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FOREIGN AND INTERNATIONAL

REAGAN ANTITRUST POLICY GAINS CREDIBILITY WITH DISPOSITION OF IBM AND AT&T CASES

The dropping of the IBM case and the settlement of the AT&T case, both of which were announced in Washington on January 8, are landmarks in U.S. antitrust history and have been widely acclaimed.

The IBM case was launched in 1969 and was not going well for the government. IBM was accused of monopolizing markets for general purpose computers and peripheral products compatible with IBM equipment. Aside from IBM's size and strong market position, the government's case was weak in terms of specifics of abuse. Also, while it had some kind of divestiture in mind as a remedy, the specifics of that were unclear as well. In addition, in sharp contrast to the AT&T case, some of the difficulties of the case were widely attributed to mismanagement by the presiding judge. Moreover, in the fast moving field of information technology, the case for a smaller and weaker IBM had become somewhat less convincing; European and Japanese rivals were growing in strength, and the rivalry of AT&T's Bell Research and Western Electric had clearly become only a matter of time even before the settlement of the AT&T case.

The theory behind the AT&T litigation, which dates back to 1949, was always clear. It was, as stated in the Competitive Impact Statement issued by the Department of Justice on February 10, 1982:

"...as a rate base/rate of return regulated monopolist, AT&T has had both the incentive and the ability, through cross-subsidization and discriminatory actions, to leverage the power it enjoys in its regulated monopoly markets to foreclose or impede the development of competition in relation, potentially competitive markets".

The Western Electric case, which was launched in 1949, was settled by a consent decree in 1956. The settlement was based on the view that the anti-competitive effects of AT&T's structure might be minimized by limiting the business activities in which AT&T could engage. AT&T's activities were limited to the provision of common carrier communications services, and Western Electric was restricted to the manufacture of types of equipment sold or leased for use within the Bell system.

Subsequent developments made the terms of the 1956 settlement inadequate and even harmful. Technological advances and, in some instances,

regulatory responses, opened up new areas of competition in the provision of customer premises equipment and of inter-city telecommunications and information services. On the one hand, they created new areas of conflict between the interests of competition and AT&T's integrated structure. On the other hand, they created conditions in which the 1956 settlement had become an anti-competitive and artificial barrier to AT&T's participation in computer and other markets where technology had come to overlap that used to provide telecommunications services.

The recently announced settlement concludes an antitrust case which was launched in 1974 and in which the Attorney General sought divestiture from AT&T of the Bell operating companies and divestiture and dissolution of Western Electric. Essentially, the settlement will require AT&T to spin off its 22 Bell operating companies (BOC's) which provide exchange telecommunications and exchange access. This will remove the incentive for the BOC's to discriminate against competitors of AT&T in the provision of interchange and information services or against the competitors of Western Electric in the provision of telecommunications equipment. AT&T will retain its long distance services, Bell Research and Western Electric, and the latter will be freed from the restrictions on its activities which were imposed by the 1956 settlement.

The effects which the settlement will have upon competition are unclear, but they will be massive and world wide. The market for telecommunications equipment used by the BOC's will become accessible to competitors of Western Electric. Companies now competing with AT&T in the provision of long distance telecommunications service may have improved access to local exchanges operated by the BOC's, although they will still be competing with AT&T. AT&T will probably enter the rapidly expanding data transmission market in competition with the smaller companies which now occupy that field. AT&T is reported to have developed a system whereby incompatible computers can be linked, and that could erode some of the advantages now enjoyed by IBM. Western Electric will be freed to seek to regain some of the share of the private branch exchange market which it has lost to smaller competitors in recent years, and it might enter the computer market as well. IBM, relieved of its biggest single antitrust concern, may become a more aggressive and more acquisitive competitor.

Canada will certainly be affected by some of these developments, although precisely how remains unclear. Companies such as Northern Telecom and Mitel will face both new opportunities and new challenges in the U.S. market, and Western Electric could become a bigger factor in the Canadian market. The U.S. settlement is likely to influence the thinking of the Restrictive Trade Practices Commission as it prepares its final report on the Telecommunications Reference. The same could well apply to the thinking of the Government when it receives the recommendations of the RTPC.

Developments in other unrelated antitrust matters in the U.S. tend to confirm that enforcement by the new administration, while conservative on the frontiers of law, will continue to be a potent factor to be taken into account in business decisions. The attempt by Mobil, the second largest oil company in the U.S., to acquire Marathon, the sixteenth largest one, was thwarted in January by the intervention of the Federal Trade Commission and by a court decision which cleared the way for U.S. steel to acquire Marathon. Also, despite administration statements which seemed to suggest that no attacks on resale price maintenance were planned, the FTC in fact took action in such a case in January with the express approval of James C. Miller, the new FTC Chairman. According to a proposed consent order, Germaine Monteil Cosmetics will be barred from imposing upon or even suggesting resale prices to its dealers for two years.

DEVELOPMENTS IN THE U.K.

The report of the Monopolies and Mergers Commission on Bicycles is expected to bring about a relaxation of the distribution policies of manufacturers who refuse to sell to discounters. The Commission recommended that TI Raleigh Industries Ltd., which has about 40 per cent of the British market, be required not to refuse to supply bicycles to discounters who provide a reasonable level of service. However, the Commission took the view that Raleigh should be allowed not to supply bicycles with the Raleigh brand name provided it supplies bicycles of equivalent specifications under another brand name and allows the dealer to publicize the name of the supplier. Also, the Commission concluded that Raleigh was justified in limiting the number of dealerships in an area according to the size of the market.

The Raleigh report is the first by the Commission under the new legislation of 1980. That law empowers the Director General of Fair Trading to carry out preliminary investigations of practices which have the effect of restrictions preventing or distorting competition. The Director General released his report on Raleigh in February, 1981 in which he condemned the company's refusal to sell to discounters. In accordance with the legislation, Raleigh had an opportunity to make an undertaking satisfactory to the Director General, but did not do so. Having received the report of the Commission, the Secretary of State for Trade may ask the Director General to seek a satisfactory undertaking from Raleigh or he may make a remedial order.

Public concern about widely divergent prices of similar cars within the E.E.C. is beginning to have some effect, particularly in the U.K. where prices are by far the highest. In the past year both the weekly Economist and the Bureau of European Consumer Unions have published surveys showing that prices net of taxes in Germany and Belgium are only about 70 per cent those in the U.K., and prices in Denmark and Holland are even lower. The basic causes of the price difference appear to be measures taken by the producers or their official distributors, as well as by governments, to make it difficult for independent dealers and individuals to move cars across frontiers. The use of

right hand drive cars in the U.K. undoubtedly facilitates control of international movements by the manufacturers.

In the U.K. an importer of a car must obtain a safety certificate, the issuance of which has been delegated to official distributors. Unofficial dealers, in addition to meeting with supply difficulties, have encountered exorbitant costs and delays in obtaining certificates. Individuals seeking to buy a car abroad for their own use have, for all practical purposes, been unable to obtain certificates and can only import a car if they can show they have used it abroad.

The British Government has been under pressure both from the public and E.E.C. Commission to take some action. Early in February it announced that the industry would be persuaded to issue safety certificates more readily. Manufacturers might still restrict supplies of right hand drive cars to unofficial dealers, but this is reported to be under investigation by the E.E.C. competition authorities. Alas, the E.E.C. has proposed a draft regulation which, while it would provide some exemption for official distributor networks, would only apply when prices among E.E.C. countries did not vary by more than twelve per cent.

Activity under the British merger legislation has increased considerably over the past year. However, the manner in which it is being applied has been under heavy attack including by business interests who are disturbed by its uncertainty. In January, 1982, the Secretary of State for Trade announced a departmental inquiry into the treatment of mergers by the Monopolies and Mergers Commission.

In fact, criticisms have been levelled both at the role of the Government and that of the Commission. While the Director General of Fair Trading can propose merger references for the Commission, it is the Trade Secretary who decides, and the rationale of some of those decisions have been questioned. For example, it is unclear why some large newspaper mergers have been referred while others have not. The same applies to a decision not to accept the advice of the Director General to refer a retailing merger involving Woolworth; the report of the monopolies and Mergers Commission on discounting had suggested that large retailing mergers be examined closely.

The recommendations of the Commission in its merger reports have been criticized as being unpredictable. The legislation gives very little guidance, and leaves it to the Commission to assess public interest according to the circumstances of each case. While the Commission takes competition into account, it also considers such factors as employment, regional effects, consumer interests, and management including the effects of foreign control. The latter was clearly a factor in its findings against the acquisition of a scotch whiskey distiller by Hiram Walker and that of the engineering firm of Davey by a U.S. corporation. Its rejection of both a foreign and a domestic bid for the Royal Bank of Scotland was based, in the one case, partly on considerations of

foreign control and, in both cases on grounds that the effect of the mergers "on career prospects, initiative and business enterprise in Scotland would be damaging to the public interest of the United Kingdom as a whole". Its rejection of a bid by the conglomerate Lonhro for the House of Fraser (which owns Harrod's) seemed to be based largely on a dislike of Lonhro's style of management.

E.E.C. COMMISSION'S MICHELIN DECISION BREAKS NEW GROUND

The E.E.C. Commission, in a decision announced on October 7, 1981, fined the Dutch subsidiary of Michelin (NBIM) about \$U.S. 700,000.00 for having abused a dominant position by applying a variant of loyalty discounts on sales of heavy truck tires to dealers.

Michelin holds about 60 percent of the Dutch market. It applied a secret system of discounts based upon a sales target for each dealer and conditional upon the share of Michelin tires in the dealer's total sales increasing or at least remaining stable. The December, 1981 Bulletin of the European Communities states:

"This policy of selective discounts not only had the effect of tying dealers closely to NBIM but also resulted in discrimination being practiced between them. The harmful effects of the system were compounded by a number of its operational aspects such as the failure to publish the criteria applied or to communicate or confirm them in writing to dealers in accordance with normal trade practice. By using such methods to consolidate its position on the market and to dissuade dealers from obtaining supplies from competing manufacturers, NBIM made it more difficult for manufacturers in the other Member States to enter the Dutch market, thus creating an artificial barrier to intra-Community trade...

...The main significance of this new Commission Decision is its reassertion that a dominant firm may not obtain or consolidate its market position by means of a policy on prices, rebates or discounts that impairs the unity of the common market".

There have been cases which dealt with pricing practices aimed at segregating markets with higher prices, usually national markets. The Michelin case, however, breaks new ground in dealing with non-cost-justified price discrimination by a dominant firm as a means of entrenching its market position. The case has been compared with Robinson-Patman cases in the United States.

Mr. Frans Andriessen, who succeeded Mr. Raymond Vouel last year as the Member of the Commission who is in charge of competition, has been

credited with introducing new enforcement vigor. Restrictions on parallel imports have been attacked in a concerted way and with very large fines. In one recent case, the British subsidiary of champagne producer Moet et Chandon was fined about \$U.S. 1.25 million for banning exports from the U.K. where prices are relatively low.

Early in December, 1981, Mr. Andriessen launched a new attempt to obtain approval from the Council of Ministers of a regulation to deal with large mergers. At present it is only possible to attack a merger after the event as an abuse of a dominant position where there is not substantial competition remaining. What is being sought is a system of prior notification of large mergers and the power to ban or dissolve those that would restrict free competition in the community.

NEGOTIATIONS RESUMED ON U.N. TECHNOLOGY TRANSFER CODE

The Interim Committee of the United Nations Conference on an International Code of Conduct on the Transfer of Technology held its first meeting in Geneva on March 1 to 5, 1982 and a second meeting is scheduled for April 26-30, 1982. Little progress was made at the first meeting.

As reported in the June, 1981 issue of Canadian Competition Policy Record, the Fourth Session of the U.N. Conference on an International Code of Conduct on the Transfer of Technology ended on April 10, 1981 without reaching agreement. The Interim Committee was established by a resolution of the General Assembly on December 16, 1981. Its mandate is essentially to consider and seek solutions to the outstanding issues and make proposals to a fifth session of the Conference if one is held.

Some of the most difficult outstanding issues are in the part of the Code dealing with restrictive practices associated with technology transfers. The North and the South are still far apart on the scope and stringency which that part of the Code should have.