To Master Stanley from Peter 21/6/05

Simmons & Simmons

The Changing Face of Competition Law[1]

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My first encounter with competition law was going along to court, soon after joining Simmons & Simmons in 1973, to attend an application by a pharmacist detained in Pentonville Prison for release from his committal for contempt of court. Why was he there? He had repeatedly sold medicaments below the stipulated minimum retail price. Pharmaceuticals, as you may recall, were in those days exempt from the prohibition in the Resale Prices Act 1964. So there is the changing face of competition law. In the 1970s we sent *price cutters* to gaol; now we send *price fixers*.

I could stop there but you might feel slightly short changed.

The rather pretentious title of this lecture is intended to cover thirty years of change in EC and UK competition law. It is deceptively objective. What I will actually cover is change from my point of view as an observer and occasional participant in the developing case law of our fascinating subject.

My theme, if I have one, is that we have seen profound change in the application of competition law, certainly in the scale of activity; but at the same time there are some constants and a cyclical pattern in which particular elements are re-presented. This I suppose is the main justification for professional longevity – the ability to spot a genuine new development from a recycled element.

With this in mind, I propose to look at some of the older cases of which I have first hand knowledge (or, more accurately, a dim recollection) and to see if they can tell us anything about "modern" (or possibly "modernised") competition law.

First of all it is necessary to cast our minds back to the legal framework in the early 1970s. In the EC (then called the EEC) Articles 85 and 86 (as they were) were still comparatively new and untried. Until 1972 English was not a working language of the Community and all cases and legislation were accessible mainly in French. There were some unofficial translations in the CMLRs. Recent cases included some of the landmark rulings - for Art 85, ICI v Commission (Dyestuffs)[2] Brasserie de Haecht No. 1[3] and No. 2[4] and, for Art 86, Commercial Solvents[5] and Continental Can[6]. Secondary legislation was essentially Council Regulation 17/62[7] and the block exemption for exclusive dealing Commission Regulation 67/67[8]. EC law was relatively small in compass; its potential was obviously large - the main tenets of direct applicability and supremacy were set out if not established - but for the UK, at least, it was something foreign.

UK competition law was very much an administrative system. In terms of institutions, the OFT itself only dates from 1973 when the Director General took over from the Registrar of Restrictive

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[1] Delivered as a lecture at Simmons & Simmons on 24 June 2003. Any opinions are those of the speaker alone, who takes full responsibility for them.
[2] Case 48/69 [1972] ECR 619
[3] Case 23/67 [1967] ECR 407
[4] Case 48/72 [1973] ECR 77
[5] Cases 6,7/73 [1974] ECR 223
[6] Case 6/72 [1973] ECR 215
[7] JO 1962 13/204
[8] JO 1967 57/849

Trading Agreements. The Monopolies Commission had become the MMC in 1965 when it acquired powers to control mergers. The Restrictive Trade Practices Acts of 1956 and 1968 operated on a registration basis with the Restrictive Practices Court deciding whether an agreement passed through public interest "gateways". After the major judgments of the 1950s and 1960s few if any cases went to trial; business and lawyers learnt to live with and around the Act. Merger control was also based on a public interest test with competition as just one of the factors. The MMC reports on, say, the proposed Barclays/Lloyds/Martins Bank mergers (1968)[9] or Beecham/Boots/Glaxo (1972)[10] are far removed in terms of content and approach from what we have today. The same goes for monopoly control; the MMC considered matters in great detail and Ministers sometimes took action as a result.

US Antitrust law was something else altogether; feared but not well understood and against which business and HMG could occasionally unite.

The Beecham Antitrust Case

The first major case I was involved in (in a very modest capacity) was the Beecham Antitrust Case[11]. This was well under way when I joined Simmons & Simmons in 1973 and was a major factor in the activities of what later came to be known as 'Department 9' for several years thereafter. The Department of Justice had brought proceedings against Beecham Group and its US licensee Bristol-Myers Company for breach of the Sherman Act in respect of licensing agreements for ampicillin, a revolutionary semi-synthetic penicillin. Most of the individual States joined in and the compensation claimed was large by any standards. A charge of fraud on the Federal Patent Office was added for good measure. Beecham and Bristol, having been partners (thus giving rise to the allegations) had by this time fallen out and were in a state of corporate enmity that complicated the defence somewhat.

Large numbers of lawyers were involved both here and in the US and much paper. Indeed the main activity in the UK was searching through countless files in the Beecham vaults for discoverable documents. Important issues of relevance, sensitivity and privilege were considered with a suitable mixture of method and terror.

Eventually in 1979 there was a settlement of the Beecham actions, although the case against Bristol-Myers continued a little longer. "Better a bad settlement than a good law suit", as the Spanish proverb goes; Beecham's share price was marked down as a result – the analysts feared a loss of royalty income as its ampicillin rights were diluted: but actually it was quite a relief for the company, since when through mergers first with Smith Kline and later with Glaxo, it has operated successfully in the USA.

What were the lessons? Some things haven't changed much – the predominance of documents and the importance of rigorous methodology in litigation. The need to organise and motivate – and feed – large teams of lawyers. These things do not change. Photocopying – there was much photocopying. But it was the analogue age; there was no electronic document management or retrieval; all the sorting was manual with colour coded stickers; and there were no emails to scrutinise. A long way from the Microsoft case. Indeed we were looking at gelatine copies in many cases – the best document retention system there is as they fade away after 5 years.

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[9] **HCP (1967-68) 319**
[10] **HCP (1971-72) 341**
[11] **In re Ampicillin Antitrust Litigation, United States v Bristol-Myers Co. Beecham Group Limited and Beecham Inc. (M.D.L. No. 50. Misc. No. 45-70) 82 F.R.D. 62 (1979-2 Trade Cases p62,935)**

More seriously, this was in the days when these cases had a diplomatic impact. At one stage the British Government invoked the then current blocking legislation (the Shipping Contracts and Commercial Documents Act 1964[12]) to prevent Beecham handing over documents to the Court in the US. Beecham had to lobby the British Government to lift the ban, otherwise it would have had adverse findings of fact made by the Court. This all is a far cry from the enthusiastic co-operation between anti-trust authorities nowadays with co-ordinated investigations in multiple jurisdictions. And as I recall, there was no mention of any leniency (although a condition of the settlement was that Beecham provided assistance to the continued case against Bristol-Myers).

The Ravenseft Case

A complete contrast was Re. Ravenseft's Application[13], an application for declarations in the Chancery Division heard in 1977 by Mr Justice Mocatta. This was a remarkable victory, but one where the argument that prevailed was put not by us, but by counsel for the DGFT. Indeed, had Alice in Wonderland ever been "modernised" then Ravenseft would surely have figured.

In 1973 the Fair Trading Act provided for, but did not enact, the extension of the Restrictive Trade Practices Act from goods to services. In 1976 the Restrictive Trade Practices (Services) Order[14] extended the RTPA to all services with very limited exclusions and exceptions. There was widespread concern about covenants in leases – against use of the premises for particular types of trade or even just to insure or to maintain and decorate. Could these not be restrictions in respect of "the form or manner in which designated services are to be provided" or "the extent to which or the scale (if any) on which designated services are to be made available, supplied or obtained" or "the persons or classes of persons for whom or from whom or the areas or places in or from which designated services are to be made available or supplied or are to be obtained" – you will recall the late lamented limpid prose of the statute – and if the tenancy were joint, were not these restrictions "accepted by two or more parties" or even, dare we say "as between two or more persons"? Thousands of agreements might need to be registered, inundating the OFT with cartloads of paper.

This latter consideration may have influenced the cordiality with which the OFT supported the Ravenseft application and the enthusiasm with which it argued our case for us. Our counsel had suggested, somewhat heroically, that the RTPA simply did not apply to leases. OFT could not quite stomach such an open-ended proposition and argued instead, by analogy with restraint of trade[15], the RTPA did apply to leases but that a "relevant" restriction could not exist where a limited freedom was granted to do something previously prohibited ("opening a previously closed door")[16]. As a lessee had no entitlement prior to the grant of his lease, conditions in that lease could not be restrictions. These could only arise in the case of sale and lease back where the previous freedom was unfettered. To deal with that situation OFT argued that only where there was a trading "nexus" between the landlord's business and the tenant's business would a lease be caught by the RTPA.

The judge concurred; and also accepted that the grant of a lease itself was not the supply of a service. This judgment, which was applicable to other sectors, particularly the licensing of intellectual property, was a significant sanity check on the ambit of the RTPA in relation to services.

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[12] **See now the Protection of Trading Interests Act 1980**
[13] **[1978] 1 QB 52**
[14] **S1 1976/98**
[15] **see Esso Petroleum v Harper's Garage (Stourport) [1968] AC 269**
[16] **see Telephone Apparatus Manufacturers' Application (1963) LR 3RP 462**

It is therefore gratifying to see that the ghost of Ravenseft lives on in the Land and Vertical Agreements Exclusion Order 2000[17], which largely excludes land agreements from the Competition Act 1998 and covers the kinds of restriction which figured in Ravenseft. The exclusion is drafted in more general and principled terms than the old judgment but that reflects the difference between the formalistic statutory approach of the RTPA and the "modern" Chapter I.

The Newspaper Proprietors' Case

Talking of which, we have, have we not, jettisoned the legalistic, formalistic control of restrictive agreements that was so easily evaded and so ridden with anomalies as to be scarcely credible? I am not one of those who loved the RTPA, but I do confess to having been fascinated by it. My most direct experience of its impact was in the Newspaper Proprietors' case of 1985[18] where our client, the managing director of a national newspaper, came to court convinced that a period of detention was likely.

The facts of this case were truly "dire". In those days most newspapers were distributed by rail, and we had rail strikes. One such national strike was called in June 1982 to take effect on 4 July. The cost of switching deliveries to road, temporarily, was very high. The national newspapers, or at least their circulation managers, thought that a cut in the discount paid to wholesalers was a reasonable contribution for wholesalers to make to this situation and that to be effective this had to be done collectively, albeit limited to the duration of the rail strike. So on 15th and 16th July they held meetings at the offices of the Newspaper Publishers' Association at Bouverie Street (not a million miles from the present site of Fleetbank House) to agree this. Someone thought there might be a legal issue; indeed the NPA's solicitors had regularly reminded the Association of the danger of committing contempt of court by breaching various undertakings previously given to the Restrictive Practices Court in 1962 and 1966. So a senior executive telephoned the OFT and spoke to a senior official; explained the agreement and asked for the OFT's blessing (which was not given). But the rail strike was called off over the weekend of 17 and 18 July and the discount cut (although notified to the wholesalers) was never implemented. The newspapers thought no more about it, until they received from the DGFT a demand that they register their agreement and a motion for committal for contempt of court.

This was an extremely serious case, highlighting both the strengths and weaknesses of the RTPA. The evidence was damning and there was a further hint of bad intent – of a possible realisation by the parties that the penalties might be lower than the loss being suffered, and therefore worth paying; a kind of "death ride" had taken over. The realisation that what was being done was wrong suggested the RTPA had some strengths at least. The weakness of the law was that contempt was only committed if the parties concluded an agreement that was either the same as the previously prohibited agreements, or was "to the like effect". The abortive discount cut was certainly not the same as the old agreements, which referred to specific discount rates expressed in £sd. But would it have had the same effect? You may think that the fact that it had never been implemented meant that it could not have any effect – let alone a like effect. However, Mr Justice Lincoln emphasised that the non-implementation of the agreement had no bearing on the question of contempt.

The parties were in something of a quandary; they wanted to argue they had not committed contempt; but equally they wanted to apologise for doing so, or at least for trying their best to do so. The task of squaring this particular circle went to Sir Jeremy Lever and, against expectations, he succeeded.

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[17] S1 2000/310
[18] [1986] ICR 44

The three sets of previously prohibited agreements had been conceded as being in breach of the law without any argument as to their possible justifications. There therefore had been no discussion of their economic effects; and the judge was most reluctant to find contempt of court when he could not compare the effects of the old and new agreements, so that the breach was not sufficiently clear. But he was not pleased at what he had heard: "The respondents' acquittal of contempt owes nothing to their own conduct...and everything to the fortunate outcome of a legal argument".

Our client was so amazed and grateful that he took the assembled party to El Vino's in Fleet Street at 11am (it was shut – we had licensing hours in those days – he had it opened up) and ordered champagne all round. What a relief. He didn't go to jail, and indeed retired soon afterwards.

The case spelt the end of that kind of collective activity in the newspaper business and, with the demise of the old Fleet Street, the bad old days were over. I am not convinced that much would have been achieved by sending those particular individuals to prison – but they came perilously close to it.

How would that case have gone today? It is likely that the authorities would have had a field day. No need for any whistleblowers, the perpetrators had had the consideration themselves to ring the OFT and disclose their agreement. We now have a new cartel offence, with dishonesty as its touchstone and no need for an agreement once made to be implemented. There was plenty of evidence in that case of intent to fix prices and of knowledge of illegality. But none of the presentations I have heard on the new section 188 cartel offence have dealt with the situation where the members themselves ring up the OFT – it could be quite a clever dodge.

Indeed, the similarities between the legally defined offences involved in the Newspapers case and what will be needed under the Enterprise Act are closer than one might suppose. The new criminal offence consists in dishonestly agreeing "with one or more other persons to make or implement, or to cause to be made or implemented arrangements "of specific kinds listed in the statute. The types of arrangement are not cross referenced to the Competition Act or to Article 81 and it is not clear whether Parliament meant the accumulated jurisprudence on these concepts to be applicable to the new offence - the indications if anything are that it did not. So be it, and no doubt the courts will work out a sensible and business-like approach to applying the offence. But in proscribing conduct in a way that deliberately rules out any consideration of the effects of a cartel, have we not come very close to re-enacting a form of the old RTPA for this specific, limited purpose. It may be an excellent idea, but I wonder if it can be characterised as "modern".

Which leads neatly to the subject of modernisation itself.

The Beecham/Parke, Davis case

This was the case of the unwanted exemption. The decision of the EC Commission[19] concerned a research and development agreement for a new prophylactic coronary treatment. It involved Beecham, again, and the US corporation Parke, Davis & Co Ltd. Parke, Davis had achieved jurisprudential fame in an ECJ case in 1968 about free movement of goods[20]; perhaps for that reason this particular Form A/B was picked out for treatment by the EC Commission.

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[19] OJ [1979] L70/11 [1979] 2 CMLR 157

[20] Case 24/67 Parke, Davis & Co Ltd v Probel [1968] ECR 55 [1968] CMLR 47

Under the 1968 Notice on Co-operation Agreements[21] research agreements between non-competitors fell outside the scope of the Article 85 (1) prohibition.

The parties were competitors only in the broad sense that they were both pharmaceutical companies; their product ranges did not overlap. The collaboration consisted in the screening by Beecham scientists of compounds supplied by Parke, Davis. If the compound looked promising for the therapeutic indication needed then it would be further developed and brought to market. There was a supervising committee and if a marketable product emerged there would be world-wide mutual reciprocal royalty bearing licences to each company – except in France and Japan where Parke, Davis had prior exclusive arrangements with other licensees. So the agreement extended the collaboration, in that sense, to sales and distribution.

So what happened? The screening operated for about three years but without much success. Beecham then lost interest and the arrangements were wound down and discontinued with effect from May 1978. The agreement had been notified in 1974; at the time of the Antitrust case, Beecham could not afford to do otherwise. Some time in 1975 the Commission sent the parties a letter indicating a measure of approval but objecting to aspects of the marketing arrangements, particularly the exclusion of France. The Commission also objected to the royalty bearing element of the reciprocal licences, characterising this as profit sharing. There were meetings; and discussions. Eventually the Commission said it intended to grant exemption under Art 85(3) if the objectionable clauses could be deleted The parties went along with this, but by this time, Beecham was losing interest : the agreement was of no interest to it commercially and the process was seen as a waste of time and money. Beecham wrote to the Commission saying they preferred the case closed. But the Commission insisted; it was a positive act underlining their broadly favourable approach to R&D agreements and, although in the form of an exemption, (which implied a prohibition) the indivisibility of Article 85 meant the overall effect was positive..

The parties did not go so far as appealing against a favourable decision; but the decision had orphan like qualities. And of what is it a reminder? Well, surely, modernisation. This decision is much better understood as an early non-infringement decision under Regulation 1/2003[22] on the basis that the prohibition under Act 85(I) was enveloped and extinguished by the fulfilment of the exemption conditions under Act 85(3). There was no need for the Commission to single out this case; it was chosen because the Commission wanted to make a point in that area of the law.

The Supply of Beer Inquiry

The only other case I want to mention specifically is the Monopolies and Mergers Commission Inquiry into the Supply of Beer[23], not only because I was involved in it but also because it was depicted at the time as a turning point in monopoly investigations - almost as the last "great" investigation and it is interesting to see whether either of these descriptions really holds up.

This was a complex monopoly inquiry under the Fair Trading Act. Its origins lay in the previous Monopolies Inquiry[24] and a perception that brewers' tied houses and beer supply agreements were unfinished regulatory business; also an EC block exemption (Regulation 1984/83[25]) had seemed to give a rather favourable legal status to the situation (although the compatibility of

[21] JO 1968 L75/3, [1968] CMLR D5
[22] OJ [2003] L1/1
[23] Cm 651 March 1989
[24] The Monopolies Commission. A Report on the Supply of Beer. HMSO April 1969
[25] OJ [1983] L 173/5

brewers' agreements with EC law is still, twenty years on, in litigation in the ECJ and in national courts[26]).

The Beer Inquiry focused on the supply of beer for retail sale, on brewers' ownership of public houses and on tied sales of beer by property ownership or by loans. It lasted 2½ years, from August 1986 to February 1989 with the Report published in March 1989 - I remember it well. It concluded that the brewers' ownership of pubs and exclusive terms of supply restricted competition, raised prices, damaged independent wholesalers and adversely affected the position not only of pub tenants but also that of free pubs and independent retail chains. The main focus of the remedies was on brewers with tied estates who were required to divest down to a maximum of 2000 pubs. In fact, after a period of considerable uncertainty the Secretary of State accepted a more complex formula which allowed brewers to keep half of the balance of pubs they owned over the 2000 limit. Nevertheless, what followed the passage of the so called "Beer Orders[27]" was a period of unprecedented property sales with about 10,000 pubs coming on to the market and the case remains the foremost, if not the only significant, example of structural remedies imposed in a "market" investigation.

The case was controversial; the Report certainly changed the industry; but perhaps not in the way intended. Better security of tenure for tenants changed fundamentally the relationship with landlords and led to more managed pubs. The divestment of pubs contributed to the emergence of large retail pub chains. UK brewers got out of brewing at an accelerating rate and international brewing groups acquired their businesses and assets. But that elusive measure, the price of beer in pubs, seems to have continued to climb inexorably.

I want to make just 3 points about this case and its possible relevance today.

1. Scale

The work involved was massive - the industry comprised more than 200 brewers in the UK and at one stage it looked as if the inquiry was devouring its own tail - data received at the start needed to be updated to be useful at the finish. But in that respect it does not appear to have differed greatly from the scale of the recent SME Banking[28] Inquiry; and it all went into one 500 page volume! It cannot be said to have been "bigger" than modern inquiries.

2. Organisation

The rôle of the Brewers' Society, with hindsight, was controversial. It was a "representative respondent" under the FTA and co-ordinated joint responses by its members, although the larger brewers also responded on their own behalf and two brewers, Guinness and Courage (then part of Elders IXL) offered a somewhat different slant on the tied house system. It was said afterwards that had each brewer responded independently the MMC could not have reached its conclusions and could not even have completed the inquiry. In fact, and I confess to an interest, neither of those claims stands up. It is true that the Brewers' Society was originally accused of operating a price cartel but the MMC's investigation found no evidence to support that. Such a claim would need to have been investigated whether or not the Society acted as joint respondent and the Society's rôle does not appear to have affected the perception of the issue. Moreover, without the intervention of the Society, the industry's case simply would not have been made. As the MMC acknowledged "we were struck by the vigour and thoroughness of the Brewers'

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[26] **Courage v Crehan Case C-453/99 [2002] QB 507, [2001] ECR I-6297**
Joynson v E C Commission Case T-231/99 [2002] 5 CMLR 123

[27] **The Supply of Beer (Tied Estates) Order (1989) 51 No. 2390**
The Supply of Beer (Loan of Ties etc.) Order (1989) 51 No. 2258

[28] **Cm 5319 (2002)**

Society's responses ...There is no doubt in our minds that the Society is formidably effective in championing its members' interests".[29] Putting a case vigorously does not always bring success; however, putting 5, 10 or even 100 different cases makes it easier for the authority to distil and impose its own view. Significantly, in the SME Banking case, where the major banks were scrupulously non-collusive in their responses, they were no more effective than the Brewers' Society had been 15 years before.

3. Epoch making nature

Looking at the Beer Inquiry in context and in the light of subsequent inquiries (eg Petrol, Fine Fragrances, Motor Cars and Parts, Supermarkets and SME Banking) what marks it out is not its scale, or even its length, but its use of structural remedies. Viewed in that way it may remain either a beacon of hope or a terrible warning as we move to the age of Market Investigations. One thing that did mark it out, however, was the eloquent dissenting opinion of Mr. Lief Mills, a trade union official, who demurred at the divestment remedies and who described[30] these as smacking of the academic question : "...the brewing industry may well work in practice, but does it work in theory?". By quoting from Aristotle's Politics ("a likely impossibility is always preferable to an unconvincing possibility")[31] he added to the Commission's reputation for learning, although such things would probably not find a place in the modern, more numerate publications for which the Commission is now so well known.

Themes and conclusions

I could go on and talk about other cases; I am sure everyone would be fascinated. Instead we should try and draw some more general comparisons between "then" and "now", the dividing point being the period about 1985-90.

I suggest four main areas of change.

First, the greater emphasis on economic analysis and the lesser emphasis on formalism; second, the emergence of cartel investigations as the main focus of the authorities' activities; third, the greatly increased political profile of competition policy and linked to this, fourth, a more international approach, with increased co-operation between authorities. Taken as a whole, whilst parallels can be found in the "then", these aspects add up to an appreciable change in kind.

Turning first to economic analysis, in the "then" time, economics was seen by lawyers as an important but somewhat remote subject that was hard to assimilate and difficult to articulate. In the UK context it was more the preserve of the Monopolies Commission than of the Registrar of Restrictive Trading Agreements or (from 1973) the OFT; the RTPA was applied relying heavily on the formalistic analysis of "relevant restrictions". Merger submissions did indeed delve into the "dark art" but at a relatively modest level of detail. Of course there were counter indications. The Beer Inquiry mobilised many economists and much data and argument; no doubt those involved in the IBM case would say the same; but there was much less general acceptance that economic analysis played a central role in the assessment of whether an agreement or practice was pro- or anti-competitive. Now I believe the situation is fundamentally different. In merger cases (particularly given that the EC's merger powers only date from 1989) market investigations and also in cases on the abuse of market power and restrictive agreements the starting point is the economic analysis of the market and of competition in the market. It is still the job of the lawyers to place that analysis in a coherent framework and to ensure the right points get the right

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[29] **Cm 651 para 1.17**
[30] **Cm 651 Note of Dissent para 43**
[31] **ibid, para 56, p303**

emphasis. And to present the arguments clearly. But the steady development of a more realistic and flexible approach in EC law to both vertical and horizontal agreements can be seen as an acknowledgement that economic rather than formalistic analysis is the key.

Then there are cartels. The 1960s and 70s saw some very major cartels - Quinine and Uranium to name two. But the whole balance of the approach was different. In the EC, the caseload tended to focus far more on occasional major interventions under Article 86 (82) - Continental Can[32], IBM[33] or United Brands[34] or Vitamins[35] (the fidelity rebates case, not the cartel). Joint Ventures were assessed individually and at great length. There was a large back-log of notified agreements, many of them vertical agreements that just missed fitting one or other block exemption. I hope it is not unkind to say that the EC Commission's policy had a slightly unpredictable air to it, which sometimes made it tempting for UK business to ignore it altogether.

In the UK, the continued prevalence of the RTPA created an industry of avoidance. It is true that occasionally, as in the Newspapers Proprietors case that we have discussed or later in Ready-mixed Concrete[36], the authorities would unleash a thunderbolt but the règime had a fundamentally benign air to it : The RTPA was widely perceived as a toothless animal; this benevolence was less apparent in the field of monopolies and mergers but even there the authorities tended to be seen as providing an occasional and non-mainstream interference in the real business of "business".

The situation today is entirely different. Not only have the US, EC and UK authorities each espoused the attack on cartel activity as the focus of their efforts; they have been armed with far greater powers and much effort is devoted to exposing the damaging results of cartels for the economy. A public perception exercise not unlike that relating to insider dealing 20 years ago is under way. The aim is to make people think that cartels are a form of theft and that guilty executives should go to jail. Opinions may differ as to the merits of this campaign, but that is what it is. There can be no doubt of the change of climate. Advising your client that the authorities are not serious about cartels would not be a career enhancing move for the professional lawyer. It is important that in this increasingly confrontational situation we do not lose the trust and working relationships between the authorities and the practitioners on which the system of enforcement depends for its day to day operation.

This is, of course, closely linked to the increased political profile of competition policy. Reform of UK competition law languished from the late 70s (the date of the Liesner Review of Restrictive Trade Practices Policy[37]) and was not seriously promoted until the mid 1990s. Even then it was not proposed to introduce an equivalent of Article 82. But with the Competition Act and the Enterprise Act, competition is now centre stage and powerful instruments have been placed in the authorities' hands, albeit with an appropriate emphasis on judicial control and, significantly, Government has started to see competition as one of the measures available to increase economic efficiency and productivity. Businesses have had to become more aware of competition risk and the need to embrace competition law in running their affairs. Competition is thus climbing quickly up the list of issues to which corporate governance has to respond.

Finally, there is the increasing internationalism. There was previously an attitude in some parts of Government at least that competition law was, if it was anything, an instrument of national policy rather than a fact of international economic life. Thus the intervention in the Beecham antitrust

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[32] **See n.6 above**
[33] **Commission Decision 84/233 [1984] OJ L118/24**
[34] **Case 27/76 [1978] ECR 345**
[35] **Case 85/76 [1979] ECR 461**
[36] **see DGFT v Smiths Concrete Ltd [1991] 4 All England Reports 150 (CA)**
[37] **Cmnd 7512 (1979); see also Cmnd 7198 (May 1978) on monopolies and mergers policy**

case against the activities of the US courts : and the British Government's objection to the US assertion of "effects" based jurisdiction against ICI. Such moves would be hard to imagine nowadays. The authorities may occasionally differ in their emphasis - as in the recent GE/Honeywell[38] merger case - but the degree of co-operation and liaison between authorities in the US and the EC not to mention Canada, Australia and others is unprecedented, stemming from a realisation that the common aspects of competition and antitrust law greatly outnumber the differences and that an international approach is a necessary reflection of the international nature of business.

Conclusion

I began writing this lecture with the intention of showing that far from changing over the past 30 years much of what we regard as new and unprecedented is simply the re-presentation of old and hallowed truths. I confess I have found this attractive thesis difficult to sustain, even for the sake of argument. Nevertheless, going back to my opening theme, what has not changed?

First, and foremost, and despite modernisation and expansion into new areas, the principles of EC competition law still have their roots in the early cases. The move towards more economic analysis and a more formalistic approach can be traced back to the LTM case in 1965[39]. The supremacy of EC competition law - on which the leading case is still Walt Wilhelm[40] in 1968 - has been re-asserted through the new Regulation 1/2003. What has of course changed is the vigour and sophistication with which the principles are applied and of course in the "then" time, the EC's merger powers were peripheral.

In the UK the transformation has been even more radical. But it is worth recalling that although the RTPA was always described as "toothless", the threat of jail for contempt of court was a central part of the enforcement mechanism which, once activated, was no less powerful than s188 of the Enterprise Act.

Taken in the round, it is clear that the differences in scale and complexity of the subject amount to a difference in kind. Competition practitioners, whether lawyers, economists, accountants, administrators or businessmen and women have to contend with a much more sophisticated subject, applied by more experienced teams with greater resources often against a glare of publicity and political sensitivity. We have indeed come a long way from the Ravenseft case (the "Alice in Wonderland" case) where the applicant's point was argued by the respondent and proceedings stopped early so that the assembled parties could proceed to Lords - not to the House of Lords, but to the cricket ground where the test match in progress possibly offered a greater attraction.

But to conclude on a serious note and repeat a point made earlier. One thing this brief review of a few old cases shows is how much the process depended (in the EC and UK at least) on the trust and good relations existing between the authorities and those defending. It is important, in this modern age, to preserve this so far as possible and to maintain the tacit conspiracy between authorities and practitioners to operate a workable system of competition law enforcement.

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[38] **Commission Decision COMP/M.2220 (2001)**
[39] **Societé La Technique Minière v Maschinenbau Ulm Case 56/65 [1966] ECR 235**
[40] **Case 14/68 [1969] ECR 1**