more serious attitude would be adopted towards control exercised by directly elected representatives.

The present centralised control by Parliament not only is ineffective, but also frustrates even the most limited regional administrative devolution. Only if the corresponding system of control is devolved can there be a truly effective devolution of decision making authority.

The present lack of effective control is disturbing when one considers that more selective and sophisticated regional policies would admit the possibility of more sensitive regional decisions. These decisions will require to be subject to an adequate system of control, and regional controls would in

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17 This is evidence of a very valid criticism about the lack of regional statistics which are available. In particular, a regional breakdown of public capital expenditure is lacking - an omission exploited by the Scottish National Party. It is conceded that such a regional breakdown of financial statistics is a complicated matter and that the cost involved may be high. Nevertheless, they are required for an effective regional policy, balancing the interests of one region against those of another.
many cases be superior to the present centralised system of Parliamentary control. Difficulties lie as to the extent of the control and in what form it should exist. It might be an extensive but largely ineffective parliamentary-type control operated on a regional basis, with regionally elected bodies. Alternatively, the range of the control might be narrower but more effective, if it were in the form of an administrative jurisdiction vested in regional judicial bodies. As has been mentioned above, regionally elected bodies might be over-concerned with sectional interests to operate an objective system of control and this would suggest a preference for a control of a judicial nature, On the other hand, there is an urgent need to allow the elected representatives to play a meaningful role in government, at both national and regional levels. This is the problem facing the Royal Commissions on Local Government and any action arising out of its proposals for the restructuring of local government should be integrated with a similar development in the structures for administration and control, which the development of governmental regional policy demands.
(b) **European Economic Community**

(i) **The need for a Community regional policy**

It is well established that there is a need for an effective regional policy within the Common Market. The evidence available suggests that an economic union is most satisfactory between economic units at the same level of development. However, the need for a policy on regional development is not a direct consequence of the creation of the E.E.C. Disparity between regions is a problem facing every country. The inception of the Common Market has only highlighted the problem within the six member states.

Initially, the problems of individual regions are the responsibility of the member state governments. Any community action to alleviate these problems must be seen as subsidiary and complementary to national measures. Nevertheless, there has been considerable pressure on the Commission to define overall concepts for a community regional policy, incorporating both the national measures employed and those at the disposal of the community institutions. This pressure has come particularly from the European Parliament. It has urged that a common policy be jointly worked out between the institutions of the three Communities and the national and regional authorities.

The Commission has been willing to respond to these pressures, but has realised that to define a community approach to regional policy, required considerable study and comparison of national measures. Three working parties of national experts were therefore set up to examine regional policy. The first group was charged with a study of the aims and methods of regional policy. Actually, after an analysis of existing national policies, it examined more

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2 7th General Report of E.E.C. Commission para. 141
specific problems facing the community, problems such as the definition of a 'region' and the role of infrastructure. The second group was concerned with the redevelopment of declining industrial areas. These are areas which have run into adaptation difficulties, because of the ageing of industrial structures and social framework. Thirdly, a group was given the task of assessing the effectiveness of the various forms of preferential treatment intended to promote regional development.

The reports and conclusions of these three working parties 3 formed the basis of the Commission's regional policy, incorporated in the medium-term economic policy adopted by the Council of Ministers in February 1967. This policy development was generally welcomed, especially by the European Parliament, 4 and attention was now turned to the creation of an administrative body to carry out the agreed policy and projects. At that time, there was no directorate within the Commission, specifically charged with an overall responsibility for regional policy. This was partly because the Treaty of Rome does not make a specific delegation of power, to the Community institutions, with regard to the co-ordination and control of regional policy within the Community. Only from the general obligation, on the Commission and the Council, to coordinate economic policy can it be assumed that there is a similar responsibility in relation to regional policy. 5

There is no difficulty where the Community institutions have been granted specific powers, as for example, with the European Investment Bank or the control over State Aids exercised by the General-Directorate on Competition. However, all of the common policies within the Community have important effects on regional development, and up till recently, there has been nobody specifically

3 see 'La politique régionale dans la C.E.E.' Brussels July 1964
4 European Parliament - Documents de Séance no. 58 (1966-67) pp. 36-37
5 see Arts. 2, 145 and 155
concerned with regional policy and its relationships with the other facets of Community economic policy. This gap is being filled by the creation of a Directorate-General on Regional Policy, as part of the reorganisation of the Commission, after the merger of the three executive bodies of the three Communities. Although this Directorate-General will only have limited powers to promote regional development, it will be able to ensure a co-ordination between balanced regional development and the other common policies administered by the Commission. Further through constant consultation with regional experts in the member states, it will achieve informally, a greater degree of collaboration between their regional policies than is already achieved under the Commission’s powers to control state aids.

There are therefore, three elements of regional development in the E.E.C. which will be considered: first, there are the instruments of regional policy at the disposal of Community institution; secondly, there is the co-ordination of the economic policies of the Community with regional development; and finally, there is the control exercisable over the regional policies of the member states.

(ii) Community Instruments of Regional Policy

European Social Fund

The European Social Fund is primarily concerned with the correction of unemployment and underemployment within the community. It aims to improve employment opportunities through financial help for retraining and re-employment schemes. By increasing the geographical and occupational mobility of the workers in the E.E.C., the Social Fund attempts to alleviate the problems facing workers displaced by the industrial rationalisation, which will accompany the community’s

6 This General-Directorate will also have responsibility for the exercise of the regional powers in the E.C.S.C., formerly the concern of the High Authority. Because of the structural crisis facing both coal and steel industries, these powers are of major importance and extend to giving financial aid for training, reclassification of workers and industrial rationalisation of enterprises and regions. Arts. 54 and 56 E.C.S.C.
economic integration. However, the Social Fund is not a welfare agency – an extension of national unemployment benefit schemes. Its activities are more productively orientated and aim to enable displaced workers to regain a productive role within the community.

The Social Fund is not limited to unemployment problems where there is a causal connection between the creation of the E.E.C. and the problems. Its funds are available for all schemes which help workers within the E.E.C. to be reintegrated into the economic process.

While the funds distributed from the Social Fund are considerable, there is a limitation of the influence exercisable by the Commission through the operation of the Fund. This is because the Social Fund is only empowered to subsidise by 50% schemes operated by the Governments of the Member States. The initiative for action lies with the member states. Consequently, the Commission is not able to operate an overall co-ordination of the schemes, which the Fund finances, although each individual scheme does require Commission approval. This lack of Commission initiative is inherent in the structure of the Social Fund as set up by the Treaty. Nevertheless, the fact that, with Commission approval, their schemes will receive a 50% subsidy, has acted as an incentive to the member states to institute such schemes.

(a) Range of schemes supported

Art. 125 states that, on the request of a member state, the Social Fund shall meet half the costs incurred by the state or a public body, for schemes for: (1) re-employment of labour by means of retraining and resettlement,


<table>
<thead>
<tr>
<th>Schemes</th>
<th>Aid</th>
<th>No. of Workers helped</th>
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</thead>
<tbody>
<tr>
<td>Retraining</td>
<td>37,401,722</td>
<td>216,656</td>
</tr>
<tr>
<td>Resettlement</td>
<td>2,988,587</td>
<td>291,079</td>
</tr>
<tr>
<td>Total</td>
<td>40,390,309</td>
<td>507,735</td>
</tr>
</tbody>
</table>

1 H.s. = $1 U.S. Figures from 10th Annual Report E.E.C.

8 The Social Fund is operated by the Commission, through a division within the General Directorate on Social Policy.
(ii) maintenance of the wages of employees whose work has been affected temporarily or has ceased entirely, due to a firm's changing over to making other products, which are carried out within the Community. The Commission has no discretion. If the conditions of Art. 125 and Council Regulation 9 are satisfied, the Social Fund must grant a 50% subsidy.

(i) The Fund gives financial assistance for retraining directed at making new employment opportunities available to registered unemployed workers. The occupational retraining must be given according to a pre-established programme, defining its scope and duration, and ensuring new productive employment for the unemployed workers concerned.

'Resettlement' is defined as meaning a change of residence within the Community, necessary for a worker to obtain new productive employment of a non-seasonal nature. The conditions for assistance include that the worker has been unable to find, at his present place of residence, a job corresponding to that he has held in the past. Further the worker must find gainful employment in his new location, within 6 months, and he must hold this for at least six out of the succeeding twelve months. Otherwise, he must undergo a period of occupational retraining. The costs recoverable include the travelling expenses of the worker and his dependents, the cost of moving his household effects and compensation for any separation of worker and family involved.

(ii) Assistance is also offered where workers are affected by certain categories of industrial reorganisation. The reorganisation covered is where an enterprise changes to the manufacture of new products, different from existing products by other ways than improvements or additions to the existing product.

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10 For a definition of 'unemployed worker' see Reg. 9 Art. 2
11 Reg. 9 enumerates certain requirements to be fulfilled and the types of assistance available Arts. 3, 4 and 5
12 Reg. 9 Art. 6
13 Reg. 9 Art. 8
range. The reorganisation must involve temporary unemployment for the workers of the enterprise and must allow for the re-employment of all or part of their number, after the reorganisation has been completed. 14 The Social Fund will repay expenditure devoted, in place of lost wages, to workers who suffer temporary hardship as a result of the reorganisation, on condition that the workers do not find any other temporary employment at an equivalent rate of pay. 15

The Social Fund will only grant assistance when the member state has submitted to the Commission a project drawn up by the enterprise concerned, relating to the proposed reorganisation and its financing, and this project has received the Commission's approval. A further condition is that the workers affected must have been fully re-employed by the same enterprise for at least six months. 16

This aspect of the Social Fund's assistance is primarily an instrument for sponsoring industrial rationalisation. It is only of benefit where there is industry wishing to rationalise its production and it is not orientated towards regional development. As a result of the long and involved procedure involved, there has been less use made of this assistance than would have been desirable. 17

(b) Administration of Social Fund

The administration of the Social Fund was entrusted to the Commission under Art. 124. It is a responsibility of a direction within the General-Directorate on Social Affairs and therefore the Social Fund has no legal personality of its own. All its actions and decisions are taken in the name of the Commission.

The funds required for the Social Fund are subject to the normal budgetary process, although the contributions of the member states are determined by a 14 Reg. 9 Art. 9 15 Reg. 9 Arts. 10 and 11 16 Reg. 9 Art. 15 17 see 9th General Report Para. 239 and 10th General Report Para. 250 — during the period covered by these two reports, no applications for assistance in re-organisations were made.
special scale and approved by the Council by a specially weighted system of voting. 18

The Commission's responsibility extends to receiving applications from member states for the reimbursement of expenditure, examining the admissibility and merits of such applications and deciding finally on the granting of assistance. 19 Each member state is required to submit a yearly estimate of the requests it will make during the coming year. All requests for assistance in undertaking projects for retraining and resettlement, must refer to the expenditure sustained by a member state or a public body. These applications must be submitted after the retraining or resettlement has been completed. On the other hand, applications for assistance with reorganisation projects must receive the prior approval of the Commission, before expenditure can be incurred.

While considering applications, the Commission is required to consult the Committee of the European Social Fund. 20 This committee is composed of representatives of the six governments and labour and management organisations in the member states. It also has to be consulted on all matters of general importance concerning the administration of the Fund. 21

If the application is approved and the Commission is satisfied that the appropriate measures have been carried out, then the Social Fund will reimburse 50% of the expenses authorised and incurred by the member states or authorised public bodies.

(c) Future of the Social Fund

Art. 126 states that at the end of the transitional period, the Council must reconsider the activities of the Social Fund. This is to be done on the basis of an opinion submitted by the Commission, although the Commission can not form its opinion in the form of a draft regulation. It is clear that the 18 Arts.199-209; particularly Art.200(2) and Art.203(5) 19 Reg.16 Arts.16-26 20 See Commission Regulations No.113/63 J.O. 1963/253 21 Reg. 9 Art.29
Commission would like the scope of the Fund to be enlarged. In particular, it would like to extend the Fund's activities into the field of normal occupational training, as envisaged under Art. 128. If the Commission were allowed to participate, through the Social Fund, in the creation and management of training centres, then it feels it could play a more effective role in regional development. Further if the Commission were able to give assistance to underemployed workers, while industrial training takes place, and to finance housing for migrant workers within the Community, this could facilitate the establishment of new industries in the depressed regions.

However, the member states are opposed to any extension of the Commission's activities with regard to the Social Fund, as the extra financial burden would fall on them. Furthermore, these proposals could not be incorporated within Art. 123 as is required for the Council's reconsideration under Art. 126. It is unlikely, therefore, that the Commission's proposals will be adopted in the near future. Thus the European Social Fund will retain its limited effectiveness, as an instrument of regional policy.

European Investment Bank

After the European Social Fund, the European Investment Bank is the main instrument of community regional policy. It is a body with separate legal personality and a Protocol concerning the composition and procedure of the Bank, its capital and its conditions of operation is attached to the Treaty of Rome.

The E.I.B. is intended to ensure a balanced economic development throughout the Community, using normal sources of capital and its own resources.

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22 see Council Decision 'On Establishment of General Principles for Putting into Operation a Common Policy on Vocational Training' J.O. 1963/1338

23 Hereafter referred to as E.I.B.; see generally 'L'activité de la Banque européenne d'investissement en faveur du développement régional' A. Campolongo p. 125 of 'La politique régionale dans La C.E.E.' op.cit.
In particular, the E.I.B. grants loans and guarantees on a non-profit making basis, to finance three categories of projects.

(a) those for developing under-developed regions in the Community,
(b) those to enable Community enterprises to adjust to the economic development of the Community by modernisation and conversion, where such projects are beyond the financial means available in Member States,
(c) those where there is a common interest between several Member States, where there is insufficient finance available in the member states concerned.

Projects of category (a) have been the main concern of the E.I.B. and have involved aspects of industrial, agricultural and infra-structural development. The projects assisted have included both profitable industrial projects and non-profit making projects of a general structural character. In both cases, the member state in which the project is to be carried out, must guarantee the loan. Modernisation and reorganisation projects, supported under category (b), may also be of a profit making nature. Such projects may be either in the less developed regions of the Community or areas where there is a high concentration of old industries. For instance, these projects must show at least an indirect connection with the establishment of the Common Market and assistance will not therefore be extended to projects concerned with normal industrial rationalisation and expansion. Projects of category (c) can either concern profitable enterprises in the production field or non-profitable projects of a general character. These qualify for assistance only when more than one member state stands to gain some economic advantage from their realisation. With projects under categories (b) and (c), the loans and guarantees granted by the Bank, can only be regarded as supplementary to finance from other sources within the member state.

24 Arts. 129 and 130; Art. 28 Protocol accords to the E.I.B. the most extensive legal capacity accorded to legal persons in the respective jurisdictions of the member states. 25 Of importance is the consultation with the Commission required by Art.21 Protocol. 26 The average contribution of the Bank is 20-25% of the total investment; Art.18,19 and 20 contain details of the financial assistance which the E.I.B. can give. Loans can be given to member states, public and private enterprises and loans raised by such bodies can be guaranteed. E.I.B. cannot acquire any interest in enterprises or undertake any responsibility in their management unless such action is essential for recovering the finance granted by the Bank.
The Bank's activities are closely integrated with the general economic policy of the Community. It is concerned with ensuring that there is a balanced development within the E.E.C., in relation both to individual industrial sectors and to the different regions of the Community. This it can only do in collaboration with the member states, for financial assistance is not the sole solution to regional problems. Thus the Bank's assistance is only available for projects which have the approval of the Member State within whose territory they are to be carried out, and to a certain extent, where the measures of the member states no longer suffice to achieve the objectives aimed for.

(a) Financial resources of European Investment Bank

Initially, the Bank was supplied with a capital of one thousand million units of account, subscribed by the member states according to a specific ratio, and of this, 25% has been paid up. The Bank is also allowed to borrow on the international capital markets and the capital markets of member states, any funds it considers necessary to fulfil its tasks. Where the Bank is unable to raise the capital for a particular project, then the member states may make special interest-bearing loans. A further source of finance is the profits that accrue from the Bank's activities, although the Bank is not an actively profit-seeking organisation.

The Bank is required to build up a reserve fund of 10% of the subscribed capital and the Directors of the Bank may decide on additional reserves if the Bank's obligations warrant them. The resources of the Bank may be held in different currencies of the member states and also in other currencies. A holding may be transferred from the currency of one member state to that of another, where the transfer is required for the Bank to fulfil its tasks.

27 Art. 20(6) Protocol requires approach of appropriate member state for any project which the Bank intends to finance, in whole or in part.
28 Arts. 4 and 5 Protocol: 1 m.a. = £1 U.S.
29 Art. 6 Protocol
30 Art. 24 Protocol.
However the Bank may not convert a holding in the currency of one member state into the currency of a third country, without the agreement of the member state concerned. 31

(b) Organisation of the Bank

The E.I.B. is a separate legal personality, responsible for its own decisions before the Court of Justice. The six member states are members of the Bank and there is no provision to enable additional members to be added. The administration of the Bank lies with a Board of Governors, a Board of Directors and a Management Committee.

Board of Governors

This consists of the finance ministers of the six member states and has the duty to establish and supervise the general policy of the Bank in relation to the development of the Common Market. In particular, it has certain specific duties, which include the right to decide on any increase of the subscribed capital, the right to exercise the powers over special loans from member states, the powers to appoint and remove from office members of the Board of Directors and the Management Committee and the duty to approve the annual report and accounts. 32 The Board of Governors is also empowered to take, by a unanimous vote, the decision to suspend the Bank’s activities or to order its liquidation. 33

Board of Directors

The Board of Directors is composed of twelve directors and twelve alternates. 34 Eleven of the directors are nominated by the member states and one by the Commission, and they are appointed by the Board of Governors for a period of five years. The Board is presided over by the Chairman of the Management Committee.

31 Art. 25 Protocol  
32 Art. 9(3) Protocol  
33 Arts. 9(4), 27 Protocol  
34 Arts. 11 and 12 Protocol
The Board of Directors has the exclusive competence to grant loans or guarantees for specific projects and to raise loans on the capital markets. It fixes the rates of interest for the loans granted and the commission on guarantees. A further duty of the Board is to ensure that the Bank is managed in conformity with the provisions of the Treaty and the Protocol, and in line with the direction of the Board of Governors. For this purpose, the Board of Directors is accorded the powers of the Commission under Art. 169, in relation to the obligations of the member states. These may also be enforced by the Board of Governors suspending the granting of loans or guarantees to a Member State or its nationals, if that member state has failed to fulfil any of its obligations.

Decisions of the Board of Directors may be challenged before the Court of Justice, but only by the Commission or a member state on certain procedural grounds.

**Management Committee**

The Management Committee consists of a Chairman and two Vice-Chairmen, appointed by the Board of Governors, on a proposal by the Board of Directors. The committee is responsible for the management of the current affairs of the Bank, under the supervision of the Board of Directors. It drafts the decision of the Board of Directors, as to the raising of funds on the capital markets and the granting of loans and guarantees. The Committee is also responsible for the implementation of the decisions of the Board of Directors.

The Management Committee and the staff of the Bank are responsible only to the Bank and are completely independent in the exercise of their functions.

35 Art. 180(a)  36 Art. 26 Protocol  37 Art. 180  38 Art. 13 Protocol
(c) Operations of European Investment Bank

The operations of the E.I.B. are primarily concerned with applications for loans and grants and the implementation of the decisions subsequently made. Applications for assistance may be submitted directly to the Bank, through the Commission or through the member state in whose territory the project is to be situated. 39 All applications not submitted by or through the member state concerned will be submitted for its opinion, and similarly applications not submitted through the Commission will be forwarded for its opinion.

The initial application is received by the Management Committee, where it is examined as to its conformity with the provisions of the Protocol. The Management Committee formulates an opinion on the proposed guarantee or loan, which it transmits with a draft decision to the Board of Directors. If the Management Committee gives an unfavourable opinion, the Board of Directors may only grant such loan or guarantee by means of a unanimous vote and similarly, if the Commission renders an unfavourable opinion, there must be a unanimous vote, with the director nominated by the Commission abstaining. When both the Management Committee and the Commission give unfavourable opinions, the Board of Directors can not grant a loan or guarantee. Thus, while the Bank is legally and independently responsible for its decisions, there is built into its procedure, the means by which the Commission must be consulted and by which it may veto proposed projects. Likewise there is co-ordination with the member states by virtue of the fact that the Bank may not finance any projects which are opposed by the member state within whose territory the projects are to be carried out. 40

(d) Future of the European Investment Bank

The future development of the Bank's activities will be largely determined by the availability of resources. Hence its ability to borrow money on the

39 Art. 21 Protocol 40 Art. 20(b) Protocol
capital markets will control the extent of its activities, since the Bank's paid-up capital is limited. Nevertheless, despite any financial limitations, the Bank remains an important instrument of regional policy. 41 So far, the majority of loans given have been to projects of an industrial nature. 42 To achieve a well balanced regional development, however, there is a need for more projects concerning infrastructure and the Bank is now turning its attention to this category of project in particular.

European Agriculture Guidance and Guarantee Fund

As part of the common agricultural policy for the community, the Council of Ministers created the European Agricultural Guidance and Guarantee Fund. 43 This fund is the financial basis of the common agricultural policy and its Guidance Section, which finances structural changes in agriculture, has important implications for regional development. 44 The Guidance Section can give financial assistance to measures for the adjustment and improvement of the conditions of production in agriculture, for the adjustment and guidance of agricultural production and of marketing agricultural products and for the development of outlets for these products. 45 Subsidies are granted to projects which are approved to projects which are approved by the Commission and form part of an approved community programme. 46 The projects must also offer reasonable proof that the economic benefits of the structural improvement will be lasting. Priority is given to projects designed to promote the development of

41 The fact that during 1966 58% of the loans granted were to projects in S. Italy shows the emphasis the Bank places on the regional aspect of its activities - see Annual Report of E.I.B. 1966. 42 In Germany during 1966 the Bank supported five projects, all of an industrial nature; in Italy eleven projects, nine of which were industrial; and in France, one infrastructure project. 43 Hereafter, referred to as E.A.G.G.F.; Council Regulation no. 25 J.O. 1962/991; see Art. 39(1)(a). 44 The Guarantee Section is responsible for the cost of price support on the internal Community market and for the cost of subsidised on exports to non-member countries. It is not of concern to this study. 45 Council Regulation no.17/64 J.O. 1964/586 Arts. 11 and 12. 46 Reg.17/64 Arts. 13 and 14; this requirement for projects to form part of an approved community programme is important, for these programmes are in effect co-ordination plans for different sectors of the agricultural industry.
a region, in collaboration with other measures. This priority may take the form of a preferred place among applications or the granting of more favourable conditions for participation.

The Guidance Section of E.A.G.G.F. grants subsidies of up to 25% of the total cost of the structural reform undertaken. The recipient must pay at least 30% of the cost himself and the balance is made up by the member state on whose territory the project is to be carried out.

(a) Financing of E.A.G.G.F.

The present contributions of the member states to E.A.G.G.F. are calculated in two parts. 40% comes from the collection of levies on imports of agricultural products from non-members countries. The remaining 60% comes from contributions by the member states, on the basis of a fixed scale. The expenditure of the Guidance Section is subject to a provisional annual ceiling of 285 mil.

(b) Administration of E.A.G.G.F.

The administration of the Fund is entrusted to the Commission and its General Directorate on Agricultural Policy. Requests for assistance must be submitted to the Commission through the member states and be accompanied by the approval of the member state concerned. The request is submitted by the Commission to the Standing Committee on Agricultural Structures for its advisory opinion. The Commission then makes a draft of the decision it intends to adopt and this is submitted to the Fund Committee for its opinion. If this Committee's opinion differs from that of the Commission, then the project must be referred to the Council of Ministers, which can over rule the Commission.

47 Reg.17/64 Art. 15  48 For the 1967-68 accounting period the maximum subsidy was raised to 45% for certain categories of projects included in Community programmes - Reg. 130/66 J.O. 1966/2965 Art. 10  49 90% of the levies, collected by the member states has to be forwarded to E.A.G.G.F.  50 Reg.130/66 Art. 11  51 Reg.17/64 Art. 10  52 Reg.17/64 Art. 19.  53 Art. 17/64 Art. 15  54 Each member state is represented on this committee by no more than five officials. The committee is also consulted on all matters of general importance relating to the Guidance Section of the Fund.
by a qualified majority.

Also of importance are the Management Committees, which exist for each major product or group of products covered by the common agricultural policy. While these committees have no specific role in the procedure of the Guidance Section of E.A.G.G.F., they must be consulted by the Commission in the formulation of its community programmes. Any project supported by the Guidance Section must form part of one of these programmes and thereby the Management Committees have some control over the projects supported, since if there is any disagreement between the Commission and a Management Committee, then the matter must be referred to the Council of Ministers, again for decision by a qualified majority.

(c) Co-ordination of E.A.G.G.F. with other policies of community and of member states.

Effective co-ordination is written into the activities of E.A.G.G.F. by the regulations concerning its procedure. A subsidy given from the fund must not conflict with the treaty rules on competition. Any subsidy, given by the Guidance Section, will be linked with a subsidy from the member states. Therefore the draft decision granting support, is examined by the Competition division within the Agriculture Directorate, referred to the Directorate-General on Competition and examined by the Service Juridique, before a final recommendation is made to the Commission for its formal decision. Clearly therefore, any subsidies given by the E.A.G.G.F. are cleared with the community's competition policy.

The Commission is also required to ensure that the operations of the Fund are in harmony with those of the European Investment Bank and the European Social Fund. Co-ordination with the member states is ensured by the fact that any applications must have the consent of the member state on whose territory

54 Reg.17/64 Art. 17(2) 55 Reg.17/64 Art. 17(3)
the project is to be carried out. 56

(d) Future Development of E.A.G.G.F.

As with the European Investment Bank and the European Social Fund, the development of E.A.G.G.F.'s activities is very largely dependent on the financial resources available. The financing of the Fund has caused considerable controversy between the member states and they are at present employing their third system of contributions, since the inception of the Fund in 1962. The full details of how the E.A.G.G.F. is to be financed after 1970 have not yet been decided, but the full proceeds of the levies on agricultural imports will accrue to the Fund from January 1st 1970.

There is now little doubt as to the importance of structural development in the common agricultural policy of the E.E.C. At present the initiative for structural development lies with the agricultural producers and the member states. The Commission can encourage them to modernise their production, through its approved community programmes and studies of particular regions or agricultural sectors. Ultimately however, the application for assistance must come from the producer or distributor himself.

This present lack of community initiative in agricultural policy is among the matters being discussed and considered for the Mansholt Plan on structural policy, at present being prepared by the Commission. Structural policy has a much higher political content than price policy, the first part of the common agricultural policy to be decided. However there are considerable pressures towards the creation of a community structural policy in agriculture, and in such a policy the role of the Guidance Section of E.A.G.G.F. (or an equivalent body) would be of increasing importance.

Regional Studies

The Commission has certain funds available to undertake studies on particular regions and on the application to these regions, of the instruments of regional 56 Reg.17/64 Arts. 18(1) and 20
policy available to these regions. Details of these studies are mentioned in the annual reports of the Community. These studies will be used as a basis for future regional development, once adequate instruments of community regional policy are available. Each study report analyses the region concerned and suggests measures which might be implemented, either by the member states or by the Commission.

(iii) Commission's co-ordinating role.

The Commission's co-ordinating role in community regional development, exists both in relation to the common policies which it administers and to the regional policies of the member states. There are three common policies where this role is of importance.

In the case of the common agricultural policy, attention has already been turned to the role of the Guidance Section of E.A.G.G.F. in the structural development of agriculture. The structural problems of agriculture vary from region to region and therefore in operating the common price policies in the various product markets, the Commission has regard to the regional implications of the price levels it decides.

The operation of these common price policies is co-ordinated with the member states through the Management Committees that exist for each product. These committees, composed of representatives of the member states, must be consulted before decisions are made in relation to the price-levels in the respective product markets. This allows the member states to inform the Commission of any adverse effects on specific regions, which an intended measure might have. If a Management Committee disagrees with an intended measure by the Commission, then the measure must be referred to the Council.

57 e.g. studies have been carried out on the promotion of an industrial development pole in southern Italy, on eastern Bavaria, on Schleswig-Holstein and on the frontier area liege-Maastricht-Aachen.
58 Art. 155
Agricultural policy throughout the E.E.C. is also co-ordinated by the Council decision which empowers the Commission to co-ordinate the member states' policies on agricultural efficiency and organisation. 59 The preamble to this decision mentions the need 'to co-ordinate policy on agricultural organisation with regional development policy' and within the framework of regional development policy, to take complementary measures for adjusting agriculture to economic and social trends. Therefore a Standing Committee on Agricultural Structures was created, composed of representatives of the member states. This committee is responsible for studying member states' structural policies and their proposed measures and programmes for improving agricultural organisation. Particular emphasis is placed on their effect on regional development. The Committee informs both the Commission and the member states of the results of its investigations. The Commission is then required to report annually to the Council on the development of agricultural structural policies, with proposals for the co-ordination of the member states policies. 60

The common transport policy is another field where the importance of balanced regional development has been stressed. Good communications require to be developed between outlying development poles and the central region of the community. Thus a co-ordination of national and regional programmes of transport infrastructure is essential. A Council decision has introduced a procedure whereby member states are required to refer to the Commission, for consultation or examination, any proposed legislative, regulatory or administrative measures affecting transport. 61 Before adopting such a measure, a member state must inform the Commission, as well as the other member states, and within 30 days the Commission is required to submit an opinion or a recommend—

59 J.O. 1962/2892  60 Ibid, secs. 3 and 4; see also secs. 5 and 6 by which the member states must submit proposed measures to the Commission for its opinion.

61 J.O. 1962/720
Community control also exists over financial assistance offered by member states, to particular enterprises or industries concerned with transport. Such financial assistance is now prohibited, unless expressly authorised by the Commission and in making a decision of this matter, the Commission is required to have regard to the requirements of regional economic policy, the needs of under-developed regions and the problems of regions seriously affected by political circumstances. The Council and the Commission also have powers to control discrimination in transport rates and conditions. Finally, for the promotion of co-ordination in transport policy, the Commission undertakes surveys of transport development, with particular reference to public investment in infrastructure.

The third important common policy is energy where the development of a common community policy has important regional implications. The location of industry is affected by the availability of energy and in the past, most of the large industrial centres of the Community have been located near coalfields. However the discovery of natural gas and the importation of cheap oil and coal, linked with the developing ability to transfer energy and fuel, will favour the peripheral regions of the E.E.C. Fuel and energy prices in these regions should now be no higher than at the large industrial centres. Consequently, any national regulations or policies preventing this equalisation of rates must be controlled.

The unified Commission is at present trying to evolve a common energy policy, integrating the energy interests of the three communities. This common policy will be extremely complex, with any planned transition from coal...
to oil and natural gas having regional and social implications separate from those of supplying cheap energy to the peripheral and less developed regions. Nevertheless, such a common policy is being evolved and the regional implications fully thought out.

In relation to the regional policies of member states, much of the Commission's co-ordinating role is no more than the collection and dissemination of information. However the power to enquire, to collect facts and to make proposals, is often an effective method of promoting action and through the regular meetings of national experts, which the Commission holds, the catalytic nature of the Commission's activities is spread throughout the member states. This collection and dissemination of information is characteristic of the Commission's operations in all fields of policy. Associated with all its activities are informal committees and working parties, composed of Community officials and representatives of the member states. These ensure that both national and community institutions are aware of what each other are doing.

However the Commission is not limited to these informal powers of co-ordination over the regional policies of the member states. It has considerable powers of control over state aids. These form an important element of the regional policy of the member states and may take the form of subsidies, interest rebates, tax concessions and other fiscal devices. A state aid gives locally produced goods an economic advantage in the home market equal to that given by a tariff. An indiscriminate use of such aids could replace the tariffs eliminated, as the common customs policy develops, and thus could frustrate the economic integration of the community. Competition will also be affected and therefore some community control was required.

State Aids, as an instrument of regional policy, were investigated by the 3rd Working Party - see note 3 above.
Thus, in principle, state aids are incompatible with the Common Market. However, Art. 92(3) permits certain aids, including those 'intended to promote the economic development of regions where the standard of living is abnormally low and where there exists serious under-employment'. While the categories of aid allowed under Art. 92(3) are only loosely defined, the control exercisable by the Commission, does allow some co-ordination between the aid systems of the different member states. In particular the Commission tries to ensure that the aids given are appropriate to the circumstances involved and that the enterprises and regions are clearly defined. Their effect on the level of competition throughout the Community is also assessed.

At all times the Commission has to reconcile the benefit to a particular member state, of developing a particular industry or region, with the interests of the community at large. The emphasis is consequently on aids to viable enterprises, which are liable to withstand competition from the rest of the Common Market.

Control also exists over aids for relief from direct taxes, such as income and company tax. This is in relation to exemption from direct taxes on profits from exports to other member states and is linked with a ban on compensatory charges in respect of imports coming from other member states. Both are prohibited, unless an exemption has received the prior approval of a qualified majority of the Council, on a proposal of the Commission. The discretion of the Commission and the Council is absolute and its exercise is linked with the whole problem of the harmonisation of the tax laws of the member states.

Mention must also be made of Art. 226 which allows, during the transitional period, certain safeguard measures of the member states. These are to restore balance from serious difficulties which are likely to persist in any sector of the Community.
economic activity or difficulties which may seriously impair the economic situation in any region. The Commission must determine whether the proposed measures are necessary, specifying the conditions and particulars of application.

All these co-ordinating controls, formal and informal, co-ordinating both the common community policies among themselves and the community policies with those of the member states, show quite clearly how the economic implications of these policies demand inter-related procedures for their administration. Throughout our discussion of the community instruments of regional policy and of the Commission's co-ordinating role, there have been numerous examples of how decisions are not taken in isolation, but are referred to other interested bodies for their consideration and opinions. In certain cases this reference is for purely advisory purposes, but in others, the consent of the other body is required. There is also the important factor that all decisions made in the name of the Commission are taken collectively by the whole Commission. Thereby the directorates of the Commission exercise some co-ordinating control over each other's decisions. While this extended consultation is accompanied by the danger of increasing administrative delay, it does ensure that problems are foreseen and prepared for, rather than arising unexpectedly after a decision has been formally taken and carried out. These factors are of considerable importance in a consideration of the general structure of governmental economic regulation to which we finally turn.
CHAPTER 5

CONSTITUTIONAL MACHINERY FOR GOVERNMENTAL ECONOMIC REGULATION
CONSTITUTIONAL MACHINERY FOR GOVERNMENTAL ECONOMIC REGULATION.

The increasing scope of governmental economic regulation demands a corresponding evolution in constitutional machinery. 'Political invention is ... part of the equipment required for economic growth.' Without structural evolution there is little possibility of deriving the fullest benefit from governmental participation in the three fields of economic policy examined above.

At the outset, it was suggested that in choosing the structures and procedures for the administration of these policies, particular attention had to be paid to the nature of any control exercisable over the decisions taken during the course of such administration. The extent of control over administrative action is a complicated issue. It may relate to maintaining the legality and morality of decisions and to affording adequate protection to the individual person or enterprise. The different aspects are important and the problem of achieving a correct balance is returned to below. The reason for control structures and procedures requiring to be evolved simultaneously with those for the actual administration of policies, arises from the influence that the former may have on the operations of the latter. An instance of this was seen with the effect of centralised parliamentary control on the administrative devolution intended with the Regional Economic Planning Boards in the U.K.

The requirement for ministers to be answerable to Parliament, for the activities

1 'Modern Capitalism' Andrew Shonfield. Page 388.

2 See below page 247
of their respective departments, has largely frustrated the regional collaboration envisaged. Likewise the political nature of parliamentary control may allow political factors to enter into decisions which should be arrived at on the basis of purely economic criteria. Thus the power of the Board of Trade to make references to the Monopolies Commission is subject to the influence of factors like the Government's relationship with a particular firm or industry. These factors may divert the Board of Trade from making economically desirable references and yet they are allowed to have influence, because of the political nature of parliamentary control. Clearly therefore there is this important relationship between the structures and procedures for the administration of a policy and those by which the subsequent administrative action is controlled.

A further point made initially was that the economic interrelation of the three economic policies suggested an examination of the respective administrative systems to determine the scope of procedural collaboration and co-ordination between them. During this it was seen how a possible conflict may exist between the I.R.C.'s efforts to encourage industrial rationalisation through publicly sponsored mergers and the Monopolies Commission's approach to controlling mergers which it considers to be unnecessary restrictions on competition. Similarly any relocation of production or labour resources, following a publicly sponsored rationalisation, requires to be integrated with governmental regional policy.

3 See above pages 163-164, 206-208.
4 See above pages 22-23.
5 See above page 59.
6 See above pages 48-49.
This economic inter-relation of the subject matter of different regulatory policies requires that the administration of these policies should be integrated with each other. There cannot be excluded from the administration of one policy, the consideration of factors which could be regarded as of secondary importance to the economic objective of the particular policy. Thus where public assistance is being given to a project for industrial reorganisation, it is wrong to ignore whether the reorganisation is in accordance with governmental regional policy or the extent of the unemployment which will result. Nor is it correct automatically to discount such unemployment because, both in the U.K. and the E.E.C., provision is made for unemployment benefits and retraining schemes to encourage the mobility of labour displaced by industrial reorganisation. The industrial repercussions of the G.E.C./A.E.I. merger demonstrated that where a decision to sponsor industrial reorganisation will cause problems of unemployment, then the application of these measures to the resultant problems must be planned and not just expected to take place automatically. Consequently the examination of the constitutional structures for the administration of competition, industrial rationalisation and regional policies has been concerned not only with the effectiveness of the structures in administering the individual policies. Particular attention has also been directed to the constitutional and procedural links between these individual structures and the broad constitutional framework of governmental economic regulation.

Before turning to certain conclusions as to the nature of administrative and control structures, it is important to make one general observation. This is in relation to the important differences in constitutional environment between/
between the U.K. and the E.E.C. - In the U.K. the constitutional balance and relationships between Government, Parliament and the courts have their roots in a period when the presently accepted concepts of governmental economic regulation were unforeseen. While the Government's role has evolved considerably, there has been no corresponding change in this constitutional balance. Not unnaturally difficulties have arisen in effectively administering sophisticated economic controls. Particularly these arise from the importance given to the doctrine of ministerial responsibility to Parliament. Through the traditional parliamentary controls there can be unnecessary interference in the administration of policies and yet because parliamentary control is exercisable over the Minister, and therefore not usually over the actual decision maker, it is very rarely an objective and effective control. This emphasis on ministerial responsibility to Parliament is accompanied by a corresponding reluctance of the courts to expand judicial control to take account of the extension and evolution of governmental activity.

The constitutional status quo in the U.K. contrasts with the institutional structure in the E.E.C. - The latter is of course a recent creation, designed specifically for the administration of policies for economic regulation. Free from the historical overtones associated with the British constitutional system, which preserve the reliance on Parliamentary controls, the founders of the community were able to create structures and procedures suitable for economic regulation. The situation was further improved by the fact that the community institutions and procedures were conceived out of continental systems of public administration, which have demonstrated a greater ability to adapt to the requirements of the economic regulation and intervention inherent in modern government.

In/
In turning to discuss what our examination has suggested in relation to the administration of economic policies, it is important to remember that policy administration is not a purely mechanical process. Any administration involves an evolution in the particular policy, through the exercise of the discretion by which the administrative agency relates the statutorily defined criteria of the policy to particular factual circumstances. This evolution takes place whether the policy is administered by a Government department or an independent public body. Thus, for example, certain choices must be made by the Commission as to which cartels it should attack first and likewise the I.R.C. must decide where to make the first investments out of its limited resources. In certain instances the discretionary element will be greater than in others and consequently the evolution in policy may be more pronounced. For example the decisions to refer mergers to the Monopolies Commission involve a greater degree of discretion than the distribution of investment grants under the Industrial Development Act 1966. Nevertheless this evolutionary element exists in the administration of all economic policies and it is therefore essential that effective administrative machinery is created to ensure that the correct choices are made.

With this administrative machinery it is important that the exercise of administrative discretion be made clearly visible. As discretionary powers increase, there is a greater requirement for the administrative process to receive more publicity. It must be made clear who is actually taking the decisions and what procedures they are following. Where possible these procedures should be made public, with sufficient information available to allow informed public discussion. If the problems involved in the administration of a policy have implications for other aspects of economic regulation, then there should be formal procedural links between the administrative agencies/

7 See above page 139.
agencies involved. Finally, as far as is possible, a clear statement should be given of the grounds justifying the decisions made.

In the U.K. the strong reliance on the doctrine of ministerial responsibility to Parliament has encouraged an increasingly powerful Government to remain highly secretive about the procedures whereby and the reasons why decisions are taken. In the three fields of economic regulation examined, it was seen how emphasis is placed on secrecy and informality in discussion, the withholding of information and a limitation on public discussion, thus preventing unnecessary and unwelcome controversy. Prior to a decision being formally announced there is little public information as to its probable form or the reasons justifying it. Thus it was seen how the role of the Board of Trade in the control of monopolies and mergers is operated on an informal basis. With both the decisions on references and the enforcement of the Monopolies Commission's conclusions and recommendations, the Board of Trade's activities take place without reference to any defined procedure and only a relatively formal announcement is made of the decisions finally taken. With the Commission itself, the fact that the referred companies are given no indication of the lines on which the Commission's conclusions and recommendations will be framed has been a source of criticism. Similarly in the two cases where the I.R.C's activities have aroused considerable controversy, the I.R.C. has remained highly secretive about its activities and the justification for/

8 In relation to the making of references see above pages 22-25, 45-51 and to the enforcement of the Commission's recommendations see above pages 33-41, 53-55.

9 See above pages 28-29.
for its final decisions. These cases were the G.E.I./A.E.I. and the 
the Kent/Cambridge Instrument10 mergers, where the companies which suffered 
from the I.R.C.'s support of other companies, namely A.E.I. and Rank, com-
plained of not being informed as to the I.R.C.'s intentions or the grounds 
for its support for the other companies.11

Secrecy and informality are also liable to be associated with the procedure 
by which it is proposed to exempt certain publicly sponsored agreements from the 
control exercised by the Restrictive Practices Court.12 Even although such 
exemptions will be required to be made by Order, it is likely that the Board 
of Trade's activities with regard to exemptions will be open to similar critic-
icism, of being influenced by unknown political factors, as is the Board of 
Trade's role in making references to the Monopolies Commission.13 This criticism 
could be avoided by introducing the change suggested above, that such exemptions 
should be granted or application to the Registrar, subject to the Board of 
Trade's consent. This would clearly show, if political or extra-economic 
factors are having any effect.

These examples all illustrate the problem of how far the administrative 
process can be made public without trespassing over the bounds of secrecy, 
which/

10 The Kent/Cambridge Instrument merger has occurred since the chapter on 
industrial rationalisation was written. Rank and Kent made rival bids 
for Cambridge Instrument. The I.R.C. not only declared its support for 
a Kent/Cambridge Instrument merger in preference to one of Rank and Cambridge 
Instrument. It also bought Cambridge Instrument shares on the open market, 
to ensure the success of Kent's bid.

11 See above page 146

12 Clause 1. Restrictive Trade Practices Bill 1968; see above page 70 et seq.

13 See above pages 22-25.
which economic activity dictates. Because so many of the facts have to remain secret there is this tendency for Government departments and public bodies to administer policies independently. Yet any opening out of the administrative process need not entail that all discussion be made public. Such a suggestion would be both unreasonable and unworkable. Rather it is suggested that procedural formalisation and clarification would be a method whereby the administrative process could be made more clearly discernible. It would be easier to ensure that adequate consultation and co-ordination take place and that the final decisions taken are shown to be related to the particular administrative process.

Thus within the institutional framework of the E.E.C., the defined procedural relationships theoretically allow a process of consultation and co-ordination not possible between the corresponding institutions in the U.K. In fact one of the outstanding features of the community is the extent to which day to day decisions are reached through a consultation and consensus that can be clearly seen to exist. Of major importance here is the written procedure by which the Directorates-General are informed of each other's proposals before the decisions are formally taken by the Commission, as a collective body. This allows a full consideration of a proposal's possible implications and facilitates any readjustment to the decision or any other measures that may prove to be necessary. Our examination has also shown how there has been written into the procedures for administering the respective policies, the procedural means for consultation between the Commission and the Governments of the Member States and also between the Commission and bodies.

14 Thus in operating the community competition policy there are certain instances where the Commission must act in collaboration with the member states — see above page 113; similarly the approval of the appropriate member state is required for projects supported by the E.A.G.C.F. — see above page 223.
bodies like the Consultative Committee on Cartels and Monopolies, the Management Committees in relation to the common agricultural policy and the Social Fund Committee. These bodies contain experts from the member states and by supplying guidelines as to what is technically and politically feasible, bring the relationship between the Community and the member states, normally seen in the balance between the Commission and the Council of Ministers, down to the level of experts. Undoubtedly the uniform structure of the Commission encourages active relationships between the different directorates, but even where power is given to a separate institution, like the European Investment Bank, its relationships with the Member State Governments, the Commission and other community institutions have been clearly thought out and statutorily defined. In addition to this clarity in constitutional relationships between the institutions involved, the common community policies are quite clearly administered through procedures that were framed to allow a consideration of all relevant factors. The need for consultation and co-ordination has been recognised and constitutional provision made for it. This does not entail that such co-ordination and consultation only takes place through the formal channels. There is a constant informal interchange of opinions among the Commission's staff and between them and members of the national administrations and public pressure groups. All the community officials have their contacts outwith the institutional framework and its procedures. Why the formalised procedures are important is that only when their basic consultative requirements are satisfied can the Commission take its final decision.

This/

15 See above page 22.
This situation contrasts with that in the U.K., where there is a tendency to consider problems compartmentally, with few formal links between Government departments and public bodies entrusted with the administration of specific elements of economic policy. Very largely this situation is due to the haphazard nature of the British administrative system. Among the Government departments the division of responsibilities is illogical and confused. Particularly this is true in the economic field where the respective responsibilities of the Treasury, The Department of Economic Affairs, the Department of Employment and Productivity, the Board of Trade, the Ministry of Technology and Scottish and Welsh Offices overlap and are far from being clearly defined. Thus it was seen how the ministerial responsibility for regional economic development was shared between the D.E.A., the D.E.P., the Board of Trade and the Scottish and Welsh Offices with further complication added by the responsibility of the Ministry of Housing and Local Government for control over physical planning. 16

The nature of the British administrative system is also complicated by the delegation of administrative responsibilities to a variety of bodies other than Government departments. Thus responsibilities have been given to advisory bodies, like the Monopolies Commission, semi-independent bodies with executive authority like the Highlands and Islands Development Board, independent bodies with executive authority, like the Industrial Reorganisation Corporation, and courts of law, like the Restrictive Practices Court. Partly because these various bodies were created at different times, there has been little positive action procedurally to integrate them with one another. For instance/

16 See above page 205 where the suggestion was made for the creation of one ministry with a responsibility for regional development.
instance there is no formal procedural link between the two bodies concerned with competition policy - the Monopolies Commission and the Restrictive Practices Court. Similarly the Monopolies Commission and the Industrial Reorganisation Corporation are not linked by any procedural relationship, despite the fact that they are both concerned with different aspects of the effect on the public interest of industrial mergers. A further result of the haphazard development of these public bodies is that their relationships with Government departments have not been very specifically defined. It was seen with the Highlands and Islands Development Board, that since the relationship between the Board and the Secretary of State for Scotland is only loosely defined by statute, certain conflict and confusion between their respective roles has arisen.17

This lack of formal procedural links, in the U.K., encourages policies to be administered compartmentally. Government departments and public bodies have tended to crystallise individual and departmental attitudes to the administration of their particular policies. Consequently other relevant factors may not receive sufficient consideration and attempts to encourage this have been regarded as unjustified political interference. Such consultation that does take place often assumes the form of diplomatic bargaining between departments and there is little formal machinery to allow spontaneous co-ordination. For example it was seen how the Board of Trade's role in the control of mergers and monopolies is confused. At both the reference and enforcement stages it was noted that it was unclear to what extent the Board of Trade's decisions were made in collaboration with other Government/17 See above pages 201-203.
Government departments. Consequently it remained uncertain what was the extent of the influence of political or extra-economic factors and even of economic factors of secondary importance to the particular policy being administered. Similarly in the field of industrial rationalisation it was seen that the I.R.C.'s relationships with other Government departments are on an informal basis. Thus when a merger, supported by the I.R.C., is cleared with the Board of Trade for merger control purposes, this is done in a highly secretive manner. As a result, as with the G.E.C./A.E.I. merger, the impression has been given that the full industrial repercussions are not always thought out; in that case from the controversy surrounding the ensuing redundancies.

In all these cases, the lack of formal procedure for consultation, even if only on an advisory basis, results in the constant danger of a lack of co-ordination between economic policies. However the secrecy and informality of administrative procedures in the U.K. do not necessarily lead to this in practice. Relationships do exist between government departments, public bodies and private pressure groups, but because they are not procedurally formalised there is often no means by which the administrative agency, be it Government department or public body, can be forced to consider a particular factor. It is this gap that a greater formalisation of consultative and co-ordinating machinery would cover.

A further result of the secrecy and informality of the British Administrative system is that the lack of publicly available information, thus caused/
caused, severely restricts the level of informed public debate. In addition, this lack of information means that when a Government department or public body deviates from its normal policy, after the consideration of a factor which is not publicly apparent, there is immediate criticism of undue political interference. In fact, however, the decision may have involved a choice, which was required to be taken, but which, because of the secrecy involved, arouses suspicion in those who disagree with the final outcome. Here we are faced with the problem of the acceptability of administrative decisions, an acceptability on which efficient and effective government relies. Informality and secrecy in the decision making process do not encourage the acceptance of final decisions and thus a final suggestion is made for opening out the administrative process. This is that a full statement be given of the reasons justifying the decisions reached.

Here again there are marked differences between the E.E.C. and the U.K. In the former there is a definite obligation to give decisions which are fully reasoned. This obligation is limited to stating the factual and legal elements, essential for an understanding of the decision. The Commission is not required to give reasons for its rejection of the alternative pleas put forward. *It is sufficient if the act concerned sets out in a concise but clear and relevant manner the principal points of law and facts upon which the decision is based and which are necessary in order to clarify the reasoning that led the Commission to act as it did.* Thus in *The Tariff Quota on Wine: German Federal/*

20 Art. 190; in certain instances this requirement to publicize the grounds takes effect before the final decision is made. Thus in enforcing the Art 85(1) prohibition, where the Commission has an objection to an agreement, it must state in writing the grounds of complaint to the enterprises concerned. Thereafter the Commission is confined to these grounds of complaint in its final decision - Reg. 99/63.

Federal Republic v. E.E.C. Commission 22 the Court of Justice annulled a Commission decision, allowing only part of an application for a permit to import wine, on the grounds that the reasoning was "inadequate, vague and inconsistent".

In the U.K. there is not a similar requirement that decisions be fully reasoned. This is linked with the well established principle that the courts of the U.K. will not enquire into the merits of the reasons which lead officials to exercise administrative discretions, granted to them by law. Only where the reasons can be said to be "bad in law" will a decision be struck down. Thus a decision may be affected by an outright refusal to consider a relevant matter, by misdirection in law, by taking into account some wholly irrelevant or extraneous factor or by wholly omitting to take account of a relevant one. Collectively these grounds are regarded by the courts as amounting to misdirection in law. Their interpretation is a matter for the courts. It is suggested that the recent case of Padfield v. Minister of Agriculture, Fisheries and Food23 marks an important development of this interpretation. There the House of Lords held that the reasons given by the Minister, for his decision not to refer a complaint to the appropriate committee of inquiry, demonstrated a misunderstanding of the object and scope of the statute and therefore amounted to misdirection in law. While the court's decision was given on the basis that the reasons were "bad in law", the various judgements were primarily concerned with questioning whether the reasons given reasonably justified the Minister's decision. 24 Further it was/

22 [1963] C.M.L.R. 377; see also Re Import Duties on Sweet Oranges; German Federal Republic v. E.E.C. Commission [1963] C.M.L.R. 361 where the Commission's decision was upheld because the reasoning was basically valid, although exaggerated; see also Société des Aciers du Temple v. High Authority [1965] C.M.L.R. 311.

23 [1968] W.L.R. 924

24 See also the judgement of Lord Denning M.R. in the Court of Appeal [1968] W.L.R. 926 particularly at 931.
was said that "if he (the Minister) does not give any reason for his decision it may be if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly".25

By this decision the House of Lords seems to be prepared to go beyond a superficially legal examination of the reasons given for an administrative decision. This attitude would be considerably facilitated if there were a requirement that the reasons for administrative decisions be more formally and fully stated. This would contrast with the situation in Padfield, where the Minister's reasons had to be extracted from a series of letters between him and the appellant's solicitors.

A more extensive statement of the reasons justifying decisions would, in some cases, be a further possibility for opening out the administrative process. It would help to increase their acceptability and to eliminate any suspicion of influence from extraneous factors. Thus it was suggested, that at the enforcement stage of the monopolies and mergers control procedure, when the Board of Trade disagreed with the Monopolies Commission's conclusions and recommendations, the Board should be required to issue a statement of the reasons justifying its decision, which it would then be required to defend before a Select Committee.26 Similarly it has been seen how the I.R.C. has been criticised for the lack of reasons given to justify its decisions.27

25 Per Lord Upjohn 1968 W.L.R. 969
26 See above page 40
27 See notes 10 and 11 of this chapter
As well as suggesting these methods of opening out the administrative process in the U.K. our examination has been concerned with the relationship between the administrative structures for the three policies and the procedures by which these structures are controlled. The importance of this relationship was noted at the beginning of this chapter, and in particular it was seen how the two aspects of maintaining the legality and morality of decisions and of affording adequate protection to the individual had to be combined. Otherwise there is the danger that the control exercisable over administrative action may be excessive and that an over-concern for the protection of the individual may interfere with the efficient administration of a policy. Alternatively a lack of sufficient thought for this combination may result in a balance between parliamentary and judicial controls which affords inadequate protection to the individual. Consequently there is this requirement clearly to define the extent of any control, before the administration of a policy is commenced.

In the E.E.C. the treaty provisions and regulations, giving administrative powers to the community institutions, clearly indicate which decisions fall within the jurisdiction of the Court of Justice, which parties have the right to challenge them and the scope of any challenge. Parliamentary control is almost negligible. The European Parliament is little more than a pressure group, which supports the Commission in its relationship with the Council of Minister. Its members are able to ask questions and speak in debates/

28 See above page 232

29 See for example the Court's jurisdiction over the Commission's enforcement of competition policy - pages 114-116; of particular importance here are the differing rights of parties to raise actions - see Arts. 173 and 175.

debates about the Commission's activities, but this amounts only to a general encouragement to more effective administrative action by the Commission.

This situation contrasts with that in the U.K. where it is rarely stated what are the precise limits of any control to be exercisable over administrative action. The scope of the control depends on how far the decisions are brought within the ambit of the doctrine of ministerial responsibility to Parliament and how far the courts will accept jurisdiction over the decisions made. In the U.K., the strong reliance on parliamentary controls and the theory of ministerial responsibility to Parliament largely limits judicial control to questions as to the legality of administrative action. The present balance between parliamentary and judicial controls is confused and is largely inappropriate for the control of modern economic regulation. The danger in this confusion, with the emphasis on parliamentary controls, politically operated, is that there may be excessive interference in the administration of these economic policies. Because economic regulation is of a highly technical nature, such interference may result in extensive delays. This interference can only be prevented by severely limiting the scope of parliamentary control, as happened with the I.R.C. Then, because of the narrow scope of judicial control, policy administration may become free from sufficient control of any nature. Consequently there is this need for attention to be directed to the nature and extent of any control desirable and allowable over policy administration in the U.K. The solutions for the various policies will involve achieving the correct balance between parliamentary/

31 See above page 142.
parliamentary and judicial controls and certain factors may influence the particular balance chosen.

Firstly there is a need to divide decision making powers in the U.K. into national and regional categories. National decisions would be defined as those taken on the basis of factors concerned with the national situation. An example of a national decision would be the decision to make a reference to the Monopolies Commission, where the monopoly situation is determined in relation to the national market. Into the regional category of decisions would fall those taken on the basis of purely regional factors, possibly within the framework of a decided national policy. Thus the decision to give a building grant under the Local Employment Act 1960 could be taken regionally, within a policy framework determined at the national level.

Linked with this division of decision making powers must be a similar division of control systems. It can be clearly seen from the experience of the Highlands and Islands Development Board, that whether the control is to be of a parliamentary or judicial nature, there must be regionally situated bodies capable of promptly reviewing regional administrative action.

This division is primarily suggested in relation to the administrative system in the U.K.. In the E.E.C., the very nature of the economic integration, so far achieved, involves a division of decision making powers into community and national sectors. At present all the decisions taken by the Commission are taken in relation to factors concerned with the economy of the whole Community. As the integration develops, it may well be that/

32 See above pages 201-203.
that community institutions will take what might be termed as 'regional decisions' and the need for regional control structures will then arise.

A further distinction may be drawn between decisions of a general nature and those of an individual nature. If this distinction is incorporated into the machinery and procedures for administering policies, then the exercise of control over administrative action is correspondingly less confused. Thus Art.190 of the Treaty of Rome distinguishes between Regulations and Decisions and this distinction is important in Art.173, which gives differing rights to parties to challenge the acts of the community institutions before the Court of Justice. Thus the member states are able to challenge the validity of any acts of the Council of Ministers or the Commission, other than recommendations or opinions. On the other hand the individual's right of challenge is limited to Decisions directed to him or, although directed to another, of direct and specific concern to him.

Within the category of general decisions one would include decisions affecting more than one individual or enterprise or a specified category of either. The 'political' element in such decisions is likely to be high and consequently parliamentary control over them is more appropriate. Such a control is lacking in the E.E.C., but the 'political' nature of Regulations is acknowledged by a restriction on the right to challenge them to the Member States, the Council and the Commission.33

Where a decision is directed to an individual person or enterprise, any controversy is liable to arise over the interpretation of the facts of the particular situation and the application of a specified policy to these facts. Such decisions would, in general, be more effectively controlled by a judicial /

33 Art. 173.
judicial body, operating a system of review similar to that operated by the Court of Justice over Decisions.

However there are exceptions to any such categorisation, into general and individual decisions, and there are certain individual decisions which retain a high 'political element' because of the large degree of discretion involved and the far-reaching consequences from an exercise of it. Because of this element it is doubtful whether the control over such bodies can be entrusted to a judicial body. Thus, although it was suggested that a Registrar of Monopolies be given the function of making references to the Monopolies Commission 34, it was reckoned that this would have to be made subject to the Board of Trade's consent. This was because of the large element of discretion involved and the important economic repercussions of the decision, particularly in relation to mergers, where a decision not to make a reference signifies that a merger may proceed without hindrance.

The decision to refer a proposed merger does not, of course, necessarily mean that it is to be disallowed. It will, however, entail some delay for the plans of the companies involved. The 'political' element of the decision to make a reference is also increased by the scope of the Board of Trade's powers at the enforcement stage 35. Consequently it was felt that the decision had to be subject to the approval of the President of the Board of Trade.

A further choice in relation to control structures and procedures also arises from the fact that control over administrative action has two objectives. Firstly there is the need for a general survey to ensure that a policy/

34 See above pages 25 and 26

35 See above page 34.
policy, as statutorily determined, is being administered effectively and efficiently. Such a survey should not be limited to instances of individual grievances and therefore it is a matter that cannot be left to a judicial body. It is, however, in the nature of the function of the Estimates Committee in the U.K., which examines the administration of a particular policy to determine whether it is being carried out effectively and makes appropriate suggestions. The recently created Select Committees on Agriculture and Science and Technology operate on similar lines as, to a certain extent, do the committees of the European Parliament. This type of control is one that could be developed and in the U.K., in particular, an increase in the number of Select Committees, assisted by expert staff, would allow elected representatives to play a valuable role in the administration of governmental economic regulation.

The second objective of control concerns instances where there are individual grievances against administrative action. The political nature of elected assemblies usually makes these bodies inappropriate for an objective review of such grievances. It is here that there may be a need for an extension of judicial control in the U.K., on the lines of the administrative jurisdiction exercised in the E.E.C. by the Court of Justice. Linked with such an extension is the important problem of providing adequate recompense for individuals adversely affected by public administration, even in cases where there has been no actual maladministration.

Judicial control does of course have its limitations. It can be an inordinately slow process and any extension of it in the U.K., to the exclusion of parliamentary control, would require that it be speeded up. 36 This is essential for judicial control to be effective, for while a firm challenging/

36 This would be in addition to any possible time limit on judicial challenge to administrative action.
challenging administrative action may not be particularly affected by a two or three year delay before a decision is annulled, such a delay will certainly inconvenience an individual person adversely affected.

A further limitation on judicial control is that it can only be brought into operation when an individual or an enterprise has a grievance against administrative action or inaction. Even then this can only be done by the parties with a sufficient title to raise an action. Thus it is only a haphazard control initiated to curb bad behaviour, and while the eventual result may be to encourage better administration, the irregular nature of the control means that this cannot be regarded as its primary objective.

Therefore a balance between parliamentary and judicial controls must be reached. In the E.E.C. the absence of parliamentary control is partially compensated for by the political control exercised over the Commission by the Governments of the Member States, operating through the Council of Ministers. In the U.K. the correct balance requires changes to both parliamentary and judicial controls, some of which have been suggested above. Whatever the balance chosen, it should clearly show which decisions are to be controlled, by which bodies and to what extent. This clarification will be aided by the suggestions made above in relation to opening out the administrative process.

In conclusion, therefore, it might be repeated how our examination of the three aspects of economic regulation has shown that their systems of administration and control must be clearly defined. The administrative processes, the procedural relationships between administrative agencies operating specific policies, the limits of independent discretions and the extent/

37 For the position in the E.E.C. see Arts. 173 and 175.
extent of any controls require to be clearly thought out and explicitly laid down. Only then will the increase in governmental economic regulation be administered for the fullest benefit of the economy at large, while affording adequate protection to the individual person and enterprise.
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