Michigan Journal of International Law

Volume 2 | Issue 1

1981

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Recommended Citation
J. D. Gribbin, *United Kingdom Regulation of Transnational Corporate Concentration*, 2 MICH. J. INT'L L. 93 (1981).
Available at: https://repository.law.umich.edu/mjil/vol2/iss1/6

United Kingdom Regulation of Transnational Corporate Concentration

J. DENYS GRIBBIN

This article begins by describing the United Kingdom's policy toward outward and inward direct investment and then sets out the essentials of the competition laws that are among the major, nondiscriminatory regulatory mechanisms that affect corporate behavior and planning. The article also analyzes the development of competition policy as a microeconomic instrument along with its application to monopoly, oligopoly, and cartels involving transnational corporations. Competition policy, except for cartels, is shown to be relatively benign toward mergers until recently, and with respect to monopoly and oligopoly has sought remedies in regulation of prices and behavior rather than through structural change. Recent proposals, including a new Competition Act, are described. The analysis will show that although transnational corporations have been prominent in competition policy enforcement, substantial detriments arising from their transnational nature have not yet been identified, despite the presence of adverse effects on the public interest. Traditional fears associated with foreign investment in the United Kingdom do not, therefore, seem to be justified, insofar as the abuse of market power is concerned. In practice, the United Kingdom has relied principally on an effective tax system and competitive markets to ensure an equitable distribution of the gains from foreign direct investment, and there has been relatively little interference with inward flows of capital.

This article does not enter into the complexities of defining a *transnational* corporation. As its purpose is to report on the U.K. government regulation of companies simultaneously controlling and operating wealth-producing assets in more than one country, it concentrates on those businesses which fall within the framework of regulation. This means outward and inward direct investment, the greater part of which is still in the manufacturing industry.

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U.K. POLICY TOWARD FOREIGN INVESTMENT

Since the Industrial Revolution of the nineteenth century, outward and inward direct investment have been important components of U.K. economic activity, and after World War II they assumed even greater significance. Outward investment has traditionally been greater than inward; by 1974 the value of the former was £ 10,000 million, and the latter was £ 6,900 million. However, the pattern of outward investment has changed in recent decades. Before World War II and for some time thereafter the Commonwealth and former colonies were the major recipients; now these have been replaced by North America and Western Europe. The latter are also the most important sources of inward flows, with the United States normally providing well over 50 percent. Inward investment was concentrated in manufacturing industry, but there is now considerable entry into banking with U.S. banks acquiring a major share. In 1971 the United Kingdom held 15 percent of the stock of direct foreign investment in developed economies compared with the 52 percent for the United States. Given such a commitment it is not surprising that U.K. regulatory policies toward national and transnational corporate concentration are liberal and nondiscriminatory.

Until November 1979 both forms of investment—inward and outward—required permission from the Bank of England under the Exchange Control Act of 1947.[1] The principal objectives were threefold: (1) to protect the U.K. balance of payments, (2) to ensure that inward investment made an appropriate contribution to the foreign exchange reserves relative to the degree of acquired control, and (3) to ensure that the price of assets purchased reflected their fair market value. There were no cases of importance during this period in which government authorities refused permission for inward investment. Since the U.K.'s balance of payments has been strengthened by sales of North Sea oil the need to protect the exchange rate has diminished and exchange control has ceased since November 1979. Part II of the 1975 Industry Act[2] introduced an additional control on inward investment which empowered the government to prohibit takeovers of important manufacturing firms where these would be against the national interest. Also, for certain takeovers consummated after 1975, the secretary of state could acquire the assets, subject to safeguards, and vest them in the National Enterprise Board.[3] This provision has not been used.

There is one notable exception to present policy which relates to the North Sea oil reserves. Here, the government has imposed special rules on exploration, trading, as well as a Petroleum Revenue Tax.[4] These controls are nondiscriminatory even though a major share of the exploration investment is held by foreign controlled companies.

Successive U.K. governments have traditionally welcomed direct foreign investment. The secretary of state of the former Labour administration issued the most recent policy statement, which appears in the foreword to the 1976

U.K. publication of the OECD *Guidelines for Multinational Enterprises*. In welcoming the guidelines and the intergovernmental consultative machinery, he stated:

> The U.K. has a special interest in this package in view of its major stake in international investment. Inward investment has made a substantial contribution to our economy notably in terms of increased productive capacity and employment, and the Government continues to welcome foreign investment which contributes to our future development. Investment overseas by U.K. companies brings us a substantial return and enables us to develop markets overseas for U.K. exports and to secure supplies of raw materials.[5]

The present government has made no policy statement, but there is no reason to believe it will change this position, particularly in view of the relaxation of exchange control in November 1979.

SOME ECONOMIC EVIDENCE AND POLICY ISSUES

As a response to the growing debate about multinationals in the late 1960s, the U.K. Board of Trade commissioned an independent study to examine some of the major implications of direct foreign investment. This study was published in 1973 under the title "The Impact of Foreign Direct Investment on the United Kingdom."[6] It was not intended to form a basis for U.K. policy, but provided valuable insights into some of the critical issues. The authors identified three areas for examination:

1. the possibility that there is a loss of national control over the economy attributable to foreign investment,
2. the possibility that there may be a loss of national autonomy because of the influence of the government of the foreign parent company; and
3. the economic effects of foreign investment on the U.K. balance of payments, technological development, industrial relations, and competition, as well as locational effects within industrial regions.

The report found little evidence of detriment to national control and autonomy, although some potential disadvantages accruing from foreign ownership were identified.[7] However, these problems were not likely to arise unless the U.K. subsidiary was part of a multinational network based on the international division of labor and subject to strong central control. Even then the incidence of such arrangements was relatively rare. The conclusion on economic effects was that on balance direct investment had brought material gains from increased investment, improved balance of payments, access to technology, and, tentatively, increased competition. The report found a tendency for foreign investment to locate itself in oligopolistic industries (their degree of concentration being higher), but the authors cautioned that in the absence of foreign firms, competition might not be enhanced; there were also several large national firms in the concentrated industries. Indeed, foreign entry may be a strong deterrent to domestic firms wishing to exploit market power. The authors also suggested that oligopoly did not necessarily indicate an absence of competition and a concomitant failure of firms to share real income gains in the form of lower product prices and higher factor incomes.[8]

The study's findings on the association between inward investment and oligopoly highlighted the importance of market structure and its influence on competition. Some have questioned the validity of these findings since the data which was relied on came from the 1963 Census of Production, and there have been substantial subsequent changes in the sources and amounts of investment. A less rigorous but more recent analysis by this author confirms the earlier findings. Data from the 1971 Census of Production at the three digit (SIC) level of aggregation show that for 104 industries the average share of sales coming from foreign-owned firms was 15 percent; there was a noticeable, but weak, positive relationship between the degree of concentration of sales and foreign ownership. Table 1 contains the sales concentration data, grouped by foreign ownership and share held by the five largest firms. However, these statistics understate the relationship. There are another 41 industries where the degree of ownership is not disclosed for reasons of confidentiality. These industries are, on the average, more concentrated than the 104, so it is highly likely that their inclusion would strengthen the statistical result. Nevertheless, the relationship as found is not strong, and this points to one conclusion: foreign ownership is unlikely to be a major cause of high concentration in the U.K. manufacturing industry. There is also a policy implication—there are several sufficiently concentrated industries with above-average foreign ownership shares so as to cause legitimate concern with the state of competition within these industries, and to question whether foreign ownership in these circumstances results in forms of conduct and standards of performance which are against the U.K. public interest yet not readily susceptible to national antitrust remedies. The remainder of this article will examine these concerns.

THE COMPETITION LAWS AND THEIR APPLICATION TO CORPORATE CONCENTRATION

United Kingdom competition policy has its origins in the wartime planning for postwar full employment and trade liberalization. At home it was accepted that the aims of competition policy were to promote industrial efficiency and

Table 1.
Sales Concentration and Foreign Ownership in U.K., Three-Digit Manufacturing Industry, 1971

Foreign-Owned Share (in percentage)	Top Five Firms' Share of Sales[a] 1–20%	21–40%	41–60%	61–80%	81–100%	Total
0	5	5	2	6	3	21
1–20	9	17	17	5	6	54
21 40	—	6	8	4	3	21
41–60	—	1	2	1	1	5
61–80	—	—	1	1	1	3
81–100	14	29	30	17	14	104

Source: Census of Production and Business Statistics Office.

a. In some industries this may be four or six.

help restrain price increases.[9] As a result of U.S. wartime initiatives to promote trade liberalization in order to secure international full employment it was agreed that safeguards should also be implemented to permit investigation and control of U.K. firms participating in national and international export cartels.

Postwar policy can be conveniently divided into two periods, demarcated on the basis of the predominant forms of industrial structure and behavior. In the first, from 1948 to the early 1960s, the prewar and immediate postwar inheritance of cartels was the primary policy target; in the second, which followed and continues today, the concern is with the growth of industrial and aggregate concentration.

The legislative landmarks of the earlier period are the Monopolies and Restrictive Practices (Enquiry and Control) Act of 1948,[10] and the Restrictive Trade Practices Act of 1956;[11] these provide, by contrast, a fair illustration of the pragmatic nature of economic regulatory policy and its development. However, as this policy was hardly concerned with dominant firms, and did not examine issues which might have been raised by the transnational corporate activities, it will only be briefly described.

The 1948 Act was neutral toward industrial structure and behavior, there being no presumption that cartels or high concentration were detrimental. Its purpose was, as stated in the title, to enquire into, and, if necessary, control monopolies and restrictive corporate practices. This it did successfully in the eight years prior to 1956.[12] A Monopolies and Restrictive Practices Commission (Commission) was established to investigate, upon reference from the Board of Trade, situations where competition was restricted, and to make public interest judgments pertaining to the structure, behavior, and performance of the industries or firms concerned. The "public interest" test was very broad, but in practice the Commission interpreted it in economic terms consistent with the purpose of achieving greater industrial efficiency.[13] As there was no legislative presumption against restrictions or competition it was for the Commission to decide that the performance of a cartel or dominant firm was better promoted by limiting competition rather than encouraging it.

During the first eight years, the Commission investigated a representative sample of eighteen cartels, two dominant firms, and examined a wide range of practices coming within the general description of collective discrimination. Although it found, in some special and limited circumstances, that certain collective limitations on competition had encouraged technical efficiency and rapid diffusion of new technology, its conclusions on cartels were overwhelmingly unfavorable.[14] Generally it found that cartels kept inefficient high cost capacity in existence, froze industry structures, retarded innovation, and caused costs and prices to be higher than they would be if there was greater competition.[15] The cumulative effect of this evidence, together with the Commission's strong condemnation of collective restrictions such as exclusive dealing, aggregated rebates, refusal to supply, and the collective enforcement and maintenance of prices (resale price maintenance), was to swing public opinion to the view that cartels should be prohibited on the presumption that they caused substantial detriment to the economy.

Before discussing the implementation of these conclusions in the 1956 Restrictive Trade Practices Act[16] it is useful to note three facets of the 1948 Act which have been of long term significance. The first is the robustness of the public interest criteria;[17] these were adequate to deal with the consequences of cartels, dominant firms, and mergers until 1973. By 1973 experience suggested that these criteria should relate more precisely to the newer policy goal of controlling concentration. Second, the wording of the sections dealing with collective behavior had been sufficiently flexible to bring both implicit and explicit collusion with their reach.[18] Third, and most important for this article, the 1948 Act established the limit of U.K. jurisdiction, which has remained unchanged. References by the Board of Trade to the Monopolies Commission could only be made where goods were supplied in the United Kingdom, or when the manufacturing process under investigation was performed within the United Kingdom. Moreover, application of the order-making power extended only to British subjects, corporate bodies incorporated in the United Kingdom, or persons carrying on business there; however, the power also extended to acts performed outside the United Kingdom by those entities listed above.

The second policy stage relevant to cartels was implemented through the Restrictive Trade Practices Act of 1956.[19] Henceforth collective restrictions on competition were presumed to be against the public interest; firms wishing to continue to participate in or to form cartels were required to disclose full details to a new enforcement agency, the Office of the Registrar of Restrictive Trading Arrangements, which then placed them in a public register. If the restrictions were not abandoned or modified, the registrar brought the infringing cartel before the newly created Restrictive Practices Court for a condemnatory judgment and prohibition on continuance. To rebut the presumption the participants could plead specified benefits, but few succeeded in doing so.[20]

The registration requirement revealed for the first time the extent to which the manufacturing industry and its distributors were subject to private collective regulation. By the end of 1963, 2,430 agreements were on the register, over 80 percent of those that were eventually disclosed. It is estimated that about 50 percent of manufacturing output was regulated in this way.[21]

Through a combination of public disclosure, determined action by the registrar, and Restrictive Practices Court decisions, the 1956 Act had a dramatic effect. Only eleven agreements received the approval of the court, the remainder being abandoned by the parties or modified to eliminate their restrictive effects. As a consequence of this vigorous policy there has been little effort by industry since the early 1960s to form legal cartels;[22] although new agreements are registered, they deal only with minor matters and are judged to have no significant effects on competition. British cartel legislation has been extremely effective in abolishing them and has thereby contributed substantially to improved industrial efficiency.[23]

THE CONTROL OF CORPORATE CONCENTRATION

The second period of U.K. competition policy begins in the late 1950s, naturally enough, after the successful and speedy abolition of cartels, and addresses the structural problems of concentration which arose out of postwar growth and trade liberalization. During this second period, the adaptability of earlier legislation was explored. Subsequently, the earlier statutes were refined and strengthened with the infusion of merger control and greater powers to deal with existing monopoly and oligopoly.[24]

Notwithstanding the earlier extensive cartelization of the manufacturing industry, structural change in the form of increasing concentration occurred in the U.K. economy. There are several reasons for this trend toward increased concentration. Technical change in many industries led to new opportunities for scale economies; economic growth at home and abroad created larger markets; developments in communications and innovations in management techniques made it easier for multiplant firms to be controlled efficiently; and successive government administrations promoted mergers in some industries as a means of achieving greater industrial efficiency. By the late 1950s, therefore, it was possible to see increasing concentration, and an important vehicle for this was merger.[25] Interestingly, the success in abolishing cartels added fuel to the developing merger boom.

The evidence on growing concentration has recently been reviewed in

Table 2.
Share of the One Hundred Largest Enterprises in U.K.—
Manufacturing Net Output 1909–72

	1909	1924	1935	1940	1953	1958	1963	1968	1970[a]	1972[a]
Share (in percentage)	16	22	24	22	27	32	37	41	39	41

Sources: S. J. PRAIS, THE EVOLUTION OF GIANT FIRMS IN BRITAIN (1976); DEPARTMENT OF PRICES AND CONSUMER PROTECTION, A REVIEW OF MONOPOLIES AND MERGERS, Green Paper, Cmnd. No. 7198 (1978).

a. A change in statistics slightly reduces comparability with earlier years.

a consultative document (Green Paper) of the previous government, *A Review of Monopolies and Mergers Policy*.[26] This review indicated that both aggregate concentration and market concentration had grown more rapidly in the United Kingdom than in the United States and other European economies, so that by the 1970s levels of concentration were substantially higher.[27] Before describing the legislative response to this structural change it will be useful to set out some of the data which illustrate the growth of concentration.

Aggregate concentration in the United Kingdom is usually indicated by the share of net output or employment held by the 100 largest enterprises in the private manufacturing industry; these indicia provide the most convenient measure for the twentieth century. As they also reflect the growth of market concentration they are a useful index of change.

Table 2 illustrates the growth of aggregate concentration in the twentieth century. The conclusion from this series is that the U.K. post–World War II rate of growth has been double that of the prewar period, although the U.S. pre- and postwar growth rates are approximately the same.

Growing market concentration can be shown through a further analysis of the relative importance of the 100 largest firms in the major industry groups (table 3). The 100 largest enterprises increased their share of manufacturing output by 9 percentage points over the fourteen years, even though in two major industries, metal manufacture and vehicles, it fell. This can only be regarded as a significant change in industrial structure.

The rise in concentration must be seen in the context of greater competition from imports; for example, in 1955 imports were 4.5 percent of home sales of manufactured goods whereas by 1977 they had grown to 15.9 percent.[28] To the extent that the imports are not made by the largest firms in each industry this rising import share may reduce the market power consequences of a higher concentration of U.K. production.

Mergers have played a major role in the growth of concentration. British statistics provide a reasonably accurate description of the prolonged merger

Table 3.
Estimated Share of the One Hundred Largest Enterprises by Industrial Order (percentage of employment)

Industrial order	1958	1972
Food, drink, and tobacco	28	53
Chemicals and allied industries	34	42
Metal manufactures	55	22
Engineering and electrical goods	32	37
Shipbuilding and marine engineering	18	28
Vehicles	69	61
Metal goods	4	19
Textiles	9	29
Leather, leather goods, and fur	—	9 (Leather, leather goods, and fur; Clothing and footwear combined)
Clothing and footwear	6	
Bricks, pottery, glass, cement, etc.	11	28
Timber and furniture	—	5
Paper, printing, and publishing	16	29
Other manufacturing	24	29
Total manufacturing	27	36

Source: DEPARTMENT OF PRICES AND CONSUMER PROTECTION, A REVIEW OF MONOPOLIES AND MERGERS, Green Paper, Cmnd. No. 7198 (1978), annex A.

Table 4.
Mergers between Industrial and Commercial Companies 1954–78

Period	Companies Acquired (annual average)	Average Amount paid £m
1954–58	291	0.4
1959–63	693	0.6
1964–68	891	0.9
1969–73[a]	988	1.4
1974–78	373	1.7

Source: Business Monitor M7.

a. Data after 1968 are on a slightly different basis, but this does not distort the picture shown here.

boom which began in the late 1940s and early 1950s. Table 4 gives relevant data for five year periods from 1954 to 1978. The long and upward swing in activity is readily apparent. Peak years were 1972 and 1973 when there were 1,210 and 1,205 mergers respectively. An earlier peak was 1965 with 1,000 mergers. (These coincide with peaks in economic activity and share values on the Stock Exchange). The steadily rising trend in the average value of

Table 5.
Inward Investment Mergers 1969–78

Period	Companies Acquired (annual average)	Average Amount Paid £m	Share of All Mergers	
			Number	Value
1969–73	19	2.6	2.0	3.6
1974–78	11	8.1	2.4	13.4

Source: Business Monitor M7.

Note: This table does not include acquisitions by foreign-owned companies already operating in the United Kingdom.

acquired firms is also noted; some part is, of course, due to the inflation of asset values.

Most mergers result in the disappearance of relatively small firms; between 1962 and 1969 only 3 percent of acquired companies were valued at over £ 5m. While the pattern changed in the 1970s, large company acquisitions still only represented 7 percent of the total number of acquisitions, but 62 percent of the assets acquired.

Reliable data on inward investment mergers has only been available since 1969.[29] Table 5 shows the flow and some relevant comparisons. The flow of inward mergers indicates a similar pattern of decline in the 1974–78 period, although the fall is less pronounced possibly because the number of mergers made by firms in the EEC doubled between the periods which, in turn, substantially reduced the importance of U.S. firm activity. These mergers differ in one major respect from U.K. activity—on the average they are substantially larger in terms of the assets acquired.

Table 6 gives some perspective to the data on the postwar merger boom and shows how it has contributed to the growth of concentration.

THE POLICY ISSUES OF CONCENTRATION

The immediately preceding section has examined the evidence on the growth of concentration in the United Kingdom. Concern over this development led in 1978 to a further review of the competition laws by an official committee composed of civil servants, known as the Leisner Committee. Its report was published as the Green Paper,[30] which in paragraph 3.40 succinctly stated the relevant policy concerns:

> It was noted in paragraphs 3.20 to 3.23 that increased concentration could be detrimental to consumers. This might arise from the emergence of a single dominant firm which exerted its market power to

Table 6.
Estimates of the Contribution of Mergers to the Growth of Concentration

Study	Hart, Utton & Walshe (1973)	Utton (1971)	Aaronovitch & Sawyer (1975)	Hannah & Kay (1977)	Prais (1976)
Time period	1958–63	1954–65	1958–67	1957–69 1969–73	1958–70
Change in concentration attributable to mergers	33%	43%	62%	116%[a] 95	50%

Source: DEPARTMENT OF PRICES AND CONSUMER PROTECTION, A REVIEW OF MONOPOLIES AND MERGERS, Green Paper, Cmnd. No. 7198 (1978).
a. *I.e.*, concentration would have fallen in the absence of mergers.

obtain monopoly profits. Much more common, given the structure of British industry, is the situation where several large firms dominate a market. Under oligopoly it is possible for firms to forego price competition in favour of competition in other areas. Companies tend to be conscious of the interdependence of their activities and this may lead to collusion in formulating decisions making them less responsive to the needs of consumers. The various forms of non-price competition involve, to a greater or lesser extent, resource costs and these in turn can mean higher prices to the consumer. The creation and defence of a position of market dominance can also involve resource costs which do not necessarily yield a social gain. Thus the accretion of market power through greater concentration can result in a range of practices which are unique to markets characterised by dominant firms and which are potentially against the public interest.

THE LEGISLATION ON CORPORATE CONCENTRATION

The Monopolies and Restrictive Practices Act of 1948

Although used primarily to explore the economic consequence of cartels, the Monopolies and Restrictive Practices Act of 1948[31] was also designed to test monopoly and oligopoly against the same public interest criteria. The 1948 Act permitted the Board of Trade to make references to the Monopolies Commission either where one firm held a one-third share of the market for goods (or process of manufacture), or where two or more firms met the same share test and acted jointly to restrict competition, whether or not they formally agreed to do so.[32] Between 1948 and 1956 only two references of dominant firms were made—those of matches and matchmaking machinery[33] and industrial and medical gases[34]—so the 1948 Act was little used against large firms in concentrated industries.

In the period following the 1956 Restrictive Practices Act the Monopolies Commission explored some of the consequences of growing concentration, although the policy response to it was slow, there being only an average of 1.3 references a year between 1956 and 1966. The investigations began to examine the causes and consequences of significant market power, and thereby laid a foundation for future work, as well as drawing attention to the consequences for the public interest when such power was exercised. Practices found to be against the public interest included agreements with foreign suppliers that eliminated competition in the United Kingdom, open and concealed acquisitions of competitors, price discrimination, resale price maintenance, and exclusive dealing with full-line forcing.[35] Two industries included foreign-owned companies of substantial size, subsidiaries of large multinationals; however, the investigations did not link any adverse impact from market power solely to the multinational nature of the enterprises involved. Although the references were few in number, the industries investigated were large and important and the impact of the findings was greater than might be thought;[36] these findings contributed to the next stage of policy development—a legislative response to the rising wave of mergers.

The Monopolies and Mergers Act of 1965

Public debate about merger control began in the early 1960s, fueled in part by a number of spectacular and hard-fought takeover battles. In 1964 the Conservative government issued a White Paper[37] containing proposals for strengthening the competition legislation. Among other things it proposed the introduction of merger control. The White Paper welcomed the growing merger wave because of the potential economic gains—better use of resources, economies of scale, increased research and development, and greater strength for competing in international trade. Only a small minority of mergers were thought potentially detrimental, and therefore appropriate targets for a regulatory scheme tailored to deal only with them. Thus, the White Paper recommended a highly discriminating regulatory system that applied to few mergers and avoided a per se prohibition. This philosophy was to shape policy and its implementation until more serious scrutiny of the potential gains from concentration occurred in the 1970s.

The 1965 Act[38] substantially strengthened the competition laws. Services became subject to investigation by the Monopolies Commission; merger control was instituted, with an automatic reference of certain pending newspaper mergers; the Monopolies Commission was increased in size to cope with a greater workload; and the order-making powers of the Board of Trade were extended to prices, price discrimination, display of prices, and most importantly, prohibition of mergers, dissolution, and conditions on business activity where a merger could not be dissolved. Moreover, the power to dissolve applied to any monopoly the Commission found to be against the public interest.[39]

For the purpose of this paper the most important innovation of the 1965 Act was the power conferred on the Board of Trade to make references of actual or proposed mergers to the Monopolies Commission for a judgment on their public interest consequences. This was the first attempt at a clear antitrust remedy for mergers and the regulation of concentration which arises through merger. The underlying philosophy was that each merger should be treated on its merits, there being no general presumption that an increase in concentration would decrease competition, or that even if concentration did lessen competition that this was necessarily detrimental.[40] As this was the same approach as to monopoly and oligopoly, the public interest criteria were not altered; mergers had to face the same test.

In keeping with the 1964 White Paper view that only a small proportion of mergers merited further scrutiny, the 1965 Act laid down two criteria which narrowed the scope of governmental concern. To be within the scope of control, a merger either had to create or intensify a monopoly as defined in the 1948 Act,[41] or the gross assets to be acquired had to be £5 million or more. *Merger* is not precisely defined; it may occur when two enterprises cease to be distinct, or where one enterprise has the ability to control or materially influence the policy of another.[42] Therefore, *merger* was not definitionally limited to a rigid concept of corporate restructuring or actual asset acquisition; the term could be extended to activities that did not involve a formal mixing of corporate assets or identities.

The 1948 Act did not impose upon enterprises a requirement to notify the Board of Trade of an intended merger; however, government action had to be initiated within six months after a merger became publicly known.[43] In practice, governmental control soon resulted in de facto prenotification because there was a risk that the merger might be dissolved after it had taken place. To assist in reaching decisions the Board of Trade set up an interdepartmental Mergers Panel which processed the relevant information and made recommendations to the president of the Board of Trade who alone had power to refer to the Monopolies Commission.

Upon receipt of a merger reference, the Commission must reach a conclusion within six months, but the minister can grant a three-month extension. If the Commission decides that a merger would be against the public interest, it may propose a remedy or recommend prohibition or dissolution. The minister may decline to act on such recommendations. However, if the Commission does not initially find against a particular merger, the minister has no independent power of prohibition or dissolution.[44]

The Fair Trading Act of 1973

Like its predecessors, the 1973 Act[45] made major innovations in competition policy that, building upon the accumulated experience of earlier enforcement, strengthened the regulatory mechanism and emphasized the promotion of competition. In particular, the legal and organizational changes have created a more effective means of controlling corporate concentration.

The 1973 Act derives directly from the experience of using earlier legislation to deal with issues raised by the growth of concentration. The deeper analysis of structural change that had come from the Commission's investigations suggested that in the presence of generally higher industrial concentration in the 1970s, the emphasis of regulatory policy should be placed more on oligopoly and its consequences. Moreover, the long-term implementation of policy had illustrated that, except for the continuing political sensitiveness of some mergers, monopoly, oligopoly, and restrictive practices did not raise issues which needed to be settled by ministers. Accordingly, policy implementation could be removed from direct ministerial control and placed with an independent body, a view reinforced by the need for an expanded program of enforcement to grapple with oligopoly.

The new legislation expressed these conclusions by reducing the market share definition of monopoly from 33 to 25 percent, and by creating the Office of Fair Trading (OFT), which was responsible only to Parliament.[46] The director general of the OFT was given the power to make his own monopoly and oligopoly references to the Monopolies Commission, subject to a ministerial veto publicly exercised. This veto provision indicates that the power to refer remained under political control, thus reflecting the continuing view that mergers may raise social and political problems not usually associated with settled monopoly.

The 1973 Act instituted another important change. Since the Monopolies Commission had found restrictive service agreements to be similar in effect to those for goods, the same procedures were applied to both. Agreements were presumed to be against the public interest and had to be registered.

THE IMPLEMENTATION OF POLICY REGARDING CORPORATE CONCENTRATION

The authoritative source of information on the public interest consequences of concentration are the reports of the Monopolies Commission. Table 7 sets out a brief description of the workload. Of particular importance are the reports on monopoly and oligopoly in the supply of goods, and those on mergers, except newspapers.[47] The general references reported on refusal to supply, parallel pricing, recommended prices, and professional services.

Table 7.
Investigations by the Monopolies Commission, 1957–September 1979[a]

Investigation	Number
Supply of goods	39
Supply of services	17
Mergers	
General	31
Newspapers	8
General references	4
	99

Source: J.D. GRIBBIN, THE POSTWAR REVIVAL OF COMPETITION AS INDUSTRIAL POLICY (Government Economic Service Working Paper No. 19, 1978).
a. Excludes a follow-up study on imported timber.

THE INVESTIGATIONS INTO MONOPOLY AND OLIGOPOLY

These references demonstrate the growing concern of policy with oligopoly. Of thirty-nine references only fourteen were of single-firm monopoly, and the emphasis on oligopoly in recent years is becoming more pronounced. The Commission's findings on the public interest consequences of monopolies and oligopolies have created a substantial body of evidence about behavior and performance in concentrated industries. Under the legislation, the Commission may find either structure, behavior, or performance to be against the public interest; it has rarely made such decisions about structure, there being only four cases in which it concluded that the monopoly or oligopoly itself was detrimental. Table 8 summarizes the relevant findings. The practices have been divided into the two groups. Those in the second are more likely to be unequivocably judged detrimental when associated with oligopoly or monopoly since they directly restrict competition by erecting artificial entry barriers. The practices in the first group are less easily assessed and the evidence suggests that their consequences must be examined on a case-by-case basis in the context of particular markets. For example, numerous instances of technical price discrimination were examined, but the Commission concluded they had no significant effect on competition. The same point may also be made about recommended prices.

TRANSNATIONAL CORPORATIONS AND THE MONOPOLY REFERENCES

Transnational corporations are prominent in the thirty-nine industries which have been investigated for monopoly or oligopoly conditions. This is not surprising, there being in the United Kingdom a strong correlation between

Table 8.
Practices Found Against the Public Interest

Practice	Number of Cases in which Practice Occurred
Group 1	
Monopoly pricing/monopoly profit	9
Discriminatory pricing	8
Vertical integration	3
Acquisition of competitors	2
Recommended or imposed resale prices	6
Patent-licensing policy	1
Delivered-pricing system	2
Financial interest in competitors	1
Failure to disclose ownership of subsidiary	1
Group 2	
Restriction of supply to certain outlets	3
Restrictions on sale of competitors' goods	13
Restrictions on the supply of inputs to competitors	1
Full-line forcing	2
Rental-only contracts	1
Tie-in sales	4

Source: DEPARTMENT OF PRICES AND CONSUMER PROTECTION, A REVIEW OF MONOPOLIES AND MERGERS, Green Paper, Cmnd. No. 7198 (1978). Updated by author.

company size, the market structure in which it operates, and the extent to which the company engages in foreign trade and investment.[48] For the purpose of this article transnational corporations have been divided into those that are owned and have their main base in the United Kingdom (national companies that have expanded abroad), and foreign-owned companies that entered U.K. markets either by direct investment or acquisition. Over 90 percent of the U.K.-owned companies which were among the leading suppliers considered in the thirty-nine references were transnational in that they had one or more subsidiaries abroad. However, because of limited U.K. jurisdiction, these references were limited to imports into or exports from the United Kingdom; hence, the Commission was precluded from examining the actual overseas operations of these transnational corporations. These reports do not indicate that the transnational links have reinforced the market power of the U.K. parent.[49]

The incidence of foreign-owned companies among the leading suppliers in the thirty-nine references is shown in Table 9.

Before discussing the implications for competition in the United Kingdom it is worth noting that the reports which cover these twenty references

Table 9.
Foreign-Owned Companies in Monopoly References, 1957–79

Report	Company	Country of Parent	Adverse Finding
1. Chemical Fertilizers. 1959	Potash Ltd.	France/Germany	Yes
2. Electrical Equipment for vehicles. 1963	Champion	U.S.	Yes
3. Petrol to retailers. 1965	Esso, Regent,	U.S.	Yes
	Mobil,	U.S.	Yes
	Petrofina	Belgium	Yes
4. Color film. 1966	Kodak	U.S.	Yes
5. Detergents. 1966	Proctor & Gamble	U.S.	Yes
6. Aluminum semi-manufacture. 1966	Alcan	Canada	Collusive agreement revealed
7. Electric lamps. 1968.	Philips	Holland	Yes
8. Starch, glucose. 1971	Brown & Polson (CPC),	U.S.	No
	Tunnel Refineries,	U.S.	No
	Albion Sugar	Holland	No
9. Breakfast cereals. 1973	Kellogg's,	U.S.	No
	Nabisco	U.S.	—
10. Chlordiazepoxide, Diazepain. 1973	Roche Products	Switzerland	Yes
11. Footwear machinery. 1973	British United Shoe Machinery	U.S.	Yes
12. Primary Batteries. 1974	Mallory	U.S.	Yes
13. Frozen Food. 1976	Findus	Switzerland	—
14. Indirect Electrostatic Repro. Equipment. 1976	Rank/Xerox	U.S./U.K.	Yes
15. Diazo materials	General Aniline and Film (GAF),	U.S.	—
	Addressograph Multigraph	U.S.	Restrictive agreements revealed
16. Cat and Dog Foods. 1977	Pedigree Petfoods	U.S.	No

Table 9—Continued

Report	Company	Country of Parent	Adverse Finding
17. Ceramic sanitary-ware. 1978	Doulton,	France	No
	Ideal Standard	U.S.	No
18. Wholesale supply of petrol. 1979	Esso, Texaco,	U.S.	No
	Mobil, Conoco,	U.S.	No
	Gulf, Amoco,	U.S.	No
	Chevron,	U.S.	No
	Total,	France	No
	Petrofina	Belgium	No
19. Electric cables.	Pirelli,	Italy/U.K.	No
	Standard Telephones and Cables	U.S.	No
20. Electric meters. 1979	Landis and Gyr,	Switzerland	No
	Sangamo Weston	U.S./Netherlands Antilles	No

provide insight into the motivation for, and economic consequences of, direct foreign investment. They also lend empirical support to the industrial organization theories which stress the importance of the foreign firm's competitive advantage derived from product differentiation, new processes, and research and development.

Typically, new foreign investment followed a period of market exploration through exports.[50] In general, the investments involved new plant construction rather than acquisitions. A large proportion of these new firms were established in the United Kingdom during the interwar period, with some originating in the first decade of the twentieth century.[51]

This process has not stopped as entry continues to exploit new market opportunities.[52] Recent decades reveal a greater tendency to enter by acquiring a U.K. company already in the market, as for example the acquisitions of Findus (frozen food) by Nestlé,[53] and those of GAF and Addressograph Multigraph in the diazo market.[54] A number of these foreign-owned firms have subsequently developed into substantial transnational corporations in their own right, mainly because entry to the United Kingdom was often regarded as a method of avoiding tariff barriers protecting former Commonwealth markets and the European Economic Community. Prime examples of this development are British United Shoe Machinery, Kodak, and Rank Xerox.[55]

In addition to illustrating the process of foreign entry into U.K. markets, these twenty reports also provide a valuable framework for examining the impact of transnational corporate entry on competition in the United Kingdom. This relatively high incidence of foreign ownership in concentrated industries raises three questions:

1. Do the links with the parent contribute to market power in the United Kingdom?
2. If so, has that market power been used against the public interest?
3. Are existing U.K. antitrust remedies sufficient to regulate the market power of such foreign-owned companies, and what problems do they bring in enforcement?

The information in table 9 lists the foreign-owned companies which are among the leading suppliers. In some cases these did not possess either 33 percent or, later, 25 percent of the market share; therefore, unless they formed part of a complex monopoly (oligopoly) the Commission could not make public interest judgments against them. However, these enterprises were examined since they were leading suppliers.

The relevant cases are Nabisco,[56] Findus,[57] and GAF and Addressograph.[58] In the diazo market, the Commission discovered a restrictive agreement. Both GAF and Addressograph Multigraph acquired U.K. companies in 1966; the dominant supplier was U.K.-owned and played an important part in organizing the collusion which began before the U.S. entry. A restrictive agreement also was discovered in the aluminium semimanufacture market, but the investigation was abandoned since the agreement was subject to the restrictive practices legislation.

Apart from these references, foreign-owned companies were substantial suppliers in eleven of the references in which the Monopolies Commission made adverse public interest findings. These may be divided into three groups: those in which the company was the dominant supplier (Champion, Kodak, Kellogg's, Roche Products, BUSM, and Rank Xerox); those in which the company was either dominant in a subsector of the market, or where a duopoly existed (Potash Ltd. and Mallory Ltd. operated in subsectors, while Proctor and Gamble was a duopolist); and those in which the company participated in an oligopoly (the oil companies and Philips).[59]

The fact that in eleven references there were adverse findings where foreign-owned companies were involved would not, in and of itself, prove the hypotheses that foreign ownership caused or contributed to the detriment. However, the references do provide some evidence that may be used to determine to what extent the parent-subsidiary linkage contributed to the dominant position and behavior of the company in the United Kingdom.

Some background information is necessary for validating any conclusions on the effects of foreign linkages on U.K. market structure. First, in none of the references did the Commission find the dominant position itself was against the public interest, so even in those instances where strong links were important, foreign ownership per se could not be considered detrimental.[60] Second, as the adverse findings were about behavior, these must be viewed in the context of the structure and history of each market. In the oligopolistic petrol retail market, such activities as exclusive dealing, tie-in arrangements, and preemptive purchase rights to premises, were judged to be against the public interest, but these forms of behavior were not imported; rather, they were practiced by the U.K. suppliers—Shell Mex and BP—and were common in other industries where there were strong forward vertical links into distribution. In the electric lamp market, Philips was the second largest supplier among five.[61] Philips entered the United Kingdom shortly after World War I, and conformed to established patterns of restrictive behavior. Mallory had a large share in a small but growing sector, but it was subject to some influence from the overall dominant supplier EverReady (ER), (U.K.-owned) both because of ER's share, over 70 percent, and its 25 percent holding of Mallory's equity.

There is evidence that foreign entry can have beneficial effects upon the competitiveness of market structure. Proctor and Gamble had entered the U.K. market in 1930 by acquisition of a failing company, and effectively transformed an almost complete monopoly held by Unilever into a duopoly. Although the Commission considered whether Proctor and Gamble and Unilever were using adverse advertising and pricing policies, the Commission did not find that these detriments resulted from the control exercised by the U.S. parent.[62]

The conclusion suggested by this group of investigations is that where the market is shared with a U.K. firm, either by oligopoly or segmentation, the links with the parent apparently do not strongly influence behavior. Of more importance seems to be the relative position of the foreign-owned firm vis-à-vis its U.K. competitors, and the length of time the foreign-owned firm has been present in the United Kingdom. In all these cases the firms had been trading for so long that they ceased to be regarded as foreign and conformed substantially to patterns of behavior established by wholly owned U.K. firms.

Links with foreign parents appear more important in those investigations where the foreign-owned firm was dominant. Table 10 summarizes relevant data about five such investigations, and indicates what appear to be the critical links with the parent that contribute to the subsidiary's dominant position in the United Kingdom.[63]

It should be noted that except for the joint venture between Rank and Xerox, the foreign investments are longstanding; this had a considerable influence on the Commission's views as to whether the subsidiary's market dominance could be linked with the parent. In the cases of Champion, Kodak, and BUSM, the Commission found that their initial impact on the market stemmed from the parents' economic advantages, but that these were not crucial for long term success.[64] The U.K. subsidiary of Champion was able to establish itself in the market in part because of the parent's trading relationship with Ford, which also had a subsidiary in the United Kingdom. However, the Com-

Table 10.
Monopolies Commission Reports on Foreign-owned Dominant Firms

Company	Entered U.K.	Market Share Percentage	Adverse Findings	Links with Parent
Champion	1922	71 (1960)	*a*) price discrimination, original, replacement equipment; *b*) prices & profits *c*) RPM	*a*) assisted entry through sales to U.S. subsidiaries of parent's customers in U.S.; *b*) supply of components; *c*) production techniques know-how, R&D; *d*) close consultation on major policies
Kodak	1898	75 (1964)	*a*) prices & profits; *b*) exclusive dealing; *c*) tie-in sales.	*a*) patents; *b*) pricing policies coordinated; *c*) consultation on major policies; *d*) day-to-day management in U.K.
Roche Products (limited to prices)	1908	99 (1972)	*a*) pricing policy & profits; *b*) price discrimination.	*a*) patents; *b*) purchase of active ingredients (transfer pricing contributed to adverse finding); *c*) access to group R&D; *d*) close control of parent.
British United Shoe Machinery	1899	44 (1971)	*a*) cancellation charges	*a*) on capital expenditures, appointment of directors, acquisitions disposals; *b*) free access to R&D, patents of parent; *c*) exports through parent's other subsidiaries

Table 10—Continued

Company	Entered U.K.	Market Share Percentage	Adverse Findings	Links with Parent
Rank/Xerox (joint venture)	1956	89 (1975)	*a*) restrictive patent licensing; *b*) rental-only policy; *c*) group-pricing plan; *d*) tie-in of toner	*a*) patents; *b*) voting control exercised by Xerox; *c*) profit-sharing agreement; *d*) Xerox controls long-range plans, major policies, pricing, sales, patents, trademarks; *e*) RX is principal exporter for group.

Source: The Monopolies and Merger Commission.

mission decided that Champion's market dominance was attributable to price discrimination between original and replacement equipment—a common feature it noted in the automobile parts industry of several countries.[65] In addition, World War II had strengthened Champion's market position since a number of competitors seriously weakened by the war effort were unable subsequently to reestablish themselves.

As for Kodak, the Commission stated:

> We think the bulk of the color film trade in this country was likely, for economic reasons, to fall into the hands of not more than two or three suppliers in any event; that the emergence of Kodak as the leading supplier is due primarily to the strength of its already established position in the photographic industry which was reinforced in the years during and after the war, to the support of its American parent and to the technical and commercial skills with which it has exploited these advantages; but that it has attained a high [*sic*] degree of dominance in the color film market than might have been the case if stronger British-based competition had been forthcoming and if other suppliers whose products are subject to import duty had been able to compete on equal terms.[66]

One of the important advantages of the link with the parent was access to patents and R&D, but the Commission concluded that Kodak had not abused its strength in these areas. Thus, although the U.S. parent contributed to Kodak's high share in the U.K. market, the foreign parent's technological and economic assets were found to be the major cause of dominant market power in the United Kingdom.

British United Shoe Machinery (BUSM) was somewhat different from Champion and Kodak in that it was the largest subsidiary of the three, responsible for the greater part of group exports, and its R&D effort was similar in magnitude to its parent. While USM's early advantages in the U.S. market had contributed to BUSM's position, BUSM's market strength in the United Kingdom resulted from subsequent independent developments.[67] The Commission was more concerned about BUSM's links with the parent's subsidiary DVSG in Germany since patents and know-how were pooled with all USM's companies. The practice which the Commission found objectionable—varying cancellation charges according to whether a new contract was made—did not appear to be a consequence of foreign parent influence.

Rank Xerox and Roche Products differ to a considerable extent from the three companies discussed earlier, as well as from each other. Rank Xerox is a special case that began as an equal joint venture between Xerox, the innovator, and Rank, the partner providing financial, management, and organizational expertise. Success, therefore, was the result of both parties' contributions. Subsequently Xerox became the majority shareholder, with responsibility for long-term planning, pricing policy, patents and licensing, major sales development, and other issues not immediately relevant to U.K. market dominance. Rank Xerox retained responsibility for day-to-day management, but was subject to strong central control from the parent. The practices found to be adverse were the result of the two companies' joint efforts, even though in a formal sense effective control passed to Xerox.[68] The problem for the Commission was that of finding an effective antitrust remedy to the patent licensing practice rather than the existence of foreign ownership.

Roche Products was also a special case in that it arose from the failure of the price control mechanism operated by the Department of Health and Social Security for drug purchases.[69] The investigation was confined to Roche's pricing policies and profit level, but the Commission also examined the patent behavior of the parent and the transfer prices for active ingredients sold to the U.K. company as well as other aspects of foreign-parent influence.[70] While the Commission could not express an opinion on these issues because of the form of the references,[71] it was reasonably clear that Roche Products was subject to very strong central direction from a foreign parent whose policies did not take the U.K. public interest into account. Specifically, the transfer prices and charges for group overheads resulted in excessive prices and profits with no tax payments, although a precise determination of how excessive was not possible because of the unwillingness of the parent to supply relevant data.[72] Therefore, while the Commission could not comment on the control exercised by the parent, it had serious doubts about the balance of advantage derived from the foreign ownership of the U.K. subsidiary.

The purpose in analyzing these cases was to see whether they provided evidence that foreign ownership contributed toward the market dominance of the subsidiary and hence, its ability to follow policies contrary to the U.K. public interest. Except for Roche Products, the Commission's reports seem to suggest that where the subsidiary has been long established the initial advantages accruing from a foreign parent are no longer crucial; instead dominance appears to be related to the U.K. subsidiary's ability to survive over a long period. This ability derives from skills developed in the U.K. market. There are, of course, continuing links with parent companies from which the subsidiaries obtain advantages, but these do not appear to be the most important factor. Thus, these cases do not raise a strong presumption that foreign ownership is itself detrimental. However, the Roche case, along with the others, shows that the potential for detriment exists because of the nature of the parent-subsidiary relationship, for example in patent licensing, transfer pricing, or direction of export activity. This then raises the question whether existing U.K. antitrust remedies are adequate to deal with actual problems that exist or may arise in the future.

Before discussing the three references which illustrate the areas where antitrust enforcement loses its bite, it is useful to state that insofar as structure and behavior in the United Kingdom are concerned, the government's remedial powers, with the exception of the control of advertising, are quite strong. A monopoly may be dissolved, or prices and most other aspects of conduct can be regulated by order if necessary. Examples of successful remedial action are Kodak, where the practices ceased, and Proctor and Gamble, whose prices for detergents were regulated.[73]

The three references that raise enforcement problems are Potash Ltd., Roche Products, and Rank Xerox. In the first, the U.K. company was virtually a sales agency for overseas owners of potash supplies (a commodity that is not naturally available in the United Kingdom), and there was no direct way of influencing their policies since the power to regulate price was not instituted until 1965. The remedial recommendation was that U.K. firms should seek and develop other sources of supply and U.K. aggregate buying power should be used to improve bargaining. Aggregation of buying power did occur and, subsequently, other sources of supply became available. Nevertheless, this case illustrated the difficulty of influencing the policies of companies operating outside U.K. territorial jurisdiction.

In the Rank Xerox case the Commission found that the company's patent licensing policy was against the public interest. According to the 1949 Patent Act,[74] an adverse finding could lead to granting a compulsory patent license. However, this remedy would not have extended to the U.S. parent of Xerox. The Commission was content to rely on a 1975 consent order issued by the U.S. Federal Trade Commission;[75] however, this order contains a potential flaw in that Xerox is not obliged to provide know-how for uses outside the United States. It remains to be seen whether this is a serious barrier to a potential entrant.

The *Roche Products* case[76] raised the problem of obtaining information and cooperation from companies outside the U.K. jurisdiction. In this in-stance, the reluctance of Hoffmann La Roche, the parent, to cooperate did not prevent the Commission from discovering enough information to reach valid conclusions about the company's prices and profits. However, if this information had not been available or of no consequence, the Commission may not have been able to assess the reasonableness of prices and profits.[77]

CONCLUSIONS ON TRANSNATIONAL CORPORATIONS AND THE MONOPOLIES REFERENCES

At the beginning of this section three questions were posed: (1) whether foreign ownership increased the market power of U.K. subsidiaries, (2) whether foreign ownership had operated to the detriment of the U.K. public interest, and (3) whether existing antitrust remedies were adequate to deal with this type of market power. Analysis of the references suggests the following conclusions:

1. There is a relatively high incidence of foreign-owned companies in the concentrated industries which were investigated by the Monopolies Commission;
2. Direct foreign investment was a method of transferring a product, technology, or other advantages possessed by the parent to the U.K. subsidiary and initially these were crucial for making successful entry;
3. The activity of the subsidiary after entry, however, (particularly its responses to existing structure and behavior) were major factors in developing market power—in the long run these became more important influences than the links with the parent; and
4. There is no compelling evidence that foreign ownership has resulted in detriments to the public interest through abuse of market power. However there are cases where such detriment may occur, and U.K. remedial powers are limited because of jurisdictional limitations.

MERGERS POLICY AND TRANSNATIONAL CORPORATIONS

When merger control was introduced in the United Kingdom in 1965 it was intended only to apply to a relatively small proportion of corporate acquisitions which had a potential for detriment to the public interest. The reasons for this have been outlined earlier;[78] these continued to determine enforcement of policy until 1973. Mr. Antony Crosland, then president of the Board of Trade in the Labour administration, expressed what was a widely held view in a speech on monopolies and mergers policy in June 1969: "I believe that in Britain, at this moment in time, the trend to mergers has been on balance beneficial. . . ."[79] The same attitude was expressed, but in different

Table 11.
Mergers Subject to Control 1965–78 (excluding newspapers)

Period	No.	Assets Acq. £ Billion	Type of Merger Percent, Assets Horiz.	Vert.	Div.	Market Share Created in Horizontal Mergers	
1965–69	466	16.6	88	5	7	25–50	45
1970–73	438	12.8	65	4	31	51–80	28
1974–78	887	34.2	66	7	27	81–100	15
						NA	12
Total	1791	63.6	72	6	22		100

Source: Graham, *Trends in U.K. Merger Control,* 14 Trade and Industry 525 (1979).

words, by the Conservative secretary of state and president of the Board of Trade, Mr. John Davies, in the House of Commons in December 1970. Explaining how he intended to implement policy he said, "I would make a reference of a merger only if I considered that competition in the relevant market would be restricted to a damaging degree as a result of that merger."[80]

A change came, however, in the early 1970s as the evidence of concentration accumulated and questions began to be raised as to when, or whether, the economic benefits of the merger wave would appear. Reviewing policy in November 1973 the minister for trade and consumer affairs, Sir Geoffrey Howe, said "no Government could be expected to see the process of concentration continue unquestioned indefinitely at the sort of pace which we have seen over the last decade . . . so I believe the facts already justify a more active use of our merger powers than has previously been the norm. . . ."[81]

Table 11 provides a historical depiction of enforcement policy by giving data on the mergers subject to the legislation from August 1965 to 1978. Notable features are the continuing rise in the annual number of mergers and their size, the absolute (although diminished) importance of horizontal merger, and the substantial increase in concentration which resulted. Until 1973 inward investment accounted for about 10 percent of all mergers, but in recent years the proportion has risen to 15 percent.[82]

The benign attitude towards mergers which shaped policy from 1965 to 1973 is illustrated by the rate of reference to the Monopolies Commission. Up to the end of 1973, 904 mergers were considered by the Mergers Panel and 25, or 2.8 percent, were referred for investigation.[83] From 1973 to 1978, the number of references increased to 28, a rate of 3.2 percent. Some characteristics of those, and the Commission's findings, are set out in table 12. The body of evidence that has now been accumulated, although limited in some respects, suggests some tentative conclusions. It appears that an adverse

Table 12.
References to the Monopolies Commission and Its Conclusions 1965–78.
Number (excluding newspapers)

Type	Public Interest Against	Public Interest Not Against	Abandoned	Total	Referral Rate Percent
Horizontal	12	9	9	30	2.3
Vertical	3	3	—	6	5.1
Diversified	3	6	8	17	4.3

Source: Graham, *Trends in U.K. Merger Control,* 14 TRADE AND INDUSTRY 525 (1979).

finding is more likely for a horizontal merger than for a vertical or diversified merger. Indeed, for diversified mergers the likelihood seems to be against an adverse judgment.[84]

THE MONOPOLIES COMMISSION'S FINDINGS ON INWARD INVESTMENT MERGERS

Although there have been only six references of mergers which were substantial acts of inward investment, the Commission's findings are a valuable supplement to the evidence derived from the monopoly investigations. All six were horizontal mergers. Table 13 contains relevant details.

Although the sample is limited, it suggests that substantial detriment to the U.K. public interest was not identified with such inward investment, with one exception. A brief description of the Commission's frame of analysis and how it was applied in the cases of Dentsply Int. Inc./AD International, and Eurocanadian Ship-holding/Furness Withy and Manchester Liners illustrates this more clearly. In order to evaluate the effect of foreign ownership of U.K. firms, the Commission developed an analytical framework that took into account the major issues raised by inward investment. Certain elements were assigned a specific weight or degree of importance depending on the facts in each case. These are the effects: on competition in the U.K. market, on supply and service to consumers or customers, on research and development, on the management and efficiency of the U.K. company and its employees, on the location of manufacturing, and on the balance of payments.[85] The Commission is required to assess advantages and disadvantages under each heading and reach a conclusion. It does not regard foreign ownership as a per se detriment; as it said of Dentsply "we see no reason to think that the fact that Dentsply is a multinational foreign based company will in itself be contrary to the public interest."[86]

In the proposed merger of Dentsply and AD International, the two companies had a trading relationship extending back to 1900 when ADI's prede-

Table 13.
Inward Investment Mergers Considered by the Monopolies Commission[a]

Name	Date of Report	Foreign bidder	Finding
1. Dental Manufacturing/ Dentists Supply of New York/Amalgamated Dental	September 1966	U.S.	Not adverse (did not take place)
2. Dentsply Int. Inc./ AD International	June 1975	U.S.	Not adverse
3. H. Weidman/BS	August 1975	Switzerland	Not adverse
4. Eurocanadian Shipholding/Furness Withy and Manchester Liners	October 1976	Bermuda	Adverse
5. Fruehauf Corp.; Crane Fruehauf	August 1977	U.S.	Not adverse
6. FMC/Merck/ Aliginate Industries	July 1979	U.S.	Not adverse

a. There is some duplication as the first and second references involved the same two companies, Dentsply Int. Inc. (formerly Dentists Supply of New York) and AD International, the U.K. company which changed its name from Amalgamated Dental.

cessors obtained from Dentsply an exclusive franchise for teeth and other dental products for Europe and other territories. According to renewed agreements, ADI was prohibited from manufacturing teeth.[87]

To determine the public interest consequences, the Commission collected evidence under each of the above headings from customers, the dental profession, government departments, and other sources. The Commission's concluding remarks indicate how an inward investment merger is assessed:

> The only potential detriment to the public interest that we found in the proposed merger is the possibility that Dentsply might use its substantial market power to adopt unacceptable pricing policies in the United Kingdom. However, we do not consider any such detriment can be regarded as an over-riding argument against the merger bearing in mind the characteristics of Dentsply and the restraints on such policies, including potential competition from abroad. In our view the possibility is outweighed by the advantages likely to arise under several heads. These include the following:
>
> *a*) benefit to ADI's research and development in the United Kingdom;
> *b*) improvement of the management, general efficiency and productivity of ADI;

> c) gain to the United Kingdom balance of payments through imports and increased exports.
>
> Moreover, we think there would be some detriment to the public interest if the merger did not take place in that there would be an adverse effect on ADI's overseas business and on the United Kingdom balance of payments.[88]

Substantially the same framework was used for the merger of Eurocanadian Shipholding, Furness Withy and Manchester Liners.[89] The latter companies were prominent in liner operations and voyage charters, with Manchester Liners carrying a substantial proportion of U.K. and Canadian trade. Manchester Liners was also the subsidiary of Furness Withy and was the main user of the port of Manchester and the Manchester Ship Canal. Both participated in the shipping conferences which regulated freight rates on their routes.

Eurocanadian was a Bermuda-based company, but was originally of Canadian registration. It operated in the Europe/Canada trade and was linked in a complex grouping named Cast which provided shipping and other services on other routes. It did not participate in shipping conferences.

In these mergers the consequences of foreign ownership were given more weight because of the international nature of Eurocanadian and its parent Cast, and the possibility that their commercial interests might not always coincide with the U.K. public interest. The Commission issued its judgment on the merger with Manchester Liners (ML), saying:

> ML gives a first class service to British exporters and shippers generally. Transfer of control to ECS would be likely to impair this service. It might well deprive the British shipper of his present choice between a conference and nonconference service. ML's operations would become closely integrated with those of the Cast group and, because of the widely differing nature and objectives of the two groups as they are at present, ML would suffer substantial disruption and damage. The economies that might be obtained by the Cast group from a merged North Atlantic container operation would compensate neither for this nor for the shift in the centre of control abroad. The effects of the merger on the balance of payments and on employment would be more likely to be unfavorable than favorable. ECS's proposals to use larger container ships would be likely at least to accelerate any substitution of Liverpool for Manchester as the base port for ML's North Atlantic operations and we think this would be harmful to regional interests.[90]

CONCLUSIONS ON INWARD INVESTMENT MERGERS

To date there have been relatively few references of foreign-initiated mergers to the Monopolies Commission; one could conclude that most of these did not appear to involve the potential for substantial detriment. The Commission's findings support this conclusion; in only one out of six such mergers did the Commission conclude that foreign ownership would be adverse to the U.K. interest. In the other mergers the potential for benefits was considered favorable, thus lending further support to the generally benign policy stance toward mergers.

RECENT DEVELOPMENTS

Earlier in this article mention was made of the Green Paper, *A Review of Monopolies and Mergers Policy.*[91] This report was the result of an internal committee of officials set up by the previous government to appraise the competition laws in the light of the growth of corporate concentration and the United Kingdom's entry into the EEC. The committee made recommendations on mergers, monopolies, and uncompetitive practices. Its main suggestion regarding mergers was that U.K. policy should move away from a benign attitude toward one of neutrality under which mergers likely to have a "significant effect" on competition would be subject to much more critical scrutiny. Nonstatutory guidelines would define *significant effect* in a manner similar to the following. Horizontal mergers that resulted in a market share of at least 25 percent of sales or production in a U.K. market of £4 million or greater or where the assets to be acquired were £1 million or greater, would be subject to increased scrutiny. Similar guidelines would apply to vertical mergers where the acquirer or acquired company had a market share of at least 25 percent and the acquirer was taking over a significant supplier or customer. Conglomerate mergers would also be considered to have a significant effect on competition where the acquired company had a market share of at least 25 percent, or the worldwide turnover of the combined enterprise was £350 million or more of which a significant proportion arose in the United Kingdom and where the gross assets to be acquired were £16 million or more.[92] When applied to recent experience these guidelines suggest that the effect would be to increase the existing rate of merger references from 3 percent to 12 percent. If implemented, these changes would represent a very considerable shift in emphasis and would effectively mark the end of the previous policy that presumed mergers to be beneficial to the U.K. economy.

The main policy proposals on monopoly were that there should be a continuing program of references to the Commission and that oligopoly be defined in terms of market share held by the largest four or five firms.[93]

The committee identified another problem area—uncompetitive practices by dominant firms. Investigations by the Monopolies Commission had shown consistent adverse effects from behavior which created or strengthened entry barriers, so it was proposed that further consideration be given to devising effective remedies, particularly where such practices occurred in small and local markets.

This proposal has been taken up by the new government in its Competition Act, now before the House of Commons, and which is a first stage in a longer term development of policy.[94] Under the Act, the director general of fair trading, after investigating complaints of uncompetitive practices and publishing a report, would have power to allow undertakings on the condition that firms will change their behavior.[95] If they fail to give satisfactory assurance, he may then refer the practice to the Monopolies Commission for a judgment whether such practices are against the public interest.[96]

The Act also provides for new power to investigate nationalized industries and certain other publicly owned bodies.[97] This would strengthen the review procedures and enables the Monopolies Commission to examine and report on their efficiency, costs, and services to consumers, as well as determine whether a monopoly has been abused. The secretary of state would have power to make remedial orders. Another provision would give the Office of Fair Trading the power to investigate prices or charges of major public concerns.[98]

CONCLUSION

This article has reviewed U.K. legislation that may be used to control the development of corporate concentration, and in particular how it has been applied to transnational corporations investing in the United Kingdom. The foreign ownership of industry arouses fears in developed and developing countries alike. There is concern that national sovereignty and independence may be undermined, economic growth restricted or distorted, and consumers, workers, and national entrepreneurs exploited by the alleged superior market power of the foreign investor. The United Kingdom as a highly developed economy has been both a major recipient and provider of foreign investment and thus has a considerable body of accumulated experience with it. As regards foreign investment in the domestic market the available evidence does not suggest that the United Kingdom economy has been significantly exploited. Direct foreign investment has been taking place throughout the twentieth century and has brought substantial economic gains in the form of new products, new technologies, greater per capita investment (particularly in the less-favored regions), and gains to the balance of payments. Although direct foreign investment tends to locate itself in concentrated industries, U.K. firms also share the positions of dominance so that it is likely these industries would also be concentrated in the absence of foreign investment. To ensure that the undoubted gains from foreign investment are equitably shared, the United Kingdom has traditionally relied on exchange control (now abandoned), an effective tax system, and competitive markets as the main regulating mechanism. The evidence from Monopolies Commission investigations of dominant positions, mergers, and foreign ownership does not suggest that transnational concentration results in substantial and frequent failures in competition. Thus, this part of the regulatory mechanism appears to operate effectively. Nevertheless, problems arise, and legislation evolves to deal with those which are capable of remedy by national action.

NOTES

1. Exchange Control Act, 1947, 10 & 11 Geo. VI, c. 14.
2. Industry Act, 1975, c. 68.
3. Industry Act, 1975, c. 68, Part II, Powers in Relation to Transfers of Control of Important Manufacturing Undertakings to Non-Residents.
4. Oil Taxation Act, 1975, c. 22.
5. SECRETARY OF STATE FOR INDUSTRY, *Foreword,* DEPARTMENT OF INDUSTRY, INTERNATIONAL INVESTMENT, GUIDELINES FOR MULTINATIONAL ENTERPRISES, Cmnd. No. 6525 at iv (1976).
6. M.D. STEUER, P. ABELL, J. GENNARD, M. PERLMAN, R. REES, B. SCOTT & K. WALLIS, THE IMPACT OF FOREIGN DIRECT INVESTMENT ON THE UNITED KINGDOM (1973).
7. *Id.* at ¶¶ 1.44–1.51.
8. *Id.* at ¶¶ 5.32–5.49.
9. EMPLOYMENT POLICY Cmnd. No. 6257 (1944).
10. Monopolies and Restrictive Practices (Enquiry and Control) Act, 1948, 11 & 13 Geo. VI, c. 66.
11. Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. II, c. 68.
12. J. D. GRIBBIN, THE POSTWAR REVIVAL OF COMPETITION AS INDUSTRIAL POLICY (Government Economic Service Working Paper No. 19, 1978).
13. *Id.*
14. *Id.*
15. *Id.*
16. Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. II, c. 68.
17. Monopolies and Restrictive Practices Act, 1948, § 14. This required the Commission to judge whether the industry or the firm's arrangement secured the efficient production and distribution of goods, enabled markets to work efficiently, encouraged technical improvements and new enterprise, promoted a balanced regional distribution of resources, and promoted exports.
18. *E.g.,* pre-1956 cartel reports, and post-1956 dominant firm reports, as in The Monopolies Commission, *Wire and Fibre Ropes,* H.C. 2 (1973).
19. Restrictive Trade Practices Act, 1956, c. 68.
20. Section 21 of the 1956 Act provided for seven beneficial effects which could be pleaded. A further description together with cases is given in R.B. STEVENS and B.S. YAMEY, THE RESTRICTIVE PRACTICES COURT (1956).
21. *See* Elliott and Gribbin, *The Abolition of Cartels and Structural Change,* in 2 WELFARE ASPECTS OF INDUSTRIAL MARKETS, STUDIES IN ECONOMICS (A.P. Jaquemin & H.W. DeJong ed. 1977).
22. *See Reports of the Registrar of Restrictive Trading Agreements* (1973).
23. *See* D. SWANN, D. O'BRIAN, W. MAUNDER & W. HOWE, COMPETITION IN BRITISH INDUSTRY (1973).
24. *See* text accompanying notes 31–36 *infra.*
25. *See* table 6, *infra.*
26. DEPARTMENT OF PRICES AND CONSUMER PROTECTION, A REVIEW OF MONOPOLIES AND MERGERS

POLICY, Green Paper, Cmnd. No. 7198 (1978).

27. The policy recommendations will be reported later.
28. *Supra* note 26, at 11, table 4.
29. *I.e.*, mergers by which a foreign-owned company enters the U.K. market, illustratively by acquiring a U.K.-owned firm.
30. *Supra* note 26.
31. Monopolies and Restrictive Practices (Enquiry and Control) Act, 1948, 11 & 13 Geo. VI, c. 66.
32. Section 3 of the Monopolies and Restrictive Practices Act of 1948 permits the market to be defined in terms of sales or production.
33. The Monopolies Commission, *Supply and Export of Matches and Match-Making Machinery*, H.C. 161 (1953).
34. The Monopolies Commission, *Supply of Certain Industrial and Medical Gases*, H.C. 13 (1956).
35. *See* table 8, *infra*.
36. *E.g.*, chemical fertilizers, electrical equipment for motor vehicles, and wholesale petroleum.
37. BOARD OF TRADE, MONOPOLIES, MERGERS AND RESTRICTIVE PRACTICES, Cmnd. No. 2299 (1964).
38. Monopolies and Mergers Act, 1965, c. 50.
39. *Id.* at § 3(6).
40. Under § 6(2) of the 1965 Act, the Monopolies Commission was required to satisfy itself that a merger subject to the legislation had taken place, and decide whether it "operates or may be expected to operate against the public interest. . . ." *See also* note 17, *supra*.
41. Section 3 of the Monopolies and Restrictive Practices (Enquiry and Control) Act of 1948 laid down the requirement of one-third share of the market. This applied to monopolies and mergers until reduced to one quarter in the Fair Trading Act of 1973.
42. *See* Monopolies and Mergers Act, 1965, c. 50, § 7.
43. *Id.* at § 6(9).
44. Section 6(10), of the Monopolies and Mergers Act of 1965, establishes that the remedial powers apply only if the Commission has found the merger or proposed merger to be against the public interest. It should be noted that Parliament has the ultimate authority to grant relief by enacting legislation.
45. Fair Trading Act, 1973, c. 41.
46. *Id.* at § 1.
47. References of newspaper mergers is automatic if the continued circulation will total 500,000 or more copies per day; so far the Commission has not judged any to be detrimental.
48. This is because companies in concentrated industries are larger than those in less concentrated industries, and because there is a considerable concentration of exports and foreign investment; *i.e.*, the twenty largest manufacturing concerns account for 25 percent of U.K. exports.
49. *E.g.*, through control of raw materials or technology. In only one case, asbestos, was the raw material supply controlled from abroad by a subsidiary.
50. *See, e.g.*, the activities of those multinationals exporting Champion spark-plugs, Kellogg's breakfast cereals, and Kodak products.
51. *E.g.*, Kodak and United Shoe Machinery entered at the end of the nineteenth century; Nabisco, as the Shredded Wheat Company, in 1908.
52. *See, e.g.*, the joint ventures of Xerox and Rank to develop the plain paper copier market, and Mallory with its battery technology.
53. *See* The Monopolies and Mergers Commission, *Supply in the United Kingdom of Frozen Foodstuffs for Human Consumption* H.C. 674 (1976). Paragraphs 186–89 set out

the facts on the entry of Findus and its acquisition by Nestlé.

54. *See* The Monopolies and Mergers Commission, *Supply in the United Kingdom of Copying Materials Sensitized with One or More Diazonium Compounds* H.C. 165 (1977). Paragraphs 83–85 describe the acquisition of Hall Harding by GAF, and ¶¶ 103–6, the acquisition of Admel International by Addressograph Multigraph.
55. *See* The Monopolies and Merger Commission, *Supply and Exports of Machinery for the Manufacture of Footwear* ¶¶ 72, 103, and 104, H.C. 215 (1973); The Monopolies Commission, *Supply and Processing of Color Film* ¶ 43, H.C. 1 (1966); The Monopolies and Mergers Commission, *Supply of Indirect Electrostatic Reprographic Equipment* ¶ 51 H.C. 47 (1976).
56. *See* The Monopolies and Mergers Commission, *Supply of Ready Cooked Breakfast Cereals* H.C. 2 (1973).
57. *Frozen Foodstuffs, supra* note 53.
58. *Diazo Copying Materials, supra* note 54.
59. *See* table 9 *supra.* In the case of Kellogg's, the Commission thought that while profits were not then excessive they could become so in the future.
60. However, the reference of Roche Products was limited to an examination of prices, so there could be no finding about the monopoly. This case is discussed more fully *infra.*
61. A U.K. company, British Lighting Industries, had the highest share. Its market behavior was conditioned by a history of restrictions with occasional competition.
62. In the U.K., Proctor and Gamble undoubtedly obtained substantial advantage from the parent with respect to product development, management, and marketing techniques. *See* The Monopolies Commission, *Supply of Household Detergents* ¶ 10 H.C. 105 (1966).
63. Kellogg's is excluded because the Commission did not examine the parent subsidiary relationship, and, in any case, no practices were found to be against the public interest.
64. The Monopolies Commission, *Supply of Electrical Equipment for Mechanically Propelled Land Vehicles* H.C. 21 (1963); *Color Film, supra* note 55; and *Machinery for the Manufacture of Footwear, supra* note 55.
65. *Electrical Equipment, supra* note 64.
66. *Color Film, supra* note 55, at ¶ 252 *(footnote omitted).*
67. *Machinery for the Manufacture of Footwear, supra* note 55, at ¶¶ 66–104.
68. *Supply of Indirect Electrostatic Reprographic Equipment, supra* note 55, at ¶¶432–47. Practices against the public interest were restrictive patent-licensing, rental-only policy, group-pricing plan, and the tie-in of toner.
69. The Monopolies Commission, *Supply of Chlordiazepoxide and Diazepain* ¶¶ 18, 19, 172–81, H.C. 197 (1973).
70. *Id.* at ¶¶ 48–52, 206–17.
71. Under § 6(1) (a) of the 1948 Act, a reference could be limited to specific aspects of conduct. This meant that the Commission had only to consider those questions contained in the reference. In the case of Roche it was only required to decide on the public interest consequences of the level of prices.
72. *Supply of Chlordiazepoxide and Diazepain, supra* note 69, at ¶¶ 125–70, 208.
73. Undertakings were given by both companies to the Board of Trade to achieve the necessary remedies.
74. Patents and Designs Act, 1949, 12 & 13 Geo. VI, c. 62.

75. *Supply of Indirect Electrostatic Reprographic Equipment, supra* note 55, at ¶¶ 148–61.
76. *Supply of Chlordiazepoxide and Diazepain, supra* note 69.
77. Once it had reached a conclusion, the order-making powers were sufficient to enforce the recommendation that prices of Librium be reduced to 40 percent of their previous level and Valium to no more than 25 percent.
78. *See* text accompanying note 37 *supra.*
79. Green Paper, *supra* note 26, at 153–55 (annex H. "Extracts from Ministerial Statements on Mergers Policy").
80. *Id.* at 155.
81. *Id.* at 156–61. *See also* J.D. GRIBBIN, *supra* note 12, and Green Paper, *supra* note 26, for a more detailed review of the change in merger policy, and the economic evidence thereof.
82. *See* Graham, *Trends in U.K. Merger Control,* 14 TRADE AND INDUSTRY 525 (1979).
83. *See* Gribbin, *The Operation of the Mergers Panel since 1965,* 14 TRADE AND INDUSTRY 70 (1974).
84. *See* table 12, *supra.* This conclusion, however, is tentative because a high proportion of such mergers were abandoned by the parties once a reference was made.
85. *See, e.g.,* The Monopolies and Mergers Commission, *Dentsply International Inc. and A D International Ltd.* ¶ 193 H.C. 394 (1975).
86. *Id.*
87. *Id.* at ¶ 52.
88. *Id.* at ¶¶222–23.
89. The Mergers and Monopolies Commission, *Eurocanadian Shipholdings Ltd. and Furness, Withy and Co. Ltd. and Manchester Linen Ltd.* H.C. 639 (1976).
90. *Id.* at ¶ 424. Because FW was the parent of ML the judgment influenced the Commission conclusions on that merger. It thought that the possibilities of conflict of interest between FW and Cast would be likely to lower the efficiency of FW. As Eurocanadian had acquired sufficient shares in FW to materially influence its policy, the remedy was that the shareholding be reduced over a two year period to not more than ten percent and in the meanwhile Eurocanadian should not exercise its voting rights in respect to the excess over 10 percent. This recommendation was accepted.
91. Green Paper, *supra* note 26.
92. *Id.* at ¶ 5.20.
93. *Id.* at ¶¶ 5.24–5.31.
94. Competition Act, 1980, c. 21.
95. *Id.* at §§ 2, 3, and 4.
96. *Id.* at § 5.
97. *Id.* at §§ 11 and 12.
98. *Id.* at § 13.