FOREIGN AND INTERNATIONAL

U.N. GENERAL ASSEMBLY ADOPTS PRINCIPLES AND RULES FOR CONTROL OF RESTRICTIVE BUSINESS PRACTICES

The United Nations General Assembly, on December 5, 1980, adopted a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. The Principles and Rules had been negotiated within UNCTAD (United Nations Conference on Trade and Development) and agreement on them was reached at a United Nations Conference last April. The full text of the Principles and Rules was reproduced in the June issue of the Record.

Speaking to the Resolution, the Canadian delegate to the General Assembly expressed full support for the Principles and Rules. However, he emphasized that the Canadian Government views them as voluntary guidelines designed to enhance development of all states and not to limit the ability of states to promote such economic development. He also noted that the Principles and Rules do not have a section on jurisdiction nor address problems of extraterritoriality. He stated:

> "The Canadian Government notes that the agreed guidelines do not contain a section on jurisdiction nor do they address problems in the control of restrictive business practices that sometimes arise when one country seeks to apply its own laws extraterritorially to the field of foreign commerce. It is my Government's view that this Set of Principles and Rules does not recognize as a basis for assertion of jurisdiction that it is sufficient that the foreign commerce of a state be affected. My Government believes that all attempts to control international restrictive practices should recognize the universally accepted principles of national sovereignty and international comity and should respect the rights of all nations to implement measures that they deem appropriate in the context of their national development. The Government of Canada, therefore, does not consider that the Principles and Rules expand the bases of jurisdiction currently recognized by international law."

U.K. CONSIDERS BAN ON COLLUSIVE TENDERING

The U.K. Department of Trade issued a paper on July 30, 1980 which concludes that collusive tendering should be made a criminal offence. ("Collusive Tendering; A Consultative Document").

The Paper points out that the 1979 Green Paper ("A Review of Restrictive Trade Practices Policy", H.M.S.O. Cmnd 7512) found growing evidence of evasion of the law in respect of collusive tendering and recommended that it be made a criminal offence.

At the present time, collusive tendering is a registrable agreement under the Restrictive Trade Practices Act of 1976 and would normally be disallowed when brought before the Restrictive Practices Court. Failure to register does not bring criminal penalties, although the agreement becomes unlawful and affected parties can bring actions for damages. Where the parties to an agreement have been subject to a Court order restraining them from making any agreement to like effect, breach of such order constitutes contempt of Court. The investigative powers under the present legislation are such that it is difficult to obtain evidence of collusive tendering. The Director General of Fair Trading can call for particulars when he "has reasonable cause to believe" that there is a registrable agreement, but he rarely has sufficient evidence of collusive tendering to permit him to start such a proceeding.

The paper points to the following advantages of a criminal prohibition:

> "(a) the creation of a criminal offence gives a much stronger indication of public disapproval of the practice. Apart from the threat of criminal penalties, the resulting stigma of criminality would be a significant deterrent. This could be particularly important in discouraging those firms who might have qualms about collusion already but who would otherwise fall in with the practice out of conformism. There will also be firms who are prepared to acquiesce in questionable practices if these are the custom of the trade, but who would stop short of committing a criminal offence, with all that that entails. And provided some firms are persuaded to break ranks, the effectiveness of collusion will be greatly reduced.

(b) in an area where evidence is difficult to obtain, and the results of an action difficult to predict, civil proceedings are unlikely to be brought unless there is strong evidence at the plaintiff's disposal and the losses suffered are identifiable. Criminal prosecutions are normally backed up by public resources and need not depend on quatification of damage caused.

(c) Collusive tendering is commonly practiced at a local level, and the local resources and experience of the police which can be brought to bear on a criminal offence will provide a more effective enforcement agency than those of the London based Office of Fair Trading."

U.K. FAIR TRADING DIRECTOR ACTIVATES NEW POWERS

The U.K. Director General of Fair Trading has moved quickly to apply his new powers to investigate anti-competitive practices by single companies. The Competition Act, which came into full effect on August 12, enables him to carry out preliminary investigations of practices which have the effect of restrictions preventing or distorting competition. If he makes a positive finding he may either refer the matter to the Monopolies and Mergers Commission or accept an undertaking by the parties to stop or modify the practice.

Two investigations were announced on the day the powers came into force. One relates to Raleigh Industries for refusing to supply bicycles to certain retail stores which discount from recommended prices. While resale price maintenance is largely prohibited, difficulties have been experienced in enforcing the ban because it does not cover refusal to supply except where resale price maintenance can be shown to be the sole motive.

The other investigation relates to Petter Engineering, which is alleged to have taken various steps to prevent independent servicing businesses from servicing truck refrigeration equipment of a new entrant. Petter is a relatively small firm but it has a substantial share of the market, and the case could have been the subject of a reference to the Monopolies and Mergers Commission. However, the new procedure is less cumbersome and better suited to dealing with the specific practice at issue.

Industry sources have expressed concern about uncertainty as to what practices are likely to be challenged under the new powers. In September the Office of Fair Trading issued an explanatory booklet entitled "Anti-Competitive Practices". The liklihood of a particular practice being challenged will depend to a considerable extent upon the market position of the firm involved. The booklet points to three pricing practices and six distribution practices which are likely targets for investigation. The pricing practices are price discrimination unrelated to cost differences, predatory pricing and vertical price squeezing. The distribution practices are tie-in sales, full-line forcing, rental-only contracts, exclusive supply whereby supplies are restricted to only one buyer in an area, selective distribution whereby only sales outlets which meet certain quantity or quality criteria are supplied, and exclusive purchases.

U.S. CONSENT DECREE REQUIRES MERCK TO DISPOSE OF CANADIAN SUBSIDIARY

The U.S. Justice Department filed a proposed consent decree on September 2 which would require Merck & Co., Inc. of New Jersey to divest itself of Scotia Marine Products Limited, a wholly-owned Canadian subsidiary. The proposed decree was to become final upon approval by the U.S. District Court in San Diego, California.

The consent decree will terminate the Department's civil antitrust suit challenging Merck's acquisition of a U.K. firm, Alginate Industries Ltd. According to the suit, the U.K. firm is the largest alginate producer in the world and Merck's Kelco Division in the U.S. is the second largest. Kelco accounted for about 80 per cent of U.S. sales and the U.K. firm about eight per cent.

The consent decree would require Merck to furnish the purchaser of Scotia Marine Products Limited, which produces alginate in Nova Scotia, with certain information and assistance "that should allow the purchaser to use Scotia Marine Product Limited to compete effectively in the sale of alginate in the United States..."

U.S. JUSTICE DEPARTMENT DROPS ALUMINUM INDUSTRY PROBE

The U.S. Justice Department has dropped a major "shared monopoly" investigation of the aluminum industry for lack of sufficient evidence according to the Wall Street Journal of November 18. Alcan Aluminum Ltd. of Montreal was among the companies included in the investigation, which began at least as early as 1975.