> "In the antitrust world, and at the patent/antitrust interface, the basic point is to prevent collusive activity unnecessary to the exploitation of a lawful monopoly. In many situations, the decision will be wonderfully ambiguous. However, there is little sense in pretending that easy resolutions exist where in fact they do not. To the extent that I have made it harder to pretend, I will count this occasion as a success."

FURTHER DEVELOPMENTS IN REAGAN ADMINISTRATION ANTITRUST POLICY

Actions by the Reagan administration and speeches by its members continue to fill out the shape of current U.S. antitrust policy. The broad lines are vigorous enforcement of the law as it applies to price fixing and other horizontal agreements, a less vigorous but still to be defined merger policy and a permissive attitude towards vertical restraints including resale price maintenance. The policy shifts are to some extent in line with trends in judicial decisions and some current economic literature. Their impact on business decisions will be moderated by the preponderance of private antitrust suits and to some extent by state antitrust enforcement. Also, business could face suits for past actions if there is a change of administration.

The Antitrust Division is now revising the Merger Guidelines which were issued in 1968. The principal factors which those Guidelines took into effect were the level of concentration of the industry involved and the share of the market accounted for by the merging firms; enforcement action was indicated at particularly low market shares of the merging forms where a highly concentrated industry was involved. In 1966 the Supreme Court declared unlawful a merger of two retail grocery chains which together accounted for only 7.5 percent of sales in their local market area. According to William F. Baxter, Assistant Attorney General in Charge of Antitrust, both economists and the courts now place less faith in market share and concentration figures alone. Appearing before the U.S. Senate Committee on the Judiciary on October 27, he stated:

> "The industrial organization literature has become far richer and more sophisticated...and it has become increasingly clear to economists and legal scholars that some of the simplified assumptions relied upon by the courts have been applied with unwarranted enthusiasm. The courts, too, during the last six or seven years have begun gradually to turn away from rigid adherence to set numerical formulae confined to market concentration and market share factors in favour of a desirably broadened analysis, permitting consideration of additional factors relevant to the realistic assessment of the likely competitive effects of any proposed transaction."

He also gave some indications of what factors other than concentration and market share would be considered in the revised guidelines in order to assess the actual state of competition. He said:

> "Among the factors under consideration are the rate of technological change, the amount of capital which must be put at risk to enter the market, the stability of relative market shares over time, the durability and restorability of the product, and the growth rate of sales in the individual market and related markets. Revised guidelines dealing with such issues...should deter anticompetitive mergers without unnecessarily deterring transactions that may contribute to productivity, cost reduction and consumer welfare."

Price and non price vertical restraints are distinguished from one another in U.S. jurisprudence. Continental T.V. v Sylvania Inc. 433 U.S. 36(1977) removed vertical non price restrictions from per se liability under s.1 of the Sherman Act but the decision did not apply to resale price maintenance or tying arrangements. In the past few years enforcement in respect to vertical restraints has been largely through private suits although the Federal Trade Commission was previously very active in attacking resale price maintenance.

Mr. Ronald G. Carr, Deputy Assistant Attorney General Antitrust, in an address to the Ohio Bar Association on October 30, discussed current official attitudes towards vertical restraints. He took the position that vertical restraints are not as objectionable as other antitrust violations and that the Antitrust Division, in allocating its limited resources, should place vertical restraints "somewhere down the line, possibly to the point of vanishing". He contended that vertical restraints are rarely collusive and can increase welfare in a number of ways. According to Mr. Carr, resale price maintenance can prevent some dealers from "free riding" on services provided by others, tie-ins can lead the manufacturer to sell the primary product at a lower price, and the granting of exclusive territories can improve distribution efficiency. He countered charges that the Division was refusing to enforce parts of the antitrust laws. He expressed the hope that the courts would eventually extend the Sylvania doctrine to resale price maintenance, tying and other vertical restraints and said that was one reason why the Antitrust Division was developing a program of active participation as amicus in private actions.

James C. Miller III was sworn in as Chairman of the Federal Trade Commission on September 30. At his nomination hearings he said he would try to lower the FTC's antitrust enforcement budget, conduct a thorough review of its enforcement efforts and in future would concentrate upon horizontal collusion. In September the FTC voted to drop a major case begun in 1973 charging collusive actions by some of the largest oil companies. At about the same time an administrative law judge of the FTC whose decision is subject to appeal, ruled that the government had failed to prove its case against the three largest breakfast cereal makers. The case, which was started in 1972, was an attempt to extend the antitrust laws to include shared monoply.

Also in September, the FTC decided to suspend temporarily its Line of Business reporting program. Under the program, the FTC has been collecting information from businesses according to each firm's different lines of business. Analysis of the data has been to some extent supportive of the Reagan administration's distrust of four-firm concentration ratios when used to evaluate mergers. The findings suggest that profit levels are related to a firm's market share whether or not it is in a highly concentrated industry. Business Week of November 16 made the following comment on that finding as it relates to the views of the administration:

> "But economists are still divided over why companies with a large market share tend to have higher profits. Most argue that companies with a large market share have the power - sometimes because they hold important patents - that lets them extract a higher price and thereby reap monopoly profits. But the newer approach emanating from the University of Chicago turns the equation around: Companies with the best management win larger market shares because they do a better job of serving the customer, and they earn higher profits because economies of scale enable them to use resources more efficiently. Under that view - held by the Justice Department's antitrust chief William F. Baxter - there would be no reason to move against a company that had amassed a large market share as long as it did so without collusion with competitors."

On the legislative front, the U.S. Senate on Oct. 27 passed a landmark bill which would permit entry by AT&T into the unregulated computer field subject to certain safeguards. While passage by the House of Representative is in doubt, the Bill provides a good indication what lies ahead for AT&T. The bill would:

- Deregulate the telecommunications equipment industry and long distance telephone service. AT&T would have to allow competing suppliers of long distance service to interconnect with local Bell telephone networks on terms comparable with those of AT&T's own long lines.

- Tie sales of telecommunications equipment within the Bell system to Bell's success in selling such equipment in competitive markets, thus opening up the Bell market to competitors of Western Electric.

- Permit a subsidiary of AT&T to enter unregulated computer based information fields including data processing, the manufacture of computers and the provision of software.

The Assistant Attorney Genral in charge of antitrust has expressed some dissatisfaction with the bill. However, there is no doubt that when legislation is finally agreed upon the Antitrust Division will drop its AT&T suit seeking divestiture of AT&T's local regulated telephone monoplies from those portions of AT&T including Western Electric which engage in competitive and potentially competitive activities.

CANADIAN PULP PRODUCERS FACE E.E.C. COMPETITION CHARGES

A despatch by Giles Merritt in London's Financial Times of September 25 reports that the European Economic Community's Competition Directorate has launched a major case against leading Nordic, North American, Spanish and Portuguese paper pulp producers. He states:

> "All have received notification from the Commission's competition authorities alleging that they have acted in collusion before posting their prices. Commission sources suggest that the effect of the 65 producers' pricing policies has been to push prices in the EEC to a point where European producers could not compete."

According to other sources, Canadian producers are included in the case. It is not yet clear whether the case, if it proceeds, will be conducted under Article 85 (collusion) of the Treaty of Rome or under Article 86 (abuse of a dominant position).

U.N. ANTITRUST GROUP HOLDS FIRST MEETING

The United Nations Intergovernmental Group of Experts on Restrictive Business Practices (I.G.E.) held its first annual meeting on November 2-11 in Geneva.

The formation of the IGE which is within the framework of UNCTAD, was one of the recommendations in the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices which was adopted by the U.N. General Assembly in December, 1980 (the text of the Principles and Rules is reproduced in the June 1980 issue of Canadian Competition Policy Record). The mandate of the IGE is basically to provide a forum for exchanges of views on matters related to the Principles and Rules and to make studies and recommendations. Those represented at the meeting included some 68 countries along with a number of specialized agencies, intergovernmental groupings including the European Economic Community, and non-governmental agencies including law associations, the International Chamber of Commerce and the International Organization of Consumer Unions. The Canadian delegate acted as the Coordinator for Group B (the OECD countries).