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**A Comparison of the American Sherman
Antitrust Act and the British Restrictive Trade
Practices Act: The Trade Association Experience
(with J. Lawniczak)**

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A Comparison of the American Sherman Antitrust Act and the British Restrictive Trade Practices Act: The Trade Association Experience*

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I. INTRODUCTION

Because trade associations are composed of competitors, they have frequently engendered suspicion. In the eighteenth century Adam Smith remarked: "People of the same trade seldom meet together for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices."¹ Consequently, antitrust and similar statutes² enacted to promote competition have directly impacted trade association activities. In the United States, when the Department of Justice's economists are unable to attribute increased prices to increased costs or increased demand, the Department frequently reacts by investigating the appropriate industry trade association. Where evidence of price fixing is uncovered, civil actions and, sometimes, criminal charges are frequently brought against association members.³ In the United Kingdom, one commentator recalls that enactment of the Restrictive Trade Practices Act of 1956 brought numerous inquiries from trade associations concerning this "funny legislation" and its impact on their

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1. A. SMITH, *THE WEALTH OF NATIONS* 117 (Everyman's Library ed. 1910) (1st ed. London 1796).

2. See, e.g., Federal Trade Commission Act, 15 U.S.C. §§ 41-77 (1976).

3. See Lipson, *Avoiding Antitrust Problems in Trade Associations*, 23 PRAC. LAW. 51, 52-53 (1977).

activities.⁴ This article will compare the American Sherman Antitrust Act with the British Restrictive Trade Practices Act. It will set forth the statutory schemes of each and then compare their applications, using trade associations as a vehicle for that comparison.

II. THE STATUTES

Enacted in 1890,⁵ the language of section one of the Sherman Antitrust Act sweeps broadly and generally, prohibiting every contract, combination or conspiracy in restraint of trade or commerce.⁶ Because every contract by its nature restrains trade, the Act has been interpreted to prohibit only unreasonable restraints of trade.⁷ Under the rule of reason,⁸ an American court must examine the purpose, nature and effect of the restraint in light of the peculiarities of the industry.⁹ Certain restraints, however, are deemed by their nature or necessary effect to be per se unreasonable. These are price fixing,¹⁰ horizontal territorial and customer divisions,¹¹ group boycotts¹² and tie-in arrangements.¹³

The Restrictive Trade Practices Act was originally enacted in 1956.¹⁴

4. *Restrictive Trade Practices: The First 20 Years*, 121 SOLICITOR'S J. 455 (1977). The Restrictive Trade Practices Act provides that specific recommendations made by a trade association to its members are considered as if each member agreed to abide by such recommendations. Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 6(7). Specific recommendations are those which advise members to take particular action or inaction either immediately or on the happening of a certain event. They thus differ from statements of policy or statements that an association will recommend appropriate action if and when that becomes necessary. See National Fed'n of Retail Newsagents, Booksellers & Stationers v. Registrar of Restrictive Trading Agreements, [1972-73] L.R. 7 R.P. 425 (1972).

5. The Sherman Antitrust Act represented populist reaction to monopolies and trusts which had developed and to the economic power and privilege which accompanied them. See generally W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA (1965); H. THORELLI, THE FEDERAL ANTITRUST POLICY (1955).

6. 15 U.S.C. § 1 (1976).

7. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

8. It is not the purpose of this article to explain in detail the operation of the American antitrust laws such as the rule of reason or the concept of per se violations, since it is assumed that the reader is generally familiar with them. For a more detailed analysis see NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA (2d ed. 1970).

9. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

10. See *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

11. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

12. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

13. See *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958).

14. Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 6(7). The Act was in part a response to reports of a commission established under the Monopolies and Restrictive Practices Act, 1948, 11 & 12 Geo. 6, c. 66. See generally 38 HALSBURY'S LAWS OF ENGLAND § 98, at 79-80 (3d ed. L. Simonds 1962). The Act was amended in 1968, Restrictive Trade Practices Act, 1968, 16 & 17 Eliz. 2, c. 66; in 1976, Restrictive Trade Practices Act, 1976, 25 Eliz. 2, c. 34; and in 1980 as part of the Competition Act, 1980, c. 21, §§ 25-30. The Competition Act of 1980, which is enforced by the Director General of Fair Trading, as well as by the Monopolies and Mergers Commission and the Secretary of State, does not apply to any course of conduct which is a material part of an agreement registered

The Restrictive Trade Practices Act requires the registration of any restrictive business agreement related to the production or supply of goods.¹⁵ The following types of restrictive agreements must be registered: prices or recommended prices; terms or conditions of sale; quantities or descriptions of goods to be produced; processes of manufacture; persons or classes of persons with whom one will deal.¹⁶ In addition, the British Secretary of State may order the registration of those types of agreements that restrict either the free market as to services,¹⁷ the availability of information as to services,¹⁸ or information regarding prices, terms, conditions of sale, quantities or descriptions of goods, manufacturing costs, process of manufacture, the person or class of persons with whom one will deal, and places or areas of supply or acquisition.¹⁹

Registration is administered by the Director General of Fair Trading.²⁰ The Director may, in his discretion, refer agreements for consideration by a Restrictive Practices Court,²¹ consisting of five nominated judges and up to ten lay members appointed on the basis of their knowledge in industry, commerce or public affairs.²² The function of the court is to determine whether or not a particular agreement is consistent with the public interest.²³ An agreement is conclusively presumed to be contrary to the public interest and will be voided unless at least one of eight justifications is applicable and unless the agreement itself is deemed reasonable when balanced against the detriment caused to the public or to persons not parties to the agreement.²⁴ The eight justifications²⁵ are that the agreement in question: is reasonably necessary to protect the public from injury; provides the public specific and substantial benefits;

or required to be registered under the Restrictive Trade Practices Act of 1976, including "terms implied into trade association agreements and services supply association agreements." See Competition Act, 1980, c. 21, §§ 2(2), 11(8)(b).

15. Restrictive Trade Practices Act, 1976, 25 Eliz. 2, c. 34, §§ 1, 6. Registration requirements for goods were the only ones contained in the original 1956 Act. Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 6.

16. Restrictive Trade Practices Act, 1976, 25 Eliz. 2, c. 34, § 6(1).

17. *Id.* § 11. The Order must be approved by resolution of each House of Parliament. *Id.* § 15.

18. *Id.* § 12.

19. *Id.* § 7. This provision initially appeared in 1968. See Restrictive Trade Practices Act, 1968, 16 & 17 Eliz. 2, c. 66, § 5.

20. Restrictive Trade Practices Act, 1976, 25 Eliz. 2, c. 34, § 1(2). The 1956 Act gave these responsibilities to a Registrar of Restrictive Trading Agreements. Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 1.

21. Restrictive Trade Practices Act, 1976, 25 Eliz. 2, c. 34, § 1(1), (2)(c).

22. Restrictive Practices Court Act, 1976, 25 Eliz. 2, c. 33, §§ 1-3.

23. Restrictive Trade Practices Act, 1976, 25 Eliz. 2, c. 34, § 1(3).

24. *Id.* §§ 10, 19.

25. Each justification appeared in the original 1956 Act, Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 21, except for the justification that the agreement does not hinder competition to any material degree, which was added in 1968. Restrictive Trade Practices Act, 1968, 16 & 17 Eliz. 2, c. 66, § 19.

is reasonably necessary to counteract restrictive practices undertaken by others; is reasonably necessary for the negotiation of fair terms with a preponderant buyer or seller; has a beneficial effect on unemployment; has a beneficial effect on the volume of earnings in exports; is reasonably necessary to maintain another agreement already found to be consistent with the public interest; or does not restrict or discourage competition to any material degree. If the court declares any provision of the agreement contrary to the public interest, that provision becomes void.²⁶

Several differences between the American and British statutes are immediately apparent. The Restrictive Trade Practices Act is narrower in scope than the Sherman Act because it specifically defines a limited number of types of agreements to which it applies,²⁷ while the Sherman Act is essentially unrestrictive in language.²⁸ Similarly, the Restrictive Trade Practices Act has no per se violations, and thus allows certain agreements prohibited by the Sherman Act.²⁹ Finally, the British Act does

26. The judgment of the court is stayed until either 21 days after the appeal period has run or 21 days after an appeal is final. Competition Act, 1980, c. 21, § 25. During that stay, any party affected may submit to the court a revised agreement. Competition Act, 1980, c. 21, § 26(1). Thereafter, the Court has the power to issue restraining orders to each party to the agreement, trade associations of which any party is a member, or any person acting on behalf of a trade association of which a party is a member. Restrictive Trade Practices Act, 1976, 25 Eliz. 2, c. 34, § 2(2), (3).

27. See, e.g., *In re Birmingham Ass'n of Bldg. Trades Employers Agreement*, [1963-64] L.R. 4 R.P. 54, 109-10 (1963)(a price fixing "recommendation" for building contractors' daywork which was intended only to apply in cases where the builder and client had not agreed on charges had "no contractual effect" and, therefore, was not subject to registration under the Act); *In re Blanket Mfrs' Ass'ns Agreement*, [1957-59] L.R. 1 R.P. 271 (1959) *affirming* [1957-1959] L.R. 1 R.P. 208 (1959)(trade association rule which obliged members to refrain from cancelling or varying a contract without prior association approval was not proscribed by the Restrictive Trade Practices Act).

In *In re Blanket*, the lower court found that the agreement was not governed by the Act at all, thus the agreement could not be proscribed even though, in the court's opinion, it was an unreasonable restriction. *Id.* at 258. Cf. *Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936)(code of ethics requiring members to adhere to publicly announced prices found violative of Sherman Act); see also *Mardirosian v. American Inst. of Architects*, 474 F. Supp. 628, 637-51 (D.C. Cir. 1979)(ethics code which prohibits architect from accepting or negotiating for a commission for which he knows another qualified individual has been selected, prior to termination of the latter's agreement, violates the Sherman Act).

28. See Schull, *Competition Policy in the United States and the United Kingdom: A Look at Underlying Forces*, 14 LAW TCHR. 39 (1980), where the author compares the philosophy of the American and the British approaches, noting that the American system is attempting generally to prevent any concentration of power in any one economic unit, while the British are more concerned with control of those specific individual agreements which are not in the public interest.

29. See, e.g., *In re Nat'l Fed'n of Retail Newsagents, Booksellers & Stationers' Agreement* (No. 3), [1972-73] L.R. 7 R.P. 27, 72 (1969), *rev'd on other grounds*, [1972-73] L.R. 7 R.P. 230 (1970), *modified and remanded*, [1972-73] L.R. 7 R.P. 425 (1972)(recognizing that group boycott may be justified under certain circumstances); *In re Cement Makers' Fed'ns Agreement*, [1960-61] L.R. 2 R.P. 241 (1961)(price fix justified); *In re Water-Tube Boiler-makers' Ass'ns Agreement*, [1957-59] L.R. 1 R.P. 285 (1959)(division of customers justified).

not impose civil or criminal penalties on parties to restrictive agreements that are contrary to the public interest, as long as the parties register their agreements.³⁰ Thus, the British apply their Act prospectively only; a British businessman is not liable for the past effects of his agreements in restraint of trade. On the other hand, the Sherman Act imposes substantial penalties for violations which can be imposed even against someone who acts in good faith ignorance that he is violating the law.³¹ These differences profoundly affect the restraints placed by the two statutes on trade association activities.

III. THE TRADE ASSOCIATION EXPERIENCE

A. *Activities Affecting Price*

1. *Sherman Act*

Price fixing is per se illegal under the Sherman Act regardless of the form it takes.³² Because a variety of trade association activities affect prices, American courts have had to assess whether such activities have crossed the line dividing reasonable restraints from price fixes. A discussion of three types of trade association activities which have given rise to charges of price fixing—cost accounting, delivered pricing, and statistical gathering and reporting—will be helpful in comparing the different approaches and results obtained under the American and British antitrust laws.

Trade association cost accounting activities can consist of little more than promoting uniform accounting systems for association members. This

Under the Sherman Act, depressed market conditions will never justify an otherwise unreasonable restraint of trade. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-23 (1940). The Restrictive Trade Practices Act specifically recognizes depressed conditions in exports and employment as justifications. Restrictive Trade Practices Act, 1976, 25 Eliz. 2, c. 34, § 10(1)(e), (f), 19(1)(e), (f).

30. See *National Fed'n of Retail Newsagents, Booksellers & Stationers v. Registrar of Restrictive Trading Agreements*, [1972] L.R. 7 R.P. 425, 445. The court stated that "[t]he Act imposed no penalty in respect either of making or of giving effect to an agreement or recommendation which is contrary to the public interest. The only penalty is for disregarding an order of the court. . . ." *Id.* at 445. A failure to register, however, will result in voiding the agreement, assuming that the existence of the agreement is discovered. Restrictive Trade Practices Act, 1976, 25 Eliz. 2, c. 34, § 35(1)(a). Adherence to a voided agreement is not, however, a criminal offense. *Id.* § 35(2). Instead, it gives rise to a civil action for breach of statutory duty. *Id.*

31. Violations of the Sherman Act are felonies, with corporate violators subject to fines of \$1,000,000 and individual violators subject to fines of \$100,000 and imprisonment for three years. 15 U.S.C. § 1 (1976). The federal government may also bring an action to enjoin antitrust violations. 15 U.S.C. § 4 (1976). Violators are also subject to private actions for injunctions, treble damages and attorney fees by individuals injured in their trade or business, and by state attorneys general for injuries sustained by natural persons residing in their states. 15 U.S.C. § 15 (Supp. IV 1980).

32. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) ("the machinery employed by a combination for price-fixing is immaterial").

function is less prevalent among associations today than it was in earlier times when the requirements of the Internal Revenue Service and other government agencies were not as complex and well-trained accountants not as available. The simple education of association members on uniform accounting principles has never been the subject of an antitrust attack, even though the improved accounting may have led to more uniform pricing.

Many cost accounting programs are designed to gather and disseminate data on the average costs of doing business. These activities, calculated to lead to cost uniformity, may also lead to price uniformity. Consequently, they have received considerable antitrust scrutiny.³³ A court examining the legality of such programs under the Sherman Act must assess their purpose and effect in light of the peculiar characteristics of the industry involved. For example, in *Vitrified China Association*,³⁴ the respondent trade organization conducted a cost accounting study to replace an obsolete study prepared by one manufacturer and adopted independently by others as a basis for determining the selling price of china. The purpose of the study was to enable members to bring prices more nearly in line with costs. The study's results were openly discussed at meetings and unanimously adopted by members as the basis for determining price. Nevertheless, the FTC held that the study and its adoption by trade association members did not violate the Sherman Act. The FTC found no intent to fix prices and no tendency towards uniformity in prices for different pieces of china even after adoption of the study.³⁵ In addition, the existence of over 1700 shapes, sizes, colors and designs of china influenced the result.³⁶ However, in an industry dominated by a few sellers, characterized by inelastic demand, and which produces a more standardized product, a similar cost accounting study may indeed produce uniform prices and result in a Sherman Act violation.³⁷

Under delivered pricing systems, sellers include in their quoted prices the cost of delivery to the buyer. Through various methods, the calculated shipping costs of near and distant sellers can be equalized.³⁸ The seller

33. The FTC has stated its position as follows: "Among the many legitimate kinds of trade association activities which may easily and imperceptibly pass over from the stage of useful service to that of abuse and even illegality, there are probably few more prone to this sort of transition than cost-accounting work. . . ." L. SCHWARTZ & J. FLYNN, *ANTI-TRUST AND REGULATORY ALTERNATIVES* 522 (5th ed. 1977).

34. 49 F.T.C. 1571 (1953).

35. *Id.* at 1574.

36. *Id.* at 1572.

37. *Confer* *United States v. Container Corp.*, 393 U.S. 333 (1969)(exchange of pricing information with regard to a product that is fungible, demand inelastic, and competition is based on price that is anti-competitive).

38. A single base point pricing system uses one location from which the cost of delivery is computed. A multiple base point system uses several locations with the buyer charged the delivery cost from the nearest location. Single and multiple zones charge the same delivery fee for all buyers in given geographic zones. A freight equalization system

absorbs the excess if the actual cost of delivery exceeds the computed cost; but if actual cost is less than the computed cost, the difference is charged to the buyer as "phantom freight."³⁹ Although much of the early litigation involving delivered pricing focused on whether it constituted price discrimination in violation of the Robinson-Patman Act,⁴⁰ delivered pricing schemes may also violate the Sherman Act.⁴¹ If each company independently offers delivered prices as a result of custom or price leadership, no violation results.⁴² However, trade associations frequently assist the offering of delivered prices by publishing freight equalization books or zone maps. Where the evidence permits an inference that association members agreed to use delivered pricing, the Sherman Act is violated. Among the factors considered are the existence of other potentially anti-competitive activities, such as product standardization and classification of customers,⁴³ and the complexity and rigidity of the price structure and its inconsistency with the immediate competitive interests of the companies that follow it.⁴⁴

The collection and dissemination of data providing a statistical profile of American trade association members is among the most important functions of these associations. In an otherwise perfect market, greater access to information enhances competition. Data gathering activity, however, may also serve to signal association members about previously agreed pricing policies. It is well established that a trade association may gather and disseminate information on costs, volume of production, inventory on hand and past transactions, and that association members may meet and discuss such information, provided that no effort is made to

uses an f.o.b. price with the seller equalizing freight rates with those of the competitor located closest to the buyer. See *FTC v. Cement Inst.*, 333 U.S. 683, 696-700 (1948); *Corn Prod. Ref. Co. v. FTC*, 324 U.S. 726, 730-32 (1945).

39. See *Corn Prod. Ref. Co. v. FTC*, 324 U.S. 726, 732 (1945).

40. See, e.g., *FTC v. Cement Inst.*, 333 U.S. 683 (1948)(violated § 2 of the Clayton Act); *Corn Prod. Ref. Co. v. FTC*, 324 U.S. 726 (1945)(violated § 2 of the Clayton Act).

41. See also *FTC v. National Lead Co.*, 352 U.S. 419, 424-25 (1957)(zone delivered pricing system may involve a conspiracy to eliminate competition).

42. By definition, if each company acts independently there is no conspiracy and therefore no violation. Some commentators have suggested, however, that all uniform uses of rigid delivered pricing systems should violate § 1 of the Sherman Act. See, e.g., Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusal to Deal* 75 HARV. L. REV. 655, 673-77 (1962). There has been some judicial indication that the consciously parallel use of delivered pricing systems may violate § 5 of the Federal Trade Commission Act. See, e.g., *Triangle Conduit & Cable Co. v. FTC*, 168 F.2d 175, 180-81 (7th Cir. 1948), *aff'd by equally divided court sub nom. Clayton Mark & Co. v. FTC*, 336 U.S. 956 (1949)(evidence of collective action enough to sustain violation). Nevertheless, cases finding violations have generally found conspiracies. The FTC has dismissed at least one complaint where no conspiracy was proven. See *Crouse-Hands Co.*, 46 F.T.C. 1114 (1950).

43. See, e.g., *Bond Crown & Cork Co. v. FTC*, 176 F.2d 974 (4th Cir. 1949)(classification of customers); *Milk & Ice Cream Can Inst. v. FTC*, 152 F.2d 478 (7th Cir. 1946)(product standardization).

44. Federal Trade Commission Memorandum to its Staff (Oct. 12, 1948).

reach any agreement as to prices, units of production or other restraints on competition.⁴⁵ However, where data gathering schemes are accompanied by daily reporting that reveals the identities of participating companies and the specific information furnished by each, and audits to insure accurate reporting, the activities are viewed as price fixes.⁴⁶

However, the FTC has generally approved such trade association data gathering where data is collected anonymously by outside firms, limited to past transactions, reported in the form of industry-wide averages or ranges, and individual responses are kept confidential.⁴⁷ The importance of maintaining the anonymity and confidentiality of reports is underscored by *United States v. Container Corp.*⁴⁸ The defendants, manufacturers of corrugated containers, agreed that each, upon request, would provide the others with its most recent price charged or quoted. Although the information exchanges were infrequent and irregular, a number of factors led the Court to conclude that the reports directly resulted in price fixing. The industry involved a fungible product in which competition focused solely on price because demand was inelastic as buyers placed orders only for short term needs. Low barriers to entry caused supply to exceed demand. When a competitor learned of another's price, it tended to match it. Consequently, the Court found that the exchange of price information produced a uniformity of prices and resulted in an unreasonable restraint of trade violative of the Sherman Act.⁴⁹

2. Restrictive Trade Practices Act

The Restrictive Trade Practices Act strongly prefers price competition to price stabilization.⁵⁰ Parties seeking to justify price fixing arrangements accordingly bear a heavy burden of proof which they usually do not meet.⁵¹ The Restrictive Practices Court has frequently rejected con-

45. See *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925); *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925); *Tag Mfrs. Inst. v. FTC*, 174 F.2d 452 (1st Cir. 1949). See generally Note, *Guidelines for Data Dissemination through Trade Associations*, 10 WASHBURN L.J. 93 (1970).

46. See *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

47. See, e.g., *Independent Wire Producers Ass'n Case*, 91 F.T.C. 1179 (1978) (no FTC objection to IWPA raw material reporting system discussing quantity, type, weight, foreign country of origin and price, provided that the information was collected by an independent firm, no individual member's data was disclosed to other members, and reports did not reveal the identity of suppliers); *Metal Cookware Mfrs. Ass'n Case*, 84 F.T.C. 1695 (1974) (no FTC objection to survey of members' customers concerning retailer and consumer attitudes toward packaging cookware products with handles disassembled, provided that the survey would not result in association policy on packaging which had a coercive effect on members).

48. 393 U.S. 333 (1969).

49. *Id.* at 337.

50. See *In re Scottish Ass'n of Master Bakers' Agreement*, [1957-59] L.R. 1 R.P. 347, 376 (1959).

51. See generally 38 HALSBURY'S LAWS OF ENGLAND §§ 149-156 (3d ed. L. Simonds 1962).

tentions that price fixes were needed to maintain high quality,⁵² to accommodate widely fluctuating demand,⁵³ to promote intra-industry cooperation,⁵⁴ and to maintain levels of exports.⁵⁵ Restrictions setting maximum prices to be charged have similarly been invalidated.⁵⁶ Even where it was demonstrated that removal of price restrictions would increase unemployment levels from 4.3% to 5.9% and from 5.2% to 7.8%, the court found that the detriment to the public from fixed prices outweighed the benefit of the restriction.⁵⁷ Thus, the results achieved by the British system are usually the same as those achieved by the American system even though price fixing is not considered to be per se unreasonable.

Price fixes, nevertheless, have been justified. In *Black Bolt & Nut Association of Great Britain's Agreement*⁵⁸ the court held a price fixing agreement justified because it saved purchasers the administrative expense of shopping for the best deal. The price fix also facilitated inter-trading arrangements by allowing an industrial user to place his order with a single manufacturer who could then obtain those items which he did not have from other manufacturers. Two-thirds of the purchasers of the products were large or medium buyers who benefitted from substantial savings in administrative costs. The court also found that if the restriction were removed, prices were not likely to decline. Consequently, there was no detriment to the remaining one-third of the purchasers to counter-balance the specific and substantial benefit to the other two-thirds.⁵⁹

Despite a substantial volume of litigation concerning price fixing in Britain, there has been very little litigation concerning non-price fixing restraints which may affect price—another indication of the narrower approach of British antitrust law. There have been occasions, however, where the British system has dealt with issues of cost accounting, delivered price

52. See, e.g., *In re Motor Vehicles Distribution Scheme Agreement*, [1960-61] L.R. 2 R.P. 173, 225 (1961); *In re Associated Transformer Mfrs' Agreement*, [1960-61] L.R. 2 R.P. 295 (1961).

53. See, e.g., *In re Blanket Mfrs' Ass'n's Agreement*, [1957-59] L.R. 1 R.P. 271 (1959).

54. See, e.g., *In re Agreement between the Members of the Locked Coil Rope Maker's Ass'n*, [1964-66] L.R. 5 R.P. 146, 211 (1965); *In re Associated Transformer Mfrs' Agreement*, [1960-61] L.R. 2 R.P. 295 (1961).

55. See *In re Agreement between the Members of the Locked Coil Rope Makers' Ass'n*, [1964-66] L.R. 5 R.P. 146, 212 (1965); *Linoleum Mfrs' Ass'n's Agreement*, [1960-61] L.R. 2 R.P. 395 (1961); *In re Associated Transformer Mfrs' Agreement*, [1960-61] L.R. 2 R.P. 295 (1961); *In re Federation of British Carpet Mfrs' Agreement*, [1957-59] L.R. 1 R.P. 472 (1959). *Contra*, *In re Blanket Mfrs' Ass'n's Agreement*, [1957-59] L.R. 1 R.P. 271 (1959), *affirming* [1957-59] L.R. 1 R.P. 208, 258 (1959) (restriction setting minimum prices was upheld).

56. *In re Finance Houses Ass'n Ltd's Agreement*, [1964-66] L.R. 5 R.P. 366 (1966).

57. *In re Yarn Spinners' Agreement*, [1957-59] L.R. 1 R.P. 118 (1959).

58. [1960-61] L.R. 2 R.P. 50 (1960).

59. *Id.* at 135-39. Although accepting the justifications described in the text, the court rejected the arguments that the price fix fostered intra-industry cooperation, *id.* at 139, and maintained high standards of quality. *Id.* at 141. See also, *In re Standard Metal Window Group's Agreement*, [1961-63] L.R. 3 R.P. 198 (1962); *In re Cement Makers' Fed'n's Agreement*, [1960-61] L.R. 2 R.P. 241 (1961).

ing, and statistical gathering and reporting, which can effectively be contrasted to the American treatment of the same issues. Cost accounting systems, for example, are sometimes used by a seller to set a tacitly agreed upon price.⁶⁰ Thus, they do have an effect on the prices charged. However, trade association programs designed to educate members on uniform accounting principles would probably not be deemed "specific recommendations" and therefore not subject to registration.⁶¹ This is in contrast to the possibility that an American trade association could run afoul of the Sherman Act by educating its members on uniform accounting principles,⁶² although that result has never actually occurred.

The only time the Restrictive Practices Court was faced with a delivered pricing plan, it held the agreement justified. In *In re Cement Makers' Federation's Agreement*,⁶³ the cement trade association used a base point pricing system to fix delivery prices and rebates on cement. The court expressly rejected the contention that delivered pricing was inherently detrimental to the public,⁶⁴ and then developed a detailed economic analysis of the restrictive agreement.⁶⁵ The British court found that the overall demand for cement was increasing by 3.5% to 4% per year

60. It has been suggested that price fixes which are not related to costs cannot be justified. See *In re Federation of British Carpet Mfrs' Agreement*, [1957-59] L.R. 1 R.P. 472, 534 (1959).

61. See *supra* note 4 for a definition of "specific recommendations."

62. If an American court found that education on uniform accounting principles directly resulted in price fixing, then the Sherman Act would be violated. The intent of the disseminators of the information would be of extreme importance to the resolution of the antitrust issue. However, as noted in the text at the beginning of this section, education on accounting principles has never been the subject of a Sherman Act challenge.

63. [1960-61] L.R. 2 R.P. 241 (1961).

64. The court stated:

It has also been argued, though but faintly, that any freight averaging scheme involving a transport subsidy is detrimental to the public. Whatever may be the theoretical arguments in favour of this view in the case of goods used in manufacturing processes, we do not think that it applies to cement which is mainly used for capital works of building and civil engineering. While it may be in the public interest to provide an economic inducement to site factories near sources of raw material required for their manufacturing processes, there seems no obvious public interest in providing an economic inducement to build houses, factories or motor-roads near a cement works in, say, Rutlandshire or Flintshire. It is true that about nineteen percent of the total home deliveries of cement are used in a manufacturing process either in making asbestos cement products or concrete products; but these products in turn are used primarily in building and civil engineering work. Here, again, there is no clear public interest in providing an economic inducement to site such factories near cement works if economies in the transport of cement to the factories are counterbalanced by the greater use of transport in moving the end product from the factories to the buildings or civil engineering works in which they are to be incorporated.

Id. at 284-85.

65. The court's use of a sophisticated economic analysis contrasts markedly with the American approach to delivered pricing, which focuses on intent and agreement.

and that this increase would not be affected at all by increased prices.⁶⁶ Since the industry was operating at full capacity, the increased demand could only be met by creating new capacity. However, the evidence indicated that the risk to an individual cement producer of expanding to generate new capacity was too great unless a higher return could be obtained.⁶⁷ Thus, in the absence of the delivered pricing plan, consumers of cement would eventually be faced with even greater prices.⁶⁸ In addition, the court recognized the need for delivered pricing because transportation accounted for 18% of the cost of doing business. Although the freight equalization rates resulted in nearby purchasers subsidizing distant purchasers, the court found that such subsidies would likely continue absent the restrictive agreement and that the amount of subsidy was less than the price increase under free competition.⁶⁹ Thus, the court concluded that the restrictive agreement conferred specific and substantial benefits on the public by keeping prices below what they would be under free competition.⁷⁰

Although information agreements have been governed by the Restrictive Trade Practices Act since 1968,⁷¹ as yet none have been referred to the Restrictive Practices Court. Justifications of other agreements referred to the court based on intra-industry cooperation, including exchanges of information, have met with varied success in price fixing cases. The court has frequently indicated that reductions in intra-industry cooperation resulting from the elimination of price fixing is not a loss of a specific and substantial benefit.⁷² In *In re Standard Metal Window Group's Agreement*,⁷³ however, the court found that a price fix accompanied by an exchange of information about costs and processes was justified as it produced substantially lower prices. In marked contrast to American decisions which require anonymity and confidentiality in reporting price

66. [1960-61] L.R. 2 R.P. 280 (1961).

67. *Id.* at 281.

68. The court found that the net return for a cement manufacturer was between 7.5% and 10% under the delivered pricing plan, while a return between 15% and 20% would be necessary to justify continuing in business without the pricing plan. *Id.* at 281-85.

69. *Id.* at 284.

70. *Id.* at 281-85.

71. *See supra* note 19.

72. *See, e.g., In re Agreement between the Members of the Locked Coil Rope Makers' Ass'n*, [1964-66] L.R. 5 R.P. 146, 211 (1964)(reduction in the degree of cooperation between members which would be likely to occur because of price competition, or even price war, would not result in the loss of a specific and substantial benefit to the public as purchasers or users); *In re British Bottle Ass'n's Agreement*, [1960-61] L.R. 2 R.P. 345, 387 (1961)("Probable" diminution in cooperation in research and design matters, with resulting loss of economies to public, not such as to constitute the loss of a specific and substantial benefit or advantage); *In re Black Bolt & Nut Ass'n of Great Britain's Agreement*, [1960-61] L.R. 2 R.P. 50, 96 (1960)(cooperative research and "know-how" not deemed to be sufficiently specific advantage or benefits and effects of reduction in cooperation purely a matter of speculation).

73. [1961-63] L.R. 3 R.P. 198 (1962).

information, the court commented favorably on the reporting of costs for each individual member, as well as on visits and talks between members with a view of deriving the full benefits of the experience and advice of their fellow members.⁷⁴ By reducing costs, members of the association were able to compete more effectively with non-members and with manufacturers of standard size wood windows, and that produced lower prices for all windows.⁷⁵ The court found that the price fix was necessary to facilitate the information exchanges and cooperation.⁷⁶

It would thus appear when information agreements are referred to the Restrictive Practices Court, they will be treated in a manner similar to price fixes. They will not be presumed to confer specific and substantial benefits, but will have to be justified in terms of their effects on prices, quality and similar terms. This contrasts sharply with the American practice of determining whether reporting is, in fact, a disguised price fix and thus a per se violation.

B. Trade Association Activities Aimed at Customers or Suppliers

1. Sherman Act

Joint activities of trade association members in their dealing with customers and suppliers pose problems under the Sherman Act. When such actions constitute group boycotts they are per se illegal. Sometimes the group boycott may be blatantly obvious, as in the case of *Fashion Originators Guild of America, Inc. v. FTC*,⁷⁷ where women's clothing designers agreed to boycott retailers who sold copies of their originals in an effort to combat style piracy.⁷⁸

Other activities, although not intended to be group boycotts, may result in individual members agreeing independent of the trade associations to boycott suppliers or customers. In these instances, the concerted power of the association members may coerce suppliers or customers into following association recommendations, thereby having the same effect as an express group boycott. Consequently, enforcement authorities view such activities cautiously, even where the program may be in the interests of the association's members and the customers or suppliers.⁷⁹ However, activities which do not involve direct contact with customers

74. *Id.* at 234-35.

75. *Id.* at 237.

76. *Id.* at 238.

77. 312 U.S. 457 (1941).

78. *Id.* at 463-65. *Accord*, *American Medical Ass'n v. United States*, 317 U.S. 519, 528-35 (1943) (AMA pressure on hospitals to boycott doctors working for a nonprofit health maintenance organization).

79. In *National Onion Ass'n*, 91 F.T.C. 1157 (1978), the FTC refused to issue an advisory opinion approving a program whereby manufacturers of onion containers would be asked to contribute one cent per container to a fund which would be used to promote the sale of onions, despite assurances that nothing would happen to companies who refused to participate. *See also* *National Ass'n of Sporting Goods Wholesalers*, 73 F.T.C. 1333 (1968)

or suppliers, but which are aimed at them, do not violate the Sherman Act if they serve legitimate purposes and do not involve price fixing, boycotts or other unreasonable restraints. The most common activity of that type is credit reporting, which generally does not violate section one unless it is accompanied by agreements on credit terms, agreements to deny credit to particular customers or agreements on terms of credit.⁸⁰

Joint selling and buying activities may result in price fixing or may simply represent reasonable efforts to secure economies of scale. In the former case, the action violates section one of the Sherman Act, while in the latter, the restraints are legal as long as market forces continue to set prices.⁸¹

In *Broadcast Music, Inc. v. Columbia Broadcasting Systems*,⁸² the use of joint sales agents by composers, writers and publishers of copyrighted music was attacked under the Sherman Act. Broadcast Music, Inc. (BMI) and the American Society of Composers, Authors and Publishers (ASCAP) served as sales agents for copyright holders. Copyright holders granted ASCAP or BMI the nonexclusive right to license performances of their works. ASCAP and BMI then offered to purchasers only blanket licenses whereby, for a fee, the purchaser obtained the right to use any composition in the agency's portfolio. ASCAP and BMI refused to sell licenses for individual works.⁸³ Although potential customers were free to seek out individual composers to purchase licenses for individual works, this alternative was usually not feasible.⁸⁴

The Court held that the blanket license only policies of ASCAP and BMI were not per se illegal price fixes.⁸⁵ The Court found that the blanket license resulted from a market composed of thousands of users, thousands of copyright holders and millions of compositions. Individual sales, monitoring and enforcement of copyrights were prohibitively expensive for most holders and users. The joint sales agents achieved major economies of scale: the need to make only a few rather than thousands of sales, thereby reducing transaction costs; elimination of the costs of close monitoring that would be required in the absence of the blanket license; and pooling of resources for blanket license sales and enforcement.⁸⁶ On the other hand, a joint sales agency was declared per se illegal in *Virginia Excelsior Mills*

(FTC refused to approve association recommendation to manufacturers of procedures for prepaid freight).

80. See *Cement Mfr's Protective Ass'n v. United States*, 268 U.S. 588 (1925).

81. See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 372-78 (1933)(joint sales agency does not violate the Sherman Act where no restrictions are placed on each party's output); *Associated Greeting Card Distrib.*, 50 F.T.C. 631, 633-34 (1954)(joint purchasing by small business wholesaler does not violate the Sherman Act).

82. 441 U.S. 1 (1979).

83. *Id.* at 27-28.

84. *Id.* at 13-14.

85. *Id.* at 2, 24.

86. *Id.* at 21.

*v. FTC*⁸⁷ where the agency served the express purpose of eliminating price competition and included limitations on production.⁸⁸

2. Restrictive Trade Practices Act

The Restrictive Trade Practices Act specifically allows collusive action by trade associations aimed at customers or suppliers when reasonably necessary to negotiate fair terms with a preponderant seller or buyer.⁸⁹ Initially, the court must determine if the proposed "market" in which the buyer or seller is allegedly preponderant is a commercially sensible division of goods or services.⁹⁰ It must then determine, based on market share and on facts peculiar to the trade, whether the buyer or seller is in fact preponderant.⁹¹ Finally, it must analyze the restrictions to determine if they are reasonably necessary for the negotiations of fair terms. Fair terms for a seller are those "on which the efficient manufacturer can make and sell his goods at a reasonable, but no more than a reasonable, profit."⁹² Fair terms for a buyer include prices not substantially higher than those it would have to pay were one supplier not preponderant.⁹³ There is no justification for collusive action by the trade association, unless a preponderant buyer or seller is disposed to impose unfair terms.⁹⁴

A joint buying pool was justified as necessary to negotiate fair terms in *In re National Sulphuric Acid Association Ltd's Agreement*.⁹⁵ All domestic producers of sulphuric acid agreed to buy their sulphur only through the pool. The evidence showed that the pool negotiated with

87. 256 F.2d 538 (4th Cir. 1958).

88. *Id.* at 539-41.

89. Restrictive Trade Practices Act, 1976, 25 Eliz. 2, c. 34, §§ 10(1)(d), 19(1)(d).

90. See *In re Agreement between the Members of the Locked Coil Rope Makers' Ass'n*, [1964-65] L.R. 5 R.P. 146, 204 (1964)(division of mining ropes into two classes is not commercially sensible in light of no significant differences in size, appearance, manner of production, general nature of machinery used, composition of the sellers' side of the market or the buyers' side of the market).

91. See *In re National Sulphuric Acid Ass'n, Ltd's Agreement*, [1963-64] L.R. 4 R.P. 169, 228-29 (1963)(rejecting position that at least 50% share is required).

92. *In re Water-Tube Boilermakers Ass'n's Agreement*, [1957-59] L.R. 1 R.P. 285, 341 (1959).

93. *In re National Sulphuric Acid Ass'n Ltd's Agreement*, [1963-64] L.R. 4 R.P. 169, 228-29 (1963).

94. Restrictive Trade Practices Act, 1976, 25 Eliz. 2, c. 34, §§ 10(1)(d), 19(1)(d). The purpose behind this particular provision is to give the Restrictive Practices Court guidelines to assist it in making its determination whether the agreement challenged is reasonable when balanced against the detriment to the public. Thus, in Britain, the balancing process was actually initiated by the legislature, although it is still up to the courts to complete the process. In *In re Water-Tube Boilermakers Ass'n's Agreement*, [1957-59] L.R. 1 R.P. 285, 340-41 (1959), the court first found that there was a preponderant buyer so that the statute was satisfied and then turned to the question of whether the restriction was reasonably necessary to negotiate fair terms with that preponderant buyer.

95. [1963-64] L.R. 4 R.P. 169 (1963).

Sulphur Export Corporation, which controlled just under fifty percent of the market and was the price leader. The court relied on evidence of the seller's demands during negotiations to find that without the pool, members would have been forced to purchase at unreasonable terms.⁹⁶

Similarly, a joint sales plan was held justified as reasonably necessary to avoid loss of exports in *In re Water-Tube Boilermakers' Association's Agreement*.⁹⁷ When association members received an invitation to bid, they reported it to the association director. The director called a meeting at which all members indicated what their bids would be. A member was then selected based on considerations of distributing the work in a manner providing for the most efficient use of the industry's resources. The selected member was allowed to meet the lowest bid. The court found that loss of even one export contract would have substantially reduced exports and that the restrictions operated to maintain export orders, thus reducing the likelihood that members' overseas offices would be closed.⁹⁸

Thus, the British system of dealing with trade association activities aimed at customers or suppliers contrasts sharply with American practice. Under the Sherman Act, the issue before American courts is whether the activity is or is not intended as a per se illegal group boycott or price fix. On the other hand, the Restrictive Trade Practices Act specifically allows certain joint activity against customers or suppliers so long as the joint activity is justified. Accordingly in Britain, some group boycotts and price fixes are not proscribed.

C. Self-Regulation

1. Sherman Act

Trade association activities involving self-regulation may take the form of codes of ethics, product standardization, or product certification. Codes of ethics are assessed under the Sherman Act to determine their overall impact on competition. Ethical provisions which deal with business practices must be justified either because they are procompetitive or because they serve legitimate business purposes with no or only insubstantial restraints on competition.⁹⁹

Product standardization campaigns can promote safer products, eli-

96. *Id.* at 226-30.

97. [1957-59] L.R. 1 R.P. 285 (1959). The court, however, rejected the association's claim that the restriction was necessary in order to negotiate fair terms with a preponderant buyer. *Id.* at 346.

98. *Id.* at 345.

99. An excellent discussion of the problem appears in *Mardirosian v. American Inst. of Architects*, 474 F. Supp. 628, 637-51 (D.D.C. 1979). *See, e.g.*, *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692-99 (1978) (ethical provision prohibiting competitive bidding violates the Sherman Act); *Goldfarb v. Virginia State Bar Assoc.*, 421 U.S. 773, 776, 793-95 (1975) (provision requiring adherence to minimum fee schedule violates Sherman Act); *Cf. Wine Inst.*, 91 F.T.C. 1190, 1191 (1978) (advisory opinion approving code provision advising against fraudulent or deceptive advertising).

minate consumer confusion and focus consumer attention on price. The resulting availability of interchangeable parts may promote efficiency and stimulate competition in maintenance and repairs. However, standardization programs are frequently scrutinized, because standardization frequently leads to increased uniformity in prices. The existence of other programs such as campaigns to promote pricing or costing systems, detailed statistical reporting programs, simultaneous price changes, and freight equalization plans may lead a court to conclude that the standardization program is intended to facilitate a price fix and thus violates the Sherman Act.¹⁰⁰ A similar conclusion may be reached where the program standardizes product characteristics which are unrelated to the program's overall goals.¹⁰¹

Certification programs also raise potential problems of group boycotts. Although a certification program does not resemble a classic group boycott, a refusal of certification may have boycott-like effects.¹⁰² Generally, certification criteria must be objectively applied,¹⁰³ and those denied certification must be given an opportunity to contest the denial.¹⁰⁴ If the requirements for certification are reasonably related to the underly-

100. See *Bond Crown & Cork Co. v. FTC*, 176 F.2d 974, 980-82 (4th Cir. 1949); *Milk & Ice Cream Can Inst. v. FTC*, 152 F.2d 478, 481-83 (7th Cir. 1946). Cf. *National Macaroni Ass'n*, 65 F.T.C. 583, 610-12 (1964), *aff'd*, 345 F.2d 421, 426 (7th Cir. 1965) (standardizing composition of macaroni to reduce demand for and, consequently, price of ingredients violates the Sherman Act).

101. In *C-O Two Fire Equip. Co. v. United States*, 197 F.2d 489, 491-94 (9th Cir. 1952), an association of fire extinguisher manufacturers contended that uniform prices were the result of product standardization necessary to meet Underwriters Laboratories (U.L.) certification requirements. The court held that the standardization program was part of a price fix because it went beyond U.L. requirements and included color and other physical characteristics. *Id.*

In *United States v. National Malleable & Steel Casting Co.*, [1957] TRADE CASES (CCH) ¶ 68,890, 73,580 (N.D. Ohio 1957), *aff'd without opinion*, 358 U.S. 38 (1958), the court found no price fixing present in the Association of American Railroads' standardization of couplings, despite its being accompanied by uniform prices, a cost accounting program and a lack of a new entries into the market. The standardization was necessitated by numerous accidents due to faulty couplings, *id.* at 73,591, and the uniform prices were considered a natural market reaction to the program. *Id.* at 73,592. The lack of new entries was explained by stable demand in the industry. *Id.* at 73,598. The above approach to the antitrust question is exactly how a British court would have tackled the issue.

102. Certification programs are not the only example of non-boycott activity which may have boycott-like effects. Much litigation has centered on access to real estate multiple listing services. For a discussion see Miller & Shedd, *Do Antitrust Laws Apply to the Real Estate Brokerage Industry?*, 17 AM. BUS. L.J. 313 (1979); Malin, *Real Estate Multiple Listing Services and the Sherman Act: A Response to Miller and Shedd*, 18 AM. BUS. L.J. 77 (1980).

103. *Radiant Burners, Inc. v. People Gas Light & Coke Co.*, 364 U.S. 656, 658-60 (1961).

104. *McCreery Angus Farms v. American Angus Ass'n*, 379 F. Supp. 1008, 1017-18 (S.D. Ill.), *aff'd mem.*, 506 F.2d 1404 (7th Cir. 1974). See *Silver v. New York Stock Exchange*, 373 U.S. 341, 364-67 (1963) (nonmember broker-dealers must be given notice and an opportunity to be heard before private stock exchange can direct its members to discontinue private wire communication with those firms).

ing purpose of the certification program, then the refusal to certify a non-complying competitor does not violate the Sherman Act even though the refusal hurts the competitor's business.¹⁰⁵

2. *Restrictive Trade Practices Act*

Trade associations have tried to bring self-regulation activities within the Restrictive Trade Practices Act's justifications of protecting the public from injury or conferring specific and substantial public benefits.¹⁰⁶ In all cases, the inquiry focuses on whether the public benefits or protections would still be present in the absence of the association self-regulation agreements.¹⁰⁷ In *In re Blanket Manufacturers' Agreement*,¹⁰⁸ the court found that minimum quality standards for woven woolen blankets conferred specific and substantial public benefits because many defects might otherwise not be detected by a consumer upon initial inspection.¹⁰⁹ In *In re Federation of British Carpet Manufacturers' Agreement*,¹¹⁰ however, minimum quality standards were held not justified because even in the absence of such standards, retailers would be capable of detecting defects.¹¹¹ In both cases, the determining factor was the ability of some entity to protect the public in the absence of a self-regulation agreement.

D. *Contract Standardization*

1. *Sherman Act*

Many trade associations provide suggested form contracts for their members to use in dealing with customers and suppliers. These forms provide an efficient, inexpensive method of handling routine business deals. In heavily regulated industries, the provision of forms which comply with government regulations is a valuable service. However, where standard provisions deviate markedly from normal or usual business arrangements in the industry, courts will infer a violation of the Sherman Act.¹¹²

105. *Hartley v. American Quarter Horse Ass'n*, 552 F.2d 646, 652-56 (5th Cir. 1977); *Bridge Corp. of America v. American Contract Bridge League*, 428 F.2d 1365, 1369-71 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971). See generally Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955).

106. See *In re Federation of British Carpet Mfrs' Agreement*, [1957-59] L.R. 1 R.P. 472, 534-35 (1960); *In re Blanket Mfrs' Ass'n Agreement*, [1957-59] L.R. 1 R.P. 208 (1959); *In re Chemists' Fed'n Agreement* (No. 2), [1957-59] L.R. 1 R.P. 75, 105 (1958).

107. In *In re Chemists' Fed'n Agreement* (No. 2), [1957-59] L.R. 1 R.P. 75, 105 (1958); the court held the Federation's refusal to sell over the counter drugs to anyone other than registered pharmacists did not prevent injury to the public, because once in the pharmacist's establishment the medicine could be dispatched by an untrained assistant. *Id.*

108. [1957-59] L.R. 1 R.P. 208 (1959), *aff'd on other grounds*, [1957-59] L.R. 1 R.P. 271 (1959).

109. *Id.* at 256.

110. [1957-59] L.R. 1 R.P. 472 (1959).

111. *Id.* at 539.

112. See *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 43-44 (1930).

For example, in *Paramount Famous Lasky Corp. v. United States*,¹¹³ motion picture distributors, operating through their association, standardized their form contracts with exhibitors. The contracts bound each party to submit any disputes to binding commercial arbitration. The forms further provided that a refusal to submit a dispute to arbitration or abide by an arbitration award would allow a distributor to require the exhibitor to post security guaranteeing performance of its contracts. Failure to pay the security within seven days enabled the distributor to suspend or terminate the contract.¹¹⁴

The Court characterized the forms' requirement of arbitration as "unusual" and concluded that the agreement to use the forms suppressed competition.¹¹⁵ Presumably, if the association had simply committed the typical practices of the industry to a form, no violation would have resulted. However, in 1930, when the case was decided, required use of arbitration was not common. The Court apparently was concerned that the association went beyond providing forms and dictated the substance of the distributors' agreements, matters which the Court believed should be set in the competitive market place rather than association meetings.

2. *Restrictive Trade Practices Act*

The use of standardized form contracts was considered by the Restrictive Practices Court in *In re Birmingham Association of Building Trades Employers' Agreement*.¹¹⁶ The trade association recommended that its members press for the use of its standardized building contracts whenever appropriate.¹¹⁷ The court recognized that special skill was required in drafting building contracts due to their complexity.¹¹⁸ It further agreed with the trade association that the standardized forms were well drafted and fair to all parties.¹¹⁹ Nevertheless, the court concluded that the standardized forms were not justified because they did not confer on the public, as building owners, specific and substantial benefits which would not otherwise be present.¹²⁰ The court based its conclusion on two factors. First, the court found that the members of the association frequently deviated from the form, using instead forms used by governmental bodies or private owners' architects.¹²¹ Second, the court found that the public did not need the protections offered by the forms. The court divided building owners into three groups: national government, local government and private individuals. The governments possessed their own expert

113. 282 U.S. 30 (1930).

114. *Id.* at 37-40.

115. *Id.* at 43-44.

116. [1963] L.R. 4 R.P. 54.

117. *Id.* at 95.

118. *Id.* at 98.

119. *Id.* at 99.

120. *Id.*

121. *Id.*

advisors and therefore did not need the protection of the association's forms. Private parties generally relied on advice from their architects who possessed the necessary expertise to protect them.¹²²

It is apparent from *Birmingham Association* that trade associations face a heavier burden of justifying standardized form contracts under the Restrictive Trade Practices Act than they face in defending them under the Sherman Act. Much of the evidence which the court relied on to invalidate the Birmingham Association's recommendation might well have influenced an American court to hold the recommendation legal. The complexity of building contracts and the need for builders to have forms with which they were familiar would serve to legitimate the publishing of recommended forms. Furthermore, the sophistication of building owners and the resulting frequent deviations from the forms would demonstrate that the recommendation did not have an anticompetitive effect. This analysis, which relied on the benefits to association members, could not justify the recommendation under the British Act which required an affirmative showing of specific and substantial benefits to the public.

IV. CONCLUSION—RECONCILING THE TWO STATUTES

Under the Sherman Act, American courts use judicial and economic experience to declare certain classes of restraints per se unreasonable. The courts interpreting the Sherman Act then examine the purposes and effects of trade association activities to determine whether they sufficiently approximate the per se offenses or whether the intent of the participants is to achieve a result equivalent to a per se offense. The Restrictive Trade Practices Act, on the other hand, allows anticompetitive arrangements, which would be struck down without discussion in America, and affords the parties an opportunity to justify them.

The American approach has two advantages not present under the British scheme. First, the per se rules provide a specific yardstick by which to measure reasonableness of restraints. They thus are far easier to apply than the Restrictive Trade Practices justifications, since the only determination to be made is whether or not a specified result is intended or achieved. The British scheme, however, provides for efficient application of the economic justifications by providing for ten appointed members of the Restrictive Practices Court who are experts in industry, commerce or public affairs.¹²³

Second, the Sherman Act's per se rules provide a consistent measure

122. The association attempted to transform the benefits of the forms to its members into substantial and specific public benefits by arguing that if builders found it necessary to use unfamiliar forms, they would likely raise prices to cover unknown contractual contingencies. The attempt, however, was unsuccessful. *Id.* at 98-99.

123. American judges are extremely reluctant to undertake detailed economic analyses because of their lack of expertise in the economic field. *See Standard Oil Co. v. United States*, 337 U.S. 293, 309-14 (1949).

of predictability that is inherently absent from the Restrictive Trade Practices Act. For example, every informed American businessman must know that he cannot fix prices under any circumstances. The British scheme, however, minimizes this need for prior knowledge by providing no penalty until the specific agreement is condemned by the Restrictive Practices Court. On the other hand, restraints only receive official scrutiny under the Sherman Act when the government or a private party commences a law suit, and the consequences of liability may be disastrous. Registration of restrictive trade agreements brings the restraints under the immediate scrutiny of the British authorities, with consequences of violation minimal.¹²⁴ Were penalties for entering illegal restrictive agreements comparable to those for violating the Sherman Act, the British system would require greater predictability. Thus, the American system emphasizes predictability and consistent treatment of classes of agreements to facilitate business planning and efficient judicial consideration while the British system is willing to sacrifice such efficiencies for detailed economic analyses of individual agreements.

124. See *supra* notes 30 & 31 for the respective penalties under the British and American systems.