FOREIGN AND INTERNATIONAL

PRESIDENTIAL ENDORSEMENT EXPECTED FOR CABINET'S ANTITRUST REFORM PROPOSALS

Commerce Secretary Malcolm Baldrige indicated on December 5 that the Cabinet had unanimously approved a package of antitrust law amendments. The Wall Street Journal of December 6 reports that the package includes incorporation in the Clayton Act of the less binding principles of the Department of Justice merger guidelines, a limited exemption from the antitrust laws for companies injured by foreign competition, elimination of treble damages in many antitrust suits but permitting them for the first time in certain government cases such as bid-rigging, and limiting the amount of damages recoverable from an individual defendant. The President was expected to endorse the package "in the next few weeks".

While details or the full extent of the package had not been revealed at the time of writing, a good deal is known about what issues were considered by the Cabinet. A working group co-chaired by Assistant Attorney General Douglas Ginsburg began meeting in September to review the antitrust laws and to report jointly to the Cabinet Council on Economic Policy, Chaired by Treasury Secretary James Baker, and to the Cabinet Council on Domestic Policy, chaired by Attorney General Edwin Meese. The Group had before it a variety of proposals including one by Commerce Secretary Baldrige to repeal Section 7 of the Clayton Act. That section, since its amendment in 1950, has been the instrument of merger control. The working group reported its findings on November 8, having reached a concensus on some issues but not on others.

With regard to merger-related issues, the working group agreed on the following two recommendations:

> "...that the Administration propose antitrust exemptions for mergers and acquisitions in industries injured by imports as alternative relief under sections 201-203 of the Trade Act of 1974."

> "...that the Administration propose amendments to section 8 of the Clayton Act to exempt de minimus interlocks that fall into safe harbors, increase to $10 million and index the current $1 million jurisdictional size threshold, and require each interlocked corporation to exceed that threshold before an interlock would be prohibited."

Sections 201-203 of the Trade Act provides for protective relief including tariffs or quotas. The Working Group refers to a proposal by Commerce Secretary Baldrige that the relief be for a maximum period of five years. The Working Group transmits three other merger-related optional proposals upon which it did not reach a concensus. They are to repeal section 7

of the Clayton Act, to codify the policies of the Department of Justice's Merger Guidelines into Section 7, or to "endorse current merger enforcement policy under the Guidelines without legislative action".

With regard to treble damages awards, the Working Group agreed on recommendations for amendments to the Clayton Act that would:

> "(i) treble only damages caused by antitrust overcharges or underpayments, in both private and government damage cases, and provide automatic prejudgment interest on actual damages in all antitrust cases;
>
> (ii) provide an affirmative defence in all antitrust cases that would reduce plaintiffs' claim for damages by the share of those damages fairly allocable to any person released from liability; and
>
> (iii) provide attorney' fees to prevailing defendants where the plaintiff's conduct is frivolous, unreasonable, without foundation, or in bad faith."

The Working Group explains the background of recommendation (ii) above as follows:

> "Under current law, all defendants found liable for damages in antitrust cases are jointly and severally responsible for the plaintiff's entire, trebled recovery. Should the plaintiff settle with any liable or potentially liable party, the plaintiff's remaining claim is reduced only by the amount the plaintiff receives for that settlement. Thus, nonsettling defendants can see their liability magnified if the plaintiff settles with other defendants, particularly those responsible for a major portion of the plaintiff's damages. This whipsaw effect is unfair and can force defendants to abandon their factual claims and legal defneces, whatever their merits."

The Working Group also considered the issue of jurisdiction in foreign commerce cases, explaining:

> "The reach of the Sherman Act to private suits which challenge activities in international commerce has been criticized severely by the United States' trading partners as failing to take adequate account of their competing regulatory and commercial interests. A recent decision in the Laker case has caused considerable concern among other governments that the United States is turning away from principles of comity as a consideration which may limit the potential reach and conflicts caused by "effects" test jurisdiction under the antitrust laws in the international commerce area."

The Working Group agreed that:

"...the antitrust laws should be amended to instruct courts to dismiss private antitrust cases when the exercise of jurisdiction would be unreasonable in light of the following exclusive factors:

(1) the relative significance, to the violation concerned, of conduct within the United States as compared to conduct abroad;
(2) the nationality of the parties and the principal place of business of corporations;
(3) the presence or absence of a purpose to affect United States consumers or competitors;
(4) the relative significance and foreseeability of the effects of the conduct on the United States as compared with the effects abroad;
(5) the existence of reasonable expectations that would be furthered or defeated by the action; and
(6) the degree of conflict with foreign law."

The Working Group considered whether, in addition, to recommend that the President be empowered to compel the dismissal of a private case "because of overriding foreign policy considerations". The Department of Justice favoured the proposal but the Department of State opposed it.

The Reagan administration has already made a considerable impact on antitrust policy, mainly by administrative means. Enforcement is now restricted largely to price-fixing cases; there is no enforcement in the area of resale price maintenance and little in respect of other vertical restraints, mergers, joint ventures or monopolies. Private civil antitrust suits are, however, normally much more numerous than cases launched by the government, and they continue unabated. The administration has, nevertheless, adopted a program of intervening before the courts in private suits as *amicus curiae*. It has issued guidelines on its more permissive interpretations of the laws governing mergers and vertical restraints. Also, amendments have been enacted to relax the antitrust laws as they apply to export trading companies and cooperation in research.

According to the *Wall Street Journal* of November 13, business interests have made much more moderate legislative proposals. They believe that what the administration seems to have in mind could not be enacted without years of debate.

U.K. RULING HERALDS COMPETITION IN LONG DISTANCE TELECOMMUNICATIONS

The Director General of the Office of Telecommunications (OFTEL) announced a landmark decision on October 16 in ruling that British Telecom and Mercury Communications must interconnect their telecommunications networks. Under the ruling, any caller on one network will be able to dial anyone on the other network and choose which network is to carry the call. Mercury's long distance rates are expected to be from ten to twenty percent lower than British Telecom's present rates.

Mercury is at present involved in the leasing of lines to companies for their internal communications. It has nearly completed a network of long distance lines that will serve many cities, extending from London and Wales in the south to Glasgow and Edinburgh in the north. Jason Crisp reports in the London Financial Times of October 22 that the first dialed calls will be made on the network in April, 1986. Mercury will start with business users, and plans to enter the residential market about a year later.

The decision is expected to lead eventually to reductions in British Telecom's profitable long distance rates and increases in local rates. However, the firm's license limits it to annual increases for most inland calls of not more than three percentage points below the increases in the Retail Price Index, and it undedrtook in its prospectus not to increase residential exchange line rentals by more than two percent over the RPI. Moreover, OFTEL has made it clear that any additional general increase in residential rentals would be subjected to "searching examination".

EEC COURT UPHOLDS COMMISSION RULING ON FORD CAR SALES

The Court of Justice of the European Communities released a decision on September 17 upholding a refusal by the Commission to grant Ford of Germany an exemption from Article 85 (prohibited agreements) of the Treaty of Rome for its selective distribution system because of Ford's refusal to allow German dealers to supply right hand drive cars to buyers from the U.K. The decision, while to some extent overtaken by related developments, was welcomed as a major one by a spokesman for the Commission. He said it would enable the Commission to "act speedily and vigorously to enforce the consumer's right to buy throughout the Community". He indicated, moreover, that the Commission was looking at other ways in which the auto companies hamper free trade in cars.

Restrictions on community trade in cars have been a matter of public concern at least since 1981 after the Bureau of European Consumer Unions and the Economist both published surveys showing that prices net of taxes in Germany and Belgium were only about 70 percent of those in the U.K.

and that prices in Denmark and Holland were even lower. One contributing factor was procedures in the U.K. which made it difficult for individuals to obtain safety certificates on cars which they had purchased on the continent. The U.K. government took action in 1982 to alleviate that aspect of the problem.

In 1983, the EEC Commission published a draft regulation clarifying the conditions under which selective distribution agreements entered into by the manufacturers with their dealers were exempt from the prohibitions of agreements and abuses of dominant positions in Articles 85 and 86 respectively. The exemption would not apply where a price difference among member states exceeded twelve percent for more than six months or where a manufacturer refused to supply its continental dealers with right hand drive vehicles for sale to U.K. residents. A regulation along those lines finally went into effect on October 1, 1985. That regulation would have applied to Ford even if it had won its appeal, which related to an earlier action by the Commission.

The Ford case has a history of some years. It was in 1982 that Ford of Germany notified its German dealers that it would no longer accept orders for right hand drive vehicles destined for sale to persons resident in the U.K. In August of that year the Commission adopted a decision requiring Ford to resume such deliveries to its German dealers. Ford appealed, and the Court ruled in its favour on February 28, 1984. In November, 1983, before Ford had won its appeal, the Commission adopted another decision, which is the one upheld by the Court on September 17, 1985. That decision revokes the one of August, 1982, states that Ford's dealer agreement is contrary to Article 85, refuses to grant an exemption for it in the period since Ford stopped supplying right hand drive cars, and orders Ford to bring the infringement to an end.

Ford's principal argument before the Court was that the Commission was not empowered to refuse an exemption for its distributor network on grounds of its refusal to supply right hand drive vehicles because the latter refusal was a unilateral action rather than an agreement coming under Article 85. The Commission took the position that the decision whether or not to grant an exemption had to be made "taking into account the whole of the economic and legal context in which the agreement functioned". The Court, in upholding the Commission's position, pointed out that dealer network agreements must necessarily leave certain aspects up to later decisions by the manufacturers. "Such decisions," the Court stated, "do not constitute unilateral behaviour on the part of the company atttempting to get around EEC competition regulations." The Court concluded that the Commission was right, in the course of its examination of the dealers contract, to take into consideration the stopping of supplies of right hand drive vehicles to its German distributors, which refusal "constituted a basic element of artificial partitioning of the market".

U.N. CONFERENCE ON CONTROL OF RESTRICTIVE BUSINESS PRACTICES MAKES NO PROGRESS

The United Nations Conference to Review All Aspects of the Set of Multinationally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was held in Geneva from November 4 to 15 under the auspices of the United Nations Conference on Trade and Development (UNCTAD). The Principles were adopted in 1980 by the U.N. General Assembly in a resolution which also called for a conference in 1985 to review the Principles. The text of the Principles is included in the June, 1980 issue of Canadian Competition Policy Record.

At the Conference, the developing countries (Group of 77), the OECD countries (Group B) and the socialist countries of eastern Europe (Group D) each presented a draft declaration setting forth its positions, but no agreement was reached.

The Group of 77 expressed dissatisfaction with the operation of the Principles, contending that restrictive practices in international trade has increased rather than diminished since 1980. They proposed, *inter alia*, that the Principles be made legally binding, that a special committee on restrictive business practices be established under the framework of UNCTAD, that measures be adopted to make the provision for technical assistance more effective, and that a further session of the Conference be held in 1990.

Group B expressed general satisfaction with the operation of the Principles in their present form. They proposed more emphasis at the annual meetings of the Intergovernmental Group of Experts on Restrictive Business Practices be placed on informal discussions of subjects of practical importance, and they also made their own proposals to improve the implementation of the technical assistance provision.

Group D was less critical of the Principles than the Group of 77, but contended that the home states of multinational corporations had not met their obligations under the Principles satisfactorily. They called for more multilateral and bilateral consultations to solve particular issues, more effective implementation of the technical assistance provision, and another conference in 1990.