FOREIGN AND INTERNATIONAL

U.S. JUSTICE DEPARTMENT REVISES THE ANTITRUST MERGER GUIDELINES

The United States Department of Justice on June 14 issued new Merger Guidelines which revise those issued in 1982. They reflect a somewhat less stringent application of the merger laws by the Reagan administration and have been welcomed as providing business with more accurate guidance as to the kinds of mergers which are likely to be challenged.

The 1982 Guidelines, which replaced those issued in 1968, indicated that mergers resulting in slightly more concentrated markets than under the earlier guidelines would be tolerated. They introduced quantitative criteria in the form of Herfindahl Indexes to indicate levels of concentration which were acceptable, doubtful or clearly unacceptable, and they described in detail how markets would be defined for measurement purposes.

While allowances were made in the 1982 Guidelines for unquantifiable factors, the 1984 Guidelines go further in that respect. In particular, they place more weight upon operating efficiencies likely to result from a merger and specifically include consideration of management efficiencies. More weight will also be accorded the failing firm defence, and that defence will be extended to acquisitions of divisions of companies. In addition, the new guidelines explain how imports will be taken into account in assessing market shares; while the current level of imports will be used, account will also be taken of quotas and other devices which impede import growth.

U.S. SUPREME COURT REPUDIATES ITS OWN INTRA-ENTERPRISE CONSPIRACY DOCTRINE

A majority decision by the United States Supreme Court on June 19 held that a parent company and its wholly owned subsidiary are incapable of conspiring with each other in violation of S. 1 of the Sherman Act, overruling previous decisions of that Court to the extent that they hold to the contrary Copperweld Corp. v. Independence Tube Corp., No. 82-1260, U.S. Sup. Ct., 6/19/84). The only other instance of the Court overturning an antitrust law doctrine was in Sylvania which repudiated the per se illegality of vertical non-price restraints. The Court explicitly excluded from its Copperweld decision the position of a parent company in its relations with a less than wholly owned subsidiary. However, the Court's reasoning would seem to apply to some extent at least beyond cases of total ownership.

The decision was undoubtedly welcomed by the United States government, which had joined the petitioners as amicus curiae. Also, the decision brings the application of the Sherman Act more into harmony with Canadian law in that respect. S. 32(7) of the Combines Investigation Act

specifically exempts arrangements among affiliates from the prohibition of conspiracies.

The intra-enterprise conspiracy doctrine orginated in U.S. V. Yellow Cab Co., 332 U.S. 218(1947). That case involved conspiracies among Checker Cab Manufacturing Co. and a number of cab operating companies; both Checker and the cab operating companies were controlled by one person. In sustaining the conviction in that case, the Supreme Court stated that even restraints in a vertically integrated enterprise were not necessarily outside the Sherman Act, observing that an unreasonable restraint:

> "...may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act."

In Kiefer-Stewart Co. v. Joseph Seagram & Sons, Inc., 340 U.S. 211(1951) the Court held that two wholly owned subsidiaries of a liquor distiller had violated S. 1 of the Sherman Act for jointly refusing to supply a wholesaler who would not observe a resale pricing scheme. The Court referred to "our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws." In succeeding years there were a number of other convictions involving affiliated concerns, but the doctrine has been under attack.(1)

In the Copperweld case, the Seventh Circuit Court of Appeals had upheld a treble damages award against Copperweld and a wholly owned subsidiary, Regal Tube Company, for joint actions which caused a third company to breach a contract with a competitor of Regal. In reversing, the Supreme Court stated:

> "Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability."

Three justices dissented from the majority decision, preferring the rule of reason approach to determine if collective action has injured competion.

(1) See, for example, Areeda, Intraenterprise Conspiracy in Decline, 97 Harvard Law Review 451 (1983).

ALCAN-ARCO DEAL DELAYED BY U.S. JUSTICE DEPARTMENT

J. Paul McGrath, U.S. Assistant Attorney General in charge of the Antitrust Division, announced on June 19 that the Department of Justice had concluded that the proposed acquisition by Alcan Aluminum Limited of most of Atlantic Richfield Company's aluminum assets would violate section 7 of the Clayton Act "if consummated as now structured". He said the companies had requested a meeting to seek to resolve the Department's concerns.

According to press reports, the proposed acquisition includes a rolling mill now under construction which would double Alcan's share of the U.S. aluminum can market to about 14 per cent. Aluminum Company of America is reported to be the dominant firm in that market.

FTC RELAXES 1980 CONSENT ORDER AGAINST GENSTAR

The Federal Trade Commission announced on July 18 a relaxation of a 1980 consent order against Genstar Corp., a Canadian conglomerate whose interests include building matrials. The company will no longer require FTC approval before shipping cement from its plant near Vancouver to Flintkote Co. plants in Oregon, Washington, California or Nevada, and it will also be free to buy cement distribution terminals in those areas.

The original order followed the acquisition by Genstar of complete control of Flintkote Co., an American producer of portland cement and gypsum wallboard. The FTC complained that the acquisition would reduce competition partly because of long term supply agreements between Genstar and two of Flintkote's competitors which contained provisions for profit sharing and exchange of cost and price information. Under the revised consent order, Genstar is still prohibited from entering such agreements and from acquiring cement or gypsum wallboard plans in areas served by a Flintkote plant.

SMALL CHANGES ANNOUNCED IN U.K. MERGER POLICY

United Kingdom Trade Secretary Norman Tebbit issued a long-awaited statement on merger policy in the House of Commons on July 5, 1984. The assets threshhold for referrals has been raised from 15 to 30 million pounds, and Ministers will place primary emphasis upon competition grounds in making referral decisions.

The statement comes after a long period of widespread criticism of the merger legislation and its administration (see Canadian Competition Policy Record, March, 1983). The legislation permits a wide range of factors in addition to competition to be taken into account in merger decisions. This has led to seemingly inconsistent ministerial referral decisions and seemingly

inconsistent recommendations by the Monopolies and Mergers Commission. Business interests complain that the official reaction to planned mergers has become too unpredictable.

Both London's Financial Times and the Economist greeted the statement as being helpful but insufficient. The Financial Times editorialized on July 10:

> "The British announcement does little more than restate the Government's intention not to alter in any fundamental way the procedure for merger control set out in the Fair Trading Act of 1973.
>
> ...
>
> "To the extent that yesterday's statement shows a more determined emphasis on competition, especially at the referral stage, it is very much to be welcomed."

The Economist of July 7 stated:

> "This week's statement is helpful but hardly all-enlightening. Mrs. Thatcher has never got to grips with the Fair Trading Act, which is capable of much improvement. Now, it seems, she never will."

Mr. Tebbit's statement is as follows:

> "Yes. I have been reviewing mergers policy in the light of the Government's general view of the role of market forces and competition in promoting the efficient use of resources and stimulating the economy, to the benefit of producers and consumers alike. I have also had in mind the desire of companies for stability and predictability in this field of policy.
>
> "I am satisfied that the mergers provisions of the Fair Trading Act remain an appropriate legislative framework for mergers policy. They leave to Ministers who are accountable to Parliament the decisions on references to the Monopolies and Mergers Commission and on action following adverse MMC reports. They also give Ministers the benefit of independent expert advice from the Director General of Fair Trading and leave the task of investigating the public interest in the hands of another independent body, the MMC. This system provides the flexibility that is necessary in dealing with commercial arrangements. It also allows for an authoritative independent evaluation of the public interest where necessary.
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> "I do not favour either increased rigidity or increased Ministerial discretion. I therefore propose no change in the basic

framework of the Act. I am, however, raising the assets threshold in Section 64(1)(b) of the Fair Trading Act from 15 million pounds to 30 million pounds. Under an order which I have made today the change will come into force on 26 July 1984.

"The threshold was last increased in 1980. The increase is greater than the adjustment needed to allow for inflation and is intended to secure a worthwhile reduction in the number of small and insignificant mergers caught by the legislation. It is estimated that the change will initially reduce the number of mergers qualifying for investigation under the Fair Trading Act from some 200 a year to some 150 a year.

"Apart from the market share and assets tests in Section 64, the Fair Trading Act lays down no statutory criteria for references to the MMC. I regard mergers policy as an important part of the Government's general policy of promoting competition within the economy in the interests of the customer and of efficiency and hence of growth and jobs. Accordingly my policy has been and will continue to be to make references primarily on competition grounds. In evaluating the competitive situation in individual cases I shall have regard to the international context: to the extent of competition in the home market from non-United Kingdom sources and to the competitive position of United Kingdom companies in overseas markets.

"An important aspect of the administration of merger control is the "confidential guidance" system operated by the Office of Fair Trading. The office is already able to provide in a considerable proportion of cases positive guidance as to whether or not a reference is likely. This service is much appreciated by companies. I expect my policy on references to enable guidance to be given in an even greater proportion of cases in future.

"The independent competition authorities in this country have a justifiably high reputation and in reaching my decisions I expect to be guided by their advice in the great majority of cases."

HOUSE OF LORDS HOLDS LAKER MAY SUE IN U.S. COURT

Five British Law Lords decided unanimously on July 19 that the liquidator of Laker Airways may continue his U.S. civil antitrust damages suit against British Airways and British Caledonian Airways. In thus reversing a decision of the British Court of Appeal in London, the Law Lords have removed a source of serious friction between U.S. and British courts.

In November, 1982 the liquidator of Laker filed suit in the U.S. against a number of American, British and Europen airlines and McDonnell

Douglas, seeking damages of $1.7 billions. Laker is alleged to have been driven out of business by fare cutting and by the placing of pressure on McDonnell Douglas to stop supporting Laker financially. Two of the defendants, British Airways and Caledonian, eventually obtained a decision by the Court of Appeal in London barring Laker from continuing its suit in the U.S. A factor in that Court's decision was its view that action taken by the British Government under the Protection of Trading Interests Act to bar the airlines from supplying information to U.S. courts would render them incapable of defending themselves. In the meantime, Laker had obtained a decision by an American court that the case was to be heard in an American court.

The Law Lords rejected the airlines' argument that the impugned agreement should not be attacked under antitrust laws because to do so would be in breach of the Bermuda Two civil aviation agreement. Only agreements approved by the U.S. Civil Aeronautics Board are exempt from Bermuda Two, and the agreement at issue did not have that approval. If the CAB's failure to approve the agreement was a breach of Bermuda Two, the remedy to be sought was arbitration between the two countries. Moreover, the Law Lords found that the airlines were operating in the U.S. and were subject to U.S. law.

The affair is by no means settled. The civil case will proceed in the shadow of the U.K.'s invocation of the Protection of Trading Interest Act. Also, the U.S. Justic Department is still studying some aspects of the case and charges by the U.S. Attorney General cannot yet be ruled out.

SETTLEMENT REACHED IN EEC CASE AGAINST IBM

The Commission of the European Communities announced an agreement with IBM on August 2 whereby the Commission has suspended competition proceedings in exchange for certain undertakings by the Company. According to London's Financial Times of August 3, the main points in IBM's undertakings are:

- All new System/370 products intended for sale in the EEC to be announced in the Community as soon as they are launched anywhere elese in the world
- IBM to make available to competitors information about interfaces between System/370 equipment and software within 120 days of announcing them. Interfaces between software to be issued as soon as products are "reasonably stable" (technically proven) and no later than when they go on sale
- Interface information defined as a description "sufficient to enable a competent professional skilled in the art to attach a product of his design to an IBM System/370 product"
- Disclosure rules to include details of products which exploit technical enhancements of IBM's Systems Network Architecture (SNA) for computer communications

- Undertaking covers large mainframe computers such as the 43XX, 303X and 308X series but excludes smaller machines such as Systems 36 and 38, Series/1,8100 and IBM personal computers
- IBM agrees to offer Series-370 mainframe processors in EEC without main memory capacity."

Press reactions have been that both sides wanted a settlement and that its effects on IBM's operations, while helpful to competitors, will be small. The focus of the EEC case was complaints by competitors that IBM had abused its dominant position by withholding information about its newly developed mainframe computers until they were shipped, thereby delaying the development of compatible equipment by competitors. IBM has now undertaken to supply information about interfaces within four months of announcing a new mainframe computer anywhere in the world. However, while that will eliminate some uncertainty for competitors, it may not mean a major advantage for them. The Wall Street Journal of August 3 states:

> "But that concession, analysts said, may be more of style than substance. IBM has announced some products a year or more before actually shipping them with the technical details that competitors need. But that time gap gradually has decreased to perhaps six months as technology moves ahead more rapidly.
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> "In addition, IBM can easily side-step the requirement - by withholding off product announcements until precisely four months before delivery. That time frame may be too short to allow competitors to revise substantially their products in time to hit the market simultaneously with an IBM introduction."

OECD PONDERS ISSUES AT FRONTIER OF COMPETITION AND TRADE POLICIES

The Organization For Economic Co-operation and Development's Committee of Experts on Restrictive Business Practices has completed the first phase of a study entitled Report on Issues Arising At the Frontier of Competition And Trade Policies. The study was prepared by a Working Party chaired by Mr. Lawson Hunter of Canada and it takes account of comments by the OECD's Trade Committee. The terms of reference were:

> "...to examine, in particular, possible longer-term approaches to developing an improved international framework for dealing with problems arising at the frontier of competition and trade policies."

The report, which is some 150 pages in length, considers "trade-related competition issues", "competition-related trade issues", and issues relating to jurisdiction including the participation of competition authorities in decisions on trade-related matters. The principal conclusions of the report are described below.

Trade-Related Competition Issues

Regarding export cartels, the Report states:

> "Governments should not encourage the creation of export cartels but should ensure that their policies are at least neutral in respect of the formation of such cartels. The governments of the countries where export cartels are located should also be ready to cooperate, as far as their laws permit, with the competition authorities of other countries in any investigation into possible anti-competitive effects of arrangements located in their countries, recognizing the jurisdictional difficulties that sometimes arise when information is sought from abroad or where the parties to a restrictive agreement are located abroad. The OECD 1979 Council Recommendation concerning cooperation on Restrictive Business Practices affecting international trade, the 1976 OECD Guidelines for Multinational Enterprises as well as the United nations Set of Multilaterally Agreed Equitable Principles and Rules remain appropriate instruments for such cooperation."

Import cartels are considered to be less prevalent, but the Report states:

> "Where exporting countries inform the competition authorities in the importing country of the existence of an import cartel, or their suspiscion of a cartel, those authorities should take appropriate steps to ensure that the cartel members are not in breach of the importing country's own laws. Where applicable under their national laws, they should cooperate to the fullest extent possible with the authorities of the exporting country in the provision of information and take what steps are open to them under their national laws to minimize the adverse effects of actions by their own importers on international trade."

The Report notes the growing importance of trading companies and the possibility of anti-competitive effects arising from their power in some geographical and product markets.

Regarding voluntary export restraints, the Report concludes:

> "VERs may conflict with the fundamental objectives of competition policy, as they lessen competitive pressures on domestic producers which may give rise to special problems in already concentrated markets. While they can produce short-term benefits, it appears from various studies that their costs for consumers and the economy of the importing country can be substantial. They may also have detrimental effects on countries not party to the agreement. It would seem that greater steps are needed to increase the transparency of VERs, to monitor their effects and to consider their treatment under trade and competition

laws. Competition authorities have an important role to prevent harmful effects on domestic market structure. Bringing VERs under international surveillance and control would be an important first step in regulating their use in a manner consistent with an effectively functioning international trading system. The Committee intends to cooperate with the Trade Committee to continue the analysis of VERs and their effects on trade and competition."

Regarding "intra-group arrangements by multinational enterprises", the Report states:

> "Practices like intra-group allocations, transfer pricing, and cross-subsidization and their effects on trade and competition are of interest to policy makers, given the large proportion of international trade attributable to intra-group transactions. Competition laws in most OECD Member countries provide that intra-group practices are not considered harmful in and of themselves unless they amount to an abuse of a dominant position adversely affecting competition outside the affiliated enterprises. In dealing with such practices, cooperation between governments in the exchange of information according to the Committee's recent report on competition law enforcement is an essential element. In addition, Member countries should continue to use the consultation process provided in the 1979 Recommendation where problems of obtaining information arise. Similarly, use should be made of the provisions of the OECD Guidelines relevant to intra-group practices."

Regarding government involvement in and regulation of commercial activities, the Report states:

> "The commercial activity of governments, be it through procurement policies, public enterprises or regulation of industries, is of considerable importance in the domestic economies of OECD Member countries. As a result, such activity can exert a significant impact on competition in domestic markets and on international trade. Of particular concern is the extent to which the government's role, through, for example, specific procurement regulations or product standards, or through subsidies or financial support to enterprises at better than market terms, affects competition in domestic and foreign markets. Further, it may be more difficult for competition officials to apply their laws against the commercial activities of foreign governments that restrict competition in their markets than would be the case with private competition restraints. Greater transparency as to the Government's role in commercial activity is a necessary basis for assessment of effects of such action on trade and competition.
>
> "In the experience of several countries, efforts to apply competition laws to regulated sectors through deregulatory reforms

have proven beneficial. Countries that have taken teps to deregulate certain sectors may however experience problems in trading with countries where regulation remains the rule and in applying their competition laws to such transactions. To improve this situation, cooperation between government authorities, including those responsible for competition policy, is necessary. The 1979 Council Recommendation on Exempted or Regulated Sectors is particularly relevant in this regard, since it calls upon Member countries to reconsider the continuing validity of present regulatory frameworks and whether the same objectives could be achieved by the operation of competition or through measures which restrict competition to a lesser degree. The Committee intends to examine in its future work programme the way this Recommendation has been applied."

Competition-Related Trade Issues

Regarding trade policy measures such as voluntary export restraints and orderly marketing agreements, the Report states:

> "The Committee therefore is of the view that policy-makers should, when considering a prospective trade measure, undertake as systematic and comprehensive an evaluation as possible of the likely effects of the measure, including, inter alia, the impact of the measure on the structure and functioning of the relevant markets and the long-term effects on the structural adaptation of the affected sector. The attached checklist of the important effects of trade measures has been developed to provide a framework for such analysis (Annex II). It is understood that it would have to be adapted to the particular situation in question and that governmental policy considerations will determine the weight given to each item. Competition policy authorities could make an important contribution to such analyses, particularly with respect to the evaluation of the likely impact of the measure on the structure of the relevant markets and the competitive process within those markets."

The checklist to which reference is made amounts to a cost-benefit analysis of the direct and indirect effects of a proposed trade measure, including the effects on other countries.

Regarding laws on injurious or unfair trading practices such as laws on dumping and countervailing duties, the Report states:

> "The Committee therefore considers that consensus should be sought on the extent to which policy-makers and enforcement authorities should give consideration to the impact on competition in domestic markets of actions taken under laws dealing with unfair trade practices. First, care should be exercised to avoid a misuse of unfair trade proceedings by enterprises seeking to restrain foreign

competition. Second, further consideration should be given to the extent to which in administering laws dealing with unfair trade practices, it would be appropriate to take into account the structure and the functioning of markets and the competitive situation within these markets and the pro-competitive impact of foreign firms in domestic markets. Injury and its causal relationship to unfair trade practices should continue to be assessed on the basis of objective criteria, in accordance with international rules, and following procedures where all interested parties are given an opportunity to express their views."

Jurisdictional Issues and Trade Policy Formulation

Regarding jurisdictional issues, the Report states:

"In this context, jurisdictional rules and international arrangements need to reflect the growth and development of the world trading system to ensure that all relevant interests are considered and disputes avoided as far as possible when questions of jurisdiction over international conduct arise and to provide businesses with reasonable certainty as to the laws applicable to their transactions. Although there seems to be growing observance of moderation and self-restraint, in the absence of multilaterally agreed upon criteria, unilateral approaches are not likely to be successful in resolving all conflicts which may arise. With due regard to the situs of conduct, jurisdictional rules should be based on reasonable standards that allow for the consistent and effective implementation of the laws and policies of the countries affected. In this connection, while significant differences remain among Member countries, the Committee recognizes the desirability of achieving international agreed criteria for avoiding or resolving jurisdictional differences of this nature.

"There is a strong common interest among OECD Member countries in overcoming difficulties arising from competing claims of jurisdiction over international business activities and there have been encouraging signs in the development of cooperation between governments, in particular in the competition area. On whatever basis jurisdiction is applied, competition authorities may need to obtain information located outside the national territory in order to adequately evaluate the nature of practices under review and the impact of such practices on competition in the domestic market. The notification and consultation procedures provided for under international instruments and bilateral agreements have provided a useful first step in creating channels to resolve conflicts between the competition policies and trading interests of countries."

Finally, the Report calls for more involvement of competition authorities in the formulation of trade policy measures. It states:

> "Given the diversity of government structures in Member countries, it is neither possible nor desirable to propose a single institutional framework in which coordination between trade and competition policies could be organized. Stress should be laid not on rigid procedural arrangements, but rather on creating the necessary conditions under which competition policy considerations can effectively be brought to the attention of policy-makers in the formulation and implementation of trade policies. For this purpose, competition authorities should be provided, subject to legal constraints, in a timely manner with relevant information on the nature and motivation of proposed trade policy decisions and be invited to express their views on all such decisions likely to have a significant impact on competition. Corresponding to different organizational patterns of government and public administration, there are various options for organizing such participation, such as informal but regular contacts, establishment of standing inter-departmental committees or formal public hearings. On their part, competition authorities should be sensitive to the realities and developments in international trade including in particular trade rules and the growing internationalization of markets. Thus, there is a need for a two-way co-operation between trade and competition authorities so as to better promote the efficient functioning of markets within an open international trading system."

The Committee intends to continue working under the terms of reference of this study, including exploring "the possibility for developing policy approaches and recommendations, in particular in those areas where it has been shown in the Committee's work to date that conflicts may arise between the trade and competition policies and practices of Member countries."

The wording of the conclusions of the report respecting jurisdictional issues (cited above) appears to reflect a willingness on the part of the United States to consider more carefully the interests of affected countries before it applies its laws extraterritorially. That impression has been strengthened by a major speech on the subject which Secretary of State George Shultz delivered before the South Carolina Bar Association on May 5. After outlining various measures being taken by the U.S. to deal with jurisdictional conflicts, he stated:

> "Such measures will not end conflicts of jurisdiction, but they are an earnest of this country's determination to do what it can to avoid conflicts where we can and to minimize the harm that the unavoidable conflicts can do. The United States, for its part, will continue to maintain that it is entitled under international law to exercise its jurisdiction over conduct outside the United States in certain situations. We will continue to preserve the statutory authority to do so. But we will exercise the authority with discretion and restraint. Balancing all the important interests involved, American and foreign, immediate and long term, economic and political.