

CHAPTER 9: GENERAL CONCLUSIONS AND RECOMMENDATIONS

Scope of the Reference

231. We are asked to report on the general effect on the public interest of the practices described in our reference. We have shown in the preceding chapters that, although these practices have common features, they differ in many important respects. Some are used for their own sake and in these cases it is their immediate effects which are most important as, for example, where mutual exclusive-dealing agreements are used to confine a particular trade to a limited number of established traders; here the effect of the practices can be directly seen. Others, such as aggregated rebates and certain forms of boycott, support or enforce practices (for example, minimum price agreements and resale price maintenance) which are not themselves within our reference. Their effects are thus less directly discernible, and are bound up with those of the practices with which they are associated. Moreover each of them is used in circumstances which vary from industry to industry and from time to time. Some of the effects of a particular practice—for instance, collectively-enforced resale price maintenance—are likely to be different in a trade where it is almost universal and in a trade where it is employed by only a small proportion of the manufacturers or for only a part of their production; our conclusions have to take account of both cases, and of a host of intermediate ones.

232. It is not always easy, in the face of these differences, to isolate the common features of the practices within our reference and to determine their general effect. There is, however, one clear common feature of them all—that they impose a collective obligation. We wish to emphasise that the basic questions with which we are concerned throughout are the effects of such a collective obligation and the need for it. Individual firms in one trade may, of their own free will, adopt precisely the same policies as are incorporated in agreements in other trades; and what they do will have its effects, good or bad, on the public interest. But that is quite outside the scope of this report. We have had to consider not the policies which particular firms adopt individually but the fact that they have accepted obligations to adopt certain policies, and our task has been to ascertain why such obligations should be thought necessary by those who accept them, and what effects they have. Policies adopted by large concerns, which if they had been collective would have been within our reference, may sometimes have the same economic effects as the collective agreements on which we are reporting. The activities of single firms, whatever their size, are however outside our reference. Even within the field of collective action we are concerned only with agreements which “have the effect of requiring” the parties to do certain things. There are arrangements which may have the same economic effects as some of those we have to consider but which nevertheless fall outside the scope of this report, because they take the form of “recommendations” and impose no obligation on those who observe them.

General Conclusions

233. Because they involve collective obligations which in some way limit the freedom of the parties in the conduct of their businesses, all the arrangements within our reference in some degree restrict competition. The degree of restriction varies both between the different types of agreements which we have distinguished in chapters 3-7, and within each type according to the circumstances of the particular case. We do not say that in every individual case this restriction is necessarily against the public interest, but

we are satisfied that all the types of agreements which we have examined do adversely affect the public interest, some to a considerably greater degree than others. In giving a judgment in the terms of our reference we conclude therefore that the general effect of each of these practices is against the public interest though we recognise that there may be special circumstances, which we describe in paragraph 240, when the use of some of them at any rate may be justified in the public interest.

234. The reasons which have led us to our general conclusion appear in detail in the foregoing chapters, but we summarise them in the paragraphs which follow. We have been impressed particularly by the effect of a binding and collective obligation in preventing manufacturers or distributors from experimenting and from trying out new or different ways of conducting their business. Such obligations create an undue rigidity which may affect the numbers and kinds of concerns engaged in a trade, the trading methods adopted by those established in the trade and the level of prices both generally and to different classes of buyers.

235. The collective selection of favoured traders, for exclusive selling or buying or for sales on preferential terms (i.e. the practices discussed in chapters 3, 4 and 6), can easily lead to the creation of a privileged group, subject to relatively little outside competition. This danger is greatest when approved lists are drawn up with criteria for admission which are arbitrary (e.g. membership of a particular trade association) or are interpreted severely and where the discrimination in favour of the approved traders is marked. Admission to the lists is usually strictly limited where potential competitors of the candidates have an effective voice in the selection. Where such conditions exist, the effect of competition in promoting efficiency and safeguarding the public interest is greatly reduced. This danger may be avoided if there is little or no restriction on admission to the lists; if the agreement is operated in this way, however, it will generally have little effect and so become unnecessary. Where both the criteria for admission to the lists and the amount of discrimination are reasonable and such as most suppliers might well adopt on their own account, the necessity for obliging suppliers to conform to them is not apparent, and any possible advantages to the public interest could be secured by means of arrangements which might be recommended to the suppliers but would not be binding on them. We recognise that manufacturers have a legitimate interest in the service given by distributors and may therefore need to select carefully those who are to handle their goods; we think, however, a manufacturer should be able to safeguard his interests—as many in fact do—by his own arrangements with individual distributors without being required to limit his trade to those who have been collectively approved.

236. Agreements which bind suppliers to adopt common policies in laying down conditions of sale, e.g. in prescribing resale prices (discussed in Section I of chapter 5), seem to us likewise to prevent experiment and to protect established traders from the competition of those who would otherwise be willing to introduce new techniques and thus to create a rigidity in trading practices which is contrary to the public interest. Many of the rules embodied in these agreements may represent perfectly reasonable and sensible policies for particular concerns to adopt; what is important, for the protection of the public interest, is that concerns which think other methods may be better should be able to try them without having to meet the organised opposition of the rest of the trade. The final verdict on which is the better method should be left to the market, where the consumer can exert his influence, and should not be reached by a collective decision of traders which prevents him from doing so.

237. Much of what we have said in the last two paragraphs applies also to collective agreements for withholding supplies for the enforcement of resale price maintenance and other trading rules*. The systems of collectively-enforced resale price maintenance which have been developed during the present century have become so effective and in many trades so extensive as to leave little freedom to manufacturers or distributors in choosing the trading methods and price policies they will adopt, or to consumers in exercising a preference between better service at a higher price and a lower price with less service. It may be said that these are criticisms rather of resale price maintenance as such than of collective enforcement. For the reasons given in Section II of chapter 5, we do not so regard them. We express no views about the advantages or disadvantages of resale price maintenance itself, but we think that the disadvantages we have described arise to an important extent from the uniformity and rigidity of its application in many trades, and that this uniformity and rigidity result in the main from collective enforcement. Apart from these considerations, we think that it is generally against the public interest for combinations of traders to be able to exercise the powers over individuals which some price maintenance associations have acquired, and for this to be done through private tribunals whose procedure cannot provide the safeguards which public justice requires. These powers are particularly open to objection when they are used against concerns which are not members of the association or have not entered into any contractual obligation to observe the rules enforced against them.

238. We appreciate that some manufacturers may at times have good grounds for wishing to be able to check extreme forms of price competition among retailers in the distribution of their branded goods, and that under the existing law the enforcement of conditions of sale in the Courts, even where there is privity of contract, may well be difficult and expensive. We appreciate that distributors as well as manufacturers may be concerned at the possibility of marked and persistent loss-leader selling where resale prices are not effectively enforced. Whether or not changes in the law should be made to meet these difficulties must depend mainly on an assessment of the general effects of resale price maintenance, a subject which, as we have explained in chapter 5, is outside the scope of our report. We are satisfied that collective enforcement arrangements of the kinds covered by our reference do not provide an answer which is consistent with the public interest.

239. Aggregated rebates (which we discuss in chapter 7) have rather different disadvantages. They encourage the spreading of orders in ways which may not promote the most efficient production and are likely, where common price systems exist, to render independent competition more difficult.

240. We have considered whether there may be circumstances in which our conclusion that the practices with which our reference is concerned are generally against the public interest may not hold good. We have not in the course of our inquiry come across any instances in which we were clearly satisfied that such practices were beneficial. However, it would have been impossible for us to consider in detail all such arrangements and in some of the cases which came to our notice these practices formed only part of more complex arrangements, going beyond the scope of the present inquiry, whose total effect on the public interest we were not in a position to judge. We cannot, therefore, conclude that there should be no exceptions to our general conclusion. It appears to us that the exceptional use of practices of these kinds might be justified, subject to safeguards to avoid any restrictive effects

* See reservation by Mr. Gifford in paragraph 254 below.

which were not directly necessary to deal with the particular problems involved, in the following circumstances:—

- (a) Where final consumers are not able to judge the standard of service which it is in their interests to demand from distributors, e.g. where they are unlikely to appreciate fully the risks resulting from faulty installation or service. Where special risks arise they are normally dealt with by special legislation. If in relation to particular goods this legislation is inadequate it can be strengthened and we think that it should not be necessary to have restrictive arrangements in addition. There may, however, be rare cases in which there is no legislation and it is more convenient, temporarily at any rate, that there should be restrictive arrangements so that it is not left only to the discretion of individual manufacturers or traders to decide on the standards of safety. Such arrangements should, however, specify precisely the standards to be observed and should secure that they are in fact observed.
- (b) Where an exclusive-buying or exclusive-dealing arrangement is designed to protect an industry of strategic importance or one which is peculiarly liable to competition from dumped imports. Here again, if as a matter of policy it is considered that some form of protection is necessary, Government action by tariff protection, or in the case of a strategic industry possibly other forms of support, should in our view be the general rule and only in exceptional cases where these methods are found to be impracticable would restrictive arrangements be justified.
- (c) In many industries there exist agreements to charge common prices. Such agreements are often associated with, or supported by, arrangements for collectively agreed price discrimination, aggregated rebates and the maintenance of common resale prices. In concluding that arrangements of these three kinds are generally against the public interest, we have not considered the effect on the public interest of the common price agreements with which they are associated, since these are outside our present reference. There might be particular cases in which a common price agreement was found after inquiry to operate in the public interest, and where the effective operation of that agreement might depend upon the use of incidental practices of these types.
- (d) Where the arrangement is a necessary means of enabling smaller concerns in a trade to compete effectively with a very large concern in that trade which is itself resorting to restrictive practices.

Implementation of Our Conclusions

241. Strictly speaking we have discharged our function under the present reference, in accordance with Section 15 of the Act, by reporting on the general effect on the public interest of the practices referred to us. Nevertheless in the course of reaching the conclusions summarised above we have inevitably devoted a great deal of thought to the practical measures that would be required to give effect to them, and we think it desirable, in order that our conclusions should have as much practical value as possible, to record the results of this consideration.

242. It is clear that the powers at present available to the Government in this field are insufficient to implement our conclusions and that therefore further legislation would be necessary for that purpose. It seems to us that any such legislation might take either of two possible forms. One would be

to ensure a measure of publicity and supervision by requiring all agreements falling within the scope of our reference to be registered, and then to prohibit such of them as after individual scrutiny were not found to be in the public interest. The alternative would be to prohibit generally by statute all agreements covered by our reference, with provision for exceptions in particular cases.

243. If the first method were adopted, the legislation would presumably require all agreements of the kinds with which we have been dealing in this reference, and which would have to be precisely defined in the Act, to be registered with an appropriate authority, the register being open to public inspection. The Minister responsible would be empowered to refer any agreement on the register to an independent body for scrutiny and advice and to prohibit by Order agreements which were not found after such scrutiny to be in the public interest. The Act would lay down certain criteria, including for example those considered in paragraph 240 above, to be taken into account in judging the public interest.

244. As compared with the present position, such an arrangement would have the advantage of ensuring that the existence and contents of agreements falling within its scope would be publicly known. This might lead the parties to abandon or modify arrangements that were likely to incur criticism, and to proceed with care when new arrangements were in contemplation. As compared with the alternative of general prohibition by statute, the registration procedure can be said to have the merit of avoiding drastic action that might not be accepted as necessary or fair by many of the interests most closely affected. It might be expected to promote informed discussion of the problems which these agreements present from the point of view of the public interest, and in this way a situation could possibly be created in time where action of a general rather than a particular character could be taken with a greater measure of agreement.

245. Nevertheless, we do not think that legislation of this kind would be an adequate or satisfactory method of implementing the conclusions which we have reached. If those conclusions are right, further individual review of the agreements to which they apply could only be of any value in exceptional cases, for the great majority of agreements would be found not to be in the public interest. Further, this procedure would be cumbersome, slow and unfair. To complete the task would take the reviewing authority many years. Even if the legislation laid down criteria more specific than those in Section 14 of the 1948 Act, by which the effect on the public interest of particular agreements was to be judged, the work would not be much shortened, since any such criteria could not be exhaustive. Because the arrangements registered and brought under review would often be closely bound up with arrangements falling outside the scope of the present reference, these reviews would in many cases have to take into account practices outside the present reference and would often need to be on a scale comparable with an investigation by the Monopolies Commission under Section 2 of the 1948 Act. The trades which happened to be among the first to be called for review might be precluded from operating practices which other trades—possibly their competitors or the suppliers of their raw materials—were permitted to continue employing over a period of years. Difficulties of this kind are inseparable from the case-by-case approach of existing legislation which relates to restrictive practices of all kinds, but we think that, if the general conclusions which we have been able to reach about the group of practices we have had under review are to be implemented by new legislation, the opportunity should be taken to avoid such difficulties, so far as possible, within this more limited field. This inquiry and the Commission's

previous inquiries over the past six years into the operation of these practices provide, in our view, a sufficient basis for action of a general character, and have convinced us that, if there are quite limited provisions for dealing with exceptional cases, such action can be taken without risk of injustice and with great benefit to the public interest.

246. We believe it follows logically from the conclusion that these practices operate generally against the public interest that they should be generally prohibited. They exist in a large number of trades and, once it is accepted that they are generally harmful to the public interest, it is wrong that they should be permitted to continue because upon examination a few exceptional cases may be found in which they are on balance advantageous. In our view, the right way to deal with such cases is to except them from the general prohibition where a case for doing so has been established. The inquiries necessary in such cases would no doubt sometimes—as in the event of legislation providing for registration and review—involve examination of related practices falling outside the scope of the present reference. The number of inquiries to be made, however, would be very much smaller; for, if the criteria we have suggested in paragraph 240 were closely observed, inquiry would only be needed in those cases where a *prima facie* case had been established under that paragraph. Moreover, if it seemed likely to be impracticable to deal fully with all claims for exception before the general prohibition came into force, some procedure for allowing interim exceptions where a *prima facie* case had been made out could be devised.

247. A general prohibition would give industry clear and unequivocal guidance as to the Government's policy, and would avoid the uncertainty and waste involved in detailed inquiries in each individual case. It would be much more effective than placing any reliance on the voluntary abrogation of harmful agreements which might result from publicity following the registration of agreements. It would avoid the unfairness (which would be inescapable with such procedure) as between those industries whose cases were considered first and condemned and those whose arrangements—though possibly no less against the public interest—could not be investigated for a long time to come. Such a general prohibition would certainly be a new departure in this country; though to some it might appear drastic, it would be less far-reaching than the legislation already enforced in some other countries.

248. Legislation of the type we propose would create a new criminal offence. It is important, therefore, that the prohibited practices should be clearly defined, so that the business man would know exactly what he might and might not do. At the same time, the definition should not be too narrowly drawn, or there would be opportunities for the exercise of ingenuity in evading the prohibition by arrangements falling technically outside its scope but having the same effect as those prohibited. This kind of difficulty would arise in connection with any kind of general legislation on restrictive practices. (It would arise in much the same form in a scheme for registration.) We have no reason to think that it would be insuperable.

249. For all these reasons we believe that all the practices falling within our reference should be prohibited by law, provision being made for exceptions on grounds which would be set out in the legislation. We have not attempted to work out in detail how the legislation itself should be framed. We set out below, however, an outline of what we think would be required.

250. The legislation should define the practices to be prohibited; it should also specify the grounds on which exceptions might be granted and the

procedure to be followed for granting such exceptions. The grounds for exception should, we think, be limited to those discussed in paragraph 240 of this chapter. There should be provision for applications for exception to be referred to an independent body, whose terms of reference would be to consider whether the arrangements in question fell within one or other of the categories of exceptions set out in the Act and whether they operated or might be expected to operate in the public interest. The Minister responsible should act only after obtaining the advice of this body, and where he decided to make an exception this should be effected by way of an Order to be laid before Parliament.

251. In many trades, as we have shown in the course of this report, the arrangements falling within the scope of the legislation would be of a complex nature. Where this happened, a decision to make an exception on one of the grounds in paragraph 240 should not automatically apply to the whole of the arrangements in the trade concerned. The Minister should have power to make an Order excepting from prohibition only those features which, after examination, were found to be essential to deal with the particular condition on which the claim for exception was founded. The terms of reference of the independent body should enable them to consider which aspects of the arrangements in such a trade did, and which did not, operate in the public interest.

252. In those cases where exceptions were allowed under the procedure described in the last two paragraphs, there should in any case be certain definite safeguards to secure that the agreements permitted to continue were so operated as to ensure the fairest possible treatment of those whose interests might be prejudicially affected by them. If, for example, they required the use of approved lists, we consider that the criteria for admission to those lists should be precisely defined and should be made known to applicants. Decisions about adding names to, or removing them from, an approved list should be taken by a body on which the candidate's business competitors should have no vote. The body responsible for taking decisions about such matters should not be precluded from ascertaining the views of the candidate's competitors, but no representative of his competitors should be present when voting took place. (By "competitors", in this connection, we mean all those engaged in the same kind of business, whether or not they trade in the same locality, e.g. when a retailer's case is under consideration, all retailers in the same trade; or when a wholesaler's case is under consideration, all wholesalers in that trade.)

253. Provision should be made to enable decisions to be reviewed if circumstances changed. A trade whose claim for exception had been refused should have the right to have its case reconsidered if circumstances affecting that trade changed substantially. Conversely, where exceptions were authorised, they should nevertheless remain subject to re-examination from time to time.

DAVID CAIRNS (*Chairman*)

G. C. ALLEN

J. A. BIRCH

C. N. GALLIE

C. H. P. GIFFORD

ARNOLD PLANT

R. E. YEABSLEY

WILLIAM HUGHES (*Secretary*)

13th May, 1955.

Reservation by Mr. Gifford

254. For the reasons given by Sir Thomas Barnes, Mr. Davidson and Professor Goodhart in paragraphs 261-269 below, I do not consider that collective arrangements for the enforcement of resale prices prescribed by individual manufacturers in general operate against the public interest.

C. H. P. GIFFORD

Note of Dissent by Sir Thomas Barnes, Mr. Davidson and Professor Goodhart

255. We are not prepared to say that the referred practices as they exist over a very wide field of trade and industry are in general injurious to the public interest and should be prohibited and made illegal by statute even with the possible exceptions mentioned in paragraph 240. The evidence and information put before us do not in our view justify so sweeping a condemnation.

256. It is, we think, worth while calling attention to the fact that, despite the publicity given to this reference and the invitation to provide evidence, so little complaint has been made to us—either about the various practices in general or about their application in particular industries. Nevertheless we recognise that the practices (with the exception of that dealt with in paragraphs 261 et seq. below) may, because restrictive of competition, in certain circumstances be injurious to the public interest.

257. A general prohibition, even with the limited provision for exceptions suggested in paragraph 240, would in our view lead to injustices. Though the practices were adopted by many industries specifically to help them in their difficulties during the years of depression, the question whether or not they should be permitted to continue in the altered circumstances of today may be vital to the industries concerned and we do not think that they should be deprived of the benefits they derive from these practices without having an opportunity of having their cases examined individually.

258. Furthermore, economic circumstances may change and a practice which today is thought contrary to the public interest may in tomorrow's conditions appear justifiable. A general statutory prohibition seems to us to create a degree of inflexibility in the law which might in the future prove undesirable.

259. If it is within our province to recommend any remedies in these matters (and it may be significant that Section 15 of the 1948 Act does not specifically authorise the Commission to make recommendations in regard to matters referred to it under that Section) we should be prepared to accept the suggestion considered (but rejected) by our colleagues in chapter 9 that all these arrangements and agreements should be put into writing and registered with the Board of Trade or some other authority. A registration system might, we think, serve at least two useful ends. Firstly the publicity entailed would itself be salutary and secondly the register would form the basis for the selection of agreements for the detailed examination of their operation which in our judgment would alone warrant a positive decision that a particular arrangement was operating against the public interest and should be prohibited.

260. Trade associations and others concerned with these matters will no doubt review their collective agreements in the light of the views expressed in the report. It may well be that they will find that in some cases at least

their present-day requirements can be met by a code of recommended practices or other arrangements not involving collective obligations and other features which have been criticised. To the extent to which existing agreements are so modified registration would be unnecessary.

261. We also cannot agree with our colleagues' finding that collective arrangements for the enforcement of resale prices prescribed by individual manufacturers in general operate against the public interest.

262. We think that agreements between manufacturers obliging all of them to fix the resale prices of their goods (or some of them) are likely to be against the public interest. The same is true of agreements between distributors obliging all of them to handle only goods whose resale prices are prescribed by their manufacturers. It follows that we should regard any arrangements for the enforcement of such agreements as also likely to be against the public interest.

263. The case with which we are here concerned, however, is quite a different one. It is the case in which manufacturers, being free to prescribe the resale prices of their goods or not as they individually think fit, have chosen to do so and, having done so, have agreed amongst themselves to enforce collectively observance of the prices individually fixed by them. Whether or not it is desirable that manufacturers should fix the resale price of their goods is quite outside the terms of this reference. The only question here to be considered is whether collective action, as opposed to individual action only, to enforce resale prices individually prescribed is or is not consistent with the public interest.

264. We think it is clearly in the public interest that contracts and conditions of sale lawfully made or imposed should be observed. And we think that it is equally in the public interest that securing their observance should involve the minimum of litigation with all its attendant expense and delay. In principle therefore we see no objection to persons having like interests joining together to secure the enforcement of lawful obligations to which one of them is a party.

265. Equally we do not feel that the retailer who sells below (or above) the prescribed resale price is deserving of any sympathy. Either he has broken one of the conditions of sale on which he bought the goods, or he has knowingly bought them from a wholesaler who has done so. He does this in order to gain an advantage over his competitors who honour their obligations.

266. It follows that we regard the greater effectiveness (which is accepted by our colleagues) of collective enforcement, as distinct from individual enforcement, as a powerful argument in its favour. It seems to us illogical that, if it is lawful for individual manufacturers to prescribe the prices at which their goods must be resold (and for the purpose of the present reference the desirability of this is not in issue) they should be debarred from enforcing the maintenance of the prescribed prices in the most effective manner consistent with the general law.

267. It should also be borne in mind that to forbid collective enforcement of resale price maintenance favours the large manufacturer, who by his own individual action can probably go a long way to enforce individually his own contracts by withholding supplies, whereas the small manufacturer seeking to enforce his contract by withholding supplies of his goods cannot do this in a competitive market without serious risk of injury to his own trade.

268. Much of the public uneasiness on this matter arises from a feeling that the recalcitrant trader is made the subject of some sinister "Star Chamber" procedure. We do not think that uneasiness on this score is well-founded. The "Star Chamber" notion arises from the existence of informal tribunals where the trader is given a hearing before any decision to apply sanctions to him is taken. Where such tribunals exist, the evidence goes to show that considerable trouble is taken to ensure that their procedure is fair and in conformity with the law. In our view there is more reason to be uneasy where no tribunal exists—but even there we are not satisfied that in any case brought to our attention the decision was wrong on the facts.

269. For these reasons we do not regard collective action to enforce the observance of resale prices (or other trading terms) lawfully prescribed by an individual trader as being in general injurious to the public interest. We do not say however that it could never be so: and accordingly, if a general registration procedure is set up, we should be content to see agreements of this kind made subject to it in order to facilitate the examination of individual cases.

T. J. BARNES
BRIAN DAVIDSON
A. L. GOODHART